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

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JUDGES:

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HON. THOMAS E. MALONE .... Wichita
HON. STEPHEN D. HILL .... Paola
HON. G. GORDON ATCHESON .... Westwood
HON. DAVID E. BRUNS .... Topeka
HON. KIM R. SCHROEDER .... Hugoton
HON. KATHRYN A. GARDNER .... Topeka
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Crawford v. State	125,720	Sedgwick	09/08/2023	Affirmed
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Kansas Right to Farm Act—Legislative Purpose to Protect Certain Agricultural Activities. The Kansas Right to Farm Act, K.S.A. 2-3201 et seq., recognizes that agricultural activities conducted on farmland in areas in which nonagricultural uses have moved into agricultural areas are often subjected to nuisance lawsuits and that such suits encourage and even force the premature removal of the lands from agricultural uses. The legislature adopted the Act to protect certain agricultural activities from this type of nuisance action. *Ross v. Nelson* ……………………………………...….. 634*

Kansas Right to Farm Act—Protection of Agricultural Activities—Requires Conformity with Federal and State Laws. The Kansas Right to Farm Act protects agricultural activities conducted on farmland if those activities are undertaken in conformity with federal, state, and local laws and rules and regulations. *Ross v. Nelson* ……………………………….. 634*

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District Court's Grant of Motion to Dismiss for Failure to State a Claim—Appellate Review. Whether a district court erred by granting a motion to dismiss for failure to state a claim is a question of law subject to unlimited review. An appellate court will view the well-pleaded facts in a light most favorable to the plaintiff and assume as true those facts and any inferences reasonably drawn from them. If those facts and inferences state any claim upon which relief can be granted, then dismissal is improper. Dismissal is proper only when the allegations in the petition clearly show the plaintiff does not have a claim.
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Punitive-Damage Award—Considerations for Appellate Review. Courts assess three considerations when determining whether a punitive-damage award shocks the conscience and thus violates a party's due-process rights: the reprehensibility of the defendant's conduct; the ratio of punitive damages to actual damages for the injury; and comparable awards for similar conduct.
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Order Involving Kansas Constitution Is Appealed to Court of Appeals by Statute. An order that involves the Constitution of this state may be appealed to the Kansas Court of Appeals as a matter of right under K.S.A. 2021 Supp. 60-2102(a)(3).
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District Court an Expert in Area of Attorney Fees—Determination of Reasonableness of Fee—Consideration of KRPC 1.5(a) Factors. The district court is considered an expert in the area of attorney fees and can draw on and apply its own knowledge and expertise in evaluating their worth. However, in determining the reasonableness of a requested attorney fee, the factors in Kansas Rule of Professional Conduct 1.5(a) (2023 Kan. S. Ct. R. at 333) should be considered. *City of Atchison v. Laurie* …...... 310

District Court's Authority to Grant Attorney Fees—Appellate Review. When a district court has the authority to grant attorney fees, its decision whether to award fees is reviewed for an abuse of discretion.
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Actions Are Prosecuted in Name of Real Party in Interest. An action must be prosecuted in the name of the real party in interest. If a city violates a detainee's constitutional rights, then the city is liable to the detainee for damages, not the county sheriff. *City of Atchison v. Laurie* …..……..…. 310

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

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

Kansas Wrongful Death Act—Heir May Participate in Apportionment Proceedings. The Kansas Wrongful Death Act, K.S.A. 60-1901 et seq., does not prohibit an heir who has negligently contributed to the death of the decedent from participating in apportionment proceedings.
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Motion to Dismiss—District Court's Considerations. In most instances, a district court ruling on a motion to dismiss may only consider the plaintiff's petition and any documents attached to it. But when a petition refers to an unattached document central to the plaintiff's claim, a defendant may submit—and a court may consider—an undisputedly authentic copy of the

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

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

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

Fifth Amendment's Takings Clause—Application to State and Local Government Entities Through Fourteenth Amendment. The Fifth Amendment to the United States Constitution prohibits the taking of private property for public use without just compensation. The protections of the Takings Clause apply to the actions of state and local government entities through the Fourteenth Amendment to the United States Constitution.
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Presumption State Action Is Constitutional—Dilutes Constitutional Protections. Presuming a state action alleged to infringe a fundamental right is constitutional dilutes the protections established by our Constitution. *League of Women Voters of Kansas v. Schwab* 187

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Punitive Damages May Violate Party's Due Process of Law. The United States Supreme Court has explained that punitive damages may violate a party's constitutional right to due process of law in at least two ways. First, the Due Process Clause of the Fourteenth Amendment to the United States Constitution makes the Eighth Amendment's prohibition against excessive fines and cruel and unusual punishments applicable to the States. Second,

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Reduction of Utility's Profit or Rate of Return Does Not Establish Taking. The mere reduction of a utility's profit or rate of return by some unproven amount does not, without more, establish an unconstitutional taking.
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Supreme Court Holding that Legislature Must Not Deny or Impede Constitutional Right to Vote. The Kansas Supreme Court has held that the Legislature "must not, directly or indirectly, deny or abridge the constitutional right of the citizen to vote or unnecessarily impede the exercise of that right." *State v. Beggs*, 126 Kan. 811, 816, 271 P. 400 (1928).
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Breach of Contract Claim against University—Requirements. To maintain a breach-of-contract claim against a university, a plaintiff must do more than simply allege that the education was not good enough. But contract claims are not educational-malpractice claims when they point to an identifiable contractual promise that the university failed to honor.
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Admissibility of Prior Crimes—Evidence of Sexual Misconduct Must be in 60-455(g) Listing of Acts or Offenses to Be Admissible under 60-455(d). K.S.A. 2021 Supp. 60-455(g) provides an exclusive listing of the acts or offenses which constitute an "'act or offense of sexual misconduct'" as that term is used in K.S.A. 2021 Supp. 60-455(d). Therefore, evidence of the defendant's commission of another act or offense of sexual misconduct must satisfy subsection (g)'s definition before it can be admissible under subsection (d). *State v. Scheetz* ………………………..………………. 1

Causation in Criminal Case—Two Elements—Cause-in-Fact and Legal Causation. Causation in a criminal case has two core elements: cause-in-fact and legal causation. Cause-in-fact requires proof that but for the defendant's conduct, the result would not have occurred. Legal causation limits a defendant's liability to the reasonably foreseeable consequences of his or her conduct. There may be more than one proximate cause of a death. When the conduct of two or more persons contributes concurrently as proximate causes of a death, the conduct of each of said persons is a proximate cause of the death regardless of the extent to which each contributes to the death. A cause is concurrent if it was operative at the moment of death and acted with another cause to produce the death. *State v. Spilman* ……..... 550*

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

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

Court's Discretion to Order Competency Evaluation for Defendant—Appellate Review. A district court has the discretion to order a competency evaluation for a criminal defendant on its own initiative when it has a real doubt that the offender possesses the sanity or mental capacity to properly defend his or her case. The court's decision on the matter will not be disturbed absent a clearly demonstrated abuse of its sound judicial discretion.
State v. Burris 250

Crime of Aiding and Abetting—Requirements. Under K.S.A. 2022 Supp. 21-5210, an aider or abettor must intend to assist the commission of a crime and must act with the same mental culpability as the principal. An aider or abettor may intend to assist the commission of a reckless act.
State v. Spilman 550*

Interference with Law Enforcement Officer Not Alternative Offense of Identity Theft—Identity Theft Definition. Interference with a law enforcement officer is not a more specific instance of identity theft. To the contrary, identity theft prohibits different conduct, to wit: possessing someone else's personal identifying information and using it to deceive someone for a benefit. *State v. Stohs* 500

Mistreatment of Dependent Adult—Criminal Prosecution for Neglect. When a dependent adult living in a private residence is unable to tend to their own needs, and the person caring for them neglects to provide or withholds life-sustaining care, with an awareness that such care is required, that caretaker may be subject to criminal prosecution for such neglect.
State v. Burris 250

— Neglect to Provide Life-Sustaining Care to Point of Death—Criminal Prosecution for Unintentional Reckless Second-degree Murder. When an individual assumes sole responsibility for the physical and mental health of a dependent adult, but neglects to provide or withholds such life-sustaining care to the point of death, that individual may be subject to criminal prosecution for the unintentional, reckless second-degree murder of that dependent adult. *State v. Burris* 250

— No Requirement that State Prove Independent Legal Duty to Victim. Mistreatment of a dependent adult does not require the State to prove that the offender had any independent legal duty to the victim. Once a person affirmatively assumes the role of caregiver to a dependent adult, and dis-

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courages or precludes others from filling that role, that person has the responsibility to act reasonably in fulfilling the obligations required of that role. *State v. Burris* 250

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

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

Prosecutorial Error—Can Occur in Probation Violation Hearing. Prosecutorial error can occur in the context of a probation violation hearing.
State v. Ralston 447*

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

Restitution—Amount and Manner of Payment Left to Discretion of Trial Court—Appellate Review. The amount of restitution and the manner in which restitution is paid are decisions left to the discretion of the trial court. An appellate court reviews that decision for abuse of that discretion. Absent demonstration of some error of fact or law, an appellate court will find an abuse of discretion only when the trial court's decision is shown to be arbitrary, fanciful, or unreasonable. *State v. Spilman* 550*

Sentencing—Burden on State to Prove Criminal History Score. The State bears the burden to prove an offender's criminal history score by a preponderance of the evidence. *State v. Degand* 457

— **Determination of Criminal History Score—Intent of Legislature to Include All Prior Convictions and Adjudications**. With some express exceptions, the Legislature intended for all prior convictions and juvenile adjudications—including convictions and adjudications occurring before implementation of the Sentencing Guidelines Act—to be considered and scored for purposes of determining an offender's criminal history score. *State v. Degand* 457

— **Inquiry of Prior Conviction—Modified Categorical Approach**. When a sentencing court is making an inquiry on the nature of an offender's prior conviction, the court may use a modified categorical approach in its search. Such an approach means that the court can examine the charging documents of the old case, any plea agreements, transcripts of plea hearings, findings of fact and conclusions

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of law from any bench trial, as well as jury instructions and completed verdicts. *State v. Degand* 457

— **K.S.A. 21-5109(d) Applicable When Multiple Crimes Charged for Same Conduct**. The sentencing rule contained in K.S.A. 2022 Supp. 21-5109(d) only applies when the prosecutor charges the defendant with multiple crimes for the same conduct. *State v. Stohs* 500

— **Prior Convictions Deemed Unconstitutional Not Used for Scoring Purposes**. Prior convictions of a crime defined by a statute that has since been determined unconstitutional by an appellate court shall not be used for criminal history scoring purposes. *State v. Degand* 457

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

Statutory Definition of Aggravated Criminal Sodomy When Victim Is Overcome by Force or Fear—Not Unconstitutionally Vague. K.S.A. 2021 Supp. 21-5503(b)(3)(A), the statute defining aggravated criminal sodomy when the victim is overcome by force or fear, is not rendered unconstitutionally vague by inclusion of language prohibiting a defendant from asserting that they "did not know or have reason to know that the victim did not consent to the sexual intercourse, that the victim was overcome by force or fear, or that the victim was unconscious or physically powerless." K.S.A. 2021 Supp. 21-5504(f). The statute gives fair warning of what is prohibited conduct and avoids arbitrary and unreasonable enforcement by leaving intact the State's burden to prove a victim was overcome by force or fear. *State v. Ninh* 91

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

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

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and unreasonable enforcement by leaving intact the State's burden to prove a victim was overcome by force or fear. *State v. Ninh* 91

Sufficiency of Evidence Challenge by Defendant—Appellate Review. When a criminal defendant challenges the evidence supporting a conviction, an appellate court examines all the evidence in a light most favorable to the prevailing party—the State—to determine whether a rational fact-finder could have found each required element of the crime beyond a reasonable doubt. An appellate court does not reweigh evidence, resolve evidentiary conflicts, or make credibility determinations. *State v. Spilman* 550*

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

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

DIVORCE:

Filing of Petition for Divorce—Each Spouse Becomes Owner of Vested Interest in All Property. It is well settled law in Kansas that upon the filing of a petition for divorce each spouse becomes the owner of a vested, but undetermined, interest in all the property individually or jointly held by them.
Martin v. Mid-Kansas Wound Specialists, P.A. 509

Marital Property—Statutory Definition Includes All Property Owned or Acquired by Either Spouse after Marriage. Under K.S.A. 2022 Supp. 23-2801, marital property includes all property owned by married persons or acquired by either spouse after the marriage.
Martin v. Mid-Kansas Wound Specialists, P.A. 509

Third Party May Assert Interest in Property of Marital Estate as Intervenor or Joining as Party in Divorce Action—Court Makes Equitable Division of Marital Property and Determines Third Party's Interest. In Kansas, third parties asserting an interest in property of a marital estate can intervene or be joined as parties in a divorce action. In this situation, the divorce court's exclusive jurisdiction over the marital estate includes not only the power to equitably divide the marital property between the spouses, but it also includes the power to determine the third party's interest in the marital property and to what extent that interest may be superior to the interest held by either spouse.
Martin v. Mid-Kansas Wound Specialists, P.A. 509

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EQUITY:

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

ESTOPPEL AND WAIVER:

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

EVIDENCE:

Admission of Evidence Regarding Settlement Agreements. The admission of evidence regarding settlement agreements for the purpose of proving liability is generally prohibited. K.S.A. 60-452. *White v. Koerner* 622*

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

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

HIGHWAYS AND STREETS:

Installation of Pipeline in Right of Way of Public Highway—Public Purpose Required. If a private person wants to install a pipeline in the right-of-way of a public highway, that pipeline must serve a public purpose. Without a public purpose, the person must have permission to install the pipeline. Depending on the nature of the installation and the property, this permission may be granted by the abutting landowners or the legislature.
Ross v. Nelson 634*

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JUDGMENTS:

Judgment Rendered with Jurisdiction and Subject Matter Is Final and Conclusive—Exceptions. A judgment rendered by a court with jurisdiction of the parties and the subject matter is final and conclusive unless it is later modified on appeal or by subsequent legislation. Such a judgment cannot legally be collaterally attacked. *In re Parentage of W.L. and G.L.* 533

JURISDICTION:

Determination of Standing—Two-Part Test—Cognizable Injury and Causal Connection between Injury and Conduct. Kansas courts use a two-part test when determining standing. To show standing, a party must show a cognizable injury and establish a causal connection between the injury and the challenged conduct. To show a cognizable injury, the injury must affect the party in a personal and individual way. A party must assert its own legal rights and interests and not base its claim for relief on the legal rights or interests of third parties. *Aeroflex Wichita, Inc. v. Filardo* 588*

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

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

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

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

KANSAS CONSTITUTION:

Grant of Judicial Power of State to Courts—Definition of Standing. Article 3, section 1 of the Kansas Constitution grants the "judicial power" of the state to the courts. Judicial power is the power to hear, consider, and determine "controversies" between litigants. For an actual controversy to exist, a petitioner must have

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standing. Standing "means the party must have a personal stake in the outcome." Standing is a component of subject matter jurisdiction. It presents a question of law and can be raised at any time.
League of Women Voters of Kansas v. Schwab ……………..……..…...…….. 187

KANSAS CORPORATION COMMISSION:

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

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

LEGISLATURE:

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

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

KANSAS OFFENDER REGISTRATION ACT:

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

MANDAMUS:

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

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MOTOR VEHICLES:

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

PARENT AND CHILD:

Kansas Parentage Act— Judgment under Act Is Determinative for All Purposes. The judgment of the court determining parentage under the Kansas Parentage Act, K.S.A. 2022 Supp. 23-2201 et seq., is "determinative for all purposes" when all necessary parties have been joined. K.S.A. 2022 Supp. 23-2215(a). When a necessary party has not been joined, such a judgment is not divested of jurisdiction but has only the force and effect of a finding of fact necessary to determine a party's duty of support. *In re Parentage of W.L. and G.L.* 533

PHYSICIANS AND SURGEONS:

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

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

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

— No Duty of Care if No Legal Physician-Patient Relationship. Without a legally recognized physician-patient relationship, there is no duty of care for purposes of establishing medical negligence.
Miller v. Hutchinson Regional Med. Center 57

— Under These Facts District Court Erred. On the particular facts presented, the district court erred in finding no physician-patient relationship existed and granting summary judgment on that basis.
Miller v. Hutchinson Regional Med. Center 57

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POLICE AND SHERIFFS:

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

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

PROBATE CODE:

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

PUBLIC HEALTH:

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

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

REAL PROPERTY:

Damages for Trespass—General Rule. When calculating damages for a trespass, the general rule is that a plaintiff can recover for any loss sustained. The wrongdoer should compensate for all the injury naturally and fairly resulting from the wrong. *Ross v. Nelson* 634*

Nuisance—Definition. A nuisance is any use of property by one which gives offense to or endangers life or health, violates the laws of decency, unreasonably pollutes the air with foul, noxious odors or smoke, or obstructs the reasonable and comfortable use and enjoyment of another person's property. *Ross v. Nelson* 634*

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Partition—Action to Determine Parties' Interests in Property. A partition case is a single judicial action that determines the parties' interests in property and orders partition. When there is an action to partition property, that case is the one and only opportunity for interested parties to challenge the partition. *Mog v. St. Francis Episcopal Boys' Home* 579*

Partition Action—Defendant in Default if Failure to File Answer or Responsive Motion. As with any other civil action, when a defendant in a partition case fails to file an answer to the petition or file a responsive motion, the defendant is in default. A defaulting party is no longer entitled to participate in the case. This means, among other things, that the remaining parties are no longer required to provide the defaulting party notice of filings or rulings in the case. *Mog v. St. Francis Episcopal Boys' Home* 579*

Partition Action—Defendant Must File Answer or Respond to Participate in Case. A defendant named in a petition in a partition action and served with process must file an answer or a responsive motion before it can participate as a party in that case.
Mog v. St. Francis Episcopal Boys' Home 579*

Possessory Right of Fee Owners of Real Property Containing Public Roadway. Fee owners of real property containing a public roadway have a possessory right to use, control, and exclude others from the land, as long as they do not interfere with the public's use of the road. In contrast, the public has an easement over the property to use the road for transportation purposes—that is, to use the road *as a road*—but no other rights beyond those purposes. Any further use by members of the public may be authorized through state action, provided the landowner is compensated for the diminished property rights, or through the landowner's consent.
Ross v. Nelson 634*

Trespass Claim—Definition. A trespass claim arises when a person intentionally enters another's property without any right, lawful authority, or express or implied invitation or license. *Ross v. Nelson* 634*

SEARCH AND SEIZURE:

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

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

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

STATUTES:

Construction of Statute—Intent of Legislature Governs—Appellate Review. The most fundamental rule of statutory construction is that the intent of the Legislature governs if that intent can be ascertained. An appellate court must first attempt to ascertain legislative intent through the statutory language enacted, giving common words their ordinary meanings. Only if the statute's language or text is unclear or ambiguous does the court use canons of construction or legislative history to construe the Legislature's intent. *Blue Valley Tele-Communications, Inc. v. Kansas Corporation Comm'n*
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Construction of Statutes—Intent of Legislature Governs—Appellate Review. The most fundamental rule of statutory construction is that the intent of the Legislature governs if that intent can be ascertained. An appellate court must first seek to ascertain legislative intent through the statutory language enacted, giving common words their ordinary meanings.
Wickham v. City of Manhattan 294

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

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

SUMMARY JUDGMENT:

Court Must Resolve Inferences from Evidence in Favor of Defending Party. In summary judgment proceedings the district court must resolve all reasonable inferences drawn from the evidence in favor of the party against whom summary judgment is sought.
Krigel & Krigel v. Shank & Heinemann 344

Disputed Issues of Material Fact May Not Be Decided by Trial Court Judge. A trial court judge may not decide disputed issues of material fact

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on summary judgment, even if the claims sound in equity rather than law. *Corazzin v. Edward D. Jones & Co.* 489

Negligence Claim for Premises Liability Requires Four Elements. *S*ummary judgment is rarely appropriate in negligence cases, unless the plaintiff fails to establish a prima facie case demonstrating the existence of the four elements of negligence: existence of a duty, breach of that duty, an injury, and proximate cause. A negligence claim based on premises liability requires the same four elements: duty, breach, causation, and damages. If a court concludes that a defendant accused of negligence did not have a duty to act in a certain manner toward the plaintiff, then a court may grant summary judgment because the existence of duty is a question of law. *Corazzin v. Edward D. Jones & Co.* 489

Party Cannot Avoid Summary Judgment if Hoping for Later Developments in Discovery or Trial. A party cannot avoid summary judgment on the mere hope that something may develop later during discovery or at trial. Mere speculation is similarly insufficient to avoid summary judgment. *Corazzin v. Edward D. Jones & Co.* 489

TORTS:

City Not Liable for Negligence of Independent Contractor under These Facts. Under these facts, the city of Kensington, as the employer of an independent contractor, is not liable for injuries caused by any negligence of an independent contractor. *Corbett v. City of Kensington* 466

Educational Malpractice Tort Not Recognized in Kansas. Kansas does not recognize a tort of educational malpractice. *Minjarez-Almeida v. Kansas Bd. of Regents* 225

Owner or Operator Open to Public Has Duty to Warn of Dangerous Condition. The owner of a business is not the insurer of the safety of its patrons or customers. But an owner or operator of a place open to the public has a duty to warn of any dangerous condition that the owner or operator knows about—or should know about—if exercising reasonable care while tending to the business. *Corazzin v. Edward D. Jones & Co.* 489

Plaintiff's Requirement to Show Duty Existed to Prove Negligence. To establish the existence of this duty, the plaintiff must show that the owner or operator had actual knowledge of the condition, or that the condition had existed for long enough that in the exercise of reasonable care the owner or operator should have known of the condition. If no duty exists, there can be no negligence. *Corazzin v. Edward D. Jones & Co.* 489

TRIAL:

Cumulative Trial Error—Requirement to Warrant Reversal of Conviction. To warrant reversal of a criminal conviction for cumulative trial error, the combined effect of the trial errors must convince the reviewing

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court that the defendant's trial was so prejudiced that the court may not declare the errors harmless. If any of the errors involved constitutional rights, the court must be willing to declare the cumulative error harmless beyond a reasonable doubt. *State v. Spilman* 550*

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

Expert Witness Testimony Required—Standard of Care for Independent Contractor in this Case Outside Common Knowledge of Juror. Expert witness testimony is necessary to show that an independent contractor hired to brush blast and paint a city's water tower should have used different materials or a protective curtain to protect an adjacent landowner from injury. The standard of care for that work is outside the ordinary experience and common knowledge of a juror. *Corbett v. City Kensington* 466

Failure to Object to Jury Instruction—Instruction Must Be Shown to be Clearly Erroneous. A litigant's failure to object to a jury instruction on the specific grounds raised on appeal does not preclude appellate review, but the litigant must show that the instruction is clearly erroneous.
State v. Spilman 550*

Jury Instruction on Aiding and Abetting—When Factually Appropriate. An instruction on aiding and abetting is factually appropriate if, from the totality of the evidence, the jury could reasonably conclude that the defendant aided and abetted another in the commission of a crime.
State v. Spilman 550*

Jury Instructions Challenge—Appellate Review. When reviewing a challenge to jury instructions, appellate courts generally apply a multi-step analysis. First, the court decides whether the issue was properly preserved in the trial court. Second, the court considers whether the instruction was legally and factually appropriate. Third, if the court finds error, the court determines whether the error requires reversal. The standard applied to this last inquiry depends on preservation. *State v. Spilman* 550*

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

Jury's Finding of Punitive Damages—Appellate Review. Appellate courts review a jury's finding that punitive damages are appropriate by asking whether, based on the evidence presented at trial, the jury could have found it highly probable that the defendant engaged in malicious, vindictive, willful, or wanton conduct. *Ross v. Nelson* 634*

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Prosecutor's Duties in Trial—Wide Latitude Afforded Prosecutor in Arguing Case. The law charges a prosecutor to restrict comments in argument to a reasoned discussion of the evidence presented at trial as it applies to the law, synthesizing facts and articulating reasonable inferences but not diverting the jury's attention from admissible evidence in deciding the case. Accordingly, a prosecutor may not mischaracterize the evidence during argument. He or she may not properly refer to information outside the admitted evidence. A prosecutor must not offer personal opinions about the significance of specific evidence or what witnesses are credible. A prosecutor must not misstate the law or invite the jurors to disregard the law. A prosecutor must not attempt to enflame the passions or prejudices of the jurors. When a prosecutor engages in these behaviors, he or she steps outside the wide latitude afforded prosecutors to argue a case.
State v. Spilman 550*

Prosecutorial Error in Closing Arguments—Appellate Review. Prosecutorial error in closing arguments occurs when the prosecutor's actions or statements fall outside the wide latitude afforded prosecutors to conduct the State's case. If an appellate court concludes the prosecutor committed error, then it determines whether the error affected the substantial rights of the defendant. The court may deem the error harmless only if the State can establish beyond a reasonable doubt that the error did not affect the outcome of the trial. In other words, the State must show that no reasonable possibility exists that the error contributed to the verdict.
State v. Spilman 550*

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

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

Special Verdict Findings—Liberal Construction on Appeal—Appellate Review. Special verdict findings are to be liberally construed on appeal and interpreted in the light of the testimony with a view toward ascertaining their intended meaning. If a careful reading of the verdict form, coupled with the instructions, clearly establishes the intent of the jury and resolves a verdict's ambiguity, the verdict will be upheld on appellate review.
Aeroflex Wichita, Inc. v. Filardo 588*

Special Verdict Findings on Essential Issues—Requirements—Appellate Review. Special verdict findings on essential issues must be certain and definite and not be conflicting or inconsistent. In determining whether jury findings are inconsistent, they are construed in the light of the circumstances and in connection with the pleadings, instructions, and issues submitted.

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When there is a view of the case that makes the findings consistent, they then must be resolved that way. *Aeroflex Wichita, Inc. v. Filardo* ....…. 588*

Warning to Disruptive Witness that Testimony May Be Stricken—Factor for Consideration. Although warning a disruptive witness that their testimony may be stricken is not mandatory in Kansas, it is a factor that should be considered as part of the totality of the circumstances.
State v. Cantu ………………….…………………………..……….….. 276

WRONGFUL DEATH:

Kansas Wrongful Death Act—District Court May Consider Heir's Actions When Apportioning Recovery. The Kansas Wrongful Death Act, K.S.A. 60-1901 et seq., does not prohibit the district court from considering an heir's actions when calculating that heir's loss for the purpose of apportioning the recovery from a wrongful death lawsuit pursuant to K.S.A. 60-1905. *White v. Koerner* …… 622*

(534 P.3d 583)

No. 124,775

STATE OF KANSAS, *Appellee*, v. BRIAN A. SPILMAN JR., *Appellant*.

SYLLABUS BY THE COURT

1. TRIAL—*Jury Instructions Challenge—Appellate Review*. When reviewing a challenge to jury instructions, appellate courts generally apply a multistep analysis. First, the court decides whether the issue was properly preserved in the trial court. Second, the court considers whether the instruction was legally and factually appropriate. Third, if the court finds error, the court determines whether the error requires reversal. The standard applied to this last inquiry depends on preservation.

2. SAME—*Failure to Object to Jury Instruction—Instruction Must Be Shown to be Clearly Erroneous.* A litigant's failure to object to a jury instruction on the specific grounds raised on appeal does not preclude appellate review, but the litigant must show that the instruction is clearly erroneous.

3. SAME—*Jury Instruction on Aiding and Abetting—When Factually Appropriate*. An instruction on aiding and abetting is factually appropriate if, from the totality of the evidence, the jury could reasonably conclude that the defendant aided and abetted another in the commission of a crime.

4. CRIMINAL LAW—*Crime of Aiding and Abetting—Requirements*. Under K.S.A. 2022 Supp. 21-5210, an aider or abettor must intend to assist the commission of a crime and must act with the same mental culpability as the principal. An aider or abettor may intend to assist the commission of a reckless act.

5. SAME—*Sufficiency of Evidence Challenge by Defendant—Appellate Review*. When a criminal defendant challenges the evidence supporting a conviction, an appellate court examines all the evidence in a light most favorable to the prevailing party—the State—to determine whether a rational factfinder could have found each required element of the crime beyond a reasonable doubt. An appellate court does not reweigh evidence, resolve evidentiary conflicts, or make credibility determinations.

6. SAME—*Causation in Criminal Case—Two Elements—Cause-in-Fact and Legal Causation*. Causation in a criminal case has two core elements: cause-in-fact and legal causation. Cause-in-fact requires proof that but for the defendant's conduct, the result would not have occurred. Legal causation limits a defendant's liability to the reasonably foreseeable consequences of his or her conduct. There may be more than one proximate cause of a death.

When the conduct of two or more persons contributes concurrently as proximate causes of a death, the conduct of each of said persons is a proximate cause of the death regardless of the extent to which each contributes to the death. A cause is concurrent if it was operative at the moment of death and acted with another cause to produce the death.

7. TRIAL—*Prosecutorial Error in Closing Arguments—Appellate Review.* Prosecutorial error in closing arguments occurs when the prosecutor's actions or statements fall outside the wide latitude afforded prosecutors to conduct the State's case. If an appellate court concludes the prosecutor committed error, then it determines whether the error affected the substantial rights of the defendant. The court may deem the error harmless only if the State can establish beyond a reasonable doubt that the error did not affect the outcome of the trial. In other words, the State must show that no reasonable possibility exists that the error contributed to the verdict.

8. SAME—*Prosecutor's Duties in Trial—Wide Latitude Afforded Prosecutor in Arguing Case*. The law charges a prosecutor to restrict comments in argument to a reasoned discussion of the evidence presented at trial as it applies to the law, synthesizing facts and articulating reasonable inferences but not diverting the jury's attention from admissible evidence in deciding the case. Accordingly, a prosecutor may not mischaracterize the evidence during argument. He or she may not properly refer to information outside the admitted evidence. A prosecutor must not offer personal opinions about the significance of specific evidence or what witnesses are credible. A prosecutor must not misstate the law or invite the jurors to disregard the law. A prosecutor must not attempt to enflame the passions or prejudices of the jurors. When a prosecutor engages in these behaviors, he or she steps outside the wide latitude afforded prosecutors to argue a case.

9. SAME—*Cumulative Trial Error—Requirement to Warrant Reversal of Conviction*. To warrant reversal of a criminal conviction for cumulative trial error, the combined effect of the trial errors must convince the reviewing court that the defendant's trial was so prejudiced that the court may not declare the errors harmless. If any of the errors involved constitutional rights, the court must be willing to declare the cumulative error harmless beyond a reasonable doubt.

10. APPEAL AND ERROR—*Constitutional Issues Raised First Time on Appeal—Not Generally Reviewed—Exceptions*. An appellate court generally does not review constitutional issues raised for the first time, though the courts have recognized three exceptions to this rule. Even when a litigant demonstrates the applicability of an exception, an appellate court is not bound to consider an unpreserved issue for the first time on appeal.

11. CRIMINAL LAW—*Restitution—Amount and Manner of Payment Left to Discretion of Trial Court—Appellate Review*. The amount of restitution and the manner in which restitution is paid are decisions left to the discretion of the trial court. An appellate court reviews that decision for abuse of that

discretion. Absent demonstration of some error of fact or law, an appellate court will find an abuse of discretion only when the trial court's decision is shown to be arbitrary, fanciful, or unreasonable.

Appeal from Doniphan District Court; JOHN L. WEINGART, judge. Opinion filed July 7, 2023. Affirmed.

Kai Tate Mann, of Kansas Appellate Defender Office, for appellant.

Charles D. Baskins, county attorney, and *Kris W. Kobach*, attorney general, for appellee.

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

GREEN, J.: Brian A. Spilman Jr. was convicted by a jury in Doniphan County District Court of involuntary manslaughter for participating in beating Jason Pantle, who later died from his injuries. Spilman challenges his conviction on several grounds: He contends (1) that the trial court erred in instructing the jury on liability as an aider or abettor; (2) that his conviction is not supported by the evidence; and (3) that the prosecutor committed error in closing argument. He further contends that these errors, if not individually prejudicial, combined to deprive him of a fair trial. We disagree and affirm.

Because of the offense of conviction, the court also required Spilman to register as a violent offender under the Kansas Offender Registration Act (KORA). For the first time on appeal, Spilman challenges KORA as unconstitutional because it compels speech in violation of the First Amendment to the United States Constitution and treats similarly situated offenders differently in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Because consideration of this issue would require the development of facts outside our appellate record, we refrain from considering this issue for the first time on appeal.

Finally, he challenges the trial court's restitution award because the court did not order restitution to be paid jointly and severally with Spilman's codefendants. Spilman has not demonstrated that the trial court's restitution award was arbitrary, fanciful, or unreasonable. Thus, he has not established a basis for vacating the restitution award. We affirm.

FACTS

In September 2019, Gracie Seager planned a surprise birthday party for her mother, Sarah Amelia Seager (a/k/a Amy Seager or Amy

Scherer), at her grandfather's shop in the town of Doniphan in Doniphan County. The shop had a garage door that was left open for the party. Outside the garage door, a concrete slab covered the drive for a few feet before running to gravel.

The party was held on Saturday, September 22, starting at about 8 p.m., but it extended into the early morning hours of Sunday, September 23. In preparation for the party, Gracie had issued invitations, but the number of people who attended the party exceeded the number of invitees as word of the party spread among acquaintances. Guests came and went throughout the evening. Estimates of the number of party guests ranged from 20 to 45.

Alcohol was served at the party, which may have contributed to the inconsistent reports about the altercations that led to the death of Pantle. No two witness accounts agree to the details of the altercations. Most witnesses, however, agree on the general story arc.

Though she could not specify the time, Gracie testified that she approached Pantle to ask him to leave because he was being boisterous and confrontational. Pantle responded rudely, asking her what she was going to do about it and calling her a "bitch." Pantle then shoved Gracie, and she lost her balance, tripping over a cooler on the floor behind her. Scott Vandeloo, who was standing near Gracie, told Pantle that he should not talk to Gracie that way and that he should respect the party. Pantle shoved Scott, and Scott pushed him back; Pantle fell to the ground. Gracie's mother essentially substantiated Gracie's testimony. Neither Gracie nor her mother mentioned any punching or wrestling between Scott and Pantle, and they did not mention any altercation between Pantle and Spilman at all. Nevertheless, Gracie and her mother left the party shortly after this altercation.

About 10 minutes before Gracie and her mother left—around 2 a.m.—Morgan Hull arrived at the party. Unlike most of the other witnesses in the case, Morgan was not related to anyone at the party, but she was friends with Shelby Seager and Gracie. After arriving at the party, Morgan found Shelby and joined her in conversation near the refrigerator, just inside the garage door of the shop. Although Morgan mentioned the departure of Gracie and her mother, she did not describe the confrontation between Gracie

and Pantle that had prompted their departure, except to say that several people were arguing.

Just after Gracie and her mother left the party, Spilman engaged in a fight with Pantle. Morgan did not describe how the altercation began. Shelby, who was standing next to Morgan, testified that the altercation occurred when Spilman asked Pantle to leave the party, and he refused. David Underwood, who was dating Shelby but also unrelated to any of the combatants, stated that the fight began when Pantle ran at a group of people, and Spilman, in response, "went at" Pantle.

Morgan testified that Spilman shoved Pantle and then hit him. Pantle fell, and Spilman straddled Pantle, punching him with both fists. While Shelby and David agreed that Spilman shoved Pantle, they both testified that they did not see Spilman throw any punches. Shelby also testified that she did not witness Spilman straddling or sitting on top of Pantle. But Shelby had previously told a KBI agent that Pantle "was getting the shit beat out of him" and that Pantle was at a disadvantage to Spilman. Though Spilman testified that Pantle sucker-punched him, Morgan and David both testified that they did not see it. And Shelby did not mention it.

All three witnesses indicated that the fight did not last long. Though Morgan testified that Spilman punched Pantle for about five minutes, she also testified that the fight did not last long; that if she had walked outside, inside, and then immediately returned, the fight would have been over. She admitted that she was not good with time estimates. Shelby testified the fight lasted only a couple minutes. None of the witnesses provided details about the resolution of the fight, but none confirmed Spilman's account, which was that he threw wild punches at Pantle, blindly and in self-defense.

Spilman and his father (Brian Sr.) testified that, after Spilman had wrestled Pantle into a hold, Brian Sr. told him to stop. Spilman reportedly complied, releasing Pantle and moving away to avoid further confrontation. Morgan and David testified that they did not hear anyone telling the participants to stop fighting.

The testimony regarding Pantle's condition after his fight with Spilman is also inconsistent. Morgan testified that Pantle remained on the ground after the fight, rolling around and trying to

get up. Shelby and David testified that Pantle got to his feet, suggesting that he stood up as soon as the fight had ended.

But shortly after the fight between Spilman and Pantle ended, Scott Vandeloo began to fight with Pantle. Brian Sr. testified that Pantle initiated this fight. Morgan testified that Scott knocked Pantle to the ground, straddled him, and punched him in the head. Shelby testified that Scott and Pantle were both swinging their arms. This fight lasted about the same amount of time as the fight between Spilman and Pantle.

During this fight, David Underwood attempted to intervene, but Spilman pulled him back and threw him to the ground. Spilman claimed that he believed David was attempting to enter the fight or, in his words, "jump" someone. When asked about this intervention, Morgan stated she did not see anyone attempt to intervene in the fight. Brian Sr. also did not testify about David's intervention. David stated that Spilman apologized days later; Spilman testified he apologized immediately.

After the fight ended, Scott stood up and began looking for his phone, believed to have been lost during the fight. Spilman picked it up and later returned it to Scott. Meanwhile, Pantle remained on the ground, trying to get up. He eventually regained his feet and moved toward the shop. As he did so, Spilman ran at Pantle, hit him, and knocked him to the ground. Spilman and Pantle then rolled around on the ground. David and Shelby, who remained in the area, did not witness this incident. Brian Sr. also did not testify about this event. Spilman testified that after the fight between Pantle and Scott, he went to the bathroom. He denied he had a second altercation with Pantle.

Morgan reportedly walked over to the group surrounding the fight and told them, "'Enough's enough.'" Brian Sr. pulled her back, telling her, "'It's not your fucking fight. Don't fucking worry about it.'" Matthew Cole Scherer also prevented Morgan from intervening. Not able to do anything to stop the fight, Morgan returned to her group of friends just inside the shop door.

Later, Morgan saw Spilman get up and return to the shop. Pantle did not get up quickly. Each time Pantle was knocked down, it took him longer to get back up. At the end of the fight, Matthew stood over Pantle, saying, "'You're good, bro. You're fine. Get up. You're fine.'" Pantle eventually got up and walked toward the

shop. Morgan said that Pantle had his arms out to the side, perhaps for balance. As he entered the shop, Pantle said something, and Matthew hit Pantle in the jaw, knocking him unconscious. Brian Sr. confirmed that Pantle initiated this confrontation and leaned into Matthew. When Matthew hit him, Pantle fell straight backward, hitting his head on the concrete slab with a "'sick[ening]'" sound.

Pantle lay on the concrete with his feet inside the shop but his head and torso outside in the rain. According to Morgan, no one did anything for Pantle until she began walking toward him, telling the other guys that Pantle needed to be brought in out of the rain. Then Matthew and Spilman dragged or carried Pantle into the shop, leaning him against the couch.

Austin Spilman, the first cousin of the defendant, had just returned to the party to see Matthew hit Pantle. Austin and John Pantle, the victim's son, tried to get to Pantle, but Matthew prevented them from reaching him. After Pantle was moved into the shop, however, Austin and John were permitted to check on him.

Morgan continued to watch Pantle because she did not think he looked well. Austin also testified that Pantle was visibly unwell. His belly was jerking, and his chest caved in when he tried to breathe. He had foam and blood coming out of his mouth. Somebody picked Pantle up off the floor and lay him on the couch, which seemed to help his breathing. Morgan checked Pantle's pulse and found it erratic. The area around Pantle's eyebrows was swollen, the left side more than the right side. One eye was completely swollen shut; the swelling was the size of a softball. Scott took a picture of Pantle lying on the couch and sent it to a Facebook Messenger group. Pantle lay on the couch anywhere from 20 to 60 minutes. Spilman did not think Pantle's condition appeared alarming, but he also testified that Pantle was unconscious after he helped move him from the concrete to the couch.

Morgan stated she wanted to call 911, but Matthew told her not to call because they did not want the "law" out there. Matthew told her that, if she wanted to get him help, she could take him. Austin agreed that the group expressed fear about involving the police and that Matthew would not let anyone take Pantle from the shop, but he testified that he heard no discussion about removing Pantle. Morgan said that she did not call 911 because she was

frightened about what the guys might do if she called; if she called from her car, everyone would know she had called when the ambulance arrived because she had suggested it. She could not have taken Pantle to her car by herself, and no one offered to assist her. She went out to her car and called a friend, Kailen Kurtz, at about 2:30 a.m. She called from her car because she did not want the others to hear what she said.

Nearly an hour later, Kailen arrived at the shop. Just before Kailen arrived, Austin was permitted to take Pantle home in his truck. Several people helped to carry Pantle to the truck. Some testimony reports that Spilman helped. Other testimony suggests that he did not. As they were carrying him out to the truck, Scott reportedly said, "'The same motherfuckers you thought that you could fight are the same ones carrying you to the vehicle.'"

They placed Pantle onto the back seat of the truck, but they did not get him completely into the vehicle. His legs dangled out the door. Nevertheless, most of the men returned to the shop and continued socializing. John, Morgan, and Kailen pulled Pantle up into the seat so the door would close. While they were moving him, Pantle may have regained consciousness. Kailen and Morgan stated that he mumbled but did not regain consciousness. Austin and John testified that Pantle regained consciousness and freaked out, agitated that they were leaving the party. Pantle then became combative with his son, who was trying to get him into the truck.

Because Pantle was freaking out, Austin returned to the shop to request help from Brian Sr. Brian Sr. testified that Austin reported that John was beating up Pantle. Austin contradicted this report, denying that he told them that John and Pantle were fighting each other. Austin claimed that Brian Sr. simply came out to the truck and talked with Pantle, trying to get him to calm down.

It is unclear whether Pantle remained conscious. Eventually, John and Austin were able to drive Pantle to Atchison. Shelby and David followed them to Atchison, before taking a different road to home. Austin did not stop along the way to Atchison.

Austin drove to his house, instead of taking Pantle to the hospital. Morgan testified that, before she left the party, she encouraged Austin to take Pantle to the hospital. She assumed that Austin and John would take him to the hospital. Austin said he thought Pantle just needed rest. John did not recall that Morgan urged him

to take his father to the hospital or that she offered to take him. John stated that his father did not have health insurance, and he did not want to incur medical costs of a hospital visit if it was unnecessary. He wanted to assess his father's condition at Austin's house. John also admitted that he did not want to involve law enforcement because his father was on bond and heavily intoxicated.

When they stopped at Austin's house, Austin placed his keys in the center console and got out to help Pantle out of the truck. Pantle had regained consciousness. He picked up Austin's keys from the console and got out of the truck with Austin's and John's assistance. Austin intended to go open the house for Pantle but could not find his keys. While Austin searched for his keys, Pantle stood, leaning against the back of the truck. He was asking to go back to the party. As he was talking, his knees buckled, and he slid to the ground like an "accordion." His head hit the pavement.

After his father fell, John began freaking out, yelling at Pantle and trying to revive him by slapping him. Pantle was unresponsive, lying on the driveway with his head toward the gutter, which was filled with water because of the rain.

Meanwhile, Austin received a text message from Brian Sr. and Blake Camp, who was in a band with Pantle, asking how Pantle was doing. Austin took a picture of Pantle and sent it to them.

John's efforts to revive his father wakened a woman staying the night nearby with a friend. She looked outside and decided to call the non-emergency dispatch number. The police arrived at Austin's house shortly thereafter. Although John told the police that they could transport Pantle to the hospital to avoid the ambulance charges, the police called an ambulance, which took Pantle to the hospital.

Pantle died. A later autopsy by Dr. Altaf Hossain revealed fractures to the right side of Pantle's maxilla, frontal bone, and nose. He had several blood clots between the skin and skull. Dr. Hossain discovered several more blood clots within the skull and contusions on the underside of the brain. The blood clotting was not limited to a single area; it occurred in the front area, right side, top area, and back. With a single blow to the jaw followed by a fall onto the back of the head, Dr. Hossain would have expected to see a small amount of bleeding in the face area and an injury to the back of the head, not the global injuries found on Pantle's head.

Even two falls onto the head did not account for Pantle's injuries. Therefore, Dr. Hossain concluded the injuries were the result of multiple blows to the head. The facial injuries were also consistent with punches to the right side of the face. The severity of the injuries was equivalent to injuries inflicted by multiple blows to the head with a baseball bat. Significant blood clotting at the base of the skull indicated profuse bleeding. Blood clotting covered the right hemisphere of the brain. The back of the skull had been fractured in two places. Dr. Hossain stated the cause of death to be subdural hematoma with multiple skull fractures. He explained that hemorrhaging within the skull increased pressure. If the pressure went unrelieved by medical intervention, the pressure results in herniation of the brain and death. As the pressure built, the individual likely would lose consciousness before death. Dr. Hossain opined that the multiple injuries compounded one another. Although the chances of survival are greater the earlier treatment is received, Pantle's injuries were significant enough that his chance of survival would have been low even with immediate medical intervention. Dr. Hossain determined the manner of death was homicide.

The State originally charged Spilman with aggravated battery. The State later amended the charge to second-degree, reckless (depraved heart) murder. After a preliminary examination hearing, the trial court found probable cause to believe Spilman was guilty of the charge.

The case was presented to a jury over two days. After the jury began its deliberations, it returned four questions to the court. The court consulted with the attorneys and returned answers. The jury returned a verdict convicting Spilman of the lesser included offense of involuntary manslaughter. Defense counsel requested the jury to be polled. The court advised Spilman of his duty to register as a violent offender under KORA.

At sentencing, the parties agreed that Spilman had no significant criminal history, and the court classified his criminal history score as I. Because his conviction fell within a border box, Spilman argued for probation. The court denied Spilman's request for probation, imposing the standard presumptive prison term of 32 months, followed by 24 months of postrelease supervision. The

court imposed $19,335.72 in restitution against Spilman. The court awarded Spilman 168 days of jail-time credit.

Spilman timely appeals.

ANALYSIS

Did the trial court err in providing the jury with an instruction on aiding and abetting?

Spilman's first appellate issue challenges the trial court's decision to provide the jury with an aiding and abetting instruction. He contends the instruction was neither legally nor factually appropriate.

When reviewing a challenge to jury instructions, appellate courts generally apply a multi-step analysis. First, the court decides whether the issue was properly preserved in the trial court. Second, the court considers whether the instruction was legally and factually appropriate. Third, if the court finds error, the court determines whether the error requires reversal. The standard applied to this last inquiry depends on preservation. *State v. Carter*, 316 Kan. 427, 430, 516 P.3d 608 (2022).

Preservation

As Spilman contends, he objected to the instruction at trial. From an examination of the portion of the record cited by Spilman, however, the objection related to the factual inappropriateness of the instruction under the facts of this case, not its legal inappropriateness because Spilman had been charged with an unintentional crime.

K.S.A. 2022 Supp. 22-3414(3) provides, in part, that a party must "stat[e] distinctly the matter to which the party objects and the grounds of the objection." In addition to the argument Spilman's attorney made during the jury instructions conference, Spilman's attorney sent a text message to the court (and presumably the prosecutor), objecting to the aiding and abetting instruction. Unfortunately, Spilman's brief does not have a pin cite where in the record the text message may be reviewed. Independent review of the record failed to discover the text message. Without the contents of the text message, we cannot determine the basis for Spil-

man's objection. Accordingly, our record supports only an objection to the aiding and abetting instruction based on factual appropriateness.

Factual appropriateness

"An instruction on aiding and abetting is factually appropriate if, from the totality of the evidence, the jury could reasonably conclude that the defendant aided and abetted another in the commission of the crime. To aid or abet, a person 'must willfully and knowingly associate himself with the unlawful venture and willfully participate in it as he would in something he wishes to bring about or to make succeed.' [Citation omitted.]" *State v. Shields*, 315 Kan. 814, 835, 511 P.3d 931 (2022) (quoting *State v. Llamas*, 298 Kan. 246, 253, 311 P.3d 399 [2013]).

Spilman contends that the evidence presented at trial did not support an aiding and abetting instruction because the evidence demonstrated only that Spilman was attempting to break up a fight after his initial altercation with Pantle. This argument paints the facts rose-colored from Spilman's perspective. Spilman admitted to pulling David away from the fight between Pantle and Scott, but he claimed he thought David intended to join the fight. A jury, however, was not required to accept Spilman's explanation for his actions. See *State v. Young*, 203 Kan. 296, 302, 454 P.2d 724 (1969) (jury justified in rejecting defendant's explanation for possession of check in concluding defendant forged the check); *State v. Wood*, 197 Kan. 241, 249, 416 P.2d 729 (1966). Indeed, when considering the factual appropriateness of a challenged jury instruction given by the court, an appellate court examines the evidence in a light most favorable to the party requesting the instruction, in this case, the State. *Carter*, 316 Kan. at 430.

On appeal, Spilman attributes an altruistic motive to his interference with David's actions, suggesting that he wanted to prevent someone from jumping into the fight against Pantle. The trial evidence does not invariably support this interpretation. Spilman testified that he wanted to prevent "someone getting jumped"—meaning two people attacking one person. He did not testify that he wanted to prevent Pantle from being jumped. So Spilman's altruistic motive is supported only if one interprets his testimony this way: that Spilman was interested in the welfare of Pantle—not in his own welfare.

Circumstantial evidence does not support this interpretation. There is some evidence that Scott was sitting on top of Pantle, pummeling him. If the jury adopted this version of events as true, then Spilman's prevention of David's attempts to intervene in the fight suggests that Spilman did not want David to assist Pantle, the more helpless of the two combatants. This interpretation of the facts is further supported by evidence that, once the fight between Pantle and Scott ended, Spilman took another run at Pantle, hit him, and knocked him to the ground. This is not the conduct of a person interested in protecting Pantle from unfair fighting.

Spilman also testified he immediately apologized to David after realizing that David had not intended to enter the fight. David disputed this testimony, indicating that Spilman apologized days after the fight. But why would Spilman realize that David was trying to stop the fight immediately after pulling him away but not before he pulled him away? He knew David. Spilman's after-the-fact apology suggests an attempt to mitigate the culpability David's testimony cast on his actions in preventing David from stopping the fight.

Viewed in a light most favorable to the State, the evidence supports a jury finding that Spilman prevented David from intervening in the fight between Scott and Pantle because Spilman wanted Scott to continue to beat up Pantle. Accordingly, we conclude that the instruction was factually appropriate.

Legal appropriateness

Although Spilman failed to object to the legal appropriateness, it does not preclude us from considering his argument, but it requires Spilman to show clear error to obtain a new trial based on the instruction's legal inappropriateness. K.S.A. 2022 Supp. 22-3414(3); *State v. Hilyard*, 316 Kan. 326, 333, 515 P.3d 267 (2022). We will consider the legal appropriateness of the aiding and abetting instruction.

Spilman contends that the aiding and abetting instruction was legally inappropriate because one cannot intend an unintentional act. Spilman recognizes that Kansas caselaw holds a contrary position but ineffectively tries to distinguish that caselaw.

In Kansas, criminal liability for aiding and abetting a principal to commit a crime is governed by K.S.A. 2022 Supp. 21-5210, which provides:

"(a) A person is criminally responsible for a crime committed by another if such person, acting with the mental culpability required for the commission thereof, advises, hires, counsels or procures the other to commit the crime or intentionally aids the other in committing the conduct constituting the crime.

"(b) A person liable under subsection (a) is also liable for any other crime committed in pursuance of the intended crime if reasonably foreseeable by such person as a probable consequence of committing or attempting to commit the crime intended.

"(c) A person liable under this section may be charged with and convicted of the crime although the person alleged to have directly committed the act constituting the crime:

(1) Lacked criminal or legal capacity;

(2) has not been convicted;

(3) has been acquitted; or

(4) has been convicted of some other degree of the crime or of some other crime based on the same act."

Spilman contends that the requisite mens rea for reckless second-degree murder, as charged, or the lesser included offense of involuntary manslaughter, the offense of conviction, is recklessness. He reasons that a person may not intentionally act to aid someone acting recklessly.

In *State v. Bodine*, 313 Kan. 378, 486 P.3d 551 (2021), our Supreme Court considered and rejected the same argument Spilman makes here. Although the underlying crimes at issue in *Bodine* did not involve involuntary manslaughter, the mental culpability of aggravated endangerment of a child, as charged in that case, required proof of recklessness. Spilman's conviction of involuntary manslaughter also required proof of recklessness. See K.S.A. 2022 Supp. 21-5405(a)(1). Rejecting Bodine's argument, our Supreme Court held:

"Bodine's reading of the statute is unreasonable. Under K.S.A. 2020 Supp. 21-5210(a), the aider must intentionally assist the principal. In doing so, the aider must possess the mental culpability required for the commission of the crime for which the aider is assisting. Aggravated child endangerment requires a reckless mental culpability. K.S.A. 2020 Supp. 21-5601(b)(1). And 'individuals may act together in the commission of a crime based upon their depraved, indifferent, or reckless conduct.' [*State v.*] *Garza*, 259 Kan. [826,] 834[, 916 P.2d 9 (1996)]. Thus, it was logically possible for the jury to find that Bodine advised, counseled,

or intentionally aided M.M. in recklessly causing or permitting E.B. to be placed in a situation in which his life, body, or health was endangered. See K.S.A. 2020 Supp. 21-5601(b)(1). Bodine's argument fails. See *State v. Keel*, 302 Kan. 560, 574, 357 P.3d 251 (2015) (we must construe statutes to avoid unreasonable or absurd results)." *Bodine*, 313 Kan. at 401.

Spilman argues that *Bodine* is distinguishable because aggravated endangerment of a child permits criminal liability through omitting to act, whereas reckless second-degree murder and involuntary manslaughter require an affirmative act. This argument is unpersuasive. *Bodine* does not draw a distinction between affirmative acts and omissions in discussing aiding and abetting liability. Perhaps more importantly, the facts of *Bodine* did not support an argument that aiding and abetting was appropriate because Bodine and M.M. neglected E.B. The horrific facts of that case demonstrated affirmative acts of child abuse and child endangerment.

Also, in reaching its conclusion, the *Bodine* court favorably cited *State v. Garza*, 259 Kan. 826, 916 P.2d 9 (1996), and *State v. Friday*, 297 Kan. 1023, 1041-42, 306 P.3d 265 (2013). *Friday* involved a theory of aiding and abetting reckless second-degree murder, the crime Spilman was charged with aiding and abetting. Our Supreme Court recognized that *Garza* and *Friday* had interpreted and applied the former aiding-and-abetting statute. Nevertheless, the *Bodine* court found the cases persuasive.

Logic dictates the *Bodine* court's interpretation of K.S.A. 2022 Supp. 21-5210(a). Let us assume the same fact scenario presented by this case with a few minor alterations. The fight was between only Scott and Pantle. But, during that fight, Spilman did not merely prevent David from breaking up the fight, but he was holding Pantle's arms while Scott pummeled him. Under this fact scenario, Spilman did not actively contribute to Pantle's death by punching him and, arguably, neither Scott nor Spilman intended Pantle's death. Yet, Spilman intentionally acted to further Scott's beating of Pantle. But under Spilman's interpretation of K.S.A. 2022 Supp. 21-5210(a), he would have no criminal liability as an aider or abettor because Scott was convicted of an unintentional crime. These slight changes of the facts of this case vividly show the absurdity of Spilman's argument.

Thus, Spilman's argument lacks logical persuasive force, even if our Supreme Court had not decided *Bodine* and *Friday*. Since

we have the authority of *Bodine* and *Friday*, we are bound by those decisions. *State v. Rodriguez*, 305 Kan. 1139, 1144, 390 P.3d 903 (2017); *Garcia v. Tyson Fresh Meats, Inc.*, 61 Kan. App. 2d 520, 524, 506 P.3d 283 (2022).

Finally, even if we were to adopt Spilman's argument and had the authority to do so, we would still be required to address the issue of prejudice—because Spilman did not raise his legal objection to the trial court. As a result, Spilman would need to establish that the aiding and abetting instruction constituted clear error. To establish clear error, the reviewing court must affirm the conviction unless it is firmly convinced the jury would have reached a different verdict if the instructional error had not occurred. *State v. Berkstresser*, 316 Kan. 597, 605-06, 520 P.3d 718 (2022). Spilman cannot establish that burden in this case.

Substantial evidence presented at the trial showed that Spilman participated in the beating of Pantle. Even if Spilman had not inflicted the blow that caused Pantle to hit his head on the concrete, Dr. Hossain's testimony provided evidence that the multiple blows inflicted on Pantle by Spilman contributed to his death. Though Dr. Hossain surmised that one of the falls alone may have ultimately led to Pantle's death, this opinion was based on conjecture. The circumstances under which he rendered his medical opinion as to causation involved multiple blows to the head. The multiple injuries to the head caused swelling in Pantle's brain, which, in turn, caused increasing amounts of pressure in the brain. When that pressure became too great, lack of consciousness and death ensued. Under these circumstances, Dr. Hossain was unwilling to speculate which blow resulted in Pantle's death; he concluded it was the combination of blows to Pantle's head. Under the circumstances presented by this case, we cannot be firmly convinced that the jury would have returned a different verdict had they not been instructed on aiding and abetting.

Did the State present sufficient evidence to support each element of Spilman's conviction for involuntary manslaughter?

Spilman also challenges the sufficiency of the State's evidence supporting his conviction for involuntary manslaughter. The standard of appellate review is well established. The appellate

court examines all the evidence in a light most favorable to the prevailing party—the State—to determine whether a rational fact-finder could have found the defendant guilty beyond a reasonable doubt. Because an appellate court does not reweigh evidence, resolve evidentiary conflicts, or make credibility determinations, a reviewing court need only look at the evidence in favor of the verdict to determine whether the essential elements of a charge are sustained. *State v. Zeiner*, 316 Kan. 346, 350, 515 P.3d 736 (2022). The State must provide evidence sufficient to support each element of a charged offense. *Hilyard*, 316 Kan. at 330.

To convict Spilman of the lesser included offense of involuntary manslaughter, the jury had to find beyond a reasonable doubt that Spilman recklessly killed Pantle. See K.S.A. 2022 Supp. 21-5405(a)(1). Spilman contends that the evidence did not show he killed Pantle, characterizing his altercation with Pantle as "a minor scrape" and noting that Pantle had walked away from it. This argument interprets the evidence in a light favorable to him, contrary to this court's standard of review.

Also, the argument contains a flawed unstated premise regarding causation. Spilman reasons that, since Pantle got up and walked away from his fight with Spilman, Spilman's conduct did not cause Pantle's death. He does not support this argument with any authority. By Pantle's failure to support this argument, he renders us helpless to judge the argument. So, we may presume the argument waived or abandoned. See *State v. Meggerson*, 312 Kan. 238, 246, 474 P.3d 761 (2020) ("Failure to support a point with pertinent authority or show why it is sound despite a lack of supporting authority or in the face of contrary authority is akin to failing to brief the issue."). But even if we were to consider this argument, it would fail:

"Causation in a criminal case has two core elements: cause-in-fact and legal causation. Cause-in-fact requires proof that but for the defendant's conduct, the result would not have occurred. Legal causation limits a defendant's liability to the reasonably foreseeable consequences of his or her conduct. *State v. Arnett*, 307 Kan. 648, 655, 413 P.3d 787 (2018); see *State v. Anderson*, 270 Kan. 68, 77, 12 P.3d 883 (2000) ('Our test for foreseeability . . . is, whether the harm that occurred was a reasonably foreseeable consequence of the defendant's conduct at the time he or she acted or failed to act.'); see also 1 LaFave, Subst. Crim. L. § 6.4, Causation (3d ed. 2017). We commonly refer to these elements together

as 'proximate cause.' *Arnett*, 307 Kan. at 655." *State v. Wilson*, 308 Kan. 516, 522, 421 P.3d 742 (2018).

Spilman cannot escape liability for his criminal conduct simply because he was not the last person to pummel Pantle before he died. When two or more persons contribute concurrently to a cause of death, the law holds them both liable for that death:

"'There may be more than one proximate cause of a death. When the conduct of two or more persons contributes concurrently as proximate causes of a death, the conduct of each of said persons is a proximate cause of the death regardless of the extent to which each contributes to the death. A cause is concurrent if it was operative at the moment of death and acted with another cause to produce the death.'" *State v. Rueckert*, 221 Kan. 727, 736-37, 561 P.2d 850 (1977) (citing jury instructions provided by district court with approval), *disapproved of on other grounds by State v. Berry*, 292 Kan. 493, 510-11, 254 P.3d 1276 (2011).

While Dr. Hossain admitted the possibility that one of the head injuries sustained in the fall might have eventually killed Pantle, he stated that the mechanism of death was swelling from bleeding within the brain, exerting pressure on the brain. Dr. Hossain stated that the multiple injuries compounded on one another. Dr. Hossain rejected the theory that Pantle's two falls accounted for his brain injuries. Highly simplified, Dr. Hossain's medical explanation foreclosed the possibility that the brain damage to Pantle's frontal brain was caused by impact to the back of Pantle's head. Dr. Hossain described the injury to Pantle's brain as global.

Pantle died from trauma to the brain caused by beatings to the head and by his falls. Since there is evidence that Spilman beat Pantle on the head, his conduct is a concurrent cause of death regardless of the extent to which his conduct contributed to Pantle's death. To the extent Spilman contends that the evidence was insufficient to establish causation, his contention fails.

Thus, the evidence was sufficient to permit a reasonable jury to conclude beyond a reasonable doubt that Spilman's conduct was a contributing proximate cause of Pantle's death.

Did prosecutorial error in closing arguments undermine Spilman's ability to obtain a fair trial?

Spilman next contends that the State committed prosecutorial misconduct in closing arguments by bolstering the credibility of

its witnesses and by misstating the law on aiding and abetting criminal liability. Spilman did not object to the argument, but appellate review of an alleged error in closing arguments is not foreclosed by lack of a contemporaneous objection. See *State v. McBride*, 307 Kan. 60, 65, 405 P.3d 1196 (2017).

In considering a claim of prosecutorial error, an appellate court first determines whether an error occurred. Prosecutorial error in closing arguments occurs when the prosecutor's actions or statements "fall outside the wide latitude afforded prosecutors to conduct the State's case and attempt to obtain a conviction in a manner that does not offend the defendant's constitutional right to a fair trial." *State v. Sherman*, 305 Kan. 88, 109, 378 P.3d 1060 (2016). If the court finds error, then it determines whether the error affected the substantial rights of the defendant. The court may deem the error harmless only if the State can establish beyond a reasonable doubt that the error did not affect the outcome of the trial. In other words, the State must show that no reasonable possibility exists that the error contributed to the verdict. 305 Kan. at 111.

The law charges a prosecutor to restrict comments in argument to a reasoned discussion of the evidence presented at trial as it applies to the law, synthesizing facts and articulating reasonable inferences but not diverting the jury's attention from admissible evidence in deciding the case. Accordingly, a prosecutor may not mischaracterize the evidence during argument. See *State v. Anderson*, 294 Kan. 450, 463, 276 P.3d 200 (2012). He or she may not properly refer to information outside the admitted evidence. *State v. Thurber*, 308 Kan. 140, 162, 420 P.3d 389 (2018). A prosecutor must not offer personal opinions about the significance of specific evidence or what witnesses are credible. *State v. Peppers*, 294 Kan. 377, 396-97, 276 P.3d 148 (2012). A prosecutor must not misstate the law or invite the jurors to disregard the law. See *State v. Tahah*, 302 Kan. 783, 791, 358 P.3d 819 (2015). A prosecutor must not attempt to enflame the passions or prejudices of the jurors. *Thurber*, 308 Kan. at 162; *Anderson*, 294 Kan. at 463. When a prosecutor engages in these behaviors, he or she steps outside the wide latitude afforded prosecutors to argue a case.

As stated, Spilman argues that the prosecutor exceeded the permissible bounds of argument by bolstering the credibility of

prosecution witnesses and by misstating the law of aiding and abetting liability.

Bolstering prosecution witnesses

In his initial closing arguments, the prosecutor began his discussion of the evidence with the accounts presented by Gracie and Morgan. He then talked about how the other witnesses, whose testimony differed from Morgan's, fit into Morgan's more complete account. He then discussed the accounts presented by Spilman and his father, which are relevant to this issue:

"You, the jury, are the final judge of the credibility of these two witnesses. And I'm referring to the defendant and the defendant's father.

"Consider the eight or nine witnesses the State called. If you think about it, Morgan Hull told us the complete story of what happened that night. The additional witnesses told us a piece of the same story. If you consider the evidence, you'll be able to match up the other witnesses to the story line that was told by Morgan Hull.

"Compare that to what you heard from Mr. Spilman Sr. and Mr. Spilman Jr. You have to decide whether you find the testimony of those two persons credible or not. And when you're doing that, don't forget to consider what their motivations may be.

"You heard from a witness who's not related to either of these families, Morgan Hull. And you heard corroboration of her testimony from several witnesses whose last names are Seager. Whose last names have been Scherer, married now, Seager. Those people are on the other side of this question. They're the family members of the three defendants. Even if they're only related shirttail by marriage, they still have a connection to that family. Think about that motivation, think about the testimony, and *those people testified honestly*. And they corroborated in part or parts of what Morgan Hull told us happened on that night." (Emphasis added.)

Spilman highlights the italicized portion of the argument as improper vouching for the credibility of prosecution witnesses. He is correct: "It is improper for a prosecutor to offer his or her personal opinion as to the credibility of a witness, including the defendant." *State v. Pribble*, 304 Kan. 824, 835, 375 P.3d 966 (2016). But a prosecutor may legitimately discuss the circumstances tending to demonstrate a witness' reliability or lack thereof. See 304 Kan. at 835 (citing *State v. Scaife*, 286 Kan. 614, Syl. ¶ 5, 186 P.3d 755 [2008]). Most of the quoted portion of the prosecutor's argument is permissible. The prosecutor emphasized

that the jury had the responsibility to make credibility determinations and discussed circumstances that tended to support or detract from the credibility of certain witnesses. The comment that "those people testified honestly," however, exceeded the scope of permissible argument. In the context of the argument, the prosecutor may have intended to say that the jury should conclude that certain witnesses testified honestly. The comment may even have been the way the jury heard it. But whether the statement was intended as such, it may also have been interpreted by the jury as the prosecutor's personal belief that certain witnesses were testifying honestly. This was error.

We do not condone the prosecutor inappropriately referring, in the context of this case, that certain witnesses had "testified honestly." Indeed, our Supreme Court has condemned the practice of inappropriately bolstering the credibility of a witness. Thus, a prosecutor may not bolster the credibility of a witness. *State v. Sprague*, 303 Kan. 418, 428, 362 P.3d 828 (2015) (Prosecutor's comments in closing argument bolstering the credibility of witnesses are improper.). Nevertheless, the prosecutor's improper comment was a fleeting remark made in the midst of a 20-minute closing argument. The record does not show that the prosecutor repeated the improper comment. To the contrary, the improper comment was isolated and short. Even if the jury perceived the comment as the prosecutor's personal opinion, the comment would have had no reasonable probability of affecting the course of the jury's deliberations. We confidently maintain that, if the passing comment of the prosecutor about the honesty of the prosecution witnesses had not been made, the jury still would have convicted Spilman. Thus, this error did not prejudice Spilman's ability to obtain a fair trial.

Misstatement of law

Spilman also contends that the prosecutor misstated the law of aiding and abetting by suggesting that Spilman aided the crime simply by doing nothing to prevent others from beating Pantle. Spilman's argument mischaracterizes the prosecutor's comments, which is more nuanced than stating Spilman aided Pantle's beating by failing to call the police. The State's theory was that Spilman acted in concert with Scott and Matthew to beat Pantle so severely

that he ultimately died. The State's comments about each participant failing to do anything to end the violence when they were not participating in a fight went to demonstrate each participant's intent—to show that they wanted Pantle to get pummeled. The prosecutor made comments of the following:

"I would point you to that evidence [evidence regarding the intervals between fights] and ask you to consider that when you start to deliberate on whether the actions of the three codefendants together amounted to extreme indifference to the value of human life.

"Now, the question may come, when you're back there, were they really working together? And I want you to think about this. Going back to the original interaction, the testimony was [Scott] pushed Mr. Pantle. This defendant then was on top of him. At that point in time, [Scott] could have left that interaction. Did he walk away? Did he call the Sheriff's department to come help? Did he leave the party? No. No.

"Again, Morgan Hull's testimony is, once this defendant was done, got off of Mr. Pantle, [Scott] got on. Now, think about this. When that happened and this defendant was not on Mr. Pantle, but [Scott] was, this defendant had the opportunity to walk away from that interaction, totally.

"Now, he testified he walked to the trees for a couple minutes and then came back. He could have left the party. He could have called the Sheriff's department to help with Mr. Pantle being unruly. Did he do either of those things? No.

"The testimony of David Underwood and Shelby Seager was that he was there when [Scott] was on top of Mr. Pantle. We know that because the action that he took where he admitted to taking, was grabbing Mr. Underwood from behind and slamming him back down onto the ground.

"Now, his testimony is that he thought somebody was jumping into the fight. He also testified that he apologized to Mr. Underwood. You listened to Mr. Underwood testify yesterday just like I did. I still don't know whether Mr. Underwood thinks this defendant apologized to him in person, or he heard that apology from multiple other people. I don't know. But you use that type of testimony to determine the credibility of this defendant when he testified to that.

"The thing that I think is important—Let me back up. The third codefendant. Ask yourself during the first part of this altercation, did Matthew Cole Scherer have an opportunity to call the Sheriff's department when the altercation began? When Mr. Spilman was on top of [Scott]? Or on top of Mr. Pantle, excuse me. When [Scott] was on top of Mr. Pantle? Third time when Mr. Spilman comes back? Did he have an opportunity to call the Sheriff's department? Did he have the opportunity to take other action to stop an errant partygoer so it didn't reach this level of altercation? Of course he did.

"Don't forget that he is the son of the owner of the property the party was at. Through the testimony, you heard at least eight names of grown men who were at the party and related to Mr. Scherer [the property owner], or dating a relative, or a shirttail relative of Mr. Scherer. Could those eight men have corralled one errant partygoer while the Sheriff's department was on the way to

avoid this type of altercation, and the damage that you heard testified to by the coroner that Mr. Pantle sustained? He was involved, as well.

"These men were not acting in an isolated vacuum. The evidence shows they were all right there. Two witnesses testified that there was a couple of minutes between the altercation with Mr. Pantle and Mr. Spilman and the altercation between Mr. Pantle and [Scott]. One witness testified the short period of time between the altercation, between [Scott] and the second altercation between Mr. Spilman.

"Three witnesses testified to you that Matthew Cole Scherer either threatened them or prevented them from getting help for Jason Pantle."

Contrary to Spilman's appellate argument, the prosecutor did not discuss these facts as evidence of aiding and abetting but as evidence of a concerted effort by these three men to beat up Pantle. He draws a reasonable inference from their actions that, if they had merely wanted to subdue a wild party guest, there were other ways to do it. He argued that the evidence shows a systematic and coordinated effort to beat Pantle without regard to the consequences. This evidence is supported by Dr. Hossain's testimony about Pantle's cause of death because of global brain injuries.

The prosecutor then shifted to a discussion of each individual's culpability, referencing the aiding and abetting instruction:

"Now, when you're back in the jury room, if you're, if you're tempted to consider the individual actions of these three, to try to determine who was more or most responsible for the death of Jason Pantle, I would point you back to jury instruction No. 6. And the Court read it to you, and I heard him read it to you, but I want you to look at it when you're back there.

"It says, again, 'A person is criminally responsible for a crime if the person, either before or during its commission, and with the mental culpability required to commit the crime intentionally aids another to commit the crime.'

"The next sentence is what I want you to heed. 'All participants in a crime are equally responsible without regard to the extent of their participation.'"

As discussed, Spilman does not contend that the jury instruction misstated the applicable law. Contrary to Spilman's appellate argument, the prosecutor does not point to Spilman's omitted conduct as evidence that he aided and abetted in someone else's criminal conduct. The prosecutor merely pointed out that, even if the jury believed Scott or Matthew was more culpable for Pantle's injuries, the law held Spilman equally liable if he participated in the crime. This is not a misstatement of the law, and Spilman's attempt to frame it as such is a mischaracterization of the prosecutor's argument.

So, the State did not commit prosecutorial error by misrepresenting the law of aiding and abetting to the jury during its closing arguments.

Did cumulative trial error deprive Spilman of a fair trial?

Spilman also argues that, if the errors he separately raised on appeal were alone insufficient to demand reversal, the cumulative effect of the errors deprived him of a fair trial.

To warrant reversal of a criminal conviction for cumulative trial error, the combined effect of the trial errors must convince the reviewing court that the defendant's trial was so prejudiced that the court may not declare the errors harmless. If any of the errors involved constitutional rights, the court must be willing to declare the cumulative error harmless beyond a reasonable doubt. *State v. Seba*, 305 Kan. 185, 215, 380 P.3d 209 (2016) (quoting *United States v. Toles*, 297 F.3d 959, 972 [10th Cir. 2002]).

Spilman's argument relies heavily on the alleged error in instructing the jury on an aiding and abetting theory of criminal culpability. If the instruction had not been appropriate either because the facts did not support it or because it was inappropriate in the context of a reckless crime, the error would have been compounded by the State's discussion of the theory in closing, even though the discussion of the theory, itself, was not improper. Likewise, the jury's assessment of the evidence might have been influenced by an improper aiding and abetting instruction. In other words, the jury might have relied on the aiding and abetting instruction to convict Spilman rather than convicting him as a principal. If providing the jury with the instruction was error, the cumulative effect of the error would demand reversal of Spilman's conviction and remand for a new trial.

As discussed earlier, however, we concluded that the instruction was both factually and legally appropriate in the context of this case. Also, although we concluded that the prosecutor erred when he commented about the honesty of the prosecution witnesses, this error did not prejudice Spilman's ability to obtain a fair trial. And the cumulative error rule does not apply if there are no errors or only a single error. *State v. Gallegos*, 313 Kan. 262, 277, 485 P.3d 622 (2021).

Accordingly, we find no cumulative trial error undermined Spilman's ability to obtain a fair trial.

Is KORA unconstitutional as a violation of the First Amendment's protection against compelled speech or as a violation of equal protection?

As his fifth issue in this appeal, Spilman contends that the obligation to register as a violent offender under KORA violates his First Amendment right to be free from compulsion to speak at the government's behest. In his sixth issue, Spilman argues that the registration scheme of KORA violates equal protection because it provides a mechanism for some offenders to end registration but not offenders like him. Spilman did not raise either of these constitutional issues in the district court.

Preservation

An appellate court generally does not review constitutional issues raised for the first time, though the courts have recognized three exceptions to this rule. *State v. Allen*, 314 Kan. 280, 283, 497 P.3d 566 (2021). Spilman argues that two of those exceptions apply: (1) that the issue involves solely a question of law on proved or admitted facts and the issue is determinative of the case; and (2) that consideration of the issue is necessary to prevent the denial of his fundamental rights. Free speech and equal protection under the law are both fundamental rights. *State v. Jones*, 313 Kan. 917, 933, 492 P.3d 433 (2021) (recognizing freedom of speech as fundamental right and liberty); *State v. Limon*, 280 Kan. 275, 283, 122 P.3d 22 (2005) (right recognized by Fourteenth Amendment to the United States Constitution and sections 1 and 2 of the Kansas Constitution Bill of Rights). And a facial challenge to the constitutionality of a statute is generally a pure question of law. *State v. Hinnenkamp*, 57 Kan. App. 2d 1, 4-6, 446 P.3d 1103 (2019) (explaining that a facial attack on a statute is a pure question of law). These exceptions cited by Spilman would seem to permit appellate review of the issue for the first time on appeal.

But even when a litigant demonstrates the applicability of an exception, an appellate court is not bound to consider an unpreserved issue for the first time on appeal. *State v. Genson*, 316 Kan.

130, 135-36, 513 P.3d 1192 (2022) ("[I]f the issues were *not* being raised for the first time on appeal, the panel would not have had discretion to refuse to consider them. But since these arguments *were* newly raised before the panel, the panel could exercise its discretion to consider whether to apply a prudential exception to the general rule that issues not raised before the district court cannot be raised for the first time on appeal."). Several panels of this court who have considered a similar First Amendment challenge to KORA have elected not to review the issue for the first time on appeal. See *State v. Ontiberos*, No. 124,623, 2023 WL 3032204, at *2 (Kan. App. 2023) (unpublished opinion), *petition for rev. filed* May 22, 2023; *State v. McDaniel*, No. 124,459, 2023 WL 2940490, at *6 (Kan. App. 2023) (unpublished opinion), *petition for rev. filed* May 15, 2023; *State v. Pearson*, No. 125,033, 2023 WL 2194306, at *1 (Kan. App. 2023) (unpublished opinion), *petition for rev. filed* March 20, 2023; *State v. Ford*, No. 124,236, 2023 WL 1878583, at *19 (Kan. App. 2023) (unpublished opinion), *rev. granted* June 23, 2023; *State v. Jones*, No. 124,174, 2023 WL 119911, at *5 (Kan. App. 2023) (unpublished opinion), *petition for rev. filed* February 6, 2023.

The *Pearson* court articulated a compelling reason for refraining to address this complex constitutional argument for the first time on appeal:

> "Identifying the compelling governmental interests KORA is meant to protect and then determining whether it is sufficiently narrowly tailored to serve those interests involves examining a host of issues best explored first at the district court level. Analyzing the proportionality of KORA requires an in-depth balancing of its benefits and costs, along with exploring potential alternatives to achieving those benefits and the accompanying costs and anticipated effectiveness of those alternatives. It may even involve evaluating KORA's effectiveness in protecting the compelling governmental interests it is meant to serve, which could involve the presentation of evidence and fact-finding. And '[f]act-finding is simply not the role of appellate courts.' *State v. Nelson*, 291 Kan. 475, 488, 243 P.3d 343 (2010) (citing *State v. Thomas*, 288 Kan. 157, 161, 199 P.3d 1265 [2009])." *Pearson*, 2023 WL 2194306, at *1.

Even if we were to agree with Spilman that KORA registration constitutes compelled speech within the meaning of the First Amendment to the United States Constitution, the restrictions on Spilman's First Amendment rights are unconstitutional only if those restrictions cannot survive strict scrutiny. See *Turner*

Broadcasting System, Inc. v. FCC, 512 U.S. 622, 642, 114 S. Ct. 2445, 129 L. Ed. 2d 497 (1994) ("Laws that compel speakers to utter or distribute speech bearing a particular message are subject to the same rigorous scrutiny" as laws that "suppress, disadvantage, or impose differential burdens upon speech because of its content."); *U.S.D. No. 503 v. McKinney*, 236 Kan. 224, 235, 689 P.2d 860 (1984). Strict scrutiny requires the State to demonstrate a compelling government interest justifying the restriction on the fundament right in a way that is narrowly tailored to achieve that interest. See *Hodes & Nauser, MDs v. Schmidt*, 309 Kan. 610, 680, 440 P.3d 461 (2019). Those considerations require the development of facts outside our appellate record. Thus, we decline from Spilman's invitation to consider this issue for the first time on appeal.

Similarly, Spilman's equal protection claim requires additional fact development. Assuming Spilman can establish standing and can articulate a valid claim for disparate treatment of similarly situated individuals, judicial review of his claim invokes rational basis scrutiny. See *State v. Huerta*, 291 Kan. 831, 834, 247 P.3d 1043 (2011) (rational basis test applied in equal protection challenge to a criminal statute). Under the rational basis test, similarly situated individuals may be treated differently without violating equal protection so long as the classification used to distinguish them bears a rational relationship to a legitimate governmental objective. "[A] classification will survive a challenge based on equal protection 'if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.'" *Crawford v. Kansas Dept. of Revenue*, 46 Kan. App. 2d 464, 471, 263 P.3d 828 (2011) (quoting *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313, 113 S. Ct. 2096, 124 L. Ed. 2d 211 [1993]). It is not sufficient to point to one set of facts in which the classification does not advance the government interest. The party challenging the classification bears the onerous burden of negating every reasonable basis that might support the classification. *Crawford*, 46 Kan. App. at 471-72.

The record before us does not permit us to conduct an adequate rational basis analysis of K.S.A. 2022 Supp. 22-4908(a) and

(b). Accordingly, we decline to consider Spilman's equal protection challenge to KORA when the argument is raised for the first time on appeal.

Did the trial court abuse its discretion in setting Spilman's restitution?

Finally, Spilman challenges the trial court's restitution award. Again, Spilman did not challenge the restitution award at sentencing. Thus, this issue is not properly preserved for appellate review. *State v. King*, 288 Kan. 333, 353, 204 P.3d 585 (2009) (noting that restitution challenge was not properly preserved in trial court but addressing the issue anyway).

Spilman again contends that consideration of the issue is a question of law on proved or admitted facts. Ironically, he then states the applicable standard of review as an abuse of discretion, rather than as a question of law. Spilman states the exception but does not really argue its application to the restitution issue. A brief examination of the substantive issue makes Spilman's assertion questionable.

Spilman does not challenge the amount of restitution calculated by the court. He argues the trial court abused its discretion imposing payment of the full amount of restitution on Spilman when he was less culpable than his codefendants. Because nothing in the record suggests Spilman's codefendants have been convicted, Spilman's argument relies on facts unsupported in the record.

The amount of restitution and the manner in which restitution is paid are decisions left to the discretion of the trial court. An appellate court reviews that decision for abuse of that discretion. See *State v. Alcala*, 301 Kan. 832, 836, 348 P.3d 570 (2015). Absent demonstration of some error of fact or law, an appellate court will find an abuse of discretion only when the trial court's decision is shown to be arbitrary, fanciful, or unreasonable. *State v. Thomas*, 307 Kan. 733, 739, 415 P.3d 430 (2018) (party claiming abuse bears burden of establishing abuse); see *State v. Coleman*, 311 Kan. 332, 334, 460 P.3d 828 (2020) (abuse of discretion standard).

Spilman does not argue the trial court violated some principle of law. In fact, the trial court was obligated to award restitution unless the court found a plan for restitution was unworkable. See K.S.A. 2022 Supp. 21-6604(b)(1). And if none of Spilman's codefendants had been convicted by the time Spilman was sentenced, the trial court would not have had a basis to order joint-and-several restitution. Accordingly, Spilman has not demonstrated that the trial court's restitution award was arbitrary, fanciful, or unreasonable.

Finally, any abuse of discretion in assigning restitution is harmless. See K.S.A. 2022 Supp. 60-261; see also *State v. Cummings*, 45 Kan. App. 2d 510, 513, 247 P.3d 220 (2011) (applying harmless error to restitution challenge but finding prejudice). Spilman cannot demonstrate prejudice arising from the court's failure to award restitution jointly and severally. A person subject to joint and several liability is obligated to pay the entire debt, which may be enforced against any or all of the obligors at the creditor's option. See *In re Morgan*, 24 Kan. App. 2d 324, 325, 943 P.2d 77 (1997) (defining joint and several liability). Then, whether Spilman's codefendants are found guilty or acquitted, Spilman's victims may seek payment from Spilman exclusively, even if we were to remand this case for resentencing, requiring the trial court to award restitution jointly and severally with other codefendants.

Spilman has not established a basis for vacating the restitution award and remanding for sentencing.

Affirmed.

(534 P.3d 604)

No. 125,456

CRAIG M. MOG and DEBBIE A. MOG, Trustees of the CRAIG M. MOG LIVING TRUST DATED OCTOBER 23, 2015, and the DEBBIE A. MOG LIVING TRUST DATED OCTOBER 23, 2015, *Appellees*, v. ST. FRANCIS EPISCOPAL BOYS' HOME OF SALINA, KANSAS, et al., *Appellees*, and KELSEY ALEXANDER, Trustee of the ANNE STODDER MCEWEN KANSAS TRUST DATED FEBRUARY 20, 1987, *Appellant*.

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SYLLABUS BY THE COURT

1. REAL PROPERTY—*Partition—Action to Determine Parties' Interests in Property*. A partition case is a single judicial action that determines the parties' interests in property and orders partition. When there is an action to partition property, that case is the one and only opportunity for interested parties to challenge the partition.

2. SAME—*Partition Action—Defendant Must File Answer or Respond to Participate in Case*. A defendant named in a petition in a partition action and served with process must file an answer or a responsive motion before it can participate as a party in that case.

3. SAME—*Partition Action—Defendant in Default if Failure to File Answer or Responsive Motion*. As with any other civil action, when a defendant in a partition case fails to file an answer to the petition or file a responsive motion, the defendant is in default. A defaulting party is no longer entitled to participate in the case. This means, among other things, that the remaining parties are no longer required to provide the defaulting party notice of filings or rulings in the case.

Appeal from Ellsworth District Court; CAREY L. HIPP, judge. Opinion filed July 14, 2023. Affirmed.

Keith A. Brock and *Daniel J. Keating*, of Anderson & Byrd, LLP, of Ottawa, for appellant Kelsey Alexander.

William W. Jeter, Tyler K. Turner, Ashley D. Comeau, and *Christopher W. Sook*, of Jeter Turner Sook Baxter LLP, of Hays, for appellees Craig Mog and Debbie Mog.

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

WARNER, J.: To participate as a party in a civil case, a defendant named in a petition must respond to the lawsuit. Most often,

that means the defendant must file an answer—the procedural gateway that informs all other parties and the court that the answering party is entitled to notice of all case filings, to file motions and participate in discovery, and to contest court rulings. By filing an answer, a defendant indicates an intent to participate in the case. When a party chooses not to file an answer or otherwise respond to the petition, it foregoes this opportunity.

This rule governs the outcome of this appeal. The Craig M. Mog Living Trust and the Debbie A. Mog Living Trust sought to partition the property rights to oil, gas, and other minerals in Ellsworth County. The petition indicated that the Anne Stodder McEwen Kansas Trust had ownership interests in the mineral rights, and the McEwen Trust was served with notice of the lawsuit. But the McEwen Trust never filed an answer to the petition. Instead, its trustee-beneficiary—who could not represent the trust because she was not licensed to practice law—appeared at a hearing. After a lengthy discussion, she informed the district court that she declined to continue the proceedings to obtain an attorney to challenge the partition or otherwise participate in the case. The district court found that the McEwen Trust had defaulted, and the case progressed without the McEwen Trust's involvement.

Months later, after the mineral rights were partitioned and sold, the McEwen Trust retained an attorney and unsuccessfully tried to set the partition aside. It now appeals, challenging the sufficiency of the notice it received regarding proceedings after the district court found it to be in default. But by not filing an answer, the McEwen Trust gave up its right to participate in the partition action and thus had no right to receive notice of ongoing developments in the case. We affirm the district court's judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Several parties owned undivided interests in oil, gas, and other minerals in and under four tracts of land in Ellsworth County. The Mog Trusts owned most of these mineral rights—together, about 60% of the rights in each tract. In January 2021, Craig and Debbie Mog, as trustees of the Mog Trusts, sued to quiet title to and partition the minerals, seeking to simplify the ability to explore for and extract oil and gas. As the case proceeded, some parties with mineral interests elected to participate, while others quitclaimed

their interests to the Mog Trusts. One of the interested parties was the McEwen Trust, which owned about 2% of the mineral rights in each tract.

The McEwen Trust did not file an answer or other responsive motion to the partition petition. But Kelsey McEwen Alexander—the McEwen Trust's trustee and only beneficiary—sent a letter to the district court in March 2021, copying the Mog Trusts. The letter stated that Alexander understood the nature of the partition request and indicated that she "d[id] not dispute the legal descriptions nor the percent interests stated" for the McEwen Trust. But Alexander did not believe partition was necessary and would prefer that no partition take place, as the trust's interests had belonged to her mother.

The court held a hearing on the Mog Trusts' request for partition in October 2021. Alexander appeared in person, purporting to represent the McEwen Trust. The district court and Alexander spoke at length on the record about Alexander's involvement in the case. Ultimately, the court explained that Alexander—who was not a lawyer or licensed to practice law in Kansas—could not represent an entity like the McEwen Trust in legal proceedings. And the court noted that it was the trust, not Alexander individually, that owned the mineral rights.

The district court asked Alexander whether she wanted to hire an attorney to represent the McEwen Trust, offering to continue the proceedings to allow her time to do so and making clear that it did not want to pressure Alexander into a decision. The court explained that because Alexander could not represent the McEwen Trust, if she did not hire an attorney to do so, the trust would be in default and lose the ability to challenge the proposed partition. Alexander confirmed that she understood.

After an extensive discussion between Alexander, the district court, and the attorneys representing the Mog Trusts, Alexander stated that she would not seek extra time to hire an attorney and challenge the partition. The court thus found the McEwen Trust to be in default. Later at the hearing—after this exchange and ruling—one of the Mog Trusts' attorneys stated that they would continue to notify Alexander of future proceedings and keep her aware of how the case unfolded.

The court filed a journal entry confirming that Alexander had "decline[d] the suggestion by the District Court to allow additional time to hire counsel," and thus "the Trust failed to appear and is in default." The court then quieted title to the property in the manner described in the petition, finding that the McEwen Trust owned about 2% of the mineral rights in question. And the court ordered a partition, appointing commissioners to appraise the mineral interests for a sale.

In January 2022, the court-appointed commissioners completed a report valuing the total mineral interests at roughly $45,000, which the district court later approved. One of the Mog Trusts' attorneys emailed the report to Alexander. The Mog Trusts were the only parties that elected to retain their mineral rights and to purchase the property (including the McEwen Trust's and other parties' interests in the mineral rights) at the commissioners' appraised value. After deducting applicable taxes, expenses, and attorney fees, the McEwen Trust's portion of the sale proceeds—reflecting its proportional interest in the mineral rights—was $227.86.

In May 2022, the Mog Trusts moved to confirm the sale and distribute the proceeds. The McEwen Trust, which had since hired an attorney, opposed this motion and moved to set aside the sale so it could file an election out of time. After a hearing, the district court granted the Mog Trusts' motion and denied the McEwen Trust's request, ultimately confirming the sale and distributing the proceeds to the affected parties. The McEwen Trust now appeals the district court's decision not to set aside the sale.

DISCUSSION

Partition proceedings have their origins in equity. Broadly speaking, partition actions seek to fairly determine and divide ownership interests in property. This can be motivated by any number of reasons. For example, property owners may "wish to terminate their relationship or avoid the discord that so often comes with shared possession." *Einsel v. Einsel*, 304 Kan. 567, 576, 374 P.3d 612 (2016). Or the sheer number of shared owners of the property may render the administrative costs associated with maintaining the separate property interests unworkable. The partition in this case falls into the latter category—more than a

dozen owners shared interests in mineral rights, most with ownership shares involving 2% or less of the property in question.

Sometimes partition can occur by dividing land into separate parcels. But the district court here found after the October 2021 hearing that a physical partition—or partition in kind—was impracticable. Thus, the court appointed commissioners to determine the value of each interest in the property and the property as a whole. See K.S.A. 60-1003(c)(2). When the court approved the appraisal, any of the interested parties participating in the partition lawsuit could have elected to purchase all or part of property at the appraised value. K.S.A. 60-1003(c)(4). The Mog Trusts were the only parties who elected to purchase the mineral rights.

The McEwen Trust argues that the Mog Trusts failed to properly serve it with notice regarding the developments in the partition case after the October 2021 hearing. More specifically, the McEwen Trust challenges the sufficiency of the email Alexander received of the commissioners' report appraising the mineral rights and of the right to elect to purchase the property. According to the McEwen Trust, because it believes the trust did not receive proper notice of these developments, it could not meaningfully contest the appraised value or seek to purchase the mineral rights. Given these alleged notice defects, it asserts the partition was unjust and inequitable. The McEwen Trust also asserts that it relied on the Mog Trusts' commitment at the hearing to notify Alexander of later developments in the case.

The Mog Trusts respond that the McEwen Trust had no right to notice after Alexander stated that she did not intend to hire counsel for the trust and allowed a default judgment to be entered. And they note that Alexander made this decision before they offered to notify her as the case progressed. We agree with the Mog Trusts and affirm the district court's judgment.

1. *The McEwen Trust had no right to notice after it defaulted (and thus ceased participating in the lawsuit).*

We begin our analysis with the McEwen Trust's assertion that it was entitled to notice of all developments in the case because it had an interest in the mineral rights being partitioned. It is generally true that a party must provide copies of all its case filings to

the other parties to the lawsuit. See K.S.A. 2022 Supp. 60-205(a)(1). The same is true with court orders. K.S.A. 2022 Supp. 60-205(a)(1)(A), (c)(2). But this ongoing notice is not required when a party that has been properly served with a petition in a lawsuit has opted not to respond or participate in the case—that is, Kansas law does not require notice to "a party who is in default for failing to appear." K.S.A. 2022 Supp. 60-205(a)(2).

Although partition is an equitable remedy, a partition proceeding in Kansas is a civil action, subject to the rules of civil procedure and governed by K.S.A. 60-1003. See *Einsel*, 304 Kan. at 576-77. A judicial action for partition begins when a property owner files a petition for partition. See K.S.A. 60-1003(a). The petition "must describe the property and the respective interests" of the property owners to the extent they are known, naming the other interested parties as defendants. K.S.A. 60-1003(a)(1). Each named defendant must then file an answer describing "the nature and extent of their respective interests" and contesting "the interests of any of the plaintiffs, or any of the defendants." K.S.A. 60-1003(b).

Once the time for filing answers and replies has passed, the partition process begins. The district court first determines "the interest[s] of the respective parties" and assesses whether partition is appropriate. K.S.A. 60-1003(c)(1). If so, the court directs partition, appointing commissioners to either partition the property in kind (by dividing the property into separate parcels) or appraise it for a sale. K.S.A. 60-1003(c)(2). Any party to the lawsuit may file exceptions to the commissioners' findings, which the district court may approve, disapprove, or modify after a hearing. K.S.A. 60-1003(c)(3).

As this procedure suggests, the partition statute envisions "a single judicial action that both determines the parties' interests and orders partition." *Nelson Energy Programs, Inc. v. Oil & Gas Technology Fund, Inc.*, 36 Kan. App. 2d 462, 470, 143 P.3d 50 (2006). So, when there is an action to partition property, that case is the one and only opportunity for interested parties to challenge the partition. But to participate as a party in the case, regardless of one's interest in the property being partitioned, one must file an answer. See K.S.A. 60-1003(b); K.S.A. 2022 Supp. 60-205(a)(2).

When a defendant in a civil case fails to file an answer or otherwise defend the case, the defendant is in default. K.S.A. 2022 Supp. 60-255(a); see *McGinty v. Hoosier*, 291 Kan. 224, 242, 239 P.3d 843 (2010) (finding adequate notice under K.S.A. 60-1003 when owners were served with a partition cross-petition and had an opportunity to file an answer). Once a party is in default, that party is no longer entitled to participate in the case. This means, among other things, that the remaining parties are no longer required to provide the defaulting party notice of filings or rulings in the case. K.S.A. 2022 Supp. 60-255(a); K.S.A. 2022 Supp. 60-205(a)(2).

Applying these principles here, neither the McEwen Trust nor Alexander had a right to notice of the commissioners' report or to elect to purchase mineral interests at the appraised value. When the Mog Trusts filed an action to partition the mineral interests, that case was the only vehicle through which interested parties—like the McEwen Trust—could challenge the partition. The parties agree that the McEwen Trust was properly served with summons and notified of this action.

But the McEwen Trust never filed a proper answer or other responsive motion to the partition petition. Because Alexander was not licensed to practice law, she could not file one or appear for the trust at the hearing. (The McEwen Trust does not contest this ruling.) The district court gave Alexander a chance to hire an attorney and properly challenge the proposed partition, but she declined this opportunity, even after the district court explained that doing so would mean the McEwen Trust defaulted. Thus, the district court properly found the McEwen Trust to be in default for failing to appear. After that point, the McEwen Trust was no longer part of the case and had no right to notice of future proceedings and developments, such as the commissioners' report. The statutes setting out service procedures and requirements no longer applied to the McEwen Trust. See K.S.A. 2022 Supp. 60-205(b).

In some limited instances, a party who has defaulted may successfully seek to set aside a judgment and reopen proceedings in a case. See K.S.A. 2022 Supp. 60-260. But the only reason the McEwen Trust provided for its request was its assertion that it did not receive proper notice of the case developments. (The parties

dispute whether the courtesy email to Alexander complied with Kansas notice requirements since the trust was not represented by counsel, but we need not resolve that question here.) The bottom line is that the Mog Trusts were not required to serve the McEwen Trust with notice of the commissioners' report or the right to purchase mineral interests because the McEwen Trust had declined to participate in the case. The district court did not err in confirming the commissioners' report or denying the McEwen Trust's motion to set aside the sale.

The McEwen Trust also argues that the district court did not make a just and equitable partition because of the asserted notice defects. But the McEwen Trust had no right to notice after it defaulted. And by choosing to default rather than participate in the proceedings, the McEwen Trust gave up the opportunity to contest the court's subsequent rulings. Thus, the district court did not err in partitioning the mineral interests and confirming the sale of those rights to the Mog Trusts.

2. *Judicial estoppel does not apply because the McEwen Trust did not detrimentally rely on the Mog Trusts' commitment to provide notice.*

Alternatively, the McEwen Trust argues that even if it was not entitled to receive notice of the partition proceedings under Kansas law, principles of fairness and judicial estoppel required the Mog Trusts to provide it notice of the commissioners' report and the right to elect to purchase mineral interests. The McEwen Trust asserts that the Mog Trusts' attorney agreed to provide this notice at the hearing, and this agreement caused the McEwen Trust to decide not to retain counsel or participate further. We do not find this argument persuasive.

Judicial estoppel is a doctrine that "advances notions of fair play by precluding a party from inducing judicial action by taking one legal position and then taking a contrary position later to achieve further advantage over the same adverse party." *State v. Hargrove*, 48 Kan. App. 2d 522, 548-49, 293 P.3d 787 (2013). To invoke judicial estoppel, the party asserting it must show that the other party took a position contradicting a statement in a prior judicial action, the two actions involve the same parties, and the party asserting judicial estoppel changed its position because of

the prior statement. *State v. Bird*, 59 Kan. App. 2d 379, Syl. ¶ 2, 482 P.3d 1157 (2021).

The McEwen Trust asserts that it detrimentally relied on the Mog Trusts' attorney's statement at the hearing that he would provide Alexander notice of later developments in the case, such as the commissioners' report. The McEwen Trust argues that Alexander's decision not to participate further in the case hinged on the Mog Trusts' assurance that they would notify her about the case as it developed. But the transcript of the October 2021 hearing belies this argument.

Our review of the record confirms that the Mog Trusts stated they would notify Alexander of further developments *after* she had informed the district court that she would not be retaining an attorney to challenge the partition on the McEwen Trust's behalf—that is, after the McEwen Trust had defaulted. Thus, consistent with the district court's ruling, the record shows Alexander did not change her position because of the Mog Trusts' promise to keep her informed as the case unfolded. The district court did not err in denying the McEwen Trust's motion to set aside the partition due to judicial estoppel.

In sum, because the McEwen Trust did not file an answer to the petition, it could not participate in the partition action. This means that it was not entitled to notice of later developments in the case. And it did not have a right to contest the outcome of the partition or elect to purchase its mineral rights. The district court did not err when it denied the McEwen Trust's motion to set aside the sale.

Affirmed.

(534 P.3d 610)

Nos. 119,563
119,564

AEROFLEX WICHITA, INC., *Appellee/Cross-Appellant*, v. KENNETH W. FILARDO, CHRIS ALLEN, and TEL-INSTRUMENT ELECTRONICS, CORP., *Appellants/Cross-Appellees*.

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SYLLABUS BY THE COURT

1. JURISDICTION—*Determination of Standing—Two-Part Test—Cognizable Injury and Causal Connection between Injury and Conduct*. Kansas courts use a two-part test when determining standing. To show standing, a party must show a cognizable injury and establish a causal connection between the injury and the challenged conduct. To show a cognizable injury, the injury must affect the party in a personal and individual way. A party must assert its own legal rights and interests and not base its claim for relief on the legal rights or interests of third parties.

2. CIVIL PROCEDURE—*Actionable Injury—Statute of Limitations Starts When Act and Resulting Injury Reasonably Ascertainable*. A substantial injury is an actionable injury. The statute of limitations starts to run when both the act and the resulting injury are reasonably ascertainable by the injured party. The injured party need not have knowledge of the full extent of the injury. But the injured party must have a sufficient ascertainable injury to justify an action for damages. When the evidence is disputed concerning when the injury became reasonably ascertainable, the trier of fact decides.

3. TRIAL—*Special Verdict Findings on Essential Issues—Requirements—Appellate Review*. Special verdict findings on essential issues must be certain and definite and not be conflicting or inconsistent. In determining whether jury findings are inconsistent, they are construed in the light of the circumstances and in connection with the pleadings, instructions, and issues submitted. When there is a view of the case that makes the findings consistent, they then must be resolved that way.

4. SAME—*Special Verdict Findings—Liberal Construction on Appeal—Appellate Review*. Special verdict findings are to be liberally construed on appeal and interpreted in the light of the testimony with a view toward ascertaining their intended meaning. If a careful reading of the verdict form, coupled with the instructions, clearly establishes the intent of the jury and resolves a verdict's ambiguity, the verdict will be upheld on appellate review.

Appeal from Sedgwick District Court; WILLIAM S. WOOLLEY, judge. Opinion filed July 21, 2023. Affirmed.

F. James Robinson Jr., of Hite, Fanning & Honeyman, LLP, of Wichita, for appellant/cross-appellee Tel-Instrument Electronics, Corp.

Robert J. Bjerg, of Law Office of Robert J. Bjerg, P.A., of Kansas City, Missouri, for appellants/cross-appellees Kenneth Filardo and Chris Allen.

Holly A. Dyer, *Jay F. Fowler*, and *Amy S. Lemley*, of Foulston Siefkin LLP, of Wichita, for appellee/cross-appellant Aeroflex Wichita, Inc.

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

HILL, J.: The nations of our world have not yet beaten their swords into plowshares. In fact, the competition to manufacture the machines of war is more intense now than ever before. The technologically advanced nations seek engines of destruction with more speed, more stealth, and more power. Aircraft now approach each other at supersonic speeds—closing on each other at speeds of many kilometers per minute. A pilot needs to know if a friend or foe is approaching—any delay in finding out could be deadly—because the ancient law of the quick and the dead still rules in warfare.

For those who supply the tools of war, the competition between manufacturers seeking government contracts is fierce. Prove to the government that what you produce is faster, stealthier, and more powerful than the product of your competitors and any possible enemies, and your company will win that contract to produce your wares for deployment to our forces. Workable innovations in products or techniques of manufacture are at a premium—sought by both companies and governments. The fact remains, what is old is known and can eventually be defended against. What is new is unknown and old defenses are useless against it. Nations prepare to win, not to lose.

So, companies need to develop new products to satisfy this very real and very vital demand. They can develop those products themselves or hire people away from their competitors who can develop those products. That is what happened in this case.

Aeroflex Wichita, Inc. and Tel-Instrument Electronics, Corp. were competitors for a multimillion-dollar Army contract for the development of Identification-Friend-or-Foe technology test systems. In 2006, the Army gave notice that it was going to award Aeroflex a sole-source contract to upgrade its TS-4530 test set to

Mode 5. Tel-Instrument protested the award, claiming it could compete with Aeroflex. Tel-Instrument recruited and hired two Aeroflex employees who were involved in the development of the TS-4530 for Aeroflex and Aeroflex's Mode 5 upgrade proposal: Chris Allen and Kenneth Filardo. Both had signed nondisclosure agreements with Aeroflex. In January 2009, the Army declared Tel-Instrument won the contract.

Aeroflex filed this suit, claiming that Tel-Instrument was only able to put together a technically sound, price-competitive proposal to upgrade the TS-4530 by wrongfully obtaining and using Aeroflex's confidential, proprietary, and trade secret information through Allen and Filardo. Aeroflex claimed misappropriation of trade secrets, tortious interference with prospective business advantage or relationship, breach of contract, and tortious interference with contract. The jury found in favor of the defendants on Aeroflex's claim for misappropriation of trade secrets. The jury found in favor of Aeroflex on its other claims. The defendants appeal, raising issues of standing, statute of limitations, errors concerning the verdict form, instructional errors, and evidentiary errors. Aeroflex makes a contingent cross-appeal.

TWO DEFENSE CONTRACTORS VIE FOR GOVERNMENT FUNDING

Aeroflex and Tel-Instrument competed for a multimillion-dollar Army contract for the development of Identification-Friend-or-Foe technology test systems. This IFF technology helps military air traffic control and planes so equipped to tell the difference between friendly and hostile aircraft. This device broadcasts a signal to the aircraft, and the approaching aircraft's IFF transponder responds.

In the 1990s, Litton Systems, Inc. (which later was acquired by Northrop Grumman) made the 424(v)2 IFF test set. In 2001, JcAIR, Inc. received an exclusive written license from Litton to "make, use, sell, and support" an upgraded test set called the 424(v)3. In exchange, Litton received a royalty payment for each test set sold. JcAIR replaced the electronics in the 424(v)2 with JcAIR-designed electronics to create the 424(v)3.

Then, in 2002, JcAIR won a contract to supply the Army with the 424(v)3 test sets. The test set was called the TS-4530 for the Army. That contract contemplated that the TS-4530 would have to be upgraded to Mode 5. JcAIR expected that it would eventually supply the

Army with the upgrade, which could make JcAIR the first IFF manufacturer to bring a Mode 5 product to the market. JcAIR began working on the upgrade. In 2005, Aeroflex bought JcAIR.

In March 2006, the Army gave notice that it was going to award Aeroflex a sole-source contract to upgrade the TS-4530 to Mode 5. Tel-Instrument protested the award, claiming it could compete with Aeroflex. Tel-Instrument explained that it would replace Aeroflex's electronics with technology based on Tel-Instrument's own Mode 5 test set that it was developing for the Navy. Aeroflex believed the protest was solely to delay the contract and that Tel-Instrument had no real plan or intent to submit a competitive proposal. Aeroflex submitted a proposal to the Army in September 2006, outlining the planned modifications to the TS-4530 for the upgrade. In November 2006, the Army cancelled the sole-source contract and announced there would be a competitive bid.

Meanwhile, Tel-Instrument hired two Aeroflex employees who were involved in the development of the TS-4530 and Aeroflex's Mode 5 upgrade proposal. Chris Allen was offered and accepted a position at Tel-Instrument in January 2007. Kenneth Filardo was offered a position at Tel-Instrument in March 2007 and began work there in April 2007. Both had signed nondisclosure agreements with Aeroflex.

According to Aeroflex, "no two JcAIR/Aeroflex employees were more crucial to the development and sale of the 4530 and the plan to upgrade it to Mode 5 . . . than Chris Allen and Kenneth Filardo." Allen was responsible for marketing and sales of the TS-4530, served as the TS-4530 program manager, and was the Army's point of contact. Filardo was a director of engineering and the chief designer of the TS-4530. Filardo was responsible for the development of the Mode 5 upgrade at Aeroflex. Both were involved in Aeroflex's proposal to the Army for the Mode 5 upgrade.

According to Aeroflex, Allen and Filardo were recruited by Tel-Instrument to work on Tel-Instrument's Mode 5 upgrade proposal and to harm Aeroflex. Allen took Aeroflex's confidential and proprietary documents and disclosed them to Tel-Instrument.

In May 2008, the Army officially solicited proposals for the contract to upgrade the TS-4530 to Mode 5. In January 2009, the Army declared Tel-Instrument won the contract. According to Aeroflex, Allen and Filardo changed Tel-Instrument's early design for the upgrade

to a design that matched what Aeroflex was proposing. Tel-Instrument's bid was more than $7 million lower than Aeroflex's bid.

In March 2009, Aeroflex filed this lawsuit, claiming that Tel-Instrument was only able to put together a technically sound, price-competitive proposal to upgrade the TS-4530 by wrongfully obtaining and using Aeroflex's confidential, proprietary, and trade secret information through Allen and Filardo.

Aeroflex claimed misappropriation of trade secrets, tortious interference with prospective business advantage or relationship, breach of contract, and tortious interference with contract. Aeroflex asserted actual damages in the range of $19.8 million to $30.1 million. Aeroflex also sought punitive damages.

After a lengthy trial, the jury found

- in favor of the defendants on Aeroflex's claims for misappropriation of trade secrets;
- in favor of Aeroflex on its claim of tortious interference with prospective business advantage or relationship against Tel-Instrument and awarded $1.3 million to Aeroflex;
- in favor of Aeroflex on its claims against Allen and Filardo for breach of their nondisclosure agreements and awarded damages of $100,000 against Filardo and $400,000 against Allen; and
- in favor of Filardo on Aeroflex's claims for tortious interference of the nondisclosure agreements but found against Allen and Tel-Instrument on the same claims and awarded damages of $25,000 against Allen and $1.5 million against Tel-Instrument.

The jury also approved the award of punitive damages. The trial court assessed punitive damages against Tel-Instrument in the amount of $2.1 million.

ISSUE I: STANDING

Did Aeroflex, as a licensee, have standing to sue even though its license had expired?

This issue of standing to sue arose before trial when Tel-Instrument moved for summary judgment claiming Aeroflex lacked standing to sue because Aeroflex merely had a license to make and sell the

TS-4530. It argued that Northrop Grumman owned the test set, not Aeroflex. Citing cases that govern patent infringement claims, Tel-Instrument contended that Aeroflex, as a licensee, could not sue Tel-Instrument unless Northrop Grumman joined the suit (Northrop Grumman did not join the action.). Tel-Instrument also argued that even if Aeroflex did have standing to sue, it lost that standing on December 31, 2011, when the license agreement terminated.

In opposing the motion, Aeroflex argued that both the underlying design of the TS-4530 and the plans for the Mode 5 upgrade were proprietary and confidential information owned by Aeroflex, citing article 1.2 of the license agreement. And Aeroflex argued Tel-Instrument did not address Aeroflex's standing for its breach of contract and tortious interference claims.

The trial court denied the motion after deciding Aeroflex had standing to seek damages or obtain injunctive relief relating to any improvement or modification to the TS-4530 test set or the resulting technical data that had been accumulated. By its express terms, the license agreement between Litton and JcAIR plainly provided that all improvements and modifications to the test equipment or technical data "'remain the property of JcAIR.'" Expiration of the license would not affect Aeroflex's right to bring an action to protect those improvements and modifications.

Tel-Instrument maintains its position in this appeal.

Citing a California federal district court decision applying federal patent law to a trade secret misappropriation case, Tel-Instrument argues the license agreement determines whether Aeroflex, as a licensee, has standing to sue in this case. Only an exclusive licensee that receives "all substantial rights" in a patent has standing to sue for infringement without joining the patent owner as a party. See *Memry Corp. v. Kentucky Oil Technology, N.V.*, No. C-04-03843 RMW, 2006 WL 3734384, at *7 (N.D. Cal. 2006) (unpublished opinion). This is a prudential standing rule designed to avoid the potential for multiple litigations and multiple liabilities and recoveries against the same alleged infringer. *Morrow v. Microsoft Corp.*, 499 F.3d 1332, 1340 (Fed. Cir. 2007).

Tel-Instrument argues that because Northrop Grumman owns the TS-4530 as the licensor, any alleged injury to Aeroflex due to

the defendants' actions necessarily also injured Northrop Grumman. And because Northrop Grumman retained substantial rights to the TS-4530, including the right to sue third parties, Aeroflex is not the proper litigant to advance its claims. Tel-Instrument argues the license agreement contemplates that next generation 424 test sets are licensed products. And Tel-Instrument argues Aeroflex must have standing to sue for the relief sought common to all claims—damages based on lost profits for TS-4530 sales. Filardo and Allen join in Tel-Instrument's arguments.

Aeroflex argues that it has standing because it personally suffered a cognizable injury caused by the defendants; the license agreement has no bearing on standing. The Army intended to award a sole-source contract to Aeroflex. Tel-Instrument interfered. Filardo and Allen breached their nondisclosure agreements with Aeroflex. Aeroflex, not Northrop Grumman, lost the Mode 5 upgrade contract. Aeroflex further contends that even if the license agreement has some relevance to the standing inquiry, it does not deprive Aeroflex of the right to sue for breach of its own contracts, tortious interference with its own contracts or expectancies, or misappropriation of its own trade secrets.

In addition, Tel-Instrument argues in the alternative that Aeroflex lost standing to sue when the license ended on December 31, 2011. When the license ended, Aeroflex could no longer make and sell the licensed test sets.

Aeroflex responds that the license agreement has no place in the analysis. Aeroflex continues to have a personal stake in the controversy because this case involves Aeroflex's business expectancy, contracts, and intellectual property. Aeroflex did have to return certain information about the 424(v)2 to Northrop Grumman when the license agreement terminated, but it kept "vast amounts of its own intellectual property related to the [424](v)3, [TS-]4530, and the Mode 5 Upgrade."

After considering the licensing agreement, the claims of the parties, and the jury verdict, our understanding of what is being sought in this litigation differs from the position taken by the defendants. We decline their invitation to apply California law or federal patent law to resolve the issues raised here. We will rely upon Kansas law, instead.

The reasoning and logic found in the line of cases cited by Tel-Instrument works well when litigating patents. For the patent system to work efficiently, there can be only one patent and only one patent infringement suit in federal court to determine a patent's scope. But we do not embrace the reasoning found in that line of cases because we are not dealing with any patent claim here. We are working with a license agreement where any improvements to the product created by the licensee remain the property of the creator. In other words, this is a contract question, not a patent claim.

Federal courts have created prudential standing requirements. Prudential standing requirements are self-imposed judicial restraints on the exercise of jurisdiction. Kansas courts have not adopted this federal model. *Kansas Bldg. Industry Workers Comp. Fund v. State*, 302 Kan. 656, 679-80, 359 P.3d 33 (2015). The burden to establish standing rests with the party asserting it. *Gannon v. State*, 298 Kan. 1107, 1123, 319 P.3d 1196 (2014).

Kansas standing law equates with simple justice.

We begin with the Kansas Constitution, the law that governs governments. Article 3, section 1 of the Kansas Constitution grants the "judicial power" of the state to the courts. Judicial power is the power to hear, consider, and determine "controversies" between litigants. For an actual controversy to exist, the petitioner must have standing. Standing "means the party must have a personal stake in the outcome." *Baker v. Hayden*, 313 Kan. 667, 672, 490 P.3d 1164 (2021). Standing is a component of subject matter jurisdiction. It presents a question of law and can be raised at any time. 313 Kan. at 673.

Kansas courts use a two-part test when determining standing. *Kansas Bldg. Industry Workers Comp. Fund*, 302 Kan. at 680. To demonstrate standing, a party "'must show a cognizable injury and establish a causal connection between the injury and the challenged conduct.'" *State v. Stoll*, 312 Kan. 726, 734, 480 P.3d 158 (2021). To demonstrate a cognizable injury, the injury must affect the party in a "'personal and individual way.'" *Peterson v. Ferrell*, 302 Kan. 99, 103, 349 P.3d 1269 (2015). A party must generally assert its own legal rights and interests and not base its claim for

relief on the legal rights or interests of third parties. 302 Kan. at 103. Harm to the party is the basis for any claim. No harm? No claim.

The evidence here shows harm to Aeroflex. Under Kansas' two-part standing test, Aeroflex suffered a cognizable injury. The loss of the Mode 5 upgrade contract was a personal and individual injury to Aeroflex. That contract was between the Army and Aeroflex—not the Army and Northrup Grumman. Tel-Instrument interfered with Aeroflex's expected Army contract and with Aeroflex's nondisclosure agreements protecting Aeroflex's confidential and proprietary information. The verdict shows that Filardo and Allen breached their nondisclosure agreements with Aeroflex and not Northrup Grumman. Aeroflex had standing to sue the defendants.

Tel-Instrument's argument concerning the license agreement is unconvincing. The license Aeroflex had obtained merely opened the gate so it could determine what it could produce. What it created and how it created its improvements was Aeroflex's property. This lawsuit concerns Tel-Instrument's interference with Aeroflex's ability to obtain a contract with the Army to supply the Army with a Mode 5 upgrade test set (what became the TS-4530A)—not lost opportunities to sell the TS-4530 or 424(v)3.

Even if Kansas had adopted the "all substantial rights" prudential standing rule, it would not affect Aeroflex's standing in this case. Tel-Instrument's argument gives no meaning to article 1.2 of the license agreement. Regardless of whether Aeroflex was given all substantial rights in the licensed test equipment and data as an exclusive licensee, Aeroflex could sue to protect whatever confidential material and trade secrets it owned as a result of article 1.2.

Article 1.2 of the license agreement reads: "1.2 Litton agrees that all improvements and modifications made by JcAIR to the Test Equipment or the technical data . . . will remain the property of JcAIR." The "Test Equipment" was described as the 424(v)3 and the 424(v)3 modification kit. When Litton and Aeroflex amended the license agreement in 2007 to contemplate derivatives of the IFF test set, "'424(v)3 Modification Kit'" was changed to "'424(v)2 to (v)3 Modification Kit.'"

In our view, the trial court correctly found Aeroflex had standing to sue and that the expiration of the license agreement did not

affect Aeroflex's standing to bring an action to protect its improvements and modifications.

ISSUE II: STATUTE OF LIMITATIONS

Did the two-year statute of limitations bar Aeroflex's tortious interference with business claim?

During the trial, Tel-Instrument moved for judgment as a matter of law on the tortious interference with business claim based on the two-year tort statute of limitations, K.S.A. 60-513(a)(4). Tel-Instrument argued that the tort was reasonably ascertainable in November 2006, when the Army cancelled the sole-source contract and Aeroflex lost the $1.3 million in funds to develop the Mode 5 technology. Aeroflex argued it had no damages until it lost the $50 million production contract in 2009. Aeroflex argued that Tel-Instrument concealed its wrongful conduct that began in 2006. And the hiring of Allen and Filardo was what ultimately took the production contract from Aeroflex.

A brief review of the facts provides a context for this legal argument. In 2006, Aeroflex and the Army had negotiated a sole-source contract for the development of the Mode 5 upgrade. The contract would have provided Aeroflex $1.3 million to develop the Mode 5 technology. Then Tel-Instrument protested the sole-source contract award. Aeroflex was given a copy of the protest letter in which Tel-Instrument explained it intended to replace all of the hardware in the TS-4530 with its own proprietary technology and would not need access to any proprietary Aeroflex technology. Aeroflex, however, believed Tel-Instrument could not do the upgrade without Aeroflex's proprietary information.

When speaking about Tel-Instrument's protest, Aeroflex's general manager, Jeff Gillum, testified, "I don't know if we thought it was without merit. . . . I guess if I was to say my opinion I would say, yeah, it would be without merit, it was purely to delay the sole source award. That was my personal opinion." But he did not blame Tel-Instrument for the loss of the sole-source contract because "Tel-Instrument was just simply protesting it."

In November 2006, the Army cancelled the sole-source contract and announced there would be a competitive bid. The bidders would have to fund the development of the Mode 5 technology

themselves. At that time, Allen and Filardo still worked for Aeroflex. When Allen and Filardo left Aeroflex in early 2007, they told colleagues they would not be working on Tel-Instrument's Mode 5 upgrade project.

In January 2009, the Army awarded Tel-Instrument the Mode 5 production contract. Aeroflex filed this suit in March 2009. Aeroflex claimed damages for "lost profits from the loss of the Mode 5 Upgrade contract."

On appeal, Tel-Instrument basically contends that the loss of the 2009 contract was a consequence of the interference in 2006. The fact that Aeroflex suspected wrongdoing in 2006 was sufficient to trigger the statute of limitations, and actual knowledge of any wrongdoing was unnecessary. The tortious interference with business claim merged with the tortious interference with contract claim, and any claim was time-barred. A continuing tort theory is unavailable in Kansas. The accrual date was a legal issue for the court.

The rules that guide us are well-established.

At any time before a case is submitted to the jury, if a party has been fully heard on an issue and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may resolve the issue against the party and grant a motion for judgment as a matter of law against the party. K.S.A. 2022 Supp. 60-250(a). Tel-Instrument asked for such relief in this trial.

A trial court's denial of a motion for judgment as a matter of law under K.S.A. 2022 Supp. 60-250 is reviewed de novo determining "whether evidence existed from which a reasonable jury 'could properly find a verdict for the nonmoving party.'" *Siruta v. Siruta*, 301 Kan. 757, 766, 348 P.3d 549 (2015).

When ruling on a motion for judgment as a matter of law, the trial court must resolve all facts and inferences that may reasonably be drawn from the evidence in favor of the party against whom the ruling is sought. The trial court must deny the motion if reasonable minds could reach different conclusions based on the evidence. An appellate court must apply a similar analysis when reviewing the grant or denial of a motion for judgment as a matter of law. *Dawson v. BNSF Railway Co.*, 309 Kan. 446, 454, 437 P.3d 929 (2019).

The statute of limitations for a tortious interference with business claim is two years under K.S.A. 60-513(a)(4). See *Taylor v. International Union of Electronic Workers, et al.*, 25 Kan. App. 2d 671, 674, 968 P.2d 685 (1998). The action must be commenced within two years "after the cause of action shall have accrued." K.S.A. 60-510. The cause of action accrues when "the act giving rise to the cause of action first causes substantial injury, or, if the fact of injury is not reasonably ascertainable until some time after the initial act, then the period of limitation shall not commence until the fact of injury becomes reasonably ascertainable to the injured party." K.S.A. 60-513(b).

A "substantial injury" is an actionable injury. The statute of limitations starts to run when both the act and the resulting injury are reasonably ascertainable by the injured party. The injured party need not have knowledge of the full extent of the injury. But the injured party must have a sufficient ascertainable injury to justify an action for damages. When the evidence is disputed concerning when the injury became reasonably ascertainable, the trier of fact decides. *LCL v. Falen*, 308 Kan. 573, 582-84, 422 P.3d 1166 (2018).

LCL involved a negligence claim concerning a deed that wrongly omitted a mineral interest reservation. The seller immediately suffered a substantial injury when the deed was filed and recorded. But the court held the filing and recording of the deed was only one piece of relevant evidence to be considered by the fact-finder in deciding whether the injury was reasonably ascertainable. 308 Kan. at 587-88.

Following the guidance offered by *LCL*, we think that we must answer two questions to resolve this issue: (1) When did Aeroflex suffer actionable injury—in other words, when were all the elements of the cause of action in place? (2) When did the existence of that injury become reasonably ascertainable to Aeroflex? See 308 Kan. at 583. We begin with the first question.

When did Aeroflex suffer an actionable injury?

Aeroflex claimed that Tel-Instrument tortiously interfered with its prospective business advantage or relationship with the Army. To recover, Aeroflex had to prove:

"1. The existence of a business relationship or expectancy with the probability of future economic benefit to Aeroflex;

"2. Knowledge by Tel-Instrument of Aeroflex's business relationship or expectancy;

"3. That, except for the conduct of Tel-Instrument, Aeroflex was reasonably certain to have continued the relationship or realized the expectancy;
"4. Intentional misconduct by Tel-Instrument; and
"5. Aeroflex suffered damages as a result of Tel-Instrument's misconduct."

Aeroflex also had to prove Tel-Instrument acted with malice.

Aeroflex's theory was that Tel-Instrument "acted intentionally, and maliciously used improper means to interfere with Aeroflex's prospective business relationship with the Army so that Tel-Instrument, rather than Aeroflex, would be awarded the Mode 5 Upgrade contract."

Aeroflex possibly could have claimed that Tel-Instrument committed misconduct when Tel-Instrument interfered in 2006 and sought damages for the loss of the development money. But Aeroflex did not know it was going to lose the competition for the contract until 2009.

The trial court decided this was a jury question because it was not clear that Aeroflex had sustained any damages from the loss of the 2006 sole-source award. That just opened the competition.

When did the existence of that injury become reasonably ascertainable to Aeroflex?

The parties are in opposition on this question. Aeroflex argues Tel-Instrument's tortious interference connected with the 2006 protest was not reasonably ascertainable as of November 2006. Tel-Instrument argues it was sufficient that Gillum suspected Tel-Instrument's wrongdoing to start the two-year clock because Aeroflex had an obligation to investigate. Tel-Instrument argues the evidence at trial was undisputed concerning when the injury became reasonably ascertainable. Also, the parties interpret Gillum's testimony in opposing ways.

There are occasions when a trial court can determine as a matter of law when an injury became reasonably ascertainable. In *Friends University v. W.R. Grace & Co.*, 227 Kan. 559, 608 P.2d 936 (1980), the university brought a negligence action against the manufacturers of roofing materials that were used in the construction of the university's library building. About a year after the library roof was completed, it leaked. It continued to leak every time it rained. The roofing company's repairs did not work. About

five years after it first leaked, an independent expert pinpointed the cause of the problem. The court held the subsequent suit was barred by the statute of limitations. The roof was "obviously defective" when the leaking occurred, i.e., the injury was reasonably ascertainable. 227 Kan. at 562. The cause of the leaking roof had to be defective design, materials, and/or work. The fact that the university had not determined the exact cause of the leaking did not toll the statute of limitations because the university could have obtained an expert opinion at any time. 227 Kan. at 562-65.

This is not a leaking roof case. The fact that Tel-Instrument protested the sole-source contract, by itself, does not establish there was any misconduct. It was possible for the jury to view Tel-Instrument's protest as reasonable competition in this highly specialized marketplace. Tel-Instrument protested in accordance with government contracting law, and the Army sustained the protest. That is not to say the misconduct was not reasonably ascertainable at that point; rather, it was a question for the jury considering all the facts.

Tel-Instrument relies on Gillum's suspicions that the purpose of Tel-Instrument's protest was merely to delay Aeroflex getting the contract. But that suspicion alone is insufficient to conclude as a matter of law that Tel-Instrument's misconduct was reasonably ascertainable. See *Armstrong v. Bromley Quarry & Asphalt, Inc.*, 305 Kan. 16, 378 P.3d 1090 (2016).

In *Armstrong*, the plaintiffs brought a trespass and conversion action against Bromley Quarry for unauthorized subsurface mining of limestone. The court held plaintiffs' suspicion of mining alone was insufficient to conclude as a matter of law that the mining was reasonably ascertainable. The plaintiffs' house shaking and their suspicion of unauthorized mining based on previous dealings with Bromley triggered an obligation to investigate. Plaintiffs obtained maps which incorrectly showed there had been no mining on the property. A question remained what, if anything, could have been done to ascertain the fact of the injury, precluding summary judgment. 305 Kan. at 31.

Here, Aeroflex obtained a copy of Tel-Instrument's protest where Tel-Instrument stated it could accomplish the Mode 5 upgrade without access to Aeroflex's proprietary information. When Allen and Filardo left Aeroflex, they assured their colleagues they

would not be working on the Mode 5 upgrade for Tel-Instrument. In other words, there were facts such that a jury could conclude Tel-Instrument's misconduct was not reasonably ascertainable in November 2006. This is true even though the jury award for tortious interference with a prospective business advantage or relationship equaled the value of the sole-source contract withdrawn by the Army in 2006.

It was a question for the jury to decide when Aeroflex could have ascertained the fact of injury. The trial court did not err by denying the motion for judgment as a matter of law.

ISSUE III: DAMAGE AWARDS

Did the trial court fail to reconcile the jury's damage awards?

Tel-Instrument argues the jury's damage awards are inconsistent because they are in different amounts and duplicative because Aeroflex submitted alternate claims for the same lost profits. The company contends that Aeroflex can have only one recovery for breach of contract by Allen and Filardo and the inducement of the breach by Tel-Instrument under Restatement (Second) of Torts §§ 766 and 774A. It argues that the trial court improperly reconciled the inconsistent awards based on speculation that the jury apportioned damages. Tel-Instrument denies that any error was invited because it asked the court to instruct the jury not to award duplicative damages. Tel-Instrument argues it was error for the trial court to fail to reconcile the damage awards. Tel-Instrument admits the two awards against it can be reconciled as separate awards for successive injuries occurring in 2006 and 2009.

Aeroflex argues the defendants invited any error because they drafted the verdict form; they waived this issue by not objecting before the jury was discharged; the damage awards are not inconsistent because the jury followed the instructions; the jury consistently answered "no" when asked if the damages were duplicative; and the total damages are within the evidence presented at trial. Aeroflex contends Tel-Instrument's arguments invite improper speculation about how the jury reached its verdict.

We are mindful that the trial court used a special verdict for this trial. The jury was asked to answer specific questions and its answers

to those questions constituted its verdict. More facts must be reviewed to explain this issue and our holding.

The jury was instructed that Aeroflex was claiming it sustained damages "in the form of lost profits from the loss of the Mode 5 Upgrade contract." Instruction No. 18 gave the jury a broad overview of the damages it was to consider by defining loss of profits:

> "If you find for Aeroflex, then you should award Aeroflex the sum you find will fairly and justly compensate Aeroflex for the damages you find were sustained as a direct result of the conduct by the Defendants. In determining Aeroflex's damages you should consider any of the following elements of damage that you find were the result of the Defendants conduct: Loss of Profits.
>
> "A loss of profits to a business caused by the wrongful act of another is compensable. You may award the amount of lost profits that Aeroflex proved with reasonable certainty.
>
> "But lost profits need not be computed with mathematical certainty; they are hypothetical by definition. The 'reasonable certainty' test is a test of probability, and depends in large measure upon the circumstances of the particular case.
>
> "You may return the same or a different amount of damages on any other claim. In addition, the same damages may have multiple causes.
>
> "The Court will ask you to clearly indicate whether any of those damages have duplicate causes, that is, whether those same damages have already been awarded against that particular Defendant."

The jury was given a special verdict form that asked a series of questions. For each claim, the jury was asked whether it found each applicable defendant liable. Then the jury was asked what damages were sustained by Aeroflex as a result of that claim against each applicable defendant. For each claim, the jury was asked whether any of those damages were duplicative of the damages, if any, awarded in response to any other verdict question. And, if so, the jury was asked to state the amount of duplicated damages. The jury answered "No" to each duplication question.

The defendants proposed this format which required the jury to assess damages against each defendant for each claim. Aeroflex argued that individual allocation of damages within each claim was inappropriate.

The jury awarded damages as follows:

- $1.3 million for tortious interference with prospective business advantage or relationship against Tel-Instrument;
- ,000 for breach of nondisclosure agreement against Filardo;

- $400,000 for breach of nondisclosure agreement against Allen;
- $25,000 for tortious interference with nondisclosure agreement against Allen; and
- $1.5 million for tortious interference with nondisclosure agreement against Tel-Instrument.

In posttrial motions, the defendants challenged the damage awards in a motion for judgment as a matter of law under K.S.A. 60-250, to correct the special verdict under K.S.A. 60-249(a), and to alter or amend the judgment under K.S.A. 60-259(f). The trial court denied the motions, finding the total damage award was supported by the evidence. The total was well below the lost profits figure that Aeroflex's damage expert gave.

The trial court also found that any inconsistency in the specific damage awards was invited by the defendants because the defendants requested separate damage questions on the verdict form for each cause of action, while Aeroflex had asked for one blank line for damages. The court found the awards were not duplicative because the jury clearly and distinctly answered "No" on the verdict form to the questions asking if the awards were duplicative. "Any finding to the contrary is pure and impermissible speculation."

If there are errors here, we are not sure that they were invited by the defendants.

The more complex something is, there is a greater chance for error. Our Supreme Court has cautioned against the use of verdict forms like the one used here with multiple places for the jury to award damages when the plaintiff seeks only one type of damage. See *Jenkins v. T.S.I. Holdings, Inc.*, 268 Kan. 623, 627, 630, 1 P.3d 891 (2000). Simply put, a duplicative damage award can be prevented by the proper drafting of the verdict form. *State ex rel. Stephan v. GAF Corp.*, 242 Kan. 152, 159, 747 P.2d 1326 (1987).

Basically, a party may not invite error and then complain of that error on appeal. *Siruta*, 301 Kan. at 774. There is no bright-line rule for applying the invited error doctrine. Context matters. For example, the invited error doctrine applies when a party "'actively pursues'" a faulty jury instruction. *State v. Cottrell*, 310 Kan. 150, 162, 445 P.3d 1132 (2019). But it does not apply when the

trial court's instruction differs from what the party proposed. See *State v. Lewis*, 299 Kan. 828, 854-55, 326 P.3d 387 (2014).

In *Cott v. Peppermint Twist Mgmt. Co.*, 253 Kan. 452, 856 P.2d 906 (1993), the defendant claimed error on appeal from a special verdict form that failed to separate past and future damage awards. The Supreme Court ruled that the defendant invited the error because it agreed to lump together past and future damage awards. 253 Kan. at 459.

In contrast, in *Jenkins*, although the sellers had submitted a verdict form that provided blanks for two separate damage awards in accordance with the trial court's rulings, they had consistently argued that one of the claims was not an independent basis for damages. Thus, the Supreme Court found it was not a clear case of invited error. 268 Kan. at 626.

Here, the defendants proposed the verdict form with multiple blanks for damages on their own and over Aeroflex's objection. But the defendants also proposed telling the jury that "you cannot award compensatory damages more than once for the same loss, harm, or detriment," which the trial court did not give. The defendants do not argue on appeal the verdict form constituted error. Thus, we will not hold that the invited error doctrine precludes Tel-Instrument's argument on appeal.

We cannot find that what the jury did was unreasonable.

A party may pursue two claims but a jury can find only one valid. While the law permits a party to maintain an action for both tortious interference with contract against the person who induced the breach and the corresponding breach of that contract by a third person, only one recovery is permitted. Each is liable to the plaintiff for the harm caused by the loss of the contract. See Restatement (Second) of Torts § 766, comment v (1979).

> "[A]n action or judgment against the one who causes the breach without satisfaction will not bar or reduce recovery from the one who breaks the contract; but to the extent that there is duplication of the damages any payments made by the tortfeasor must be credited in favor of one who has broken the contract." Restatement (Second) of Torts § 774A, comment e (1979).

Special verdict findings on essential issues "must be certain and definite, and must not be conflicting or inconsistent;" when

determining whether the findings are inconsistent, they are "construed in the light of the surrounding circumstances and in connection with the pleadings, instructions, and issues submitted." *Rohr v. Henderson*, 207 Kan. 123, 130, 483 P.2d 1089 (1971). "'Where there is a view of the case that makes the [findings] consistent, they must be resolved that way.'" 207 Kan. at 130. Special findings "are to be liberally construed on appeal and interpreted in the light of the testimony with the view toward ascertaining their intended meaning." *Brunner v. Jensen*, 215 Kan. 416, Syl. ¶ 5, 524 P.2d 1175 (1974). "If a careful reading of the form, coupled with the instructions[,] clearly establishes the intent of the jury and resolves the verdict's ambiguity, we may uphold the verdict." *Jenkins*, 268 Kan. at 629.

Our review of some caselaw is useful here. On appeal we will not speculate where the jury's intent is unclear. In *Reed v. Chaffin*, 205 Kan. 815, 820, 473 P.2d 102 (1970), the Supreme Court ordered a new trial because the jury's special verdict findings were "patently inconsistent" such that the case "was left in the condition of actually being undecided." 205 Kan. at 820. The jury found both that the defendants had breached an agreement because they had fired the plaintiff from his position as manager and the plaintiff was not unlawfully ousted as manager.

Another example is *Hubbard v. Havlik's Estate*, 213 Kan. 594, 518 P.2d 352 (1974), which involved a wrongful death suit brought against the City of Pratt, Kansas, and the estate of a driver involved in a one-vehicle accident for damages for the death of the passengers in the vehicle. The jury was instructed: "'If from the evidence you find that decedent Havlik's conduct was wanton and the defendant City of Pratt was guilty of negligence which was concurrent to the other, the degree of fault or culpability of each is immaterial, and each is liable for the entire damage.'" 213 Kan. at 601. The jury returned a verdict of $12,000 separately against each defendant for one plaintiff and $12,500 separately against each defendant for the other plaintiff. The trial court entered judgment accordingly. The plaintiffs argued the jury intended a total award of $24,000 for one plaintiff and $25,000 for the other. The defendants argued the jury assessed the full amount of the award against each defendant, which would cut the defend-

ants' total liability in half. On appeal, the court ruled that its decision on the issue would be "nothing more than a speculative determination as to what the jury intended." 213 Kan. at 604. Thus, the verdict could not stand.

Also, in *ClearOne Communications, Inc. v. Biamp Systems*, 653 F.3d 1163, 1170-71 (10th Cir. 2011), in a suit for misappropriation of trade secrets, the jury assessed lost-profits damages in the amount of $956,000 against Biamp and $956,000 against WideBand. The district court concluded the two defendants were jointly and severally liable for the total of $1,912,000. The defendants argued the jury assessed a total of $956,000 against all defendants. The Tenth Circuit Court of Appeals agreed. The district court's interpretation of the verdict amounted to improper additur because, due to the wording of the verdict form, it was possible the jury intended a total damage award of $956,000. Where the jury's verdict is susceptible to two interpretations, the court cannot select an interpretation that possibly exceeds the intended award. There must be conclusive evidence the jury apportioned damages. The court ruled the district court erred because although it was "plausible" the jury apportioned damages, it was not "inescapable." 653 F.3d at 1180.

Here, the jury's special findings are not "patently inconsistent" as the cases require. See *Reed*, 205 Kan. at 820. The jury was instructed it could "return the same or a different amount of damages" on the claims. Though it is impossible to tell how the jury arrived at the differing damage awards, the answers on the verdict form are markedly consistent. The jury was not instructed against apportioning damages. Rather, the jury was instructed to "clearly indicate" whether any of the damages it awarded had "duplicate causes." That is the difference between this case and those cited by Tel-Instrument. Here, it is inescapable the jury apportioned damages because the jury stated each time that the damages were not duplicative of any other damages. As the trial court pointed out, the jury filled in 12 lines on the verdict form on the issue of duplicate damages. The jury consistently answered that it did not duplicate damages. Any speculation that the jury was confused or did not mean what it said is unfounded.

Jenkins provides support for the trial court's judgment totaling the damage awards. In *Jenkins*, the buyers claimed the sellers violated two provisions of a contract—a best efforts clause and a no-shop clause. The special verdict form had two blanks to indicate whether the sellers had breached the contract—one for each clause. The form also had two blanks for the jury to award damages caused by each breach. The jury found the sellers violated both provisions of the contract. The jury awarded the buyers $1 million for breach of the best efforts clause and $3 million for breach of the no-shop clause. The district court entered a $4 million judgment against the sellers. On appeal, the sellers argued the verdict was inconsistent. Any breach of the contract caused the buyers to sustain the same damage. Thus, different amounts could not be awarded for each violation.

The *Jenkins* court upheld the judgment. A $4 million award was within the range supported by the evidence. The jury was instructed to award the plaintiffs the "sum" that would adequately compensate them. 268 Kan. at 629. A consistent reading of the form and instructions showed the jury determined the sellers breached both contract clauses and that the total benefit of the bargain lost due to the seller's breach was $4 million, which the jurors allocated between the two damage blanks. 268 Kan. at 629.

Like the jury in *Jenkins*, the jury here was instructed: "[Y]ou should award Aeroflex the sum you find will fairly and justly compensate Aeroflex." The sum the jury awarded was $3.325 million. That amount was within the range of evidence at trial. See *United Phosphorus, Ltd. v. Midland Fumigant, Inc.*, 205 F.3d 1219, 1228 (10th Cir. 2000). The trial court did not err by denying the defendants' motion for judgment as a matter of law.

ISSUE IV: COMPETITOR'S PRIVILEGE

Was it reversible error to refuse to give a jury instruction on competitor's privilege, a doctrine not yet accepted by Kansas courts?

Citing some federal cases and predicting the Kansas Supreme Court would adopt the business competitor privilege found in Restatement (Second) of Torts § 768 (1979), Tel-Instrument contends the trial court erred by failing to instruct the jury on the privilege. Tel-Instrument admits that the Kansas appellate courts have

not specifically adopted § 768 but contends the trial court should have because it did not fairly instruct the jury on the meaning of "wrongful" or "improper" means.

Aeroflex contends the instruction was not legally appropriate because § 768 is not Kansas law since it has not been adopted by the Kansas Supreme Court. Aeroflex argues that even if it were adopted, any error was harmless because the trial court gave the substance of the requested instruction.

Based on the Restatement (Second) of Torts § 768, the defendants asked the trial court to instruct the jury:

"The Court has found that the 'competitor's privilege' applies. One who intentionally causes a third person not to enter into prospective relation with another who is his competitor or not continue an existing contract terminable at will does not interfere improperly with the other's relation if:

1. The relation concerns a matter involved in the competition between the defendant and the plaintiff;
2. The defendant does not employ wrongful means;
3. defendant's action does not create or continue an unlawful restraint of trade; and
4. defendant's purpose is at least in part to advance his interest in competing with the plaintiff.

"'Wrongful means' includes acts equivalent to physical violence, fraud, civil suits and criminal prosecutions. Wrongful means does not include persuasion and the exertion of limited economic pressure. Conduct that is merely 'sharp' or 'unfair' does not qualify as 'wrongful means.'"

We note that the proposed instruction follows § 768, except the Restatement does not precisely define "wrongful means." It does give the examples of physical violence, fraud, civil suits, and criminal prosecutions in a comment. Restatement (Second) of Torts § 768, comment e.

The law we follow on jury instructions is not complex.

When reviewing jury instruction issues, we consider: (1) whether the issue was preserved below; (2) whether the instruction was legally and factually appropriate; and (3) if the instruction was appropriate, whether the error requires reversal. An instruction is legally appropriate if it fairly and accurately states the applicable law. *Reardon v. King*, 310 Kan. 897, 902-03, 452 P.3d 849 (2019). We have unlimited review over whether an instruction

was legally appropriate. An instruction is factually appropriate if there is sufficient evidence, viewed in the light most favorable to the requesting party, that would support the instruction. *Burnette v. Eubanks*, 308 Kan. 838, 845, 425 P.3d 343 (2018). A jury instruction error is harmless when there is no reasonable probability the error affected the trial's outcome. *State v. Nunez*, 313 Kan. 540, 550, 486 P.3d 606 (2021).

All of the jury instructions are to be considered together and read as a whole. When they fairly instruct the jury on the law governing the case, an error in an isolated instruction may be disregarded as harmless. If the instructions are substantially correct and do not mislead the jury, the instructions may be approved on appeal. *Wolfe Electric, Inc. v. Duckworth*, 293 Kan. 375, 383, 266 P.3d 516 (2011).

To prove tortious interference with a prospective business advantage or relationship, Aeroflex had to prove intentional misconduct by Tel-Instrument and that Tel-Instrument acted with malice, i.e., an intent to do harm without any reasonable justification or excuse.

We cannot condemn the trial court's reasonable approach to this question.

The trial court refused to give the requested instruction. Instead, it gave an instruction on justification that mirrored PIK Civ. 4th 124.93 (2020 Supp.), with the addition of an eighth factor concerning competition. The authority for PIK Civ. 4th 124.93 is *Turner v. Halliburton Co.*, 240 Kan. 1, 722 P.2d 1106 (1986), which cited the Restatement (Second) of Torts § 767.

The trial court told the jury:

"It is a defense to an action for tortious interference with existing or with prospective contractual relations that the interference was justified.

"Justification exists when the Defendant acts in the exercise of a right equal to or superior to that of the Plaintiff and uses fair means and good faith for some lawful interest or purpose.

"In determining whether the interference was justified, the following factors should be considered:

1. The nature of the Defendant's conduct;
2. The Defendant's motive;

3. The interests of the Plaintiff with which the Defendant's conduct interfered;

4. The interests sought to be advanced by the Defendant;

5. The social interests in protecting the freedom of action of the Defendant and the contractual interests of the Plaintiff;

6. The proximity or remoteness of the Defendant's conduct to the interference; and

7. The relations between the parties.

8. *The parties were in competition on the matter and the defendants did not employ improper means*." (Emphasis added.)

The *Turner* court had recognized that "not all interference in present or future contractual relations is tortious. A person may be privileged or justified to interfere with contractual relations in certain situations." 240 Kan. at 12.

It is important to understand that the privilege stated in § 768 is "a special application of the factors determining whether an interference is improper or not, as stated in § 767." Restatement (Second) of Torts § 768, comment b. The privilege is based on the belief that "competition is a necessary or desirable incident of free enterprise." Restatement (Second) of Torts § 768, comment e. "One's privilege to engage in business and to compete with others implies a privilege to induce third persons to do their business with him rather than with his competitors." Restatement (Second) of Torts § 768, comment b. "If the actor succeeds in diverting business from his competitor by virtue of superiority in matters relating to their competition, he serves the purposes for which competition is encouraged." Restatement (Second) of Torts § 768, comment e. The privilege does not apply to inducement of breach of contract. Restatement (Second) of Torts § 768, comment h. The privilege is lost when the competitor uses "wrongful means." Restatement (Second) of Torts § 768(1).

Tel-Instrument's prediction is not based on reading tea leaves. The Tenth Circuit predicted the Kansas Supreme Court would adopt § 768 in *DP-Tek, Inc. v. AT&T Global Information Solutions Co.*, 100 F.3d 828, 833-34 (10th Cir. 1996). The *DP-Tek* court held, where the claim is interference with a prospective contract, "wrongful means requires independently actionable conduct." 100 F.3d at 833. The court noted that some jurisdictions do not require the defendant's actions to be independently unlawful,

but that the weight of authority supported its conclusion that wrongful means required independently actionable conduct. 100 F.3d at 834-35. The Tenth Circuit followed the *DP-Tek, Inc.* holding again later in *Utility Trailer Sales of Kansas City, Inc. v. MAC Trailer Manufacturing, Inc.*, 443 Fed. Appx. 337, 342 (10th Cir. 2011) (unpublished opinion).

Aeroflex offers no reason why the Kansas Supreme Court would not adopt § 768. After all, it is referred to in the comments to § 767, which our Supreme Court has adopted, and it provides further context for that section. It may be that the Kansas Supreme Court will adopt § 768 in some form, but we question whether such speculation is useful in this case. Though the entirety of the requested instruction may not be legally appropriate, the Restatement does not give "wrongful means" a precise definition.

After all, the trial court did give the substance of the requested instruction by adding a competition factor to its justification instruction. The trial court's instruction was legally appropriate under the circumstances.

In denying Tel-Instrument's posttrial motion, even the trial court speculated the Kansas Supreme Court would adopt the majority view that wrongful means requires independently actionable conduct. But the court defended its approach to the instruction because § 767 comment c states that the fact-finder should consider all the factors, including motive:

> "[T]he issue is not simply whether the actor is justified in causing the harm, but rather whether he is justified in causing it in the manner in which he does cause it. The propriety of the means is not, however, determined as a separate issue unrelated to the other factors. On the contrary, *the propriety is determined in the light of all the factors present*." (Emphasis added.)

The trial court concluded the jury was not under-instructed; its instruction allowed both sides to argue the facts on competition and also allowed the jury to weigh all the justification factors. The trial court also detailed various evidence presented at trial that the jury could have found constituted "wrongful means."

Under the circumstances, the failure to give a more detailed competition instruction was not reversible error. We cannot fault a trial court for refraining from going out on a limb and trying to predict how the Supreme Court will rule. The duty of the trial

court is to instruct the jury on the law as it is when the instruction is given, not what the law might be in the future. The jury was appropriately instructed. We see no reason to reverse on this point.

ISSUE V: 49 ITEMS

Was it reversible error not to require the jury to decide on the verdict form whether 49 items were trade secrets or confidential?

Allen and Filardo contend the trial court was required to list the 49 items on the verdict form that Aeroflex claimed were trade secrets or confidential. In their view, the court should have instructed the jury to first determine whether any of the 49 items were trade secrets or confidential and, if so, determine whether any of the items were misappropriated or disclosed by the defendants. By failing to do so, they claim that the jury was left in a difficult position of not knowing what items Aeroflex claimed were trade secrets or confidential. They then complain that we do not know now which items the jury believed were protected by the nondisclosure agreements.

The defendants have been consistent on this point. In the pretrial order, Aeroflex had identified 49 pieces of information it claimed were confidential, proprietary, or trade secrets that were improperly retained, disclosed, acquired, or used by the defendants. The defendants asked the trial court to list the items in its contention instruction and on the verdict form. For each item, the defendants wanted the jury to first answer yes or no whether the item constituted a trade secret under the Kansas Uniform Trade Secrets Act, K.S.A. 60-3320 et seq., and if so, for each item, whether any of the defendants had misappropriated the trade secret. For the breach of contract claim, if the jury found Allen or Filardo breached Aeroflex's nondisclosure agreement, then the defendants wanted the jury to answer for each of the 49 items whether it was misappropriated by either defendant.

The trial court declined to include a list of the 49 items in the instructions or verdict form. On the verdict form, for the trade secret misappropriation claim, the court simply asked whether defendants misappropriated Aeroflex's trade secrets. For the breach of contract claim, the court simply asked whether Allen or Filardo breached their contract with Aeroflex.

Later, when denying the posttrial motions on this point, the trial court found Aeroflex had presented sufficient evidence on its alleged confidential information for the jury to make the requisite determination.

The standard of review stated above for jury instruction issues applies equally to verdict form issues. *Unruh v. Purina Mills*, 289 Kan. 1185, 1197-98, 221 P.3d 1130 (2009).

Allen and Filardo rely on K.S.A. 60-249 and *LendingTools.com, Inc. v. Bankers' Bank*, No. 116,382, 2018 WL 4655902 (Kan. App. 2018) (unpublished opinion), to support their claim that the trial court was required to specifically identify the confidential items on the verdict form.

The statute concerning special verdict forms states: "The court may require a jury to return only a special verdict in the form of a special written finding on each issue of fact. . . . The court must give the instructions and explanations necessary to enable the jury to make its findings on each submitted issue." K.S.A. 2022 Supp. 60-249(a)(1)-(2).

In *LendingTools*, LendingTools brought an action against Bankers' Bank for misappropriation of trade secrets, civil conspiracy, and tortious interference with contract. The district court granted summary judgment to Bankers' Bank on the tort claims, ruling that the Kansas Uniform Trade Secrets Act preempted those claims. The jury found in favor of the defense on the misappropriation of trade secrets claim, and LendingTools appealed. LendingTools argued the district court erred by granting summary judgment on the tort claims because the tort claims were an alternative theory of recovery in the event the jury determined the misappropriated information was not a trade secret. A panel of this court agreed. The panel stated that on remand the first question the jury should be asked on the verdict form is whether any of the information LendingTools sought to protect was a trade secret. If the jury determined that any of the information was a trade secret, then the jury should be instructed to move on to the question concerning whether Bankers' Bank misappropriated any trade secret. 2018 WL 4655902, at *19.

In its cross-appeal, Bankers' Bank argued the district court erred by denying its motion to dismiss and motion for judgment as a matter of law based on LendingTools' failure to identify the

specific trade secrets that it claimed were misappropriated. The panel held that by the time a case reaches the final pretrial conference, the plaintiff should be required to concisely identify the trade secrets alleged to have been misappropriated. Sufficient disclosure of trade secrets is necessary for the defendant to have a fair opportunity to prepare. The panel then noted that because the verdict form did not ask the jury to determine the existence of any trade secrets but instead jumped directly to the question of whether Bankers' Bank misappropriated any trade secrets, it was unclear whether the jury found any of the information to be a trade secret. But the panel found the district court did not err by denying the motions. 2018 WL 4655902, at *20-22.

We hold that neither K.S.A. 2022 Supp. 60-249(a)(1)-(2) nor *LendingTools* supports the defendants' contention here that the trial court was required to itemize the claimed trade secret and confidential information in the instructions to prevent jury confusion. *LendingTools* was about preemption and disclosure of information in advance of trial.

Aeroflex did itemize its claims prior to trial. The defendants are now merely speculating that the jury may have been confused. They complain that we do not know what information the jury considered confidential, without explaining why we need to know that. The defendants do not argue there was insufficient evidence for the jury to find that Allen and Filardo disclosed confidential information in violation of their nondisclosure agreements. We see no reason in this record to believe the jury did not follow the instructions. The defendants have not shown the trial court erred. There is no reason to reverse on this point.

ISSUE VI: DECLINED INSTRUCTION

Was the refusal to give an instruction on industry secrets reversible error?

Allen and Filardo contend the trial court erred by failing to give their requested jury instruction that information is not secret if it is generally known to the public at large or to people in the trade or business. They list several items of Aeroflex's alleged proprietary information which they maintain are in the public domain.

They complain now that the jury was never simply told that information cannot be secret or confidential if it is available to the general public or if it is known within the industry.

The defendants asked the trial court to give this jury instruction:

"To determine that a trade secret exists you must first decide whether the information was indeed secret when any of the defendant's allegedly wrongful conduct occurred. Matters that are generally known to the public at large or to people in a trade or business are not trade secrets. Nor can information be considered a trade secret if it would be ascertainable with reasonable ease from publicly available information. In addition, a trade secret must possess enough originality so that it can be distinguished from everyday knowledge.

"Absolute secrecy is not necessary for information to qualify as a trade secret. There is no requirement that no one else in the world possess the information. Rather, a plaintiff must demonstrate that the information was known only to it or to a few others who have also treated the information as a trade secret."

The trial court refused to give that instruction.

When deciding an issue such as this, we must read all of the jury instructions together as a whole. *Wolfe Electric*, 293 Kan. at 383. Notice that the proposed jury instruction mentions only "trade secrets," and not other confidential information. In its jury instructions, the trial court had told the jury there is a difference between trade secret information and confidential information: "For purposes of this case, 'confidential, protected information' is any information defined and covered by the Non-Disclosure Agreement but does not meet the definition of a 'Trade Secret' as stated in this instruction."

The jury was also instructed that Aeroflex's breach of contract claim concerned information covered by the nondisclosure agreements "not already available to the public." The trial court also differentiated between trade secret information and confidential information on the verdict form for both liability and damages. The jury found that none of the defendants misappropriated trade secrets and awarded no damages for disclosure of trade secret information on any of the other claims.

The jury found for the defendants on all trade secret matters. That means that it is unnecessary to decide whether the requested

jury instruction on the meaning of a trade secret was legally appropriate because we can definitively say any error in failing to give this instruction was harmless.

ISSUE VII: CURATIVE INSTRUCTION

Should the trial court have given a curative instruction?

Allen and Filardo argue the trial court erred by failing to give a curative instruction after counsel for Aeroflex stated in closing that Tel-Instrument made more than $11.4 million from the TS-4530 upgrade contract. They contend that there was no evidence to support the comment, and it was prejudicial because Tel-Instrument was not permitted to argue it had actually lost more than $2 million on the contract.

A quick review of what happened at trial is helpful at this point. During trial, the court stopped a witness, Jeff O'Hara, from testifying that Tel-Instrument lost money on the contract. The court ruled the witness could testify about Tel-Instrument's revenues but not profits. The issue at trial was Aeroflex's lost profits, not Tel-Instrument's. The court reasoned, "[W]hether you make $50,000 or whether you make $5,000 all depends on what your costs are associated with getting it to market. And those are different and specific."

Then in the first part of his closing argument, when discussing Aeroflex's damages, Aeroflex's counsel stated,

"And we know that there are future Mode 5 sales. We know the sales are going on right now. Right now in their Mode 5 sales outside of the Army, the third parties. And that figure, that has not been challenged in the evidence in this case at all, is $11,418,047. That's the damages that have been argued, go unchallenged, and that's what we're ultimately going to ask for in this case."

The next day, in the final closing argument, Aeroflex's counsel argued:

"We were criticized by Mr. Bjerg yesterday about dropping this right-side column. Well, you know, this right-side column is the expectancy described by Mr. O'Hara. The left-side column is what Tel-Instrument actually got. They got $27 million from the Army contract, according to Mr. O'Hara. And they also had some additional sales. That's what this figure adds up to. This takes their revenue figures for the contract that they got, applies them to the costs that would have been incurred by Aeroflex, because Aeroflex knows what those costs were because they were able to do the project, and if you ignore price erosion, it's

$11,418,047. That's what they got. That's the benefit of this contract using Aeroflex's costs and Tel-Instrument's revenues. That proposition cannot legitimately be challenged."

After Aeroflex's closing, Tel-Instrument's counsel objected that Aeroflex's counsel made an improper argument by suggesting that Tel-Instrument had an $11 million profit from the contract, though there was actually a loss. Tel-Instrument asked for a correction. The court overruled the objection.

In civil cases, counsel have latitude in making arguments. Courts will not impose narrow and unreasonable limitations on the arguments of counsel made to the jury. But if counsel exceeds that latitude, the court must determine whether the error prejudiced a party's right to a fair trial. "The test is whether '"there is a reasonable probability that the error will or did affect the outcome of the trial in light of the entire record."'" *Castleberry v. Debrot*, 308 Kan. 791, 807, 424 P.3d 495 (2018).

From this record, it appears that Aeroflex was making an argument concerning the amount of its lost profit damages using Tel-Instrument's revenue figure and its own cost figure. That is, Tel-Instrument's revenues and Aeroflex's costs. It is true that O'Hara did testify that Tel-Instrument's gross revenues were around $27 million. And counsel's statement, "That's what they got," could be construed as a statement about Tel-Instrument's profit. But counsel clarified that the figure was derived using Tel-Instrument's revenues and Aeroflex's costs. Thus, the statement was not clearly outside the latitude given to attorneys in closing arguments.

We frankly do not see that this claimed error affected the outcome of this lengthy trial. We will not reverse on this point.

ISSUE VIII: PRIOR AGREEMENT

Was it reversible error to admit a confidentiality agreement with a former employer?

Filardo and Allen contend the trial court erred by admitting into evidence Filardo's JcAIR confidentiality agreement because it was irrelevant and prejudicial. Filardo's retention of the dissertation documents alone was not a violation of the Aeroflex nondisclosure agreement. But the jury may have based its breach of

contract finding on the retained dissertation materials because the JcAIR agreement was admitted into evidence.

In response, Aeroflex contends there was no contemporaneous objection to the admission of the agreement at trial, the agreement was relevant to show JcAIR's information was considered confidential prior to the merger, and Aeroflex never argued at trial that Filardo breached the JcAIR agreement.

To understand this argument, some case history is important for context. Before JcAIR and Aeroflex merged, Filardo and Allen worked for JcAIR and had signed confidentiality agreements with JcAIR. After the merger, they signed new confidentiality agreements with Aeroflex.

Prior to trial, the defendants sought to exclude Filardo's and Allen's JcAIR confidentiality agreements from trial. They argued the Aeroflex confidentiality agreements replaced and superseded the earlier agreements. The sticking point was that the JcAIR agreements contained a provision not contained in the Aeroflex confidentiality agreements. That provision required Filardo and Allen to return all materials in their possession upon their termination. The trial court denied the motion to exclude evidence.

But the trial court did grant summary judgment to Filardo and Allen on Aeroflex's claim for breach of the JcAIR confidentiality agreement. The court ruled Aeroflex could not directly state or imply the defendants breached or tortiously interfered with the JcAIR confidentiality agreements.

At trial, Aeroflex offered Filardo's JcAIR confidentiality agreement into evidence. The defendants objected to "make sure" the agreement was only admitted for a limited purpose and not to serve as a basis for the breach of contract claim. The court ruled the agreement could be admitted, but Aeroflex could not imply that Filardo breached that agreement.

Filardo testified at trial that he kept the backup documentation he used for his Ph.D. dissertation that was proprietary to Aeroflex after his employment with Aeroflex ended. Filardo testified he never disclosed those documents to anyone at Tel-Instrument.

The trial court directed a verdict on this point. The court instructed the jury: "On the Aeroflex claims for misappropriation of trade secrets, breach of nondisclosure agreement or tortious interference with existing contractual relations, you must not find in

favor of Aeroflex and must find in favor of Dr. Filardo on the claim that . . . Dr. Filardo improperly held onto his dissertation materials."

Jury instruction Nos. 8 and 15 concerning Aeroflex's breach of contract claim each referred to and used language from the Aeroflex nondisclosure agreement which prohibited disclosure "either directly or indirectly . . . intellectual property not already available to the public." The jury was instructed, "Aeroflex claims that Defendants Allen and Filardo each breached their individual contracts (Non-disclosure Agreements) with Aeroflex by directly or indirectly disclosing intellectual property not already available to the public."

Evidence is relevant if it has "any tendency in reason to prove any material fact." K.S.A. 60-401(b); *Nauheim v. City of Topeka*, 309 Kan. 145, 153, 432 P.3d 647 (2019). A material fact is one in dispute or in issue. Materiality presents a question of law subject to unlimited review. Evidence is probative if it tends to prove a material fact. We review whether evidence is probative for abuse of discretion. *Kansas City Power & Light Co. v. Strong*, 302 Kan. 712, 729, 356 P.3d 1064 (2015). Even if evidence is relevant, the trial court has discretion to exclude it where the court finds its probative value is outweighed by its potential for producing undue prejudice. See K.S.A. 60-445; *Wendt v. University of Kansas Med. Center*, 274 Kan. 966, 979-80, 59 P.3d 325 (2002). The erroneous admission of evidence is reviewed for harmless error under K.S.A. 2022 Supp. 60-261. The party benefiting from the error must persuade the court that there is no reasonable probability that the error affected the trial's outcome in light of the entire record. *State v. McCullough*, 293 Kan. 970, 983, 270 P.3d 1142 (2012).

The defendants did not object on the basis of relevance at trial. K.S.A. 60-404 generally precludes an appellate court from reviewing an evidentiary challenge absent a timely and specific objection at trial. We will not review this claim.

But even if the JcAIR confidentiality agreement was irrelevant, its admission could not have affected the trial's outcome in light of the entire record. The jury was instructed not to find for Aeroflex on the fact that Filardo retained his dissertation materials. The jury was instructed the breach of contract claim concerned

the nondisclosure agreements Allen and Filardo signed with Aeroflex and their disclosure of Aeroflex's intellectual property.

This claimed error is not reversible error.

We need not address the cross-appeal.

Because we are not granting the defendants a new trial, Aeroflex's cross-appeal is moot and we will not address those claims. See *Rodarte v. Kansas Dept. of Transportation*, 30 Kan. App. 2d 172, 182-83, 39 P.3d 675 (2002).

CONCLUSION

To sum up, we must conclude that this was a well-tried case with skilled advocates on all sides and a judge that made some insightful decisions. It reflected the fierce competition between two companies striving for government contracts in an important market—the machinery of war, the working tools of a nation's defense. While the jury found in favor of the defendants on Aeroflex's claim of misappropriation of trade secrets, it found in favor of Aeroflex on all other claims. Neither side got everything they sought. While we cannot say that this was a perfect trial—indeed a perfect trial is not within the experience of any judge on this panel—we can say this was a fair trial. Justice was done.

The issues raised in this appeal—standing, statute of limitations, errors concerning the verdict form, instructional errors, and evidentiary errors—do not rise to the level that persuades us to reverse the judgments of the trial court.

Affirmed.

(533 P.3d 314)

No. 125,787

CANDICE WHITE, *Appellee*, v. BRYAN KOERNER, *Appellant*.

SYLLABUS BY THE COURT

1. CIVIL PROCEDURE—*Kansas Wrongful Death Act—Heir May Participate in Apportionment Proceedings*. The Kansas Wrongful Death Act, K.S.A. 60-1901 et seq., does not prohibit an heir who has negligently contributed to the death of the decedent from participating in apportionment proceedings.

2. EVIDENCE—*Admission of Evidence Regarding Settlement Agreements*. The admission of evidence regarding settlement agreements for the purpose of proving liability is generally prohibited. K.S.A. 60-452.

3. WRONGFUL DEATH—*Kansas Wrongful Death Act—District Court May Consider Heir's Actions When Apportioning Recovery.* The Kansas Wrongful Death Act, K.S.A. 60-1901 et seq., does not prohibit the district court from considering an heir's actions when calculating that heir's loss for the purpose of apportioning the recovery from a wrongful death lawsuit pursuant to K.S.A. 60-1905.

Appeal from Johnson District Court; RHONDA K. MASON, judge. Opinion filed July 28, 2023. Reversed and remanded with directions.

Brett Votava, of Votava Nantz & Johnson, LLC, of Kansas City, Missouri, for appellant.

Brant A. McCoy and *Jason R. Covington*, of Jones, McCoy & Covington, P.A., of Overland Park, for appellee.

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

HURST, J.: In a tragic turn of events, Candice White and Bryan Koerner's adult son died by suicide in Koerner's home. White later filed a wrongful death action against her ex-husband Koerner, which Koerner's home insurer agreed to settle without his consent. Koerner denied—and continues to deny—any liability or negligence related to their son's death. After the settlement agreement was approved by the district court, over Koerner's objection, he sought to participate in the apportionment of the settlement funds and recover some amount of the proceeds. The district court denied Koerner's request and prohibited him from participating in the apportionment, reasoning that Koerner's negligence

had been determined by settlement and that allowing him to participate would permit him to profit from his own wrongdoing. The district court thereafter awarded 100% of the settlement funds to White.

On appeal, Koerner argues that the district court erred in prohibiting him from participating in the apportionment of the settlement funds. Finding Koerner's arguments availing, this court reverses the district court's judgment, reverses the district court's determination that Koerner cannot participate in apportionment of the settlement proceeds, and remands for a new apportionment hearing consistent with this opinion. The district court erred in relying upon the settlement agreement to determine Koerner had admitted or been determined negligent in his son's death. Moreover, even if Koerner had been properly found to negligently contribute to his son's death, the Kansas Wrongful Death Act, K.S.A. 60-1901 et seq. (the Act), does not disallow recovery by an heir who has negligently contributed to the death of the decedent.

FACTUAL AND PROCEDURAL BACKGROUND

This court need only recount and consider a limited set of facts material to this dispute, and those are undisputed by the parties. White and Koerner were married when their son Parker was born, but the couple subsequently divorced. In October 2019, when their son was a teenager, he moved out of White's home and began living with Koerner. About two years later, when Parker was 19 years old, he died by suicide in Koerner's house using a firearm he took from Koerner's bedroom. At the time of his death, Parker was unmarried and had no children.

White later filed a wrongful death action against Koerner. Koerner's homeowners insurer at the time of his son's death agreed to settle White's claim without Koerner's consent. The settlement agreement expressly provided "that this settlement is a complete compromise of doubtful and disputed claims and that the payment set out herein is not to be construed as an admission of liability on the part of those herein released, by whom liability is expressly denied." The settlement agreement further provided that neither payment nor the negotiation of the agreement shall be construed as admissions of liability and that no wrongdoing shall be implied

by the agreement. At every stage of the litigation below, Koerner denied—and continues to deny—any liability or negligence related to his son's death.

After obtaining an agreement from the insurer to settle, White filed a Petition for Settlement Approval and Apportionment of Settlement with the district court seeking approval of the settlement agreement. In response, Koerner filed an answer wherein he admitted that White and the insurer reached a settlement but denied that he and White agreed on apportionment of the proceeds and denied "any liability." White and Koerner each filed competing memoranda addressing whether Koerner should be permitted to participate in the apportionment of the funds disbursed as a result of the settlement agreement. The district court conducted a hearing concerning approval of the settlement agreement, but the parties also presented argument about whether Koerner should be permitted to participate in the future apportionment of the settlement funds. In its journal entry approving the settlement agreement, the district court noted that "[Koerner] has and continues to deny any and all liability concerning the death of [Parker] and there is no finding of liability or negligence by [Koerner]."

The district court later entered a written order addressing apportionment in which it prohibited Koerner from participating in the apportionment of the settlement funds. The court reasoned:

> "It is a bedrock principle of law that one must not be able to profit from one's wrongdoing. If [Koerner] is able to seek apportionment of the settlement proceeds, he would be benefitting from his own alleged wrongdoing. Although [Koerner] denies wrongdoing, he entered into a contract with his insurance company and bestowed upon his insurance company the authority to settle any claims made against him. His insurance carrier settled this claim based on that potential liability. [Koerner] should not be allowed to profit from a settlement made by his insurance company to settle allegations of negligence made against him."
>
> . . . .
>
> "The issue of [Koerner]'s negligence has been resolved by settlement; while [Koerner] denies negligence, and the Court does not find [Koerner] to be negligent at this point, it simply will not re-address the issue by allowing [Koerner] to assert an interest in the settlement proceeds. [Koerner]'s motion to participate and receive an apportion of the settlement proceeds is **DENIED**."

The district court thereafter conducted the apportionment hearing without Koerner and awarded 100% of the settlement funds to White, less her attorney fees. Koerner now appeals the

district court's decision prohibiting him from participating in the apportionment of the settlement funds.

DISCUSSION

On appeal, Koerner makes three arguments: (1) The district court erred in relying upon the settlement agreement to exclude him from participating in the apportionment hearing; (2) even if the district court had properly found Koerner negligent in the death of his son, it still erred in prohibiting him from participating in the apportionment hearing; and (3) if the case is reversed and remanded, the district court is prohibited from determining or considering Koerner's alleged negligence or liability in his son's death when apportioning the settlement funds. The district court interpreted and relied on the Act when it prohibited Koerner from participating in the apportionment of the settlement proceeds. This court therefore exercises unlimited review over the district court's decision. *Nauheim v. City of Topeka*, 309 Kan. 145, 149, 432 P.3d 647 (2019) ("Statutory interpretation presents a question of law subject to de novo review."); *Siruta v. Siruta*, 301 Kan. 757, 761, 348 P.3d 549 (2015). When interpreting a statute, this court first attempts to determine the Legislature's intent through the statutory language, giving common words their ordinary meaning. *Nauheim*, 309 Kan. at 149. "When a statute is plain and unambiguous, an appellate court should not speculate about the legislative intent behind that clear language, and it should refrain from reading something into the statute that is not readily found in its words." *In re M.M.*, 312 Kan. 872, 874, 482 P.3d 583 (2021).

The Act provides a mechanism by which heirs of a decedent may maintain an action for damages. Under the Act, "[i]f the death of a person is caused by the wrongful act or omission of another, an action may be maintained for the damages resulting therefrom if the former might have maintained the action had such person lived." K.S.A. 2022 Supp. 60-1901(a). The action may be filed "by any one of the heirs at law of the deceased who has sustained a loss by reason of the death" and "shall be for the exclusive benefit of all of the heirs who has sustained a loss regardless of whether they all join or intervene" in the suit. K.S.A. 60-1902. Thus, the Act provides the exclusive mechanism by which an heir

may recover damages for their loss. The statute includes a nonexhaustive list of recoverable damages, including: (1) mental anguish, suffering, or bereavement; (2) loss of society, companionship, comfort, or protection; (3) loss of marital care, attention, advice, or counsel; (4) loss of filial care or attention; (5) loss of parental care, training, guidance, or education; and (6) reasonable funeral expenses for the deceased. K.S.A. 60-1904.

Important to this appeal, the Act provides for the apportionment of recovered funds among the decedent's heirs: "The net amount recovered in any such action . . . shall be apportioned by the judge upon a hearing, with reasonable notice to all of the known heirs having an interest therein, such notice to be given in such manner as the judge shall direct." K.S.A. 60-1905. The Act further provides that "[t]he apportionment shall be in proportion to the loss sustained by each of the heirs, and all heirs known to have sustained a loss shall share in such apportionment regardless of whether they joined or intervened in the action." K.S.A. 60-1905.

I. THE DISTRICT COURT ERRED IN DETERMINING THAT THE SETTLEMENT AGREEMENT RESOLVED OR ESTABLISHED KOERNER'S NEGLIGENCE

In its order prohibiting Koerner from participating in the apportionment, the district court somehow found that both "[t]he issue of [Koerner's] negligence has been resolved by settlement" and that "the Court does not find [Koerner] to be negligent at this point." The court explained that Koerner could not participate in the apportionment because if he did the court would be required to either find him negligent in his son's death and award him nothing, or find he was not negligent and then be forced to "set aside the settlement agreement, since the settlement agreement is predicated on settling a claim related to [Koerner]'s negligence." The court provided no legal authority for this assertion that it would have to set aside the settlement agreement if it later found Koerner did not negligently cause his son's death—and this court is not aware of any authority requiring such result.

Koerner has not been found liable for, or negligent in, the unfortunate death of his son. Nor has Koerner admitted any liability or negligence associated with his son's death. Moreover, the settlement agreement entered into by White (as Releasor) disclaimed any liability or implied liability of Koerner or the insurer (as Releasees). The Settlement Agreement provided:

"Releasors agree and acknowledge that payment of the sums specified in this Agreement are accepted by them as a full and complete compromise of claims against Releasees and that neither payment by these individuals or entities of the sums of money described above nor the negotiation of this Agreement (including all statements, admissions, or communications by the parties and or their representatives) shall be construed as admissions by them and that no past or present wrongdoing on Releasees' part shall be implied by such payment or negotiation."

Not only did the settlement agreement expressly disclaim any implication of liability, but settlement agreements are generally inadmissible to prove liability. K.S.A. 60-452 ("Evidence that a person has, in compromise . . . furnished or offered or promised to furnish money . . . to another who has sustained or claims to have sustained loss or damage, is inadmissible to prove his or her liability for the loss or damage of any part of it."); *Hess v. St. Francis Regional Med. Center*, 254 Kan. 715, 721, 869 P.2d 598 (1994); see *Ettus v. Orkin Exterminating Co.*, 233 Kan. 555, 567, 665 P.2d 730 (1983). "In addition to promoting settlement efforts, the purpose behind [K.S.A. 60-452] is to protect the defendant from an improper inference of liability." *Ettus*, 233 Kan. at 567; see also *Hess*, 254 Kan. at 721 ("K.S.A. 60-452 is concerned with possible prejudice to a party on the issue of liability. . . . The public policy behind [K.S.A. 60-452] is to promote settlement."). It is a fundamental legal principle that entering into a settlement agreement does not prove liability or create an admission or inference of liability. To find otherwise would undermine the ability of insurers to settle claims without the insured's approval and would significantly diminish the incentive to settle claims.

The district court therefore erred in relying on the settlement agreement to establish Koerner's alleged negligence, and using such to exclude him from participating in the apportionment hearing.

II. THE DISTRICT COURT ERRED IN PROHIBITING KOERNER FROM PARTICIPATING IN THE APPORTIONMENT HEARING REGARDLESS OF HIS ALLEGED NEGLIGENCE

Even if the district court had properly found Koerner negligent in the death of his son, the district court erred by excluding

him from participating in the apportionment of the settlement proceeds. The Kansas Wrongful Death Act does not disallow recovery by an heir who has negligently contributed to the death of the decedent. It is uncontested that White and Koerner are their son's only heirs because Parker did not leave a surviving spouse or child. K.S.A. 59-507; *Osborn v. Anderson*, 56 Kan. App. 2d 449, 454, 431 P.3d 875 (2018). The Act provides that any wrongful death action "shall be for the exclusive benefit of *all* of the heirs who has sustained a loss regardless or whether they all join or intervene" in the wrongful death suit. (Emphasis added.) K.S.A. 60-1902. The plain and unambiguous language of the statute does not limit or prohibit recovery by an otherwise entitled heir who negligently contributed to the death of the decedent. Even if this court believes such a result is counterintuitive or that the Legislature might not have anticipated such a scenario when it enacted the statute, this court is "still bound by the statutory language as written." *Siruta*, 301 Kan. at 764; see *Johnson v. McArthur*, 226 Kan. 128, 129-35, 596 P.2d 148 (1979) (explaining that K.S.A. 60-1901 et seq. is plain and unambiguous, and in such cases courts "must give effect to the intention of the legislature as expressed, rather than determine what the law should or should not be").

Both parties rely heavily on *Siruta* in advancing their contrary claims. In *Siruta*, a minor child was killed in a one-car rollover crash in which the child's mother was driving and the father was asleep in the passenger seat. The father later brought a wrongful death action against the mother, alleging that her negligence was the proximate cause of their child's death. At trial, the mother argued that neither party was negligent in causing the accident or, if she was negligent, the father was also negligent as a result of their joint driving decisions. The jury ultimately found both parties equally at fault for the accident that lead to their child's death. 301 Kan. at 760.

Although factually distinguishable from the present case, on appeal the mother in *Siruta* asserted a claim similar to White's claim here. In *Siruta*, the mother argued that the district court should have barred the father's wrongful death action against her because, if the father succeeded and was awarded damages, the mother—as an heir—would share in the father's award and therefore profit from her own negligence. 301 Kan. at 763. The Kansas

Supreme Court rejected this argument for two reasons. First, the court observed that "[a] wrongful death action is purely a statutory creation, and the statutory language *does not disallow recovery by an heir who has negligently contributed to the death of the decedent*." (Emphasis added.) 301 Kan. at 763. Second, the court was not convinced that the mother would actually recover any damages. The Act "leaves the apportionment decision to the judge, and nothing in the statutory language prohibits the judge from using discretion in calculating the relative 'loss' sustained by each of the heirs." 301 Kan. at 764. The court explained that "[t]here is nothing preventing a judge from considering any of [the mother]'s actions in causing her own loss or from fashioning an award tailored in some other way to the peculiar facts of this case and the losses sustained by the heirs at law." 301 Kan. at 764. The court therefore did "not believe that [the mother] would necessarily receive, merely because of her status as an heir at law, any portion of the damages she was ordered to pay as a defendant." 301 Kan. at 765.

The Kansas Supreme Court's guidance in *Siruta* supports the result demanded by the plain language of the statute. 301 Kan. at 763 (explaining "the statutory language [of the Act] does not disallow recovery by an heir who has negligently contributed to the death of the decedent"). Moreover, the court decided *Siruta* more than eight years ago, and yet the Legislature has made no changes to the Act undermining that decision, which suggests legislative acquiescence. See *State v. Spencer Gifts*, 304 Kan. 755, 765-66, 374 P.3d 680 (2016).

The district court erroneously interpreted the holding of *Siruta* when it stated in its order that *Siruta* "does not stand for the idea that [Koerner] has a right to the [apportionment] of the settlement funds under Kansas law, but rather that [White] can still bring claims against [Koerner], even if [Koerner] is simultaneously an heir at law." While the *Siruta* court did make a finding consistent with the district court's interpretation when it held that "[a] wrongful death action under K.S.A. 60-1901 et seq. can be brought against an alleged tortfeasor who is an heir at law of the decedent," that was not the end of the analysis. 301 Kan. 757, Syl. ¶ 1. The court addressed the mother's argument and explained that "the statutory language does not disallow recovery by an heir who has negligently contributed to the death of the decedent." 301 Kan. at

763. The district court's determination that an heir who has negligently contributed to the death of the decedent is categorically prohibited from recovering any portion of the proceeds from a wrongful death action is simply inconsistent with the plain language of the statute and the Kansas Supreme Court's guidance in *Siruta*, and it must therefore be reversed.

Moreover, as explained by the court in *Siruta*, permitting Koerner to participate in the apportionment of the settlement funds would not necessarily result in a tortfeasor recovering damages from himself as the defendant. First, unlike in *Siruta*, Koerner has not been found negligent in or liable for the death of his son. Second, as described above, the Act provides for bifurcated proceedings with two independent steps in which wrongful death claims are resolved. In the first step, the substance of the underlying action—the action for wrongful death—is litigated (or, as here, settled). Only after that does the district court move to the second step, which is apportionment of the recovery from the first step among all of the decedent's heirs who have sustained a loss.

Here, Koerner did not seek to join White's wrongful death suit—the first step—as a party plaintiff or to otherwise intervene. Rather, Koerner simply sought to participate in the second step—apportionment of the settlement funds—after the underlying litigation had been resolved (i.e., the second step in a wrongful death action). "[T]he statutory provisions regarding apportionment of the ultimate award make clear that the 'exclusive benefit' language pertains to apportionment of damages. Apportionment must occur *after* the substance of the action has been litigated and damages have been awarded to the named plaintiff(s)." 301 Kan. at 763. Accordingly, as in *Siruta*, this court is not required to view Koerner as a plaintiff in a manner that he would necessarily recover damages from himself as a wrongdoer. See 301 Kan. at 763. This court does not pass judgment on what the appropriate outcome would be if Koerner had intervened in the underlying litigation—the first step—rather than the apportionment hearing—the second step. But under the circumstances, Koerner is not prohibited in participating in the apportionment hearing simply because his homeowners insurer settled a claim levied against him without his participation or admission of liability.

III. THE DISTRICT COURT IS NOT PROHIBITED FROM CONSIDERING EVIDENCE OF AN HEIR'S ACTIONS IN CAUSING THEIR LOSS WHEN CALCULATING PROPORTIONAL LOSS FOR THE PURPOSE OF APPORTIONING THE SETTLEMENT FUNDS

Koerner argues that, upon remand, the district court is categorically prohibited from determining or considering his alleged negligence or liability in his son's death when apportioning the settlement funds:

"The purpose of K.S.A. 60-1905 is apportionment of proceeds between heirs—not determination of liability, fault, or causation.

. . . .

"[T]he time to determine whether Koerner was causally negligent in Parker's death was *before* the settlement was approved when the underlying matter could still be litigated. Once the settlement is approved, the die is cast.

". . . There can be no adjudication of the issue in the apportionment phase because the District Court is limited in its function to only that authority granted by K.S.A. 60-1905."

Koerner's argument is unavailing.

When apportioning settlement proceeds in a wrongful death proceeding, the district court is charged with calculating the loss sustained by each heir claiming a portion. K.S.A. 60-1905 authorizes the district court to hear evidence to calculate the portion due to each heir according to the proportion of

"the loss sustained by each of the heirs, and all heirs known to have sustained a loss shall share in such apportionment regardless of whether they joined or intervened in the action; but in the absence of fraud, no person who failed to join or intervene in the action may claim any error in such apportionment after the order shall have been entered and the funds distributed pursuant thereto."

In *Siruta*, the Kansas Supreme Court expressly stated that "[*t*]*here is nothing preventing a judge from considering any of* [*an heir*]*'s actions in causing* [*their*] *own loss* or from fashioning an award tailored in some other way to the peculiar facts of th[e] case and the losses sustained by the heirs at law." (Emphasis added.) 301 Kan. at 764. Therefore, contrary to Koerner's assertion, determining whether Koerner's actions caused his own loss is part of calculating Koerner's proportional loss for purposes of apportioning

the settlement funds. Though the same issue could have been litigated in the underlying wrongful death action—the first step—there is nothing in the Act preventing the issue from being determined in the apportionment hearing—the second step—for the limited purpose of calculating Koerner's proportional loss. See, e.g., *Sedlock v. Overland Park Medical Investors, LLC*, No. 19-2614-DDC, 2021 WL 1056516, at *5-6 (D. Kan. 2021) (unpublished opinion) (where the district court heard evidence during the apportionment proceedings, after a settlement agreement was reached, that one of the decedent's siblings had suffered no loss from the decedent's death but two others had suffered a loss). Just as the district court can hear evidence concerning the heirs' respective pecuniary and non-pecuniary damages, "nothing in the statutory language prohibits the judge from using discretion in calculating the relative 'loss' sustained by each of the heirs." *Siruta*, 301 Kan. at 764.

At the new apportionment hearing, the district court can hear and consider evidence from both parties concerning their damages and loss, and nothing inherent in the bifurcated process limits the district court from hearing any and all arguments and evidence that can be used to calculate and apportion each heir's loss. The Legislature has conferred broad discretion on the district court to hear evidence necessary to make these determinations. See, e.g., *Schmidt v. American Family Mutual Insurance Co., S.I.*, No. 21-1036-DDC, 2022 WL 1538695, at *4 (D. Kan. 2022) (unpublished opinion) (where the district court determined that the decedent's spouse was entitled to 100% of the settlement proceeds while the decedent's children received none). Therefore, it is not at all certain that, upon remand, Koerner will receive any portion of the settlement funds. See *Siruta*, 301 Kan. at 764-65.

CONCLUSION

The district court erred in excluding Koerner from the apportionment proceedings. First and foremost, the court erred in finding that the settlement agreement demonstrated that Koerner was in any way negligent in or liable for his son's death. Second, the district court erred in finding that, if Koerner was negligent in or liable for his son's death, he was prohibited from participating in the apportionment of the settlement funds from White's wrongful

death suit. The district court's award of 100% of the settlement proceeds to White is vacated, its judgment excluding Koerner from the apportionment hearing is reversed, and the case is remanded for a new apportionment hearing in which Koerner shall be permitted to participate.

Reversed and remanded with directions.

(534 P.3d 634)

No. 125,274

RODNEY L. ROSS, et al., *Appellees*, v. NORMAN TERRY NELSON, STILLWATER SWINE LLC, HUSKY HOGS, LLC, and NTN, L.P., *Appellants*.

SYLLABUS BY THE COURT

1. REAL PROPERTY—*Trespass Claim—Definition*. A trespass claim arises when a person intentionally enters another's property without any right, lawful authority, or express or implied invitation or license.

2. SAME—*Possessory Right of Fee Owners of Real Property Containing Public Roadway*. Fee owners of real property containing a public roadway have a possessory right to use, control, and exclude others from the land, as long as they do not interfere with the public's use of the road. In contrast, the public has an easement over the property to use the road for transportation purposes—that is, to use the road *as a road*—but no other rights beyond those purposes. Any further use by members of the public may be authorized through state action, provided the landowner is compensated for the diminished property rights, or through the landowner's consent.

3. HIGHWAYS AND STREETS—*Installation of Pipeline in Right of Way of Public Highway—Public Purpose Required*. If a private person wants to install a pipeline in the right-of-way of a public highway, that pipeline must serve a public purpose. Without a public purpose, the person must have permission to install the pipeline. Depending on the nature of the installation and the property, this permission may be granted by the abutting landowners or the legislature.

4. REAL PROPERTY—*Damages for Trespass—General Rule*. When calculating damages for a trespass, the general rule is that a plaintiff can recover for any loss sustained. The wrongdoer should compensate for all the injury naturally and fairly resulting from the wrong.

5. SAME—*Nuisance—Definition*. A nuisance is any use of property by one which gives offense to or endangers life or health, violates the laws of decency, unreasonably pollutes the air with foul, noxious odors or smoke, or obstructs the reasonable and comfortable use and enjoyment of another person's property.

6. AGRICULTURE—*Kansas Right to Farm Act—Legislative Purpose to Protect Certain Agricultural Activities*. The Kansas Right to Farm Act, K.S.A. 2-3201 et seq., recognizes that agricultural activities conducted on farmland in areas in which nonagricultural uses have moved into agricul-

tural areas are often subjected to nuisance lawsuits and that such suits encourage and even force the premature removal of the lands from agricultural uses. The legislature adopted the Act to protect certain agricultural activities from this type of nuisance action.

7. COURTS—*References to State Laws—Kansas Right to Farm Act References to State Laws Include Common Law*. Kansas courts have consistently recognized that general references to state "laws" include the Kansas Constitution, statutes, regulations, and caselaw unless the legislature has indicated a contrary intention. K.S.A. 2-3202(b) and (c)(1)'s references to Kansas "laws" include the common law governing torts like trespass, developed through Kansas cases.

8. AGRICULTURE—*Kansas Right to Farm Act—Protection of Agricultural Activities—Requires Conformity with Federal and State Laws*. The Kansas Right to Farm Act protects agricultural activities conducted on farmland if those activities are undertaken in conformity with federal, state, and local laws and rules and regulations.

9. SAME—*Courts' Review of Activities under Kansas Right to Farm Act—Considerations*. Courts do not view agricultural activities under the right-to-farm laws in a vacuum. Rather, courts' review of agricultural activities under the Kansas Right to Farm Act—including whether those agricultural activities conform with state and federal laws—must necessarily consider related farming practices incidental to the challenged agricultural activities that make the challenged activities possible.

10. TRIAL—*Jury's Finding of Punitive Damages—Appellate Review*. Appellate courts review a jury's finding that punitive damages are appropriate by asking whether, based on the evidence presented at trial, the jury could have found it highly probable that the defendant engaged in malicious, vindictive, willful, or wanton conduct.

11. CONSTITUTIONAL LAW—*Punitive Damages May Violate Party's Due Process of Law*. The United States Supreme Court has explained that punitive damages may violate a party's constitutional right to due process of law in at least two ways. First, the Due Process Clause of the Fourteenth Amendment to the United States Constitution makes the Eighth Amendment's prohibition against excessive fines and cruel and unusual punishments applicable to the States. Second, the Due Process Clause itself prohibits the States from imposing grossly excessive punishments on tortfeasors.

12. APPEAL AND ERROR—*Punitive-Damage Award—Considerations for Appellate Review*. Courts assess three considerations when determining whether a punitive-damage award shocks the conscience and thus violates a party's due-process rights: the reprehensibility of the defendant's conduct; the ratio of punitive damages to actual damages for the injury; and comparable awards for similar conduct.

Appeal from Phillips District Court; PRESTON PRATT, judge. Opinion filed August 25, 2023. Affirmed.

Patrick B. Hughes, of Adams Jones Law Firm, P.A., of Wichita, for appellants.

Randall K. Rathbun and *Braxton T. Moral*, of Depew Gillen Rathbun & McInteer LC, of Wichita, for appellees.

Aaron M. Popelka, vice president of legal and governmental affairs, and *Jackie Newland*, associate counsel, of the Kansas Livestock Association, and *Terry D. Holdren*, general counsel, and *Wendee D. Grady*, assistant general counsel, of the Kansas Farm Bureau, amici curiae.

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

WARNER, J.: This case arises at the intersection of property rights, public roadways, and the Kansas Right to Farm Act. Norman Terry Nelson, who owns several farming operations in rural Norton County, installed about two miles of pipeline in the right-of-way next to a public road so he could transport liquified hog waste to fertilize his cropland. He installed the pipes without the consent of the landowners who owned the property and for his own private farming needs. The landowners sued him for trespass, as well as nuisance when the hog waste was sprayed from an irrigation pivot system across the road from their home. The plaintiffs prevailed on both claims after a trial.

Nelson now appeals, challenging the jury's damages findings for both nuisance and trespass, as well as several legal rulings the district court rendered before and after trial. After carefully reviewing the record and the parties' arguments, we affirm the district court's judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Rodney and Tonda Ross have lived in a house in rural Norton County, where Rodney has been a farmer for decades. Laura Field owns nearby property. Nelson is a local farmer and businessperson who owns and operates crop and hog farms, among other ventures.

Rodney Ross and Nelson have known each other since childhood. One of Nelson's entities, NTN, L.P., owned farmland and grew crops directly south of the Rosses' home. The cropland was

irrigated by a pivot system. When the north pivot swept across the land, its spray came within 200 feet from the Rosses' home. The issues in this case arose when Nelson sought to transport effluent—liquified hog manure—from one of his hog farms to the NTN pivot to dispose of the waste and fertilize the NTN cropland.

Around 2017, Nelson began developing Stillwater Swine, a new hog operation in the area. Hogs generate significant waste, so Nelson needed a way to dispose of the hog manure. He planned to run water to the facility, liquify and treat the waste, then run the effluent to the NTN pivots for use as fertilizer. This required Nelson to install three underground pipes—two to carry the water and one to carry the effluent—in the right-of-way next to a road that ran along the Rosses' and Field's properties. Nelson planned to install a mile of pipe along each property.

Neither the Rosses nor Field gave permission for Nelson to lay pipes in the right-of-way. Before installation, Nelson contacted Rodney Ross but not Field. Nelson personally told Ross his plans, stating that he had nowhere else to put the hog waste. Ross objected to having pivots spray hog waste across the street from his house, and he asserted that Nelson had other nearby land—where nobody lived—that he could use to get rid of the effluent.

Nelson's permit attempts and pipe installation

According to the Norton County Road and Bridge Supervisor, the County does not typically grant a physical permit for underground roadwork. Rather, someone fills out a permit application, pays a fee, the county clerk signs it, and then the person begins work. The Road and Bridge Supervisor then inspects the work and eventually signs off on the permit. In other words, the County grants permits after the work has been completed and inspected. The signed application then becomes the permit.

Nelson did not follow this permitting practice in installing the pipeline. Nelson's daughter-in-law filled out a permit application and later paid the fee for the roadside pipe installation. But neither the county clerk nor the Road and Bridge Supervisor ever signed the permit application.

Instead, Nelson sought permission directly from the Norton County Board of Commissioners. In August 2017, Nelson began

attending commission meetings to discuss his plan to install pipes in the road right-of-way. At the first meeting, Nelson explained his plan, which would require removing the Rosses' fence. According to the minutes from that meeting, the commissioners were under the impression that "[t]he land owner-tenant has been contacted." The commissioners thus approved "construction of the road"—that is, elevating the existing road to create ditches. According to Nelson, he took this to mean he had permission to install the pipes.

A week later, Rodney Ross found a county employee using Nelson's equipment to remove the Rosses' fence as part of the roadwork. Ross called his county commissioner, who arrived shortly after, as did Nelson. The county commissioner asked Nelson if he had a permit to do this work. Nelson replied that he did not need a permit—he had done this before and would do it again. Nelson apparently then completed the roadwork to prepare for the pipe installation.

At a subsequent commission meeting, the Norton County Counselor advised the commissioners that they needed the landowners' consent to approve Nelson's application. The minutes reflect that Nelson had led the commissioners to believe he had the landowners' permission, but then the commissioners learned that was untrue. That meeting left the issue unresolved—Nelson asserted that he did not need the landowners' permission, while the county counselor asserted that he did. Nelson continued to lobby the commissioners, but there is no evidence that the commission granted his request to install the pipes.

Nelson nevertheless went forward with the pipe installation. In September 2017—as the back-and-forth between Nelson and the county commissioners was ongoing—the county counselor called the sheriff and stated that someone was installing pipes in the disputed right-of-way. The sheriff went to the scene, believing the installation violated local resolutions. See Norton County Resolution 13-1999 (no person may construct an underground pipeline without county inspection). The sheriff also contacted someone at the Kansas Department of Health and Environment, who explained that although KDHE regulates the disposal of hog waste, it does not oversee piping installation between hog operations and disposal sites.

Following the county counselor's instructions, the sheriff told Nelson's team to stop the work until they sorted out the legal issues and determined whether they had the necessary permission. But Nelson's employees apparently resumed and completed the work shortly after. Given these events, the parties dispute whether Nelson ever obtained the County's permission. Regardless, Nelson has maintained that this point is immaterial because he did not need the County's permission.

Nelson's use of the waste as fertilizer at the NTN cropland

In April 2019, Nelson started transporting waste through the pipes and spraying the effluent through the pivots next to the Rosses' property. This created a strong, unpleasant stench at the Rosses' home and in the surrounding area. When Nelson began applying the effluent, the Rosses filed a report with the sheriff. The sheriff came to their house and noted that the odor was just as bad inside the house as outside. The smell would linger for up to 10 days.

Along with the smell, the Rosses stated that the effluent mist sprayed by the pivots would drift onto their property when the wind blew north. One day, it sprayed Tonda Ross. Another time, it drifted onto a local resident as she was passing through the area. The effluent mist would also hit the Rosses' house, which would become covered in flies. The Rosses could not entertain at their house and ultimately began spending most of their time at their second home in Nebraska. At the time of trial, Tonda had not stayed at their Norton County house in a year.

Before Nelson began his operation, the Rosses had planned to sell their land to one of their farming tenants. That potential sale fell through because of the effluent's smell and other effects. The pivots did not spray the cropland with effluent every day; it was applied for a total of 96 hours in 2019. Nelson later testified that when he did spray the effluent, he tried to reduce drift and odor on the Rosses' property, such as tracking the winds to avoid running the pivot nearest their house when the winds blew north.

Nelson had a permit from KDHE for the waste-disposal operation. But KDHE only had authority over the Stillwater Swine site and the disposal site—not how Nelson transported the waste from

one site to the other. The parties disputed whether the effluent transport and application violated other legal requirements. Nelson admitted that the pipes he installed did not comply with thickness requirements in a 1999 county resolution. And the Rosses contended that the pivots sprayed effluent closer to the Rosses than KDHE allowed. They also asserted that Nelson improperly sprayed effluent through the pivot's end gun and that he did not report all the days he applied it. Nelson and his son disputed these allegations.

The lawsuit

In July 2019, the Rosses and Field sued Nelson and his affiliated businesses. (We refer to these defendants collectively as Nelson.) The Rosses and Field brought trespass claims for the underground piping; the Rosses also brought a nuisance claim related to the effluent application.

The case progressed, and both sides moved for summary judgment on the trespass claim—specifically, whether Nelson trespassed when he installed pipelines in the right-of-way abutting the Rosses' and Field's properties. The district court ultimately ruled in favor of the plaintiffs, finding that Nelson did not have free use of road rights-of-way to bury pipes. Nelson had laid the pipes solely for his private hog operation. Without a public purpose or use for installing the pipes, the district court found that Nelson needed permission from either the legislature or the landowners. Nelson had neither, so the court found he trespassed on the Rosses' and Field's properties.

Nelson also sought summary judgment on the Rosses' nuisance claim based on the Kansas Right to Farm Act. Under this Act, Kansas law protects many agricultural activities from nuisance claims if those activities comply with "federal, state, and local laws and rules and regulations." K.S.A. 2-3202(b). The district court found that this protection did not apply here, however, because the alleged nuisance—the application of effluent through the NTN pivot—resulted from Nelson's trespass and thus violated state law. As such, the court found that the Right to Farm Act did not bar the Rosses' claim. The district court also allowed the Rosses to add a claim for punitive damages on their nuisance claim.

The case went to trial in July 2021. After hearing the evidence, the jury awarded damages for the trespass claims and found in the Rosses' favor on the nuisance claim:

- The jury found that Nelson's trespass on the Rosses' and Field's properties caused $65,000 in damages to each property. The district court later reduced these damages to $63,360 each to conform to the evidence presented.
- The jury found that the Rosses had suffered $2,000 in damages for the nuisance (spraying the hog waste).

The jury also found that Nelson's conduct warranted punitive damages. After trial, Nelson moved for judgment as a matter of law, arguing that the jury disregarded the district court's instructions about punitive damages. The district court denied the motion. Eventually, the court awarded $50,000 in punitive damages against Nelson. Nelson appeals.

DISCUSSION

Nelson challenges several aspects of the district court's summary-judgment rulings on the trespass and nuisance claims, the jury verdicts on each, and the $50,000 punitive-damage award:

- *Trespass.* Nelson argues that the district court erred in granting summary judgment on the trespass claim by misapplying Kansas law governing easements and rights-of-way. And he challenges the damages the jury awarded for the trespass claims.
- *Nuisance.* Nelson claims that the district court erred when it found, also on summary judgment, that the Kansas Right to Farm Act did not insulate his use of the hog waste from a nuisance claim. And he claims that the evidence did not support the jury's verdict on the nuisance.
- *Punitive damages.* Nelson challenges the punitive-damage award on multiple grounds, including the jury's finding that punitive damages were appropriate for the nuisance claim, the verdict form where the jury recorded its finding, and the ultimate amount of damages the district court awarded.

We conclude that Nelson has not shown that the district court or jury erred. We thus affirm the district court's judgment.

1. *The district court properly ruled that Nelson's pipelines trespassed on the Rosses' and Field's properties, and the evidence at trial supported the jury's damages awards on the trespass claims.*

Though Nelson raises several issues on appeal, his central challenge concerns the district court's trespass ruling. Nelson asserts that the district court erred when it found at summary judgment that installing the pipelines in the right-of-way trespassed on the Rosses' and Field's property rights. He also challenges the damages the jury assessed for those claims, arguing the evidence did not support the jury's verdict. We find neither argument persuasive.

1.1. *The court did not err in granting summary judgment on the trespass claims.*

Nelson first challenges the district court's summary-judgment ruling on the plaintiffs' trespass claims. He asserts that the court erred when it found he did not have the right to install pipelines in the public right-of-way to transport water and effluent. And he argues that the court erred in finding that the installation of those pipelines trespassed on the plaintiffs' properties.

The district court's trespass decision resulted from the parties' competing motions for summary judgment. Summary judgment is appropriate when "there is no genuine issue as to any material fact" and "the movant is entitled to judgment as a matter of law." K.S.A. 2022 Supp. 60-256(c)(2). A party seeking summary judgment must show there are no disputed questions of material fact—that there is nothing the fact-finder could decide that would change the outcome. See *Shamberg, Johnson & Bergman, Chtd. v. Oliver*, 289 Kan. 891, 900, 220 P.3d 333 (2009). This requires the district court to view the evidence in the light most favorable to the nonmoving party, giving that party the benefit of every reasonable inference drawn from the evidence. See 289 Kan. at 900.

Because summary judgment tests the legal viability of a claim, appellate courts apply this same framework on appeal. *Martin v.*

Naik, 297 Kan. 241, 246, 300 P.3d 625 (2013). To the extent that this analysis requires examining, interpreting, and assimilating Kansas statutes, our review is also unlimited. *Nauheim v. City of Topeka*, 309 Kan. 145, 149, 432 P.3d 647 (2019). Applying these principles here, we agree that summary judgment in the plaintiffs' favor was appropriate.

Public roadways and private property rights

As a starting point, a trespass claim arises when a person intentionally enters another's property "without any right, lawful authority, or express or implied invitation or license." *Armstrong v. Bromley Quarry & Asphalt, Inc.*, 305 Kan. 16, 22, 378 P.3d 1090 (2016). The controlling question in the plaintiffs' trespass claims—and the legal question the parties disputed at summary judgment—was whether Nelson had a right to install the pipelines in the right-of-way next to the road without permission. To resolve this question, we must examine the respective rights of the landowners and the public in property that abuts a public road.

Since the earliest days of Kansas statehood, our state's appellate courts have been called on to resolve the tension between the rights of the public and adjacent landowners in public highways. One of the earliest examples of this conflict arose in *Caulkins v. Mathews*, 5 Kan. 191 (1869), when the Kansas Supreme Court considered the difference between the public's right to travel on a public road and the right to use the abutting property. In *Caulkins*, the plaintiff sued for damages from the loss of his horse after the horse fell into a well on the defendant's property. The plaintiff argued that the defendant's right to exclude others from his property was diminished because a public road crossed the defendant's land. The Kansas Supreme Court roundly discarded this argument: "[H]ow a public road on the defendant's land would give the plaintiff any right to pasture his horse outside of the road, we cannot see." 5 Kan. at 199. The court explained that people "may pass and repass with their stock upon the public highways," but "that is the extent of their right." 5 Kan. at 200.

Four years later, the court again considered the extent of the property rights of landowners whose properties abut public roads. *Comm'rs of Shawnee Co. v. Beckwith*, 10 Kan. 603 (1873). In that

case, Shawnee County had exercised its right of eminent domain to create a public road across private property; the issue before the Kansas Supreme Court was the extent of the landowner's damages associated with that taking. The court began its analysis with a recognition that while Kansas statutes allowed for the creation of public roads and highways, nothing in the Kansas Constitution or statutes indicated the extent of the interests that the public obtained in the resulting thoroughfares—that is, Kansas law did not explain "what interest therein, shall pass to the public, and how much of the land, or what interest therein, shall remain with the original proprietor." 10 Kan. at 607.

The *Beckwith* court concluded that, given this silence, "nothing connected with the land passes to the public, except for what is actually necessary to make the road a good and sufficient thoroughfare for the public." 10 Kan. at 607. In other words, the public "obtains a mere easement to the land"—"the right for persons to pass and repass, and to use the road as a public highway only, and nothing more." 10 Kan. at 607. The ownership of the land and "everything connected with the land over which the road is laid out" "never passes to the public, but always continues to belong to the original owner." 10 Kan. at 607-08. Indeed, "the original owner has as complete and absolute dominion over his land, and over everything connected therewith, after the road is laid out upon it as he had before, except only the easement of the public therein." 10 Kan. at 608. That is, the owner still owns and controls the land "so long as he does not interfere with the use of the road as a public highway. No other person has any such rights." 10 Kan. at 608.

These cases established the foundational principle that fee owners of real property containing a public roadway have a possessory right to use, control, and exclude others from the land, as long as they do not interfere with the public's use of the road. In contrast, the public has an easement over the property to use the road for transportation purposes—that is, to use the road *as a road*—but no other rights beyond those purposes. Any further use by members of the public may be authorized through state action, provided the landowner is compensated for the diminished property rights, or through the landowner's consent.

Public-utility providers may use rights-of-way to deliver commodities for a public purpose.

On this foundation, the Kansas Supreme Court has repeatedly evaluated the scope of the public's easement in the roadway (or right-of-way). For example, in one case, the court evaluated whether a telephone company could plant poles in a right-of-way next to a public roadway when they interfered with the landowner's ability to maintain his property. *McCann v. Telephone Co.*, 69 Kan. 210, 76 P. 870 (1904). The court found the company could, noting that a highway's purpose is "for passage, travel, traffic, transportation, transmission, and communication." 69 Kan. at 213. This purpose is not confined only to uses established when the easement was granted, but "include[s] the newest and best facilities of travel and communication which the genius of man can invent and supply." 69 Kan. at 213. Telephone communication fell under this purpose, so installing telephone lines did not exceed the scope of the easement. 69 Kan. at 218-19.

But one of the fundamental premises of the *McCann* decision was that "[t]he purpose of a telephone—the transmission of intelligence between people and places—*is a public one*, which the public may authorize, regulate, and control." (Emphasis added.) 69 Kan. at 212. On top of that, the legislature had permitted telephone companies to build and maintain their lines in streets and highways. 69 Kan. at 212.

A year later, the court similarly held that a gas company could bury pipes in a public highway. *State v. Natural-gas Co.*, 71 Kan. 508, 510, 80 P. 962 (1905). Like the telephone company in *McCann*, the legislature had acknowledged gas companies as "*quasi* public corporations" that conducted "'business of a public nature.'" 71 Kan. at 509 (quoting *La Harpe v. Gas Co.*, 69 Kan. 97, Syl. ¶ 1, 76 P. 448 [1904]). The court thus rejected the State's attempt to stop the gas company from installing the pipes. The gas company also had the landowners' permission. *Natural-gas Co.*, 71 Kan. at 508; see *Empire Natural Gas Co. v. Stone*, 121 Kan. 119, 120, 245 P. 1059 (1926) (same).

One of the common threads in these cases is that they involved providers of public utilities. But even utility companies' ability to

use a public road has limits. Their use must be for "highway purposes"—travel, repairs, and "such other *public uses as will not be injurious to the abutting owner's fee* nor inconsistent with highway purposes." (Emphasis added.) *Mall v. C. & W. Rural Electric Cooperative Ass'n*, 168 Kan. 518, Syl. ¶ 2, 213 P.2d 993 (1950) (ruling against an electric co-op); see also *The State, ex rel., v. Weber*, 88 Kan. 175, Syl. ¶ 2, 127 P. 536 (1912) (finding a person could install an electric line on a highway if "there is no invasion of the rights of the owners of abutting lands").

This court considered a comparable issue more recently in *Stauber v. City of Elwood*, 3 Kan. App. 2d 341, 594 P.2d 1115, *rev. denied* 226 Kan. 793 (1979). In that case, abutting landowners sued to stop private companies from putting advertisements in a road right-of-way, even when the companies had the city's permission. The panel found for the landowners, holding that the defendants—the city and the companies—"failed to make the necessary showing that there is a *primary public purpose* to be served by the erection of the signs in question." (Emphasis added.) 3 Kan. App. 2d at 346. That is, "the primary use of the right-of-way [must] benefit the public and any private use must be incidental to the public purpose." 3 Kan. App. 2d at 346.

Nelson did not have a right to use the right-of-way for private purposes.

Applying these principles here, the district court ruled that Nelson needed—and lacked—a public purpose to install the pipelines in the public highway right-of-way. The court found that without such a purpose, and without the consent of the landowners or some other legislative permission, Nelson had no right to use the Rosses' or Field's property to run pipelines for his company. Thus, installing and maintaining those pipelines trespassed on the plaintiffs' properties. We agree.

The parties acknowledge that the roads at issue are public highways. See L. 1874, ch. 111, § 1 (declaring all section lines in Norton County public highways). But Nelson had no public purpose to lay pipes in (or adjacent to) the roads. He installed them for a purely private farming operation. Nelson does not run a quasi-public corporation or conduct a "business of a public nature"—one that is "almost, if not quite, a public necessity." *La*

Harpe, 69 Kan. 97, Syl. ¶ 1, 100. Kansas law provides no support for Nelson's claim that any person can permanently install pipes on a public highway, for any reason, as long as they do not interfere with public travel.

Nelson argues that even if a public purpose were required, he had one because he was raising pigs that would eventually be available to the public as pork products. He cites a Texas eminent-domain case in which a court found an electric line serving one customer was a "public use" because the customer produced oil. *Dyer v. Texas Elec. Service Co.*, 680 S.W.2d 883, 885 (Tex. App. 1984). The Kansas Supreme Court approvingly cited this case when finding that installing a fiber-optic telephone cable in a right-of-way was a public use in the eminent-domain context. *Williams Telecommunications Co. v. Gragg*, 242 Kan. 675, 681, 750 P.2d 398 (1988).

But this is not an eminent-domain case, and unlike the companies in those cases, Nelson had no eminent-domain power. He was a private citizen who took and used a public right-of-way for his private gain. And those cases, like the others, involved utility providers—electric and telecommunications companies. Indeed, under Nelson's theory of "public purpose," there would be no limit to who could use a right-of-way and why—as long as, somewhere down the line, there is a product available to the public. This argument invites absurd results and finds no support in Kansas law.

Nelson did not have permission to install the pipelines.

Without a public purpose, Nelson needed some other source of authority to install the pipelines. But the Rosses and Field never consented, and the legislature never sanctioned his actions. See *McCann*, 69 Kan. at 212 (noting the legislature had authorized telephone companies to build lines in state highways); *La Harpe*, 69 Kan. at 100-01 (same for gas companies); see also, e.g., K.S.A. 17-618; K.S.A. 17-4604(i); K.S.A. 17-1901–K.S.A. 17-1903 (all granting various utilities the right to use public roads and rights-of-way).

Nelson argues that he did not need the abutting landowners' permission to install the pipelines in the right-of-way. He points to *Natural-gas Co.*, when the court stated that a landowner "has

no power to transfer to another any right to occupy the highway for any purpose." 71 Kan. at 509. The court observed that the landowners could not give the gas company permission "as against the state" to install its gas lines. 71 Kan. at 509. But that case involved a utility company with statutory authority to use public highways. It was the State that was trying to stop the pipelines, not the landowners; the court merely recognized that landowner permission cannot defeat a contrary state directive. 71 Kan. at 509. Contrary to Nelson's assertions, *Natural-gas Co.* does not negate the need for landowners' consent to use their land for private purposes.

Nelson also asserts that Kansas law does not require legislative permission to use a public roadway for transportation purposes. He points to the Kansas Supreme Court's decision in *Weber*, when the court found that "[a] natural person needs no special license or grant of authority in order to use a highway for any of the purposes for which it was established." 88 Kan. at 178. That case involved an electric company's installation of an electric line, and the court observed that the legislature could have "prescribed the conditions on which persons might transmit and transport light, heat, and power along a highway" but had not done so. 88 Kan. at 178-79. The court concluded that "the absence of a statutory regulation" did not prevent electricity from being "transmitted and transported over the highway." 88 Kan. at 179.

But *Weber* is distinguishable from this case in several ways. The company installing the electric line in *Weber* had the abutting landowners' permission, while Nelson did not. 88 Kan. at 180. *Weber* also had public utilities in mind; it speaks of permission to transport "light, heat, and power"— the disputed electric line in that case was to supply a city's "electric light plant." 88 Kan. at 176. In contrast, Nelson's actions benefited his private company. Finally, *Weber* qualified the ability to build a line on a highway by stating that it could not invade "the rights of the owners of abutting lands." 88 Kan. 175, Syl. ¶ 2. Thus, while *Weber* recognized that members of the public do not need legislative approval to travel on public roadways, that decision does not support Nelson's claim that members of the public have a right to use roads for all transportation purposes—including burying pipelines to transport materials for private farming operations.

Nelson argues that it is the role of the legislature—not the courts—to restrict people's rights to install pipes in a public highway on a first-come, first-served basis. But while the legislature certainly has the authority to establish and revise public policy, Nelson is mistaken in his premise. He did not have a superior right to use the right-of-way without the landowners' permission. Rather, the property owners had the right to consent to or deny his request to use the right-of-way.

Nelson further asserts that the County's permission to install the pipelines was sufficient to support his actions. We note that the question of the County's consent was disputed and inappropriate for resolution at summary judgment. The evidence presented at trial showed that while the county commission approved initial work for the installation, it did so thinking that Nelson had the landowners' permission—that was what the county counselor advised was required. When the commission learned there was no permission, it reconsidered the proposal over several meetings, and there is no evidence it ever granted a permit. The county sheriff also went to the scene and explicitly told Nelson's team to cease installation of the pipeline.

Caselaw suggests that the authority to grant permission lies with the legislature, not counties. See *Weber*, 88 Kan. at 178 ("The state has sole control of its highways, and the Legislature has full power, within constitutional limitations, to regulate the use of them."); see also *Stauber*, 3 Kan. App. 2d at 346 (finding city could not authorize nontravel use of right-of-way unless it was for a public purpose). And even if the County could have permitted Nelson to install the pipelines for his private business, this installation would have changed the nature of the plaintiffs' property rights. Thus, Nelson's actions still would have required either the landowners' consent (which he did not have) or compensation from the County to the landowners for taking their property rights (which did not occur).

Nelson cites two cases in which companies laid oil and gas pipelines for seemingly private purposes. See *Thompson v. Traction Co.*, 103 Kan. 104, 172 P. 990 (1918); *Murphy v. Gas & Oil Co.*, 96 Kan. 321, 150 P. 581 (1915). But those cases specified that the right to lay such lines applied to "oil for fuel and other

purposes" and "'a natural gas company . . . for the purpose of transporting and distributing natural gas for fuel, light, and power.'" *Thompson*, 103 Kan. at 106; *Murphy*, 96 Kan. at 329 (quoting *Natural-gas Co.*, 71 Kan. 508, Syl.). It does not follow that Nelson can unilaterally take rights-of-way to dispose of hog waste more efficiently. And both were negligence cases in which the court had no occasion to consider whether the companies had obtained permission from the landowners or the State.

As fee owners of the property, the plaintiffs could sue to protect their property rights.

In his final arguments relating to the district court's trespass ruling, Nelson asserts that the plaintiffs did not have a strong enough possessory interest in the public right-of-way to sue for trespass. He cites *Ruthstrom v. Peterson*, 72 Kan. 679, 680, 83 P. 825 (1905), when the Kansas Supreme Court observed that "[t]he only special right which an abutting owner has in a public highway is that of access to his premises." But Nelson ignores the context of this observation—made while discussing the landowner's use of the road itself. The court went on to explain that a landowner's "right to travel [on the road] is not different from the right enjoyed by other members of the community." 72 Kan. at 680. Traveling on the road is different from owning and controlling the property adjacent to the roadway.

The Kansas Supreme Court has recognized *Ruthstrom* as holding that "an injunction will not lie at the suit of a private person to protect the public interests." *Weinlood v. Simmons*, 262 Kan. 259, 267, 936 P.2d 238 (1997). Rather, a plaintiff "must have a special private interest distinct from that of the public at large in order to bring an actionable claim." 262 Kan. at 267. This principle does not apply to the plaintiffs here, who are suing for damages to protect their own property interests—not the interests of the public at large. And Kansas law recognizes that while the Rosses and Field may have the same right to travel on the road as anyone else, as abutting landowners they have a distinct property interest that other members of the public do not. See *Beckwith*, 10 Kan. at 607-08.

Nelson also cites *Hefley v. Baker*, 19 Kan. 9, 11 (1877), in which the court found that a plaintiff who possessed land but did

not own it could not recover for damage to the land—only the owner could. 19 Kan. at 11. Here, however, the Rosses and Field own the right-of-way, and the public only possesses it under an easement for travel purposes. Because the Rosses and Field are the owners, *Hefley* does not bar recovery.

The district court's decision accurately and ably synthesized the caselaw on trespass. If a private person wants to install a pipeline in the right-of-way of a public highway, that pipeline must serve a public purpose—like providing a utility to the community. Without a public purpose, the person must have permission to install the pipeline. Depending on the nature of the installation and the property, this permission may be granted by the abutting landowners or the legislature. Nelson installed pipes for a private purpose and had no permission from the landowners or the legislature. The district court did not err in granting the plaintiffs summary judgment on their trespass claims.

1.2. *There was evidence to support the damages for the trespass claims.*

Nelson challenges the damages the jury awarded (and the district court confirmed, subject to a slight reduction to conform to the evidence) for the trespass claims. He argues that these damages—which were based on the cost to remove the pipelines from the plaintiffs' properties—were inappropriate and unsupported by the evidence. In particular, Nelson notes that the plaintiffs agreed not to remove the pipes until this case concluded; he asserts that this inaction effectively undermined their damages claims. And he argues that the plaintiffs suffered no real injury from having pipes in the ground.

Appellate courts examine the correct measure of damages de novo, viewing the record in the light most favorable to the prevailing party. *Peterson v. Ferrell*, 302 Kan. 99, 106-07, 349 P.3d 1269 (2015).

"When calculating damages for a trespass, the general rule is that a plaintiff can recover for any loss sustained." *Armstrong*, 305 Kan. at 35. The "'wrongdoer should compensate for all the injury naturally and fairly resulting from [the] wrong.'" 305 Kan. at 35 (quoting *Mackey v. Board of County Commissioners*, 185 Kan.

139, 147, 341 P.2d 1050 [1959]). "From every direct invasion of the person or property of another, the law infers some damage, without proof of actual injury." *Longenecker v. Zimmerman*, 175 Kan. 719, 721, 267 P.2d 543 (1954).

The district court found that Nelson trespassed on the plaintiffs' land by installing pipes in the right-of-way. The plaintiffs did not consent to the pipes' presence, so paying for removal would "'compensate for all the injury naturally and fairly resulting from'" the installation. *Armstrong*, 305 Kan. at 35. And the cost of removal was the only evidence of damages presented at trial; the parties never presented evidence of any other measure the jury could have used. The evidence supports the compensatory-damage awards after the district court remitted them slightly to reflect the evidence.

That the plaintiffs agreed before trial not to remove the lines without the court's approval says nothing about the damages they incurred. It simply maintained the status quo until the case is resolved by the courts. Nor do Nelson's cited sources require another damages measure. See 87 C.J.S., Trespass § 116 ("The measure of damages in trespass actions is the sum that will compensate the person injured for the loss sustained."); Restatement (Second) of Torts § 929 (1979) (available damages include loss in value "or at [the plaintiff's] election in an appropriate case, the cost of restoration"). There was no evidence presented showing what the loss in value was or that the cost of removal was disproportionately higher. See Restatement (Second) of Torts § 929, comment b.

Nelson has not shown any error in the damages assessed for the trespass claims.

2. *The district court did not err in submitting the Rosses' nuisance claim to the jury, and the evidence supported the damages the jury awarded for that claim.*

At its heart, a nuisance is "an annoyance." *Sandifer Motors, Inc. v. City of Roeland Park*, 6 Kan. App. 2d 308, Syl. ¶ 1, 628 P.2d 239, *rev. denied* 230 Kan. 819 (1981). This court has described a nuisance as "any use of property by one which gives offense to or endangers . . . life or health, violates the laws of decency, unreasonably pollutes the air with foul, noxious odors or

smoke, or obstructs the reasonable and comfortable use and enjoyment" of another person's property. 6 Kan. App. 2d 308, Syl. ¶ 1. The Rosses claimed that spraying the effluent near their property—and the attendant odor and pests that resulted from that action—constituted a nuisance.

Although Nelson's appeal focuses on the district court's ruling on his trespass claim, he also challenges the court's rulings on the Rosses' nuisance claim. First, Nelson argues the district court erred when it allowed that claim to be presented to the jury, asserting that the Kansas Right to Farm Act protected his fertilization practices from nuisance claims. He also claims that there was no evidence submitted at trial to support the jury's finding that spraying the effluent as fertilizer was a nuisance. Again, we are not persuaded by these arguments.

2.1. *The district court properly concluded that the Right to Farm Act did not protect Nelson's farming activities against the Rosses' nuisance claim.*

Nelson asserts that the defendants were entitled to judgment as a matter of law on the Rosses' nuisance claim because the Kansas Right to Farm Act protected his fertilization and irrigation of the NTN cropland from nuisance actions. We agree with the district court's ruling.

The Kansas Legislature enacted the Kansas Right to Farm Act in 1982, motivated by urban and suburban populations encroaching upon traditionally agricultural areas. See K.S.A. 2-3201; *Finlay v. Finlay*, 18 Kan. App. 2d 479, 482-83, 856 P.2d 183, *rev. denied* 253 Kan. 857 (1993). The Act recognized that "agricultural activities conducted on farmland in areas in which nonagricultural uses have moved into agricultural areas are often subjected to nuisance lawsuits" and that "such suits encourage and even force the premature removal of the lands from agricultural uses." K.S.A. 2-3201. The legislature adopted the Act to protect certain agricultural activities from this type of nuisance action. See K.S.A. 2-3201.

To accomplish this goal, K.S.A. 2-3202 immunizes some farming practices from nuisance claims. K.S.A. 2-3202(a) states that "[a]gricultural activities conducted on farmland, if consistent

with good agricultural practices and established prior to surrounding agricultural or nonagricultural activities, are presumed to be reasonable and do not constitute a nuisance." And K.S.A. 2-3202(b) provides that an activity is presumed to be a "good agricultural practice"—and thus not a nuisance—if it "is undertaken in conformity with federal, state, and local laws and rules and regulations." In 2013, the legislature added a third provision to clarify that someone conducting an agricultural activity "[m]ay reasonably expand the scope of such agricultural activity . . . without losing such protection so long as such agricultural activity complies with all applicable local, state, and federal environmental codes, resolutions, laws and rules and regulations." K.S.A. 2-3202(c)(1); see L. 2013, ch. 93, § 2.

The district court found that the protections in K.S.A. 2-3202(a) did not apply to Nelson's actions. In particular, the court found that because Nelson transported the effluent that he used to fertilize the NTN cropland by trespassing on the plaintiffs' properties, his activities did not conform to state law. Nelson challenges this ruling in two ways:

- He asserts that K.S.A. 2-3202(b)'s reference to "laws and rules and regulations" does not include common-law torts like trespass. He argues that this phrase only includes positive legislative enactments or regulations, not caselaw.

- He asserts that K.S.A. 2-3202's reference to "agricultural activity" must be read narrowly and limited to the activity that caused the alleged nuisance—here, the fertilization of the NTN cropland with the effluent—not all of Nelson's farming practices. In other words, the manner of transporting the effluent to the pivot was not relevant to whether the fertilization itself was lawful.

Before turning to these claims, we note that it is unclear from the record whether these protections apply at all. The Right to Farm Act only immunizes agricultural activities that are "established prior to surrounding agricultural or nonagricultural activities." K.S.A. 2-3202(a). The parties do not dispute that the Rosses lived in their house for decades before this lawsuit; nor does the record indicate whether the NTN farmland predated the Rosses'

home, or vice versa. Other courts have refused to apply their states' right-to-farm protections in such situations, requiring the farmers seeking those protections to show that this precondition was met. See, e.g., *Buchanan v. Simplot Feeders, Ltd. Partnership*, 134 Wash. 2d 673, 680-84, 952 P.2d 610 (1998) (reasoning that this timing requirement under Washington's right-to-farm law creates a condition precedent to protection). This rule is consistent with the longstanding principle that "one who comes to the nuisance may not sue to abate it." *Bice v. City of Rexford*, No. 97,227, 2007 WL 2915611, at *1 (Kan. App. 2007) (unpublished opinion).

The district court did not address this question in its decision, however. And the parties do not raise it on appeal. Thus, we presume—without deciding—that the Act *could* apply to Nelson's activities. But we do not find Nelson's arguments persuasive and agree with the district court that the Act does not protect Nelson against the Rosses' nuisance claim.

Undertaken in conformity with state law

We first look to the meaning of "laws" in K.S.A. 2-3202(b). Nelson points to nothing in the text of K.S.A. 2-3202—or in Kansas law generally—to suggest that the legislature intended to exclude the common-law prohibition against trespassing from the "state laws" with which agricultural activities must comply. He merely points out that the legislature logically excluded compliance with *one* common-law principle—nuisance—because the statute's purpose is to immunize farming practices against those claims. But the fact that the legislature carved out an immunization for one tort does not mean that an agricultural activity can violate other provisions of Kansas tort law while still receiving the protection of the Act.

Indeed, under Nelson's theory, the statute would protect him if he placed a pivot directly on the Rosses' land to fertilize his crops. This reading would lead to unreasonable, if not absurd, results. Accord *State v. Arnett*, 307 Kan. 648, 654, 413 P.3d 787 (2018) (courts "must construe a statute to avoid unreasonable or absurd results").

Kansas courts have consistently recognized that general references to state law include the Kansas Constitution, statutes, regulations, and caselaw unless the legislature has indicated a contrary intention. See, e.g., *State v. Dunn*, 304 Kan. 773, 788, 375 P.3d 332 (2016) (state law includes "the Kansas Constitution, Kansas statute, *or* Kansas common law") (emphasis added). Nelson points to no such exclusion here. But the Kansas Livestock Association and Kansas Farm Bureau have submitted a brief as amici curiae, arguing that K.S.A. 2-3202(c)(1) contains this exclusion. Under this provision, a reasonable expansion of agricultural activities will be protected against nuisance suits when the expanded activities comply "with all applicable local, state, and federal environmental codes, resolutions, laws and rules and regulations." K.S.A. 2-3202(c)(1). The amici argue that this language focused on environmental laws and did not refer to Kansas caselaw.

This argument was not raised to the district court and is not included in the parties' briefing. Accord *Hensley v. Board of Education of Unified School District*, 210 Kan. 858, 864, 504 P.2d 184 (1972) (an amicus brief generally may not raise an issue not raised by the parties); *Citifinancial Auto, Inc. v. Mike's Wrecker Service, Inc.*, 41 Kan. App. 2d 914, 919, 206 P.3d 63 (2009) (issues not raised to the district court generally cannot be raised for the first time on appeal). And we are unpersuaded by the amici's interpretation for at least two additional reasons.

- First, the amici's reasoning would grant expansions of "agricultural activity" greater protection than the preexisting farming practices that warranted protection in the first place. Under the amici's rationale, expansions need only comply with environmental laws to receive protections from nuisance suits, while other agricultural activities must comply with any "federal, state, and local laws and rules and regulations" before receiving protection. K.S.A. 2-3202(b). This reading cannot be reconciled with the legislature's express purpose in adopting the Act—protecting longstanding agricultural activities from suburban sprawl. Accord *Miller v. Board of Wabaunsee County Comm'rs*, 305 Kan. 1056, 1066, 390 P.3d 504

(2017) (courts should read statutory provisions *in pari materia* with a view of reconciling and bringing the provisions into workable harmony if possible).

- Second, K.S.A. 2-3202(c)(1) generally references "laws." Both the Kansas and United States Supreme Courts have long recognized that a reference to state law "includes the common-law as well as statutes and regulations." *Jenkins v. Amchem Products, Inc.*, 256 Kan. 602, 610, 886 P.2d 869 (1994) (citing *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 522, 112 S. Ct. 2608, 120 L. Ed. 2d 407 [1992] [plurality opinion]). And phrases like "'all other law'" do not distinguish "between positive enactments and common-law rules of liability." *Norfolk & Western R. Co. v. Train Dispatchers*, 499 U.S. 117, 128, 111 S. Ct. 1156, 113 L. Ed. 2d 95 (1991).

We conclude that K.S.A. 2-3202(b) and (c)(1)'s references to Kansas "laws" include the common law governing torts like trespass, developed through Kansas cases.

Scope of agricultural activities

Because the Act's references to "laws" include trespass law, we must consider whether the district court erred when it included Nelson's trespass in its assessment of whether the Act protected Nelson against the Rosses' nuisance claim. Again, this question requires interpretation of the statutes defining this protection.

Subject to its other requirements, the Act protects "[a]gricultural activities conducted on farmland" if those activities are "undertaken in conformity with federal, state, and local laws and rules and regulations." K.S.A. 2-3202(a), (b). The legislature broadly defined an *agricultural activity* as "the growing or raising of horticultural and agricultural crops, hay, poultry and livestock, and livestock, poultry and dairy products for commercial purposes." K.S.A. 2-3203(a). Agricultural activities include "activities related to the handling, storage and transportation of agricultural commodities." K.S.A. 2-3203(a).

Nelson does not dispute that transporting the effluent from the Stillwater Swine hog farm to the NTN pivot is an agricultural ac-

tivity within this definition. But he claims that activity—transporting liquified hog waste—was not itself a nuisance. Rather, the nuisance arose from spraying the effluent on the NTN farmland. Nelson points out that the Rosses would have a nuisance claim even if the effluent had been transported to the pivot system in a different, lawful manner. Thus, he asserts, the two activities are separate for purposes of the Act's protections, and the district court erred when its analysis of the trespass claim influenced its conclusion on whether Nelson's fertilization practices should receive protection against the Rosses' nuisance claim.

We recognize that, unlike the right-to-farm statutes of several other states, Kansas' Act immunizes agricultural *activities*, not broader agricultural operations. Compare K.S.A. 2-3202 ("agricultural activity") with 3 Pa. Stat. § 954(a) ("agricultural operation"); see also *Burlingame v. Dagostin*, 183 A.3d 462, 470 (Pa. Super. Ct. 2018) (interpreting "agricultural operation" under the Pennsylvania right-to-farm law to mean "the farm, not the farming process"). Thus, we agree with Nelson that an agricultural activity would not be exempted from the Act's protections because of a regulatory dispute involving some different, unrelated aspect of Nelson's farming operation.

But that is not the case here. Nelson's spraying of the effluent on the NTN land was made possible by the infrastructure he installed to transport that effluent from the hog farm. For purposes of the Right to Farm Act, the application and infrastructure that enabled it are logically indistinguishable. And that infrastructure trespassed on the Rosses' and Field's properties.

Only a few Kansas cases have discussed the Right to Farm Act since its adoption in 1982. But our review of the limited discussion in those cases underscores that courts do not view agricultural activities under the right-to-farm laws in a vacuum. Rather, courts' review of agricultural activities under the Act—including whether those agricultural activities conform with state and federal laws—must necessarily consider related farming practices incidental to the challenged agricultural activities that make the challenged activities possible. For example, in *Finlay*, the plaintiffs brought a nuisance claim challenging the smell of the defendant's feedlot. Though this smell likely arose from other activities

incidental to the feedlot, this court noted that the defendant's feedlot activities had violated KDHE instructions to annually clean the feeding pens. 18 Kan. App. 2d at 484. While this violation may not have been the leading cause of the ongoing odors the plaintiffs challenged, the pens made the other feedlot activities possible.

Returning to this case, Nelson could have transported that effluent in a lawful manner and then used the waste to fertilize his property. If he had, then he would not have trespassed on the plaintiffs' properties, and thus our analysis under the Act would be different. But he did not. And transporting the effluent made the fertilization possible. As such, we agree with the district court that Nelson's agricultural activity—fertilizing the NTN cropland—was not "undertaken in conformity with" state law. K.S.A. 2-3202(b).

The district court correctly found that the Kansas Right to Farm Act did not prevent the Rosses from bringing a nuisance claim against Nelson.

2.2. *There was evidence presented at trial to support the jury's nuisance finding.*

Nelson also argues that the evidence presented at trial was insufficient to support the jury's finding that spraying the effluent near the Rosses' home was a nuisance. Appellate courts will not disturb a jury verdict "if there is substantial competent evidence in the record to support it." *Kleibrink v. Missouri-Kansas-Texas Railroad Co.*, 224 Kan. 437, 440, 581 P.2d 372 (1978). Nor will appellate courts weigh evidence or pass on witness credibility; "it is of no consequence that there may have been evidence which, if believed, would have supported a different verdict." 224 Kan. at 440-41.

During the several-day trial, the jury heard evidence that Nelson's activities made life "pure hell" for the Rosses. At the time of trial, Tonda Ross had not stayed at their house for a year because of Nelson's activities. They could not host company at home, and their house became coated with flies when Nelson applied the effluent. Multiple witnesses testified about the stench, and the spray drifted onto Tonda. The local sheriff confirmed that the smell was just as bad inside the Rosses' home as outside.

Nelson was free to present his contrary view of the situation at trial, and he did. The jury, however, found that the evidence supported the Rosses' claim. Substantial competent evidence supports the jury's nuisance verdict.

3. *The district court did not err in awarding punitive damages.*

In his final collection of arguments, Nelson challenges several aspects of the $50,000 in punitive damages awarded for the Rosses' nuisance claim. He asserts that there was insufficient evidence to warrant punitive damages, that the jury disregarded the instructions on when punitive damages were appropriate, and that the district court's award of $50,000 was too high.

3.1. *There was evidence to support the jury's finding that Nelson acted willfully or wantonly when spraying the hog waste near the Rosses' home.*

Punitive damages punish and deter "malicious, vindictive, or willful and wanton behavior." *Adamson v. Bicknell*, 295 Kan. 879, Syl. ¶ 3, 287 P.3d 274 (2012). "To warrant an award of punitive damages, a party must establish by clear and convincing evidence that the party against whom the damages are sought acted with willful or wanton conduct, fraud, or malice." 295 Kan. 879, Syl. ¶ 3; see K.S.A. 60-3702(c).

On appeal, this court reviews a jury's finding that punitive damages are appropriate by asking whether, based on the evidence presented at trial, the jury "could have found it highly probable" that the defendant engaged in malicious, vindictive, willful, or wanton conduct. *In re B.D.-Y.*, 286 Kan. 686, 705, 187 P.3d 594 (2008); *York v. InTrust Bank, N.A.*, 265 Kan. 271, 306-07, 962 P.2d 405 (1998). In making this determination, we view the evidence in the light most favorable to the prevailing party, without reweighing the evidence or evaluating witness credibility. *Hawkinson v. Bennett*, 265 Kan. 564, 583, 962 P.2d 445 (1998).

Before trial, the district court ruled that the Rosses could only pursue punitive damages for their nuisance claim against Nelson himself. And the court further limited the jury's consideration of punitive damages to whether Nelson acted willfully when spraying the effluent near the Rosses' house. Willful conduct involves

an intent or purpose "to do wrong or to cause an injury to another." *Anderson, Administrator v. White*, 210 Kan. 18, 19, 499 P.2d 1056 (1972); see PIK Civ. 4th 103.04.

Our review of the trial record shows there was evidence to support the jury's finding that Nelson used the effluent on the NTN property in a manner that intended to wrong or injure the Rosses. There is no question that Nelson purposefully ran effluent through the pivot—that was the planned waste-disposal method. But there was also evidence presented suggesting that Nelson knew how the effluent was impacting the Rosses and their property. Before Nelson began installing the pipelines to transfer the effluent to the pivot system, Rodney Ross personally expressed concern to Nelson about having hog waste sprayed onto his property. Nelson decided to apply the waste anyway, including on the pivot just across the road from the Rosses' house. In the year after the Rosses filed suit, the evidence showed that Nelson sprayed the fertilizer about twice as many hours as he had the previous year. Based on this evidence, the jury could have found that Nelson engaged in willful conduct.

Nelson points out that he offered evidence at trial showing that he tried to reduce odor and spray problems for the Rosses, such as by not spraying effluent when the wind would carry it towards their house. He also notes that he had a KDHE permit for the waste-disposal operation. But this was all evidence that the jury heard and weighed. See *Hawkinson*, 265 Kan. at 583 (appellate courts do not reweigh evidence). Based on the evidence presented, a rational juror could have found by clear and convincing evidence that Nelson acted willfully, rendering punitive damages appropriate.

3.2. *Nelson has not shown that the instructions regarding punitive damages were unclear, confusing, or incorrect.*

Nelson next asserts that even if the jury could have found he acted willfully, the punitive damages should nevertheless be set aside due to instructional error. He argues that the verdict form was unclear, making it impossible to know whether the jury awarded punitive damages for nuisance or for trespass, which

would have been an improper basis. Put differently, Nelson asserts it is unclear that the jury awarded punitive damages for nuisance.

Nelson never objected to the verdict form. Appellate courts reviewing challenges to jury instructions raised for the first time on appeal will only disrupt the jury's verdict if the party challenging the instructions demonstrates they were clearly erroneous. See K.S.A. 2022 Supp. 60-251(d)(2). "While a verdict form is not technically a jury instruction, it is part of the packet sent with the jury which includes the instructions and assists the jury in reaching its verdict." *Unruh v. Purina Mills*, 289 Kan. 1185, 1197-98, 221 P.3d 1130 (2009). Courts therefore analyze verdict forms under the same standard. 289 Kan. at 1198.

Applying these principles here, we must determine whether the verdict form misstated the law as it applied to this case, and if so, whether we are firmly convinced the jury would have reached a different verdict if a different form were used. See *Siruta v. Siruta*, 301 Kan. 757, 771, 348 P.3d 549 (2015). Question 5 on the verdict form addressed punitive damages. That question, in context with the preceding questions, provided:

"3. Do you find it more probably true than not true that Defendants created a nuisance across the road from Plaintiffs Rodney and Tonda Ross's property?

__✓__ Yes ______ No

[If you answered YES to Question No. 3, then Proceed to Question No. 4. If you answered NO to Question 3, then Skip to Question 6]

"4. If you answered yes to Question 3, what amount of damages were sustained by Plaintiffs Rodney and Tonda Ross as a result of such nuisance?

$__2000______

"5. If you answered yes to Question 3 and awarded damages in question 4, do you find by clear and convincing evidence that punitive damages should be awarded against Defendant Terry Nelson in favor of Plaintiffs Rodney and Tonda Ross?

__✓__ Yes ______ No"

After the trial, Nelson sought to set aside the verdict, arguing that the jury disregarded the district court's instructions about punitive damages. He attached affidavits to his motion from three jurors who claimed to be confused about the punitive-damage instruction and felt compelled to award them based on the preceding instructions. The district court denied the motion.

Nelson speculates that because Question 5 did not explicitly state that punitive damages could only be awarded for the nuisance claim, the jurors could have been confused and awarded punitive damages based on the plaintiffs' trespass claims. But this argument invites us to inquire into the jurors' thought processes, which is improper. Courts are loath to delve into the thought processes of individual jurors. *Williams v. Lawton*, 288 Kan. 768, Syl. ¶ 13, 207 P.3d 1027 (2009); see K.S.A. 60-441. "[T]here is a need for confidentiality of deliberation and verdict finality," so public policy forbids inquiring into how jurors reached a verdict. 288 Kan. at 797. We thus prohibit jurors from impeaching their own verdict unless, for example, "a jury intentionally disregards a court's instructions." 288 Kan. at 798. The district court properly declined Nelson's efforts to allow jurors in this case to impeach their verdict after it had been rendered.

Turning to the language of the verdict form itself, Nelson is correct that the language of Question 5 does not explicitly limit punitive damages to the nuisance claim. But when viewed in context, these questions reasonably informed the jury that any punitive damages would be for nuisance, not trespass. The jury could only reach the punitive-damage question if it "answered yes to Question 3 [was there a nuisance?] and awarded damages in question 4 [if there was a nuisance, what were the damages?]." Given this qualifier, it would make no sense to award punitive damages for trespass. Though the verdict form could have been clearer, it did not misstate or misapply the law.

3.3. *The $50,000 in punitive damages was not inappropriate or excessive.*

In his final argument on appeal, Nelson asserts that the district court's punitive-damage award of $50,000 was excessive. This court reviews the amount of a district court's punitive-damage award for an abuse of discretion. *Smith v. Printup*, 262 Kan. 587, Syl. ¶ 3, 938 P.2d 1261 (1997). A district court abuses its discretion when its decision is unreasonable or based on an error of law or fact. *Adamson*, 295 Kan. 879, Syl. ¶ 2.

In challenging the award, Nelson points to mitigating measures he took to minimize odor problems for the Rosses, such

as monitoring the wind and adding drop nozzles to the pivot to minimize spray. He also points to Kansas courts' recognition that people living in agricultural areas should expect to experience things like unpleasant odors. See *Dill v. Excel Packing Co.*, 183 Kan. 513, 525-26, 331 P.2d 539 (1958). But these are all considerations the district court made in determining the award; appellate courts do not reweigh evidence. *Hawkinson*, 265 Kan. at 583.

And not all the evidence the district court considered portrayed Nelson's actions in a favorable light. For example, the evidence at trial showed that Nelson sprayed the effluent almost twice as often after the Rosses filed suit than in 2019. The district court also heard new evidence that after the trial, Nelson piled truckloads of manure across from the Rosses' home for several days straight.

In determining the appropriate amount of damages, the district court conducted a nuanced analysis of the statutory considerations for punitive damages. See K.S.A. 60-3702(b). It found that some factors weighed in Nelson's favor—such as the fact that he was operating a legitimate business and that the Rosses had a second home to go to. It found that some factors—like the fact that Nelson's conduct was profitable—could be interpreted multiple ways. And it found that some factors favored a larger award. The court ultimately awarded $50,000—less than what the Rosses wanted, but more than what Nelson deemed appropriate. Given the evidence, a reasonable person could agree with this award. The district court did not abuse its discretion.

Nelson also argues that the $50,000 award violated his due-process rights, as the award was disproportionately large compared to the damages the jury awarded for the nuisance claim. The United States Supreme Court has explained that punitive damages may violate a party's constitutional right to due process of law in at least two ways. First, the Due Process Clause of the Fourteenth Amendment to the United States Constitution "makes the Eighth Amendment's prohibition against excessive fines and cruel and unusual punishments applicable to the States." *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 433-34, 121 S. Ct. 1678, 149 L. Ed. 2d 674 (2001). Second, the Due Process Clause itself "prohibits the States from imposing 'grossly excessive' punishments on tortfeasors." 532 U.S. at 434.

Courts assess three considerations when determining whether a punitive-damage award shocks the conscience and thus violates a party's due-process rights: the reprehensibility of the defendant's conduct; the ratio of punitive damages to actual damages for the injury; and comparable awards for similar conduct. See 532 U.S. at 435; *Hayes Sight & Sound, Inc. v. ONEOK, Inc.*, 281 Kan. 1287, 1307, 136 P.3d 428 (2006). This court has unlimited review over the constitutionality of a punitive-damage award. 281 Kan. at 1307.

In rendering its award, the district court relied on *Ostroski v. Lynn Revocable Trust*, No. 109,112, 2014 WL 2747571 (Kan. App. 2014) (unpublished opinion), in which the defendant harassed his neighbors in various ways, like shining a floodlight into their house overnight. The panel found that the defendant's conduct was sufficiently reprehensible because it "inflicted a personal, rather than an economic, harm" on the plaintiffs. 2014 WL 2747571, at *8. The panel also recognized that "[t]he law gives special protection to homes and to people in their homes," so targeting the plaintiffs in their homes added to the reprehensibility. 2014 WL 2747571, at *8.

As to the ratio consideration, the panel resisted a bright-line ratio, finding it would be "unreflectively formulaic." 2014 WL 2747571, at *10; see *State Farm Mutual Auto Insurance Co. v. Campbell*, 538 U.S. 408, 425, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (2003) (noting "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages . . . will satisfy due process"). The panel also noted that K.S.A. 60-3702 caps punitive-damage awards based on the defendant's income, serving "much the same purpose as the ratio review." *Ostroski*, 2014 WL 2747571, at *11. And while the panel found little help when looking to comparable awards, it ultimately found a $27,500 award—compared to just $100 in actual damages—satisfied due process, even suggesting that the district court could award more on remand if it wanted to. 2014 WL 2747571, at *18.

Applying these principles here, the district court's punitive-damage award did not violate Nelson's right to due process of law. Nelson, like the defendant in *Ostroski*, inflicted a personal harm on the Rosses in their home—"'the ultimate sanctuary.'" 2014 WL 2747571, at *7. His activities caused a lasting stench and a mist

that sprayed their house, cars, and Tonda Ross. They could not host company at home, their house became covered in flies, and Tonda had to stay elsewhere for at least a year. And after losing at trial, Nelson piled truckloads of manure directly across from the Rosses' home. Nelson's conduct was reprehensible enough to warrant punitive damages.

That the award here exceeded a single-digit ratio—25 to 1—does not make it unconstitutional. The award was meant to punish and deter Nelson. After reviewing his financial information—which is not in the record because Nelson obtained a protective order preventing its disclosure—the district court determined that $50,000 would "sting" without being "grossly excessive." After all, the jury awarded only $2,000 in compensatory damages, so the district court apparently concluded that a single-digit ratio would not meaningfully punish or deter Nelson. The ratio here is also modest compared to the 275 to 1 ratio approved in *Ostroski*.

As in *Ostroski*, looking to comparable awards sheds little light on the analysis. See 2014 WL 2747571, at *13; *Martin v. Johnston*, No. 70,426, 1994 WL 17120421, at *3 (Kan. App. 1994) (unpublished opinion) ($12,500 punitive-damage award for a nuisance judgment in a boundary-line dispute). Nor do related criminal sanctions provide particularly useful guidance, though they would suggest that $50,000 is high. See *Ostroski*, 2014 WL 2747571, at *13; see also K.S.A. 2022 Supp. 21-6204. But even assuming this factor favored Nelson, it would not be strong enough on its own to render the punitive-damage award unconstitutional.

Finally, the amici brief argues that Kansas law prohibits punitive-damage awards in agricultural nuisance cases. For support, the brief points to K.S.A. 2-3205(a), which defines "[t]he exclusive compensatory damages that may be awarded to a claimant where the alleged nuisance originates from farmland primarily used for agricultural activity." But the statute's plain language establishes the exclusive methods for calculating *compensatory*—not punitive—damages in agricultural nuisance cases; it does not say compensatory damages are the *only* damages available in those cases.

Kansas courts have long recognized that punitive damages are available for nuisance claims that resulted from willful conduct.

See *Ostroski*, 2014 WL 2747571, at *2-3. While the legislature is free to indicate that punitive damages are not available for some categories of claims, the Kansas Right to Farm Act contains no such exemption. K.S.A. 2-3205(a) merely defines the "exclusive compensatory damages" for nuisance claims originating from agricultural activity on farmland. It does not address punitive damages at all.

Kansas courts will not categorically exempt claims from punitive damages if the legislature has not specifically done so. As the Kansas Supreme Court explained in rejecting a similar argument under the Uniform Trust Code:

> "We find it significant the Kansas Legislature created some exceptions to the availability of punitive damages in K.S.A. 60-3702. . . . [To exclude the claim for punitive damages requested,] we would have to graft another exception onto the statute. The same is true with K.S.A. 58a-1002, which allows punitive damages without exception. In this context, the question is not whether to allow punitive damages but whether to extinguish damages the Legislature has authorized. And it is not an appropriate role for a court to add those words to any of the Kansas statutes without an indication of legislative intent, especially when doing so would limit a remedy the Kansas Legislature has allowed." *Alain Ellis Living Trust v. Harvey D. Ellis Living Trust*, 308 Kan. 1040, 1060, 427 P.3d 9 (2018).

In short, the plain language of K.S.A. 2-3205(a) does not preclude a claim of punitive damages in agricultural nuisances when such a claim is otherwise available under Kansas law. And the district court's assessment of $50,000 in punitive damages against Nelson for the Rosses' nuisance claim was not inappropriate or constitutionally excessive.

After carefully reviewing the record and the parties' arguments, we find that Nelson has not shown any error in the proceedings before the district court. We thus affirm the judgment against the defendants.

Affirmed.