NOT DESIGNATED FOR PUBLICATION

No. 114,890

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

PAMELA HEIMERMAN, Individually, as Surviving Spouse
and Heir at Law of DANIEL JOSEPH HEIMERMAN, Deceased,
Appellant,

v.

ZACHARY ROSE and PAYLESS CONCRETE PRODUCTS, INC.,
Appellees,

and

NORTHERN CLEARING, INC. and OLD REPUBLIC INS. CO.,
Intervenors/Appellees.

MEMORANDUM OPINION

Appeal from Allen District Court; DANIEL D. CREITZ, judge. Opinion filed January 13, 2017. Affirmed.

Scott J. Mann and *Jesse Tanksley*, of Mann, Wyatt & Rice, LLC, of Hutchinson, for appellant.

Brian J. Fowler and *Kyle P. Sollars*, of Evans & Dixon, LLC, of Kansas City, Missouri, for intervenors/appellees Northern Clearing, Inc., and Old Republic Ins. Co.

Before SCHROEDER, P.J., BUSER, J. and WALKER, S.J.

Per Curiam: Pamela Heimerman appeals the denial of her request for the district court to apportion damages for loss of consortium and loss of spousal services in order to obtain an offset of Northern Clearing Inc.'s (Northern) workers compensation lien attached to her settlement with the third-party tortfeasor. The district court found her claim was settled in federal district court without any apportionment, and she was bound

by the decision of the federal district court. We agree with the district court as it properly recognized the federal district court's decision and declined to modify the negotiated bulk settlement Pamela made with Zachary Rose and Payless Concrete Products, Inc. (Payless). In order to avoid the lien's attachment, Pamela should have asked the federal district court—since it determined the third-party's liability—what portion of her proceeds reflected damages for loss of consortium and loss of spousal services when it approved the apportionment of the proceeds between Pamela and her son. We affirm.

FACTS

On August 31, 2013, Dan Heimerman was driving in Allen County in the course of his employment with Northern. He was rear-ended by Rose who was driving a dump truck owned by Payless. Dan was killed and his passenger was severely injured. He was survived by his wife, Pamela, and their son, Lucas Heimerman.

Lucas, a Florida resident, brought a wrongful death claim against Rose and Payless in September 2013 in the United States District Court for the District of Kansas. Pamela joined the federal lawsuit in November 2013. Pamela also filed a separate wrongful death claim against Rose and Payless in Allen County in October 2013. In a workers compensation action, Pamela was awarded $300,000 in workers compensation death benefits pursuant to K.S.A. 44-504. Northern retained subrogation rights and obtained a workers compensation lien pursuant to K.S.A. 44-504(b) against any recovery Pamela might obtain from Rose and Payless; however, Northern did not intervene in the federal lawsuit.

The parties settled the federal lawsuit, and damages were apportioned between Lucas and Pamela. After payment of costs, expenses, and attorney fees, Pamela received a net recovery of $258,637 from the settlement. In its journal entry of judgment, the federal district court explicitly stated: "Pamela Heimerman and her attorney shall satisfy

any and all valid liens, including the worker's compensation lien pursuant to K.S.A. 44-504." Pamela did not seek apportionment of her claims for loss of consortium and loss of spousal services before the federal district court.

Pamela unsuccessfully attempted to negotiate a resolution with Northern regarding its workers compensation lien. In June 2015, Northern moved to intervene in the Allen County District Court case based on its lien. Pamela filed a motion for apportionment pursuant to K.S.A. 44-504(b), arguing the validity of Northern's lien had never been addressed by a court and the monies received for her claims for loss of consortium and loss of spousal services were not subject to the lien. Northern moved to dismiss Pamela's motion, arguing her apportionment request should have been made and determined in the federal district court.

Following a hearing and briefing from the parties, the district court granted Northern's motion to dismiss, concluding Pamela's motion for apportionment should have been made in the federal district court. Pamela filed a motion for reconsideration and/or to alter or amend the judgment. The district court denied her motion.

Upon receipt of the decision from the district court, Pamela filed a motion before the federal district court asking for the closed case to be reopened. She requested the federal district court conduct an evidentiary hearing to address the validity of the workers compensation lien. In her motion, Pamela claimed no court had determined the validity of the workers compensation lien held by Northern. The federal district court found Pamela's decision to rely on Allen County District Court to try the validity of Northern's claim was a tactical decision. It further found: "This case does not present the exceptional circumstances necessary to allow Mrs. Heimerman to renew litigation in this closed case."

Pamela timely appealed.

ANALYSIS

The issue on appeal turns on the interpretation of K.S.A. 44-504. Interpretation of a statute is a question of law over which appellate courts have unlimited review. The most fundamental rule of statutory construction is the intent of the legislature governs if that intent can be ascertained. *Neighbor v. Westar Energy, Inc.*, 301 Kan. 916, 918, 349 P.3d 469 (2015). An appellate court must first attempt to ascertain legislative intent through the statutory language enacted, giving common words their ordinary meaning. *Cady v. Schroll*, 298 Kan. 731, 738, 317 P.3d 90 (2014). Courts must construe statutes to avoid unreasonable or absurd results and presume the legislature does not intend to enact meaningless legislation. *Fisher v. DeCarvalho*, 298 Kan. 482, 495, 314 P.3d 214 (2013).

Pamela argues the district court erred for two reasons. First, she argues there has never been any determination as to whether Northern's lien is valid. Second, she argues her request for apportionment must be considered by a court based on the language of K.S.A. 44-504(b). Her arguments are misplaced.

As to her first argument, Pamela misconstrues the plain language of the federal district court's order. In her brief, she places emphasis on the language "any and all *valid* liens, including the worker's compensation lien *pursuant to K.S.A. 44-504*." Essentially, she argues the federal court's order left open the question of whether Northern's lien was validly obtained and legally enforceable. She argues she "agreed to satisfy any 'valid' workers compensation lien 'pursuant to' K.S.A. 44-504," but she "[did not] concede that [Northern's] lien was valid, nor did she concede that [Northern] had a lien on all or a portion of the third party recovery." She fails to explain, however, why she did not raise these issues before the federal court, or, at a minimum, ask the federal court to clarify its order.

Pamela's argument is purely an exercise in semantics and is inconsistent with the order's plain language. The order approving the settlement and apportionment of the proceeds dated February 23, 2015, plainly states Pamela shall satisfy "any and all valid liens, including *the* worker's compensation lien pursuant to K.S.A. 44-504." (Emphasis added.) By its plain language, the order references Northern's existing lien pursuant to K.S.A. 44-504. If the order had stated to the effect of "any and all valid liens, including *any* lien pursuant to K.S.A. 44-504," Pamela's argument might have merit. Here, however, the federal court's order suggests the lien: (1) already existed; (2) was valid; and (3) was obtained pursuant to K.S.A. 44-504. Moreover, as the federal district court noted in its order filed February 10, 2016, Pamela "represented that she 'will satisfy the worker's compensation lien pursuant to K.S.A. 44-504, pursuant to either a negotiated agreement with the lienholder or in accord with an order issued by the state court.'"

Her own representations to the federal district court acknowledged the workers compensation lien pursuant to K.S.A. 44-504 and that she would satisfy the lien. The only question was the value of the lien. Her representations to the federal district court make her argument on appeal seem disingenuous as she agreed to "satisfy all valid liens." Pamela failed to seek any apportionment of the settlement proceeds hoping she could reach a beneficial settlement with Northern. At best, she invited the error she now complains of. When a party has invited error, the error cannot be complained of on appeal. *Thoroughbred Assocs. v. Kansas City Royalty Co.*, 297 Kan. 1193, 1203, 308 P.3d 1238 (2013).

Further, as a matter of law, there can be no dispute Northern had a valid lien pursuant to K.S.A. 44-504. "[T]here is no statutory requirement that a lienholder file a notice of lien to be subrogated to recovery from a third party. Such subrogation and creation of a lien occurs automatically under K.S.A. 44-504(b). [Citation omitted.]" *Ballard v. Dondlinger & Sons Const. Co.*, 51 Kan. App. 2d 855, 868, 355 P.3d 707 (2015). When an employer pays workers compensation benefits under K.S.A. 44-504, a

lien is created by operation of law. Here, there is no dispute Northern paid Pamela workers compensation death benefits pursuant to K.S.A. 44-504. Accordingly, Northern had a valid lien pursuant to K.S.A. 44-504(b). *Ballard*, 51 Kan. App. 2d at 867-68. Pamela's argument lacks merit.

Similarly, Pamela's second argument is not supported by K.S.A. 44-504(b), which states in pertinent part:

> "In the event of recovery from such other person by the injured worker or the dependents or personal representatives of a deceased worker by judgment, settlement or otherwise, the employer shall be subrogated to the extent of the compensation and medical aid provided by the employer to the date of such recovery and shall have a lien therefor against the entire amount of such recovery, excluding any recovery, or portion thereof, determined by a court to be loss of consortium or loss of services to a spouse."

Here, the settlement agreement and the federal district court's order are silent as to how much of Pamela's net recovery was for loss of consortium or loss of spousal services. Pamela did not request any such determination be made by the federal district court. As this court noted in *Ballard*, a party may not avoid satisfying an employer's lien based on claims of loss of consortium and loss of spousal service where a court has not made a determination on those claims. See 51 Kan. App. 2d at 868. Pamela argues:

> "[T]he language [of K.S.A. 44-504(b)] is '*a* court,' not '*the* court.' The legislature's selection of the word 'a' court implies that it understands that a workers compensation lien is an entirely separate issue [than] the merits of a plaintiff['s] claim against a defendant. There is no reason that the same court that serves as the venue for a plaintiff's civil action against a defendant must be the same court and venue for any lien disputes that arise from the recovery."

She fails, however, to support this argument with pertinent authority. 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. *State v. Tague*, 296 Kan. 993, 1001, 298 P.3d 273 (2013). She further fails to explain why the federal district court, as the presiding court determining the third-party's liability and her damages, was not capable of determining the elements of her damages, including loss of consortium and loss of spousal services.

Actually, K.S.A. 44-504(b) provides the court that determined the third-party's liability should also be the court that determines the type of damages the injured employee suffered since it grants the workers compensation lienholder the right to notice of the action and standing to intervene. We find no support for Pamela's claim that K.S.A. 44-504(b) discourages or prevents the court presiding over the third-party's liability from allocating the type of damages suffered, including loss of consortium or loss of spousal services, when it approves a settlement agreement. Rather, by its plain language, the statute contemplates a court doing so.

> "In the event of recovery from such other person . . . by judgment, *settlement* or otherwise, the employer shall be subrogated to the extent of the compensation and medical aid provided by the employer . . . excluding any recovery, or portion thereof, determined by a court to be loss of consortium or loss of services to a spouse." (Emphasis added.) K.S.A. 44-504(b).

Pamela's assertion that, "[t]here is no reason that the same court that serves as the venue for a plaintiff's civil action against a defendant must be the same court and venue for any lien disputes that arise from the recovery," is wholly misplaced. A court's factual findings allocating damages for loss of consortium and loss of spousal services in no way implicates resolution of a lien dispute between the plaintiff and employer. Such a finding is solely related to the damages suffered by the plaintiff because of the third-party tortfeasor's actions. Accordingly, under the facts of this case, the federal district court presiding over the ultimate settlement of the third-party claim had jurisdiction to determine the nature and extent of Pamela's various damages.

In *Varner v. Gulf Ins. Co.*, 18 Kan. App. 2d 801, 859 P.2d 414 (1993), and *Houston v. Kansas Highway Patrol*, 238 Kan. 192, 708 P.2d 533 (1985), bulk settlements of the employees' claims were settled against the third-party tortfeasor without describing the various elements of damages included. Both were decided prior to K.S.A. 44-504(b)'s last amendment in 1993. That amendment now detaches the workers compensation lien from those damages found to be for loss of consortium and loss of spousal services. The *Varner* and *Houston* courts both found bulk settlements entered into and approved without apportionment of various elements of damages allowed the workers compensation lien to attach to all of the settlement funds equal to the value of workers compensation benefits provided or to be provided in the future. We find both *Varner* and *Houston* persuasive as they discuss the impact of a bulk settlement with a pending statutory workers compensation lien.

Pamela should have followed the teachings of *Varner* and *Houston* to allocate her elements of damages. Upon allocation, the workers compensation lien would not attach to the loss of consortium and loss of spousal services damages. The record reflects Northern had notice of the federal district court action and chose not to intervene. When Northern decided not to intervene, it would have been bound by the damage allocation by the federal district court. The same is now true for Pamela. She is bound by the bulk settlement made in the federal district court and cannot ask another court—Allen County District Court—to make its own determination of how the settlement reached in federal district court should now be divided among various elements of damages when she could not negotiate a favorable settlement with Northern on the value of the lien.

Pamela's proposed construction of K.S.A. 44-504(b) is unreasonable. This court cannot construe a statute in a manner which leads to an unreasonable or absurd result. *Fisher*, 298 Kan. at 495. It opens the door for an entirely different court to reopen, relitigate, and amend the judgment of the court from which recovery was obtained, where the claim at issue is legally and factually distinct and between different parties. Her

request violates the rule of comity. See *In re Marriage of Laine*, 34 Kan. App. 2d 519, 525, 120 P.3d 802 (2005) ("The general rule is that courts should exercise comity between themselves in order to avoid expense and harassment and inconvenience to the litigants. This general rule is applicable not only between courts of coordinate jurisdiction within the same state, but between federal courts and state courts, and between state courts of different states."). The district court exercised its discretion and properly found the decision by the federal district court controlled.

Affirmed.