OFFICIALLY SELECTED
CASES ARGUED AND DETERMINED

IN THE

COURT OF APPEALS

OF THE

STATE OF KANSAS

Reporter:
SARA R. STRATTON

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JUDGES AND OFFICERS OF THE KANSAS
COURT OF APPEALS

CHIEF JUDGE:

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

JUDGES:

HON. HENRY W. GREEN, JR. ..... Leavenworth
HON. THOMAS E. MALONE ..... Wichita
HON. STEPHEN D. HILL ..... Paola
HON. G. GORDON ATCHESON ..... Westwood
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State v. Arita	124,928	Wyandotte	06/09/2023	Convictions reversed; sentences vacated
State v. Armstrong	124,709	Douglas	06/09/2023	Affirmed in part; reversed in part; remanded with directions
State v. Bazy	125,434	Wyandotte	06/16/2023	Affirmed
State v. Brown	125,080	Sedgwick	05/12/2023	Affirmed in part; dismissed in part
State v. Charlsen	124,795	Sedgwick	05/19/2023	Appeal dismissed
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TITLE	DOCKET NUMBER	DISTRICT COURT	DATE OF DECISION	DECISION
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APPELLATE PROCEDURE:

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

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

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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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Constitutions Do Not Prohibit Use of Evidence Obtained in Violation of Provisions—Exclusionary Rule Created as Deterrent by United States Supreme Court. Neither the Fourth Amendment to the United States Constitution nor section 15 of the Kansas Constitution Bill of Rights expressly prohibits the use of evidence obtained in violation of their respective provisions. Instead, to supplement the bare text of the Fourth Amendment, the United States Supreme Court created the exclusionary rule as a deterrent barring the introduction of evidence obtained in violation of the

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Fourth Amendment in criminal prosecutions. The exclusionary rule is not an individual right and applies only when it results in appreciable deterrence. *State v. Cline* ……..…….... 167

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

Fifth Amendment's Takings Clause—Application to State and Local Government Entities Through Fourteenth Amendment. The Fifth Amendment to the United States Constitution prohibits the taking of private 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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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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Right to Vote Is Foundation of Representative Government. The right to vote is the foundation of a representative government that derives its power from the people. All basic civil and political rights depend on the right to vote. *League of Women Voters of Kansas v. Schwab* …….. 187

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

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

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

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

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

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

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affirmatively assumes the role of caregiver to a dependent adult, and discourages or precludes others from filling that role, that person has the responsibility to act reasonably in fulfilling the obligations required of that role. *State v. Burris* ……..……..…….. 250

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— 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

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

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

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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*

EQUITY:

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

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ESTOPPEL AND WAIVER:

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

EVIDENCE:

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

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

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:

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

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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 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

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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

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

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— 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

POLICE AND SHERIFFS:

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

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

PROBATE CODE:

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

PUBLIC HEALTH:

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

Immunity under Federal PREP Act for Covered Persons from Liability for Claim under Federal Statute. The Public Readiness and Emergency Preparedness (PREP) Act immunizes "covered persons" from liability for any claim for loss

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that has a causal relationship with the administration of a "covered countermeasure." 42 U.S.C. § 247d-6d(a), (d) (Supp. 2020).
M.T. v. Walmart Stores, Inc. 401

SEARCH AND SEIZURE:

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

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

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

STATUTES:

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

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

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

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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 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

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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:

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*

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

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

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

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

(530 P.3d 737)

No. 124,971[1]

AMANDA DULING, *Appellee*, v. MID AMERICAN CREDIT UNION, *Appellant*.

SYLLABUS BY THE COURT

1. ARBITRATION—*Requirement of Agreement to Arbitrate Dispute.* A party cannot be required to arbitrate a dispute without an agreement to arbitrate.

2. SAME—*Contract Law Determines Whether Agreement to Arbitrate.* Whether the parties agreed to arbitrate is determined by contract law.

3. SAME—*Enforceable Agreement to Arbitrate—Burden on Moving Party to Present Evidence.* A party who moves to compel arbitration has the "initial summary-judgment-like burden" of presenting enough evidence to show an enforceable agreement to arbitrate.

4. CONTRACTS—*Acceptance of Contract—Requires Outward Expressions of Assent.* Acceptance of a contract is measured not by the parties' subjective intent, but rather by their outward expressions of assent.

5. SAME—*Interpretation of Ambiguous Language—Interpreted against Drafter.* We interpret ambiguous language in a written document against the drafter.

Appeal from Sedgwick District Court; DEBORAH HERNANDEZ MITCHELL, judge. Opinion filed December 16, 2022. Affirmed.

Benjamin A. Ramberg and *John G. Schultz*, of Franke Schultz & Mullen, P.C., of Kansas City, Missouri, for appellant.

Anthony A. Orlandi, of Branstetter, Stranch & Jennings, PLLC, of Nashville, Tennessee, pro hac vice, and *Richard S. Fisk*, of Beam-Ward, Kruse, Wilson & Fletes, LLC, of Overland Park, for appellee.

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

GARDNER, J.: Mid American Credit Union (MACU) appeals the denial of its motion to compel arbitration in a putative class action that

[1]**REPORTER'S NOTE:** Previously filed as an unpublished opinion, the Supreme Court granted a motion to publish by an order dated April 21, 2023, under Rule 7.04(e) (2023 Kan. S. Ct. R. at 47). The published opinion was filed with the clerk of the appellate courts on May 5, 2023.

Amanda Duling, a MACU member, filed against it. MACU argues that it acted according to the "change [of] term" provision in the parties' contract by unilaterally adding arbitration and class action waiver provisions to Duling's membership agreement and that Duling accepted the arbitration provision by continuing to use her account. Finding no reason to overrule the district court's negative finding against MACU, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Duling opened an account with MACU in 2018. The terms of the contract that Duling signed to open this account—her membership agreement—included an "Amendments and Termination" section. This section outlined MACU's authority to change the terms of the agreement:

"We may change our bylaws and any term of this agreement. Rules governing changes in rates are provided separately in the Truth-in-Savings disclosure or in another document. For other changes we will give you reasonable notice in writing or by any other method permitted by law. . . . Reasonable notice depends on the circumstances, and in some cases such as when we cannot verify your identity or we suspect fraud, it might be reasonable for us to give you notice after the change or account closure becomes effective. For instance, if we suspect fraudulent activity with respect to your account, we might immediately freeze or close your account and then give you notice. . . . If we have notified you of a change in any term of your account and you continue to have your account after the effective date of the change, you have agreed to the new term(s)."

Her membership agreement included notice requirements for amendments:

"Any written notice you give us is effective when we actually receive it, and it must be given to us according to the specific delivery instructions provided elsewhere, if any. We must receive it in time to have a reasonable opportunity to act on it. If the notice is regarding a check or other item, you must give us sufficient information to be able to identify the check or item, including the precise check or item number, amount, date and payee. Written notice we give you is effective when it is deposited in the United States Mail with proper postage and addressed to your mailing address we have on file. Notice to any of you is notice to all of you."

The membership agreement included no provision mentioning arbitration or class actions.

Notice of Arbitration Provisions

In a cover letter dated December 7, 2020, MACU notified its members that it would be adding a new arbitration provision to their membership agreements:

"Thank you for your continued loyalty to Mid American Credit Union. As a member owned financial co-operative we are always mindful that it is our duty to protect credit union resources. As good stewards it is imperative that we stay up to date with all regulatory and legal requirements placed upon the credit union.

"Because of this ongoing duty we are adopting a new Arbitration of Claims and Disputes and Waiver of Class Action provision. This new provision will provide more clarity as to how legal disputes between the credit union and its members shall be resolved. We are making this change as a way to protect our member owners and the Credit Union through the parties working together to resolve disputes. This new Arbitration and Class Action Waiver provision will become effective on December 28, 2020."

MACU attached to its cover letter a copy of the arbitration and class action provision, which stated that, with limited exceptions, MACU or its members could force "any disputes" about a member's account to be "resolved by binding arbitration." And once effective, the provision would preclude class actions or the joinder of parties to such disputes.

Opt-out Language in Cover Letter and Arbitration Provision

MACU's cover letter stated that the arbitration provisions would become effective on December 28, 2020, that members would have until January 6, 2021, to opt out, and that continued use by a member who did not opt out would be treated as consent:

"This new Arbitration and Class Action Waiver provision will become effective on December 28, 2020. You will have until January 6, 2021 to exercise your right to opt out of this provision. If you do not opt out of this provision, then your continued use or maintenance of your credit union account will act as your consent to this new provision."

The cover letter also stated that "[i]nstructions on how to opt out are included in the new provision provided with this letter." But those instructions on how to opt out stated a different opt-out date than the cover letter's January 6, 2021 opt-out date. Under the heading "Right to Reject this Resolution of Disputes by Arbitration provision," rather than stating any date certain, the new arbitration provision explained that MACU members could opt out by sending written notice to MACU's address within 30 days of the

opening of the member's account or the mailing of the notice, "whichever is sooner":

> "You have the right to opt out of this agreement to arbitrate if you tell us within 30 days of the opening of your account or the mailing of this notice, whichever is sooner. To opt out, send us written notice that you reject the Resolution of Disputes by Arbitration provision, including your name as listed on your account and your account number to the following address: Mid American Credit Union, 8404 West Kellogg Drive, Wichita, KS 67209-1845[.]
>
> "Otherwise, this agreement to arbitrate will apply without limitation, regardless of whether 1) your account is closed; 2) you pay us in full any outstanding debt you owe; or 3) you file for bankruptcy."

Duling's Initiation of a Class Action

In October 2021, Duling filed a putative class action petition alleging MACU had breached its contract, violated the Kansas Consumer Protection Act, and unjustly enriched itself. Duling's petition alleged that MACU had improperly assessed or collected insufficient funds fees from her and other MACU members.

In addition to filing an answer, MACU moved to stay all legal proceedings and to compel arbitration or, alternatively, to dismiss. MACU attached to its motion a copy of the December 7 cover letter and argued that Duling was contractually required to resolve her dispute through arbitration, since she had not opted out by January 6, 2021.

Duling responded that she had received no letter or notice about MACU adding an arbitration provision. Duling also argued that the cover letter—which MACU had attached as an exhibit to its response—insufficiently established that MACU had sent notice on or after the date listed because the cover letter was unsigned, was not on MACU's letterhead, and was unaccompanied by a copy of the arbitration provision that it alluded to. Duling also claimed that the cover letter was false or misleading.

MACU replied to Duling's contentions, attaching several exhibits:

- a copy of the cover letter dated December 7, 2020;
- an affidavit from MACU's President/CEO (Brad Herzet), attesting that MACU had mailed all members the cover letter and a copy of the arbitration provision on December 7, 2020; and

- a copy of a mailing invoice, dated December 16, 2020, listing the units and total price of several "Class Action Change Items," which included, among other things, an "all member cover letter" and a "change letter."

At the hearing on MACU's motion to compel arbitration, MACU argued

- the cover letter was an offer, clearly indicating that Duling had until January 6, 2021, to opt out of the provisions;
- because Duling continued to use her credit account after that date, she accepted the terms of the provision—thus forming a binding arbitration agreement;
- Duling's continued use of her account was an "affirmative act" of acceptance that fell outside the general rule precluding acceptance of a contract by silence;
- no "mutual consent" was required because Kansas recognizes "unilateral contracts"; and
- the arbitration and class action provisions were not "adding a new term" to the parties' contracts but were simply "a change to the agreement," citing the "legal actions affecting your account" and "resolving account disputes" sections of Duling's membership agreement.

The district court denied MACU's motion to compel arbitration. Although it noted that public policy favored arbitration, the district court determined that the parties had not entered into a valid arbitration agreement. Instead, the court found that the arbitration and class action provisions were "new terms not contemplated by the initial agreement." The court explained that "[a]lthough the initial agreement . . . mention[ed] claims disputed, the entire waiver of methods of pursuing claim[s] exceeds a mere change and, essentially, [was] a new provision."

The district court also found that MACU's notice "indicate[d] the opt-out time had already lapsed." Because the arbitration provision stated that the time to opt out ended 30 days after Duling opened her account—the earlier of the two dates—"she may have seen the opt-out provision as futile as more than 30 days had passed since she opened her account." Rejecting MACU's claim

that the "whichever is sooner" language was simply printed incorrectly, the district court construed the language against MACU as the drafter. Finding no facts showing mutual consent to arbitrate, the district court denied MACU's motion.

MACU timely appeals.

We note that Duling also briefs several issues on appeal, as if she had appealed. She challenges the sufficiency of MACU's notice, alleging that MACU failed to prove that it mailed the notice or that she received it. She contends that MACU's cover letter was not a legal document, so it did not convey a legal offer. And she claims that MACU could not unilaterally add an arbitration clause to the agreement without breaching the implied duties of good faith and fair dealing. True, these are matters generally considered when determining contract formation. But Duling's claims are not properly raised here because the district court did not make the factual findings necessary for us to review these arguments and Duling failed to object to any inadequacy in the district court's factual findings. *State v. Jones*, 306 Kan. 948, 959, 398 P.3d 856 (2017) ("When there is no objection to a trial court's findings, this court presumes that the trial court found all facts necessary to support its judgment."). Nor did Duling cross-appeal from any adverse ruling entered against her in the district court. *Lumry v. State*, 305 Kan. 545, 553-54, 385 P.3d 479 (2016) (noting K.S.A. 60-2103(h)'s requirement that an appellee file a notice of cross-appeal from adverse rulings to obtain appellate review of those issues). We thus decline to reach the issues Duling raises.

Did the District Court Err by Denying MACU's Motion to Compel Arbitration?

MACU challenges the district court's findings that, per the terms of the parties' contract, it could not add an arbitration clause to the agreement, and that it failed to prove mutual consent. MACU contends that it could add the arbitration clause to the agreement under its change of terms provision. Alternatively, MACU claims that the cover letter was a valid offer to modify the terms of the parties' initial agreement "under basic notions of con-

tract law." It adds that in either instance, the undisputed facts establish that Duling affirmatively consented to the change by continuing to use her account after failing to opt out.

Legal Principles Guiding Our Decision

The district court properly exercised its authority to decide whether an agreement to arbitrate existed, and its decision is a final and appealable order. See *Anderson v. Dillard's, Inc.*, 283 Kan. 432, 435, 153 P.3d 550 (2007); *NEA-Topeka v. U.S.D. No. 501*, 260 Kan. 838, 841, 925 P.2d 835 (1996). "An appellate court reviews an alleged arbitration agreement like any other contract, applying a de novo standard of review." *Anderson*, 283 Kan. at 436. This court is not bound by the district court's interpretations of a written instrument. *Trear v. Chamberlain*, 308 Kan. 932, 936, 425 P.3d 297 (2018).

"The primary rule for interpreting written contracts is to ascertain the parties' intent. If the terms of the contract are clear, the intent of the parties is to be determined from the language of the contract without applying rules of construction." *Anderson*, 283 Kan. at 436.

> "An interpretation of a contractual provision should not be reached merely by isolating one particular sentence or provision, but by construing and considering the entire instrument from its four corners. The law favors reasonable interpretations, and results which vitiate the purpose of the terms of the agreement to an absurdity should be avoided." *Johnson County Bank v. Ross*, 28 Kan. App. 2d 8, 10-11, 13 P.3d 351 (2000).

The Supreme Court recently clarified that

> "an arbitration agreement is 'a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute.' An arbitration agreement thus does not alter or abridge substantive rights; it merely changes how those rights will be processed. And so . . . '"[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral . . . forum."' [Citations omitted.]" *Viking River Cruises, Inc. v. Moriana*, 596 U.S. ___, 142 S. Ct. 1906, 1919, 213 L. Ed. 2d 179 (2022).

Kansas courts generally favor arbitration agreements. *Coulter v. Anadarko Petroleum Corp.*, 296 Kan. 336, 370, 292 P.3d 289 (2013). And courts generally seek to uphold arbitration agreements even when the contract provisions are somewhat unclear

and indefinite. *City of Lenexa v. C.L. Fairley Const. Co.*, Inc., 245 Kan. 316, 319, 777 P.2d 851 (1989); *Hemphill v. Ford Motor Co.*, 41 Kan. App. 2d 726, 735, 206 P.3d 1 (2009). But a party cannot be required to arbitrate a particular dispute without an agreement to arbitrate. K.S.A. 5-429(c); *AT & T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 648, 106 S. Ct. 1415, 89 L. Ed. 2d 648 (1986); see *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 569 n.2, 133 S. Ct. 2064, 186 L. Ed. 2d 113 (2013) (explaining whether an arbitration agreement exists is a "gateway matter[]"); but see *Franklin v. Sunflower Imports, Inc.*, No. 95,299, 2006 WL 3257461, at *3 (Kan. App. 2006) (noting contrary authority suggesting federal policy favoring arbitration might apply to the determination of whether there is a valid agreement to arbitrate).

Whether the parties agreed to arbitrate is determined by contract law. See *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943-45, 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995); *Heartland Premier, LTD v. Group B & B, L.L.C.*, 29 Kan. App. 2d 777, Syl. ¶ 3, 31 P.3d 978 (2001). And under Kansas law, whether a binding contract has been formed depends on the intention of the parties and is a question of fact. *Reimer v. Waldinger Corp.*, 265 Kan. 212, 214, 959 P.2d 914 (1998). An appellate court generally reviews a district court's finding that a contract exists for substantial competent evidence. *Price v. Grimes*, 234 Kan. 898, 904, 677 P.2d 969 (1984); *Source Direct, Inc. v. Mantell*, 19 Kan. App. 2d 399, 407, 870 P.2d 686 (1994). Similarly, whether a particular term of a written contract has been modified or waived by a later agreement is a question of fact for the trial court. *Thoroughbred Assocs. v. Kansas City Royalty Co.*, 297 Kan. 1193, 1209, 308 P.3d 1238 (2013).

Still, as the party moving to compel arbitration, MACU had the "initial summary-judgment-like burden" of presenting enough evidence to show an enforceable agreement to arbitrate. See *Unified School Dist. #503, Parsons, Kansas v. R.E. Smith Const. Co.*, No. 07-2423-GLR, 2008 WL 2152198, at *2 (D. Kan. 2008). The district court found that MACU failed to meet this burden, which is a negative finding. See *Mohr v. State Bank of Stanley*, 244 Kan. 555, 567, 770 P.2d 466 (1989) ("A finding that the plaintiff did not sustain the burden of proof is a negative finding."); see also

Short v. Sunflower Plastic Pipe, Inc., 210 Kan. 68, 74-75, 500 P.2d 39 (1972) (applying negative finding test when reviewing trial court's order finding that a contract did not exist). Under these circumstances, this court applies an "even more deferential standard of review." *Woodard v. Hendrix*, No. 123,900, 2022 WL 2286922, at *5 (Kan. App. 2022) (unpublished opinion) (citing *Cresto v. Cresto*, 302 Kan. 820, 845, 358 P.3d 831 [2015]). We thus accept the district court's factual findings unless the party challenging the finding proves that the district court arbitrarily disregarded undisputed evidence or relied on some extrinsic consideration such as bias, passion, or prejudice to reach its decision. *State v. Douglas*, 309 Kan. 1000, 1002-03, 441 P.3d 1050 (2019).

A binding contract typically entails an offer of terms, an acceptance of those terms, and consideration or a thing of value passing from each party to the other. *M West, Inc. v. Oak Park Mall*, 44 Kan. App. 2d 35, 49, 234 P.3d 833 (2010) (noting that offer, acceptance, and consideration constitute "all the components of a valid contract"). The parties must each accept the essential terms of the contract and outwardly communicate that acceptance in a way reasonably intended to be understood as such. *Southwest & Assocs. Inc. v. Steven Enterprises*, LLC, 32 Kan. App. 2d 778, 781, 88 P.3d 1246 (2004); see also *Morales v. Sun Constructors, Inc.*, 541 F.3d 218, 221 (3d Cir. 2008) ("Acceptance is measured not by the parties' subjective intent, but rather by their outward expressions of assent."). "The parties' mutual promises to arbitrate constitute sufficient consideration under Kansas law." *Clutts v. Dillard's, Inc.*, 484 F. Supp. 2d 1222, 1224 n.1 (D. Kan. 2007).

Kansas contract law defines the assent necessary to form a contract as a "meeting of the minds," i.e., "[a]n unconditional and positive acceptance." *USD 446 v. Sandoval*, 295 Kan. 278, 282, 286 P.3d 542 (2012). "To constitute a meeting of the minds there must be a fair understanding between the parties which normally accompanies mutual consent and the evidence must show with reasonable definiteness that the minds of the parties met upon the same matter and agreed upon the terms of the contract." *Steele v. Harrison*, 220 Kan. 422, Syl. ¶ 3, 552 P.2d 957 (1976). When a "purported contract is so vague and indefinite that the intentions

of the parties cannot be ascertained, it is unenforceable." *Mohr*, 244 Kan. at 573.

In determining whether a contract was formed, we require only reasonable certainty as to the terms of the agreement. *Mohr*, 244 Kan. at 573. A contract will not fail for uncertainty or indefiniteness if the court can determine the terms by which the parties intended to be bound and carry out their intentions. *Holley v. Allen Drilling Co.*, 241 Kan. 707, 710, 740 P.2d 1077 (1987). Moreover, courts will generally "seek to uphold arbitration agreements even where the contract provisions are somewhat uncertain and indefinite." *Heartland Premier, LTD*, 29 Kan. App. 2d at 780.

Analysis

We assume, without deciding, that MACU properly sent notice to Duling of its new arbitration provision.

We first address MACU's argument that its membership agreement with Duling and others permitted it to unilaterally add the arbitration clause. We then address its alternative argument that its December 7 letter was an offer to modify the initial agreement which Duling accepted by her continued use of her account.

Agreement Did Not Contemplate Addition of an Arbitration Provision

MACU cites *Rupe v. Triton Oil & Gas Corp.*, 806 F. Supp. 1495, 1502 (D. Kan. 1992), stating a "right" to unilaterally change the terms of a contract is "generally available only to those who expressly provide for this right in the agreement." MACU contends that its change of terms provision does so. The change of terms provision in the parties' membership agreement provides that MACU "may change [its] bylaws and any term of th[e] agreement." That same paragraph states, "[i]f we have notified you of a change in any term of your account and you continue to have your account after the effective date of the change, you have agreed to the new term(s)."

The district court found that other provisions of the membership agreement merely "mention[ed] claims disputed" and did not contemplate arbitration. We agree. MACU cites several provisions of its agreement with Duling that allegedly show the parties

contemplated arbitration. See *Follman v. World Fin. Network Nat. Bank*, 721 F. Supp. 2d 158, 166 (E.D.N.Y 2010). These provisions are titled "agreement," "liability," and "resolving account disputes." Yet MACU fails to explain how or where any language in these sections points to arbitration. Having reviewed these provisions, we cannot reasonably conclude that any of them do so. They do not elect or discuss dispute resolution methods or forums—they merely suggest that disputes could arise and would be resolved under relevant state and federal laws. Without more, we cannot find that the contract specifically contemplated arbitration or the addition of an arbitration agreement under any of its provisions. See *TMG Life Ins. Co. v. Ashner*, 21 Kan. App. 2d 234, 244, 898 P.2d 1145 (1995) (reviewing court will not create a contract term that the drafter of the contract could have but failed to include); see also *Bellman v. i3Carbon, LLC*, 563 Fed. Appx. 608, 613-15 (10th Cir. 2014) (reviewing several documents for an agreement to arbitrate but finding no such evidence based in part on lack of mention of arbitration in signed agreement).

The district court also held that MACU's attempt to add the new arbitration provision was not a "change" to "any term of the agreement"—as permitted by the membership agreement. Its decision reflected other court's findings that "[t]here is a clear distinction between amending the financial terms and rates of a credit card agreement and the unilateral addition of [a] new provision not contemplated at the time of the original agreement." *Discover Bank v. Shea*, 362 N.J. Super. 200, 211, 827 A.2d 358 (2001). See *Badie v. Bank of America,* 67 Cal. App. 4th 779, 79 Cal. Rptr. 2d 273 (1998) (finding that credit issuer cannot impose binding arbitration on its cardholders through "bill stuffer" stating that continued use of card constitutes acceptance).

MACU shows us no terms of the membership agreement that the arbitration provision would change. Rather, it offers dictionary definitions of "change" and suggests that the word broadly includes the ability to add something new. And it cites Mississippi federal district court cases determining that the term "change" allowed a bank to unilaterally modify a preexisting agreement by mailing its members notice of a new provision. See *Beneficial Nat. Bank, U.S.A. v. Payton*, 214 F. Supp. 2d 679, 687 n.9 (S.D. Miss. 2001) (noting "Black's Law Dictionary 231 [6th ed. 1990] defines

'change' to include '[a]n alteration; a modification or addition; substitution of one thing for another.'"); *Herrington v. Union Planters Bank, N.A.*, 113 F. Supp. 2d 1026, 1030 (S.D. Miss. 2000), *aff'd* 265 F.3d 1059 (5th Cir. 2001) (same, and also noting Webster's International Dictionary 1944 [3d ed. 1981] defines "revise" as "to make a new, amended, improved, or up-to-date version of"). Kansas law may reflect that broad interpretation. See, e.g., *Griffin ex rel. Green v. Suzuki Motor Corp.*, 280 Kan. 447, 460, 124 P.3d 57 (2005) (finding that the phrase "change in design" encompassed a "'wholly different design'").

We assume, without deciding, that the change of terms provision in Duling's agreement with MACU empowered MACU to add new terms to the parties' agreement, including an arbitration requirement. Still, the membership agreement does not give MACU unlimited authority to change it unilaterally. Rather, the change of terms section first requires MACU to give members reasonable notice of the changes it intends to make to the terms, and it then gives members the option to agree to those changes by continuing to accept MACU's services or to reject the changes by notifying MACU. The members' ability to accept or reject notified changes in MACU's terms of service prevents the contract from being illusory. See *Flood v. ClearOne Communications, Inc.*, 618 F.3d 1110, 1119-1120 (10th Cir. 2010) (An illusory promise is but a "façade" that imposes no performance obligations on the promisor and affords no consideration to the promisee.); *CIT Group v. E-Z Pay Used Cars, Inc.*, 29 Kan. App. 2d 676, 678-79, 32 P.3d 1197 (2001) ("a contract which purports to promise a specified performance but allows one party the discretion to determine whether to perform is only an illusory contract and unenforceable"). Thus the notice and opt-out provisions prevent MACU from unilaterally adding terms to the agreement that were not contemplated by the original agreement. Rather, an offer, acceptance, and consideration are necessary. In other words, mutuality remains necessary.

Under Kansas law, a party to a contract cannot unilaterally change the terms of the agreement. *Guy Pine, Inc. v. Chrysler Motors Corp.*, 201 Kan. 371, 376, 440 P.2d 595 (1968); *Thoroughbred Associates, L.L.C. v. Kansas City Royalty Co., L.L.C.*, 58

Kan. App. 2d 306, 317, 469 P.3d 666 (2020). The terms of a written contract may, however, be "'varied, modified, waived, annulled, or wholly set aside, by any subsequently executed contract, whether such subsequently executed contract be in writing or in parol.'" *Coonrod & Walz Const. Co. v. Motel Enterprises, Inc.*, 217 Kan. 63, 73, 535 P.2d 971 (1975).

Mutuality is required to amend the terms of a contract. *Gill Mortuary v. Sutoris, Inc.*, 207 Kan. 557, 562, 485 P.2d 1377 (1971). With some exceptions, the agreement to modify may be express or implied from the parties' conduct. See *Fast v. Kahan*, 206 Kan. 682, 685-686, 481 P.2d 958 (1971) (although the contract included provisions for determining amount of partners' annual settlement, partners adopted another means to determine annual settlement, and so modified contract by their conduct); *Wachter Mgmt. Co. v. Dexter & Chaney, Inc.*, 282 Kan. 365, Syl. ¶¶ 3, 5, 144 P.3d 747 (2006) (applying Uniform Commercial Code's rule requiring express assent to amendment that materially changed contract terms by adding "shrinkwrap" license agreement). The new arbitration provision MACU proposed was a material change to the membership agreement.

We view MACU's letter as an offer for Duling to modify her membership agreement. See *Wachter Management Co.*, 282 Kan. 365, Syl. ¶ 3 (treating a shrinkwrap software licensing agreement not included in the parties' original contract as a request to amend the contract). The crucial question thus becomes whether Duling accepted the arbitration agreement by failing to opt out.

Insufficient Showing of Assent

The crux of the district court's ruling and the parties' claims on appeal centers on the assent issue. "[A]ssent is as much a requisite in effecting a modification as it is in the initial creation of a contract. . . . In either case . . . there must be a meeting of the minds with respect to the proposed modification. [Citations omitted.]" *Kahan*, 206 Kan. at 684-85.

To establish a meeting of the minds, the terms of the parties' agreement must be complete and definite enough that each party reasonably understands the rights and obligations created. *Jack Richards Aircraft Sales, Inc. v. Vaughn*, 203 Kan. 967, 971, 457 P.2d 691 (1969). To be considered binding, the contract's terms

must also be definite enough that a court may "determine what acts are to be performed and when performance is complete." *Lessley v. Hardage*, 240 Kan. 72, Syl. ¶ 4, 727 P.2d 440 (1986).

It is generally accepted, as MACU concedes, that the offeror controls the handling of the offer. The offer determines who may accept and how. See Restatement (Second) of Contracts § 30, cmt. a (2022) (explaining "offeror is entitled to insist on a particular mode of manifestation of assent. The terms of the offer may limit acceptance to a particular mode; whether it does so is a matter of interpretation."); *Wachter Mgmt. Co.*, 282 Kan. at 377-78 (observing that under Kansas law, "[t]he offeror, whether the seller or the buyer, is the master of the offer," adhering to "the traditional contract principles"). That rule applies here.

The parties also agree that generally, silence will not be construed as acceptance. See *Caterpillar Tractor Co. v. Sickler*, 149 Kan. 457, 460, 87 P.2d 503 (1939); See also Restatement (Second) of Contracts § 69, cmt. a (2022) ("Acceptance by silence is exceptional" because "[o]rdinarily an offeror does not have power to cause the silence of the offeree to operate as acceptance. . . . The mere receipt of an unsolicited offer does not impair the offeree's freedom of action or inaction or impose on him any duty to speak."); *PCS Nitrogen Fertilizer, L.P. v. Christy Refractories*, L.L.C., 225 F.3d 974, 981 (8th Cir. 2000) (insufficient proof of course of dealing to integrate an arbitration provision into the contract when the buyer did not expressly assent to the term); *Locklear Automotive Group, Inc. v. Hubbard*, 252 So.3d 67, 85 (Ala. 2017) (assent to arbitrate typically manifested by signing the contract containing an arbitration provision).

Yet the parties still disagree as to what constitutes acceptance. According to MACU, Duling accepted its offer to amend the initial agreement by not electing to exercise her right to opt out and by then continuing to use her account. Despite recognizing its inconsistent language in the arbitration provision, particularly the "whichever is sooner" phrase, MACU argues that when read with the December 7th cover letter, members should have reasonably known that their last opt-out date was January 6, 2021.

To the contrary, Duling maintains that the district court correctly found that her time to opt out ended 30 days after she opened her account. Because she opened her account years before

MACU mailed the cover letter and notice of the new arbitration provision, her 30 day opt-out period expired long before she got that letter. Duling thus asserts that "[n]ot doing something that is impossible" does not evidence assent. Duling also argues that the cover letter does not resolve confusion but rather creates two ambiguities: (1) it states a different deadline for opting out than the one contained in the instructions for opting out; and (2) that the arbitration provision would become effective on a date before the January 6, 2021 cut-off date for opting out, and thus her use of the account even one day after the letter was mailed would be viewed as acceptance.

The parties each cite factually similar cases supporting their desired result, and we have found many on each side. MACU cites two cases in which the district court approved of general procedures much like those that MACU followed here. Noting the opt-out provisions when considering assent, the courts found that the members' acts of not opting out and continuing to use their accounts showed their intent to be bound. See *Gillam v. Branch Banking and Trust Co. of Va.*, No. 3:17-cv-722, 2018 WL 3744019, at *3 (E.D. Va. 2018) (unpublished opinion); *Valle v. ATM Nat., LLC*, No. 14-cv-7993, 2015 WL 413449, at *1, *3 (S.D.N.Y. 2015) (unpublished opinion).

In contrast, Duling cites two cases which considered the same "whichever is sooner" language MACU used in its new arbitration provision instructions. In both cases, the courts refused to compel arbitration, rejecting the credit unions' attempted unilateral addition of arbitration clauses and their ineffective attempt to bind members by the confusing opt-out language. One case is apparently pending on appeal. See *Pruett v. WESTConsin Credit Union*, No. 2021CV0000158 (Wis. Cir. Ct. Apr. 11, 2022). The other has recently been reversed. See *Canteen v. Charlotte Metro Credit Union*, No. 21-CVS-6056, n. 36 (Mecklenburg Cnty. N.C. Super. Ct. Sept. 1, 2021), *rev'd* 881 S.E. 2d 753, 757 (N.C. App. 2022) (finding the facts show a binding arbitration agreement).

Assent is decided case-by-case, so caselaw considering whether a party agreed to arbitration encompasses many factual scenarios. See, e.g., *Rudolph v. Wright Patt Credit Union*, 175 N.E.3d 636, 649 (Ohio Ct. App. 2021) (finding arbitration agreement added to existing con-

tract valid when the contract mentioned dispute resolution and customer continued using their account after receiving notice, even though no right to opt out was provided). But a common factor among cases finding sufficient assent is a clear and specific offer. And when acceptance does not require a specific act, the offeror's inclusion of both a clearly drafted opt-out requirement and a warning that the customer's continued use will be construed as assent strengthens the support for assent. See, e.g, *AT & T Mobility Services LLC v. Inzerillo*, No. 4:17-cv-00841-HFS, 2018 WL 10160964, at *3 (W.D. Mo. 2018) (finding assent where consumer employee failed to opt out and continued working for company).

Failure to opt-out of an arbitration program can, of course, constitute acceptance. For example, in *Rittenhouse v. GlaxoSmithKline*, CV No. 21-1836, 2021 WL 6197361, at *3-4 (E.D. Pa. 2021), it was undisputed that an employee received several emails with links, notifying her about adding an arbitration agreement and instructing her how to opt out. When the employee claimed that she had not assented to the agreement, the court rejected her argument in these well-reasoned terms:

> "[An] argument that by 'doing nothing' in response to GSK's communications about the arbitration agreement she did not assent to the arbitration agreement is equally unpersuasive. An employee's failure to opt-out of a voluntary arbitration program constitutes acceptance, especially where failure to opt-out is the exact form of acceptance invited by the offer. See, e.g., *Stephenson*, 2021 WL 3603322, at *6; *Bracy*, 2020 WL 1953647, at *7; *Hoffman v. Compassus*, 2019 WL 1791413, at *6 (E.D. Pa. Apr. 23, 2019). This is because '[a]cceptance is measured not by the parties' subjective intent, but rather by their outward expressions of assent.' *Morales*, 541 F.3d at 221. Thus, if an offeree, 'acts or expresses itself as to justify the other party in inferring assent, and this action or expression was of such a character that a reasonable person in the position of the offeree should have known it was calculated to lead the offeror to believe that the offer had been accepted, a contract will be formed.' (Citations omitted.)" 2021 WL 6197361, at *4.

We agree that acceptance is measured not by the parties' subjective intent, but by their outward expressions of assent. Because the offer controls the manner of acceptance, an offer with clearer and more specific terms provides a better basis from which we may find an outward expression of assent and thus a binding contract. This is true even in cases like this one, which include opt out and continued use of account terms.

MACU's offer, however, failed to provide sufficient clarity to reasonably convey to its members what was required for their assent or for their refusal. We agree with Duling that the date MACU stated by which members needed to opt out was unclear. The arbitration agreement explained: "You have the right to opt out of this agreement to arbitrate if you tell us within 30 days of the opening of your account or the mailing of this notice, whichever is sooner." But to the contrary, the cover letter stated: "You will have until January 6, 2021, to exercise your right to opt out of this provision." MACU contends that because Duling first opened her account with it in 2018, the date that was "sooner" for her was 30 days after the mailing of the December 7th notice, or January 6, 2021. Yet it fails to explain this interpretation, and none is apparent to us. MACU apparently interprets "sooner" to mean closer in time *after* receipt of the notice, or in the near future. But the district court accepted Duling's interpretation that "whichever is sooner" meant whichever date was *earlier* chronologically.

Because the relevant documents do not define "sooner," we resort to the general principle that ordinary words are presumed to carry their ordinary, natural, common meanings. See *State v. Sandoval*, 308 Kan. 960, 963, 425 P.3d 365 (2018). And we find that the common meaning of the word "sooner" arguably supports both MACU's and Duling's conflicting interpretations. See Webster's New World College Dictionary 1386 (5th ed. 2020) (defining "sooner" to mean "in a short time (after a time specified or understood)"; and also to mean "ahead of time; early"). Reading the word in context provides no clarity.

So even if we assume that the cover letter can constitute a legal offer, we still find confusion because we must consider its terms along with those in the arbitration provision. See *Waste Connections of Kansas, Inc. v. Ritchie Corp.*, 296 Kan. 943, 963, 298 P.3d 250 (2013) (We interpret contracts by construing and considering entire instrument from its four corners—not by isolating one sentence or provision.). True, the cover letter clearly states the January 6, 2021 opt-out date. But that letter cannot be read in isolation—we must read it together with the opt-out instructions in the arbitration provision, which the cover letter referenced, and those instructions produce uncertainty and confusion. Having reviewed those instructions, we find it genuinely uncertain not only

which document controls the opt-out date, but also what the opt-out-date is supposed to be according to the arbitration instructions. In short, we cannot tell what the opt-out deadline was. Ambiguity arises when "the face of the instrument leaves it genuinely uncertain which one of two or more meanings is the proper meaning." *Catholic Diocese of Dodge City v. Raymer*, 251 Kan. 689, 693, 840 P.2d 456 (1992); *Kincaid v. Dess*, 48 Kan. App. 2d 640, 647, 298 P.3d 358 (2013). The opt-out provision is thus ambiguous.

MACU counters that reading the text of the December 7th notice in harmony with the opt-out provision resolves any arguable ambiguity. It reasons:

- "The December 7th notice stated, '[y]ou will have until January 6, 2021 to exercise your right to opt out of this provision.'";
- "30 days after December 7, 2020, is January 6, 2021";
- "Thus when Duling received the December 7th notice, …[s]he had '30 days from the mailing of the' December 7th notice," which the cover letter clearly stated was January 6, 2021.

But this interpretation ignores language that MACU expressly included in the arbitration agreement, italicized below, that members could opt out of the arbitration agreement by informing MACU of that decision "*within 30 days of the opening of your account* or the mailing of this notice, *whichever is sooner*." What this latter clause was intended to mean, in context, remains a mystery. Yet one reasonable interpretation is that the opening of Duling's account in 2018 is sooner than any date in 2021.

We interpret ambiguous language in a written document against the drafter. See *Liggatt v. Employers Mut. Casualty Co.*, 273 Kan. 915, 921, 46 P.3d 1120 (2002). This is particularly so in cases involving adhesion contracts—ambiguities should be interpreted most strongly against the party who drafted the agreement. See *Badie*, 67 Cal. App. 4th at 798; see also *Anderson v. Union Pacific R.R. Co.*, 14 Kan. App. 2d 342, 346, 790 P.2d 438 (1990) (citing Black's Law Dictionary 38 [5th ed. 1979], defining contract of adhesion as a "[s]tandardized contract form offered to consumers of goods and services on essentially

'take it or leave it' basis without affording consumer realistic opportunity to bargain and under such conditions that consumer cannot obtain desired product or services except by acquiescing in form contract"); *Kortum-Managhan v. Herbergers NBGL*, 2009 MT 79, ¶ 23, 349 Mont. 475, 482, 204 P.3d 693 (2009) (finding arbitration agreement was a contract of adhesion and considering whether terms were "'within [weaker parties'] reasonable expectations, or . . . unduly oppressive unconscionable or against public policy.' [Citations omitted.]").

Construing the opt-out provisions against MACU, we find that MACU failed to show Duling assented to its offer to add an arbitration clause to her membership agreement by her continued use of her account after receiving notice of the ambiguous opt-out date. Duling's failure to opt out and her continued use of her account thus did not justify MACU in inferring her assent. Nor was Duling's act of such a character that a reasonable person in her position should have known it was calculated to lead MACU to believe that the offer had been accepted. When a "purported contract is so vague and indefinite that the intentions of the parties cannot be ascertained, it is unenforceable." *Mohr*, 244 Kan. at 573. Such is the case here. MACU's new arbitration agreement is unenforceable because its opt-out provisions are too vague and indefinite for us to find that Duling assented to the new arbitration agreement by continuing to use her account.

Affirmed.

(529 P.3d 1275)

No. 125,071

STATE OF KANSAS, *Appellee*, v. DAVID LEE RALSTON JR., *Appellant*.

SYLLABUS BY THE COURT

CRIMINAL LAW—*Prosecutorial Error—Can Occur in Probation Violation Hearing*. Prosecutorial error can occur in the context of a probation violation hearing.

Appeal from Franklin District Court; DOUGLAS P. WITTEMAN, judge. Opinion filed May 5, 2023. Affirmed.

Kasper Schirer, of Kansas Appellate Defender Office, for appellant.

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

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

COBLE, J.: David Lee Ralston Jr. appeals from the revocation of his probation. Ralston entered into a global plea agreement, pleading no contest to three charges—one felony and two misdemeanors—in three separate cases. In exchange for his plea, the State dismissed other charges and agreed not to oppose probation. The district court sentenced Ralston to a total of 40 months' imprisonment but granted his motion for a downward departure and imposed a 12-month probation period for all cases to be served concurrently. Ralston was later charged with new crimes and other probation violations and the State moved for revocation. Ralston stipulated to all violations, except one felony charge which had been dismissed. The district court revoked Ralston's probation and imposed the original sentence of 40 months' imprisonment, denying Ralston's request for a modified sentence.

Ralston argues that the State committed prosecutorial error through improper statements made during the probation revocation hearing, which affected the district court's decision to impose the original prison sentence without modification. On our review, although we find the prosecutorial error rule does apply to this probation revocation proceeding, we find any error harmless. Because

Ralston had committed new crimes during his probation period and he was previously granted probation as a dispositional departure, the district court's decision to revoke his probation was well within its discretion under K.S.A. 2018 Supp. 22-3716(c)(8)(A) and (c)(9)(B). The district court's ruling is affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

On August 24, 2020, Ralston pleaded no contest to one count of possession of methamphetamine, a felony, in case No. 19-CR-115; one misdemeanor count of domestic battery, in case No. 18-CR-229; and one misdemeanor count of theft, in case No. 17-CR-36.

Three months later, Ralston appeared for sentencing where the district court found his criminal history score to be A, and neither party objected. Ralston filed a motion for a dispositional departure to probation with an underlying sentence in the guideline range, which the State did not oppose. The district court imposed a standard 40 months' sentence on the felony charge and granted a dispositional departure to a probation term of 12 months. On the two remaining cases 17-CR-36 and 18-CR-229, the district court imposed a 12-month term of probation to run concurrent with the felony case.

Five months later, Ralston admitted to violating the terms of his probation by failing to report on four occasions and by using THC. The State moved to revoke Ralston's probation in all three cases. Due to continued delays, the probation violation hearing was postponed six times. In the meantime, the State filed addendums to the motion to revoke probation. Included in the fourth addendum to the motion to revoke probation was an affidavit from Scott Monninger, Ralston's supervising community corrections officer. The affidavit alleged these violations:

- Numerous failures to report to his supervising officer, and his last report was on April 7, 2021;
- Ralston tested positive for THC and methamphetamine multiple times;
- Ralston was unsuccessfully terminated from substance abuse treatment;

- Ralston was charged with driving while suspended twice, in February and April 2021, and in November 2021 was charged with driving while a habitual violator; and
- Ralston was charged with aggravated domestic battery in July 2021.

During the probation revocation hearing, Ralston stipulated to all violation allegations in the fourth addendum affidavit except for the aggravated domestic battery charge, which both parties had agreed to dismiss. The district court accepted the stipulation and found Ralston in violation of his probation terms.

Ralston asked the court for a modification of his sentence and at least one day before surrendering so that he could put his affairs in order. In support, Ralston argued that he had been struggling with methamphetamine and was forced to drive with a suspended license because he had to get to work. Ralston stated that he did what he had to do to provide for himself and that he had been paying his court costs to date.

The State argued that the original 40 months' prison sentence should be imposed. The State reminded the district court that Ralston's probation was the result of a downward dispositional departure, but even given that chance, Ralston failed to comply with the terms of probation. In support of the State's arguments, the prosecutor stated:

"He has failed to report to his probation officer multiple times, hasn't seen his probation officer prior to these motions being filed since April of last year, so almost a year ago. When he was seen by his probation officer he tested positive for meth and marijuana. He had to do a two day jail sanction and showed up to the jail and was turned away because he blew a .089 on the Intoxilyzer. He's continued to violate the law by being convicted of two new driving while suspended cases. He was charged with an aggravated domestic battery. It was dismissed, but it wasn't dismissed because we didn't think it happened; it's because the victim was unable to be located and refused to cooperate. Clearly the underlying, some of the misdemeanor convictions, Judge, included a domestic battery. He failed to attend the batterer's intervention program that's created to try to prevent that behavior, and clearly his previous arrest shows that at least there was an indication that some of that's still going on."

During the hearing, Ralston's counsel objected to the State's comment that Ralston failed to report since April 2021. He stated

that Ralston had reported, although infrequently, to his community corrections officer.

The district court revoked Ralston's probation and imposed the underlying prison sentence of 40 months without modification. The court noted that Ralston's sentence was originally a presumptive imprisonment case, and a departure motion was granted. Although the hearing transcript was silent on this point, the journal entry for the probation violation hearing also reflected that the probation was revoked because Ralston committed new crimes.

Ralston timely appeals.

ANALYSIS

Ralston argues on appeal that the prosecutor made improper statements of fact during the probation revocation hearing by referencing the aggravated domestic battery charge, noting he failed to attend batterer's intervention program, and arguing that Ralston had not reported to his probation officer since April 2021. He contends that these improper statements denied him a fair hearing on the requested sentencing modification.

Standard of Review

Although Ralston challenges the district court's decision to impose the underlying sentence after revoking his probation, which we would normally review under an abuse of discretion standard, he frames his appeal only as a prosecutorial error claim. The appellate court uses a two-step process to evaluate claims of prosecutorial error: error and prejudice. See *State v. Blansett*, 309 Kan. 401, 412, 435 P.3d 1136 (2019) (citing *State v. Sherman*, 305 Kan. 88, 109, 378 P.3d 1060 [2016]). First, the appellate court examines whether the identified prosecutorial acts "fall outside the wide latitude afforded prosecutors" to pursue the State's case and try to obtain a conviction in a way that does not offend the defendant's right to a fair trial. 305 Kan. at 109. If the court determines there was an error, it then moves to consider whether the error "prejudiced the defendant's due process rights to a fair trial." 305 Kan. at 109.

Even if the prosecutor's actions were egregious, reversal of a criminal conviction or other district court order is not an appropriate sanction if the court determines the actions satisfy the constitutional harmlessness test from *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). See *Blansett*, 309 Kan. at 412; *Sherman*, 305 Kan. at 109. This test means the prosecutorial error is harmless "'if the State can demonstrate "beyond a reasonable doubt that the error complained of will not or did not affect the outcome of the trial in light of the entire record, *i.e.*, where there is no reasonable possibility that the error contributed to the [decision]."'" *Blansett*, 309 Kan. at 412 (quoting *Sherman*, 305 Kan. at 109). The statutory harmlessness test found in K.S.A. 2022 Supp. 60-261 also applies to prosecutorial error, but when analyzing both constitutional and non-constitutional error, appellate courts only need to address the higher standard of constitutional error. See *Sherman*, 305 Kan. at 109.

The prosecutorial error analysis is applicable to probation revocation hearings, but here, the errors were harmless.

At the outset, we note that Ralston's argument appears to be a novel one. To date, our court has not clearly applied the prosecutorial error standard in the context of a probation revocation hearing.

The prosecutorial error jurisprudence in Kansas "recognizes a prosecutor's conduct can implicate a criminal defendant's due process rights to a fair trial under the Fourteenth Amendment to the United States Constitution." *State v. Wilson*, 309 Kan. 67, 73, 431 P.3d 841 (2018.) Our Supreme Court's test for prosecutorial error, set forth in *Sherman*, clearly shows that criminal defendants have a constitutional right to a fair trial. 305 Kan. at 109.

But what about prosecutorial misstatements made outside the criminal trial context? A panel of this court applied the prosecutorial error analysis when reviewing a hearing on a motion to correct illegal sentence—a decision later upheld by our Supreme Court. *State v. Wilson*, No. 114,567, 2016 WL 7324427, at *4 (Kan. App. 2016) (unpublished opinion), *aff'd and remanded* 309 Kan. 67, 431 P.3d 841 (2018). The Court of Appeals panel explained it had "previously addressed claims of prosecutorial misconduct for

statements made before a judge at the preliminary hearing and at sentencing." 2016 WL 7324427, at *4. The panel pointed to other opinions where our court addressed claims of prosecutorial misconduct for statements made during a preliminary hearing and at sentencing. *Wilson*, 2016 WL 7324427, at *4 (citing *State v. Serrano-Garcia*, No. 103,651, 2011 WL 4357804, at *3-4 [Kan. App. 2011] [unpublished opinion] [sentencing]; *State v. Roland*, No. 101,879, 2010 WL 1078454, at *1-3 [Kan. App. 2010] [unpublished opinion] [sentencing]; *State v. Clelland*, No. 93,001, 2005 WL 1805250, at *3-5 [Kan. App. 2005] [unpublished opinion] [preliminary hearing]); see also *State v. Blevins*, 313 Kan. 413, 428, 485 P.3d 1175 (2021) (addressing a prosecutorial error claim related to the prosecutor's comments made during the sentencing phase of the trial).

In addition to the prosecutorial error analysis having been applied outside the trial context, it is clear that defendants have a constitutional due process right to a fair hearing before their probation is revoked. See *State v. Hurley*, 303 Kan. 575, 581, 363 P.3d 1095 (2016) ("[O]nce the privilege of probation has been bestowed upon a defendant, he or she acquires a conditional liberty interest which is subject to substantive and procedural due process limits on its revocation."). No doubt, the due process protections applied to a probationer are not as stringent as those that attach in a criminal trial to a jury or to a judge, given that the burden of proof on the State is to establish a probation violation by a preponderance of the evidence rather than guilty beyond a reasonable doubt as required at trial. See *State v. Lloyd*, 52 Kan. App. 2d 780, 783, 375 P.3d 1013 (2016) (stating the State's burden on a probation violation); K.S.A. 2022 Supp. 21-5108(a) ("In all criminal proceedings, the state has the burden to prove beyond a reasonable doubt that a defendant is guilty of a crime.").

Despite the differences in levels of proof, if we were to say that the prosecutorial error rule applies in trials but does not apply to probation revocation hearings, we would be condoning blatant misstatements of fact or law by the prosecution, without any impact on the district court's revocation decision. We would then leave, as the only remedy for such misstatements, a contempt sanction or an ethical complaint against the prosecutor, personally. But neither of these remedies cure a loss of liberty suffered

by the defendant whose probation is revoked. And the "remarkable responsibility" of a prosecutor to see that justice is done simply cannot end with, or be confined to, a conviction and sentencing. See *State v. Pabst*, 268 Kan. 501, 510, 996 P.2d 321 (2000) ("A prosecutor is a servant of the law and a representative of the people of Kansas [and] the prosecutor represents 'a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.'") (quoting *Berger v. United States*, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 [1935]).

A panel of this court recently stated:

> "Prosecutors have a duty to fairly state the law and the facts. See *State v. Tahah*, 302 Kan. 783, 791, 358 P.3d 819 (2015). The failure to do so amounts to error. *State v. Watson*, 313 Kan. 170, 179, 484 P.3d 877 (2021). Although we commonly deal with prosecutorial error in closing arguments to juries, the rule applies to statements a prosecutor addresses directly to the district court. More generally, prosecutors—as representatives of the State in criminal cases—have a paramount duty to see that justice is done, rather than simply securing convictions or maximum sentences. *State v. Pabst*, 268 Kan. 501, Syl. ¶ 6, 996 P.2d 321 (2000) (overarching 'interest' of State, and its legal representative, in criminal prosecution 'is not that it shall win a case, but that justice shall be done'); see *Tahah*, 302 Kan. at 791." *State v. Jackson*, No. 124,540, 2023 WL 176079, at *2 (Kan. App. 2023) (unpublished opinion), *rev. denied* 317 Kan. __ (May 5, 2023).

Although *Jackson* was, like other cases cited above, examining prosecutorial misconduct in the context of sentencing, we adopt its explanation of the broad duty of a prosecutor. This duty must likewise extend to probation revocation proceedings and candor in such proceedings. Consequently, a prosecutor is not permitted to argue facts outside the record or misstate facts in a probation revocation hearing, any more than he or she could in a jury trial or a sentencing hearing. And the record before the district court, in this case, consisted only of the stipulated violations as outlined in the affidavits accompanying the motion for probation revocation.

For these reasons, we find the prosecutorial error rule necessarily applies to Ralston's claims, and we address each of the instances Ralston cites.

First, we address whether the prosecutor's statement regarding Ralston's failure to report "since April of last year . . . almost a

year ago" rises to the level of error. The affidavit accompanying the 4th Addendum to the Motion to Revoke Probation in the record does specifically say that Ralston last reported on April 7, 2021—an assertion which, at first glance, supports the prosecutor's statement. However, the same affidavit notes that Ralston tested positive for various drugs on June 28, 2021, and he signed an admittance of substance use on September 30, 2021. Apparently, Ralston had some contact with his corrections officer for him to test and admit to drug use. Ralston's counsel, while disputing the prosecutor's statement, admitted that Ralston reported "infrequently" at best, which tracks the dates provided in the affidavit. At worst, the affidavit contained contradictory information, making the prosecutor's blanket statement inaccurate. Under these circumstances, though, given that Ralston's counsel agreed he reported irregularly, and that Ralston stipulated to the violations, the prosecutor's error did not deprive Ralston of a fair hearing, given that all parties essentially agreed he reported irregularly.

Next, when reviewing the prosecutor's comments related to the aggravated domestic battery charge, we also find prosecutorial error. The parties agreed the criminal charge was previously dismissed, so the State withdrew that ground as a basis for revocation. Effectively, then, the domestic battery charge was no longer an issue for the district court's consideration. But by reinjecting the issue into his argument, and in fact expanding on it by alluding to the reasoning behind the dismissed charge and the related batterer's intervention program, the prosecutor injected highly prejudicial, yet entirely irrelevant, information into the hearing.

Finding prosecutorial error, we must then determine whether the error influenced the district court's decision to revoke Ralston's probation and deny his request for modification. We find it did not. The district court did not mention the domestic battery issue during the announcement of its decision to immediately revoke Ralston's probation. Instead, the district court reminded Ralston he had welcomed an exceptional "break" by receiving a departure sentence to probation in the first place—echoing an admonition the court delivered to Ralston at sentencing that any failures to abide by the terms and conditions of probation would be poorly received. The district court acknowledged Ralston's "extraordinary" criminal history, including the new charges. And the district

court, when considering whether to allow Ralston to report to jail at a later date, reminded Ralston that when he was required to report to jail on an earlier sanction, he arrived at the jail intoxicated. On our review of the record, we are convinced beyond a reasonable doubt that the prosecutor's statements related to the dismissed domestic battery charge did not affect the outcome of Ralston's probation violation hearing.

Even setting aside the prosecutorial error, the district court's decision to impose the original sentence was within its sound discretion.

Despite the prosecutor's errors, the district court had sufficient legal grounds to invoke the prison sanction. Although Ralston does not outright challenge the district court's decision to revoke his probation, he contends that the court could have imposed a modified sentence after the probation revocation.

Generally, the appropriate disposition after the finding of a probation violation is governed by the version of the statute in existence at the time the offender committed the crime of conviction. *State v. Coleman*, 311 Kan. 332, 334-37, 460 P.3d 828 (2020). Since Ralston committed his original offense in March 2019, K.S.A. 2018 Supp. 22-3716 governs. In this edition of the statute, a district court may bypass intermediate sanctions and revoke the offender's probation if the probation was originally granted as the result of a dispositional departure under K.S.A. 2018 Supp. 22-3716(c)(9)(B). Additionally, K.S.A. 2018 Supp. 22-3716(c)(8)(A) allows revocation without intermediate sanctions if the probationer commits a new crime while on probation. Once probation has been revoked, the district court may impose the original sentence or any lesser sentence. K.S.A. 2018 Supp. 22-3716(c)(1)(E).

An appellate court reviews the district court's decision to deny an offender's request for a lesser sentence upon the revocation of probation for an abuse of discretion. *State v. Reeves*, 54 Kan. App. 2d 644, Syl. ¶ 3, 403 P.3d 655 (2017). A district court abuses its discretion if its action is (1) arbitrary, fanciful, or unreasonable; (2) based on an error of law; or (3) based on an error of fact. *State v. Levy*, 313 Kan. 232, 237, 485 P.3d 605 (2021). The movant

bears the burden of showing an abuse of discretion. See *State v. Thomas*, 307 Kan. 733, 739, 415 P.3d 430 (2018).

During the probation revocation hearing, both Ralston's counsel and the State conceded that his probation resulted from a dispositional departure. The district court noted in its ruling that it had granted the departure motion. And Ralston stipulated to violating all the probation terms stated in the State's fourth addendum to the motion to revoke probation except for the aggravated domestic battery charge. That stipulation included that Ralston had committed other crimes—driving while suspended—while on probation.

Based on these stipulations, the district court's basis for the revocation of probation was neither legally nor factually erroneous. And, under these circumstances, we cannot say the district court acted unreasonably when it revoked Ralston's probation and imposed the underlying sentencing. The district court's decision to impose the original underlying sentence was within its sound discretion under K.S.A. 2018 Supp. 22-3716(c)(1)(E), (c)(8)(A), and (c)(9)(B).

Affirmed.

(530 P.3d 439)

No. 125,120

STATE OF KANSAS, *Appellant*, v. CODY MICHAEL DEGAND, *Appellee*.

SYLLABUS BY THE COURT

1. CRIMINAL LAW—*Sentencing—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.

2. SAME—*Sentencing—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.

3. SAME—*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.

4. SAME—*Sentencing—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 of law from any bench trial, as well as jury instructions and completed verdicts.

Appeal from Shawnee District Court; NANCY E. PARRISH, judge. Opinion filed May 5, 2023. Affirmed.

Jodi Litfin, assistant solicitor general, and *Derek Schmidt*, attorney general, for appellant.

Patrick H. Dunn, of Kansas Appellate Defender Office, for appellee.

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

HILL, J.: This is a sentencing appeal by the State. The State argues that the sentencing court miscalculated Cody Michael Degand's criminal history score by not including a felony criminal threat conviction. This error meant that the court set his score too

low. The State asks us to vacate Degand's sentence and remand for resentencing. Our review of the record reveals no error, and we affirm.

Because this is a sentencing appeal, the details of Degand's crimes are immaterial.

Degand and the State reached a plea agreement concerning three separate cases from 2020. According to their agreement, Degand would plead guilty to one count each of burglary of a vehicle and theft in one case and he would also plead guilty to one count each of theft and battery in a second case. In exchange, the State agreed to dismiss one count in one of those cases and dismiss a third case entirely. The parties had no specific agreement on sentencing.

A presentence investigation report was prepared and it listed all of Degand's various convictions. One conviction in 2018 was for criminal threat and the report rated it as a person felony. This meant that Degand's criminal history score was B. Degand disagreed with that score and asked the court not to count that criminal threat conviction. If granted, Degand's criminal history score would be lowered from B to C. The State opposed, arguing Degand's criminal threat conviction should be considered a person felony for criminal history scoring purposes.

At the hearing on the matter, Degand maintained that his criminal threat conviction should not be counted in his criminal history because there was no showing that the conviction was for intentional criminal threat. The State disagreed and argued the district court should read the transcript of the plea hearing in that conviction and it would show that Degand had intentionally made the criminal threat in that older case. Thus, the court could include the conviction in setting his criminal history.

The district court was unconvinced. It held that the State failed to carry its burden to establish that Degand's conviction was for an intentional criminal threat. The court therefore did not include that conviction in his criminal history. The court then ruled that Degand had a C criminal history score. The district court then sentenced Degand to various terms of imprisonment and probation for his crimes.

Some fundamental points of sentencing law provide a context for our ruling.

In order to pass sentence on an offender, a court needs to know two things. First, the severity level of the crime that was committed. And second, the criminal history of the offender. With these two components, the court can find the appropriate grid box in our sentencing grid and then choose the number of months that, in the eyes of the court, are appropriate for the offense. Because the criminal history score is an important sentencing component, it has been the subject of many appeals.

Our Supreme Court has held that, "except as specifically stated otherwise, 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. Keel*, 302 Kan. 560, 581, 357 P.3d 251 (2015).

There are, however, exceptions. One such exception to including all prior convictions is found in K.S.A. 2022 Supp. 21-6810(d)(9). It states: "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."

The State bears the burden to establish a criminal defendant's criminal history score by a preponderance of the evidence. K.S.A. 2022 Supp. 21-6814(a); *State v. Obregon*, 309 Kan. 1267, Syl. ¶ 4, 444 P.3d 331 (2019).

This brings us to the focus of this appeal.

A part of the criminal threat statute has been struck down by our Supreme Court.

Our Supreme Court ruled in *State v. Boettger*, 310 Kan. 800, 822-23, 450 P.3d 805 (2019), *cert. denied* 140 S. Ct. 1956 (2020), that a conviction for criminal threat based solely on recklessness was unconstitutional. In so finding, our Supreme Court held the recklessness provision was "unconstitutionally overbroad because it [could] apply to statements made without the intent to cause fear of violence," and the language of the statute "provide[d] no basis

for distinguishing circumstances where the speech is constitutionally protected from those where the speech does not warrant protection under the First Amendment." 310 Kan. at 822-23. The ruling struck down the reckless criminal threat crime but left the intentional criminal threat crime untouched.

That ruling applies here. The presentence investigation report ordered after Degand entered the plea agreement designated his 2018 conviction for criminal threat as a person felony. See K.S.A. 2022 Supp. 21-5415(c)(1). But the report did not reveal whether his conviction was for a reckless or intentional criminal threat. This distinction is important here, because if the conviction was for an intentional criminal threat, Degand's criminal history would be scored as B. If it was for a reckless criminal threat, then his score would be a C since the conviction could not legally be included in his history.

The district court resolved all of these issues at the sentencing hearing. First, it took up Degand's objection to the presentence investigation report's inclusion of the prior criminal threat conviction. At the same time, it considered the State's reply that supported the report's score. The court used a "modified categorical approach" in its treatment of this dispute.

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 of law from any bench trial, as well as jury instructions and completed verdicts. This procedure has been approved by the Supreme Court in *State v. Dickey*, 301 Kan. 1018, 1037-38, 350 P.3d 1054 (2015).

In the amended indictment filed in the prosecution of the 2018 criminal threat conviction, Degand was charged with one count each of criminal threat, aggravated assault on a law enforcement officer, interference with law enforcement, and disorderly conduct. The language pertaining to the criminal threat charge stated:

"On or about the 25th of November, 2017 in the State of Kansas and County of Shawnee, CODY MICHAEL DEGAND, did, then and there, unlawfully and feloniously, threaten to commit violence against, to-wit: Deputy Robert Miller, and communicated that threat with the intent to place another in fear, or to cause the evacuation, lock down or disruption in regular, ongoing activities of any building, place of assembly or facility of transportation, or communicated that threat in reckless disregard of the risk of causing such fear, or evacuation, lock down or disruption in regular, ongoing activities, contrary to the form of the statutes in

such case made and provided and against the peace and dignity of the State of Kansas."

This language essentially mirrors the language from the criminal threat statute. See K.S.A. 2022 Supp. 21-5415(a)(1). The charge does not differentiate between intentional or reckless criminal threat.

In trying to convince the court that Degand's prior conviction was for intentional criminal threat, the State offered its rendition of the factual basis of Degand's plea of guilty that he made at the plea hearing in the 2018 prosecution. Before Degand entered his guilty plea in that case, the State gave the factual basis for the plea at the plea hearing as required by K.S.A. 2022 Supp. 22-3210(a)(4). In doing so, the State said:

"Your Honor, if the State were to proceed to trial, the State would introduce evidence that on or about the 25th of November, 2017, that deputies were dispatched to [Degand's father's residence], which is located in Shawnee County, for a domestic disturbance.

"Upon arrival, deputies located an individual who was later identified as Cody Degand and was acting belligerent towards his father while deputies were on scene. Deputies observed Cody wanting to fight with deputies and called deputies explicit names on the scene.

"Eventually, Cody was transported to his mother's residence, which is located [in] Shawnee County, by his father. While at [his mother's residence], Cody continued to act belligerent. Cody's stepfather . . . did not want Cody at his residence and was asked to leave, and Cody was asked to leave by Corporal Foster.

"Cody then made gestures and said he would shoot Corporal Foster, as well as Deputy Miller with the Shawnee County deputy or Sheriff's Office. He additionally called them explicit names.

"While on scene, Cody grabbed a pair of gardening shears in one hand and a gardening picket in his other hand and approached Corporal Foster as well as Deputy Miller. Deputy Miller reported that he was afraid for [the] safety of himself and Corporal Foster [when] Cody approached with the tools. Cody asked Deputy Miller as well as Corporal Foster to shoot him. Cody then threw the tools on the ground and walked away.

"Corporal Foster advised that Cody was under arrest and he placed his hands behind his back. When Corporal Foster and Deputy Miller attempted to take Cody into custody for aggravated assault on a law enforcement officer, he resisted. Eventually, he was able to place handcuffs on Cody's right wrist and Corporal Foster and Deputy Miller used their weight displacement technique to get Cody to the ground. Once Cody was on the ground, he continued to resist until the other half of the handcuff was placed on his left wrist.

"All of these events happened in Shawnee County, Kansas.

"THE COURT: Mr. Degand, are you familiar with what Ms. Heinen just read into the record?

"DEFENDANT DEGAND: Yes, but the only other thing is, my mom's—that was my mom's property, [my stepfather] had no names on the bills. My mom was allowing me to be on that property and he told me to get off the property. My mom allowed me to be on her property.

"THE COURT: The issues that we're talking about—because there's some more that Ms. Heinen may have read into the record that goes beyond what you're pleading to. So what I'm going to ask you is whether or not you admit to making a threat to Deputy Robert Miller on or about the 25th day of November, 2017, in Shawnee County, Kansas.

"DEFENDANT DEGAND: Yes."

Once again, the offered factual basis does not differentiate between reckless and intentional criminal threat.

Similarly, the 2018 journal entry of judgment from the case also failed to differentiate between reckless and intentional criminal threat, as it simply stated that Degand had been convicted under K.S.A. 2017 Supp. 21-5415(a)(1).

A case decided by another panel of this court offers us guidance. In *State v. Martinez-Guerrero*, No. 123,447, 2022 WL 68543 (Kan. App. 2022) (unpublished opinion), this court dealt with a similar situation. Martinez-Guerrero pled guilty to one count of aggravated domestic battery, and his presentence investigation report set his criminal history score as A based on three prior criminal threat convictions—all person felonies. Martinez-Guerrero objected to his criminal history score, and the district court agreed that two of his prior criminal threat convictions should be excluded.

His presentence investigation report, however, did not specify whether the remaining conviction was for making an intentional or reckless criminal threat. To resolve the issue, the district court looked to the plea transcript to see if it could tell which version of the criminal threat statute applied to the crime. After doing so, the district court found the remaining criminal threat conviction could be included in Martinez-Guerrero's criminal history score. 2022 WL 68543, at *1-2.

On appeal, Martinez-Guerrero claimed the district court improperly calculated his criminal history score by including his prior criminal threat conviction. He challenged the district court's application of the burden of proof, as well as the sufficiency of the evidence on whether his conviction was for intentional or reckless

criminal threat. On Martinez-Guerrero's first point, the panel agreed that the district court erred by framing the State's burden of proof as a challenge to the sufficiency of the evidence and viewing the evidence in the light most favorable to the State. Instead, the district court should have reviewed the evidence without deference to the State to determine whether Martinez-Guerrero had been convicted of intentional criminal threat by a preponderance of the evidence. 2022 WL 68543, at *3.

In resolving the second issue, the panel noted that the district court relied on the transcript of the plea hearing from Martinez-Guerrero's 2018 criminal threat conviction when making its determination. The factual basis provided by the State during the plea hearing demonstrated that Martinez-Guerrero threatened to shoot a police officer. The threat occurred during a conflict between the police officer and Martinez-Guerrero when Martinez-Guerrero disregarded the police officer's orders. Given all of this, the panel concluded that the State had failed to show that Martinez-Guerrero's prior criminal threat conviction was for an intentional threat or recklessly made in the heat of the moment. 2022 WL 68543, at *4-6.

We come to the same conclusion here. The State's factual statement alleged Degand "made gestures and said he would shoot Corporal Foster, as well as Deputy Miller." The State also alleged Degand called the officers explicit names and approached them with "a pair of gardening shears in one hand and a gardening picket in his other hand." But like in *Martinez-Guerrero*, this is not enough to establish whether Degand made those comments in the heat of the moment or that he actually intended to threaten the officers. See 2022 WL 68543, at *6; *State v. Jackson*, No. 124,271, 2022 WL 1906940, at *5 (Kan. App. 2022) (unpublished opinion). Our Supreme Court has also previously rejected similar assertions even when the defendants made explicit death threats to their victims. See *State v. Lindemuth*, 312 Kan. 12, 18-19, 470 P.3d 1279 (2020); *State v. Johnson*, 310 Kan. 835, 843-44, 450 P.3d 790 (2019); *State v. Cardillo*, No. 120,606, 2021 WL 1149145, at *6 (Kan. App. 2021) (unpublished opinion).

The State asks us not to consider *Martinez-Guerrero* in this case. The State argues that *Martinez-Guerrero* "is distinguishable because unlike the defendant there who entered a no contest plea,

here Degand pled guilty." The State also argues the panel erred by making its own determination of what type of criminal threat Martinez-Guerrero committed because the district court previously concluded Martinez-Guerrero committed an intentional criminal threat.

We reject the State's second argument immediately, as it mischaracterizes the holding in *Martinez-Guerrero*. First, the panel found that the district court used the incorrect standard of review and resulting burden of proof when rendering its decision because it viewed the evidence in the light most favorable to the State. 2022 WL 68543, at *3. Second, the panel did not determine which type of criminal threat Martinez-Guerrero committed. Instead, the panel reviewed the evidence and prior caselaw before concluding it could not discern whether Martinez-Guerrero pled no contest to intentional or reckless criminal threat. 2022 WL 68543, at *4-6.

But considering the State's first argument, it is accurate that Martinez-Guerrero pled no contest in his case, but Degand pled guilty here. The State tries to distinguish Degand's guilty plea from Martinez-Guerrero's no-contest plea by arguing that Degand admitted all elements of the crime charged by pleading guilty. See *State v. Harned*, 281 Kan. 1023, 1045, 135 P.3d 1169 (2006). We fail to see the legal significance of the difference between the two pleas. In *Martinez-Guerrero*, the panel stated:

"Although ""a defendant does not expressly admit his [or her] guilt"" under a no-contest plea, such a plea ""authorizes the court for purposes of the case to treat him [or her] as if he [or she] were guilty.' During such pleas a defendant is agreeing to refrain from contesting, rather than affirmatively voicing his [or her] guilt to, the charge or charges."' A district court is required to establish a factual basis for the crime charged before it can accept a no-contest plea.

"By entering into a no-contest plea, Martinez-Guerrero did not admit to the underlying facts of the case. Strictly speaking, Martinez-Guerrero pled no contest to reckless or intentional criminal threat. A factual basis only needed to be established for reckless or intentional criminal threat for the district court to accept Martinez-Guerrero's plea because that was how he was charged. Thus, Martinez-Guerrero's no-contest plea does not help the State in this instance because his plea does not establish which version of criminal threat he pled to—intentional or reckless criminal threat. The State still had to prove Martinez-Guerrero's prior criminal threat conviction was for an intentional threat. It failed to do so on the record before us. [Citations omitted.]" 2022 WL 68543, at *6.

It is true that Degand admitted to the underlying facts of the case by pleading guilty, but his plea does not establish which version of criminal threat he pled to. The language of the amended indictment, the factual basis given by the State during the plea hearing, and the journal entry of judgment in the case reinforce this conclusion. They all show it could be both intentional or reckless.

Degand's plea is similarly unhelpful to the State because of the following exchange during the 2018 plea hearing:

> "THE COURT: At this time, I would ask you, how do you plea to Count I in the Amended Indictment, criminal threat?
>
> "DEFENDANT DEGAND: Guilty."

Put differently, the State never differentiated between which version of criminal threat Degand pled guilty to. Instead, Degand pled guilty to what the State alleged—that he was guilty of either reckless or intentional criminal threat.

In sum, to resolve this sentencing issue before us, we must apply a statute to the facts. K.S.A. 2022 Supp. 21-6810(d)(9) prohibits the inclusion of prior convictions of laws that have since been determined unconstitutional. The statute does not have any exception for convictions obtained as the result of a guilty plea. Because the record before us fails to establish which version of criminal threat Degand pled to, the State failed to prove that Degand's prior criminal threat conviction was for an intentional threat. Thus, we affirm the district court's judgment.

Affirmed.

(530 P.3d 750)

No. 125,258

WILLIAM LORIN CORBETT, *Appellant*, v. CITY OF KENSINGTON, KANSAS, and CUNNINGHAM SANDBLASTING & PAINTING CO., INC., *Appellees*.

SYLLABUS BY THE COURT

1. 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.

2. TRIAL—*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.

Appeal from Smith District Court; PRESTON A. PRATT, judge. Opinion filed May 12, 2023. Affirmed.

Todd D. Powell, of Glassman Bird Powell, LLP, of Hays, for appellant.

Allen G. Glendenning, of Watkins Calcara, Chtd., of Great Bend, for appellee City of Kensington.

Alan R. Pfaff, of Wallace Saunders, Chtd., of Wichita, for appellee Cunningham Sandblasting & Painting Co., Inc.

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

GARDNER, J.: William Lorin Corbett sued the City of Kensington (City) and Cunningham Sandblasting & Painting Co. Inc. (Cunningham) for personal injury and property damage, which Corbett claimed was caused by work the City contracted Cunningham to do on a water tower next to his property. The district court granted the City's motion for summary judgment because it found the City was immune and because it found the City was an employer of an independent contractor. It granted Cunningham's mo-

tion for summary judgment because Corbett failed to present expert testimony to establish the standard of care and causation for its claims. Corbett appeals. Finding no error, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The City owns a water tower that sits on property next to property owned by Corbett and his wife, Jennifer. In June 2018, the City contracted to hire Cunningham to brush blast and paint the City's water tower in accordance with SSPC-SP7. That document required the use of compressed air nozzle blasting, centrifugal wheels, or other specified methods to remove "all visible oil, grease, dirt, dust, mill scale, rust, paint, oxides, corrosion products and other foreign matter." The contract also required Cunningham to apply an epoxy primer coat and finish paint to the tower.

On September 7, 2018, Corbett learned that the City planned to have the water tower painted and sandblasted soon. Corbett told Cunningham's foreman, Nelson Bones, that Cunningham needed to cover his garage and porch before it began work on the tower.

By September 8, someone had covered Corbett's garage with plastic. The next day, Corbett noticed that his garage roof was covered in sand. Corbett told Bones that his garage and patio should be covered with heavy plastic or tarps. Someone later replaced the covering and applied a heavy black plastic cover to Corbett's porch and the length of his garage roof. Corbett apologized to Bones for being difficult and told him this was the type of covering he had expected. Corbett also suggested that had he known about the water tower project sooner, he would have covered his garage with heavy tarps and delayed installation of his $20,000 metal dome roof.

On September 12, Corbett slipped on sand that had accumulated on a small ornamental bridge in his yard and fell. Corbett later found paint chips in his yard and surrounding property, which he believed came from the water tower. After sending the paint chips and some soil samples for testing, he received lab results showing that the lead in one of the paint chips and one of the soil samples exceeded the standard acceptable level for lead contamination in a play area.

Corbett sued the City and Cunningham for negligently causing him personal injury and causing lead contamination to his property. Corbett claimed that he fell and was injured because the water tower project caused sand and debris to cover the bridge in his yard, and that the City and Cunningham were negligent for failing to use reasonable care under the circumstances or to take reasonable measures to protect him from being injured.

Jennifer testified in her deposition that before Corbett fell, she had sometimes noticed that the bridge had dust or sand on it from the water tower project. Corbett's son also stated that before Corbett's fall, the family had been avoiding the bridge because of the sand. Corbett testified that he typically crossed the bridge to take his kids to school every day and that he took his children to school the two days right before he fell. And a day before he fell, he saw sand on "just about everything" and thus assumed that the bridge was also covered in sand. Corbett had also walked around his yard taking pictures and videos of the sand on his property, including on the bridge.

For his personal injury claim, Corbett designated Brenton Phillips—owner of Cunningham—as his expert on the standard of care for brush blasting and painting a water tower. Corbett summarized Phillips' anticipated testimony:

"This witness is expected to testify regarding industry standards for brush blasting and sandblasting on water towers in regard to measures to protect health and safety of workers and people and property near the project and how to control the spread of sandblast media, lead paint, and other debris . . . . This witness is expected to testify consistent with his deposition testimony, which has not yet been taken. Anticipated testimony includes a discussion of under what circumstances a curtain or other protective equipment is used in blasting and painting projects on water towers."

But when Phillips was deposed, he testified that he would *not* recommend a protective curtain for the brush blasting process used for the City's water tower project, as there was simply "no reason to use it." He added that Cunningham had never discussed the possibility of using a curtain when going over the details of this project with the City, because it would have been unnecessary. And had the question arisen, Phillips would have asked why the City would want a curtain because it would have been a waste of taxpayers' money, and "for no good reason." Phillips provided

uncontroverted testimony that the applicable standard of care for painting a water tower requires no special precautions.

For his lead contamination claim, Corbett designated Steven Northcott as an expert on the testing of the paint and soil samples. Corbett summarized his anticipated testimony:

"Mr. Northcott is expected to testify as to the results of testing of soil and paint chips located on plaintiff's property . . . . Mr. Northcott is expected to testify to the results of lead testing, including explaining the nature and extent of lead contamination on Plaintiff's property and specifically that one soil sample exceeds the acceptable level for a play area and one paint chip sample exceeds the standard for lead in paint."

Northcott's report included lab reports for the samples Corbett had collected.

The City and Cunningham designated David Folkes, a civil and geological engineer, as their lead contamination expert. Folkes found that Northcott's investigation failed to determine the source of the lead, and the data and evidence collected failed to show that the 2018 water tower project was the source of the lead contamination on Corbett's property. Folkes concluded that a more likely source of the lead was paint from Corbett's house, other older painted structures in the area, historical auto emissions, or lead-containing herbicides or pesticides.

Cunningham moved for summary judgment, arguing that Corbett had failed to provide the expert testimony necessary to establish the standard of care required to complete the water tower project, or breach of that standard. Cunningham maintained that expert testimony was required because the procedure for preparing and painting the water tower—as provided in its contract with the City—was beyond the common knowledge and experience of the typical juror.

The City also moved for summary judgment, arguing it was not liable for negligence because it had not done the work or directed the work but had hired and relinquished full control to Cunningham, an independent contractor. The City also claimed discretionary immunity. Both defendants also argued that they could not be liable for an open and obvious hazard on Corbett's property, they had no duty to warn, and Corbett failed to prove causation or damages.

THE DISTRICT COURT'S DECISION ON CUNNINGHAM'S MOTION

After reviewing the parties' briefs, the district court found that Cunningham owed a duty of reasonable care to Corbett, but Corbett failed to show that Cunningham had breached that duty. The district court also held that Corbett failed to provide necessary expert testimony to establish the standard of care applicable to his personal injury claim. The district court found that Corbett's evidence failed to show, for example:

- What Cunningham should have done differently;
- Whether Cunningham should have used a different blast method or media; and
- Whether Cunningham needed to use some sort of protective cover to contain any debris.

The district court rejected Corbett's claim that no expert was needed because the standard of care was in the jury's common knowledge. In reaching that conclusion, it relied on *Gaumer v. Rossville Truck and Tractor Co.*, 41 Kan. App. 2d 405, 202 P.3d 81 (2009), *aff'd* 292 Kan. 749, 257 P.3d 292 (2011). There, this court determined that the "standard of care of the seller of a used hay baler is outside the ordinary experience and common knowledge of the jury and beyond the capability of a lay person to decide." 41 Kan. App. 2d at 408. The district court agreed with Cunningham that Corbett needed but failed to provide expert testimony to establish the standard of care for the "specialized work" involved in the water tower project. The district court thus granted summary judgment on Corbett's negligence claim because Corbett did not offer expert testimony to establish the standard of care and in turn could not prove that a breach occurred. Similarly, the district court granted summary judgment on Corbett's lead contamination claim because Corbett had no expert testimony showing that the paint or other samples his expert tested had likely come from Cunningham's work on the water tower in 2018.

THE DISTRICT COURT'S DECISION ON THE CITY'S MOTION

As for the City, the district court first applied the independent contractor doctrine, finding that the City was not liable for Cor-

bett's alleged injuries because of its employer-independent contractor relationship with Cunningham. The court recognized, but rejected, Corbett's claims that several exceptions applied to this doctrine.

Finally, the court ruled that the City had discretionary function immunity under K.S.A. 75-6104(e) of the Kansas Tort Claims Act because the City's decision to hire Cunningham to work on the water tower was a policy decision rather than a ministerial function. The district court also found that maintaining a water tower is a proprietary function rather than a legal duty.

Corbett timely appeals.

Cunningham cross-appeals, arguing the district court erred in finding it owed Corbett a duty of reasonable care. The City also filed a notice of conditional cross-appeal, asking that if we reverse the district court's dismissal of Corbett's claims against it, it be allowed to reinstate a cross-claim that it raised against Cunningham.

I. DID THE DISTRICT COURT ERR BY FINDING THE CITY NOT LIABLE BASED ON THE INDEPENDENT CONTRACTOR DOCTRINE?

We first address Corbett's argument that certain exceptions to the independent contractor rule raise a material question of fact about the City's liability.

Basic Legal Principles

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—there is nothing that the fact-finder could decide that would change the outcome of the claim. See *Shamberg, Johnson & Bergman, Chtd. v. Oliver*, 289 Kan. 891, 900, 220 P.3d 333 (2009).

When deciding a motion for summary judgment, the district court must 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. *Shamberg, Johnson & Bergman, Chtd.*, 289 Kan. at 900. Because summary judgment tests the legal viability of a claim, this court applies this same framework on appeal. 289 Kan. at 900; see also *Martin v. Naik*, 297 Kan. 241, 246, 300 P.3d 625 (2013). When, as here, the parties agree that the facts are undisputed, we review a district court's decision to grant summary judgment de novo. And we review issues of statutory interpretation, like other questions of law, de novo. *Roe v. Phillips County Hospital*, 317 Kan. 1, 5, 522 P.3d 277 (2023).

Negligence is "the lack of ordinary care"—that is, "the failure of a person to do something that a reasonably careful person would do, or the act of a person in doing something that a reasonably careful person would not do, measured by all the circumstances then existing." *Johnston v. Ecord*, 196 Kan. 521, 528, 412 P.2d 990 (1966). To succeed on a negligence claim, a plaintiff must prove that the defendant owed the plaintiff a legal duty and breached that duty, and that the plaintiff was injured as a result of the defendant's breach. *Sall v. T's, Inc.*, 281 Kan. 1355, Syl. ¶ 2, 136 P.3d 471 (2006). Generally, "'[w]hether a duty exists is a question of law,'" but "'[w]hether the duty has been breached is a question of fact.'" *Deal v. Bowman*, 286 Kan. 853, 858, 188 P.3d 941 (2008) (quoting *Nero v. Kansas State University*, 253 Kan. 567, Syl. ¶ 1, 861 P.2d 768 [1993]). Summary judgment is seldom considered proper for claims of negligence. *Esquivel v. Watters*, 286 Kan. 292, Syl. ¶ 3, 183 P.3d 847 (2008).

Kansas law does not impose a generalized duty on everyone to prevent all possible harm to others. See *Gragg v. Wichita State University*, 261 Kan. 1037, 1045, 934 P.2d 121 (1997). It, however, imposes a duty of care to safeguard against reasonably foreseeable harms based on the circumstances of a particular case and the parties' relationships. See 261 Kan. at 1045.

Analysis

The parties agree that generally, the employer of an independent contractor is not liable for injuries caused by the negligence of an independent contractor. See Restatement (Second) of Torts § 409 (1964); *Dillard v. Strecker*, 255 Kan. 704, 716, 877 P.2d 371 (1994). "An independent contractor is defined as one who, in exercising an independent employment, contracts to do certain work

according to his own methods, without being subject to the control of his employer, except as to the results or product of his work." *Falls v. Scott*, 249 Kan. 54, 64, 815 P.2d 1104 (1991). The district court found that Cunningham acted as an independent contractor and that the City relinquished control of the work to Cunningham. See 249 Kan. at 64. Corbett does not challenge those conclusions, conceding that Cunningham was an independent contractor of the City and recognizing that if the general rule applies, the City is not liable for injuries caused by Cunningham's negligence.

Corbett argues solely that the district court erred by not applying these exceptions to the independent contractor doctrine:

- the City knew that the water tower work was likely to create a nuisance or trespass;
- the work created a peculiar or unreasonable risk of physical harm to others absent special precautions;
- the work involved an inherently dangerous activity; and
- the City failed to exercise reasonable care to hire a competent contractor.

We examine these individually.

Nuisance Exception

Restatement (Second) of Torts § 427B (1965) provides that an employer of an independent contractor may be held liable for harm caused to another when the employer knows or has reason to know that the work is "likely to involve a trespass upon the land of another or the creation of a public or a private nuisance," and the harm results from that trespass or nuisance.

Although Corbett relies on this exception, he fails to show that our appellate courts have ever adopted this rule. Cf. *McDonnell v. The Music Stand, Inc.*, 20 Kan. App. 2d 287, 293, 886 P.2d 895 (1994) (adopting similar exception provided in Restatement [Second] of Torts § 411 [1965]); see *State v. Meggerson*, 312 Kan. 238, 246, 474 P.3d 761 (2020) (point raised incidentally in brief but not argued is considered waived or abandoned; point considered improperly briefed based on failure to cite pertinent authority in support). But cf. *Davis v. City of Kansas City*, 204 Kan. 524,

532-33, 464 P.2d 154 (1970) (applying rule that "where the conduct of the contractor gives rise to a nuisance and the employer retains the right to control the manner and method of the contractor's performance of the contract, the employer is liable for the nuisance"). We assume, without finding, that the Kansas Supreme Court would apply this exception to appropriate facts.

The City also notes that Corbett did not plead nuisance when he filed his initial claims; he claimed only negligence and lead contamination. But the City cites no authority showing that Corbett had to do so to rely on § 427B in its summary judgment motion. We know of no such requirement.

Still, in response to the City's motion for summary judgment, Corbett had to give the district court "something of evidentiary value to establish a disputed material fact." *Kastner v. Blue Cross and Blue Shield of Kansas, Inc.*, 21 Kan. App. 2d 16, Syl. ¶ 6, 894 P.2d 909 (1995). To fall within the nuisance exception to the independent contractor rule, Corbett had to provide probative evidence that the City knew or should have known that the water tower project would likely cause a private or public nuisance on his property. Restatement (Second) of Torts § 427B.

The district court found the nuisance exception inapplicable because the City lacked "expertise or knowledge in how the tower work would be carried out, or what, if any, issues [it] might cause for neighboring landowners, or how significant those issues might be." The City argues that the nuisance exception applies only if the City had "actual knowledge" of a likelihood of a nuisance or trespass. Alternatively, the City also argues that it had no reason to know that a nuisance would result because, as the district court found, it lacked any training or expertise in this area.

Corbett claims that the City knew the proximity of his property to the water tower and knew that the work would cause sand and other debris to fall onto his property, as this evidence shows:

- the bids that the City received from Cunningham stated the following scope of work: "SSPC-SP 6—The removal of all visible oil, grease, dirt, dust, mill scale, rust, paint, oxides, corrosion products and other foreign matter by compressed air nozzle blasting, centrifugal wheels or other specified method";

- Corbett's property is adjacent to the water tower;
- City maintenance worker, Troy Conaway, helped put a protective covering on Corbett's property; and
- Corbett spoke to a Cunningham representative about having a protective curtain or sock put up to contain any debris.

Contrary to the City's claim, the City did not need to direct Cunningham to cause a nuisance or have actual knowledge that a nuisance would occur; its knowledge that a nuisance was likely to occur is enough:

"This exception applies to work which involves a trespass on the land of another, or either a public or a private nuisance. It applies in particular where the contractor is directed or authorized by the employer to commit such a trespass, or to create such a nuisance, and where the trespass or nuisance is a necessary result of doing the work, as where the construction of a dam will necessarily flood other land. It is not, however, necessary to the application of the rule that the trespass or nuisance be directed or authorized, or that it shall necessarily follow from the work. It is sufficient that the employer has reason to recognize that, in the ordinary course of doing the work in the usual or prescribed manner, the trespass or nuisance is likely to result." Restatement (Second) of Torts § 427B, comment b.

Corbett's evidence, viewed in the light most favorable to him, and together with reasonable inferences, suggests that the City knew or should have known that the work it contracted for Cunningham to do would likely cause dust or debris to fall on Corbett's property.

It does not necessarily follow, however, that the City knew that the work was likely to create a problem rising to the level of a nuisance. And that is what Corbett must show to fall within this exception.

Generally, whether a nuisance exists is a question of fact.

"'Nuisance means annoyance, and 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, offensive odors or smoke, or obstructs the reasonable and comfortable use and enjoyment of the property of another, may be said to be a nuisance. What may or may not constitute a nuisance in a particular case depends upon many things, such as the type of neighborhood, the nature of the thing or wrong complained of, its proximity to those alleging injury or damage, its frequency or continuity, and the nature and extent of the injury, damage or annoyance resulting. Each case must, of necessity, depend upon particular

facts and circumstances.' [Citation omitted.]" *Cherry v. Board of County Commissioners*, 202 Kan. 121, 123-24, 446 P.2d 734 (1968).

Factors we consider in determining whether an offense rises to the level of a nuisance are its frequency, continuity, and duration. *Sly v. Board of Education*, 213 Kan. 415, 419, 516 P.2d 895 (1973).

"A single offense, or several isolated offenses, may not constitute a nuisance, and may not, for any reason, be enjoined or enjoinable; but when the offense is repeated continuously and persistently, without any immediate prospect of a final termination, the aggregate of such offenses will finally become and will constitute a public nuisance, which may be enjoined by the public unless some other adequate remedy is given for its complete suppression and extirpation." *State ex rel. Vance v. Crawford*, 28 Kan. 726, 736 (1882).

The interference with property must also be both substantial and unreasonable. *Sandifer Motors, Inc. v. City of Roeland Park*, 6 Kan. App. 2d 308, 312, 628 P.2d 239 (1981).

The City argues that any sand or debris the water tower project caused to fall on Corbett's property was merely an inconvenience and not a nuisance, citing *Hofstetter v. Myers, Inc.*, 170 Kan. 564, 228 P.2d 522 (1951). There, our Supreme Court found an occasional but repeated operation of an asphalt plant over several years did not constitute a nuisance, in part because the dust deposited on the plaintiffs' property was only occasional—when the wind was in the right direction. The *Hofstetter* court distinguished between an "inconvenience" and a nuisance:

"Now it may be that plaintiffs suffered actual injury and damage to their persons and property as a result of the plant's operation, but the fact remains the lower court did not so find. It merely found they were *inconvenienced*. While it is perhaps true that 'inconvenience,' depending upon its nature, extent and result, might, in some instances, be such as to constitute a nuisance in the eyes of the law, yet under all of the facts and circumstances of the case before us we cannot give the court's findings such interpretation." 170 Kan. at 569.

We assume that the sand or debris on Corbett's property was caused by brush blasting the water tower. But the sand or debris was on his property only a few days, had an immediate prospect of a final termination, and was washed away during the next rainstorm. The evidence, including the photographs of Corbett's property, does not show such a volume of sand as to arguably constitute a nuisance.

Nor does the evidence show the City's knowledge that the work was likely to create a problem rising to the level of a nuisance. Corbett argues that the "Cleanup/Disposal" clause in Cunningham's contract shows the City's knowledge of the likelihood of creating a nuisance. But other terms in the contract suggest that the water tower work would be completed in as short a timeframe as possible, promising the work would be "pursued aggressively" and defining "excessive" delays as "several days or weeks." The City may have taken Cunningham's promise to cleanup and dispose of any leftover material as an assurance that a nuisance would *not* be created. Nothing in the contract tends to show the City's knowledge that the project could create sand or debris on neighboring property in such an amount or for the duration necessary to constitute a nuisance.

So even if we assume that § 427B applies in our jurisdiction and we agree that the City knew that the water tower project would create some sand or debris on neighboring property, Corbett's evidence fails to raise a material question of fact that the City should have known that the sand would be significant enough to cause a nuisance, damaging Corbett or his property. Thus the nuisance exception under § 427B does not apply.

Peculiar Risk Exception

Corbett also invokes the "so-called peculiar risk doctrine" set forth in Restatement (Second) of Torts § 416 (1965). *See Balagna v. Shawnee County*, 233 Kan. 1068, 1082-83, 668 P.2d 157 (1983), *superseded by statute on other grounds*. It provides:

> "One who employs an independent contractor to do work which the employer should recognize as likely to create during its progress a peculiar risk of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the failure of the contractor to exercise reasonable care to take such precautions, even though the employer has provided for such precautions in the contract or otherwise." Restatement (Second) of Torts § 416.

But expert Phillips testified that the applicable standard of care in the industry for a water tower project requires no special precautions. That testimony was uncontradicted.

And Corbett offers no evidence to reasonably support a finding that the water tower project was *likely to create* an unsafe

build-up of sand or debris. He presented no evidence that would show, for example, that brush blasting a water tower routinely leaves excessive sand or debris that is unsafe for neighboring property owners. Nor does Corbett show the City should have known the work was likely to create a peculiar risk of physical harm to others.

"It is that knowledge of risk that creates the exception to the general rule of nonliability of one who hires an independent contractor. Not being involved in the execution of the work or supervising the activities, only owners who have knowledge of the peculiar risk or reasonably should have known of the risks are liable under § 413." *Dumler v. Conway*, 49 Kan. App. 2d 567, 573, 312 P.3d 385 (2013).

Dumler found this exception inapplicable. There, the plaintiff was injured when her car slid on mud on a road next to a field where ensilage was being harvested. She sued the farmer and the harvester, an independent contractor. Her suit against the farmer alleged he should have recognized his harvester was likely to create a peculiar risk of physical harm to others by leaving mud and debris on the roadway next to his field being harvested. Because the farmer did not require the harvester to take precautions, the plaintiff argued he was liable for the physical harm the harvester caused. But the district court granted summary judgment to both the farmer and the harvester. As for the farmer, the court held the "peculiar risk doctrine" did not apply so he was not liable for the negligent acts of his independent contractor. It rejected plaintiff's argument that the existence of mud on a roadway was likely to create a peculiar risk of physical harm, finding that transportation of farming equipment, which could leave mud and debris in a road, is an everyday activity that can be done safely and does not inherently pose a physical risk of harm to others. 49 Kan. App. 2d at 574.

Similarly, brush blasting and painting a water tower can be done safely and does not inherently pose a physical risk of harm to the neighbors of the water tower. Corbett fails to raise a genuine question of material fact that the City should have recognized that Cunningham's work was likely to create a peculiar risk of physical harm to others unless it took special precautions. This exception does not apply.

Inherently Dangerous Activity Exception

Corbett next relies on the inherently dangerous activity doctrine. This exception is much like the peculiar risk exception addressed above.

"'An exception to the general rule is the inherently dangerous activity doctrine, which provides that one who employs an independent contractor to do work involving a special danger to others which the employer knows or has reason to know to be inherent in or normal to the work, or which he contemplates or has reason to contemplate when making the contract, is subject to liability for physical harm caused to such others by the contractor's failure to take reasonable precautions against such dangers.'" *Dillard v. Strecker*, 18 Kan. App. 2d 899, 906, 861 P.2d 1372 (1993) (quoting *Balagna*, 233 Kan. 1068, Syl. ¶ 4), *aff'd* 255 Kan. 704, 877 P.3d 371 (1994).

See Restatement (Second) of Torts § 427.

"'In determining whether an inherently dangerous activity exists, each case must rest upon its own facts.'" *Wilson v. Daytec Constr. Co.*, 22 Kan. App. 2d 401, 404, 916 P.2d 72 (1996) (quoting *McCubbin v. Walker*, 256 Kan. 276, 290, 886 P.2d 790 [1994]). Still, comparing our facts to others is helpful.

"The reporter's note under § 427 in the Appendix to the original volume lists a number of situations in which the doctrine has been held applicable. Among those listed are included the following: Crop dusting and spraying insecticides; work involving excavation in or near the highway, where the excavation was left unguarded; work done above the highway or sidewalk, where something fell; work contemplating obstruction of the highway; installing safety doors on an elevator while it is in use; installing defective joists on a steel building frame; turning gas into mains before they were cemented; use of an acetylene torch near inflammable materials in repairing a building; repairing a skylight, with no arrangement for removal of loose iron, which was blown off; red hot rivets dropped into work being done below." *Balagna*, 233 Kan. at 1080.

Whether an activity is inherently dangerous is a question of law when the facts are undisputed. *Falls*, 249 Kan. at 61. Generally, the proper test is whether danger "inheres" in performance of the work; important factors to consider are the contemplated conditions under which the work is to be done and the known circumstances attending it. *Phillips Pipe Line Co. v. Kansas Cold Storage, Inc.*, 192 Kan. 480, 488, 389 P.2d 766 (1964); *Reilly v. Highman*, 185 Kan. 537, 541, 345 P.2d 652 (1959). Stated another way,

intrinsic danger in an undertaking is one which inheres in the performance of the contract and results directly from the work to be done—not from the collateral negligence of the contractor. *Balagna*, 233 Kan. at 1081 (finding trenching operations not inherently dangerous, thus the employer was not vicariously liable for independent contractor's failure to shore up the trenching operations).

In *McCubbin*, 256 Kan. at 296-97, the court determined that tree trimming is generally not an inherently dangerous activity under the Restatement (Second) of Torts § 427 (1964). The court reasoned it would not take an expert witness to determine that if branches are cut from a tree, they will fall to the ground and increase the risk to a person below. But an undertaking cannot be found inherently dangerous just because it might produce injury. 256 Kan. at 296-97.

Corbett has the burden to show evidence that reasonably supports a factual finding that the normal work of brush blasting and painting of a water tower is likely to create a special danger to one in his position. Corbett alleges two inherent dangers: the creation of sand and other debris; and the danger associated with the water tower's height. As for sand and debris, the City correctly states that several types of work create sand and debris—its danger is not special. And Corbett shows no facts suggesting that the City knew that Cuningham's activity was likely to create enough sand or debris to create a special danger to nearby landowners.

As for the special danger associated with the tower's height, that danger is the risk that a worker will fall off the tower. Corbett was not injured by that special danger. This exception could perhaps subject the City to liability for physical harm caused to others by the contractor's failure to take reasonable precautions against the special danger of falling that the City knows or has reason to know are inherent in or normal to the work. But Corbett's harm was not caused by Cunningham's failure to take reasonable precautions against that risk, as this exception requires. See *Dillard*, 18 Kan. App. 2d at 906 (employer who should know of special danger inherent in work is subject to liability "for physical harm caused to such others by the contractor's failure to take reasonable precautions against such dangers"). Yet Phillips provided uncontroverted testimony that the applicable standard of care for this water tower project requires no special precautions. So even if the

City knew of some special danger that injured Corbett, no facts show that the contractor failed to take reasonable precautions against such dangers.

We find that the brush blasting and painting of a water tower is an activity that can be accomplished safely and does not inherently pose a physical risk of harm to persons not working on that project. The inherently dangerous activity exception does not help Corbett.

Negligent Hiring of Independent Contractor Exception

The last exception Corbett relies on states that an employer may be directly liable for its negligent hiring of an independent contractor. See *Dye v. WMC, Inc.*, 38 Kan. App. 2d 655, 663-64, 172 P.3d 49 (2007). Restatement (Second) of Torts § 411 states:

> "An employer is subject to liability for physical harm to third persons caused by his failure to exercise reasonable care to employ a competent and careful contractor
>
> "(a) to do work which will involve a risk of physical harm unless it is skillfully and carefully done, or
>
> "(b) to perform any duty which the employer owes to third persons."

Kansas has adopted this exception. See *McDonnell*, 20 Kan. App. 2d at 293.

Corbett suggests that the City should have required Cunningham to provide references and a list of its employees before hiring them. He also argues that the City had to include certain contract provisions to show its due diligence in hiring a reputable company to complete the water tower work. But Corbett fails to support these points with facts of record or legal authority. See *Meggerson*, 312 Kan. at 246 (point raised incidentally in a brief but not argued is considered waived or abandoned; point is improperly briefed based on failure to cite pertinent authority in support).

We consider the extent of the employer's knowledge and experience in the field of work to be done. The record does show that when the City hired Cunningham, it knew Cunningham had decades of experience and expertise in maintaining water towers. In fact, Cunningham had inspected and maintained the City's water tower for the last several decades. No evidence shows that Cunningham had provided references or a list of its employees on

prior occasions. No facts suggest that any contract provisions required Cunningham to take special precautions on prior occasions. And no evidence shows that Cunningham had ever taken special precautions, such as using a curtain, or that the City had any evidence that Cunningham was not a careful and competent contractor, or that the City knew that other neighbors had been injured by sand or debris falling from a previous water tower project of Cunningham's.

Corbett's petition states a claim of physical injury. But the City convincingly argues that Corbett's evidence does not tend to show that the City acted unreasonably when hiring Cunningham or that Cunningham acted incompetently or dangerously or that the City's failure to employ a competent and careful contractor caused Corbett's injury. Corbett thus fails to prove the elements necessary to meet this exception.

No argued exception to the general rule applies. Thus, the City, as the employer
of an independent contractor, is not liable for injuries caused by any negligence of an independent contractor. Summary judgment in its favor is warranted.

We find it unnecessary to reach Corbett's claim that the court erred by finding that his claims against the City were also barred by the City's discretionary immunity.

II. DID THE DISTRICT COURT ERR BY GRANTING CUNNINGHAM SUMMARY JUDGMENT BASED ON CORBETT'S FAILURE TO PROVIDE EXPERT TESTIMONY?

We next address Corbett's claim that the district court erred by granting Cunningham summary judgment on his personal injury and property damage (paint contamination) claims. We address these claims separately.

Corbett's Personal Injury Claim

Corbett challenges the district court's ruling that his negligence claim against Cunningham failed because he did not provide expert testimony to establish the applicable standard of care or its breach. Corbett distinguishes between other claims alleging "malpractice" and his claim involving "ordinary negligence":

"While specialized knowledge may be required to evaluate allegations of sandblasting malpractice, this is a case for ordinary negligence and for which Cunningham operated under an ordinary, general standard of care of reasonableness under the circumstances."

But a party's characterization of the claim does not dictate the applicable test for determining whether expert testimony is required. Rather, the question turns on whether the subject matter requires specialized knowledge.

"Whether expert testimony is necessary to establish the applicable standard of care does not depend upon the classification of a claim as ordinary negligence rather than medical malpractice or another cause of action. *Tudor v. Wheatland Nursing*, 42 Kan. App. 2d 624, 628, 214 P.3d 1217 (2009), *rev. denied* 290 Kan. 1105 (2010). Rather, 'the well-established test for determining whether expert testimony is required is whether the subject matter is too complex to fall within the common knowledge of the jury and is "beyond the capability of a lay person to decide."' *Williamson v. Amrani*, 283 Kan. 227, 245, 152 P.3d 60 (2007), *superseded by statute on other grounds as stated in Kelly v. VinZant*, 287 Kan. 509, 197 P.3d 803 (2008)." *Estate of Doty v. Dorsch*, No. 119,216, 2019 WL 5090387, at *15 (Kan. App. 2019) (unpublished opinion).

Using this standard, Cunningham contends that expert testimony is necessary because a person would need specialized, not common, knowledge to determine whether it followed the proper procedure for brush blasting and painting a 50,000 gallon elevated water tower. Ordinary persons may have common knowledge about painting houses or rooms, but they lack a basis of knowledge about brush blasting or painting water towers, and any risk of injury to neighboring landowners.

Corbett acknowledges the proper standard but maintains that he never claimed that Cunningham negligently performed the work that it was hired to do—instead, his claim stems from what Cunningham failed to do. He argues that Cunningham should have used "different materials or a protective curtain." And this, he asserts, requires no specialized knowledge. See *McKnight v. St. Francis Hosp. & School of Nursing*, 224 Kan. 632, 633, 585 P.2d 984 (1978) (common knowledge exception to requirement of expert testimony); *Webb v. Lungstrum*, 223 Kan. 487, Syl. ¶ 3, 575 P.2d 22 (1978) (same).

But our review of caselaw leads us to agree that an expert witness was necessary here. See *Gaumer*, 41 Kan. App. 2d at 408 (finding that standard of care for seller of used hay baler was outside ordinary experience and common knowledge of the jury and beyond capability of lay person to decide, so expert testimony was necessary); *Tudor v. Wheatland Nursing*, 42 Kan. App. 2d 624, 632-33, 214 P.3d 1217 (2009) (finding expert testimony necessary to prove standard of care for nursing home employees for patient who needed particularized supervision because of a complex medical condition); *Midwest Iron & Metal, Inc. v. Zenor Elec. Co.*, 28 Kan. App. 2d 353, 354-55, 19 P.3d 181 (2000) (finding customer who sued electrical contractor for causing electrical fire while installing fusing needed expert testimony to establish standard of care for electrical contractors, as profession was technical and complex).

Corbett relies most heavily on *Juhnke v. Evangelical Lutheran Good Samaritan Society*, 6 Kan. App. 2d 744, 748, 634 P.2d 1132 (1981). It used this test: "Whether expert testimony is necessary to prove negligence is dependent on whether, under the facts of a particular case, the trier of fact would be able to understand, absent expert testimony, the nature of the standard of care required of defendant and the alleged deviation therefrom." 6 Kan. App. 2d at 748. There, a patient was pushed by another patient, fell to the floor, and was seriously injured. The panel found that the defendant's "treatment and care of this patient was so obviously lacking in reasonable care and had such serious consequences that the lack of reasonable care would have been apparent to and within the common knowledge and experience of mankind in general." 6 Kan. App. 2d at 748. Thus the trial court erred by requiring expert testimony to establish the standard of care in the community in similar facilities.

But the facts about the defendant's knowledge in *Juhnke* are distinguishable from ours. The defendant in *Juhnke* had notice that the patient who pushed others had been suffering from progressive mental deterioration for over a year, and that her mental condition continued to deteriorate. The defendant in *Juhnke* also knew that her behavior generally was very belligerent, and that she wandered around the nursing home and into the rooms of other patients, pushing, tripping, and hurting others.

A juror's common knowledge includes that one person should not push another so that one falls and sustains serious injuries, and that caregivers should not permit a mentally disturbed patient to roam about freely. Common knowledge may also tell a juror what the caregivers should have done differently, given their knowledge. But as the district court here explained:

"The proper procedure[] to sandblast and paint a water tower is specialized work. It is not within the common knowledge and expertise of jurors.

. . . .

"Now, without some expert testimony, the jury is not going to be able to understand what the reasonable care is when cleaning and painting a water tower, or what Cunningham should have done differently."

Corbett points to no comparable evidence here. One's common knowledge does not extend to understanding whether a curtain or other protective device exists or should be used to protect adjacent landowners from debris created by brush blasting a City's water tower. The district court properly held that without expert testimony, a jury would be unable to determine the standard of care, or duty. And without this standard, a jury could not determine whether that duty has been breached.

Corbett invites us to focus on the mechanism of the injury and find that a slip and fall caused by surface sand is within the common knowledge of jurors, so his case needs no expert testimony. Corbett contrasts this with *Gaumer*, when the plaintiff was injured by a hay baler and brought a failure to warn claim, requiring specialized knowledge. But our inquiry is not so narrow—we must consider all the circumstances. Corbett alleges Cunningham was negligent by failing to control the spread of sand and debris from the water tower project, suggesting that Cunningham should have used a different material or a protective curtain. But a typical juror has no way to know whether Cunningham should have used a curtain or other material. A person's ordinary knowledge gained from common life experience, such as painting a house or a room, does not include whether a painter and brush blaster of water towers should, in the exercise of reasonable care, use a protective curtain, or whether a curtain or some other precaution is possible or preferable or effective. So one's common knowledge does not suggest that Cunningham was negligent by failing to control the spread of sand and debris from the water tower project.

Corbett provided no evidence which could show that the exercise of "reasonable care would have prevented any sand from falling on [his] immediately adjacent property." Corbett also failed to show that "such tidy perfection is required by industry standards, or [that it is] even possible." Corbett concedes that the duty of ordinary care requires reasonableness under the circumstances, but he ignores that the chief circumstance that allegedly caused his injury was the brush blasting of a water tower, something outside the common knowledge of a juror.

Because expert testimony was required, Corbett had the burden to provide the necessary expert evidence when Cunningham moved for summary judgment. "He must actively come forward with something of evidentiary value to establish a disputed material fact. Evidentiary value means a document or testimony must be probative of [his] position on a material issue of fact." *Hare v. Wendler*, 263 Kan. 434, 444, 949 P.2d 1141 (1997). Corbett did not do so.

To the contrary, the only expert on this issue (Phillips)—whom Corbett and both defendants endorsed—provided uncontroverted testimony that Cunningham performed its job according to industry standards. Phillips testified that "it's typical industrial practices to do exactly what was done on the tank." The record thus establishes that Cunningham followed industry standards when completing its work. And Corbett fails to show that Cunningham had to do more than industry standards require. Cunningham is thus entitled to summary judgment on his personal injury claim.

Corbett's Lead Contamination Claim

Similarly, the district court granted summary judgment on Corbett's lead contamination claim because Corbett provided no expert testimony showing causation:

"There has to be some expert testimony about the causation of the supposed lead contamination to show that whatever lead contamination there was caused by this work done in 2018 by Cunningham on the water tower. There simply isn't enough evidence there to present that to the jury."

Corbett contends that the district court erred, as expert testimony is not always necessary to prove causation, citing *Moore v.*

Associated Material & Supply Co., 263 Kan. 226, 948 P.2d 652 (1997) (regarding cause of flooding to house). True, *Moore* held that "[w]here the causal nature of an action is self-evident, an expert is not required in order to submit a matter for decision to a jury, regardless of the existence of other complicating factors." 263 Kan. at 239. So, for example, as *Moore* recognized, the jury did not need help from an expert to evaluate whether a duty clearly defined in the Manual on Uniform Traffic Control Devices had been breached. 263 Kan. at 235 (citing *Sterba v. Jay*, 249 Kan. 270, 283, 816 P.2d 379 [1991]).

But the district court's ruling was not broad enough to find expert testimony always necessary to prove causation. It made its ruling in the context of the facts of this case and required an expert to show causation between the lead contamination on Corbett's land and Cunningham's 2018 work on the water tower. Nothing about the fact that Corbett found paint chips in his yard makes the causal nature of his lead contamination claim self-evident, so as to fall within *Moore*'s holding. See *Kuxhausen v. Tillman Partners*, 291 Kan. 314, 320, 241 P.3d 75 (2010) (*post hoc ergo propter hoc* reasoning alone shows speculation and does not forge causal link between purported wrongful conduct and claimed harm).

Although Corbett designated an expert on lead contamination, Northcott, his testimony did not establish causation. His testimony was about the results of lead testing. Corbett points to no evidence in Northcott's expert report that tends to show that the samples taken from Corbett's yard and tested were not on Corbett's property before the water tower project began, or that they likely came from that project.

To the contrary, defendants' lead contamination expert, Folkes, found Northcott's investigation insufficient to determine the source of the lead; the data and evidence collected failed to show that the 2018 water tower project was the source of the lead contamination on Corbett's property. Folkes concluded that a more likely source of the lead was paint from Corbett's house or older painted structures in the area, historical auto emissions, or lead-containing herbicides or pesticides.

The only evidence contradicting Folkes is Corbett's conclusory testimony that the paint chips from his yard came off the water tower. Had the paint chips been found on the plastic tarp that

was put on Corbett's property right before the water tower project began, one might reasonably infer that the paint chips had come from the water tower. But without more, Corbett's testimony that he got the paint chips from his yard does not support his speculation that they came from the water tower, particularly in the face of expert testimony to the contrary. Corbett thus fails to raise a material question of fact about his lead contamination claim.

Summary judgment is warranted in favor of both defendants.

THE CROSS-APPEALS

The City filed a notice of conditional cross-appeal, asking that if we reverse the district court's dismissal of the claims against it, it be allowed to reinstate a cross-claim against Cunningham. Cunningham also cross-appeals, arguing the district court erred in finding it owed Corbett a duty of reasonable care.

Because we are ruling in defendants' favor, we decline to address these cross-appeals. See *Rodman v. Matzke*, No. 115,374, 2018 WL 911225, at *9 (Kan. App. 2018) (unpublished opinion) ("if the appellate court denies relief to a losing party on the grounds he or she has raised and, thus, affirms the judgment, it has no reason to address the cross-appeal—that's what makes the cross-appeal conditional"). We would be offering an advisory opinion on the issues in the cross-appeal since those issues would not alter the parties' legal relationship. See *State ex rel. Schmidt v. City of Wichita*, 303 Kan. 650, 659, 367 P.3d 282 (2016) ("Kansas courts do not issue advisory opinions.").

Affirmed.

(530 P.3d 445)

No. 125,442

GUY CORAZZIN, *Appellant*, v. EDWARD D. JONES & CO., L.P., d/b/a EDWARD JONES, et al., *Appellees*.

SYLLABUS BY THE COURT

1. SUMMARY JUDGMENT—*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.

2. SAME—*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 on summary judgment, even if the claims sound in equity rather than law.

3. SAME—*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.

4. TORTS—*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.

5. SAME—*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.

Appeal from Johnson District Court; DAVID W. HAUBER, judge. Opinion filed May 19, 2023. Affirmed.

Caroline R. Gurney and *Michael J. Mohlman*, of Smith Mohlman Injury Law, LLC, of Kansas City, Missouri, for appellant.

Andrew D. Holder, of Fisher, Patterson, Sayler & Smith, L.L.P., of Overland Park, for appellees.

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

GREEN, J.: In this premises liability case the plaintiff, Guy Corazzin, was injured when he sat in an office chair, which later collapsed and caused him to be injured. Corazzin sued Edward D. Jones & Co., L.P. (Edward Jones), alleging that Edward Jones negligently injured him because it failed to make sure that the chair was safe for normal use. Edward Jones moved for summary judgment. It alleged that it had no actual or constructive notice that the chair was defective or dangerous. The trial court agreed and granted Edward Jones' summary judgment motion.

On appeal, Corazzin contends that there were genuine issues of material fact that precluded summary judgment. Corazzin maintains that a warning in the assembly instructions put Edward Jones on notice that the chair was not intended for commercial use. Thus, Corazzin maintains that he created a genuine issue of material fact as to whether Edward Jones had actual knowledge that the chair was dangerous. Because we conclude that there are no genuine issues of material fact, the granting of summary judgment was appropriate. Thus, we affirm.

FACTS

Tracy Kunkel is a financial advisor at Edward Jones, with an office in Overland Park. In November 2018, Kunkel bought six new office chairs from Nebraska Furniture Mart in Kansas City, Kansas. All six chairs were new Coaster Company of America, L.P. brand, Model 800056 office chairs. The assembly instructions that Kunkel followed also included the following warning: "'This product is for home use only and not intended for commercial establishment.'" Kunkel assembled the chairs and placed them in her office for customers to use. Kunkel acted in the course and scope of her employment with Edward Jones.

Roughly a month later, Corazzin and his wife attended a meeting at Kunkel's office to discuss investment opportunities. Kunkel

did not direct Corazzin to sit in any particular chair. Corazzin did not recall anything unusual about the chair he chose to sit in and stated at his deposition that he would have chosen a different chair if he had thought there was anything unusual. Although Corazzin did not inspect the chair, he did not see any readily apparent cracks, flaws, instability, or other indication that the base of the chair could break.

Corazzin sat in the chair for approximately 30 minutes. But when he pushed back from the table to cross his legs, he fell to the ground. Corazzin recalled everything going black, and when his vision returned his wife and Kunkel were standing over him. After helping Corazzin up, Kunkel told him that someone larger than him—in excess of 300 pounds—had sat in the chair the day before. Kunkel remarked that the chairs were brand new, indicating she was surprised that the chair had broken. Two photographs of the chair show that the legs of the chair had snapped. At his deposition, Corazzin was shown the chair's assembly instructions. He agreed that assembly required the wheels to be inserted into the spokes. But when he viewed the photographs of the chair, it did not appear that the wheels had come off the spokes, but rather two of the spokes simply snapped. Corazzin could not think of anything that, in hindsight, would have told him that there was an issue with the chair.

Corazzin filed a negligence action against Edward Jones based on premises liability, alleging personal injury and damages. Edward Jones moved for summary judgment, arguing that it had no duty to repair the chair or warn Corazzin because it had no notice of a dangerous condition. The trial court granted summary judgment, ruling that no genuine issues of material fact existed in this action.

Corazzin timely appeals.

ANALYSIS

Did the warning give Edward Jones notice that the chair was dangerous?

Corazzin argues that summary judgment was improper because he presented the following evidence of the warning in the

chair's assembly instructions, which created a genuine issue of material fact:

"Warning!
"1. Don't attempt to repair or modify parts that are broken or defective. Please contact the store immediately.
"2. *This product is for home use only and not intended for commercial establishment.*" (Emphasis added.)

Corazzin contends in his brief that despite the warning, an Edward Jones' employee assembled the chair and used it in Edward Jones' business.

"Plaintiff contends that the warning exists because this piece of furniture was not designed to tolerate constant, heavy traffic in a commercial setting. Furniture placed in a commercial setting like Defendant's offices would require higher durability since you have more people and heavier people using it, and thus more wear and tear on the furniture. Constant use in a commercial setting may cause a piece of furniture to snap and break, as happened in the case presently before the Court. The warning provided Defendant actual notice that the subject chair was not intended to withstand frequent use in a commercial office setting. Defendant Edward Jones, through their employee, Tracy Kunkel, had this information, but chose to use the chair in a commercial setting, directly counter to the warning. Thus, there is sufficient evidence in the record to establish that Defendant had actual knowledge of a dangerous condition on the premises."

Thus, Corazzin maintains that Edward Jones was aware that the chair had been misused based on the warning label, and he maintains that this created a dangerous condition. Edward Jones, however, argues that no evidence exists showing that it knew the chair presented a dangerous condition. Also, we note that Corazzin, in his brief, acknowledges the following: that Edward Jones "did not create the hazard. Therefore, actual or constructive notice is required to establish liability."

Our standard of review for summary judgment is well known:

"Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, admissions on file, and supporting affidavits show that no genuine issue exists as to any material fact and the moving party is entitled to judgment as a matter of law. The district court must resolve all facts and reasonable inferences drawn from the evidence in favor of the party against whom the ruling is sought. When opposing summary judgment, a party must produce evidence to establish a dispute as to a material fact. In order to preclude summary judgment, the facts subject to the dispute must be material to the conclusive issue in the case. Appellate courts apply the same rules and, where they find reasonable

minds could differ as to the conclusions drawn from the evidence, summary judgment is inappropriate. Appellate review of the legal effect of undisputed facts is de novo. [Citation omitted.]" *GFTLenexa, LLC v. City of Lenexa*, 310 Kan. 976, 981-82, 453 P.3d 304 (2019).

When the controlling facts are based on the parties' joint stipulation, an appellate court determines de novo whether the moving party is entitled to a judgment as a matter of law. *Stewart Title of the Midwest v. Reece & Nichols Realtors*, 294 Kan. 553, 557, 276 P.3d 188 (2012).

An issue of fact is not genuine unless it has legal controlling force as to the controlling issue. A disputed question of fact which is immaterial to the issue does not preclude summary judgment. In other words, if the disputed fact, however resolved, could not affect the judgment, it does not present a "genuine issue" for purposes of summary judgment. *Northern Natural Gas Co. v. ONEOK Field Services Co.*, 296 Kan. 906, 934, 296 P.3d 1106 (2013). As a general rule, summary judgment in a pending case should not be granted until discovery is complete. Nevertheless, if the facts pertinent to the material issues are not disputed, summary judgment may be appropriate even when discovery is unfinished. 296 Kan. at 935. "A party who requires more discovery to defend against a motion for summary judgment must seek a continuance to conduct that discovery under K.S.A. 2019 Supp. 60-256(f). [Citation omitted.]" *Farmers Bank & Trust v. Homestead Community Development*, 58 Kan. App. 2d 877, 883, 476 P.3d 1 (2020).

Summary 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." *Montgomery v. Saleh*, 311 Kan. 649, 653, 466 P.3d 902 (2020). 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. *Elstun v. Spangles, Inc.*, 289 Kan. 754, 757, 217 P.3d 450 (2009).

Our Supreme Court has recognized that a trial court judge may not decide disputed issues of material fact on summary judgment: "A district court judge may not decide disputed issues of material

fact on summary judgment, even if the claims sound in equity rather than law." *Stechschulte v. Jennings*, 297 Kan. 2, Syl. ¶ 1, 298 P.3d 1083 (2013).

A nonmovant cannot evade summary judgment by hoping something may develop later in the action: "'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.' [Citations omitted]." *Geer v. Eby*, 309 Kan. 182, 190, 432 P.3d 1001 (2019).

As stated earlier, negligence claims require a plaintiff to show four well-known elements—that a duty is owed to the plaintiff; that a breach of that duty has occurred; that the breach of duty has caused the plaintiff's injury; and that damages have been suffered by the plaintiff—in short: duty, breach, causation, and damages. *Granados v. Wilson*, 317 Kan. 34, 44, 523 P.3d 501 (2023). A negligence claim based on premises liability requires the same four elements: duty, breach, causation, and damages. *Rogers v. Omega Concrete Systems, Inc.*, 20 Kan. App. 2d 1, 4, 883 P.2d 1204 (1994) (citing *McGee v. Chalfant*, 248 Kan. 434, 437, 806 P.2d 980 [1991]).

One of the succinct expressions of the premises liability rule is found in *Cunningham v. Braum's Ice Cream & Dairy Stores*, 276 Kan. 883, 890, 80 P.3d 35 (2003) (quoting *Seibert v. Vic Regnier Builders, Inc.*, 253 Kan. 540, 548, 856 P.2d 1332 [1993]). There our Supreme Court observed this business principle: "'The owner of a business is not the insurer of the safety of its patrons or customers.'" 276 Kan. at 890. Nevertheless, 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. *Thompson v. Beard and Gabelman, Inc.*, 169 Kan. 75, 77, 216 P.2d 798 (1950).

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. See *Jackson v. K-Mart Corp.*, 251 Kan. 700, 703, 840 P.2d 463 (1992); *Magness v. Sidmans Restaurants, Inc.*, 195

Kan. 30, 32, 402 P.2d 767 (1965). Whether a duty exists is a question of law. *Rogers*, 20 Kan. App. 2d at 4-5. "If no duty exists, there can be no negligence." *Fountain v. Se-Kan Asphalt Services, Inc.*, 17 Kan. App. 2d 323, 327, 837 P.2d 835 (1992).

With this understanding, it is appropriate for us to focus on Corazzin's negligence action. Corazzin claims that the warning about home use furniture versus commercial use furniture gave Edward Jones sufficient notice that the chair presented a danger to customers. Edward Jones, however, argues that the warning itself is not enough to qualify as notice of a dangerous condition. Our research has revealed no Kansas case exactly on point with the issue in this case. We have found persuasive precedents from other jurisdictions involving an issue similar to the one in this case.

In the first case we will consider, Melinda Thomas sustained injuries at The Shed restaurant when a picnic bench, which she was sitting on, collapsed. *Thomas v. Shed 53, LLC*, 331 So. 3d 66, 68 (Miss. App. 2021). After Thomas filed a personal injury action, The Shed moved for summary judgment. Thomas responded by arguing that the furniture The Shed purchased from Lowe's or Home Depot was substandard and not intended for commercial use. Thomas submitted expert affidavits in support of her claim. But the affidavits from Thomas' experts did nothing to clarify why the residential or commercial distinction was important or how the business knew or should have known of a dangerous condition. The trial court struck the expert testimony and granted summary judgment.

On appeal, Thomas argued that there was a genuine issue of material fact whether The Shed maintained its premises in a reasonably safe manner. She claimed that The Shed created a dangerous condition by buying cheap, residential-grade furniture from Lowe's or Home Depot which failed because the furniture was not intended for more rigorous restaurant use. The *Thomas* court affirmed the trial court's summary judgment. In doing so, the court held that The Shed had fulfilled its duty to customers by reasonably inspecting and maintaining the restaurant furniture and had no actual or constructive knowledge of a dangerous condition involving the furniture. The court candidly concluded: "Thomas provides no genuine issue of material fact that The Shed breached its

duty. Instead, Thomas merely points to the fact The Shed purchased marked-down residential-grade picnic benches instead of commercial-grade furniture." 331 So. 3d at 71.

Similarly, in our next case, Heather Dalzell sat at an outdoor picnic table at a restaurant. *Dalzell v. Mosketti L.L.C.*, No. 2015-CA-93, 2016 WL 3032733 (Ohio App. 2016) (unpublished opinion). The bench broke, injuring her. The restaurant purchased the furniture at Lowe's less than a year before the accident, and the restaurant did not alter or modify the furniture. The *Dalzell* court held that summary judgment was appropriate because the restaurant had no knowledge of a defect in the bench until Dalzell fell. 2016 WL 3032733, at *7.

And in our third case, Charles Burnett was injured when visiting Kenneth Covell's law office and a chair collapsed under him. *Burnett v. Covell*, 191 P.3d 985 (Alaska 2008). Burnett failed to produce—or even allege that he could produce—any evidence of any signs of physical deterioration present in the chair. The *Burnett* court upheld summary judgment for Covell because Burnett could not show that Covell had breached his duty of care. 191 P.3d at 991.

To advance our inquiry here, the cases which best exemplify the extreme ends in this inquiry are probably *Parks v. Steak & Ale of Texas, Inc.*, No. 01-04-00080-CV, 2006 WL 66428 (Tex. App. 2006) (unpublished opinion), and *Prechel v. Walmart, Inc.*, No. 21-CV-12388, 2023 WL 2267193 (E.D. Mich. 2023). Mitchell Parks suffered injury when his chair at Steak & Ale collapsed under him. The *Parks* court affirmed summary judgment because Parks did not direct the court to anything in the record that showed that Steak & Ale knew or should have known that the chair created an unreasonable risk of harm. 2006 WL 66428, at *3. Thus, *Parks* represents perhaps the low end of the spectrum, with the least evidence and the weakest appellate case against summary judgment. Corazzin gives us more than Parks gave the *Parks* court. Corazzin points to the warning in the instruction manual that the chair was intended for home use—not commercial use.

And *Prechel* represents the other end of the spectrum—a plaintiff who presented sufficient evidence to survive a summary judgment motion. Denise Prechel was shopping for a desk chair at a Sam's Club store when a sales associate placed a chair in the

aisle for her to try out. When Prechel sat down in the chair, the chair tipped or tilted and Prechel sunk more than expected, into a squatting position. Her petition alleged a back injury, caused by the fact that the chair was missing one of its five wheels. The *Prechel* court denied summary judgment, noting that the photographs clearly showed that the wheel was visibly missing both before and after the incident. The court held that a jury could find that the alleged defect existed long enough for the defendants to know about it and fail to correct it: "A reasonable jury could conclude that defendants had constructive notice of the hazardous defect." 2023 WL 2267193, at *4. Thus, a visible, uncorrected defect in the chair was enough to move Prechel beyond summary judgment.

In reading these five cases, *Parks* and *Prechel* show the kinds of evidence which would control a summary judgment ruling. If a plaintiff presents literally nothing, as in *Parks*, the trial court should grant summary judgment. But if a plaintiff can show—as in *Prechel*—a readily apparent structural defect in the chair, then summary judgment is inappropriate.

In support of its position, Edward Jones cites *Pringle v. SLR, Inc. of Summerton*, 382 S.C. 397, 400-01, 675 S.E.2d 783 (2009). In this case, the plaintiff suffered personal injuries at a restaurant when the legs of the chair she was seated in suddenly broke. In her deposition, the plaintiff testified that before the chair collapsed, she did not notice anything wrong with the chair, and that the chair was not rickety, wobbly, or otherwise unstable.

Edward Jones points out in its brief that the plaintiff in *Pringle* designated a furniture salesman as an expert, who opined the following: (1) that the chair was a residential chair unfit for use in a commercial setting and (2) that residential chairs are not built to withstand frequent use in a commercial setting. The expert further opined that over time and with frequency of use, a residential chair in a commercial setting would show signs of wear, such as becoming wobbly, shaky, or loose.

Although Corazzin did not file a reply brief to distinguish his case from *Pringle*, we note that his case is distinguishable on the issue of notice. Here, the record clearly establishes that Kunkel purchased the chair and followed the instructions—instructions which contained the residential-use-only warning. But the expert

in *Pringle* testified that "some" residential chairs were stamped with such a warning label. 382 S.C. at 401. And the expert could not say whether a residential-use-only warning label was present since he was unable to examine the broken and discarded chair. Also, the owner in *Pringle* testified that some chairs came with the restaurant when he bought it and others he purchased later. But he could not say whether the chair which broke was one that he purchased himself. 382 S.C. at 402. So the record in *Pringle* is more ambiguous than this case since the chair in *Pringle* may or may not have had a warning label and the defendant may or may not have seen it.

Nevertheless, this factual dissimilarity between this case and *Pringle* is useful in our discussion of premises liability because it shows that a warning label may not be significant in determining whether a residential chair is dangerous. For instance, the *Pringle* court held: "Although [the expert in *Pringle*] opined that residential chairs like the ones used in the restaurant are not substantial enough for use in a commercial setting because they cannot sustain heavy general use, he never stated that a residential chair in and of itself is a dangerous condition." 382 S.C. at 404-05. Thus, under the *Pringle* court's reasoning, if a residential chair in and of itself is not a dangerous condition, then a warning label that a chair is for residential use only would not warn the owner or operator of a dangerous condition.

Indeed, the *Pringle* court further ruled that summary judgment would be appropriate whether or not the owner knew the chair was for residential use only. The *Pringle* court stated: "We agree with the trial court that the Pringles did not present a genuine issue of material fact as to whether the use of a residential chair in a commercial establishment, without more, constitutes evidence of negligence on the part of the owner of the establishment." 382 S.C. at 406. And, mindful of the plaintiff's burden when confronted with summary judgment, the *Pringle* court further added that there was no evidence that the restaurant "knew or should have known that the chair was in danger of collapse or other failure." 382 S.C. at 405.

To establish damages for injuries caused by a dangerous or defective condition on a defendant's premises, a plaintiff must show either (1) that the owner or operator had actual knowledge of the condition or (2) 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. See *Jackson*, 251 Kan. at 703.

Applying these principles to the present case, the subject chair here was undisputedly residential—not commercial—furniture. Corazzin contends that residential furniture presents a dangerous condition when used in a commercial setting. Also, he contends that residential chairs, like the one he collapsed in, are not substantial enough for commercial use because they cannot take the heavy general use they encounter. Nevertheless, the evidence shows that the subject chair was in use for only a short period before it collapsed—roughly one month. As Edward Jones points out in its brief, the subject chair showed no signs of deterioration. There was no evidence presented that the subject chair had a visible or uncorrected defect in the chair, unlike the evidence of the visible and uncorrected chair defect in the *Prechel* decision.

Also, Corazzin, in his deposition testimony, stated that he would have chosen a different chair if he had thought there was anything unusual about the chair. Although he did not inspect the chair, he stated that he did not see any readily apparent cracks, flaws, instability, or other indication that the base of the chair could break.

As *Thomas* and *Pringle* show, a plaintiff does not establish a genuine issue of material fact just by showing residential-grade furniture being used in a commercial setting. Corazzin's argument that Edward Jones knew or should have known that the subject chair was dangerous—based on the warning label—does not present evidence showing that Edward Jones had reason to know: (1) that the chair was dangerous or (2) that the chair was in a defective condition that had existed long enough that in the exercise of reasonable care Edward Jones should have known of this condition. Thus, Corazzin's claim is insufficient to create a genuine issue of material fact that Edward Jones negligently placed the subject chair in one of its offices.

For the preceding reasons, we affirm the trial court's grant of summary judgment.

Affirmed.

No. 124,314

STATE OF KANSAS, *Appellee*, v. JOSHUA EVAN STOHS, *Appellant*.

SYLLABUS BY THE COURT

1. CRIMINAL LAW—*Sentencing—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.

2. SAME—*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.

Appeal from Shawnee District Court; C. WILLIAM OSSMANN, judge. Opinion filed May 26, 2023. Affirmed.

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

Jodi Litfin, deputy district attorney, *Michael Kagay*, district attorney, and *Derek Schmidt*, attorney general, for appellee.

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

ARNOLD-BURGER, C.J.: Joshua Evan Stohs was convicted by a jury of one count of identity theft after giving a police officer a social security card that belonged to someone else to hide his identity and thus avoid being arrested on outstanding warrants. On appeal, he argues that the charge of interference with law enforcement is a more specific crime related to the same conduct. Based on K.S.A. 2022 Supp. 21-5109(d)(2), he contends the court could only sentence him to the misdemeanor charge of interference with law enforcement. Because we find that K.S.A. 2022 Supp. 21-5109(d)(2) does not apply when only one crime is charged, Stohs' claim fails.

Second, Stohs argues that his conviction should be reversed because the district court gave a jury instruction that contained an element broader than the charging document. We agree that the instruction was erroneous, but we are not firmly convinced the

jury would have reached a different verdict if the erroneous instruction had not been given. In other words, the error does not require reversal. We affirm the district court.

FACTUAL AND PROCEDURAL HISTORY

On July 2, 2019, City of Topeka police officers Derek Child and Bryan Stricklin stopped a man walking down the wrong side of a road. The man told them his name was Joshua Greemore and produced a social security card with that name on it, claiming that his other forms of identification had been stolen. The social security card listed the correct social security number for Joshua Greemore. Upon running that name through a driver's license database, Officer Child determined the man did not look like the photo depicted on the license and asked Officer Stricklin to look at the photo as well. When shown the photo, the man agreed the person in the photo was not him. The officers placed the man under arrest and transported him to the police station, where he revealed his real name was Joshua Stohs. The officers then learned Stohs had outstanding warrants.

Stohs was charged through grand jury indictment with one count of identity theft, a felony, under K.S.A. 2019 Supp. 21-6107(a)(1). In particular, the indictment alleged:

> "On or about the 2nd of July, 2019 in the State of Kansas and County of Shawnee, JOSHUA EVAN STOHS, did then and there, unlawfully, knowingly, and feloniously, obtain, possess, transfer, use, sell, or purchase any personal identifying information, or document containing the same, belong to or issued to another person, to-wit: name and/or date of birth and/or social security number of Joshua Greemore, with the intent to defraud that person, or anyone else, to-wit: Officer Child, in order to receive any benefit, or with the intent to misrepresent that person in order to subject that person to economic or bodily harm[.]"

Joshua Greemore testified at Stohs' jury trial that he did not know Stohs and never gave him his social security card nor allowed Stohs to use his identity.

During the jury instruction conference, Stohs proposed a defense instruction on interference with law enforcement as an alternative offense—not a lesser included offense. See K.S.A. 2019 Supp. 21-5904(a)(1)(C). The court declined and instructed the jury to consider whether:

"1. The defendant obtained, possessed, transferred, or used any personal identifying information or document containing personal identifying information belonging to or issued to Joshua Greemore.

"2. The defendant did so with the intent to defraud Officer Child and/or Officer Stricklin in order to receive any benefit.

"3. This act occurred on or about the 2nd day of July, 2019, in Shawnee County, Kansas."

The jury found Stohs guilty of identity theft as charged.

At sentencing, the district court found Stohs' criminal history score to be A, without objection, and imposed a mitigated sentence of 19 months in prison.

Stohs timely appealed.

ANALYSIS

I. STOHS' SENTENCE WAS NOT ILLEGAL

Stohs challenges the sentence for his felony identity theft conviction under K.S.A. 2019 Supp. 21-5109(d)(2), arguing that misdemeanor interference with law enforcement is a more specific crime applicable to his conduct in giving a false name to the officers. As a result, he contends that the statute requires that he can be sentenced only under the more specific though uncharged crime, the misdemeanor. Although not raised before the district court, we have jurisdiction to decide this issue because an illegal sentence can be corrected at any time. K.S.A. 2022 Supp. 22-3504.

Our standard of review is unlimited.

Resolving Stohs' claim turns on interpretation of three statutes, which presents a question of law subject to unlimited appellate review. See *State v. Stoll*, 312 Kan. 726, 736, 480 P.3d 158 (2021). When interpreting a statute, this court must first seek to ascertain the legislative intent behind the language used by giving common words their ordinary meanings. *State v. Keys*, 315 Kan. 690, 698, 510 P.3d 706 (2022). When a statute is plain and unambiguous, an appellate court should not speculate about the legislative intent behind the clear language and it should refrain from reading something into the statute that is not readily found in its words. 315 Kan. at 698.

The law related to prosecutorial charging decisions is examined.

"It is often the case that a particular set of facts—if proven beyond a reasonable doubt—could support a conviction under several different statutes." *State v. Euler*, 314 Kan. 391, 395, 499 P.3d 448 (2021). The prosecuting attorney has broad discretion in discharging their duty. The scope of this discretion extends to the power to investigate and to determine who will be prosecuted and what crimes will be charged. *Comprehensive Health of Planned Parenthood v. Kline*, 287 Kan. 372, 408, 197 P.3d 370 (2008).

But prosecutorial power is not limitless. 287 Kan. at 408. The Legislature has restricted that power by adopting rules related to sentencing when the prosecutor has charged multiple crimes for the same act. For example, "[a] defendant may not be convicted of identical offenses based upon the same conduct." K.S.A. 2022 Supp. 21-5109(e). "Where identical offenses are involved, the question is not truly a matter of one being a lesser included offense of the other. Each has identical elements and the decision as to which penalty to seek cannot be a matter of prosecutorial whimsy in charging. As to identical offenses, a defendant can only be sentenced under the lesser penalty." *State v. Clements*, 241 Kan. 77, 83, 734 P.2d 1096 (1987). Stohs does not argue that the offenses of identity theft and the uncharged crime of interference with a law enforcement officer are identical.

Similarly, upon prosecution for a crime, the defendant may be convicted of either the crime charged or a lesser included crime, but not both. K.S.A. 2022 Supp. 21-5109(b). Stohs does not argue that interference with a law enforcement officer is a lesser included offense of identity theft.

And finally, the situation that Stohs argues governs his case:

"[W]hen crimes differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct, the defendant:

(1) May not be convicted of the two crimes based upon the same conduct; and

(2) shall be sentenced according to the terms of the more specific crime." K.S.A. 2019 Supp. 21-5109(d).

Stohs argues that interference with a law enforcement officer is a more specific—though uncharged—crime applicable here, and therefore he can only be subject to the lesser misdemeanor sentence. We disagree.

The statutory rule is not favored, but we must apply it to these facts.

Before reaching this claim, we pause to note that our Supreme Court has rejected the rule of statutory construction that a general crime must give way to a more specific crime when applied to prosecutorial charging decisions. See *Euler*, 314 Kan. 391. Euler argued that the uncharged misdemeanor crime of unlawful use of a financial card was a more specific crime than identity theft, therefore she could be convicted only of the misdemeanor crime. The court declared that the court-adopted rule of the application of specific versus general crimes in the sentencing context was

> "an accidental 'rule' which was never intended to apply to two statutes with divergent elements. And importantly, as a tool of statutory interpretation to divine legislative intent, the rule appears to be an anachronism held-over from the days prior to our more rigorous insistence on the governing principle of statutory plain language." 314 Kan. at 397.

It emphasized that "when a criminal statute by its plain language unambiguously applies to a given set of facts, there can be no conclusion under our current rules of statutory interpretation other than that the Legislature *intended the statute to apply*." 314 Kan. at 397. But the court was not presented with a statutory claim in *Euler*, so the court "express[ed] no opinion on the possible applicability of [K.S.A. 2020 Supp. 21-5109(d)]" to the claims made by Euler. 314 Kan. at 396. Here we must address the statutory claim.

K.S.A. 2022 Supp. 21-5109(d) has no application when only one crime is charged.

Statutory interpretation presents a question of law over which appellate courts have unlimited review. *Stoll*, 312 Kan. at 736. The most fundamental rule of statutory construction is that the intent of the Legislature governs if that intent can be ascertained. *State*

v. LaPointe, 309 Kan. 299, 314-15, 434 P.3d 850 (2019). An appellate court must first attempt to ascertain legislative intent through the statutory language enacted, giving common words their ordinary meanings. *State v. Ayers*, 309 Kan. 162, 163-64, 432 P.3d 663 (2019).

Reviewing the language in the statute it is clear that it applies only when the prosecutor charges multiple crimes based on the same conduct. The statute prohibits a defendant from being "convicted *of the two crimes* based upon the same conduct" and instructs that the defendant can be sentenced only to the terms of the more specific crime. (Emphasis added.) K.S.A. 2022 Supp. 21-5109(d). There would be no reason to caution prosecutors if only one crime was charged. This provision applies only when the prosecutor exercises their discretion to charge multiple crimes based on the same conduct, discretion that is recognized earlier in the statute. K.S.A. 2022 Supp. 21-5109(a) ("When the same conduct of a defendant may establish the commission of more than one crime under the laws of this state, the defendant may be prosecuted for each of such crimes.").

In other words, if the prosecutor stacks the charges based on the same conduct, the sentence will be based on the more specific statute, which may carry a significantly reduced sentence. It does not prevent a prosecutor from charging a crime that carries a stiffer penalty than other crimes the prosecutor could have charged. That is purely a prosecutorial decision. See *State v. Dixon*, 60 Kan. App. 2d 100, 136-37, 492 P.3d 455, 481 (2021) ("The discretion to decide what charges to file in any situation is an important tool reserved to the prosecutor, and courts should not try to interfere with such discretion, nor do we have the power to do so."), *rev. denied* 314 Kan. 856 (2021).

And if the evidence supports the crime with the stiffer penalty, and the defendant is convicted, the defendant is subject to the stiffer penalty regardless of how many other crimes the prosecutor could have charged that had lesser penalties. Because Stohs was only charged with one crime, felony identity theft, and he does not question the sufficiency of the evidence supporting his conviction of that charge, K.S.A. 2019 Supp. 21-5109(d) has no application.

Interference with a law enforcement officer is not a more specific instance of identity theft.

Even if we accepted Stohs' position that even when only one crime is charged, he cannot receive a sentence any greater than the most specific—though uncharged—statute criminalizing his conduct, interference with a law enforcement officer is not a more specific instance of identity theft.

To determine whether one crime is more specific than another, we first look to the language of the statute which instructs us to examine whether one crime prohibits a designated kind of conduct generally and the other crime prohibits "a specific instance of *such conduct*." (Emphasis added.) K.S.A. 2022 Supp. 21-5109(d). So we first examine the conduct or behavior criminalized in each statute.

A person commits identity theft by "obtaining, possessing, transferring, using, selling or purchasing any personal identifying information . . . with the intent to . . . [d]efraud that person, or anyone else, in order to receive any benefit." K.S.A. 2022 Supp. 21-6107(a)(1). The key unlawful behavior as it applies to these facts is the actual possession of personal identifying information with intent to defraud or deceive someone (law enforcement) to receive a benefit (not be arrested on a warrant).

Interference with a law enforcement officer is falsely or deceptively reporting to a law enforcement officer "any information, knowing that such information is false and intending to influence, impede or obstruct" such officer's duty. K.S.A. 2022 Supp. 21-5904(a)(1)(C). The key unlawful behavior is reporting any false information that would impede or obstruct the officer in performing the officer's duty.

We have no hesitancy in concluding that 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. Although interference with a law enforcement officer may be specific as to who the information must be given to, it is not criminalizing "a specific instance" of identity theft.

II. ALTHOUGH THE DISTRICT COURT ERRED IN INSTRUCTING THE JURY, THE ERROR WAS NOT REVERSIBLE

Stohs also challenges his conviction for identity theft by arguing that the district court expanded the scope of the charged offense by including both officers in the jury instruction for identity theft. Like the first issue, Stohs did not challenge the instruction in district court. But we still have jurisdiction to hear his claim, albeit under a different standard of review than had he raised it before the district court. See K.S.A. 2022 Supp. 22-3414(3) ("No party may assign as error the giving or failure to give an instruction . . . unless the party objects thereto before the jury retires to consider its verdict . . . unless the instruction or the failure to give an instruction is clearly erroneous.").

First, we consider whether the instruction was legally and factually appropriate, using an unlimited standard of review of the entire record. *State v. Holley*, 313 Kan. 249, 254, 485 P.3d 614 (2021). Here, the State concedes that the identity theft instruction was erroneous because it did not conform to the elements of the crime charged in the indictment. See *State v. McClelland*, 301 Kan. 815, 828, 347 P.3d 211 (2015) (holding that a jury instruction on the elements of a crime that is broader than the complaint charging the crime is erroneous). Although the indictment charged Stohs with intending to defraud either Greemore or Officer Child, the district court instructed the jury to find Stohs guilty if the State proved he acted "with the intent to defraud Officer Child and/or Officer Stricklin." As a result, the question we must answer is whether that error is reversible.

When a party does not object to a jury instruction before the district court, an appellate court reviews the instruction to determine whether it was clearly erroneous. K.S.A. 2022 Supp. 22-3414(3). For a jury instruction to be clearly erroneous, the court must be firmly convinced the jury would have reached a different verdict if the erroneous instruction had not been given. The party claiming clear error has the burden to show both error and prejudice. *State v. Crosby*, 312 Kan. 630, 639, 479 P.3d 167 (2021).

Stohs contends he was prejudiced by the erroneous instruction because it tripled the number of ways the jury could find him guilty since there were now two possible victims and he lacked

adequate notice to defend against the charge. See *State v. Hart*, 297 Kan. 494, 509, 301 P.3d 1279 (2013) (noting that prejudice can result from overbroad instruction because of "lack of notice about the accusation that must be defended"). To say that the instruction "tripled" the number of victims is not quite accurate, however, since the jury instruction omitted Greemore while adding Officer Stricklin. Stohs also fails to show how the erroneous instruction hindered his defense in any way. As the State notes, Stohs' defense consisted of arguing (1) that he was guilty of interference with law enforcement, and (2) that the evidence failed to show he intended to receive any benefit. Put simply, neither defense required the jury to believe Stohs specifically intended to defraud only Officer Child—the only way the jury could have acquitted him if given the correct instruction. The available evidence shows that a jury would have still found him guilty if instructed to focus on whether Stohs intended to defraud Officer Child.

In sum, we are not firmly convinced the jury would have reached a different verdict if the erroneous instruction had not been given.

Affirmed.

No. 125,287

In the Matter of the Marriage of THOMAS A. MARTIN, *Appellant*, and NANCY J. MARTIN *Appellee*, v. MID-KANSAS WOUND SPECIALISTS, P.A., and EMERGENCY SERVICES, P.A., *Intervenors*.

SYLLABUS BY THE COURT

1. 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.

2. SAME—*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.

3. SAME—*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.

4. CREDITORS AND DEBTORS—*Debtor May Direct How Repayments for Multiple Debts Are Applied under Common Law Rule in Kansas.* Kansas courts recognize the common law rule that a debtor who owes a creditor multiple debts may direct how repayments should be applied; otherwise, the creditor may elect to apply any payment as the creditor chooses.

Appeal from Sedgwick District Court; JEFFREY E. GOERING, judge. Opinion filed June 16, 2023. Affirmed in part, reversed in part, and remanded with directions.

Christopher M. Joseph and *Carrie E. Parker*, of Joseph, Hollander & Craft LLC, of Topeka, for appellant.

No appearance by appellee.

Todd E. Shadid, of Klenda Austerman LLC, of Wichita, for intervenors.

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

MALONE, J.: Thomas A. Martin (Husband) appeals the district court's judgment granting Mid-Kansas Wound Specialists, P.A. (MKWS) and Emergency Services, P.A. (ESPA) (collectively, Intervenors) equitable liens against property in the marital estate resulting from Husband's pending divorce from Nancy J. Martin (Wife). The main issue on appeal is whether the district court erred in granting Intervenors' request for equitable liens against specific assets in the marital estate while the divorce was still pending and before the marital property had been divided between Husband and Wife.

Under the facts presented here, we find the district court had the authority and did not err in granting Intervenors' request for equitable liens against specific assets of the marital estate. But we find the district court erred in removing this property from the marital estate. The property subject to Intervenors' liens remains part of the marital estate and must be divided between the spouses by decree under Kansas' statutory procedure.

FACTUAL AND PROCEDURAL BACKGROUND

Wife worked for Intervenors as a business administrator for many years. In May 2017, Intervenors discovered that Wife had been secretly taking millions of dollars from the two businesses. Husband and Wife lived a comfortable lifestyle despite Wife's only employment as a business administrator and Husband's only reported source of income being social security retirement benefits. They owned residences in Wichita and Phoenix; farmland; an extensive art collection including paintings, sculptures, vases, and wine glasses; memberships in Exclusive Resorts; two Mercedes and a Lexus.

On October 31, 2017, Intervenors filed a lawsuit (civil action) against Husband, Wife, and various entities that Husband and Wife owned, alleging that Wife stole over $6 million from Intervenors during her time of employment. The pleadings in the civil action alleged that Husband conspired with Wife to embezzle the funds from Intervenors and that Husband aided and abetted Wife in the embezzlement. The pleadings also alleged that Husband and

Wife used the embezzled funds to maintain an extravagant lifestyle they could not otherwise afford, and they used the embezzled funds to support their businesses and acquire real estate and other assets.

After Intervenors had filed their civil action against Husband and Wife, Husband filed for divorce from Wife. Wife did not respond in either case. On July 27, 2018, the district court awarded Intervenors a default judgment against Wife in the civil action for $6,265,221.06 in actual damages and $4,859,823.96 in punitive damages, plus interest and costs. Intervenors have obtained no judgment against Husband in the civil action as of the time of this appeal. On August 8, 2018, the district court granted a default decree of divorce between Husband and Wife that reserved the issue of property division for the future. No division of property between Husband and Wife has been ordered in the divorce case as of the time of this appeal.

Pretrial motions and proceedings

After obtaining the default judgment against Wife, Intervenors moved in the civil action to seize, store, and dispose of certain personal property belonging to Wife. In response, Husband argued that the pending divorce prohibited Intervenors from executing against any marital property until after the court presiding over the divorce divided the property. During a hearing on the motions in the civil action, Husband argued extensively that issues about property had to be taken up in the divorce case, which had exclusive jurisdiction over the marital estate. On October 19, 2018, the district court in the civil action found that it lacked jurisdiction to grant the relief that Intervenors had requested, and it denied Intervenors' motion without prejudice.

In the divorce case, Husband moved for summary judgment on Intervenors' claims to any marital property. Husband argued that Intervenors could not assert an equitable claim against the marital estate because they only obtained a money judgment against Wife in the civil action, they did not have a civil judgment against Husband, and caselaw prohibited execution against the marital estate during a pending divorce. After hearing arguments of counsel, the district court denied summary judgment and found

that Husband was judicially estopped from contesting Intervenors' claims in the divorce case because it conflicted with the position he had argued in the civil action.

In a trial memorandum filed in the divorce case, Intervenors claimed the following marital property was subject to a constructive trust or equitable lien in favor of Intervenors because the purchase of the property could be traced to embezzled funds:

- Items of art such as paintings, sculptures, vases, and wine glasses;
- Membership interest in Exclusive Resorts;
- Real estate such as the Gatewood residence, Arizona residence, and farmland;
- Fidelity brokerage account;
- Farm implement; and
- Life insurance policies.

Husband filed a trial memorandum objecting to Intervenors' claims for a constructive trust and equitable liens asserting, among other arguments, that the Kansas Supreme Court's decision in *In re Marriage of Smith*, 241 Kan. 249, 737 P.2d 469 (1987), prohibits creditors from executing on property in a marital estate based on a judgment obtained against one spouse during a divorce action until a determination is made on how the property should be divided in the divorce. Husband also asserted that Wife had reimbursed Intervenors over $2 million and specifically identified the reimbursement checks to embezzled funds. As a result, Husband argued that liens should not attach to property traced to embezzled funds after Wife had repaid the specific debts.

The bench trial

The divorce case proceeded to a bench trial on April 8, 2021. At the beginning of the trial, Intervenors' counsel introduced, and the district court admitted, almost 50 exhibits tracing the acquisition of specific assets in the marital estate to funds embezzled by Wife. Likewise, Husband's counsel introduced, and the district court admitted, Exhibits A through D consisting of Wife's reimbursement checks purportedly showing how Wife matched each reimbursement check with funds she had stolen from Intervenors.

The exhibits showed that in 2016 Wife had secretly repaid $1,856,803.34 of the money she had stolen from Intervenors before the theft was discovered. Wife repaid another $149,167.16 in July 2017 after the theft was discovered. The parties agreed they did not need to address each exhibit at trial because the facts on the tracing of assets to embezzled funds were not in dispute—only the legal effect of the reimbursement payments was being contested in the trial.

Only two witnesses testified at the trial. Intervenors called Tracey Reed, a legal assistant for their counsel's law firm. Reed testified that she identified and traced the specific instances and amounts of Wife's thefts and partial repayments. Reed testified that after she traced the stolen and repaid funds, she was instructed to apply the repayments chronologically starting with the earliest known thefts in 2006. This method of repayment led to Wife's debt being repaid for the amounts she stole in or before 2009, with all debts from 2010 and after still outstanding.

Husband called Jeffrey Quirin, Ph.D., a professor of accounting, as a witness. Quirin testified that when Wife deposited her reimbursement checks, she wrote on the memo lines a check number for an earlier check that she had used to steal Intervenors' funds. Wife also matched her repayment amounts to the exact amount taken in each check referenced in the repayment checks' memo line. Using this "specific identification" method of repayment, Quirin testified that Intervenors had been fully reimbursed for the embezzled funds used to purchase the artwork and items at the Arizona property, and they had been partially reimbursed for the embezzled funds used to purchase some of the other property subject to Intervenors' claimed equitable liens. But Quirin also testified that his opinion was not based on Kansas law, he did not know how Kansas law would treat the facts, and he would not challenge how the court ruled on the matter.

The district court's decision

On March 15, 2022, the district court filed a 22-page memorandum decision ruling in Intervenors' favor. In broad terms, the district court reasserted its summary judgment ruling that Husband was judicially estopped from contesting Intervenors' claims

asserting a constructive trust and equitable liens against specific assets traced to the stolen funds, reasoning that Husband's arguments in the divorce case conflicted with the position he had argued in the civil action. Alternatively, the district court ruled on the merits of Intervenors' claims. The district court denied Intervenors' request for an equitable lien on farmland in the marital estate. But the district court granted Intervenors' request for equitable liens against the remaining assets they had traced to funds embezzled by Wife. The district court stated: "The Court's rulings above are predicated on the notion that assets purchased with stolen money are not properly part of the marital estate." Finally, the district court found that Intervenors could apply Wife's repayments as they saw fit and the general rule allowing a debtor to apply payments to specific debts did not affect Intervenors' equitable liens on specific assets traced to stolen funds.

On May 25, 2022, the district court issued its "Judgment Imposing Equitable Lien on Specific Assets." The judgment reaffirmed the district court's memorandum decision imposing an equitable lien in favor of Intervenors on certain property "thereby removing such property or the portion subject to an equitable lien from the marital estate." The judgment listed the assets to which an equitable lien attached including the principal and interest values of the debt associated with each asset. It authorized Intervenors to execute on the property subject to their liens pending an appeal, except for the Gatewood residence and the life insurance policies, but directed that the net proceeds of any sale must be deposited with the clerk of the district court. Our record does not reflect whether any property has been sold pending this appeal. The district court directed entry of judgment under K.S.A. 60-254(b), and Husband timely appealed.

On appeal, Husband claims the district court erred in finding he was judicially estopped from contesting Intervenors' claims asserting a constructive trust and equitable liens against specific assets traced to stolen funds. Husband also argues that the district court's order granting Intervenors equitable liens against property in the marital estate "directly contravenes Kansas Supreme Court precedent, disregards the statutory definition of marital property, exceeds the divorce court's equitable authority, and erroneously

substitutes equitable relief for execution." Finally, Husband argues that if it was proper for the district court to grant equitable liens against property traced to embezzled funds, the liens should not have been granted against property traced to embezzled funds that Wife had reimbursed. We will address each issue in turn.

Husband does not challenge in this appeal any findings made by the district court tracing embezzled funds to specific assets in the marital estate and the principal and interest values of the debt associated with each asset. An issue not briefed is considered waived or abandoned. *Cook v. Gillespie*, 285 Kan. 748, 758, 176 P.3d 144 (2008).

DISTRICT COURT'S RULING APPLYING JUDICIAL ESTOPPEL

To begin, we will address whether the district court erred in finding that Husband was judicially estopped from contesting Intervenors' claims asserting a constructive trust and equitable liens against specific assets traced to the stolen funds, based on the district court's reasoning that Husband's arguments in the divorce case conflicted with the position he had argued in the civil action. Husband argues on appeal that the harsh remedy of judicial estoppel was inappropriate, given that his arguments in the two cases remained consistent, did not mislead the district court, and afforded Husband no unfair advantage. Intervenors respond that Husband should be estopped from changing his earlier position taken in the civil action.

"Judicial estoppel precludes a party from taking one position in a case to induce the court to act in a certain way and then taking a contrary or conflicting position in a related proceeding involving the same opposing parties." *Estate of Belden v. Brown County*, 46 Kan. App. 2d 247, 262, 261 P.3d 943 (2011). A court may apply judicial estoppel to preserve "'the essential integrity of the judicial process.'" 46 Kan. App. 2d at 263. Kansas courts have not established a definitive standard of review for judicial estoppel, but this court has acknowledged with approval that most federal courts, including the Tenth Circuit, apply an abuse of discretion standard. *Midwest Crane and Rigging v. Schneider*, No. 113,725, 2016 WL 1391805, at *10 (Kan. App. 2016) (unpublished opinion). A judicial action constitutes an abuse of discretion if (1) it is arbitrary,

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

Intervenors at first moved in the civil action to seize, store, and dispose of certain personal property belonging to Wife. Husband argued—correctly—that the holding in *Smith* required that any claims to marital property must be adjudicated in the divorce case which had exclusive jurisdiction over the marital estate. The district court in the civil action agreed with Husband and found that it lacked jurisdiction to grant the relief that Intervenors had requested, and it denied Intervenors' motion without prejudice. But later in the divorce case, the district court ruled that Husband was judicially estopped from contesting Intervenors' claims asserting a constructive trust and equitable liens against specific assets traced to the stolen funds, reasoning that Husband's arguments in the divorce case conflicted with the position he had argued in the civil action.

Husband now claims that judicial estoppel is inappropriate because he did not concede to any of Intervenors' claims in the civil action, and instead only argued that the issue must be taken up in the divorce case. We agree. The record shows that Husband did not concede to any of Intervenors' claims to the property in the civil case; he merely contended that Intervenors' claims should be argued in a different forum. Husband's arguments in the civil action did not extend further than that. Nothing about Husband's position in the civil action precluded him from arguing against the merits of Intervenors' claims in the divorce case. Indeed, the record shows that Husband raised nearly identical arguments in both cases. The district court erred to whatever extent it relied on judicial estoppel in ruling for Intervenors in the divorce case.

But we see this error as a nonissue. Even though the district court erred in applying judicial estoppel, the error did not matter because the district court still addressed the merits of the parties' claims and objections. As the district court stated in its memorandum decision: "In any event, even if [Husband] was not judicially estopped from objecting to the Intervenor's claim of an equitable lien on certain assets of the marital estate, the objection is without merit." The district court proceeded to address whether Interve-

nors' claims for equitable liens against specific assets in the marital estate were barred by *Smith* and how to account for Wife's reimbursement checks. Ultimately, the district court resolved the parties' claims on those issues on the merits. Thus, the district court's ruling on judicial estoppel was not reversible error.

DID THE DISTRICT COURT ERR IN FINDING THAT IT COULD GRANT INTERVENORS' REQUEST FOR EQUITABLE LIENS AGAINST SPECIFIC ASSETS IN THE MARITAL ESTATE?

Husband's main argument on appeal is that the district court's order granting Intervenors equitable liens against property in the marital estate "directly contravenes Kansas Supreme Court precedent, disregards the statutory definition of marital property, exceeds the divorce court's equitable authority, and erroneously substitutes equitable relief for execution." More specifically, Husband argues that *Smith* directly precludes the district court from granting an equitable lien on the property. Husband also argues there is no exception to K.S.A. 2022 Supp. 23-2801's mandate that all property owned by married persons or acquired by either spouse after marriage becomes marital property at the time of the commencement of an action for divorce and remains in the marital estate until it is divided between the spouses by decree. Husband asserts that while the district court has broad discretion to equitably divide property between spouses in a divorce action, that equitable discretion does not extend to the determination of what assets comprise the marital estate. Finally, Husband argues that it was error to grant Intervenors a postjudgment equitable remedy to collect its judgment when Intervenors had only elected the legal remedy of a money judgment against Wife.

Intervenors assert that the divorce court's exclusive jurisdiction over the marital estate includes the power to determine a third party's interest in specific assets in the marital estate. Intervenors distinguish *Smith* and explain why that case does not control the outcome of this appeal. Intervenors also explain why they can assert a constructive trust and equitable liens against specific assets traced to stolen funds even though they only have a money judgment against Wife.

The parties agree that resolution of this issue involves the interpretation of statutes and the application of law to undisputed facts. Statutory interpretation presents a question of law over which appellate courts have unlimited review. *Naheim v. City of Topeka*, 309 Kan. 145, 149, 432 P.3d 647 (2019). The application of law to undisputed facts is subject to unlimited review. *University of Kansas Hosp. Auth. v. Board of Wabaunsee County Comm'rs*, 299 Kan. 942, 951, 327 P.3d 430 (2014).

In re Marriage of Smith

Husband first argues that *Smith* directly precludes the district court from granting Intervenors' request for an equitable lien against property of the marital estate before the divorce court had divided the property between Husband and Wife. *Smith* involved facts like those here. In *Smith*, the husband filed for divorce and while the divorce case was pending, the husband's employer discovered that he had wrongfully converted corporate funds during his employment. The employer sued the husband for embezzlement, fraud, and conversion, and obtained a money judgment against him while the divorce was still pending. The employer intervened in the divorce case and sought to collect its judgment against the husband by executing on the property in the marital estate. The district court ruled in the employer's favor and found that the employer's interest in the property took priority over any claim that the wife had to the marital estate. On appeal, this court reversed the district court's judgment. 241 Kan. at 249-50.

The Kansas Supreme Court took the case and considered the issue of "whether the Court of Appeals erred in holding that a creditor who obtains a judgment against one spouse during the pendency of a divorce action is precluded from collecting its judgment by executing against or claiming a lien on property owned individually or jointly by the debtor spouse." 241 Kan. at 250-51. The Kansas Supreme Court affirmed this court's ruling with the following holding:

"We hold that the filing of a petition for divorce creates a species of common or co-ownership and a vested interest in one spouse in all the property individually or jointly owned by the other, the extent of which is to be determined pursuant to K.S.A. 1986 Supp. 60-1610(b). Until that determination is made by

the trial court, the property is not subject to a lien or execution *based on a judgment obtained against one spouse during the pendency of the divorce action*." (Emphasis added.) 241 Kan at 256.

At first glance, the holding in *Smith* indeed seems to support Husband's argument here that the district court could not grant Intervenors' request for an equitable lien against any property in the marital estate until the divorce court divided the property between Husband and Wife. But as Intervenors explain, one important distinction between *Smith* and the case here is that the creditor in *Smith* made no claim tracing specific assets of the marital estate to the stolen funds. As the *Smith* court stated: "We note that there is no evidence in the present case to indicate that the property appellee seeks to acquire is the product of the assets that [the husband] converted, or that [the wife] knew of the conversion." 241 Kan. at 254. Here, it has been determined by the district court—and not challenged on appeal—that the property subject to Intervenors' claimed equitable liens is the product of the assets that Wife converted.

In *Smith*, the husband's employer-creditor had a money judgment against husband and was trying to collect that judgment by executing on property of the marital estate while the divorce was pending and before the court had divided the property between the husband and the wife. The employer-creditor made no claim tracing specific assets of the marital estate to funds the husband had embezzled. *Smith* plainly prohibits that kind of interference in marital property while a divorce is pending. But that is not what is happening here. Intervenors have established a constructive trust tracing specifically identified assets purchased by Husband and Wife with funds Wife embezzled from Intervenors. Intervenors assert that the constructive trust against specific assets gives them an interest in those assets that is superior to the interest held by either spouse.

Intervenors point to an even more important reason why the holding in *Smith* does not apply here. *Smith* holds that until marital property is divided between the spouses in a divorce, the property is not subject to a lien or execution "based upon a judgment obtained against one spouse during the pendency of the divorce action." 241 Kan. at 256. But Intervenors' constructive trust against assets traced to stolen funds is not based on their judgment against

Wife in the civil action. Intervenors acknowledge in their brief that they cannot execute on their judgment against Wife in the civil action by trying to attach a lien against undivided property in the marital estate. But that is not what they are doing here. Intervenors have pursued the constructive trust and equitable lien theory only against Husband as part of the equitable remedy they are seeking in the divorce case.

The district court's memorandum decision found that "[t]he *Smith* decision stands for the proposition that assets of the marriage that are the by-product of fraud are not part of the marital estate and are subject to the claims of the party against whom the fraud was committed." On appeal, Husband asserts this statement is incorrect, and we agree in part. As we will explain, the statutory definition of marital property includes all property owned by married persons or acquired by either spouse after marriage. That includes the property Husband and Wife purchased with the money Wife embezzled from Intervenors. But although this property is part of the marital estate—and the district court erred in finding it was not—the court's exclusive jurisdiction over the marital estate includes not only the power to equitably divide the marital property between the spouses, it also includes the power to determine a third party's interest in the marital property and to what extent that interest may be superior to the interest held by either spouse.

Still, Husband insists that the district court cannot grant a lien on any marital property in a pending divorce until the court first divides the property between the spouses, and he emphasizes one sentence from *Smith* to support his argument. The *Smith* court, in discussing the rights of third-party creditors with potential claims against marital property in a pending divorce, observed that "[i]f the third party could prove that the property *decreed* to the nondebtor spouse was the product of fraud against it, it would have a claim to that property." (Emphasis added.) 241 Kan. at 255. Husband argues in his brief that by using the term "decreed" in this sentence, the *Smith* court "contemplat[ed] that even assets of the marriage that a third party claims or has proved to be by-products of fraud *are* part of the marital estate and subject to division."

As we said, the assets Husband and Wife purchased with stolen money *are* part of the marital estate. But that fact does not

necessarily mean that the property must be divided between Husband and Wife before the district court can determine a third party's claimed interest in the property. Here, the district court traced assets in the marital estate to money that Wife embezzled from Intervenors—and those findings are not challenged on appeal. As we will explain, the district court had the authority and did not err in granting Intervenors' request for equitable liens against those assets.

A careful reading of *Smith* reveals that it is distinguishable and does not control the outcome of this appeal. We disagree with Husband's fundamental assertion that the district court's order granting Intervenors equitable liens against property in the marital estate directly contravenes Kansas Supreme Court precedent in *Smith*.

Statutory definition of marital property

Husband next argues that the district court's judgment for Intervenors disregards the statutory definition of marital property. K.S.A. 2022 Supp. 23-2801 states:

> "(a) All property owned by married persons, . . . or acquired by either spouse after marriage, and whether held individually or by the spouses in some form of co-ownership, such as joint tenancy or tenancy in common, shall become marital property at the time of commencement by one spouse against the other of an action in which a final decree is entered for divorce, separate maintenance, or annulment.
>
> "(b) Each spouse has a common ownership in marital property which vests at the time of commencement of such action, the extent of the vested interest to be determined and finalized by the court, pursuant to K.S.A. 2022 Supp. 23-2802, and amendments thereto."

The predecessor statute to K.S.A. 2022 Supp. 23-2801 was K.S.A. 23-201(b) which also defined marital property as all property owned by married persons or acquired by either spouse after the marriage. K.S.A. 2022 Supp. 23-2802(a) sets forth a procedure for the division of marital property between spouses by decree. In making the division of property, the district court shall consider several factors in the statute. K.S.A. 2022 Supp. 23-2802(c); see also K.S.A. 60-1610(b)(1) (predecessor statute which sets forth the same procedure for the division of marital property between the spouses by decree and factors for the court to consider).

Husband asserts there is no exception to K.S.A. 2022 Supp. 23-2801's mandate that all property owned by married persons or acquired by either spouse after marriage becomes marital property when a divorce commences and remains in the marital estate until it is divided between the spouses by decree. Intervenors acknowledge the statutory definition of marital property and agree that a divorce court has exclusive jurisdiction over the property in a marital estate. But Intervenors assert the divorce court's exclusive jurisdiction over the marital estate includes the power to determine a third party's interest in marital property and nothing in the statutes prohibits this procedure.

The most fundamental rule of statutory construction is that the intent of the Legislature governs if that intent can be ascertained. *Montgomery v. Saleh*, 311 Kan. 649, 654, 466 P.3d 902 (2020). An appellate court must first attempt to ascertain legislative intent through the statutory language enacted, giving common words their ordinary meanings. 311 Kan. at 654. 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. 311 Kan. at 654-55. Where there is no ambiguity, the court need not resort to statutory construction. Only if the statute's language or text is unclear or ambiguous does the court use canons of construction or legislative history to construe the Legislature's intent. *In re M.M.*, 312 Kan. 872, 874, 482 P.3d 583 (2021).

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. *Smith*, 241 Kan. at 251; *Cady v. Cady*, 224 Kan. 339, 344, 581 P.2d 358 (1978). 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. The parties do not dispute this definition, even though the district court found otherwise when it stated that "assets purchased with stolen money are not properly part of the marital estate." As we said, this finding was legally erroneous and contrary to the plain and unambiguous language of K.S.A. 2022 Supp. 23-2801(a). See *Nicholas v. Nich-*

olas, 277 Kan. 171, 177-84, 83 P.3d 214 (2004) (discussing marital property and holding that a spouse did not dispose of marital property by changing the beneficiary on pay on death accounts, transfer on death accounts, and life insurance policies).

Divorce court's power to determine third party's interest in marital property

While the parties agree on the meaning of marital property and that a divorce court has exclusive jurisdiction over the property in a marital estate, they disagree on the court's power to determine a third party's claimed interest in marital property. Husband asserts that all marital property must be divided between the spouses by decree and that the court lacks the power to determine a third party's claimed interest in the property. Intervenors assert that the divorce court's exclusive jurisdiction over the marital estate includes the power to determine a third party's claimed interest in the property.

Intervenors cite two older Kansas Supreme Court cases to support their argument. In *Cadwell v. Cadwell*, 162 Kan. 552, 178 P.2d 266 (1947), a wife filed for a divorce from her husband seeking custody of their four-year-old son and also a division of real and personal property. A third party, the wife's mother, petitioned to intervene in the divorce, claiming that she had furnished the husband and wife with sums of money and that she was the owner of certain items of personal property in the marital estate and the equitable owner of the real estate. The husband moved to strike the petition to intervene, which the district court denied. On appeal, the Kansas Supreme Court affirmed the district court's decision to allow the third party to intervene in the divorce case to assert her claimed interest in the marital property. 162 Kan. at 555-58.

In *Breidenthal v. Breidenthal*, 182 Kan. 23, 318 P.2d 981 (1957), a wife filed for divorce from her husband seeking child custody, alimony, and property division. As part of the divorce action, the wife joined as parties four members of a family partnership in which her husband allegedly owned a one-fifth interest, and secured an order restraining the defendants from altering the partnership interests until she could fully determine the value of

her husband's interest in the partnership. The district court sustained a motion by the defendants other than the husband to dismiss the action and dissolve the restraining order as to them on the ground that they could not be joined as parties in a divorce action. On appeal, the Kansas Supreme Court reversed the district court's order dismissing the action against the defendants other than the husband and dissolving the restraining order as to them. 182 Kan. at 33. While recognizing that the husband and wife are generally the only proper parties to a divorce action, the Kansas Supreme Court stated:

"However, the right of a wife to name as defendants third parties to whom the husband has conveyed his property in fraud of her rights, or third parties having, or claiming to have an interest in property involved in a divorce action, is universally accepted as the prevailing rule on the ground that the court, in the exercise of its duty to determine a reasonable amount of alimony to be awarded to the plaintiff, *must determine whether the property is in fact owned by the husband or by the third* [*party*] *defendant*. [Citation omitted.]" (Emphasis added.) 182 Kan. at 28.

Breidenthal and *Cadwell* hold that 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.

On appeal, Husband does not dispute that MKWS and ESPA could intervene as third parties in the divorce case, consistent with the rules of civil procedure. See K.S.A. 2022 Supp. 60-219; K.S.A. 2022 Supp. 60-224. But Husband asserts that after MKWS and ESPA intervened in the divorce case, the court had no power to determine their interest in the marital property. Husband argues that the divorce court only has the power to equitably divide the marital property between the spouses and that the district court's order granting Intervenors' request for equitable liens against specific assets in the marital estate traced to stolen funds "exceeds the divorce court's equitable authority."

We disagree. K.S.A. 2022 Supp. 23-2801 is clear and unambiguous to the extent that it defines marital property, but it does

not address the situation in which a third party intervenes in the divorce case and claims an interest in the property. Likewise, K.S.A. 2022 Supp. 23-2802 is clear and unambiguous in describing how marital property is divided between the spouses by a divorce decree. But the divorce court's order granting Intervenors' request for equitable liens against the marital property traced to stolen funds is based on a constructive trust theory that is a remedy separate and distinct from the statutes governing the division of marital property between the spouses by decree. The divorce court's power to determine all interests in marital property is necessary for the court to properly perform its duties of equitably dividing the marital property.

There is no question the divorce court has the exclusive jurisdiction to resolve competing interests in marital property. 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 a third party's interest in the property. Stated another way, all property owned by married persons or acquired by either spouse after the marriage is marital property, but if there is a dispute involving a third party's interest in the property and the interest held by either spouse, it must be resolved by the divorce court. Nothing about this process is contrary to the statutes defining marital property and the procedure for dividing property by a divorce decree.

Election of remedies

Finally, Husband argues that it was error to grant Intervenors a postjudgment equitable remedy to collect its judgment when Intervenors had only elected the legal remedy of a money judgment against Wife. But as the district court found, Husband's argument is premised on his misunderstanding of a constructive trust. A constructive trust "'is a remedy for unjust enrichment.'" *Nelson v. Nelson*, 288 Kan. 570, 579, 205 P.3d 715 (2009). "[T]he constructive trust remedy is res specific; a constructive trust is essentially a tracing remedy, allowing recovery of the specific asset or assets taken from the plaintiff, any property substituted for it, and any gain in its value." 288 Kan. at 580. "Where a person holding title to property is subject to an equitable duty to convey it to another

on the ground that he or she would be unjustly enriched if permitted to retain the property, a constructive trust arises." 288 Kan. 570, Syl. ¶ 7.

Husband cites *Walsh v. Weber*, No. 113,972, 2016 WL 4750102, at *25 (Kan. App. 2016) (unpublished opinion), for the proposition that a district court "may impose a personal money judgment or an equitable remedy such as [a] constructive trust, but not both." See also *Griffith v. Stout Remodeling, Inc.*, 219 Kan. 408, 411-12, 548 P.2d 1238 (1976) (discussing doctrine of election of remedies as an application of the law preventing a party from taking or occupying inconsistent positions). But as Intervenors point out, to any extent they needed to elect remedies, it applied only to their claims against Wife. As we have already discussed, Intervenors' claimed constructive trust covering assets traced to the stolen funds is not based on their judgment against Wife in the civil action. Intervenors have pursued the constructive trust and equitable lien theory only against Husband. The doctrine of election of remedies does not apply here.

In sum, we disagree with Husband's fundamental assertion that the district court's order granting Intervenors equitable liens against property in the marital estate directly contravenes Kansas Supreme Court precedent in *Smith*. The property purchased with funds Wife embezzled from Intervenors is marital property, and the district court erred in finding otherwise. But the divorce court's exclusive jurisdiction over the marital estate includes not only the power to equitably divide marital property between the spouses, it also includes the power to determine a third party's interest in the marital property and to what extent that interest may be superior to the interest held by either spouse. Nothing about this process is contrary to the statutes defining marital property and the procedure for the district court to divide property between the spouses by a divorce decree. Finally, the remedy of a constructive trust and equitable liens against specific assets traced to the stolen funds did not violate the doctrine of election of remedies.

Husband argues that we must reverse the district court's judgment and remand with directions for the district court to equitably divide the marital property between Husband and Wife before it can grant Intervenors' request for any liens on the property. K.S.A. 2022 Supp. 23-2802 sets forth a procedure for the district court to divide marital property between the spouses by a divorce decree,

but it does not say the property must be divided by decree before the district court can determine a third party's interest in the property. In fact, Husband fails to explain how the district court could equitably divide the property between the spouses without first determining Intervenors' interest in the property. After all, it would not be equitable for the district court to divide the marital property between the spouses and then have Husband find out later that much of the property awarded to him is subject to Intervenors' claims.

Instead, it seems like the district court took the better approach—it first determined Intervenors' interest in the marital property so it will know to what extent the property is subject to equitable liens before dividing the property between the spouses. This procedure is consistent with K.S.A. 2022 Supp. 23-2802(c) which provides that in making the division of property, the district court shall consider many factors including "such other factors as the court considers necessary to make a just and reasonable division of property." Under the facts presented here, we conclude the district court did not err in granting Intervenors' request for a constructive trust and equitable liens against specific assets traced to funds Wife embezzled from Intervenors.

SHOULD THE LIENS HAVE BEEN GRANTED AGAINST PROPERTY TIED TO EMBEZZLED FUNDS THAT WIFE REIMBURSED?

Husband next claims that the district court erred in allowing Intervenors to apply Wife's repayments as they saw fit rather than as Wife directed. Husband asserts that under the general rule, voluntary payments made by a debtor to a creditor must be applied as the debtor directs, and even embezzlers are permitted to direct how their voluntary payments are to be applied. Husband argues that Wife's repayments were voluntary and that she communicated her directions on how the repayments were to be applied. Thus, Husband argues that if it were proper for the district court to grant equitable liens against property traced to embezzled funds, the "liens should not have been granted against property tied to embezzlement checks that were specifically reimbursed."

Intervenors argue that the general rule allowing a debtor to direct how voluntary payments to a creditor should be allocated

does not apply in cases of theft. And even if the general rule did apply here, Intervenors argue that Wife's repayments were not voluntary; Wife failed to effectively communicate how her reimbursement checks should be applied when she secretly made the payments; Wife repaid the wrong creditor and thus did not properly direct how the repayments should be applied; and Wife did not pay any interest on her debts which was necessary to satisfy the debts.

Although Husband designated an expert witness to testify about how Wife's repayments should be applied, the witness conceded his opinion was not based on Kansas law, and he did not know how Kansas law would treat the facts involving Wife's repayments of some of the embezzled funds. The parties agreed the facts were not in dispute and only the legal effect of the reimbursement payments was being contested at trial. The application of law to undisputed facts is subject to unlimited review. *University of Kansas Hosp. Auth.*, 299 Kan. at 951.

We will briefly review the relevant facts. In 2016, before Wife's embezzlement was discovered, she deposited into ESPA's account $1,856,803.34 that she took from MKWS. Wife also deposited into MKWS's account another $149,167.16 after her theft was discovered. On the various checks she deposited, she wrote a number on the memo line corresponding to the check numbers of various checks that she used to embezzle the money in the first place. The repayment checks were also written in the exact amounts as the checks referenced in the memo line. After discovering Wife's scheme, Intervenors applied her repayments chronologically starting with the earliest known debts instead of to the specific debts referenced in the memo lines of the reimbursement checks.

Based on these undisputed facts, the district court found that the general rule allowing a debtor to direct how voluntary payments should be allocated—which the district court called the "debtor-creditor rule"—did not apply in cases of theft. Alternatively, the district court found that the general rule would not apply here because Wife's repayments were not voluntary; Wife failed to effectively communicate how her reimbursement checks should be applied when she secretly made the payments; and Wife repaid the wrong creditor with her reimbursement checks.

"At common law, the general rule is that a debtor has a right to make the appropriation of payments to particular obligations, but if the debtor fails to do so, the right passes to the creditor, and if both fail to do so, the court will make the application. No third person may control or compel an appropriation different from that agreed on or made by the debtor or creditor. The rules relating to the application of payments are used only if the parties have not reached an agreement concerning where the payments are to be applied.

"Once the application of a payment is made to a particular obligation by either the debtor or the creditor, it is final and conclusive. However, the general rules regarding the application of the payments will not be followed when, from the circumstances surrounding the case, it appears that their application would be inequitable or unjust." 60 Am. Jur. 2d, Payment § 55.

Kansas courts recognize the common law rule that a debtor who owes a creditor multiple debts may direct how repayments should be applied; otherwise, the creditor may elect to apply any payment as the creditor chooses. See, e.g., *Ram Co. v. Estate of Kobbeman*, 236 Kan. 751, Syl. ¶ 1, 696 P.2d 936 (1985) ("Voluntary payments made by a debtor shall be applied as the debtor directs, unless the money for the payment is security for the creditor's loan. Then the money belongs to the creditor to apply as it chooses."); *Aetna Casualty and Surety Co. v. Hepler State Bank*, 6 Kan. App. 2d 543, Syl. ¶ 13, 630 P.2d 721 (1981) ("If a debtor owes a creditor more than one debt, in the absence of a direction from the debtor to the creditor as to how a payment is to be applied, the creditor may elect to apply it to any debt he chooses.").

Turning first to whether the general rule applies in theft cases, we find it to be somewhat of a stretch to classify the relationship between Wife and Intervenors as a debtor/creditor relationship. Wife did not borrow money from Intervenors—she stole it. Equity does not favor a claim by either Husband or Wife that Wife should be able to direct how her repayments should be applied. But we note this court has discussed and applied the general rule that a debtor can direct how payments should be applied in two cases involving an employee's embezzlement of company funds. *Home Life Ins. Co. v. Clay*, 13 Kan. App. 2d 435, 440-42, 773 P.2d 666 (1989); *Aetna*, 6 Kan. App. 2d at 554-55. The cases both involved a bank that had cashed fraudulent checks, and the issue was whether the bank's liability for the loss could be offset by a partial recovery of the stolen funds. *Home Life Ins. Co.*, 13 Kan. App. 2d at 440-42; *Aetna*, 6 Kan. App. 2d at 554-55.

Assuming without deciding that the general rule allowing a debtor to direct how voluntary payments to a creditor should be allocated can apply in cases involving theft, we agree with the district court that the rule does not apply here to Wife's repayments to Intervenors. To begin, the district court found that the general rule would not apply here because Wife's repayments were not voluntary, but on this point we disagree. Involuntary payments are excluded from the general rule allowing the debtor to direct payments to a certain debt. *Ram Co.*, 236 Kan. at 756; *In re Hart's Transfer & Storage, Inc.*, 6 Kan. App. 2d 579, 582, 631 P.2d 258 (1981). Kansas courts have typically defined involuntary payments as those compelled by court order or other legal mechanisms. See *State Bank of Downs v. Moss*, 203 Kan. 447, 455-56, 454 P.2d 554 (1969). The district court found that Wife's repayments were involuntary because she was compelled to make them to avoid detection of her theft in a company audit, but there is no authority to support that position. Thus, we find that Wife's repayments to Intervenors, while possibly motivated by an effort to conceal or reduce her culpability, were voluntarily made.

Although Wife's payments were voluntary, she failed to effectively communicate how her reimbursement checks should be applied when she secretly made the payments without notifying Intervenors. Under the general rule, the debtor's direction to the creditor on how a payment should be applied must be made at or before payment. 60 Am. Jur. 2d, Payment § 59. Until payment is made, the money is the debtor's property which the debtor is free to apply as he or she sees fit. *Ram Co.*, 236 Kan. at 756. But once payment is made, the money belongs to the creditor and the debtor no longer has authority to direct payment. 60 Am. Jur. 2d, Payment § 59.

This case presents a unique set of facts where Wife secretly made her payments without Intervenors having any knowledge of it at that time. On one hand, Wife did direct her repayments when they were made by written notations to specific checks, but on the other hand, she did not communicate those directions—or the payments themselves—to Intervenors. Because Wife did not make Intervenors aware that she was making payments, Wife essentially communicated her directions only to herself when she deposited

the checks and lost ownership of that money. So by the time Intervenors discovered Wife's repayments and her uncommunicated directions, the money was already Intervenors' property to apply as they saw fit.

Finally, we agree with the district court that it matters that Wife repaid the wrong creditor with her reimbursement checks. Before Wife's embezzlement was discovered, she deposited into ESPA's account $1,856,803.34 that she took from MKWS. As a result of this mix up, Wife failed to adequately communicate her directions how the repayments should be applied to the appropriate debts.

For these reasons, the general rule allowing a debtor to direct how voluntary payments to a creditor should be allocated does not apply to Wife's repayments to Intervenors. The district court did not err in allowing Intervenors to apply Wife's repayments as they saw fit. As a result, Wife's reimbursement checks did not affect Intervenors' equitable lien remedy.

CONCLUSION AND REMAND ORDER

This is a divorce case. The filing of the divorce petition between Husband and Wife created a marital estate, and the divorce court has exclusive jurisdiction over the property in the marital estate. All property owned by Husband and Wife or acquired by either of them after the marriage is marital property, including the property purchased with money Wife embezzled from Intervenors. K.S.A. 2022 Supp. 23-2801. 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 Intervenors' interest in the property. The district court erred when it found that the assets purchased with stolen money are not part of the marital estate. But it did not err in granting Intervenors' request for a constructive trust and equitable liens against specific assets traced to funds Wife embezzled from Intervenors.

The district court's judgment granting Intervenors' request for equitable liens against specific assets traced to funds Wife embezzled from Intervenors is affirmed. The district court's judgment "removing" this property from the marital estate is reversed. All

marital property when the divorce action commenced must be divided between the spouses by decree under K.S.A. 2022 Supp. 23-2802. Our record reflects that the net proceeds of any marital property that may have been sold has been paid to the clerk of the district court. These proceeds are also marital property and must be divided. Any marital property awarded to Husband in the property division that the district court has traced to stolen funds is subject to Intervenors' equitable liens in the amounts determined by the district court—and not challenged on appeal. After the marital property is divided, Intervenors may execute on their money judgment against Wife. *Smith*, 241 Kan. at 256. The case is remanded for further proceedings consistent with this opinion.

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

No. 125,304

In the Matter of the Parentage of W.L. and G.L.

SYLLABUS BY THE COURT

1. 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.

2. 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.

Appeal from Crawford District Court; GUNNAR A. SUNDBY, judge. Opinion filed June 16, 2023. Affirmed.

Allison G. Kort, of Kort Law Firm LLC, of Kansas City, Missouri, for appellant C.L.

Valerie L. Moore, of Lenexa, for appellee M.S., and *Sara S. Beezley*, of Girard, for appellee E.L.

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

GARDNER, J.: This case asks whether a person may claim a presumption of parentage after a district court has tried and entered judgment on another person's presumption of parentage for the same child. E.L. was in a same-sex relationship with M.S. when twins conceived through artificial insemination were born to E.L. After that relationship ended and the twins were three years old, the biological mother entered a same-sex marriage with C.L. They have since divorced. Both of E.L.'s ex-partners claimed to be the parent of the twins, but at different times. M.S. petitioned for parentage and the Crawford County District Court heard evidence, including from C.L., and entered a judgment finding M.S. the legal parent of the twins. C.L. first asserted her parentage after

that order was entered. So when M.S. moved to dismiss C.L.'s parentage petition for failure to state a claim for relief, the district court granted that motion. After careful review, we affirm, finding C.L.'s parentage petition an improper collateral attack on the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In January 2012, E.L. and M.S. began a same-sex relationship. In May 2014, E.L. became pregnant with twin boys—W.L. and G.L.—through artificial insemination. E.L. gave birth to the twins in December 2014. The two never had a coparenting agreement. They lived in Kansas City until they permanently separated in January 2016. After the separation the parties moved separately to Pittsburg.

In January 2017, E.L. and C.L., a woman, began dating, just after the twins' second birthday. In the summer of 2017, E.L. and C.L. became engaged and moved in together.

M.S. Files a Parentage Action

In October 2017, M.S. filed a Petition for Determination of Parentage in Crawford County District Court, asserting parentage of the twins under K.S.A. 2017 Supp. 23-2208(a)(4)'s presumption of maternity. She argued that she had stood in the role of a parent since the boys' conception, and that "it would be in the best interest of the minor children that the Court make a determination of parentage, custody, and child support." E.L. answered, denying that M.S. was a parent under the Kansas Parentage Act (KPA). See K.S.A. 2022 Supp. 23-2201 et seq. E.L. then cut off M.S.'s visitation. E.L. and C.L. married in January 2018.

In April 2018, M.S.'s parentage action was tried. M.S., C.L., and E.L. testified. Both C.L. and E.L. described C.L. as very involved in the twins' lives. C.L. detailed her daily schedule with the boys. E.L. testified that she and C.L. intended for C.L. to adopt the boys, but they had postponed the adoption plans while M.S.'s parentage case was pending. Yet C.L. did not assert any presumption of parentage during the trial.

The district court denied M.S.'s petition, finding her involvement with the children was incidental rather than an intentional

sharing of full parenting responsibilities. M.S. appealed, but another panel of this court affirmed the district court. See *In re W.L.*, 56 Kan. App. 2d 958, 982, 441 P.3d 495, *rev. granted* 310 Kan. 1062 (2019). M.S. petitioned the Kansas Supreme Court for review of that decision, however, and that petition was granted.

In August 2018, after M.S.'s parentage case had concluded at the district court level, C.L. petitioned to adopt the children, with E.L.'s consent. While the adoption was pending, E.L. "voluntarily wrote and signed a parenting agreement confirming [C.L.] is the boys' legal mother." But that agreement had no preclusive or binding effect on M.S.'s parentage case. See K.S.A. 2022 Supp. 23-2209(d) ("Any agreement between an alleged or presumed father and the mother or child does not bar an action under this section."). And the adoption was never completed, as E.L. and C.L.'s marriage began to deteriorate.

E.L. and C.L. Divorce

In the spring of 2019, while M.S.'s appeal of her parentage case was pending with this court, E.L. and C.L.'s marriage deteriorated. They separated in early October and by the end of October, E.L. had petitioned for divorce. In December 2019, C.L. filed her answer and counter-petition to E.L.'s divorce petition, alleging that there were two children of their marriage and that C.L. was a parent to them. E.L.'s answer denied C.L.'s allegation of parentage but admitted that C.L. was a stepparent to the children and was entitled to some time with them.

The divorce case remained pending. In the fall of 2020, E.L. and C.L. reached a coparenting agreement that established joint legal and physical custody of the children.

The Supreme Court Reverses M.S.'s Parentage Action

While E.L. and C.L.'s divorce was pending, the Kansas Supreme Court issued its decision in M.S.'s parentage case in November 2020. *In re W.L.*, 312 Kan. 367, 369, 475 P.3d 338 (2020). That case held that "the same-sex partner of a woman who conceives through artificial insemination may establish a legal fiction of biological parentage by asserting the KPA presumption of maternity in K.S.A. 2019 Supp. 23-2208(a)(4) (notorious recognition

of maternity)." 312 Kan. at 381. No written coparenting agreement is necessary. *In re M.F.*, 312 Kan. 322, 323, 475 P.3d 642 (2020); *In re W.L.*, 312 Kan. at 368. Instead,

> "[s]he need only show she has notoriously recognized maternity and the rights and duties attendant to it at the time of the child's birth. In addition, in keeping with *Troxel v. Granville*, 530 U.S. 57, 66, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000), the court must ultimately be persuaded that the birth mother, at the time of the child's birth, consented to share her due process right to decision-making about her child's care, custody, and control with the woman who is claiming parentage under the KPA." 312 Kan. 381-82.

See *Frazier v. Goudschaal*, 296 Kan. 730, 746-47, 295 P.3d 542 (2013).

Under this "legal fiction," the procedure for establishing maternity under K.S.A. 2022 Supp. 23-2208(a)(4) is the same as the procedure for establishing paternity. See *In re W.L.*, 312 Kan. at 381 ("KPA provisions applicable to father and child relationship apply, insofar as practicable, to determine existence of mother and child relationship."). Thus, a woman claiming to be a presumptive mother of a child can be an interested party under the KPA without claiming to be the biological or adoptive mother. *Frazier*, 296 Kan. at 747.

A woman trying to establish maternity "bears the burden to demonstrate the initial presumption." *In re W.L.*, 312 Kan. at 381. If this burden is successfully met, the burden shifts "to the party opposed to establishment of the relationship to rebut the presumption by clear and convincing evidence, by court decree establishing paternity or maternity of someone other than the presumed parent, or under K.S.A. 2019 Supp. 23-2208(c)." 312 Kan. at 381. Under K.S.A. 2019 Supp. 23-2208(c), "if two conflicting presumptions arise, 'the presumption which on the facts is founded on the weightier considerations of policy and logic, including the best interests of the child' prevails." 312 Kan. at 381. Finally, if a presumption of parentage is rebutted, "the burden shifts back to the party seeking establishment of the parent and child relationship, who must go forward with the evidence. K.S.A. 2019 Supp. 23-2208(b). The ultimate burden placed on the party seeking court

recognition of the relationship can be discharged by a preponderance of the evidence." 312 Kan. at 381 (citing *In re M.F.*, 312 Kan. 322, Syl. ¶ 4).

The Kansas Supreme Court reversed the district court's order denying M.S.'s parentage action. It found that the district court erred by relying on evidence "critical of M.S.'s performance as a partner and a parent after the twins' birth," stating, "the quality of her partnering with E.L." is "not necessarily material to the statutory and constitutional questions a district judge must answer" in determining parentage. 312 Kan. at 382. Similarly, the court found that the district judge improperly relied on evidence of C.L.'s positive effect on the twins' lives, because counsel never "truly pursued" the possibility of conflicting parentage presumptions under K.S.A. 2019 Supp. 23-2208(c). 312 Kan. at 383. And without an asserted conflicting presumption, "[C.L.] and her relationship to the twins is irrelevant to whether M.S. can establish her pre-existing maternity under K.S.A. 2019 Supp. 23-2208(a)(4) and (b)." 312 Kan. at 383.

Our Supreme Court clarified that the focus should be on the woman's parenting at the time of birth, not the women's relationship. "*In re M.F.* makes clear that a birth parent needs to make a decision and be held to it, not given the power to change his or her mind whenever the bloom is off the rose of romance or it otherwise suits." 312 Kan. at 383. The court stated: "A child is born with one legal parent or two. His or her birth mother does not get to change that reality once it arises by operation of law." 312 Kan. at 383.

Thus, the Kansas Supreme Court reversed the Court of Appeals' decision and remanded the case for further proceedings. The court instructed that on remand, the district judge was free to allow more evidence by the parties, including proof of any conflicting presumptions. 312 Kan. at 384; see K.S.A. 2022 Supp. 23-2208(c).

M.S.'s Remanded Parentage Action

M.S.'s remanded parentage case was assigned to Senior Judge Sundby in February 2021. Because C.L. was not a party to that

case, she was not electronically notified of any filings or hearings in it.

Still, C.L. discovered there was a status conference in that parentage case scheduled for February 22, 2021, and secured an attorney to represent her as an interested party in M.S.'s remanded parentage case. Without objections, the district court allowed her attorney to join the status conference held on Zoom to observe. In discussing the mandate, the attorneys discussed whether a new evidentiary hearing was necessary. M.S.'s counsel opined that because C.L. was not involved with E.L. at the time of the twins' birth, C.L. could not establish a competing presumption of parentage. Thus, M.S. should "just be declared a parent . . . based on the record alone." E.L.'s counsel disagreed:

"I think there is going to be an issue of competing presumptions. [C.L.] has actually been in these boys lives for longer than [M.S.] has been in their lives, especially during the period of time that have been more formative where they have known her. They call her mom. She's been around three plus years so I think that's going to be the question for this Court is maybe have to get to the position where we have a *Ross* Hearing on the issues of these competing presumptions."

M.S.'s counsel then asked if C.L. intended to assert a competing presumption of parentage. C.L.'s counsel responded that he had just been hired and had not yet fully reviewed the case, but he stated: "I don't think she's going to assert the presumption, Judge. I think she's going to ask for stepparent visitation in this. . . . [T]hat's my understanding."

At another hearing, on February 25, 2021, M.S., E.L., and C.L. all appeared with counsel. The original guardian ad litem also appeared on behalf of the twins. At that hearing, C.L. said that she intended to file a motion to intervene in the parentage action that day. But she neither asserted a presumption of parentage at this hearing, nor moved to intervene that day.

Similarly, at the next hearing, on March 2, 2021, M.S., E.L., and C.L. all appeared with counsel. Again, C.L. did not assert a presumption of parentage, file any pleadings doing so, or move to intervene. The court set the case for trial on April 9, 2021.

Between that hearing and the trial date, E.L. and M.S. attended mediation and reached an agreement. That agreement became the basis of the district court's "Order Establishing Parentage," filed on April 5, 2021. That order declared M.S. to be the

legal parent of the twins, awarded M.S. and E.L. joint legal custody, and adopted a reintegration parenting time schedule for M.S.

C.L. Intervenes in M.S.'s Parentage Action

Not until July 1, 2021, nearly five months after the first status conference, and three months after the court decreed M.S. the twins' legal mother, did C.L. first move to intervene in M.S.'s parentage action as an interested party. In that motion, and for the first time, C.L. claimed a presumption of parentage. She asserted, as M.S. had, that she had recognized maternity of the twins notoriously and in writing under K.S.A. 2022 Supp. 23-2208(a)(4).

On August 19, 2021, the district court entered E.L. and C.L.'s divorce decree in that separate case. It stated that the parties had not reached an agreement on any of the issues about the twins.

On that same day, the district court heard C.L.'s motion to intervene in the parentage case. The district court considered consolidating E.L. and C.L.'s divorce case with M.S.'s parentage case rather than permitting C.L. to intervene in M.S.'s parentage case. But it ultimately denied C.L.'s motion to consolidate the two cases and granted C.L.'s motion to intervene in the parentage case. The district court also made orders consistent with E.L.'s and C.L.'s agreed schedule, giving C.L. temporary stepparenting time and ordering that she be listed as a stepparent for school purposes. Mediation was ordered to form a permanent schedule.

In November 2021, the district court entered a journal entry approving the detailed parenting plan agreed to by M.S. and E.L. and finalizing the child support order.

C.L. Files a Parentage Action

On December 3, 2021, approximately three months after her motion to intervene was granted, and nearly eight months after the district court found M.S. to be a legal parent, C.L. first petitioned to determine parentage or, in the alternative, stepparent visitation. C.L.'s parentage petition asserted that all three women should have legal custody of the children. She claimed that she was entitled to these parental presumptions:

(1) K.S.A. 2021 Supp. 23-2208(a)(3)(A), because after the children's birth she and E.L. married and C.L. acknowledged maternity of the children in writing;

(2) K.S.A. 2021 Supp. 23-2208(a)(3)(C), because after the children's birth she and E.L. married and C.L. was "obligated to support the children under a written voluntary promise"; and

(3) K.S.A. 2021 Supp. 23-2208(a)(4), because C.L. had notoriously or in writing recognized maternity of the children.

M.S. answered and she and E.L. later jointly moved to dismiss C.L.'s parentage action. They agreed that C.L. is a stepparent and that the children love her and have a relationship with her. But they argued that C.L. had failed to state a claim upon which relief could be granted for several reasons, including that no legal framework exists in Kansas under which a child can have three legal parents (stepparents aside), and that stepparent visitation should be handled in E.L. and C.L.'s divorce case rather than in a parentage case. The motion also argued that the only two parents for the twins are M.S. and E.L. because C.L. knew about M.S.'s parentage petition, C.L. participated in the trial as a witness for E.L., M.S.'s parentage had already been established by court order by the time C.L. filed her own parentage petition, and there is "zero legal precedent or argument for adding another parent post-decree."

The district court granted the motion to dismiss C.L.'s parentage action for failure to state a claim under K.S.A. 2022 Supp. 60-212(b)(6).

C.L. timely appeals.

Analysis

On appeal, C.L. does not raise all the claims she made to the district court. She does not argue that Kansas law recognizes or should recognize three legal parents of a child. Nor does she argue that she had a presumption of maternity under K.S.A. 2022 Supp. 23-2208(a)(4) (notoriously or in writing recognized maternity of the children). C.L. has thus abandoned those claims. See *State v. Funk*, 301 Kan. 925, 933, 349 P.3d 1230 (2015) (issue not adequately briefed is considered abandoned).

DID THE DISTRICT COURT PROPERLY DISMISS C.L.'S PARENTAGE PETITION?

We first address M.S.'s claim that the district court "properly exercised the doctrine of collateral estoppel and/or res judicata"

when denying C.L.'s parentage petition. In response, C.L. argues that the parties never argued these doctrines on remand and the district court never relied on either doctrine to support its dismissal of her petition, but even if it had, reliance on those doctrines is improper because M.S.'s parentage action did not determine C.L.'s parentage.

Collateral estoppel and res judicata are affirmative defenses that must be set forth in the responsive pleading—here, M.S.'s answer. K.S.A. 2022 Supp. 60-208(c); *Estate of Belden v. Brown County*, 46 Kan. App. 2d 247, 262, 261 P.3d 943 (2011); see *State v. Parry*, 305 Kan. 1189, 1193, 390 P.3d 879 (2017). An affirmative defense not asserted in an answer is waived. *Turon State Bank v. Bozarth*, 235 Kan. 786, Syl. ¶ 1, 684 P.2d 419 (1984); *Church of God in Christ, Inc. v. Board of Trustees*, 47 Kan. App. 2d 674, 685-86, 280 P.3d 795 (2012) (holding, as matter of law, affirmative defenses of res judicata and collateral estoppel are waived when no answer was filed); *Estate of Belden*, 46 Kan. App. 2d at 262 (holding application of res judicata improper when not raised in answer).

But M.S.'s answer to C.L.'s petition does not raise the affirmative defense of collateral estoppel or res judicata. By failing to plead these defenses in her answer, M.S. waived them and cannot assert them for the first time on appeal. See *Turon State Bank*, 235 Kan. 786, Syl. ¶ 1; *Church of God in Christ, Inc.*, 47 Kan. App. 2d at 685-86; *Estate of Belden*, 46 Kan. App. 2d at 262; see also *In re Adoption of Baby Girl G.*, 311 Kan. 798, 801, 466 P.3d 1207 (2020) (holding issues not raised before district court cannot be raised on appeal). But see *Forster v. Fink*, 195 Kan. 488, 493, 407 P.2d 523 (1965) ("A party impliedly consents to the introduction of issues not raised in the pleadings by his failure to make a timely objection to the admission of evidence relating thereto.").

And like C.L., we find no indication in the record that the district court relied on either res judicata or collateral estoppel as a basis to dismiss C.L.'s parentage action. The court neither referred to those doctrines nor cited any of their elements in its written order or its oral ruling from the bench. See *Herington v. City of Wichita*, 314 Kan. 447, 457-58, 500 P.3d 1168 (2021) (res judicata elements); *In re Care & Treatment of Easterberg*, 309 Kan. 490, 502, 437 P.3d 964 (2019) (collateral estoppel elements). Nor does

M.S. show that these preclusion doctrines bar suit by a nonparty. See *Brockman Equipment Leasing, Inc. v. Zollar*, 3 Kan. App. 2d 477, 482, 596 P.2d 827 (1979) (one not a party is not bound by the doctrine of res judicata); see also *In re Tax Appeal of Fleet*, 293 Kan. 768, 778, 272 P.3d 583 (2012) ("Issue preclusion prevents a second litigation of the same issue between the same parties, even when raised in a different claim or cause of action."). We thus disagree that the district court dismissed C.L.'s parentage petition based on the doctrine of res judicata or collateral estoppel.

Still, the district court did find C.L.'s parentage petition was essentially filed too late, as the motion to dismiss had argued. The court had already adjudicated another person (M.S.) to be the legal mother of the twins, besides their birth mother. In other words, C.L. did not timely present any "competing presumption." See K.S.A. 2022 Supp. 23-2208(c).

The district court's written order simply states that dismissal is proper because "[t]he Court finds that there were no competing presumptions at the time of the children's birth." But its oral ruling puts flesh on the bones of that order:

> "And now there is no denying that [C.L.] has gained a relationship with these children and has been involved in it and nobody seems to be disputing that.
>
> "But the facts are, as I think we have to look at it from a—not from the facts that you wish to present to support her care and her love and closeness to this child, I have to look at it and I am looking at it on the basis that at the time of birth and conception there was no competing interest or presumption. Then a hearing was held and found—and she was found to be a parent and no matter how close and loving that relationship has become as a stepparent, that can't rise to the level of a parent or to a presumption of a parentage.
>
> "Only then the Court would—this Court would be creating new law, which is not applicable, to create the concept of a third parent. And that doesn't appear to fly with the legislature. That doesn't appear to be contained within the language of the past cases issued by the Appellate Courts and so, therefore, the Court will grant the motions to dismiss at this time."

True, this ruling states that "at the time of birth and conception there was no competing interest or presumption." That statement is accurate. C.L. was not in the picture when the twins were born, since she and E.L. began dating after their second birthday. And that finding is controlling as to C.L.'s claim of maternity under K.S.A. 2022 Supp. 23-2208(a)(4). As the Kansas Supreme Court held in *In re M.F.*, 312 Kan. 322, Syl. ¶ 5, a notorious or written

recognition of parentage had to be done at the time of the child's birth to give rise to a presumption under K.S.A. 2022 Supp. 23-2208(a)(4). So the district court correctly held that the facts precluded C.L. from any presumption of maternity under K.S.A. 2022 Supp. 23-2208(a)(4).

But the two subsections that C.L. asserts on appeal, K.S.A. 2022 Supp. 23-2208(a)(3)(A) and (a)(3)(C), expressly base presumptions on events arising "[a]fter the child's birth." ("After the child's birth, the man and the child's mother have married . . . and . . . (A) The man has acknowledged paternity of the child in writing; . . . or (C) the man is obligated to support the child under a written voluntary promise."). According to the plain language of those subsections, those presumptions under K.S.A. 2022 Supp. 23-2208 need not exist at the time of the child's birth. Although the Legislature put time limits (300 days after certain events) on presumptions in K.S.A. 2022 Supp. 23-2208(a)(1) and (a)(2), the presumptions in K.S.A. 2022 Supp. 23-2208(a)(3)(A) and (a)(3)(C) are based on events "after the child's birth" and state no time limit. And no general statute of limitations applies to a parentage action based on the presumptions in K.S.A. 2022 Supp. 23-2208. See K.S.A. 2022 Supp. 23-2209(a)(1) ("any person on behalf of such a child may bring an action . . . [a]t any time to determine the existence of a father and child relationship presumed under K.S.A. 2022 Supp. 23-2208").

Still, the district court did not base its ruling solely on the lack of conflicting presumptions at the time of birth. The rest of the court's ruling says that the court held a parentage hearing, that the court found M.S. to be a parent, that a stepparent cannot also be a parent, and that to find in C.L.'s favor would create new law—the concept of a third parent—which the district court declined to do. In other words, C.L. was bringing an improper collateral attack on the court's previous judgment that M.S. was the twins' parent. C.L. invites us to ignore the district court's prior judgment in favor of M.S., yet that judgment, even if voidable for some reason, had become a finality and beyond attack before C.L. began her parentage action.

A collateral attack is "[a]n attack on a judgment in a proceeding other than a direct appeal." Black's Law Dictionary 329 (11th ed. 2019). Collateral attacks on judgments of our courts of general

jurisdiction (such as the district court) are generally precluded unless permitted by statute. *Jones v. Jones*, 215 Kan. 102, 112-13, 523 P.2d 743 (1974). Although res judicata principles apply only to parties and those in privity with them, the collateral attack doctrine applies to both parties and nonparties. *Ohio Pyro, Inc. v. Ohio Dept. of Commerce*, 115 Ohio St. 3d 375, 382, 875 N.E.2d 550 (2007).

"The questioning of the validity of a decree of adoption in any proceeding other than a direct appeal or a petition to set aside the adoption is a collateral attack." *Jones*, 215 Kan. at 111. In *Jones*, the district court found the natural parents' consent to adoption was valid. On appeal, the Kansas Supreme Court found that the district court had jurisdiction to decide the validity of the parents' consent, and decided the consent was valid, so the parents were estopped from collaterally attacking the decree of adoption. The court held that a judgment by a court having jurisdiction of the parties and the subject matter is final and conclusive unless it is later modified on appeal or by later legislation, and such a judgment cannot legally be collaterally attacked.

> "This court has consistently held against collateral attacks upon judgments of the courts of this state which have general jurisdiction of an issue. Where a court has jurisdiction of the parties to an action and of the subject matter, and renders a judgment within its competency, even if erroneous, the judgment is final and conclusive unless corrected or modified on appeal or by such other method as may be prescribed by statute, and it may not be attacked collaterally otherwise. [*State v. Shepherd*, 213 Kan. 498, Syl. ¶ 3, 516 P.2d 945 (1973)]." 215 Kan. at 112-13.

Lack of jurisdiction is the only exception we know of to the rule barring collateral attacks. Even then, the collateral attacker has the burden to show clearly and conclusively that the court that entered the judgment lacked jurisdiction to do so:

> "Collateral attacks upon judicial proceedings are never favored, and where such attacks are made, unless it is clearly and conclusively made to appear that the court had no jurisdiction, or that it transcended its jurisdiction, the proceedings will not be held to be void but will be held to be valid." 215 Kan. 102, Syl. ¶ 4.

See *Chamberlin v. Thorne*, 145 Kan. 663, 669-70, 66 P.2d 571 (1937) (presumption of jurisdiction attaches to judgments of

courts of general jurisdiction; mere silence of record as to existence of facts essential to jurisdiction of probate court in adoption proceedings cannot defeat judgment of adoption on collateral attack); *Brockman Equipment Leasing*, 3 Kan. App. 2d at 482 (finding collateral attacker failed to sustain burden which "rests heavily" upon him to show lack of jurisdiction). Cf. *Choctaw & Chickasaw Nations v. City of Atoka, Okl.*, 207 F.2d 763, 766 (10th Cir. 1953) ("On a collateral attack on a judgment of a court of general jurisdiction it will be presumed, unless the contrary affirmatively appears, that all parties to the action were properly served with process.").

When a collateral attack fails to challenge the jurisdiction of the court, it should be dismissed on this basis alone:

> "Second, collateral attacks on judgments are clearly disfavored under the law, and Kansas courts have held this especially true in cases of adoptions. Kansas decisions hold that valid adoptions proceedings are not subject to collateral attack. *Jones v. Jones*, 215 Kan. 102, 111, 523 P.2d 743, *cert. denied* 419 U.S. 1032 (1974); *Walker v. McNutt*, 165 Kan. 533, Syl. ¶ 3, 196 P.2d 163 (1948); *LeShure v. Zumalt*, 151 Kan. 737, 739[,] 100 P.2d 643 (1940). The defendants' counterclaim is a collateral attack on the Winkelmans' adoptions and is not favored; more importantly, it does not challenge the jurisdiction of the adoptions court and should be dismissed on this basis alone. See *Long v. Winkelman*, case No. 86,270, unpublished opinion filed October 19, 2001." *Winkelman v. Tihen*, No. 96,488, 2007 WL 2767973, at *8 (Kan. App. 2007) (unpublished opinion).

Thus, in *Long v. Winkelman*, No. 86,270, 2001 WL 37132485, at *2 (Kan. App. 2001) (unpublished opinion), the court found that collateral attacks on an adoption judgment failed to state legally cognizable causes of action, and allowing an amendment to the pleadings would have been an exercise in futility, citing *Johnson v. Board of Pratt County Comm'rs*, 259 Kan. 305, 327, 913 P.2d 119 (1996) (quoting *Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 [1962]).

Although this is not an adoption case, the principles underlying the collateral attack doctrine apply just as strongly here, in a parentage action. Both types of cases create a parent-child relationship and share the underlying realities that children are not commodities, that competing claims to children are foreseeable, that judgments are life-altering, that finality is necessary, and that delay is to be avoided.

The district court had jurisdiction of the parties to M.S.'s parentage action and of the subject matter, and rendered a judgment within its competency on April 5, 2021, declaring M.S. the legal parent of the twins. See K.S.A. 2022 Supp. 23-2210(a) ("The district court has jurisdiction of an action brought under the Kansas parentage act."). Although that 2021 judgment stemmed from the agreement of the parties to that litigation, it is still a valid judgment of the court. A consent judgment is just as effective as if the merits had been litigated and "it binds the parties as fully as other judgments." Black's Law Dictionary 1007 (11th ed. 2019). As a result, the 2021 judgment that M.S. is a parent is entitled to the presumption of finality that the doctrine disfavoring collateral attacks affords to a valid judgment. So even if that ruling were somehow erroneous, the judgment is final and conclusive unless corrected or modified on appeal or by another method prescribed by statute, and it may not be attacked collaterally except for lack of jurisdiction.

Yet C.L. makes no challenge to the district court's jurisdiction in M.S.'s parentage action. She mentions that she was not a party to that case and that neither E.L. nor M.S. notified her about its progress, but she does not argue or show on appeal that she should have been made a party to that action.

The relevant statutes under the KPA do not suggest that C.L. was a necessary party to M.S.'s parentage action. These statutes set out who the necessary parties are to a parentage action and who must get notice of that action. K.S.A. 2022 Supp. 23-2210(b) provides that in any parentage action, the initial pleading shall include the information required by K.S.A. 2022 Supp. 23-37,209. The latter statute requires the petitioner to state, among other matters, whether the petitioner "knows the names and addresses of any person not a party to the proceeding who has physical custody of the child or claims rights of legal custody or physical custody of, or visitation with, the child and, if so, the names and addresses of those persons." K.S.A. 2022 Supp. 23-37,209(a)(3). K.S.A. 2022 Supp. 23-2211(a) states that for parentage actions (non-child support) "the child, the mother, each man presumed to be the father under K.S.A. 2022 Supp. 23-2208, and amendments thereto, and each man alleged to be the father shall be made parties." But in October 2017, when M.S. filed her parentage petition, C.L. had

not alleged that she was the children's mother, nor had she asserted any presumption under K.S.A. 2017 Supp. 23-2208. Nor did she so allege during the trial in May 2018. And on appeal, C.L. does not allege that M.S. or E.L. violated these statutes and does not contend that she was a necessary party to M.S.'s parentage action.

We find nothing inequitable about this. C.L. had actual knowledge of M.S.'s parentage petition while it was being litigated in the district court as evidenced by her testimony during that trial about her relationship to E.L. and to the children. And although C.L. contends that she was not notified of the post-remand progress of M.S.'s parentage case because she was not a party to it, she had actual and timely knowledge of its progress after the Kansas Supreme Court remanded it—her attorney represented her interests in that case and she also appeared in pretrial conferences in February and March 2021, before the district court entered its order finding M.S. to be the legal parent of the twins. Yet C.L. filed no motion to intervene nor any petition for parentage until months after the district court entered that order. Essentially, she sat upon her rights. See *Ingraham v. Fischer*, No. 109,584, 2013 WL 5975967, at *1 (Kan. App. 2013) (unpublished opinion) (noting legal maxim that if you sit on your rights, you can lose them, often with unfortunate results); *Hagen v. Perry*, No. 92,256, 2005 WL 3433998, at *4 (Kan. App. 2005) (unpublished opinion) (same). Cf. *State ex rel. Stovall v. Meneley*, 271 Kan. 355, 388-89, 22 P.3d 124 (2001) (explaining that doctrine of laches stems from maxim that equity aids the vigilant and not those who slumber on their rights; laches is "the neglect to assert a right or claim which, taken together with the lapse of time and other circumstances causing prejudice to the adverse party, operates as a bar in a court of equity"). And C.L. does not contend on appeal that her lack of notice deprived the district court of jurisdiction to enter its order finding M.S. the legal parent.

But even if C.L. were a necessary party to M.S.'s parentage action, her non-joinder would not void the district court's judgment that M.S. was the twins' legal parent. This is because under the KPA, failure to join a necessary party does not divest the court of jurisdiction. Rather, in that event, the court's judgment, which otherwise determines the existence of the parent and child relationship for all purposes, solely determines the duty of child support:

"The judgment or order of the court determining the existence or nonexistence of the parent and child relationship is determinative for all purposes, but if any person necessary to determine the existence of a father and child relationship for all purposes has not been joined as a party, a determination of the paternity of the child shall have only the force and effect of a finding of fact necessary to determine a party's duty of support." K.S.A. 2022 Supp. 23-2215(a).

So if C.L. were a necessary yet non-joined party to M.S.'s parentage petition, her non-joinder would not divest the district court of jurisdiction.

Since C.L. does not show that she was a necessary party, the judgment of the court finding a parent and child relationship between M.S. and the twins is "determinative for all purposes." K.S.A. 2022 Supp. 23-2215. And because C.L. fails to meet her burden to show "clearly and conclusively" that the district court lacked jurisdiction to enter its judgment finding M.S. to be the legal parent of the twins, she cannot now attack that judgment. See *Jones*, 215 Kan. 102, Syl. ¶ 4.

C.L. cites one case in support of her argument that her parentage petition was timely—*In re A.K.*, 62 Kan. App. 2d 536, 518 P.3d 815 (2022). She cites its language that "[t]he reasonable way for a court to consider the 'time of birth' analysis in a stepparent case such as this is to consider that analysis as one more factor to be weighed." 62 Kan. App. 2d at 548. But there, the court was presented with two conflicting presumptions before it reached any decision on parentage—one under K.S.A. 2022 Supp. 23-2208(a)(4) from a woman, and one under K.S.A. 2022 Supp. 23-2208(a)(3)(B) from a man who was named as father on the child's birth certificate several years after the child was born. A panel of this court recognized that the "time of birth" analysis applies only to presumptions under K.S.A. 2022 Supp. 23-2208(a)(4). 62 Kan. App. 2d at 548. Still, it found "concerns for preserving 'vital bonds' that develop between parent and child and for the stability of the child do come into play in a case like this where A.M.'s parentage began at the birth of the child and Q.K.'s claim arose several years later." 62 Kan. App. 2d at 548. Under those circumstances, the fact that the man's competing presumption did not arise until years after the woman had entered the children's lives was just one factor to be weighed in the competing presumption analysis.

Not so here. *In re A.K.* does nothing to help convince us that we should or could ignore the binding effect of the district court's judgment that M.S. was the legal parent of the twins. There, the parties raised conflicting presumptions of parentage which the court weighed and resolved in one action. Here, C.L. first asserted parentage four years after M.S. asserted parentage and several months after the court entered its judgment that M.S. was the legal parent.

Affirmed.