OFFICIALLY SELECTED
CASES ARGUED AND DETERMINED

IN THE

COURT OF APPEALS

OF THE

STATE OF KANSAS

Reporter:
SARA R. STRATTON

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JUDGES AND OFFICERS OF THE KANSAS
COURT OF APPEALS

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HON. THOMAS E. MALONE ..... Wichita
HON. STEPHEN D. HILL ..... Paola
VACANT .....
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State v. Dayvault	122,784	Sedgwick	02/11/2022	Affirmed
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State v. Levy	123,197	Shawnee	03/25/2022	Affirmed
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State v. Mendez	123,936	Geary	02/18/2022	Reversed; remanded with directions
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State v. Wheeler	122,917 122,918	Sedgwick	02/18/2022	Affirmed in part; dismissed in part
State v. Whiteman	123,338	Sedgwick	03/11/2022	Affirmed in part; sentence vacated; case remanded with directions
State v. Williams	123,672	Franklin	02/18/2022	Affirmed
State v. Wilson	123,619	Reno	02/25/2022	Sentence vacated; case remanded for resentencing
State v. Ya	121,971 121,991	Finney	02/25/2022	Affirmed; remanded with directions
Stenberg v. State	123,438	Gray	02/25/2022	Affirmed
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In re S.L.

(505 P.3d 382)

No. 124,105

In the Matter of S.L.

SYLLABUS BY THE COURT

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

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

Appeal from Sedgwick District Court; GREGORY D. KEITH, judge. Opinion filed February 11, 2022. Sentence vacated and case remanded for resentencing.

Jordan E. Kieffer, of Jordan Kieffer, P.A., of Bel Aire, for appellant.

Julie A. Koon, assistant district attorney, and *Marc Bennett*, district attorney, for appellee.

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

GREEN, J.: S.L., an adjudicated juvenile offender, pleaded no contest to aggravated robbery and aggravated battery. The trial court accepted S.L.'s plea and found her guilty. The trial court ruled that S.L. was a violent offender II based on the severity level of the crimes committed and sentenced her within the statutory minimum and maximum under the revised Juvenile Justice Code. S.L. appeals, arguing that the trial court failed to make a specific written finding on the record that S.L. "pose[d] a significant risk of harm to another or damage to property" under the juvenile sentencing statute. The State, however, argues that we lack jurisdiction to review this appeal. Because the statute in question requires the trial court to make a specific written finding before it can apply

the presumptive sentence, we have jurisdiction to review this issue. And because the trial court failed to make this specific written finding, we vacate S.L.'s sentence and remand with directions that the trial court resentence her as required by K.S.A. 2019 Supp. 38-2369(a).

FACTS

The State charged S.L. in November 2019 with aggravated robbery, aggravated battery, and robbery. S.L. was born in 2004 and was 15 years old when the alleged offenses occurred. In November 2019, the trial court found probable cause existed to believe S.L. had committed the alleged offenses, and the court ordered S.L. to be detained until December 2019 for a detention review hearing. In April 2021, S.L. pleaded no contest to aggravated robbery and aggravated battery. The trial court accepted S.L.'s plea, found her guilty, and continued the case to a later date for sentencing.

The parties agreed S.L. was direct commitment eligible as a violent offender II with a minimum and maximum sentence of direct commitment of 24 months to the age of 22 years and 6 months with a minimum and maximum of aftercare of 6 months to the age of 23 years. The plea specified that the State would recommend the trial court directly commit S.L. to a juvenile correctional facility for 66 months with 6 months of aftercare. According to the plea agreement, S.L. was free to argue for an alternative disposition.

At the sentencing hearing in May 2021, S.L.'s lawyer argued that probation was a viable sentencing option because S.L.'s behavior improved while in detainment. S.L. argued that the trial court should not sentence her to a direct commitment because she did not pose a significant risk of harm to others. She also showed remorse for her actions and that she had improved her behavior once she was on the proper medication for her intellectual development disability.

The State argued that S.L. had a criminal history of thefts and batteries and that it seemed her behavior was escalating. The State recommended the trial court sentence S.L. to 66 months in the juvenile correctional facility with 6 months of aftercare.

The trial court noted S.L.'s criminal history, which began when she was 12 years old for theft. The trial court then stated that

S.L.'s criminal history went from theft to batteries, and aggravated robbery to aggravated battery. The trial court noted that the escalation in amounts stolen, in addition to the aggression shown during some of these offenses, was concerning. The trial court then adopted the State's recommendation and ordered S.L. to be committed for 66 months in a juvenile correctional facility with 6 months of aftercare. The trial court further ordered that S.L. receive credit for any time served.

The trial court's journal entry noted that the court reviewed the results of the risk and needs assessment and found that there was no "overall case length limit." The trial court then found that S.L. was a violent offender II as defined in K.S.A. 2019 Supp. 38-2369(a)(1)(B). The trial court ordered S.L. to be placed in the custody of Kansas Department of Corrections—Juvenile Services for commitment to a juvenile correctional facility for 66 months with 6 months of aftercare. The trial court then ordered S.L. to pay restitution, joint and several with her co-respondents, to the victims in the amount of $4,481.59. The trial court also noted that it advised S.L. of her inability to possess a weapon as an adjudicated felon under K.S.A. 2019 Supp. 21-6304.

S.L. timely appeals.

ANALYSIS

Did the trial court err in sentencing S.L.?

S.L. argues that the trial court improperly sentenced her to a direct commitment without first finding that she posed a significant risk of harm to others or damage to property. The State argues that we should dismiss this issue for lack of jurisdiction. In the alternative, the State argues that the trial court did not abuse its discretion and made the appropriate findings when it noted on the record that S.L.'s behavior had escalated from her previous crimes.

Standard of Review

Whether this court has jurisdiction is a question of law over which this court exercises unlimited review. *In re T.T.*, 59 Kan. App. 2d 267, 269, 480 P.3d 790 (2020), *rev. denied* 313 Kan. 1041 (2021). Similarly, statutory interpretation presents a question of law over which appellate courts have unlimited review. *State v. Alvarez*, 309 Kan. 203, 205, 432 P.3d 1015 (2019).

The Revised Kansas Juvenile Justice Code and Jurisdiction

Once a court has adjudicated a person a juvenile offender, K.S.A. 2019 Supp. 38-2361(a) controls the authorized sentencing dispositions. The Code sets minimum and maximum terms of commitment based on the various types of offender. K.S.A. 2019 Supp. 38-2361(a)(1)-(13). The trial court may classify the juvenile as either (1) a violent offender I or II, (2) a serious offender I, II, or III, or (3) a chronic offender I, based on the severity level of the underlying crime. K.S.A. 2019 Supp. 38-2369(a)(1)-(3). A "violent offender II is defined as an offender adjudicated as a juvenile offender for an offense which, if committed by an adult, would constitute a nondrug severity level 1, 2 or 3 felony." K.S.A. 2019 Supp. 38-2369(a)(1)(B). The trial court may sentence a violent offender II to a "minimum of 24 months and up to a maximum term of the offender reaching the age of 22 years, six months." K.S.A. 2019 Supp. 38-2369(a)(1)(B).

S.L. does not contest the trial court's legal finding that she is a violent offender II under the Juvenile Justice Code. This is likely because the trial court properly ruled that she had committed a nondrug severity level 3 felony. See K.S.A. 2019 Supp. 38-2369(a)(1)(B); K.S.A. 2019 Supp. 21-5420(b)(2), (c)(2).

S.L. challenges the trial court's failure to make a written "significant risk of harm" finding before committing her to a facility. But the first issue we must consider is if we have jurisdiction to review the trial court's failure to make the specific written "significant risk" finding, even though the trial court here imposed a presumptive sentence.

An appellate court has a duty to question jurisdiction on its own initiative. When the record discloses a lack of jurisdiction, the appellate court must dismiss the appeal. *In re C.D.A.-C.*, 51 Kan. App. 2d 1007, 1008, 360 P.3d 443 (2015). A juvenile has a statutory right to appeal "from an order of adjudication or sentencing, or both." K.S.A. 2019 Supp. 38-2380(b). But an appellate court lacks jurisdiction to review a sentence for an offense committed after July 1, 1999, that was within the presumptive sentence or was agreed to by the juvenile and the State and approved by the trial court. K.S.A. 2019 Supp. 38-2380(b)(2)(A), (B).

In *In re J.A.*, No. 122,883, 2021 WL 401284 (Kan. App. 2021) (unpublished opinion), this court reviewed a juvenile's presumptive sentence and whether this court had jurisdiction to review the trial court's decision. In *In re J.A.*, the trial court accepted J.A.'s no-contest plea to one charge of committing acts that, if he were an adult, would constitute aggravated burglary, a severity level 4 person felony. At sentencing, the trial court found that J.A. was a "serious offender I" and posed a "'significant risk of harm to others.'" 2021 WL 401284, at *1. The trial court also reflected this finding in its written sentencing order. 2021 WL 401284, at *1. J.A. appealed.

Although J.A. acknowledged the statutory bar in K.S.A. 2019 Supp. 38-2380(b)(2)(A) and that he received a presumptive sentence, J.A. argued that the trial court imposed an overly harsh sentence and that the court's finding that he posed a significant risk to others violated his "due process rights." 2021 WL 401284, at *2. But this court ruled that J.A.'s argument was unpersuasive because the juvenile offender statutes do not provide for an exception to the presumptive sentence jurisdictional bar on constitutional grounds. And this court further determined that J.A. had failed to point to other legal authority providing this court with jurisdiction to review constitutional issues, despite the plain language of K.S.A. 2019 Supp. 38-2380(b)(2)(A). Because the statute prohibits appellate courts from reviewing a juvenile offender's presumptive sentence, this court dismissed for a lack of jurisdiction. 2021 WL 401284, at *3.

A review of our caselaw suggests that our appellate courts have not yet decided if we lack jurisdiction to review a juvenile's presumptive sentence if the trial court has failed to make a certain factual finding in its written order. Thus, the issue we must decide is if the statutory bar for reviewing presumptive juvenile sentences prohibits our review of the trial court's failure to make the appropriate written factual finding in the record. To decide this issue, we must interpret the statutory construction of parts of the revised Juvenile Justice Code. We are guided in our interpretation of this Code by the following cardinal rule:

"The most fundamental rule of statutory construction is that the intent of the Legislature governs if that intent can be ascertained. 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. Further, where there is no ambiguity, the court need not resort to statutory construction. [Citations omitted.]" *In re C.M.W.*, No. 120,621, 2020 WL 1814304, at *2 (Kan. App. 2020) (unpublished opinion), *rev. denied* 312 Kan. 891 (2020).

Under K.S.A. 2019 Supp. 38-2361(a), upon adjudication as a juvenile offender, the court may impose one or more of the following sentencing alternatives for a fixed period. K.S.A. 2019 Supp. 38-2361(a)(12) reads in part:

"If the judge finds and enters into the written record that the juvenile poses a significant risk of harm to another or damage to property, and the juvenile is otherwise eligible for commitment pursuant to K.S.A. 2019 Supp. 38-2369, and amendments thereto, commit the juvenile directly to the custody of the secretary of corrections for placement in a juvenile correctional facility or a youth residential facility."

K.S.A. 2019 Supp. 38-2369(a) reads in part:

"Except as provided in subsection (e) and K.S.A. 2019 Supp. 38-2361(a)(13), for the purpose of committing juvenile offenders to a juvenile correctional facility, upon a finding by the judge entered into the written order that the juvenile poses a significant risk of harm to another or damage to property, the following placements shall be applied by the judge in cases specified in this subsection."

This subsection requires the trial judge to make this written finding before imposing a sentence within the guidelines of the sentencing statute if the juvenile falls within the category of a violent offender. See K.S.A. 2019 Supp. 38-2369(a)(1)(B). A plain reading of this statutory language requires the trial court to make a specific written finding that the juvenile posed a significant risk of harm to another or damage to property before the court can sentence the juvenile to a direct commitment in a correctional facility. See K.S.A. 2019 Supp. 38-2369(a); see also *In re T.T.*, No. 120,336, 2019 WL 1868498, at *2 (Kan. App. 2019) (unpublished opinion) (appellate court notes the trial court properly made significant risk to others written finding, as required by juvenile sentencing statute).

By comparison, when K.S.A. 2019 Supp. 21-6820(c)(1) jurisdictional bar applies, for presumptive sentences, our Supreme

Court has recognized that appellate courts have jurisdiction to review a claim of an illegal sentence when the complainant argues that it was not authorized by statute. See *State v. Quested*, 302 Kan. 262, 264, 352 P.3d 553 (2015). This court recently held that this reasoning applies to the Juvenile Code as well because the prohibition against challenging presumptive sentences in K.S.A. 2019 Supp. 38-2380(b)(2)(A) is nearly identical to K.S.A. 2019 Supp. 21-6820(c)(1). See *In re Z.T.*, No. 122,189, 2020 WL 3393793, at *2 (Kan. App. 2020) (unpublished opinion). Likewise, appellate courts have jurisdiction to review a presumptive sentence if the sentence is imposed under K.S.A. 2019 Supp. 38-2369(a) and K.S.A. 2019 Supp. 38-2369(a)(1)(B) and it lacks a specific finding in a written order stating that the juvenile offender poses a significant risk of harm to another or damage to property.

Also, under our Juvenile Code, the trial court may impose a variety of sentencing alternatives. K.S.A. 2019 Supp. 38-2361. One subsection of that statute references the trial court's authority to impose a conditional release from custody as well as the authority to choose between a youth residential facility or a juvenile correctional facility. But the trial court may do so only *after* they have "enter[ed] into the written record that the juvenile poses a significant risk of harm to another or damage to property." K.S.A. 2019 Supp. 38-2361(a)(12).

A review of our juvenile offender caselaw reveals that the trial court must make a specific written finding to directly commit the juvenile to a correctional facility. The *In re J.A.* court stated that the "revised Kansas Juvenile Justice Code includes a placement matrix for sentencing juvenile offenders whom the trial court has found, *in writing*, to 'pose[] a significant risk of harm to another or damage to property.'" (Emphasis added.) 2021 WL 401284, at *2 (quoting K.S.A. 2019 Supp. 38-2369[a]). In *In re T.A.*, 123,813, 2021 WL 4497404, at *2 (Kan. App. 2021) (unpublished opinion), this court stated: "*Once the trial court made findings on the record* reflecting T.A. posed a significant risk of harm to others or damage to property, K.S.A. 2020 Supp. 38-2361(a)(12) authorized the court to place T.A. in a correctional facility under the custody of the Secretary of Corrections." (Emphasis added.)

Because K.S.A. 2019 Supp. 38-2369(a) specifically requires a trial judge to "enter into the written order" a finding on whether a juvenile offender poses a risk of harm before the trial judge can sentence a juvenile offender to a direct commitment in a correctional facility, the trial judge must make this specific finding in a written order. And when a trial court imposes a sentence under K.S.A. 2019 Supp. 38-2369(a)(1)(B) directly committing a juvenile offender to a juvenile correctional facility, which lacks a specific finding in a written order stating that the juvenile poses a significant risk of harm to another or damage to property, this is a mistake of law.

S.L. entered a no-contest plea to aggravated robbery and aggravated battery, severity level 3 and 7 person felonies, respectively. As a result, the trial court ordered her to serve 66 months in the juvenile corrections facility followed by 6 months of aftercare. This sentence was within the sentencing range for a violent offender II as directed by K.S.A. 2019 Supp. 38-2369(a)(1)(B). Although the trial court imposed a presumptive sentence, the court did not first make the risk of harm factual finding in its written order. As a result, the trial court exceeded its statutory authority under K.S.A. 2019 Supp. 38-2369(a) when it sentenced S.L. to a direct commitment without the written order containing the risk of harm factual finding.

We note that the State's argument that the trial court made the factual finding when it alluded to S.L.'s escalated behavior is unpersuasive. The trial court's vague statements about S.L.'s escalating behavior during the sentencing hearing is not sufficient to establish the risk of harm written factual finding. Also, the sentencing statute requires that the trial court enter the juvenile's risk of harm finding into the *written order*, which the trial court failed to do. See K.S.A. 2019 Supp. 38-2369(a).

The Juvenile Justice Code, however, is unclear on the appropriate remedy in this situation. Under K.S.A. 2019 Supp. 38-2380(b)(5), an appellate court "may reverse or affirm the sentence." This statute does not provide for a specific remedy when a trial court fails to make the requisite statutory finding before sentencing the juvenile to a direct commitment. See K.S.A. 2019 Supp. 38-2380. But it does provide for remand if the trial court's

factual findings are not supported by the evidence or do not establish substantial and compelling reasons for departure. K.S.A. 2019 Supp. 38-2380(b)(5). Thus, because the trial court exceeded its statutory authority under K.S.A. 2019 Supp. 38-2369(a) when it sentenced S.L. to a direct commitment sentence, without the written order containing the risk of harm factual finding, we vacate S.L.'s sentence and remand to the trial court with directions to hold a resentencing hearing in this case.

Sentence vacated and case remanded for resentencing consistent with this opinion.

(505 P.3d 794)

No. 123,684

NANCY GRANADOS, Individually, as Heir-at-Law of Francisco Granados, Decedent, and as Class Representative of all Heirs-At-Law of Francisco Granados, Decedent, *Appellee/Cross-appellant*, v. JOHN WILSON, *Defendant*, and KEY INSURANCE COMPANY, *Appellant/Cross-appellee*.

SYLLABUS BY THE COURT

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

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

Appeal from Wyandotte District Court; BILL KLAPPER, judge. Opinion filed February 18, 2022. Reversed and remanded with directions.

James P. Maloney and *Kevin D. Brooks*, of Foland, Wickens, Roper, Hofer & Crawford, P.C., of Kansas City, Missouri, and *James D. Oliver*, of Foulston Siefkin LLP, of Overland Park, for appellant/cross-appellee.

Michael W. Blanton, of Gerash Steiner P.C., of Evergreen, Colorado, and *Jared A. Rose*, of The Law Office of Jared A. Rose, of Kansas City, Missouri, for appellee/cross-appellant.

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

MALONE, J.: This appeal arises from the district court's award of a garnishment order for Nancy Granados against Key Insurance Company (Key). John Wilson, who was insured by Key, ran a red light and killed Nancy's husband, Francisco Granados, when his car crashed into Francisco's car. Wilson was under the influence of drugs and alcohol at the time of the crash. Wilson had an automobile liability insurance policy issued by Key with a coverage limit of $25,000 per person and $50,000 per accident.

Nancy filed a wrongful death lawsuit and the district court found Wilson liable, entering judgment in excess of $3 million. Nancy then filed a garnishment action against Key based on Key's bad faith or negligence in handling the claim. The district court entered judgment for Nancy, finding Key failed to properly investigate the accident and breached its duty to communicate the risk of an excess judgment to Wilson. Key appeals, arguing the district court erred in finding it breached its duty to communicate and in finding Key caused the excess judgment. Nancy cross-appeals, arguing the district court erred in finding Key had no affirmative duty to initiate settlement negotiations.

On the record presented here, we hold the district court did not err in finding Key owed no affirmative duty to initiate settlement negotiations with Nancy before she made a claim for damages. We also hold Key's purported negligence or bad faith in handling the claim was not the legal cause of the excess judgment, and the district court erred in finding otherwise. Thus, we reverse the district court's judgment for Nancy in the garnishment action and remand with directions to enter judgment for Key.

FACTUAL AND PROCEDURAL BACKGROUND

On October 4, 2017, Francisco Granados was driving his car in Kansas City, Kansas, when Wilson failed to stop at a red light and hit Francisco's car. Francisco died as a result of the collision. Raymond Elkins, a passenger in Wilson's car, told police that Wilson was taking him home and that he and Wilson each drank a half pint of brandy and had smoked a blunt before leaving.

The next day, Wilson called Key, his insurer, and spoke to Alexandra Soto, a claims adjuster. Wilson told Soto about the accident, stating he did not have a police report but that the police said he ran a stop sign. Wilson said he did not run a stop sign and maintained that he had a green light and the other person hit him. Wilson told Soto that the other person had been ejected from the car and died. Wilson also told Soto that Elkins was in the car with him, and he gave her Elkins' address and phone number.

On October 10, 2017, Soto requested the police report. Soto also left a message with a detective the day she requested the police report asking for more information. Soto then did nothing on the claim for the rest of October.

Key received the police report on November 7, 2017. The police report included no insurance information for Wilson. The police report stated that Wilson was driving under the influence of drugs and alcohol and that he ran a red light and struck the Granados' car. The police report also listed the Granados' insurance carrier, State Farm Mutual Automobile Insurance Company (State Farm), its policy number, and 12 witnesses to the crash. Soto did not enter the information from the police report into Key's claim system until November 22, 2017. On December 19, 2017, Soto finished the liability evaluation and noted that Wilson was at fault.

Nancy received a letter from State Farm, dated December 26, 2017, sent to Francisco's estate asking for any medical claims to be listed on the form. Nancy threw away the form because Francisco had died at the scene, so she believed that there were no medical bills to claim. The letter mentioned nothing about Wilson being insured, or that he was insured by Key.

Nancy hired an attorney on February 28, 2018. Nancy agreed to pay her counsel 33 1/3 percent of all sums recovered unless the case settled for $50,000 or less before suit was filed, in which case all fees would be waived. The agreement also stated that all costs and expenses associated with preparing, investigating, and prosecuting the claims would be deducted from any recovery "whether by suit, settlement, or otherwise" before the calculation of attorney fees.

On March 6, 2018, Soto received a call from an employee at State Farm, which was the first time she ever spoke to the Granados' insurance carrier. State Farm told Soto that State Farm insured Francisco, that it had no information related to an attorney being involved, that it had made no payment under its policy, and that State Farm had sent letters to Nancy, but she had not responded. On April 9, 2018, Soto set a loss reserve of $25,000, the policy limit, because she knew the damages were higher than the limit.

In a letter dated June 4, 2018, Nancy's counsel notified State Farm that he was representing her. Sometime after June 9, 2018,

Nancy opened a letter from State Farm, dated May 31, 2018, stating Nancy had "a liability claim against Key Insurance and an underinsured claim against this policy.'" Nancy testified this was the first time she heard of Key. But the letter did not mention Wilson or provide any contact information for Key. Nancy eventually settled her underinsured motorist claim against State Farm for $25,000.

Wrongful death action

On June 12, 2018, Nancy filed a petition for wrongful death against Wilson, seeking "damages in excess of $75,000." Nancy had made no claim or settlement demand on Wilson before filing the lawsuit. On June 19, 2018, a special process server left a copy of the petition at Wilson's residence. On July 2, 2018, Key received a copy of the petition. On July 23, 2018, an attorney representing Wilson answered the petition. On the same day, Key offered to settle the lawsuit for the policy limit of $25,000.

On July 26, 2018, Nancy's counsel sent a letter to Wilson's attorney, rejecting Key's offer of $25,000 to settle the wrongful death lawsuit. The letter explained that Key should have offered the policy limit "a long time ago" and stated that it had a duty to promptly initiate settlement regardless of Nancy's actions. The letter also stated that an insurance company cannot cure negligence or bad faith by offering the policy limit after suit has been filed. The letter lacked any counteroffer to settle. But on October 2, 2018, Nancy's counsel sent a letter to Wilson's attorney, seeking $2,973,434 to settle the wrongful death claim. The letter stated: "By resolving the case now, the insurance company would also avoid the consequential damages available in a bad faith lawsuit." In May 2019, Key paid out the policy limit of $25,000 to Nancy in exchange for a covenant not to execute against Wilson personally for any judgment.

Nancy moved for summary judgment on the issue of liability, but the district court denied the motion. The case proceeded to a bench trial in September 2019. Both parties were represented by counsel and evidence was offered on the issues of liability and damages. The district court ruled from the bench on October 4, 2019, finding Wilson solely liable for the accident. The district

court awarded $4,603,777.52 in total damages. Wilson filed an appeal challenging the damages. The parties later jointly moved to amend the judgment by reducing the noneconomic damages to avoid an appeal. The district court granted the motion, entering a total damage award of $3,353,777.52.

Garnishment proceedings

On December 28, 2019, Nancy filed a request for garnishment against Key, the basis for this appeal. Key moved for summary judgment, asserting that it could not be held liable for any amount beyond the policy limit. Nancy also moved for summary judgment, asserting she may stand in the place of Wilson, the insured, and take what he could enforce from Key based on Key breaching various duties owed to Wilson. The district court denied both motions.

The district court held a two-day bench trial beginning November 24, 2020. Nancy called Leonard Gragson, claims handling manager for Key, as her first witness. Gragson testified in detail about Key's policies in handling accident claims. After outlining these policies, Gragson testified that the handling of this claim did not comply with Key's claim handling standards. Gragson summarized that Soto did not call everyone involved in the wreck after Wilson provided notice, did not call witnesses on the police report, did not contact her supervisor, did not inspect the Granados' car, did not contact the Granados' insurance provider, did not complete the investigation within 30 days, and did not complete an evaluation of liability and damages. Gragson also testified that Soto failed to contact Wilson and notify him of the risks he was facing as a result of the claim.

Soto testified next. She admitted that she did not speak to Elkins the day of the crash, or after, despite learning that he gave a statement to police at the time of the crash. Soto admitted that she did not look for any news stories to learn the identities of those involved in the crash. Soto admitted that she never contacted any of the witnesses listed in the police report. Soto also admitted that generally in a fatality case, if she received a police report revealing the insured was liable, it would be important to contact the insured, but she did not contact Wilson after receiving the report.

Nancy then called Charles Miller, who testified as an expert on matters related to the insurance industry. Miller testified that he reviewed the claims file, the documents produced in the underlying wrongful death action, various exhibits, and the depositions of Soto, Gragson, and Nancy. Miller also considered industry standards, Key's standards, and other companies' standards in forming his opinion. Miller acknowledged there was not one single source for insurance claim handling standards.

Miller testified that one standard repeated throughout the industry is the requirement to obtain statements from the insured, the claimants, and any witnesses at the earliest possible moment. Another standard is to have prompt investigation, leading to the fair resolution of claims as soon as possible. Similarly, in fatality cases, it is a standard to learn the measure of damages, such as whether the person was a wage earner, so that the claim can be properly evaluated. Another recognized standard practice is to affirmatively engage in settlement even when there is not a settlement demand. Miller concluded Key had failed to treat the interest of its insured equally to its own interest by failing to protect its insured from the risk of excess judgment, in violation of industry standard. Miller pointed to Key's failure to conduct a thorough and timely investigation, failure to communicate with its insured, and failure to engage in settlement discussions.

Nancy testified next. She stated that she received the police report, but it lacked Wilson's insurance information, so she assumed Wilson did not have any insurance. Nancy testified that neither State Farm nor any other insurance company informed her that Wilson was insured by Key before she sued. Nancy first learned that Key existed when it was mentioned in the letter from State Farm dated May 31, 2018, but the letter did not mention Wilson and it did not provide any contact information for Key.

Nancy testified that if she had been contacted either before she hired her attorney or before she sued, she would have settled her claims for the policy limit because then she would not have had to pay a lawyer and go through the trial. Nancy said she met with attorneys after the accident because she had not been contacted by Wilson's insurance and she did not know about State Farm's unin-

sured motorist insurance. When asked, Nancy agreed that the second paragraph of the December letter from State Farm asked about loss of monthly earnings and funeral expenses and the last paragraph asked her to advise if she intended to present a claim for injury to the negligent party.

Nancy did not call Wilson as a witness. After she rested, Key moved for a directed verdict arguing that it did not owe any duty until the time Nancy filed the lawsuit as no claim had been made before then and because Nancy did not show that the alleged breaches caused the excess judgment. The district court denied Key's motion, finding that Nancy had established a prima facie case of bad faith and that she showed causation.

Key called Soto and Gragson who testified to much the same information elicited in Nancy's case-in-chief. Gragson testified that once Key had the police report, it had enough information to conclude that Wilson was liable and did not need any more information to conclude that a wrongful death claim would exceed the $25,000 policy limit. Gragson testified that Key paid Elkins the $25,000 policy limit after he issued a demand. Gragson testified that as of June 15, 2018, Key had received no indication that Nancy was asserting a claim. After Nancy sued, Gragson authorized Key's counsel to offer a $25,000 settlement. Gragson also testified that the file contained no notation that the decision not to solicit a claim from Nancy was a conscious strategy. Gragson testified that they did not purposely avoid contacting Nancy or Wilson in this case.

Soto similarly testified that the first time Key knew that Nancy was asserting damages against them was when they received her wrongful death lawsuit. Soto testified that she could not remember another case in which it took eight months for Key to receive notice that an injured party was pursuing a claim. Soto also testified that she had never seen a claim in which the first notice Key had that the injured person was pursuing a claim occurred when the injured party sued.

Key then called Doug Richmond, a licensed lawyer in Kansas and Missouri and a licensed insurance agent in Kansas, as an expert witness. Richmond stated there is no group or organization in the insurance industry that sets standards. Richmond testified that he was familiar with industry standards for claim handling based

on his work with adjusters over the years and reading and writing material for the industry.

Richmond testified that Key's claim handling practices complied with the insurance industry custom, practices, and standards. Richmond also believed Key's investigation was adequate and consistent with custom and practice. Richmond concluded that Key offered to settle with Nancy "on a timely basis" and he did not believe Key had a reasonable chance to settle before that because the first time she ever asserted a claim was in her lawsuit. Richmond also concluded that Key should not have made a settlement offer to Nancy until she made a claim because it could have exposed Wilson to the potential for personal liability if Nancy rejected the offer.

After hearing the evidence, the district court ruled from the bench. The district court's comments about the case were somewhat meandering, and the court did not delineate explicit findings of fact and conclusions of law. But the court found that Gragson was a credible witness and that his testimony about how claims should be handled represented the standards in the industry. The district court found Soto "was much less forthcoming about how she handled things." The court found that Nancy was "a pretty unsophisticated consumer of insurance" but stated it believed her testimony that she would have settled for the policy limit had it been offered before the lawsuit. The court did not give the testimony of either expert much weight, stating, "this isn't a case where the court really needed experts to be honest with you."

The district court found that Soto did not comply with Key's standards for conducting her investigation. More specifically, the court said: "The court by no stretch of the imagination believes that Ms. Soto complied with the standards that Key had as far as how she conducted her investigation or the timeliness of her investigation." But the court also recognized that "many of the things that she needed to know were answered by the Police report." The court found that Key did not protect Wilson's rights because it did not even consult him. The court found "that Key Insurance breached the duty that it had to Mr. Wilson by failing to communicate and advise him of what would happen if the claim

of Mrs. Granados or the lawsuit of Mrs. Granados exceeded $25,000."

The district court also found that Key had no affirmative duty to reach out to Nancy and initiate a settlement offer before she made a claim, even if directed by Wilson to do so, observing that "Key wouldn't have had to do that." Finally, the district court found that it did not have to decide, and it was not going to decide, whether the letters from Nancy's counsel mentioning a bad-faith lawsuit was proper legal practice. Based only on these findings, and without engaging in any further analysis of the facts or the law, the district court granted judgment for Nancy against Key for the full amount of the excess judgment with interest at the statutory rate.

On December 3, 2020, the district court filed a journal entry of judgment referencing its findings from the bench. Key timely appealed the district court's judgment and Nancy has cross-appealed, arguing the district court erred in finding Key had no affirmative duty to initiate settlement negotiations.

ANALYSIS

To begin, Nancy argues that Key failed to preserve its issues for appeal because it violated Supreme Court Rule 6.02(a)(5) (2021 Kan. S. Ct. R. at 36), which requires that the appellant provide "a pinpoint reference to the location in the record on appeal where the issue was raised and ruled on." Nancy does not assert that Key did not raise its issues below but simply asserts that Key failed to follow the pinpoint citation requirement. Key replies that it did make the required pinpoint references on pages 11-12, 24, and 30-31 of its appellant's brief.

Key's citation to pages 11 and 12 of its appellant's brief does not fulfill the requirements of Rule 6.02 as those pages are part of the statement of facts. Pages 11 and 12 lack any reference to the arguments Key made in district court. But Key correctly asserts that, on page 24 of its brief, it pointed out that it argued these issues below and provided citations to those arguments. While Key buried this citation in the middle of its analysis, and the better practice would be to place this citation at the beginning of the legal issue, the issues raised in this appeal were raised and ruled on below. See Rule 6.02(a)(5) (2021 Kan. S. Ct. R. at 36) ("Each issue

must *begin with* citation to the appropriate standard of appellate review and a pinpoint reference to the location in the record on appeal where the issue was raised and ruled on."). (Emphasis added.)

Before addressing the parties' arguments, we will examine the relevant law on bad-faith claims against insurance companies, as doing so will help distinguish this case from most cases involving an insurer being liable for an excess judgment.

Relevant law on garnishments and bad-faith claims

This appeal arises from a garnishment action. "'Garnishment is a procedure whereby the wages, money or intangible property of a person can be seized or attached pursuant to an order of garnishment issued by the court under the conditions set forth in the order.'" *Geer v. Eby*, 309 Kan. 182, 191, 432 P.3d 1001 (2019) (quoting K.S.A. 60-729[a]). In a garnishment action, the creditor stands in the shoes of the debtor to enforce what the debtor could enforce. Nancy stands in the shoes of Wilson and can enforce an action against Key to the extent that Wilson could enforce such an action. Nancy sought to enforce a garnishment against Key based on Key's liability for the excess judgment because it acted in bad faith or negligently by failing to properly investigate, failing to settle once it knew liability would exceed the policy limit, failing to consider the risks of excess judgment, and failing to communicate those risks with Wilson.

Insurance companies generally owe their insured certain duties, including the duty to defend a claim, the duty to investigate, and the duty to settle claims. The Kansas Supreme Court has long recognized that an insurance company can be liable for more than the policy limit if it fails to act in good faith or fails to act without negligence in defending and settling claims against its insured. *Glenn v. Fleming*, 247 Kan. 296, 305, 799 P.2d 79 (1990); *Bollinger v. Nuss*, 202 Kan. 326, Syl. ¶ 1, 449 P.2d 502 (1969). The seminal case for this rule is *Bollinger*.

Karl Nuss hit Walter Bollinger, a pedestrian, with his car and Bollinger sustained injuries requiring hospitalization and care amounting to just under $3,000. Nuss' insurance policy limit was $25,000. Bollinger sued less than a year later seeking $85,000.

Counsel for Nuss' insurance company was Tudor Hampton. An associate of Hampton informed Nuss of the suit and that the insurance company would only pay the policy limit and he would be liable for the excess. Nuss told Hampton to settle. During discovery, Hampton made two settlement offers, with Nuss' knowledge, of $7,500 and $10,000 before trial. Bollinger offered to settle for $23,500 but Hampton and Nuss thought that Bollinger would not recover that much at trial. After Bollinger presented his evidence, Hampton told Nuss that there was no evidence supporting a contributory negligence defense and advised that they should admit liability and ask for mercy on the amount of judgment. Nuss agreed with this strategy. Hampton did not challenge Bollinger's medical evidence. The jury returned a verdict for Bollinger in the sum of $30,483.84.

Bollinger filed for garnishment against the insurer for the full amount of the judgment on a theory of fraud, bad faith, or negligence in handling the claim. The district court found no evidence to support any of the theories and Bollinger appealed. Our Supreme Court explained that the area of an insurer's liability for excess judgments "has been fraught with uncertainty since its inception." 202 Kan. at 331. The court noted there were two prominent theories for imposing liability: a "negligence theory" and a "good faith theory." 202 Kan. at 331. The court noted the first time it had cited both theories was in *Bennett v. Conrady*, 180 Kan. 485, 305 P.2d 823 (1957), in which it examined whether an insurer was negligent or acted in bad faith for failing to settle all the claims against its insured. The *Bollinger* court observed that in *Conrady*, it "noted that once the insurer steps into the negotiations between its insured and an injured claimant, due care must be exercised by the insurer to protect the rights of the insured." 202 Kan. at 332.

The court noted that its application of both tests in *Bennett* led to confusion about which test governed in Kansas, but it found that in Kansas liability may be imposed under either theory because an insurer owes both a duty of good faith and a duty to act without negligence. *Bollinger*, 202 Kan. at 333. The court then discussed when the duty to act in good faith or without negligence is breached regarding settlement. The court explained:

"When a claim is made against the insured for an amount in excess of the policy coverage, the insurer's obligation to defend creates a conflict of interest on its part. On the one hand, its interests lie in minimizing the amount to be paid; on the other, the insured's interests, which the insurer is supposedly defending, lie in keeping recovery within policy limits, so that he will suffer no personal financial loss. The conflict becomes particularly acute where there is an offer of settlement approximating policy limits. The insured's desire to avoid the risk of a large judgment by settling within the limits of the policy, regardless of the merits of the claim, would compel him, were he in charge of settlement negotiations, to accept the offer. The insurer's interests, on the other hand, are prompted by its own evaluation of the liability aspects of the litigation and a desire not to expose itself to payments which do not adequately reflect the dangers that might be involved in pursuing the case to trial. When the settlement offer approaches policy limits, the insurer has a great deal less to risk from going to trial than does the insured, because the extent of its potential liability is fixed." 202 Kan. at 336.

Based on this conflict, the court held that the insurer "may properly give consideration to its own interests, but it must also give at least equal consideration to the interests of the insured." 202 Kan. at 336. The court then cited the "equality of consideration" factors—often called the *Bollinger* factors—to be used in deciding whether an insurer's refusal to settle constituted a breach of its duty to exercise good faith or act without negligence:

"'(1) the strength of the injured claimant's case on the issues of liability and damages; (2) attempts by the insurer to induce the insured to contribute to a settlement; (3) failure of the insurer to properly investigate the circumstances so as to ascertain the evidence against the insured; (4) the insurer's rejection of advice of its own attorney or agent; (5) failure of the insurer to inform the insured of a compromise offer; (6) the amount of financial risk to which each party is exposed in the event of a refusal to settle; (7) the fault of the insured in inducing the insurer's rejection of the compromise offer by misleading it as to the facts; and (8) any other factors tending to establish or negate bad faith on the part of the insurer.'" *Bollinger*, 202 Kan. at 338 (quoting *Brown v. Guarantee Ins. Co.*, 155 Cal. App. 2d 679, 689, 319 P.2d 69 [1957]).

After deciding the law, the court then applied it to the facts of the case. The court noted that several factors did not apply under the facts and that Nuss' argument only centered on three of the factors: the failure of the company to inform him about "certain matters," the company's failure to settle once it knew that he was liable, and the company's rejection of Bollinger's offer. 202 Kan. at 339. The court noted: "A duty is imposed on the company to

communicate to the insured the results of any investigation indicating liability in excess of policy limits and any offers of settlement which have been made, so that he may take proper steps to protect his own interests," but found that the record showed the company made an adequate investigation and fully informed Nuss of the results and risks. 202 Kan. at 339 (citing *Davy v. Public National Ins. Co.*, 181 Cal. App. 2d 387, 5 Cal. Rptr. 488 [1960] for the rule).

As for settlement, the court found that the amount of financial risk to which each party is exposed is a relevant factor in determining whether the insurance company is liable for the excess judgment, but that the strength of the plaintiff's case must be gauged as it appeared at the time of the offer, not through hindsight. 202 Kan. at 340. The court noted that at the time of the offer, both Nuss and Hampton believed that Bollinger would not recover $23,500 if they proceeded to trial despite knowing Nuss was liable for the accident. The court pointed out that after its investigation, the insurance company believed a $10,000 settlement was appropriate. The court found that at most the case established "an error of judgment" on the part of Nuss and the insurance company and it did not warrant a conclusion that the insurer acted in bad faith or negligently. 202 Kan. at 342. Thus, the court affirmed the district court's refusal to hold the insurance company liable for the excess judgment. 202 Kan. at 343.

Bollinger's progeny later recognized that because the duty of good faith arises from the contract, there must be a causal connection between the insurer's conduct and the excess judgment. *Gruber v. Estate of Marshall*, 59 Kan. App. 2d 297, 315, 482 P.3d 612, *rev. denied* 313 Kan. 1040 (2021). An insurer is not liable for a judgment entered against its insured unless the plaintiff can show the excess judgment is traceable to the insurer's conduct. 59 Kan. App. 2d at 315. Courts have held that an insurer is not the legal cause of an excess judgment when the claimant rejects a policy-limits settlement offer that he or she would have accepted earlier, solely to manufacture a bad-faith claim. 59 Kan. App. 2d at 315. "The plaintiff should be able to show why an offer that would have been good one day is not acceptable a short time later." 59 Kan. App. 2d at 316.

With this general framework in mind, it is important to note this case is different from typical bad-faith or negligence claims against an insurer in that Nancy never made any demand for damages before filing her lawsuit, yet her entire bad-faith claim stems from Key's conduct before Nancy sued. Similarly, Key never refused to settle for policy limits, believing it could do better at trial. As we will explain in this opinion, this narrow focus on Key's actions before Nancy made any demand for damages distinguishes her case from other cases on the liability of an insurer for excess judgment.

In granting judgment against Key, the district court did not address each of the *Bollinger* factors in deciding whether Key's actions breached its duty to exercise good faith or act without negligence. The district court did find that Soto violated Key's own standards and insurance industry standards in conducting her investigation of the accident. This finding is supported by substantial competent evidence. But the district court also recognized that much of the information Soto needed to know was in the police report that she requested and received about one month after the accident.

The district court appeared to base its judgment mostly on its finding "that Key Insurance breached the duty that it had to Mr. Wilson by failing to communicate and advise him of what would happen if the claim of Mrs. Granados or the lawsuit of Mrs. Granados exceeded $25,000." But the district court never explained how Key's failure to communicate the risks to Wilson caused the excess judgment. As Key points out, Wilson did not testify at the hearing and there is no evidence in the record showing what he would have done to change the result of the case or to prevent the excess judgment had he known the risks: would he have hired an attorney, would he have tried to settle outside his insurance company, would he have reached out to Nancy personally.

Key challenges the district court's finding that Key breached its duty to communicate with Wilson, arguing that it owed no duty to communicate the risks of an excess judgment to Wilson until Nancy made a claim. For the purpose of deciding this appeal, we will accept that Key violated its own standards and industry standards in investigating the accident. We will also assume that Key owed a duty to communicate the risk of an excess judgment to Wilson even before Nancy

made a claim, and that Key breached this duty. The lack of communication between Key and Wilson would amount to only one of the factors the district court should have considered in deciding whether Key breached its duty to exercise good faith or act without negligence. See *Bollinger*, 202 Kan. at 338. More importantly, there must also be a causal connection between Key's breach of duty to Wilson and the excess judgment. *Gruber*, 59 Kan. App. 2d at 315.

Key's main argument on appeal is that the district court erred by entering judgment for Nancy against Key in excess of the policy limit based on Key's failure to communicate with Wilson because any lack of communication was not the cause of the excess judgment. We will address this issue first.

DID THE DISTRICT COURT ERR IN DETERMINING THAT KEY'S INADEQUATE COMMUNICATION WITH WILSON CAUSED THE EXCESS JUDGMENT?

As we have stated, Kansas law is clear that because the duty of good faith arises from the contract, there must be a causal connection between the insurer's conduct and the excess judgment. *Gruber*, 59 Kan. App. 2d at 315. Key argues that the district court erred in entering judgment for Nancy because (1) there is no evidence of causation beyond the fact that Nancy rejected Key's policy-limit offer to pursue a bad-faith claim against Key, and (2) there is no evidence that communication with Wilson would have prevented the excess judgment. In response, Nancy asserts that Key's argument about causation is contrary to both the law and the facts of her case.

An appellate court applies a bifurcated standard of review to garnishment orders. *Geer*, 309 Kan. at 190. Under a bifurcated standard,

> "'[t]he function of an appellate court is to determine whether the trial court's findings of fact are supported by substantial competent evidence and whether the findings are sufficient to support the trial court's conclusions of law. Substantial evidence is such legal and relevant evidence as a reasonable person might accept as sufficient to support a conclusion. An appellate court's review of conclusions of law is unlimited. The appellate court does not weigh conflicting evidence, pass on credibility of witnesses, or redetermine questions of fact. [Citations omitted.]'" 309 Kan. at 190-91.

The district court found Nancy's assertion that "she would have settled this case for $25,000" credible. The court then stated the causal connection for Nancy's action was the lack of communication with Wilson. More specifically, the court found "that Key Insurance

breached the duty that it had to Mr. Wilson by failing to communicate and advise him of what would happen if the claim of Mrs. Granados or the lawsuit of Mrs. Granados exceeded $25,000." The court stated Key "had to at least consult with him. They had at least to advise him that look [Key was] going to cover this first $25,000 and after that it [was] all on [him]." But the court later stated that if Wilson had reached out to Key and told them to settle, Key would not have had to do that, but the communication would have "fulfilled their duty to have communicated with him and to have told him what would have happened if Mrs. Granados doesn't accept the $25,000." Finally, the district court found that it did not have to decide, and was not going to decide, whether the letters from Nancy's counsel mentioning a bad-faith lawsuit was proper legal practice.

Key argues that the district court incorrectly declined to consider evidence—the letters from Nancy's counsel—that showed Nancy impermissibly rejected a policy-limit offer simply to manufacture this bad-faith claim, which is part of a causation analysis. Key argues that an insurer's actions cannot be the cause of an excess judgment when the rejection of a policy-limit settlement was because of the claimant's desire to pursue a bad-faith claim. Key asserts that Nancy's own testimony established that she was willing to accept a policy-limit settlement on June 11, 2018—the day before she filed her lawsuit—but she then rejected Key's policy-limit offer which it extended on July 23, 2018. Key asserts that the only evidence explaining the reason for rejection of the policy-limit offer was the letter from Nancy's counsel rejecting the offer because they believed Key had acted in bad faith or negligently. Key asserts that the fee agreement, the reference to a bad-faith claim in rejecting the settlement offer, and the drastic increase in the amount acceptable for settlement also prove Nancy rejected the offer to pursue a bad-faith claim.

Nancy argues that Key's argument fails to recognize the proposition of law that an insurer cannot offer the policy limit after a lawsuit was filed to cure previous negligence or bad faith. Nancy asserts that the reliance on statements in her counsel's letters is improper because the statements represent her attorney's reasons for rejecting settlement rather than Nancy's own personal reasons

for not settling. Nancy asserts that her reason for rejecting the offer was because she incurred legal fees when she sued. Nancy argues that Key's argument also focuses on the time frame after suit instead of the time frame before suit in which Key "repeated[ly] fail[ed]" to follow its own policies on settlement.

Key replies that Nancy's arguments establish that her decision to hire an attorney was the determinative factor in whether she would settle for the policy limit. Key asserts that Nancy arbitrarily created a deadline for settlement that was not based on a statute of limitations or cost expenditure but was based on her agreement with counsel that incentivized pursuing a bad-faith claim. Key also points out that Nancy's argument relies on Key failing to solicit a claim or contact her, but the district court found that it owed no duty to settle with her.

Caselaw addressing the manufacture of a bad-faith claim

Key is correct that Kansas courts have recognized that an insurer is not the legal cause of an excess judgment if the claimant rejects a settlement offer that he or she would have accepted earlier solely to manufacture a bad-faith claim. See *Gruber*, 59 Kan. App. 2d at 315-16. We have found a half-dozen cases in federal and state court addressing the manufacture of a bad-faith claim. Four have found that the insurer was not the legal cause of the excess judgment because the plaintiff manufactured the bad-faith claim, while two have found the claimant did not manufacture a bad-faith claim.

The case with the most thorough discussion on manufacturing a bad-faith claim is *Wade v. EMCASCO Ins. Co.*, 483 F.3d 657 (10th Cir. 2007), where the Tenth Circuit found that an insurer was not the legal cause of the excess judgment because the claimant manufactured a bad-faith claim. In *Wade*, the claimant demanded a policy-limit settlement soon after an accident in which both liability and the extent of injuries were contested. In the settlement offer, claimant's counsel stated that he had ordered claimant's medical records and would forward them to the insurer upon receipt. Two weeks later, claimant's counsel sent part of the medical records to the insurer and stated that claimant would withdraw the policy-limit settlement offer in a month. When the offer ex-

pired, the insurer was still unable to determine liability as key witnesses were not responding and it still had not received all the medical records. In fact, claimant's counsel did not receive the rest of the medical records until two weeks after the settlement offer expired and he did not send those records to the insurer.

A few days later, claimant's counsel again offered to settle for the policy limit. Less than three weeks later, on August 20, and before the insurer examined the rest of the medical records, claimant sent a letter withdrawing the settlement offer, enclosed a copy of a petition, and stated that claimant would delay filing the petition to give the insurer time to make a settlement offer should it desire to do so. It took another two months for the insurer to obtain the missing medical records independent of claimant. After review, on November 1, it authorized a policy-limit settlement offer.

Two weeks later, claimant's counsel rejected the policy-limit offer in a letter stating claimant could not accept the policy limit because the facts of the case established a "'prima facie case'" of negligence or lack of good faith because the insurer failed to accept either of claimant's policy-limit settlement offers. 483 F.3d at 664. The case went to trial and claimant procured a judgment in excess of the policy limits. Claimant then sought to collect from the insurer based on a claim of negligence or bad faith. The district court granted summary judgment for the insurer finding it did not act negligently or in bad faith in waiting to settle until it had more information.

On appeal, the Tenth Circuit explained that courts should be cautious to avoid creating an incentive for claimants to manufacture bad-faith claims:

> "[T]he doctrinal impetus for insurance bad faith claims derives from the idea that the insured must be treated fairly and his legitimate interests protected . . . . In other words, the justification for bad faith jurisprudence is as a shield for insureds—not as a sword for claimants. Courts should not permit bad faith in the insurance milieu to become a game of cat-and-mouse between claimants and insurer, letting claimants induce damages that they then seek to recover, whilst relegating the insured to the sidelines as if only a mildly curious spectator." 483 F.3d at 669-70.

The court then applied the law to the facts and found that the insurer did not act in bad faith when it refused to settle for the first two offers because the claimant set an arbitrary deadline and failed

to provide necessary information. 483 F.3d at 670-71. The court explained that the "undisputed evidence" showed that claimant's sole reason for rejecting the offer was to pursue a bad-faith claim, as evidenced by claimant's counsel's letter stating as much and his deposition. 483 F.3d at 673. The court pointed out that no new information emerged between August 20 and November 1 that would have showed the circumstances had changed, and claimant could not provide "any other legitimate reason why the policy-limits offer, which was good on August 20, was no longer good on November 1." 483 F.3d at 673. The court found when a claimant arbitrarily withdraws a settlement offer and later rejects an identical one, the claimant's conduct, not the insurer's, is the legal cause of the failure to settle. 483 F.3d at 674. The court held:

"The cause of action for failure to settle is meant to protect the interests of the insured by requiring the insurer to conduct the litigation, including settlement negotiations, as if the insurance contract had no policy limits. It is not meant to create an artificial incentive for third-party claimants to reject otherwise reasonable settlement offers that are within the policy limits. We would be turning the cause of action on its head by holding an insurance company liable where it eventually offered to settle the claim for the policy limits, but a claimant rejected the offer precisely in order to manufacture a lawsuit against the insurer for bad-faith refusal to settle. [Citation omitted.]" 483 F.3d at 674.

Wade is an example of a case when the court held that the claimant's own conduct manufactured a bad-faith claim. Before discussing the next case, we recognize that *Wade* is distinguishable because our case does not involve an insurer trying to get medical records to establish the damages involved in the case. Still, *Wade* is relevant to our case for other reasons, including its discussion of the claimant's arbitrary settlement deadline, the claimant's reference to pursing a bad-faith claim when rejecting the insurer's policy-limit settlement offer, and the claimant's failure to explain why a policy-limit settlement offer that was good one day was not acceptable a short time later.

Next, in *Wiebe v. Hicks*, No. 98,990, 2008 WL 4291641, at *7 (Kan. App. 2008) (unpublished opinion), a panel of this court upheld a district court's decision that the insurer did not act in bad faith or negligently in failing to settle a claim. Hicks rear-ended Wiebe at a stoplight, and Hicks immediately notified his insurer of the accident. A few months later, Wiebe sent a demand letter

for $250,000 or, in the alternative, a settlement for the policy limit subject to certain conditions. The letter explained Wiebe planned to consult with a surgeon, but he was "'hesitant'" to have surgery. 2008 WL 4291641, at *1. Hicks' insurer responded the policy limit was $100,000, and it needed more information to evaluate the claim. Wiebe's attorney notified the insurer the settlement offer would remain open until May 31, 2003. The insurer asked for an extension until June 13, but Wiebe's attorney did not respond. On June 2, 2003, Wiebe withdrew his settlement offer and sued Hicks. Wiebe had surgery two days later.

Wiebe ultimately recovered a judgment for over $200,000. Wiebe filed a garnishment action against the insurer. The district court found the insurer did not act in bad faith in failing to accept Wiebe's offer. The panel affirmed the findings, stating that Hicks' insurer was still investigating the value of the claims and did not know the nature and extent of Wiebe's injuries; Wiebe's settlement offer was "'completely arbitrary,'" as there was no statute of limitations issue; there was no evidence of trial preparation of investigation taking place between May 31 and June 13; and Wiebe offered no other evidence to establish a legitimate reason why the policy limit was acceptable on May 31 but not on June 13. 2008 WL 4291641, at *7.

Similarly, in *Blanco-Diaz v. Maus*, No. 103,916, 2012 WL 718919, at *1 (Kan. App. 2012) (unpublished opinion), a panel of this court upheld a district court's denial of a bad-faith judgment based on lack of causation. The panel explained that the facts established that 6 months after an accident, claimant sent a demand letter for $1,000,000, to the insurer with a 30-day time limit. The letter also suggested that failure to settle within the 30 days would amount to bad faith and would impose liability on the insurance company for an excess judgment. At the time of the offer, both claimant and the insurer knew that the amount of coverage was unresolved based on the potential applicability of business liability provisions. The panel concluded that the 30-day deadline in the demand letter "was arbitrary in the sense that no legal rights or duties would have been compromised if settlement were not reached within that period" and "[t]he language of the [demand] letter supports an inference the lawyer, at least in part, intended to

maneuver [the insurer] into a bad-faith posture." 2012 WL 718919, at *3. The panel also noted that both parties knew that the policy limit was in dispute at the time of the offer. 2012 WL 718919, at *3.

Next, in *Kemp v. Hudgins*, 133 F. Supp. 3d 1271 (D. Kan. 2015), a federal district court found that a claimant manufactured a bad-faith claim. Kaston Hudgins, who was fleeing from police at a high rate of speed, crashed his car into the car driven by Teresa Kemp, killing Kemp and her daughter. The car Hudgins was driving was owned by his girlfriend, Ashley Kelley, and was insured through Dairyland Insurance Company (Dairyland) with a $25,000/$50,000 policy limit. Dairyland knew within days of the accident that the potential claims exceeded the policy limit.

Dairyland offered to settle all potential claims for the policy limit in exchange for a release of Hudgins and Kelley. The claims were never settled because Kemp's estate did not want to release Kelley so that it could pursue a negligent entrustment action against her. Kemp's personal representative signed a contingency fee contract with an attorney which provided that the attorney would recover 40% of any funds recovered except no fee would apply to the first $50,000 collected from Dairyland. Kemp's estate filed a wrongful death action against Hudgins and did not name Kelley as a defendant. Dairyland again offered to settle the case for its policy limit. The estate responded that it would settle with Hudgins if he would consent to judgment in excess of $5 million. The case never settled, and ultimately the estate recovered a judgment against Hudgins in excess of $5 million. The estate then filed a garnishment action against Dairyland to recover the excess judgment. Dairyland moved for summary judgment asserting it did not act in bad faith during the settlement negotiations.

The Kansas district court granted summary judgment for Dairyland, finding it was not liable for the excess judgment because its conduct was not the cause of the excess judgment. 133 F. Supp. 3d at 1295. The district court found the uncontroverted evidence showed that the estate rejected each policy-limit settlement proposal after the lawsuit was filed because it did not believe the offer sufficiently covered its claim. 133 F. Supp. 3d at 1296. The court also pointed out that the fee agreement and stipulated judgment offer made clear that the estate was planning to pursue

a bad-faith claim and was not interested in settling for the policy limit. 133 F. Supp. 3d at 1296. The court also pointed out that while the estate's circumstances changed in terms of litigation expenses, it would not have incurred the fees had it accepted the policy-limit offers advanced early in the case. 133 F. Supp. 3d at 1296. The court concluded from the evidence that "no reasonable jury" could find that Dairyland's conduct caused the excess judgment. 133 F. Supp. 3d at 1295.

In contrast, the Tenth Circuit found that a claimant did not manufacture a bad-faith lawsuit in *Roberts v. Printup*, 595 F.3d 1181 (10th Cir. 2010). Roberts was injured when the brakes failed while riding in the car with her son. She later consulted with an attorney and sent a letter to Shelter Mutual Insurance Company (Shelter) seeking to settle all her claims for the policy limit of $25,000. The demand had a 10-day time limit because the statute of limitations was due to expire. When Shelter did not accept the settlement, Roberts sued her son. Because of a mix up on Shelter's end, Roberts' settlement demand was sent to a different department and was not received by the claims department until three weeks after its original delivery. Shelter then offered to pay the policy limit. The district court found Shelter negligent in handling Roberts' claim but found that based on *Wade*, Shelter's negligence was not the legal cause of excess judgment because Shelter offered the policy limit three weeks after Roberts' deadline.

The Tenth Circuit found the district court erred in finding Roberts caused the excess judgment because there was no "semblance of impropriety on the part of Ms. Roberts" as there was in *Wade*, where the insurer acted reasonably and any delay in settlement was because of the claimant's failure to turn over information. *Roberts*, 595 F.3d at 1189. The court summarized that Roberts did not intentionally send her claim to the wrong office, the 10-day deadline was reasonable given the impending expiration of the statute of limitations, and the delay in settlement led Roberts to incur additional costs and fees and her filing a lawsuit against her son. Based on these facts, the Tenth Circuit explained that no evidence suggested that Roberts imposed an arbitrary deadline or provided insufficient information to Shelter for it to make a fair appraisal of the case. 595 F.3d at 1190. The court

found that "it was Shelter's failure to implement a system to handle reasonable time-sensitive offers in negligent disregard of its insured's interest that exposed Mr. Printup to damages in excess of policy limits" and that "the facts of this case do not raise a suspicion of the 'cat-and-mouse' game between claimants and insurers cautioned against in *Wade*." *Roberts*, 595 F.3d at 1190-91. Thus, The Tenth Circuit reversed the district court and directed it to enter judgment for Roberts. 595 F.3d at 1191.

Finally, a panel of this court also found a claimant had not manufactured a bad-faith claim in *Gruber*—a case with unusual facts. In *Gruber*, two friends, Marshall and Gruber, died when the plane Marshall was piloting crashed in April 2013. Marshall was a retired surgeon and Gruber was a development officer for the College of Veterinary Medicine at Kansas State University. Marshall had general liability insurance coverage and the policy included "'voluntary settlement coverage,'" which allowed payment of the $100,000 policy limit upon the insured's request to a passenger's estate regardless of fault in exchange for a release of liability of the insured. The policy had a one-year expiration date, meaning that if the insured had not asked the insurer to pay the voluntary settlement within a year, the coverage expired. The Marshall estate authorized payment under the policy in September 2013, within the one-year time limit. The insurance company knew within a few months of the crash that the potential liability of Marshall's estate was higher than the policy limits and that the estate had substantial assets to protect.

In December 2014, Gruber's estate filed a wrongful death lawsuit against the Marshall estate and two aircraft repair companies. Then, in May 2015, the insurance company offered the Gruber estate the $100,000 policy limit, but the estate rejected the offer stating it had come "too late." 59 Kan. App. 2d at 308. The district court found Marshall solely at fault for the crash and awarded damages in excess of $11 million. The Gruber estate then filed a garnishment action against Marshall's insurance company. The district court found that the insurer had acted negligently or in bad faith by failing to timely offer the voluntary settlement coverage policy limit, and the district court found the insurer liable for the entire amount of the excess judgment.

On appeal, the *Gruber* panel upheld the district court's judgment. As for causation, the panel noted that the evidence showed that the Gruber estate would have accepted the policy-limit settlement offer within the first year of the crash. 59 Kan. App. 2d at 315. The panel found that the causation depended on the voluntary settlement coverage policy that was "unique to this case." 59 Kan. App. 2d at 317. The Gruber estate had not made a settlement offer with an arbitrary deadline nor withheld necessary information to settle the claim. 59 Kan. App. 2d at 317. The panel found there was no evidence to show that the rejection of the settlement offer was to set up a bad-faith claim. 59 Kan. App. 2d at 317. The panel noted the insured was not of "'meager means'" and the Gruber estate could have recovered against the personal assets of the insured. 59 Kan. App. 2d at 318.

Applying the law to our facts

Applying the analysis in these cases to our facts, Key asserts that Nancy's own arbitrary actions were the legal cause of the excess judgment, not Key's purported bad-faith or negligent actions. The relevant facts of this case are not in dispute: (1) Key knew that Wilson was liable and that damages would exceed the $25,000 policy limit after it received the police report in November 2017; (2) Nancy received a letter from her own insurance company, State Farm, in December 2017 asking her to report any claims, but she threw the letter away; (3) Nancy hired an attorney in February 2018; (4) the fee agreement stated that she would pay counsel one-third of all sums recovered unless the case settled for $50,000 before suit was filed, in which case all fees would be waived; (5) as of March 2018, State Farm informed Key that Nancy had not responded to its letters and it had made no payment under its policy; (6) on June 4, 2018, Nancy's attorney told State Farm that he was representing her; (7) sometime after June 9, 2018, Nancy opened a letter from State Farm, dated May 31, 2018, stating she had a liability claim against Key, but the letter did not mention Wilson or provide any contact information for Key; (8) on June 12, 2018, Nancy filed her wrongful death suit; (9) Key received the petition on July 2, 2018; (10) on July 23, 2018, Key offered to settle for the policy limit; (11) on July 26, 2018, Nancy

rejected the offer in a letter from her counsel stating that an insurance company cannot cure negligence or bad faith by offering the policy limit after suit has been filed; and (12) Nancy testified—and the district court found it credible—that if she had been contacted before she sued she would have settled her claim.

To begin, the district court's finding that Nancy would have settled for the policy limit if she had been contacted before she sued is supported by substantial competent evidence. The district court explicitly found Nancy credible, a finding that this court does not reweigh on appeal. See *Geer*, 309 Kan. at 190-91. That said, Nancy filed her lawsuit on June 12, 2018, and she rejected Key's policy-limit settlement offer on July 26, 2018. In evaluating Nancy's bad-faith claim against Key, a relevant inquiry is why a policy-limit settlement she would have accepted on June 12, 2018, was not acceptable about 6 weeks later, on July 26, 2018. Nancy contends that it was because she had to incur the added expense of filing a lawsuit. She emphasizes our court's ruling that an insurer cannot cure its previous negligence or bad faith by offering the policy limit after commencement of a lawsuit. *Gruber*, 59 Kan. App. 2d at 303.

But like *Wade*, *Wiebe*, *Blanco-Diaz*, and *Kemp*, Nancy set an arbitrary deadline—June 12 when she filed her lawsuit—for settlement. As in *Blanco-Diaz*, the deadline is arbitrary in that no legal rights or duties would have been compromised if settlement had not been reached by that date. For instance, this case is not like *Roberts* where the statute of limitations would run. Nancy sued a little more than eight months after the accident. Thus, she still had about 16 months on the statute of limitations. See K.S.A. 60-513.

The deadline imposed by Nancy is even more arbitrary than those considered in *Wade*, *Wiebe*, *Blanco-Diaz*, and *Kemp* because Nancy never revealed she was seeking damages, let alone that there was a deadline for settlement. Without communicating her "deadline" for accepting settlement, she was in total control of whether Key's actions would lead to an excess judgment. As explained in *Wade*, "[p]ermitting an injured plaintiff's chosen timetable for settlement to govern the bad-faith inquiry would promote the customary manufacturing of bad-faith claims." 483 F.3d at 670.

Nancy contends she did not know that Wilson was insured by Key when she filed her lawsuit. Coincidently, Nancy received a letter from State Farm referencing her potential claim against Key about the same time the lawsuit was filed. But even if the lawsuit hit the courthouse before Nancy had any official notice of Key, it remains relevant to the bad-faith claim that Nancy filed her lawsuit without sending any demand letter to Wilson, making a claim for Nancy's damages or asking about Wilson's possible insurance coverage. Our Supreme Court has stated that it should be "standard procedure unless an immediate filing of an action is required by imminent running of the statute of limitations or some other good reason" for an attorney "before filing an action, [to make] a demand upon his client's adversary and [extend] to him the opportunity to respond with his version of the facts." *Nelson v. Miller*, 227 Kan. 271, 285, 607 P.2d 438 (1980).

Nelson is distinguishable because that case involved a malicious prosecution case against attorneys for filing a medical malpractice lawsuit against a physician without conducting a proper investigation. But the fact remains that a routine demand letter from Nancy's counsel to Wilson, had counsel had any motivation to send one, could have led to a swift settlement of Nancy's claim for Key's policy limits—and Nancy would not have incurred any legal fees in this case based on her fee agreement with counsel.

Next, we consider Nancy's response to Key's policy-limit settlement offer. In a letter from Nancy's counsel dated July 26, 2018, Nancy rejected Key's offer without making any counteroffer. The letter gave no reasons why Nancy would not settle for Key's policy limits, except for referring to a potential bad-faith claim against Key for not settling "a long time ago." Then, on October 2, 2018, Nancy's counsel sent a letter to Wilson's attorney, seeking $2,973,434 to settle, asserting that settlement for that amount would allow Key to "avoid the consequential damages available in a bad faith lawsuit." As in *Blanco-Diaz* and *Wade*, this reference to a bad-faith claim is evidence supporting that the claimant rejected settlement solely to manufacture the bad-faith claim. See *Blanco-Diaz*, 2012 WL 718919, at *3 (pointing to counsel's letter as supporting an inference that lawyer intended to maneuver the insurer into a bad-faith posture); *Wade*, 483 F.3d at 673 (pointing

to counsel's letter stating it would pursue a bad-faith claim as evidence of manufacturing a bad-faith claim).

In awarding judgment against Key for bad faith and negligence, the district court commented that it need not consider whether the letters from Nancy's counsel mentioning a bad-faith lawsuit was proper legal practice. But the reference in the letters to a potential bad-faith claim was evidence supporting that counsel rejected the settlement with motivation to pursue a bad-faith claim. See *Blanco-Diaz*, 2012 WL 718919, at *3; *Wade*, 483 F.3d at 673. Contrary to its assertions, the district court should have considered the letters, and other evidence about Nancy's rejection of the policy-limit settlement offer, as part of its causation analysis. The district court erred by failing to do so.

Nancy asserts that the reliance on statements in her counsel's letters is improper because the statements represent her attorney's reasons for rejecting settlement as opposed to Nancy's own personal reasons for not settling. But "[i]t has been recognized generally that a client is bound by the appearance, admissions, and actions of counsel acting on behalf of his client." *Reimer v. Davis*, 224 Kan. 225, 229, 580 P.2d 81 (1978). We presume that Nancy essentially followed her counsel's advice on what strategy she should pursue in her claim against Key. Although the decision to accept or reject a settlement offer was Nancy's, the reference in counsel's letters to a potential bad-faith claim is the type of evidence a court can consider in assessing the motivation for rejecting a settlement offer. See *Blanco-Diaz*, 2012 WL 718919, at *3; *Wade*, 483 F.3d at 673.

As a related matter, in rejecting the policy limit, Nancy's counsel asserted that "[a]n insurer cannot cure its previous negligence or bad faith by offering the policy limit after commencement of a suit." She relies on this proposition to support her assertion that the issue of manufacturing a bad-faith claim is irrelevant. See *Gruber*, 59 Kan. App. 2d at 303. But the rule in *Gruber* is taken from *Smith v. Blackwell*, 14 Kan. App. 2d 158, 791 P.2d 1343 (1989), in which the insurer had a pre-suit policy-limit demand, which it refused to pay, and then it offered the policy limit after the claimant had sued. The panel in *Smith* explained that the insurer could not "'cure'" its previous negligent behavior because "'[A]ll the good faith and settlement offers in the world *after* suit

is filed will not immunize a company from the consequences of an unjustified refusal to pay which made the suit necessary.'" 14 Kan. App. 2d at 163-64 (quoting *Sloan v. Employers Casualty Ins. Co.*, 214 Kan. 443, 444, 521 P.2d 249 [1974]). The panel pointed out that the insurer had "ample" time to complete its investigation after the policy-limit offer was made and that the lawsuit had not been filed "'precipitously'" as claimant's counsel had agreed to extend the time to settle. *Smith*, 14 Kan. App. 2d at 164.

Nancy fails to consider the context of the rule: that the insurer in *Smith* refused to pay a policy-limit offer before a lawsuit was filed and that filing suit was necessary. The rule does not apply here because Key had no pre-suit demand from Nancy that it refused to pay. As we have discussed, filing a lawsuit may not have been necessary to obtain the policy limit from Key. To be clear, this analysis is not stating that a claimant cannot make the first claim for damages from an insurer by filing a lawsuit. Instead, it is stating that if the claimant chooses that route, the claimant cannot rely on "having to file suit" as the justification for rejecting a post-suit policy-limit settlement offer.

Similarly, Nancy's argument that she reasonably rejected the post-suit policy-limit settlement offer because of the fees she incurred by filing the lawsuit is unpersuasive. Nancy testified that because she recovered from Key and State Farm—her own insurance company—after she sued, she now owed attorney fees. But Nancy only collected $50,000 from both companies. Even if she would need to pay one-third of that amount in attorney fees because a lawsuit had been filed, that expense does not explain why a claim she would have settled for $25,000 in June 2018 could only be settled for nearly $3 million in October 2018. The record does not reflect that Nancy incurred any significant litigation expense during those four months by taking depositions or hiring expert witnesses.

Before wrapping up this discussion on causation for the excess judgment, we are mindful that Nancy and her family sustained a horrific loss at the hands of Wilson, who had purchased a minimum coverage liability policy from Key. See K.S.A. 2020 Supp. 40-3107(e). The policy-limit offer made by Key after the lawsuit was filed could not begin to fully compensate Nancy for

her damages. But the issue in this case is Key's contractual responsibilities to Wilson under the insurance policy. Nancy stands in the shoes of Wilson and can enforce an action against Key only to the extent that Wilson could enforce such an action. *Geer*, 309 Kan. at 191. Key is liable for a judgment in excess of the policy limit only if it breached a duty it owed to Wilson in settling the claim and there is a causal connection between Key's conduct and the excess judgment. *Bollinger*, 202 Kan. at 336-43; *Gruber*, 59 Kan. App. 2d at 315.

As mentioned earlier, this case is different from typical bad-faith or negligence claims against an insurer in that Nancy never made any demand for damages before filing her lawsuit, yet her entire bad-faith claim stems from Key's conduct before Nancy sued. Similarly, Key never refused to settle for policy limits, before or after the lawsuit was filed, believing it could do better at trial. Nancy filed her lawsuit 16 months before the statute of limitations would have expired, and she filed the suit without sending a demand letter to Wilson. Key made a policy-limit settlement offer six weeks later, but by that time Nancy had no intention to settle the case for any amount close to the policy limits.

Kansas law is clear that for an insurer to be liable for a judgment in excess of the policy limit, there must be a causal connection between the insurer's conduct and the excess judgment. *Gruber*, 59 Kan. App. 2d at 315. An insurer is not liable for a judgment entered against its insured unless the plaintiff can show the excess judgment is traceable to the insurer's conduct. 59 Kan. App. 2d at 315. Courts have held that an insurer is not the legal cause of an excess judgment when the claimant rejects a policy-limits settlement offer that he or she would have accepted earlier, solely to manufacture a bad-faith claim. 59 Kan. App. 2d at 315. "The plaintiff should be able to show why an offer that would have been good one day is not acceptable a short time later." 59 Kan. App. 2d at 316.

Again, we accept that Key violated its own standards and industry standards in investigating the accident. We also assume for this opinion that Key breached its duty to Wilson by failing to communicate with him and advise him about the risk of an excess judgment before Nancy filed her lawsuit. But Nancy has failed to show that Key's breach of its duty to communicate with Wilson is

what caused the excess judgment. Instead, the record reflects that the excess judgment was more the result of Nancy's actions after the lawsuit was filed, rather than Key's conduct before the lawsuit was filed. Based on the undisputed facts in the record, and even taking Nancy's testimony that she would have settled pre-suit as credible evidence, this case resembles *Wade*, *Wiebe*, *Blanco-Diaz*, and *Kemp*, in which the courts found that the claimant's own arbitrary actions were the legal cause of the excess judgment. As a result, we hold Key's purported negligence or bad faith in handling the claim was not the legal cause of the excess judgment and the district court erred in entering judgment against Key in the garnishment action.

One final point. Although some courts have addressed the causation issue in terms of the claimant "manufacturing" a bad-faith claim, we refrain from using that term to describe Nancy's actions in this case. We need not find that Nancy intentionally set out to make Key liable for an excess judgment in order to conclude there is no causation here. Instead, we simply find that under the facts of this case, Key's conduct in handling the claim was not the legal cause of the excess judgment, and so the district court erred in entering judgment for Nancy against Key in the garnishment action.

DID THE DISTRICT COURT ERR IN FINDING KEY HAD NO AFFIRMATIVE DUTY TO INITIATE SETTLEMENT NEGOTIATIONS?

In her cross-appeal, Nancy contends the district court erred in finding Key owed no duty to pursue settlement on Wilson's behalf, and the court should have found Key breached that duty. To recap, the district court found Key had no affirmative duty to reach out to Nancy and initiate a settlement offer before she made a claim, even if directed by Wilson to do so, observing that "Key wouldn't have had to do that." Nancy challenges that finding and asserts that Key's failure to initiate settlement negotiations when it was clear Nancy had a policy-limit claim supports an excess judgment against Key. Key argues the district court correctly ruled it owed no duty to solicit a claim from Nancy against its own insured before Nancy asserted a claim against Wilson or Key.

The parties' arguments on this issue hinge on when an insurer's duty to act in good faith and without negligence begins. Key asserts that until a claimant makes a claim—meaning the claimant makes known to the insurance company that the claimant is seeking damages—it has no duties. Nancy counters that an insurance company owes duties to its insured once an accident has occurred because the claimant has a claim—meaning the claimant can, at any time from that point forward, demand damages.

As in the first issue, an appellate court determines whether the district court's findings of fact are supported by substantial competent evidence and whether the findings are sufficient to support the district court's conclusions of law. *Geer*, 309 Kan. at 190. An appellate court's review of conclusions of law is unlimited. 309 Kan. at 190-91.

Nancy is correct in asserting that panels of this court have cited the rule that an insurer has a duty to initiate settlement despite the actions of the injured party. For instance, in *Gruber* the panel summarized the law as:

> "The insurer thus has a duty to settle if the insurer would start settlement negotiations on its own behalf were its potential liability equal to that of its insured. An insurer must exercise diligence and good faith in its efforts to settle damage claims within the policy limits. *Farmers Ins. Exchange v. Schropp*, 222 Kan. 612, Syl. ¶¶ 4-5, 567 P.2d 1359 (1977). The fiduciary relationship between the insurer and insured imposes a duty on the insurer to make reasonable efforts to negotiate a settlement. *The insurer has to begin settlement negotiations regardless of the actions of the injured party*. *Rector v. Husted*, 214 Kan. 230, 241-42, 519 P.2d 634 (1974); *Smith v. Blackwell*, 14 Kan. App. 2d 158, 163, 791 P.2d 1343 (1989). An insurer cannot cure its previous negligence or bad faith by offering the policy limit after commencement of a suit. *Blackwell*, 14 Kan. App. 2d at 163-64, 791 P.2d 1343." (Emphasis added.) *Gruber*, 59 Kan. App. 2d at 303.

But further investigation into the authorities relied on to support this rule suggest that the rule is not as broad as the cases would imply. We are aware of no controlling legal authority in Kansas that required Key to initiate settlement negotiations with Nancy before she made any claim for damages against Wilson or Key.

The "rule" that an insurer has a duty to initiate settlement originates from *Rector v. Husted*, 214 Kan. 230, 241-42, 519 P.2d 634 (1974). In *Rector*, the claimant was injured when the insured ran

a stop sign and hit Rector's car. Claimant suffered back pain after the accident and saw various doctors. Claimant offered to settle for $6,000 throughout the trial but the insurer decided to take its chance with the jury, even though it knew the insured was liable and it knew claimant's medical expenses. The insurer only made one offer of $1,000 during the case. The court found that the record clearly established that the case was worth more than $1,000 because liability and damages were clear. 214 Kan. at 240. The court explained that the insurer, because of its fiduciary relationship with the insured, had a duty to make reasonable efforts to negotiate a settlement of the claim and the insurer breached that duty when it "elected to take their chances with the jury without reasonably attempting to negotiate a settlement." 214 Kan. at 241. The court explained it was not stating that the insurer had to settle for the $6,000 offered by claimant but,

"it was incumbent upon the appellant, with a claim involving admitted liability and permanent disability, to make a good faith attempt at negotiating a settlement. By taking a chance with the jury the appellant was exposing the insured to potential personal liability for an amount well above the policy limits. The action filed by the plaintiff sought damages in the amount of $25,000. Fair and equal consideration of the insured's vulnerable position demands that reasonable attempts be made to protect him from such exposure." 214 Kan. at 241-42.

A reading of the entire opinion in *Rector* establishes that the Kansas Supreme Court relied on the circumstances of the case to determine that the insurer did not make good-faith attempts to negotiate settlement when it rejected a post-suit offer from the claimant and instead chose to proceed to a jury. Notably, it is the dissent in *Rector* that interprets the opinion as imposing a duty to initiate settlement "when its insured is about to be sued by an injured third party." See 214 Kan. at 242 (Fromme, J., dissenting). But the opinion does not state such a broad rule, especially considering the facts of the case. Thus, it is unclear where the broader rule statement that the insurer has a duty to begin settlement negotiations regardless of the actions of the injured party—that panels of this court have attributed to *Rector*—came from. See *Blackwell*, 14 Kan. App. 2d at 163.

The other case Nancy cites in support of her argument is *Farmers Ins. Exchange v. Schropp*, 222 Kan. 612, 567 P.2d 1359 (1977). In *Schropp*, Clint R. Sohl, who was insured by Farmers

Insurance Exchange (Farmers), hit a car that Michael D. Schropp was riding in. Schropp and other people involved in the crash sustained injuries. Schropp was in the hospital for 30 days and Farmers reached out to his mother asking for his medical bills so it could pay them. Schropp's attorney sent the bills, totaling around $9,000, and Farmers replied that it would be in touch regarding future settlement. The company did not contact Schropp and two months later Schropp sent another letter with more medical bills, exceeding $26,000, and demanding payment of the policy limit.

The Kansas Supreme Court summarized the rules surrounding an insurer's duty to its insured. It then quoted a Tenth Circuit case in which the Tenth Circuit stated that it believed under its reading of Kansas law, "'the duty to settle does not hinge on the existence of a settlement offer from the plaintiff. Rather, the duty to settle arises if the carrier would initiate settlement negotiations on its own behalf were its potential liability equal to that of its insured.'" 222 Kan. at 620 (quoting *Coleman v. Holecek*, 542 F.2d 532 [10th Cir. 1976]). The court found that the facts established that Farmers said it would be in touch regarding settlement, then never followed through; that it made no effort to work out a settlement with all claimants; and that when it received Schropp's demand for the policy limits it refused the settlement despite knowing its insured was liable and that Schropp's medical expenses exceeded its policy limits. The court also pointed out:

> "All but one of the claimants were represented by counsel, and that claimant sustained the least serious injuries of all, and had returned to military duty. He was a minor, and his parents were available for consultation. Under these circumstances, Farmers could well have notified all of the potential claimants involved that the value of the claims would doubtless exceed policy limits, and invite them or their attorneys to participate jointly in efforts to reach agreement as to the disposition of the available funds. Alternatively, Farmers could have attempted to settle claims within the policy limits as they were presented. Or as a third alternative, Farmers could have promptly and in good faith commenced an interpleader action, and paid its policy limits into court. The first of these alternatives is preferable, where the claimants are readily available, and such a procedure may avoid litigation. Farmers pursued none of these alternatives. [Citation omitted.]" 222 Kan. at 621.

Thus, the court upheld the jury's finding that Farmers acted negligently or in bad faith in handling the claims arising from the collision. 222 Kan. at 621.

Nancy asserts *Schropp* stands for the proposition "that when an insurer is aware of 'potential claimants,' and the insurer is aware that the value of the claim would likely exceed policy limits, the 'preferable' approach is for the insurer to reach out to the claimants, even if it has not been contacted by the claimants." But as she notes, the court only stated such contact would have been preferable; it did not state that the insurer had a duty to do so. *Schropp*, 222 Kan. at 621. Further, the quote from the Tenth Circuit case stemmed from the statement from *Rector* that "'*the claim* should be evaluated by the insurer without looking to the policy limits and as though it alone would be responsible for the payment of any judgment rendered on the claim.'" (Emphasis added.) *Schropp*, 222 Kan. at 620 (quoting *Coleman* which quoted *Rector*).

In both *Rector* and *Schropp* the claimants demanded damages from the insured. Here Nancy never demanded the policy limit or any other damages until she sued. Thus, the authorities cited by Nancy do not support her broad assertion that an insurer must initiate settlement negotiations before a claimant even indicates a desire to pursue damages. In fact, these cases support the district court's finding. Once Key knew that Nancy was pursuing a claim, Key initiated settlement negotiations and offered its policy limit to settle. Thus, unlike the insurer in *Rector* who declined to settle after a lawsuit was filed and instead took its chances with the jury, Key tried to negotiate with Nancy to prevent the case from going forward and it was Nancy's rejection of that policy-limit offer that led to the excess judgment being entered.

Nancy then asserts an insurer's duties to its insured begin from the moment the accident occurs. In support, she cites *Jameson v. Farmers Mutual Automobile Ins. Co.*, 181 Kan. 120, 126-27, 309 P.2d 394 (1957), for its statement:

"[A]n injured party . . . is generally under no obligation to give notice, [but] he could not recover under the policy unless he sees to it that the insurer is notified of the accident of suit. . . . In other words, it mattered not who gave the notice so long as notice was given and the insurer had actual notice thereby, giving it an opportunity to make an investigation and to defend the suit."

But the *Jameson* case focused on what effect the failure of the insured to forward suit papers had on the insurer's liability for a

failure to defend the case. The statement Nancy relies on came in the court's general recitation of the notice an insurer must have before their duty to defend kicks in. *Jameson*, 181 Kan. at 127. But Nancy fails to recognize that in *Jameson*, the insurer was told of both the accident and pending suit and thus the insurer was liable: "Appellee had notice of *the pendency of the actions for damages* against the [insureds]; it was advised of the claims and knew of every step taken in the damage actions." (Emphasis added.) 181 Kan. at 127. Thus, the full authority, not the piecemeal quote Nancy presents, undermines her position.

Nancy also cites *Moses v. Halstead*, 581 F.3d 1248, 1255 (10th Cir. 2009), for the statement that "under Kansas law an insurance company has a 'duty to exercise reasonable care and good faith in efforts to settle a claim against its insured.' To trigger this duty, the insured need only put the insurer on notice of the claim. [Citation omitted.]" Based on this rule, the Tenth Circuit reasoned that the insurer had a duty to defend once the claimant's father "put the company on notice of the accident." 581 F.3d at 1255. But again, Nancy fails to recognize the context of this statement and that the authorities cited by the Tenth Circuit to support its assertion do not state that notice of an accident alone can trigger the duty to defend. First, the facts of *Moses* established that the claimant's father "reported the accident to Allstate, *requesting coverage for his daughter's injuries*." (Emphasis added.) 581 F.3d at 1250. Thus, claimant's father not only gave notice of the accident but simultaneously gave notice that claimant was seeking damages.

Second, and more importantly, the authorities cited by the Tenth Circuit to support its statement—that the "'duty to exercise reasonable care and good faith in efforts to settle a claim against its insured'" arises on notice of the claim—all support finding that the claimant must make some sort of "claim," whether that be a lawsuit or a demand on the insurer. See, e.g., *Am. Motorists Ins. Co. v. Gen. Host Corp.*, 946 F.2d 1489, 1490 (10th Cir. 1991) ("In determining whether the insured has a duty to defend, it is by now well-recognized that 'we must examine the complaints in the[] underlying actions and decide whether there are any allegations that arguably or potentially bring the action within the protection purchased or a reasonable possibility that coverage exists.'"); *Bankwest v. Fid. & Deposit Co. of Maryland*, 63 F.3d 974, 981 (10th

Cir. 1995) (finding insurer had duty to defend lawsuit because lawsuit alleged covered acts).

Nancy then cites two irrelevant cases. First, she cites *Henry Enterprises, Inc. v. Smith*, 225 Kan. 615, 620, 592 P.2d 915 (1979), for its quote:

"An insurance company by the nature of its business is not called into action until one of its insured has suffered some form of injury and has a potential claim against some other party and/or the insurer itself. At this point, the insurer must conduct a review of the factual data underlying the claim . . . ." 225 Kan. at 620.

This excerpt does not help Nancy's case. First, the question in this case was whether statements of witnesses taken by claims adjusters or investigators were discoverable. Thus, the case was not discussing an insurer's duties at all. Second, the quote cited by Nancy is the Kansas Supreme Court's quoting of a federal district court case from Illinois which discussed the Federal Rules of Civil Procedure and whether documents written by insurance agents were discoverable. See 225 Kan. at 620 (quoting from *Thomas Organ Co. v. Jadranska Slobodna Plovidba*, 54 F.R.D. 367 [N.D. Ill. 1972]). And the Illinois case that provided the excerpt cited involved admiralty law and cargo loss, not an insurer's duties to its insured and not when a claimant can recover on a breach of those duties. See *Thomas Organ Co.*, 54 F.R.D. at 368 ("The plaintiff in this admiralty lawsuit seeks to recover damages for cargo loss.").

Second, Nancy cites *LaForge v. Am. Cas. Co. of Reading, Pennsylvania*, 37 F.3d 580 (10th Cir. 1994). This case discussed the difference between "claims made" policy coverage—where "coverage is only triggered when, during the policy period, an insured becomes aware of and notifies the insurer of either claims against the insured or occurrences that might give rise to such a claim"—and an "occurrence" policy coverage—where coverage attached automatically on occurrence of a covered event. 37 F.3d at 583. Nancy then asserts, without citation to the record, that the insurance policy in this case was an occurrence policy and, thus, once the accident occurred, Key's duties kicked in. In the alternative, Nancy asserts even under the policy coverage definition, the accident here provided notice of the claim as the accident "might give rise" to a claim. But *LaForge* is unpersuasive because it

speaks to when *coverage* is triggered. See 37 F.3d at 580-81. Here, there is no dispute that Wilson had coverage for the accident. Instead, the question in this case is when the insurer's duties to its insured, specifically the duty to initiate settlement negotiations, arises.

To summarize to this point, none of the cases relied on by Nancy persuasively establish that Key had a duty to initiate settlement negotiations with Nancy before she informed Key that she was requesting damages. While panels of this court have cited a rule that would on its face seem to support Nancy, the "rule" is not found in any of the caselaw cited to support such a proposition. Further, the context of the "rule" has always been applied after the claimant has at least made some indication that he or she was seeking damages from the insurance company. The rule does not state that an insurer must initiate settlement negotiations before the claimant makes any type of demand for damages. And Nancy cites no authority to support her assertion that Key had a duty to initiate settlement negotiations based solely on its notice of the occurrence of an injury accident caused by its insured. Instead, the authorities state that an insurer has a duty to defend *when a claim*—meaning some demand for damages or lawsuit—is made.

Turning to Key's arguments, Key asserts that *Roberts v. Printup*, 422 F.3d 1211 (10th Cir. 2005), supports its assertion that its good-faith duties only arise once a claim in excess of the policy limits is asserted. This *Roberts* case is a prior proceeding, an appeal from summary judgment, in the same *Roberts* case discussed earlier in this opinion. See 595 F.3d 1181. To summarize the facts again, Roberts obtained an insurance policy from Shelter for her new car—titled and registered to both her and her 16-year-old son, Patrick Printup—where she was the insured and Printup was an insured driver. Printup was driving and Roberts was a passenger when the brakes failed, and the car struck a pole. Roberts' medical bills exceeded $125,000. They reported the accident to Shelter, who coded the accident as a one-car collision with the insured at fault. Roberts told Shelter that Printup did everything he could when the brakes failed so Shelter had no reason to believe a liability claim against Printup was imminent. Roberts submitted her first medical bills and Shelter paid out the personal injury protection limit.

Roberts later consulted with an attorney and sent a letter to Shelter seeking to settle all her claims for the policy limit of $25,000. When

Shelter did not accept the settlement, she sued her son. Roberts obtained a judgment against Printup for more than $1 million. Roberts then sought to collect from Shelter, alleging it acted negligently or in bad faith by failing to investigate, failing to evaluate the claim, failing to properly document claim activity, failing to train and supervise claim personnel, failing to give equal consideration to the interest of its insured, failing to initiate negotiations from settlement when liability was "reasonably clear," and failing to accept or respond to time sensitive settlement offers. 422 F.3d at 1214. The district court granted summary judgment to Shelter on all claims and Roberts appealed.

On appeal, Roberts claimed that Shelter had a duty to initiate settlement when the accident was reported. The Tenth Circuit acknowledged that Kansas law "under certain circumstances" imposes a duty on the insurer to initiate settlement negotiations even without an offer being made by the claimant. 422 F.3d at 1215. But the court pointed out that there must be some indication that a claim was being made before the insurer had a duty to settle. 422 F.3d at 1216. The court cited and quoted from *Sloan*, stating:

"[T]he Kansas Supreme Court rejected the argument that 'any time an insurance agent acquires knowledge of some injury to a policyholder it becomes the company's duty to initiate an investigation and offer a settlement . . . without any claim being made. . . .' Instead, the court found that 'the insured has some duty to give notice to his company of his loss, and of the fact that he is making a claim under his policy before the company is obligated to move.'" *Roberts*, 422 F.3d at 1216 (quoting *Sloan*, 214 Kan. at 445).

Nancy asserts that *Sloan*, which *Roberts* relied on, is distinguishable and thus makes *Roberts* unpersuasive. In *Sloan*, the Kansas Supreme Court considered whether Sloan's insurance company refused to pay Sloan's loss without just cause or excuse which would cause the insurance company to be liable for attorney fees. 214 Kan. at 443. Sloan claimed damages against his insurance company under his uninsured motorist policy for damage to his truck, medical expenses, and personal injuries. The court noted that the statute discussed assessing attorney fees when an insurance company "'refused' to pay" which the court explained meant a demand had been denied. 214 Kan. at 444. The court pointed out that Sloan's first notice of injury came in the form of a letter submitted to his insurance company a year after the accident. But Sloan argued the insurance company had earlier notice of his inju-

ries because he did yard work for the insurance agent before the accident, and after the accident, he was no longer able to do the agent's yardwork. In addressing this personal knowledge argument, our Supreme Court stated:

"If, by this contention, plaintiff means to suggest that any time an insurance agent acquires knowledge of some injury to a policyholder it becomes the company's duty to initiate an investigation and offer a settlement—without any claim being made—we reject the suggestion. We believe the insured has some duty to give notice to his company of his loss, and of the fact that he is making a claim under his policy, before the company is obligated to move. In this case we cannot convert whatever knowledge Luckey may have had of plaintiff's condition into a claim against the company under plaintiff's uninsured motorist coverage." 214 Kan. at 445-46.

Nancy is correct that *Sloan* deals with a claim from the insured against his insurer, while Nancy's case deals with a claim from a third party. But this distinction does not undermine the application of *Sloan* and *Roberts*. The crux of the paragraph in *Sloan* was that unofficial notice of an injury alone is not enough to require an insurance company to act on a claim. Instead, the insurance company must have some official notice of an injury *and* some indication that the injured party sought to be paid under the insurance policy for those injuries. As Nancy points out, Key had official notice—from Wilson—of the accident and that Francisco had died. But Nancy never gave any indication that she was seeking damages from Key. If an insured cannot recover from his or her own insurance policy without providing notice that he or she is in fact seeking damages, then likewise a third-party claimant cannot recover from an insurance company without providing some notice to the insurer that the claimant is seeking damages.

To wrap up this lengthy discussion of the caselaw, Nancy's case provides a good example of why an insurer owes no affirmative duty to initiate settlement negotiations with a potential claimant until the claimant makes some type of claim or demand for damages against the insurer. In December 2017, about two months after the car accident, Elkins, Wilson's passenger, presented a demand to settle his claim against Key for the injuries he sustained in the accident. Key promptly settled the claim and paid Elkins the policy limits of $25,000. As Gragson testified at the garnishment hearing, Key was prepared to settle Nancy's case the same way when she made a demand for damages. But Key's first indication Nancy was making a demand for damages was

the lawsuit. When Key received notice of the lawsuit, it promptly offered to settle for the policy limits. But Nancy rejected that offer, making it clear that she intended to pursue a claim against Key for its alleged negligence and bad faith in handling the claim.

Nancy cites cases from our court for the general proposition that an insurer has a duty to initiate settlement despite the actions of the injured party and that the duty to settle does not hinge on a settlement offer from the claimant. But a close reading of these cases does not support Nancy's assertion that under the facts presented here, Kansas law required Key to initiate a settlement offer to Nancy after Key received notice of the accident but before Nancy made any claim for damages against Key. Although an insurer must exercise diligence and good faith in its efforts to settle claims within the policy limits, we hold an insurer owes no affirmative duty to initiate settlement negotiations with a third party before the third party makes a claim for damages. The district court did not err in making this finding in evaluating Nancy's claim.

CONCLUSION

The district court disregarded the proper analysis when it failed to consider all the *Bollinger* factors in deciding whether Key breached its duty to exercise good faith or act without negligence in handling the claim. But more importantly, the district court failed to engage in the proper causation analysis in finding Key liable for the judgment. Nancy has failed to show that Key's breach of its duty to communicate with Wilson is what caused the excess judgment. Based on the undisputed facts in the record, and without reweighing any evidence or reassessing the credibility of any witnesses, we find that the excess judgment was more the result of Nancy's actions after the lawsuit was filed, rather than Key's conduct before the lawsuit was filed. Finally, under the facts of this case, the district court did not err in finding Key owed no affirmative duty to initiate settlement negotiations with Nancy before she made a claim for damages. As a result, we reverse the district court's judgment for Nancy in the garnishment action and remand with directions to enter judgment for Key.

Reversed and remanded with directions.

No. 123,778

STATE OF KANSAS, *Appellee*, v. MATTHEW D. HASBROUCK, *Appellant*.

SYLLABUS BY THE COURT

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

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

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

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

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

6. SAME—*Sentencing—Burden of Proof on State to Prove Criminal History of Defendant at Sentencing—Requirements.* Under K.S.A. 2020 Supp. 21-6814, the State bears the burden to prove criminal history at sentencing. The

State can satisfy its burden to establish criminal history by preparing for the court and providing to the offender a summary of the offender's criminal history. If the defendant provides written notice of any error in the summary criminal history report and describes the exact nature of that error, then the State must go on to prove the disputed portion of the criminal history. In the event the offender does not provide the required notice of alleged criminal history errors, then the previously established criminal history in the summary satisfies the State's burden, and the burden of proof shifts to the offender to prove the alleged criminal history error by a preponderance of the evidence.

Appeal from Johnson District Court; BRENDA M. CAMERON, judge. Opinion filed March 4, 2022. Affirmed.

Hope E. Faflick Reynolds, of Kansas Appellate Defender Office, for appellant.

Shawn E. Minihan, assistant district attorney, *Stephen M. Howe*, district attorney, and *Derek Schmidt*, attorney general, for appellee.

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

HILL, J.: This appeal raises two questions about an offender's criminal history score: whether an out-of-state conviction is a person crime and whether some misdemeanor convictions should have been included in the criminal history as well. Our research reveals that the Legislature has answered the first question and the Supreme Court has answered the second. These authorities compel us to affirm the sentencing court.

Matthew D. Hasbrouck pleaded guilty to possession of methamphetamine. His crime was committed in August 2019. When he pled, both he and his attorney thought his criminal history score would be E. It turns out they were wrong. When the district court sentenced Hasbrouck, it set his score at A—the highest score possible.

Hasbrouck's record revealed several convictions. He had two felony convictions in Missouri in 2014—one for second-degree robbery and one for first-degree burglary. His record also revealed he had two person misdemeanor convictions for domestic violence and one person misdemeanor conviction for violation of a protective order in Johnson County, Kansas. According to the law, these three were aggregated to equal one person felony conviction.

This meant that Hasbrouck had three felony convictions for person crimes in his record which led to a criminal history score of A.

At sentencing Hasbrouck neither objected to his criminal history score nor to the aggregation of his three person misdemeanor convictions that aggregated them into one person felony conviction. With no further argument, the court passed sentence on Hasbrouck and sent him to prison for 40 months.

Hasbrouck makes two arguments to us. First, the sentencing court should not have considered the Missouri burglary conviction as a person crime. Second, the court should not have included his Johnson County misdemeanor convictions since the State did not prove that he was represented by counsel in those three cases or that he had waived his right to counsel in those prosecutions. We will take up those issues in that order.

Judge-made rules have been replaced by statute.

Under the old rules, sentencing courts had to compare out-of-state crimes with Kansas crimes. Over the years, several cases dealt with the subject and concluded with a succinct test for the court to use. In 2018 the Kansas Supreme Court defined the term "comparable offense" in *State v. Wetrich*, 307 Kan. 552, 561-62, 412 P.3d 984 (2018). The *Wetrich* court said that courts must compare the elements of the out-of-state crime to the elements of the Kansas crime. If the out-of-state crime's elements were not identical to or narrower than the Kansas crime, it had to be classified as a nonperson offense. We must note that comparable Kansas offenses are still used in designating an out-of-state misdemeanor as a person or nonperson crime. See K.S.A. 2019 Supp. 21-6811(e)(3)(A).

Effective May 23, 2019, the Kansas Legislature amended K.S.A. 21-6811 to replace the "comparable offense" test with a simpler test when a court is deciding if an out-of-state felony is a person or nonperson crime. With the enactment of K.S.A. 2019 Supp 21-6811(e)(3)(B), the Legislature replaced all of the prior judge-made rules concerning how out-of-state criminal convictions are to be treated when a sentencing court is setting the offender's criminal history score. The revision removed the term "comparable offense" from the law. Before its enactment, courts

looked to see if there was a Kansas crime comparable to the out-of-state crime when deciding whether the out-of-state conviction was a person or nonperson crime.

But this amendment has changed those rules. When the Legislature amends a statute, Kansas courts presume that it intended to change the law that existed prior to the amendment. See *State v. Mishmash*, 295 Kan. 1140, 1144, 290 P.3d 243 (2012).

Before 2019, Kansas courts determined whether prior out-of-state convictions were person or nonperson offenses by comparing the out-of-state statutes to the "comparable offense" in effect in Kansas on the date the current crime was committed. If there was a comparable crime, the sentencing court had to classify the prior conviction as a person crime; if not, it was a nonperson crime. K.S.A. 2018 Supp. 21-6811(e)(3); *State v. Baker*, 58 Kan. App. 2d 735, 738-39, 475 P.3d 24 (2020). But all of that changed in 2019.

Now, sentencing courts are no longer to compare out-of-state jurisdiction crimes with Kansas crimes and reach their conclusion by the use of analogy. Instead of comparing crimes, sentencing courts are to simply examine the elements of the out-of-state statutes to see if they are written to help protect innocent people. The statute exempts a charged accomplice or another person with whom the defendant is engaged in the sale of a controlled substance or a noncontrolled substance. If the out-of-state statute contains any of the elements listed as "circumstances" in the Kansas statute, they are person crimes. If they contain no such elements, they are nonperson crimes.

A close examination of the statute illustrates our point.

Our sentencing guidelines are found in Article 68 of the Criminal Code. K.S.A. 2019 Supp. 21-6811 explains how an offender's criminal history classification must be determined when using the presumptive sentencing guidelines grid. This is important because our sentencing grid depends on two components: the severity level of the crime committed and the criminal history of the offender. The more severe crimes lead to longer sentences. Person crimes receive longer sentences than nonperson crimes. The greater criminal history of an offender leads to more severe sentences. Each offender before sentencing will receive a presentence

investigation report that reveals that offender's crime and criminal history expressed as a score from E—the lowest—to A—the highest.

When we turn to subsection (e)(1) of the statute, it directs that out-of-state convictions must be used in classifying an offender's criminal history. Then, subsection (e)(2) says that classification of a crime as a felony or misdemeanor is made by the convicting jurisdiction. So, in Hasbrouck's case, since burglary in the first degree is a felony in Missouri, then it will be considered a felony for criminal history scoring in Kansas.

Then, moving on to subsection (e)(3), the law commands that the State of Kansas will classify the out-of-state crime as a person or nonperson crime. In other words, Kansas judges will determine this classification when imposing Kansas sentences.

Next, the statute then explains what the sentencing court is to look for when making this person/nonperson classification. The revised statute describes two ways an out-of-state crime can be classified as a person crime. Those two ways are found in subsection K.S.A. 2019 Supp. 21-6811(e)(3)(B)(i) and (e)(3)(B)(ii) of the statute. There is only one way for a crime to be classified as a nonperson crime. That is found in subsection (e)(3)(B)(iii) of the statute. We will look first at the two ways a crime may be found to be a person crime.

Basically, the statute in subsection (e)(3)(B)(i) directs that this classification of a person crime is determined by looking at the elements of the out-of-state offense. The statute then lists eight "circumstances" that if any are found in the elements of the out-of-state crime, then the crime will be classified as a person crime in Kansas when a court establishes a criminal history score. The eight circumstances are found in (e)(3)(B)(i)(a)-(h). All eight circumstances depict dangerous situations in which innocent people may be harmed. Again, we note that the statute exempts a charged accomplice or another person with whom the defendant is engaged in the sale of a controlled substance or a noncontrolled substance.

Then, subsection (e)(3)(B)(ii) directs that an out-of-state conviction is a person crime if the elements of that felony necessarily prove that a person was present during the commission of the crime. So even if the crime does not require proof of any of the

eight circumstances listed above, if the elements require the prosecution to prove that another person was present when the crime was committed, then it is classified as a person crime.

Finally, subsection (e)(3)(B)(iii) states that if the elements of the offense do not require proof of any of the circumstances listed in (B)(i) or (ii), then it must be classified as a nonperson crime. In other words, if there are none of the circumstances in the elements of the crime, or if the prosecution does not have to prove that another person was present when the crime was committed, then it is a nonperson crime for criminal history scoring in Kansas.

We set out the specific portions of the statute that are important for this case. We begin first with four of the eight statutory circumstances listed in the law:

"(B) In designating a felony crime as person or nonperson, the felony crime shall be classified as follows:

(i) An out-of-state conviction or adjudication for the commission of a felony offense . . . shall be classified as a person felony if one or more of the following circumstances is present as defined by the convicting jurisdiction in the elements of the out-of-state offense:

. . . .

(b) threatening or causing fear of bodily or physical harm or violence, causing terror, physically intimidating or harassing any person;

. . . .

(d) the presence of a person, other than the defendant, a charged accomplice or another person with whom the defendant is engaged in the sale, distribution or transfer of a controlled substance or non-controlled substance;

. . . .

(g) being armed with, using, displaying or brandishing a firearm or other weapon, excluding crimes of mere unlawful possession; or

(h) entering or remaining within any residence, dwelling or habitation." K.S.A. 2019 Supp. 21-6811(e)(3)(B).

Then, the second way a crime can be considered a person crime is found in the next section. That statute states what must be proved:

"(ii) An out-of-state conviction . . . for the commission of a felony offense . . . shall be classified as a person felony if the elements of the out-of-state felony offense that resulted in the conviction . . . necessarily prove that a person was present during the commission of the offense. For the purposes of this clause, the person present must be someone other than the defendant, a charged accomplice or another person with whom the defendant is engaged in the sale, distribution or transfer of a controlled substance or non-controlled substance." K.S.A. 2019 Supp. 21-6811(e)(3)(B)(ii).

Finally, the statute sets out how a crime can be a nonperson crime:

"(iii) An out-of-state conviction or adjudication for the commission of a felony offense, or an attempt, conspiracy or criminal solicitation to commit a felony offense, shall be classified as a nonperson felony if the elements of the offense do not require proof of any of the circumstances in subparagraph (B)(i) or (ii)." K.S.A. 2019 Supp. 21-6811(e)(3)(B)(iii).

With this review of the statute, our task becomes manifest. We must examine the Missouri first-degree burglary statute to see if it has any of the four circumstances mentioned above. If it does, then it is a person crime. If it does not, it is a nonperson crime.

We examine the out-of-state statute.

The 2014 Missouri statute for burglary in the first degree states:

"1. A person commits the crime of burglary in the first degree if he knowingly enters unlawfully or knowingly remains unlawfully in a building or inhabitable structure for the purpose of committing a crime therein, and when in effecting entry or while in the building or inhabitable structure or in immediate flight therefrom, he or another participant in the crime:
Is armed with explosives or a deadly weapon or;
(1) Causes or threatens immediate physical injury to any person who is not a participant in the crime; or
(2) There is present in the structure another person who is not a participant in the crime." Mo. Rev. Stat. § 569.160.

The elements found in sections (2) and (3) of the Missouri statute render this crime a person crime. Section (2) of the Missouri statute states: "Causes or threatens immediate physical injury to any person who is not a participant in the crime," which corresponds with subsection (b) of the Kansas statute that states, "threatening or causing fear of bodily or physical harm . . . ." And section (3) of the Missouri statute that states, "[t]here is present in the structure another person who is not a participant in the crime" tracks almost exactly with subsection (d) of the Kansas statute that states, "the presence of a person, other than the defendant, a charged accomplice or another person [involved in the crime]."

Another panel of this court has reached a similar conclusion. See *Baker*, 58 Kan. App. 2d at 738-39. In *Baker*, the panel held that because the elements of the Missouri resisting arrest statute demonstrated that another person would be present when the crime was committed—the arresting officers—then it must be

considered a person crime in Kansas under K.S.A. 2019 Supp. 21-6811 (e)(3)(B)(i)(d). The panel examined the elements of the statute, found that another person had to be involved, and ruled the crime was a person crime and affirmed the sentencing court. 58 Kan. App. 2d at 746.

This is the same process that we have used in our analysis. According to the Kansas law, if one or more of the listed circumstances are present in the elements of the out-of-state crime, then it is a person crime. We found two.

We thus hold that the Missouri conviction for burglary in the first degree in Hasbrouck's criminal history is a person crime and the court did not err when it ruled that it was a person crime. We move now to Hasbrouck's second issue.

Did the court err by including the aggregated misdemeanor convictions in Hasbrouck's criminal history?

Hasbrouck argues that the district court erred by including his prior municipal misdemeanor convictions in his criminal history score because the State did not show that Hasbrouck was represented by counsel or waived his right to counsel in those cases. Hasbrouck does not claim that his misdemeanor convictions were uncounseled—just that the State did not meet its burden to prove they were counseled. He asks us to vacate his sentence and remand for resentencing.

We note that Hasbrouck incorrectly states that the misdemeanor convictions used to calculate his criminal history score were from municipal court. He says that the court aggregated three municipal misdemeanor convictions to a person felony. This is incorrect. The three person misdemeanors that were aggregated were all from state court.

It is true that the PSI report also shows three scored nonperson misdemeanors. One of these is from state court while the other two are from municipal court. But because Hasbrouck already had three person felonies, the misdemeanor convictions did not contribute to his criminal history score of A. While there are several other municipal convictions listed in the PSI report, they are all unscored.

In opposition, the State argues that we should not reach this issue because Hasbrouck did not object to the inclusion of his misdemeanor convictions in his criminal history score.

Supreme Court precedent controls our resolution of this issue. The Kansas Supreme Court in *State v. Roberts*, 314 Kan. 316, 498 P.3d 725

(2021), a case with nearly identical facts to this case, ruled that K.S.A. 2020 Supp. 21-6814 governs the admission of a defendant's criminal history in court. The *Roberts* court explained that the statute shifts the burden to the defendant to show an error in criminal history when the defendant does not object to any errors:

> "Under this statute, the State bears the burden to prove criminal history at sentencing. The State can satisfy its burden to establish criminal history by preparing for the court and providing to the offender a summary of the offender's criminal history. If the defendant provides written notice of any error in the summary criminal history report and describes the exact nature of that error, then the State must go on to prove the disputed portion of the criminal history. In the event the offender does not provide the required notice of alleged criminal history errors, then the previously established criminal history in the summary satisfies the State's burden, and the burden of proof shifts to the offender to prove the alleged criminal history error by a preponderance of the evidence." 314 Kan. at 322.

The *Roberts* court then held:

> "[A] defendant who fails to object under K.S.A. 2020 Supp. 21-6814(c) at sentencing to the constitutional validity of a prior conviction used to enhance a current sentence, based on a claim of the absence of counsel without a valid waiver, has the burden to show the prior conviction is invalid, regardless of whether the defendant's constitutional challenge to the allegedly uncounseled conviction in criminal history is brought on direct appeal or the current sentence or in a proceeding collaterally attacking that sentence." 314 Kan. at 334-35.

The State satisfied its burden of establishing Hasbrouck's criminal history by submitting the PSI report, which summarized his criminal history. At sentencing, Hasbrouck did not object to his criminal history, nor provide any written notice claiming that there was an error in his criminal history summary.

Under *Roberts*, Hasbrouck has the burden to show that his prior misdemeanor convictions were invalid—either uncounseled or without a valid waiver. Hasbrouck has neither pointed to any evidence that his prior misdemeanor convictions were invalid nor even argued that they were invalid. He merely argued that the State failed to meet its burden to show they were counseled. He has no right to relief on this point.

We hold the district court did not err by including the aggregated misdemeanor convictions in Hasbrouck's criminal history score.

Affirmed.

No. 123,383

STATE OF KANSAS, *Appellant*, v. CASS WAYNE MCDONALD, *Appellee*.

SYLLABUS BY THE COURT

1. CONSTITUTIONAL LAW—*Speedy Trial Assessment—Consideration of Totality of Circumstances—Factors*. The speedy trial assessment considers the totality of the circumstances with special emphasis on four factors: length of the delay, reason for the delay, defendant's assertion of his or her right, and prejudice to the defendant.

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

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

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

5. SAME—*Speedy Trial Assessment—Evaluation of Actual Prejudice—Three Factors*. Courts consider three factors when evaluating actual prejudice: oppressive pretrial incarceration, the defendant's anxiety and concern, and most importantly, the impairment of one's defense.

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

7. SAME—*Speedy Trial Assessment—Presumed Prejudice if Excessive Delay.* When the State has been negligent, prejudice can be presumed if the delay has been excessive. A delay of over six years attributable to the State is long enough

to give rise to a presumption that the defendant's trial would be compromised, and the defendant would be prejudiced.

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

Appeal from Shawnee District Court; CHERYL A. RIOS, judge. Opinion filed March 11, 2022. Affirmed.

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

Debra J. Wilson, of Capital Appeals and Conflicts Office, for appellee.

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

GARDNER, J: In 2011, police interviewed Cass Wayne McDonald about sexual assault allegations. In 2013, the State charged McDonald with rape of a child under 14, yet the State did not arrest him until 2019. McDonald moved to suppress his 2011 statements to police and to dismiss the State's complaint based on a speedy trial violation. The district court granted both motions, and the State appeals both decisions. Finding the district court properly dismissed the State's complaint, we affirm without reaching the merits of the suppression issue.

FACTUAL AND PROCEDURAL BACKGROUND

In September 2011, four-year-old P.S.E. and her father (Father) went to the Topeka Police Department and reported that sometime during the previous few months Cass Wayne McDonald had inserted his finger into P.S.E.'s vagina. McDonald was related to P.S.E. through her mother and sometimes stayed in the same house as P.S.E. during the summer when the assault reportedly occurred. Father, who shared custody of P.S.E., learned of the incident after he picked P.S.E. up from her mother's home and promptly contacted police.

Investigation

P.S.E. participated in a "Safe Talk" interview in Topeka shortly after disclosing the incident to Father. Detective Braden Palmberg watched P.S.E.'s Safe Talk interview through a video feed, and then

spoke to McDonald. McDonald agreed to meet Palmberg at the police station for questioning on November 5, 2011.

Palmberg never gave McDonald *Miranda* warnings. McDonald told Palmberg he lived on the Navajo Reservation in New Mexico before moving to Topeka in 2011 and that his older brother had been convicted of touching his own daughter in New Mexico. McDonald claimed that those allegations were false but his brother just "went with it."

Palmberg then confronted McDonald with P.S.E.'s allegations, asking him to explain why P.S.E. reported him. Palmberg also told McDonald that one of P.S.E.'s friends had claimed McDonald touched her inappropriately. McDonald denied touching either of the girls or ever committing that type of act.

Palmberg asked McDonald if he was considered a suspect in the New Mexico crime, and McDonald denied that he was. Palmberg asked McDonald if he ever wanted to touch P.S.E. but McDonald denied that too. When pressed to explain how P.S.E. could give Palmberg details about the event, McDonald persisted in his denial. McDonald explained that he did not know why P.S.E. claimed he touched her, but suggested Father may have made up the allegations. McDonald also felt he may have been accused because he was the only "boy" in his grandmother's house, which is where the incident allegedly occurred. Still, McDonald claimed he was never left alone there with P.S.E. Palmberg released McDonald without arresting him.

Palmberg interviewed McDonald a second time on November 30, 2011, again without giving McDonald *Miranda* warnings. Palmberg told McDonald he knew McDonald had recently been interviewed by Federal Bureau of Investigation (FBI) agents about the New Mexico incident with McDonald's niece. McDonald told Palmberg that he had explained to FBI agents that he may have accidentally touched his niece in New Mexico while changing her diaper, but he never purposefully touched or penetrated her in any way. McDonald denied that anything like that had happened with P.S.E.

When accused of committing all acts alleged and showing a pattern, McDonald continued to maintain his innocence in this case. But McDonald eventually said he needed help with "not touching little girls, or something like that." McDonald then admitted he sometimes wanted to touch little girls, including P.S.E., but denied ever doing it.

McDonald said when the children were around, he would take long walks or play video games to make sure he was never put in a compromising situation. He said that when he moved to Kansas, he began growing his fingernails long to ensure he would not engage in that type of behavior. But McDonald still denied touching, reaching out to, or grabbing P.S.E.

McDonald told Palmberg he was guilty of the offense his brother had been convicted of in New Mexico. But when asked what he had done, McDonald explained that he was referring to the accidental grazing of his niece's vagina during a diaper change that he had described earlier. But McDonald continued to deny ever touching P.S.E. Palmberg did not arrest McDonald when the interview ended.

Search for McDonald

A week or two after Palmberg's second interview of McDonald, Palmberg met with P.S.E.'s grandmother (Grandmother). She told Palmberg that McDonald had moved back to the reservation in New Mexico. In April 2012, Palmberg completed an affidavit detailing his investigation. Palmberg did not have any more contact with McDonald, his family, or other law enforcement agencies about this case after April 2012.

In May 2013, the State charged McDonald with one count of rape of a child under 14 years old based on P.S.E.'s allegation. The district court issued a warrant for McDonald's arrest about a week later. The warrant was entered into the NCIC database and remained active for several years. McDonald was also listed on the Northeast Kansas Most Wanted list.

In September 2015, John Peterson, an officer assigned to the United States Marshals Service Violent Offender Fugitive Task Force, contacted the Marshal's Office in Farmington, New Mexico, to discuss the warrant for McDonald's arrest. Peterson notified the marshals that McDonald might be in Farmington, New Mexico, and asked them to search the surrounding areas.

Arrest and Pretrial Proceedings

Police eventually apprehended McDonald in July 2019 in Farmington, Utah. It was later discovered that from 2016 to 2019,

McDonald had worked for a roofing company on projects in Wyoming and Utah. McDonald had obtained that position using his legal name and social security number. While working on an air force base in Utah in June 2019, McDonald forgot the pass he had been issued and needed to enter the base. He was required to undergo another background check to get a new pass. While performing this additional background check, McDonald's employer discovered the active warrant for McDonald's arrest and contacted police.

After police arrested McDonald, he attended his first appearance on the State's charge in August 2019. During pretrial proceedings, McDonald moved to suppress his statements to police, arguing that he had been subject to custodial interrogation without having been given *Miranda* warnings and that his statements had been made involuntarily. The district court held several hearings on the suppression motion, but we do not find it necessary to set them out in detail. The district court later granted McDonald's motion to suppress, agreeing that he had been subject to custodial interrogation without receiving *Miranda* warnings and that his statements had been made involuntarily.

The Motion to Dismiss

McDonald also moved to dismiss his case based on a constitutional speedy trial violation because of the delay after his warrant issued in 2013. The district court held two hearings to consider the motion to dismiss. After the parties' closing arguments, the district court made findings on several factors applicable to McDonald's speedy trial claim but asked the parties to submit more briefing on the final factor—prejudice to McDonald.

The court later granted McDonald's motion to dismiss based on a constitutional speedy trial violation, finding the delay caused actual prejudice to McDonald's defense because evidence showed it unlikely that McDonald could receive a fair trial.

The State filed an interlocutory appeal from the district court's order suppressing McDonald's statements and later filed an amended notice of appeal from the district court's order dismissing its complaint.

DID THE DISTRICT COURT ERR IN GRANTING MCDONALD'S MOTION TO DISMISS BASED ON A SPEEDY TRIAL VIOLATION?

We first decide whether the district court properly dismissed the State's complaint. This is because if the district court was correct, the State's claims about the suppression of evidence will be moot. Cf. *State v. Renteria*, No. 99,309, 2009 WL 500953, at *2 (Kan. App. 2009) (unpublished opinion) (affirming order of dismissal based on speedy trial violation and finding decision rendered suppression issue moot).

Standard of Review and Basic Legal Principles

When considering a district court's decision on a defendant's constitutional speedy trial right, appellate courts review the supporting factual findings for substantial competent evidence, but we review the ultimate legal conclusion drawn from those facts de novo. *State v. Owens*, 310 Kan. 865, 868, 451 P.3d 467 (2019). "Whether a lower court properly applied the *Barker* factors is a question of law subject to unlimited review." *In re Care & Treatment of Ellison*, 305 Kan. 519, 533, 385 P.3d 15 (2016).

The Sixth Amendment to the United States Constitution grants every defendant the "right to a speedy and public trial." Similarly, section 10 of the Kansas Constitution Bill of Rights guarantees Kansas defendants "[i]n all prosecutions . . . a speedy public trial by an impartial jury." See *Owens*, 310 Kan. at 869.

> "'The constitutional protection of a speedy trial attaches when one becomes accused and the criminal prosecution begins, usually by either an indictment, an information, or an arrest, whichever first occurs.' *State v. Taylor*, 3 Kan. App. 2d 316, 321, 594 P.2d 262 (1979).
>
> . . . .
>
> "'The length of the delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance.' [Citations omitted.]" *State v. Rivera*, 277 Kan. 109, 112-113, 83 P.3d 169 (2004).

Courts consider these four factors when determining speedy trial claims:

- Length of the delay;
- reason for the delay;
- defendant's assertion of his or her right; and
- prejudice to the defendant.

See *Barker v. Wingo*, 407 U.S. 514, 530, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972). These factors are nonexclusive. 407 U.S. at 530. The speedy trial assessment in a given case looks at the totality of the circumstances with special emphasis on those four considerations. See *Ellison*, 305 Kan. at 531 (describing *Barker* as establishing an "'ad hoc'" approach to assessing speedy trial rights). "None of these four factors, standing alone, is sufficient for finding a violation. Instead, the court must consider them together along with any other relevant circumstances." *Rivera*, 277 Kan. at 113.

First Factor: Length of Delay

The district court found the total length of the delay was six years and three months, and neither party quibbles with that. The State charged McDonald in May 2013, yet his arrest and first appearance were not until July and August 2019. See *Rivera*, 277 Kan. at 112 (finding constitutional speedy trial rights attach at formal charging or arrest, whichever occurs first). The State concedes that this delay is "sufficient to constitute presumptive prejudice." Still, the State argues that the presumption was undercut because McDonald was not incarcerated and was unaware the State charged him with a crime. Yet when arguing this issue in the district court, the State "stipulated that the period of six years is presumptive" for purposes of considering this first factor. So the record shows the State acquiesced to the district court's finding and is thus precluded from challenging it on appeal.

At any rate, the finding of presumptive prejudice was legally sound. See *Rivera*, 277 Kan. at 114 (244 days from time warrant served to preliminary hearing found presumptively prejudicial); *State v. Ruff*, 266 Kan. 27, 32, 967 P.2d 742 (1998) (three years presumptively prejudicial); *State v. Fitch*, 249 Kan. 562, 563-64, 819 P.2d 1225 (1991) (402 days presumptively prejudicial). And as the *Barker* Court pointed out, a delay that might be tolerable for a "serious, complex conspiracy charge" would be entirely unacceptable for "an ordinary street crime." 407 U.S. at 531. McDonald's charge of child rape, although serious, is not complex enough to warrant a delay of over six years.

The length of delay operates, in part, as a gatekeeper to the remaining factors. *Barker*, 407 U.S. at 530-31; *State v. Waldrup*, 46 Kan. App. 2d 656, 679, 263 P.3d 867 (2011). So when a defendant shows, given

the circumstances of the case, that the trial delay is likely or presumptively prejudicial, we analyze the other three *Barker* factors. See *Ellison*, 305 Kan. at 534 (finding that presumptive prejudice simply triggers a full judicial review of the circumstances to assess the claimed constitutional deprivation). We do so here.

Second Factor: Reason for Delay

"The flag all litigants seek to capture is the second factor, the reason for delay." *United States v. Loud Hawk*, 474 U.S. 302, 315, 106 S. Ct. 648, 88 L. Ed. 2d 640 (1986). This factor essentially tries to assess responsibility for the delay as between the government and the defendant. *Doggett v. United States*, 505 U.S. 647, 651, 112 S. Ct. 2686, 120 L. Ed. 2d 520 (1992). Kansas courts must assign weight to the reasons one of the party's actions caused a delay to the defendant's case. Deliberate actions, such as "a deliberate attempt by the State to thwart the defense," should be weighed heavily against the State. *Rivera*, 277 Kan. at 114. But "a more neutral reason, like negligence or a crowded court docket, would weigh less heavily against the State." 277 Kan. at 114. The State bears the burden to justify the delay. *Hakeem v. Beyer*, 990 F.2d 750, 770 (3d Cir. 1993).

The district court faulted the State for causing the delay, finding it had acted negligently in locating McDonald:

> "There was no evidence that Defendant intentionally tried to hide his location or his identity. Defendant offered evidence that he had been working for the same company from 2016 until his arrest and he paid taxes. A search using his social security number by a defense investigator revealed a phone number and a post office box in Defendant's name for 7 years. . . . There is no indication that law enforcement would not have been able to discover his location and arrest him if they had made an effort to do so."

First, the State claims that the district court erred by finding that McDonald did not intentionally try to hide from police, as McDonald's flight from Kansas to New Mexico within two weeks after Palmberg interviewed him shows his motive to avoid detection. We agree that the State's inability to arrest or try a defendant because of the defendant's own evasive tactics constitutes a valid reason for delay. *United States v. Villarreal*, 613 F.3d 1344, 1351 (11th Cir. 2010); see *United States v. Richardson*, 780 F.3d 812, 817 (7th Cir. 2015) (one's right to a speedy trial is not violated "where the defendant prevents a speedy trial from being held because he has fled, or refused to enter, the jurisdiction"). But the record fails to show why McDonald returned to New

Mexico in 2011. He had come to Kansas from New Mexico, stayed for the summer, and lived with relatives. Whether the date of his return to New Mexico was previously planned, was due to lack of work, or was rather an attempt to flee the jurisdiction due to Palmberg's interrogation is not shown by the record. Yet the record does show that after 2013, McDonald kept a phone number and post office box, worked openly under his legal name, and used his social security number in New Mexico and other states. Those acts seem inconsistent with a deliberate effort to evade detection.

Second, the State asserts that the district court erred by considering Palmberg's actions in determining the State lacked reasonable diligence, because one calculates delay for constitutional speedy trial purposes from the 2013 date the State filed its complaint, and Palmberg's acts all predated that act. We note that using that same time standard provides another reason for us not to consider McDonald's "flight" in 2011.

We agree that Palmberg's acts are immaterial here. Palmberg tried to get in touch with McDonald after the 2011 interviews by contacting Grandmother a week or two after his last interview with McDonald. Grandmother told Palmberg that McDonald had moved back to New Mexico to live on a reservation. Palmberg sent McDonald's case file to an FBI agent in New Mexico in April 2012 and had no more involvement in the case. Nothing shows that his acts or inactions caused any delay between the charging date in May 2013 and McDonald's arrest in 2019.

Still, the record is sparse as to efforts the State took after May 2013 until McDonald was arrested in 2019. Palmberg testified that once McDonald's arrest warrant issued, it became the warrants division's duty to take care of the matter. Palmberg had no power or control over other state jurisdictions. Generally when a defendant cannot be located, police "issue attempt to locates [and distribute] bulletins to surrounding agencies"; they can also add fugitives to the Kansas most wanted lists.

The State called Peterson to testify at the second hearing on the motion to dismiss. He had around nine years' experience locating and apprehending violent offenders through warrants or probable cause arrests. He testified about typical procedures used to locate fugitives and his attempts to locate McDonald.

Peterson explained that all warrants assigned to the Third Judicial District are maintained by the Shawnee County Sheriff's Office Warrants Unit. The warrants are entered into the NCIC database by warrants clerks, which provides nationwide notice of active warrants. Then a team of two deputies is assigned to locate and apprehend the fugitive. That team "will work the warrant until they don't have any other avenues to take." Once a fugitive leaves the state, the warrant clerks will contact the necessary jurisdictions to let them know there is an active warrant in Shawnee County. In his experience, it was "a little harder to apprehend on a Native American reservation" because they were governed by federal law enforcement and the Bureau of Indian Affairs instead of by local law enforcement.

Peterson was assigned McDonald's case in September 2015. McDonald's "warrant jacket"—a manila envelope deputies use to keep track of information and attempts to locate a fugitive—showed six entries, encompassing over six years. Peterson wrote only one of those entries—a "lead" that McDonald was believed to be in "Farmington, New Mexico."

Peterson testified that someone had entered McDonald's warrant in the NCIC database and placed it on the Northeast Kansas Most Wanted list, which he described:

> "The Northeast Kansas Most Wanted is a group effort between local media and the Shawnee County Sheriff's Office in wanted fugitives that is either a severe crime or we just can't—are unable to locate, and we need the public's assistance. The local news media will put their photo up on their Facebook page and on the news saying this person is wanted, trying to generate tips or self surrender or someone just turning them in."

Peterson testified that after receiving the Farmington lead on McDonald's warrant, he notified New Mexico's Marshal's Office. Then, for the next four years, Peterson simply conducted "database searches" for McDonald as he did not have jurisdiction to act in New Mexico or on the Navajo Nation Reservation. But McDonald was eventually found in Farmington, Utah—not Farmington, New Mexico, as was previously thought—on July 29, 2019. Police then booked McDonald into the Shawnee County Department of Corrections in Topeka, Kansas, on August 9, 2019.

Based on the record, we cannot agree with the State that its officers made every effort available to find McDonald and should not be

faulted for the failures of other jurisdictions. In support of that assertion, the State shows only that it made six inquiries over six years. Although the State did more here than did the government in *Doggett*, where the court found a complete absence of any effort on the government's part to prosecute Doggett for over six years, 505 U.S. at 652-53, the State has failed to show that it took reasonably diligent efforts to pursue McDonald. See *United States v. Velazquez*, 749 F.3d 161, 180 (3d Cir. 2014) (finding government not reasonably diligent when its activity was limited to checking the NCIC eight times in five years and placing Velazquez on the "Most Wanted" list for the Philadelphia DEA office, when defendant was not evasive).

And McDonald's apprehension was ultimately the result of a simple background check related to his employment. John Perrine, an investigator with the Public Defender's Office, testified to that. He contacted McDonald's former employer, Craig Peters, who wrote an affidavit about McDonald's employment. In the affidavit, Peters explained that he had hired McDonald in 2016. Once hired, McDonald completed standard Internal Revenue Service documents and showed the company his social security card. During June and July 2019, McDonald worked on a job at Hill Air Force Base in Utah. McDonald had to submit to a background check to enter the base. McDonald passed the initial background check and worked on the base until July 19, 2019, when McDonald forgot his pass and had to undergo a second background check. That check revealed McDonald's active arrest warrant. The State does not show that it could not have used the same inquiry that was used in the background check to locate McDonald.

Although the facts show no bad faith by the State, they do show a lack of reasonable diligence, or negligence. This weighs against the State. When considering constitutional speedy trial claims, courts are required to determine "whether the government or the criminal defendant is more to blame for [the] delay." *Doggett*, 505 U.S. at 651; see also *State v. Sanders*, 209 Kan. 231, 234, 495 P.2d 1023 (1972) (prosecution, not the accused, must ensure speedy trial right is not violated). We assign error to the State based on law enforcement's failure to diligently pursue McDonald. See *Doggett*, 505 U.S. at 657 (even where actions are not deliberate, State's negligence "still falls on the wrong side of the divide between acceptable and unacceptable reasons for delaying a criminal prosecution once it has begun"); *Ellison*, 305 Kan. at 542

("There is no evidence of any improper motive lurking behind the State's role in the delay, but the State had an obligation to bring Ellison's case to trial. It cannot fulfill that obligation by remaining passive year after year.").

Third Factor: Assertion of Right

The parties agree that McDonald timely and appropriately asserted his right to a speedy trial. He moved to dismiss about five months after he was arrested, and no evidence shows McDonald knew the State had filed its complaint before his arrest. See *Doggett*, 505 U.S. at 653-54 (finding a defendant who lacks knowledge of the pending charges cannot be penalized for failing to assert the speedy trial right). This factor weighs in McDonald's favor.

Fourth Factor: Prejudice to Defendant

When assessing prejudice for a constitutional speedy trial analysis, we consider both actual prejudice and, in a proper case, presumed prejudice flowing from excessive delay. We use the following approach which reflects *Barker* and *Doggett*'s teaching:

"[A] defendant can establish prejudice in two ways. [*Battis*,] 589 F.3d at 682. First, he can make a specific showing that . . . he was subject to "'oppressive pretrial incarceration," that he suffered "anxiety and concern" about the impending trial, or that his defense was impaired as a result of the delay.' *Id.* (quoting *Barker*, 407 U.S. at 532). Second, a defendant can claim prejudice without providing "'affirmative proof of particularized prejudice'" based on "'excessive delay [which] presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify.'" *Id.* (quoting *Doggett*, 505 U.S. at 655-56)." *United States v. Green*, 471 F. Supp. 3d 577, 600 (M.D. Pa. 2020).

We thus consider both actual prejudice and presumptive prejudice to McDonald.

Actual Prejudice to the Defendant

It is defendant's burden to establish actual prejudice. See *Loud Hawk,* 474 U.S. at 315-16. Courts consider three factors when evaluating actual prejudice: (1) "oppressive pretrial incarceration"; (2) "the defendant's anxiety and concern"; and (3) "most importantly, the impairment of his or her defense." *Rivera*, 277 Kan. at 118. The last consideration is the "most serious." *Barker*, 407 U.S. at 532.

We agree with the parties that the first two factors do not apply to McDonald. Because McDonald was free during the six years' delay, he suffered no oppressive pretrial incarceration, and because he was unaware of his charge from 2013 to 2019, he had no related anxiety or concern.

The district court properly relied on the third factor. It found the delay caused "significant harm" to McDonald's defense and would likely result in an unfair trial:

> "Although affirmative proof of actual prejudice is not necessary, this Defendant has demonstrated significant harm that would deny his right to receive a fair trial. The alleged victim in this case would have been between the ages of 3 and 4 when this incident occurred. She is now between the age of 11 and 13. The location of the alleged crime has changed. New homeowners have moved into the residences where the allegations may have occurred, making it difficult for his counsel to cross-examine original accounts of the event. Initial statements given by [Father] to Officer Koch were not recorded or preserved in evidence. This leaves the Defendant without evidence essential to effective confrontation of [Father], who is likely to emerge as the central accuser. Additionally, Defendant's investigators were unable to locate material witnesses . . . (the alleged victim's aunt and mother). The time from the allegation to the time of trial is actually a span of 9 years. Over that span of time memories fade, crime scenes change, and witnesses are lost."

The State contends the delay created only the same generic type and amount of harm that any passage of time creates. The State also alleges the district court erred in finding that the location of the crime changed. Overall, the State argues the record fails to prove "actual prejudice."

We agree that McDonald fails to show actual prejudice. First, we find no support in the record for the district court's statement that the location of the alleged crime has changed. Defense investigator Perrine did testify that the people who now own the home where the crime allegedly occurred denied him access to investigate. And Palmberg never visited the home during his investigation. But McDonald fails to show how these facts affect his defense. Nor does he show that a future view of the home, if material, is not feasible.

McDonald contends that no one recorded Father's initial interview, but he fails to show how that fact prejudices McDonald as time passes. Father was the chief accuser and his statements are captured in the police report. McDonald fails to show how lack of a recording of Father's interview weighs more heavily against him because of the delay.

Missing witnesses and failed memories are the more crucial issues. During the second hearing on McDonald's motion to dismiss, Perrine testified that he could not locate the victim's mother and Grandmother, who were listed as defense witnesses. But the record fails to show what either of them planned to testify about, how the passage of time has affected their testimony, or how the change would harm McDonald. The same is true for the victim's testimony, who was 3 or 4 years old when the incident occurred and is now 14 years old. Witnesses for both the prosecution and defense suffer memory lapses over time. A lengthy delay may be more likely to weaken the prosecution's case than the defense's because "it is the prosecution which carries the burden of proof." *Barker*, 407 U.S at 521. "[D]elay is a two-edged sword. It is the Government that bears the burden of proving its case beyond a reasonable doubt. The passage of time may make it difficult or impossible for the Government to carry this burden." *Loud Hawk*, 474 U.S. at 315. Or the passage of time may weaken the defendant's case.

In short, McDonald does not explain how the delay impaired his defense other than alleging that something may have been forgotten. McDonald does not point to any specific instances in which memories have lapsed or show how the delay thwarts his ability to defend himself. Because of this lack of specificity, he fails to meet his burden to show actual prejudice.

Presumed Prejudice to the Defendant

The Supreme Court recognized an alternative presumption of prejudice in *Doggett.* 505 U.S. at 655-66. A showing of actual prejudice is required if the government exercised reasonable diligence in pursuing the defendant. 505 U.S. at 656; *United States v. Erenas-Luna*, 560 F.3d 772, 778-79 (8th Cir. 2009). When the government has been negligent, however, prejudice can be presumed if there has been an excessive delay. *Doggett*, 505 U.S. at 656-58; *Erenas-Luna*, 560 F.3d at 778-79; Cf. *State v. Otero*, 210 Kan. 530, 535-36, 502 P.2d 763 (1972) (finding, pre-*Doggett*, a delay of more than seven years prejudiced a defendant's case even though the defendant did not present concrete evidence establishing the exact extent of harm caused).

To succeed on this factor, McDonald must first show that the pretrial delay in his case was of sufficient duration to be considered presumptively prejudicial as that term is meant in this fourth-factor context. See, e.g., *United States v. Battis*, 589 F.3d 673, 682-83 (3d Cir.

2009). This presumption of prejudice differs from the initial presumption necessary to trigger consideration of the *Barker* factors.

Is the delay here of over six years excessive enough to be considered presumptively prejudicial? *Doggett* answered this question affirmatively, holding that a six-year delay attributable to the government was long enough to presume that the defendant's trial would be compromised, and he would be prejudiced. 505 U.S. at 657-58. The Court in *Doggett* found that the durational requirement for relief without specific prejudice was met where the delay attributable to the government's negligence was six years, an amount that "far exceeds the [one-year] threshold needed to state a speedy trial claim." 505 U.S. at 658. The defendant was entitled to relief because the presumption of general prejudice was not "persuasively rebutted." 505 U.S. at 658.

Other courts have found similar delays warrant relief. See, e.g., *United States v. Brown*, 169 F.3d 344, 351 (6th Cir. 1999) (five-and-a-half years); *United States v. Graham*, 128 F.3d 372, 376 (6th Cir. 1997) (eight years). For example, in *Battis*, 589 F.3d at 683, the Third Circuit held that "prejudice will be presumed when there is a forty-five-month delay in bringing a defendant to trial, even when it could be argued that only thirty-five months of that delay is attributable to the Government."

As the *Doggett* Court recognized, "excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify." 505 U.S. at 655. So prejudice for speedy trial purposes "is not limited to the specifically demonstrable, and . . . affirmative proof of particularized prejudice is not essential to every speedy trial claim." 505 U.S. at 655. Although that sort of latent prejudice "cannot alone carry a Sixth Amendment claim without regard to the other *Barker* criteria, . . . it is part of the mix of relevant facts." 505 U.S. at 655-56. The longer the delay, the greater the significance of such intangible degradation of the trial process generally. See 505 U.S. at 656. McDonald has shown a delay of sufficient duration to be considered presumptively prejudicial for purposes of *Barker*'s fourth factor.

Acquiescence or Rebuttal

When, as here, a defendant relies on a presumption of prejudice to establish the fourth *Barker* factor and identifies a delay of sufficient duration to be considered presumptively prejudicial, "this presumption

of prejudice can be mitigated by a showing that the defendant acquiesced in the delay, or can be rebutted if the Government 'affirmatively prove[s] that the delay left [the defendant's] ability to defend himself unimpaired.'" *Battis*, 589 F.3d at 682 (quoting *Doggett*, 505 U.S. at 658 & n.1). Cf. *Rivera*, 277 Kan. at 119 (indicating presumption created by lengthy delays may be defeated by evidence of defendant's own acts and warning dismissal should be granted with "great caution").

Here, the record shows neither mitigating factor. Nothing shows that McDonald acquiesced in the delay, nor does the State offer affirmative proof that McDonald's ability to defend himself is unimpaired by the delay. We are thus left with the fact that six-and-a-half-years' delay is long enough to presume that McDonald's trial would be compromised, and he would be prejudiced.

Weighing

All four *Barker* factors weigh against the State. Yet the *Barker* factors are nonexclusive, 407 U.S. at 530, and our speedy trial assessment considers totality of the circumstances. One of those is the nature of the case. We do not take lightly the fact that the defendant is charged with child rape. But as the United States Supreme Court held, "When the Government's negligence . . . causes delay six times as long as that generally sufficient to trigger judicial review . . . and when the presumption of prejudice, albeit unspecified, is neither extenuated, as by the defendant's acquiescence, nor persuasively rebutted, the defendant is entitled to relief." *Doggett*, 505 U.S. at 658. Given that clear direction from the United States Supreme Court and having considered the totality of circumstances, we find no error in the district court's decision to dismiss this case for a violation of McDonald's constitutional right to a speedy trial.

Affirmed.

No. 123,943

In the Matter of the Estate of Alma Faye Lessley.

SYLLABUS BY THE COURT

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

2. SAME—*Decedent's Will Required to be Delivered to District Court in County Where Resided.* After the decedent's death, the person having custody of the decedent's will shall deliver the will to the district court in the county where the decedent resided.

3. SAME—*Petition for Probate and Will Required to be Filed Within Six Months of Decedent's Death.* A petition for probate of a will and the will itself must be filed with the district court within six months of the decedent's death.

4. SAME—*Probate Process Requires Timely Filing of Will.* In order to probate a will, the district court must have the will. Timely filing of the will is a required step in the probate process.

5. SAME—*Will Ineffective and Not Admissible if Not Timely Filed.* The untimely filing of a will causes the will to become ineffective and not subject to admission to probate.

Appeal from Sedgwick District Court; ROBB W. RUMSEY, judge. Opinion filed March 11, 2022. Affirmed and remanded with directions.

Thomas C. McDowell, of McDowell Chartered, of Wichita, for appellant Kris F. Lessley.

Russell L. Mills, of Russell L. Mills Attorney at Law, of Derby, for appellee Kelli F. Lessley.

Before POWELL, P.J., SCHROEDER, J., and JAMES L. BURGESS, S.J.

SCHROEDER, J.: Alma Faye Lessley died on June 22, 2018. A petition to admit her will to probate was filed by Kris F. Lessley, the named executor in the will, on September 26, 2018. But Alma's Last Will and Testament was not filed with the district

court until almost 18 months later on December 20, 2019. Kris filed this interlocutory appeal of the district court's determination the will could not be admitted to probate and record because it was filed outside of the six-month window allowed by K.S.A. 59-617 and K.S.A. 59-2220. Upon an extensive review of the record and the applicable statutes contained in the probate code, we find no error by the district court. We affirm and remand for further proceedings.

FACTS

Alma, a resident of Kansas, died on June 22, 2018, leaving four children—two sons and two daughters. Alma and her husband had prepared reciprocal wills in 1982, which divided all property equally among their four children if one spouse predeceased the other. On April 18, 2018, a few months prior to Alma's death, she prepared a new will naming her son, Kris F. Lessley, as personal representative and further bequeathing a substantial portion of her assets to Kris to the exclusion of her three other children and her husband. About the time the new will was prepared and executed, Alma filed for divorce from her husband of 60 years. Alma was granted an emergency divorce on June 6, 2018, with the district court bifurcating the division of assets to another day.

Kris filed a petition for probate of Alma's will and issuance of letters testamentary in the matter of Alma's estate on September 26, 2018. The petition stated, in relevant part:

> "The instrument dated April 18, 2018, and filed with this Petition is the Last Will and Testament of the decedent. The Will dated April 18, 2018, was executed according to law and unrevoked at the time of the decedent's death. At the time of the execution of the Will, the decent was of legal age, of sound mind, and was not under any restraint."

Contrary to the above statement in the petition for probate, Alma's will was not attached to the petition or filed with the district court. Kris also prepared and filed an affidavit of service stating he had complied with K.S.A. 59-2209, which requires the petitioner, within seven days after the first publication of the notice of hear-

ing, to mail, postage prepaid, a copy of the petition with its attachments, including a copy of the will, to the known heirs and beneficiaries.

One of Alma's daughters, Kelli F. Lessley—an heir and beneficiary under the will—filed a petition to stay all probate proceedings until Alma's divorce proceedings had concluded as the marital property had not been divided and Alma's individual assets were unknown. A few days prior to the scheduled hearing to stay all probate proceedings, Kris' attorney e-mailed a copy of Alma's will to the attorneys representing Alma's heirs. The day after Kris e-mailed Alma's will, Kelli filed written defenses and objections to the probate of Alma's will. Among Kelli's objections included the failure to file a properly executed will with the district court or provide a copy of the will to any heir. No stay order was entered in the probate matter, but it was continued several times from October 2018 until January 8, 2020. Even with notice from Kelli in October 2018 that the will was not filed with the petition to admit the will, Kris still did not file Alma's will until December 20, 2019—approximately 18 months after Alma's death. After the will was filed, Kelli, along with the other heirs, filed another written defense, arguing in part the district court should deny admission of Alma's will to probate as it was untimely filed and the result of undue influence. Alma's probate case and divorce case were eventually consolidated, and the district court continued the matter to address the admissibility, but not the validity, of Alma's will.

In February 2020, Kris filed another petition to admit the will with the will attached. Kris argued that the petition for probate of Alma's will and issuance of letters testamentary was filed and set for hearing within six months of Alma's death, which stopped the statute of limitations from running. Kris further stated the petition mentioned Alma's will three times, which was sufficient to establish the will existed and the petition was timely filed. Kris argued, in the alternative, his attorney conveyed to him Alma's original will was timely filed with the clerk of the district court along with the petition in September 2018. Kris then stated he knowingly withheld Alma's will under the mistaken belief he was to safe-

guard it forever. Kelli filed a petition for judgment on the pleadings or, in the alternative, for partial summary judgment because Alma's will was untimely filed.

The district court found the petition for probate was timely filed within six months of Alma's death but neither the original will nor a copy of the will was attached, which was a necessary part of the probate filing. Kris needed to file Alma's will by December 22, 2018—six months after Alma's death—for the district court to consider admitting the will to probate. The district court also explained Kelli's petition for a stay order was not heard by the district court and no order was filed granting a stay of the probate proceedings. The district court amended its journal entry for purposes of an interlocutory appeal to include a finding that K.S.A. 59-617 involved a controlling question of law in which there was a substantial ground for difference of opinion. Specifically, the question is whether a will needed to be filed with the petition for probate or, if not filed with the petition, filed within six months of the decedent's death. We granted Kris' application for interlocutory appeal. Additional facts are set forth as necessary.

ANALYSIS

A PETITION TO ADMIT A WILL FILED WITHIN SIX MONTHS OF THE DECEDENT'S DEATH WITHOUT THE WILL ATTACHED WILL NOT TOLL THE NEED TO FILE THE WILL WITHIN SIX MONTHS.

Kris argues, under K.S.A. 59-617 and K.SA. 59-2220, Alma's April 2018 will did not need to be filed along with the petition for the probate of the will or within six months after Alma's death. Kelli responds Alma's will had to be filed with the district court within six months of Alma's death or it became ineffective to pass real or personal property. The parties agree Alma was a resident of Kansas and the essential facts underlying this appeal are not in dispute. The issue presented is a question of law over which we have unlimited review.

Both parties correctly identify our standard of review. We exercise unlimited review over the legal question of statutory interpretation. The fundamental rule of statutory interpretation is that the Legislature's intent governs if its intent can be ascertained

through the plain and unambiguous language of a statute. That is, appellate courts are to interpret statutory language as it appears, without speculation or reading language into the statute not readily found therein. *In re Estate of Strader*, 301 Kan. 50, 55, 339 P.3d 769 (2014).

K.S.A. 59-617

The parties agree K.S.A. 59-617 acts as a six-month statute of limitations for the admission of a will to probate, stating: "No will of a testator who died while a resident of this state shall be effectual to pass property unless a petition is filed for the probate of such will within six months after the death of the testator, except as hereinafter provided." See *In re Estate of Clare*, 305 Kan. 967, 969, 389 P.3d 1274 (2017) (finding K.S.A. 59-617 sets time limitation for passing property under will).

Kris argues the clear and unambiguous language of K.S.A. 59-617 requires the filing of only a petition for the probate of a will, not the will itself. Kris' argument is unpersuasive because Kris fails to recognize the petition as set forth in K.S.A. 59-617 is further defined in K.S.A. 59-2220 to require that the will is to be filed if it can be produced. Nothing in the record reflects the will could not have been produced and timely filed. Kelli also responds a petition without an attached will fails to toll the statutory requirement for a will to be filed within six months of the decedent's death.

While K.S.A. 59-617 explicitly provides a *petition* must be filed for the probate of a will within six months of the testator's death, K.S.A. 59-618 provides an exception to the statute of limitations, allowing a will to be filed if it was knowingly withheld from probate. K.S.A. 59-618 states:

> "Any person who has possession of the will of a testator dying a resident of this state, or has knowledge of such will and access to it for the purpose of probate, and knowingly withholds it from the district court having jurisdiction to probate it for more than six months after the death of the testator shall be liable for reasonable attorney fees, costs and all damages sustained by beneficiaries under the will who do not have possession of the will and are without knowledge of it and access to it. Such will may be admitted to probate as to any innocent beneficiary on petition for probate by any such beneficiary, if such petition is filed within 90 days after such beneficiary has knowledge of such will and access to it . . . ."

Our Supreme Court analyzed K.S.A. 59-618 and explained:

"[A]pplying this ordinary meaning, K.S.A. 59-618 can legitimately be read only one way: 'such will' in the second sentence refers to the will 'having just been mentioned' in the first sentence. In other words, it means a will that has been knowingly withheld from probate for more than 6 months after the death of a testator by a person who has possession of the will or knowledge of and access to it." *Strader*, 301 Kan. at 57.

That is, a petition must be filed for the probate of a will, and the exception allows for additional time to admit the *will* to probate once an innocent beneficiary has knowledge and access to the will.

The district court correctly noted K.S.A. 59-618 did not apply as an exception to the statute of limitations here as Kris had knowledge and access to Alma's will and was not an innocent beneficiary. K.S.A. 59-618 does not provide Kris with the protection he seeks. Kris had six months from June 22, 2018—the date of Alma's death—to file a petition with the will attached or file the will separately within the same six-month period for probate of the will. Kris should have filed the will along with the petition for probate of the will within six months of Alma's death, as he had knowledge of the will and access to it. In fact, within the petition for probate of Alma's will, Kris represented the will was attached to the petition:

"The instrument dated April 18, 2018, and filed with this Petition is the Last Will and Testament of the decedent. The Will dated April 18, 2018, was executed according to law and unrevoked at the time of the decedent's death. At the time of the execution of the Will, the decent was of legal age, of sound mind, and was not under any restraint."

More importantly, K.S.A. 59-616 explicitly states: "No will shall be effectual to pass real or personal property unless it shall have been duly admitted to probate." Kris failed to cite or reference K.S.A. 59-616. The district court also considered K.S.A. 59-621, which requires the person having custody of the decedent's will to deliver the will to the district court after the decedent's death. The record reflects, after filing his petition to admit the will to probate, Kris was put on notice the will had not been filed with the district court and took no action to remedy the issue before the expiration of the six-month period from Alma's death.

K.S.A. 59-616, K.S.A. 59-617, K.S.A. 59-618, K.S.A. 59-621, and K.S.A. 59-2220 should be read together in workable harmony. See *In re Estate of Wolf*, 279 Kan. 718, 724, 112 P.3d 94 (2005) ("'General and special statutes should be read together and harmonized whenever possible, but to the extent a conflict between them exists, the special statute will prevail unless it appears the legislature intended to make the general statute controlling.' [Citation omitted.]"). Read together, the statutes plainly indicate a petition for probate of a will *and the will itself* must be filed with the district court within six months of the decedent's death to be eligible for admission to probate unless the party presenting the will is an innocent beneficiary. See K.S.A. 59-618.

Our Supreme Court has explained that technical requirements for probate procedures are flexible and do not deprive a probate court of jurisdiction. *Clare*, 305 Kan. at 970-71. But the obvious function of a will is to publish it by timely filing it for probate and to further control the distribution of real or personal property to the decedent's heirs, devisees, legatees, and other beneficiaries. Once filed, the probate court can give legal force and effect to the will after it is admitted to probate. Filing a petition to admit a will without attaching the will or otherwise timely filing the will leads to an absurd result—one this court cannot abide. See *In re Marriage of Traster*, 301 Kan. 88, 98, 339 P.3d 778 (2014) (courts must construe statutes to avoid unreasonable or absurd results).

K.S.A. 59-2220

Kris appropriately contends Kansas public policy does not favor suppressing or withholding a will from probate based on technicalities. However, while our Supreme Court has acknowledged this public policy rationale conflicts with statutory interpretation, it determined "this policy is qualified by the legislative intent clearly expressed" in the statutes. *Strader*, 301 Kan. at 60. Kris' intentional retention of the will reflects his public policy argument is unpersuasive under the plain meaning of the statute *in pari materia*.

K.S.A. 59-2220 provides:

"A petition for the probate of a will, in addition to the requirements of a petition for administration, shall state: (a) The names, ages, residences and addresses of the devisees and legatees so far as known or can with reasonable diligence be ascertained; (b) the name, residence, and address of the person, if any, named as executor; and (c) the

name and address of the scrivener of the will, if known or ascertainable with due diligence. *The will shall accompany the petition if it can be produced.* . . . A petition for the probate of a lost or destroyed will shall contain a statement of the provisions of the will." (Emphasis added.)

In *In re Estate of O'Leary*, 180 Kan. 419, 422, 304 P.2d 547 (1956), our Supreme Court examined "whether a will which has been offered for probate should be admitted to probate." Our Supreme Court explained: "It is clear that one of the steps to be made by petition in a probate proceeding is the admission of a will. Not only was it proper for appellee to offer the will for probate, but it was his duty to do so. [Citations omitted.]" 180 Kan. at 421.

K.S.A. 59-2220 says what it means and simply provides certain requirements a petition for the probate of a will must contain. Among those requirements is a copy of the testator's will if it can be produced. The district court correctly noted neither Alma's original will nor a copy of the will accompanied the petition for probate of will and issuance of letters testamentary filed on September 26, 2018, as required by the plain meaning of the statute. In October 2018, Kelli objected to the probate of Alma's April 2018 will, providing notice to Kris that Alma's will was not filed with the district court or provided to any heir. For reasons not fully explained in the record, Kris did not file the will with the district court, and his attorney choose to email a copy of the will to the parties' attorneys and not mail it postage prepaid to each heir, devisee, legatee, or other interested parties as K.S.A. 59-2209 requires.

Kris, without explanation, has provided conflicting and evolving explanations as to why Alma's will was not presented for timely filing. Kris first explained the petition for probate mentioned the will, which was sufficient. Kris then alleged his attorney told him the will was hand delivered to the clerk of the district court, which we now know was an incorrect statement since Kris had the will in his possession. Kris finally admitted the will was not filed with the petition but claimed he was an innocent beneficiary because he had the mistaken impression he was to safeguard the will forever.

Kris admitted he had access to Alma's will, so it could have been produced and filed with the district court within the six-month statute of limitations. K.S.A. 59-2220 requires the will accompany the petition if it can be produced or, if the will has been lost or destroyed, the petition contain a statement of the provisions of the will. If the petition is required to contain a statement of the provisions of a lost or stolen will,

it necessarily would require the filing of the will itself—being the best evidence of the decedent's wishes—if it is available. See K.S.A. 60-467(a) ("As tending to prove the content of a writing, no evidence other than the writing itself is admissible . . . .").

The district court correctly found there was no reason Alma's will could not have been produced and filed with the petition for probate, or at least within six months of Alma's death, as Alma's will was not lost or misplaced. In order to probate a will, the district court must have the will. Filing the will is a required step in the probate process, and Kris failed to timely file Alma's will as required by Kansas statutes. The untimely filing of Alma's will causes the will to become ineffective and not subject to admission to probate.

Sedgwick County Administrative Order 16-4 Amended

Kris contends Sedgwick County Administrative Order 16-4 Amended impermissibly conflicts with Kansas probate statutes and cannot add the requirement the will be electronically filed when such requirement is not mandated in the statutes. Kelli asserts the local rule is consistent with statutory provisions for filing a will.

"A local rule may not conflict with statutes or Supreme Court rules. The validity of a local rule is also subject to review for its reasonableness. [Citations omitted.]" *In re Estate of Clare*, 305 Kan. at 970; see also Supreme Court Rule 105 (2022 Kan. S. Ct. R. at 175) ("A judicial district . . . may adopt rules that are: (1) clear and concise; (2) necessary for the judicial district's administration; (3) consistent with applicable statutes; and (4) consistent with—but not duplicative of—Supreme Court Rules."). A local rule cannot create jurisdictional obstacles or add statutory requirements. *In re Estate of Clare*, 305 Kan. at 971. Our Supreme Court approves of electronic filing in district courts and requires a Kansas licensed attorney permitted to practice law to electronically file any document submitted to the district court. Kansas Supreme Court Rule 122(a)(1), (b) (2022 Kan. S. Ct. R. at 212).

Effective October 3, 2016, Sedgwick County Administrative Order 16-4 Amended provided: "When electronically filing a petition to admit a will to probate, a copy of the will shall also be electronically filed with other pleadings. The original may be filed or archived with the clerk of the district court pursuant to Kansas Statutes as amended."

Because the filing of a will is a necessary step to probate the will under Kansas statutes, Sedgwick County Administrative Order 16-4 Amended is logical and consistent with requiring the electronic filing of a copy of the will with the petition or other pleadings for probate. In other words, the electronic filing requirement in Sedgwick County regarding a petition for probate of a will is consistent with, but not duplicative of, our Supreme Court's electronic filing rules.

The parties' agreed-upon continuances of hearings did not toll the statutory obligation to file the will within six months of Alma's death.

Kris argues the parties to this suit agreed to stay all proceedings then currently pending in this probate action until resolution had been achieved in the domestic action regarding Alma's divorce. Kris contends the stay was to remain in effect until the legal and factual issues related to the admission of Alma's April 2018 will for probate were resolved. Kris further asserts, while the proceedings were stayed, the parties unsuccessfully engaged in settlement negotiations, during which Alma's 2018 will was exchanged among the parties.

Kelli responds the parties agreed to continue the probate matter pending mediation, hearings, and motions in Alma's divorce case but contends a continuance is not a stay order or a waiver of the statute of limitations requiring the timely filing of Alma's will. Kelli asserts the probate case was not stayed but, rather, was continued because there were no assets to administer until Alma's divorce case was resolved.

Kris explains: "*Black's Law Dictionary Free Online Legal Dictionary 2nd ed., thelawdictionary.org/stay-order/*, [defines] a 'stay order' [as] a 'court order suspending a judicial proceeding either in full or in part.'" Kris unpersuasively alleges the parties acquiesced, or passively accepted, a stay of probate proceedings. While Kris provides the definition of a stay order, he fails to also provide the definition of a continuance.

A continuance is defined as: "1. The act of keeping up, maintaining, or prolonging . . . . 2. Duration; time of continuing . . . . 3. *Procedure*. The adjournment or postponement of a trial or other proceeding to a future date." Black's Law Dictionary 400 (11th ed. 2019). The record reflects multiple continuances occurred throughout the matter in which the district court continued, prolonged, and postponed proceedings to a set future date. While Kelli filed a petition to stay the probate

proceedings, there is no corresponding order in the record on appeal to reflect the district court heard the issue or granted a stay of proceedings. The record on appeal does, however, reflect the probate matter was continued multiple times within the sound discretion of the district court. See K.S.A. 2020 Supp. 60-240(b). Kris even acknowledges in his brief the October 2018 hearing "was continued to January 23, 2019, and then subsequently continued [three more times with the final hearing not held] until January 8, 2020." All of the parties agreed to each of the continuances, and nothing in the record on appeal reflects the statutory time within which the will was to be filed was stayed.

Finally, Kris asserts Kelli waived any statute of limitations defense by failing to assert such defense in a meaningful manner. Kris also asserts, under the doctrine of equitable estoppel, he was lulled "into a good faith reliance that a statute of limitations defense pursuant to K.S.A. 59-617 would not be sought by Kelli." Kris alleges Kelli never indicated she would raise such a defense and raised the issue for the first time in January 2020. Kris misstates the record. Kelli's October 2018 filing reflects her written defenses and objections to the probate of Alma's will. Kelli specifically stated: "No properly executed will has been filed with the court as far as I know, and none has been provided to any heir."

Kris' argument is a strained and unpersuasive attempt to extend the statute of limitations after conceding the will was untimely filed. Kris had possession and access to Alma's will during the proceedings and easily could have filed Alma's will within six months of her death as part of the pleadings.

We find the district court never granted a stay order to toll the six-month statute of limitations for filing of the will. Therefore, Kris' failure to timely file the will within six months of Alma's death, given the fact he is not an innocent beneficiary, causes the will to become ineffective and not subject to admission to probate. We affirm the district court's finding on the question certified for interlocutory appeal and remand the matter to the district court for further proceedings.

Affirmed and remanded with directions.

No. 121,321

STATE OF KANSAS, *Appellee*, v. ERNESTO VAZQUEZ, *Appellant*.

SYLLABUS BY THE COURT

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

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

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

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

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

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

7. SAME—*Booking Photo of Defendant from Prior Case May Be Unduly Prejudicial*. A booking photo for the current crime does not carry the same

potential for an unduly prejudicial impact as a mugshot from a prior case where the latter may suggest the defendant has a history of criminality.

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

Appeal from Finney District Court; ROBERT J. FREDERICK, judge. Opinion filed March 18, 2022. Affirmed.

Michael P. Whalen, of Law Office of Michael P. Whalen, of Wichita, for appellant.

Tamara S. Hicks, assistant county attorney, *Susan Hillier Richmeier*, county attorney, and *Derek Schmidt*, attorney general, for appellee.

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

ISHERWOOD, J.: A jury found Ernesto Vazquez guilty of one count of rape and three counts of aggravated indecent liberties with a child. The court sentenced him to two consecutive life sentences in prison. On appeal, Vazquez presents three arguments: (1) there was insufficient evidence to sustain the convictions; (2) the district court erred when it admitted his booking photo into evidence; and (3) the prosecutor made inappropriate comments during closing arguments. Following a comprehensive review of his case, we decline to find that Vazquez is entitled to relief on the issues raised. His convictions are affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

In 2017, M.S. and G.A. lived with their two young daughters, 11-year-old E.R.S. and 10-year-old E.X.S., in Garden City. G.A.'s friend, 40-year-old Ernesto Vazquez, lived close by them with his wife and children.

E.R.S. and E.X.S. enjoyed playing soccer and often joined other children from the neighborhood for matches in a nearby vacant lot. Vazquez frequently played with the group, but he was the only adult to do so. Unfortunately, he also used those games as an opportunity to fondle E.R.S. and E.X.S. On more than one occasion, Vazquez hugged E.X.S. from behind then touched her waist or breasts and vagina. E.R.S. experienced similar behavior from Vazquez as he likewise approached her from behind and rubbed

her waist or breasts. He also tried to kiss E.R.S. once, but she succeeded in dodging his advances. In yet another instance, Vazquez passed a note to E.R.S. in which he professed his love for her. The inappropriate touching did not go unnoticed by the other children.

In November 2017, E.X.S. and E.R.S. attended a birthday party that Vazquez threw for his son, A.V. During the party, E.R.S. went outside to play with her friend, R.S. Vazquez came outside at one point, grabbed E.R.S. and pulled her between two cars where he fondled her breasts under her clothes, then lifted her bra and placed his mouth on her breasts. When R.S. approached them, Vazquez stopped and returned inside to the party.

A few days later, Vazquez approached E.R.S. in her driveway, pushed her up against a vehicle, touched her breasts under her shirt, then pulled her pants down and penetrated her vagina with his penis. E.R.S. struggled and told Vazquez to stop, but he ignored her pleas. Vazquez eventually relented when a car approached, then E.R.S. ran inside her family's home to safety. She did not immediately tell anyone what happened out of fear that Vazquez would retaliate and harm her parents or friends.

Following these incidents, M.S. observed peculiar behavior from E.R.S., like resting her hands on her stomach. She also discovered that E.R.S. searched out information on YouTube about menstrual cycles and pregnancy. M.S. asked E.R.S. why she explored those topics and whether someone abused her, but E.R.S. insisted that nothing happened. Not satisfied or convinced, M.S. persisted in her inquiry and told E.R.S. "[S]wear to God . . . if you are telling me a lie, God is going to get mad at you." E.R.S. eventually broke down and cried. She told M.S. that on the day before Thanksgiving, Vazquez trapped her in the driveway and "put his thing on her—to her . . ." M.S. panicked and woke G.A. up, who then joined her and E.R.S. in the living room. The commotion awakened E.X.S. When she investigated and found E.R.S. crying and telling her parents about the incidents, E.X.S. disclosed that Vazquez touched her too. M.S. contacted her friends both of whom promptly arrived to comfort the family and encouraged them to contact 911.

M.S. eventually asked her friend to call 911 for them and law enforcement officers quickly got an investigation underway. Detective Freddie Strawder obtained a warrant to search Vazquez'

home and found a red sweatshirt and black pants, which matched the description of the clothing E.R.S. reported that Vazquez wore when he attacked her in the driveway. E.R.S. underwent a sexual assault exam and told the examining nurse, Melanie Anderson, that "a man put his private part in my private parts." Anderson observed healed trauma in E.R.S.'s genital area consistent with the account E.R.S. provided. Both girls also participated in interview with Kelly Robbins, the Executive Director at Western Kansas Child Advocacy Center and Kansas Childfirst. E.X.S. told Robbins that Vazquez touched her vagina and nipples. E.R.S. told Robbins that Vazquez raped her and that she did not tell anyone at first because she feared Vazquez might hurt her family if she did.

The investigation yielded four charges against Vazquez, a single count of rape and three counts of aggravated indecent liberties with a child. His case eventually proceeded to a jury trial. Between the date of his arrest and the commencement of trial, however, Vazquez lost a considerable amount of weight. Because of this alteration in his physical appearance, some of the child witnesses struggled when asked to identify him at trial. To overcome this complication, when E.R.S. testified, the prosecutor presented her with Vazquez' booking photo from the day of his arrest to help confirm his identity and explain the confusion. Detective Strawder also testified and verified that the photo accurately reflected how Vazquez looked at the time of his arrest, but he was significantly thinner at trial. Over defense counsel's objection, the State requested and received permission to publish the photo to the jury.

During closing arguments, the State addressed E.R.S.'s testimony about the conversation she shared with her mother that prompted her disclosure:

"She did tell her daughter something is wrong. I know something is wrong. You're looking up stuff on the internet about missed periods and being pregnant, things of that nature. You need to talk to me. Tell me what is wrong. You need to tell me. You swear to God you are going to tell me the truth, and then she did say, if you don't tell me the truth, I might die in the night. This did cause [E.R.S.] to tell her for fear that her mom might die in the night. She did admit the truth and told her mom that she had been sexually touched by the defendant in this case. That it was on more than one occasion. It was outside in the trailer park, and it was at the office where the birthday party occurred."

During defense counsel's closing argument, she told the jury it could find reasonable doubt existed by focusing on the inconsistencies that plagued each witness' testimony. As examples, she contrasted E.R.S.'s testimony that no one saw Vazquez rape her in the driveway, with that of Detective Strawder and his assertion that the neighborhood was consistently busy with foot and road traffic. Defense counsel also highlighted a discrepancy between E.R.S.'s interview video where she stated Vazquez raped her against a car and her in-court testimony when she said it happened on a red van. As Vazquez' counsel wrapped up her argument she remarked:

"I think you heard a lot of inconsistencies, a lot of stories that may be described as told in order to bolster [E.R.S.'s] and [E.X.S.'s] version of events, told to support their two friends, [E.R.S.] and [E.X.S.] I'm not sure which parts of what were said were accurate or inaccurate. I would point out that there were a lot of inconsistencies."

On rebuttal, the prosecutor acknowledged the inconsistencies occurred but argued that identical testimonies carried their own degree of suspicion. As for E.R.S.'s testimony, the prosecutor told the jury:

"But I want you to remember when I talked to [E.R.S.], I specifically pointed to the red car that was in the photograph because I was under the assumption that was the car. She could have easily said, yeah, it happened right there. But no, she wanted to make sure that the truth came out to you and that she was honest with you. She said, no, ma'am, it was not that car. It was a different car. So take those things into consideration when you are thinking about whether the statements that these girls gave you were true."

Later, the prosecutor reiterated, "The children are young. They tried to be as honest with you as they could be and tell you what they remembered." She continued, "And remember what you saw. You saw two very emotional young ladies trying to tell you what happened to them so that you could find him guilty."

The jury deliberated over the evidence for a considerable period before returning a verdict finding Vazquez guilty on all four counts. The district court sentenced Vazquez to serve consecutive life sentences without the possibility of parole for 50 years.

Vazquez now brings his case to us to review and analyze whether error occurred during his trial.

ANALYSIS

WAS THE EVIDENCE ADDUCED AT TRIAL SUFFICIENT TO SUSTAIN VAZQUEZ' CONVICTIONS FOR RAPE AND AGGRAVATED INDECENT LIBERTIES WITH A CHILD?

Appellate courts review challenges to the sufficiency of the evidence in the light favoring the State to determine whether a rational fact-finder could have found the defendant guilty beyond a reasonable doubt. *State v. Rosa*, 304 Kan. 429, 432-33, 371 P.3d 915 (2016).

In Kansas, courts give juries wide latitude to interpret their own conclusions from the evidence. A conviction of even the gravest offense can be based entirely on circumstantial evidence and the inferences deducible therefrom. *Rosa*, 304 Kan. at 433. If an inference is reasonable, it is well within the province of the jury to rely on the same. *Rosa*, 304 Kan. at 433. On appeal, courts cannot reweigh the evidence or reassess the credibility of witnesses. *State v. Kettler*, 299 Kan. 448, 466, 325 P.3d 1075 (2014).

Vazquez stands convicted of rape and three counts of aggravated indecent liberties with a child. He contends the State failed to present sufficient evidence to support his rape conviction, the aggravated indecent liberties incident perpetrated against E.R.S. at the birthday party, or the aggravated indecent liberties offenses he committed against E.X.S.

We first turn our attention to the rape conviction. The jury found Vazquez raped E.R.S. in violation of K.S.A. 2016 Supp. 21-5503(a)(3). To sustain the conviction, the State carried the burden to prove, beyond a reasonable doubt, that Vazquez engaged in sexual intercourse with a child under the age of 14. "Sexual intercourse" means any penetration of the female sex organ by a finger, the male sex organ or any object. Any penetration, however slight, is enough to constitute sexual intercourse. K.S.A. 2020 Supp. 21-5501(a).

Vazquez advances a multi-faceted argument in support of his claim that his rape conviction should not be permitted to stand. First, he focuses on multiple inconsistencies in E.R.S.'s testimony. Next, he argues the rape could not have occurred next to the red van as E.R.S. claimed because, according to a different witness, E.R.S.'s father removed the van the summer before. Vazquez also asserts there is a question regarding the "physics" of the sex act. He also contends that E.R.S.

could not truly have believed she was pregnant because she started her period the day after the alleged rape. Finally, he argues that neighbors would have witnessed the rape had it actually occurred in the driveway as E.R.S. alleged, and that Detective Strawder neglected to interview neighbors and obtain exculpatory evidence. Each claim will be addressed in turn.

Again, the foundation for the first point in Vazquez' challenge to his convictions is an allegation that inconsistent statements made throughout the investigation and trial are remarkable enough to require reversal of his convictions. Sexual assaults are traumatic occurrences in a person's life that do not come with a script which enables them to seamlessly process the incident and navigate the criminal justice system. Inconsistencies, therefore, are frequent occurrences, and this is particularly true in those cases involving young children, as in Vazquez' case. See *State v. Voyles*, 284 Kan. 239, 263, 160 P.3d 794 (2007). Our Supreme Court has provided helpful guidance.

In *State v. Prine*, 287 Kan. 713, 738-39, 200 P.3d 1 (2009), the six-year-old victim testified at the preliminary hearing that Prine penetrated her, but during her trial testimony she denied that penetration occurred. The jury also watched a videotape of the young girl's interview with police where she said Prine's abuse included penetration. On review, the court held that while the child's statements contained inconsistencies, they were still sufficient to support Prine's rape conviction because the "essentials" of the victim's account did not vary. 297 Kan. at 739.

In *Reyna*, a similar credibility challenge arose as part of an effort to overturn four convictions for aggravated indecent liberties with a child. *State v. Reyna*, 290 Kan. 666, 234 P.3d 761 (2010), *overruled on other grounds by State v. Dunn*, 304 Kan. 773, 375 P.3d 332 (2016). Reyna sought to prove that the accounts provided by his two victims, ages six and seven, did not remain entirely consistent from the point of their disclosures to the time of trial. The Supreme Court acknowledged that while the victims' statements contained some inconsistencies, they steadily held firm to key details. *Reyna*, 290 Kan. at 674-75. Thus, Reyna failed to show that the victims' variations demanded reversal of his convictions.

The foundation for this portion of Vazquez' claim of error is that inconsistencies in E.R.S.'s statements rendered her account untrustworthy. But in sufficiency of the evidence inquiries, we are

not at liberty to conduct an independent assessment of E.R.S.'s credibility. *State v. Daws*. 303 Kan. 785, 789, 368 P.3d 1074 (2016). That task belongs to the finder of fact alone—in this case, the jurors. They had the benefit of hearing E.R.S.'s testimony firsthand, alongside each of the inconsistencies Vazquez highlights and complains of on appeal. Yet they concluded that the evidence established Vazquez' guilt beyond a reasonable doubt. We cannot supplant that conclusion with one of our own. This allegation of error does not warrant relief.

In his remaining contentions of error within this issue, Vazquez claims his conviction cannot stand because the evidence adduced through E.R.S.'s testimony is not compelling or sufficient. He also asserts that Detective Strawder conducted a deficient investigation which failed to afford the jury a true appreciation for and understanding of the environment where the rape occurred. Each of his allegations is flawed in their own way and will be analyzed in turn. But collectively, and perhaps most significantly, in reviewing the sufficiency of the evidence we are prohibited from reweighing the evidence or resolving conflicts in the evidence. *State v. Rosa*, 304 Kan. 429, 432-33, 371 P.3d 915 (2016). Nevertheless, that is precisely what Vazquez asks that we do in presenting these issues for our consideration. We turn to an independent analysis of each allegation.

In his first claim, Vazquez highlights E.R.S.'s testimony that the rape occurred next to a red van, but according to a different witness, Jose Romero, that van was not in the driveway in November 2017 when the act occurred. Vazquez cannot prevail under this theory of error because it assumes Romero's memory and testimony are accurate. It is within the province of the jury to determine which evidence to accept or reject and it did that here when it opted to reject Romero's timeline of events and recollection of the van's location. Even if the jury did decide to accept Romero's statements about the van, it could still simply conclude that E.R.S. was mistaken in her recollection of the type of vehicle in the driveway. A mistake does not disprove E.R.S.'s overall assertion that the rape took place. Whether Vazquez raped E.R.S. against a red van or a red car is an inconsequential detail that does not minimize

or negate the essential details of the act that E.R.S. consistently provided. See *Prine*, 287 Kan. at 739.

Vazquez' next allegation arises out of what he characterizes as the "physics" of the unlawful sex act. It is his contention that if both E.R.S. and Vazquez had their pants around their knees as E.R.S. described, it would have restricted the movement of her legs, rendering it physically impossible for Vazquez to penetrate her with his penis. This argument is grounded in speculation as the record lacks any evidence by which to analyze the claim. A matter of this nature fell within the province of the jury. It is well beyond the scope of our review to run our eyes through the evidence anew. This claim of error does not entitle Vazquez to a reversal of his conviction.

Vazquez next asserts we should overturn his conviction because E.R.S.'s purported pregnancy fears were undercut by the fact she experienced her period at some point after the assault occurred. This argument fails to appreciate the fact that E.R.S. was merely eleven years old when the rape occurred and likely lacked a sophisticated understanding of her reproductive system. Even so, those details were also present for the jury to consider, and they did not find it tipped the balance in Vazquez' favor. Vazquez fails to convince us that this evidence precludes a rational juror from finding him guilty beyond a reasonable doubt.

Lastly, Vazquez questions Detective Strawder's investigation. He insists that someone in the neighborhood would have witnessed the rape had it truly occurred in the manner which E.R.S. claimed. He extrapolates from this conclusory contention that the detective must have conducted a mere cursory investigation because he lacked any legitimate interest in apprehending the real perpetrator. The record before us reflects the contrary to be true. Detective Strawder's investigation yielded ample evidence to sustain convictions for all four offenses charged against Vazquez. Despite Vazquez's seeming assertion to the contrary, Strawder had no legal obligation to sleuth out exculpatory evidence. Indeed, the Kansas and United States Supreme Courts have both consistently held that it is *defense counsel's* duty to investigate and present evidence of their client's innocence. See, e.g., *Strickland v. Washington*, 466 U.S. 668, 691, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) ("[C]ounsel has a duty to make reasonable investigations

or to make a reasonable decision that makes particular investigations unnecessary."). Vazquez' complaint about Strawder's lack of exculpatory evidence is unpersuasive.

The record before us belies Vazquez' claim that his case was plagued with deficient evidence. The jury heard testimony from E.R.S.'s friends about the inappropriate manner in which Vazquez touched E.R.S. long before the rape. It also heard that E.R.S. provided substantially similar accounts of the assault to her mother and sister, as well as to Kelly Robbins and Melanie Anderson. Anderson bolstered those accounts when it informed the jury that her examination of E.R.S. revealed evidence of genital trauma consistent with the incident E.R.S. reported.

We decline Vazquez' invitation to reassess witness credibility and reweigh the evidence, as we must. The State presented sufficient evidence to enable a reasonable jury to conclude that Vazquez was guilty beyond a reasonable doubt of the rape of E.R.S. That conviction is affirmed.

a. The incident at the birthday party

Vazquez also argues the State failed to present sufficient evidence to sustain his conviction of aggravated indecent liberties against E.R.S. for the incident at A.V.'s birthday party. He contends that it would be senseless to commit the act in such close proximity to other partygoers. The State counters that Vazquez again simply seeks to have us disregard the limitations of our governing standard of review.

The State charged Vazquez with aggravated indecent liberties with a child in violation of K.S.A. 2016 Supp. 21-5506(b)(3)(A). Accordingly, it carried the burden to establish, beyond a reasonable doubt, that Vazquez engaged in lewd fondling or touching of the person of either E.R.S., who is a child under 14 years of age, or Vazquez, done or submitted to with the intent to arouse or to satisfy the sexual desires of either E.R.S. or Vazquez, or both.

Vazquez does not direct us to any evidence that directly contradicts E.R.S.'s testimony. Rather, he simply reiterates his earlier contention that Detective Strawder failed to find exculpatory evidence. As the Kansas Supreme Court has instructed however, E.R.S.'s testimony alone can be enough to sustain the conviction

if it is not so improbable as to defy belief. See *State v. Race*, 293 Kan. 69, 79, 259 P.3d 707 (2011); *Prine*, 287 Kan. at 739. Here, the jury could have reasonably believed that Vazquez saw a brief window of time to assault E.R.S. in the parking lot, free from other partygoers' vantage point. Vazquez asserts such a conclusion is impossible because many witnesses did not see him leave the party. That argument is little more than speculation and certainly not conclusive evidence that he lacked the opportunity and ability to assault E.R.S. as she claimed. He further argues that a security camera at the facility would have captured evidence of the assault if it had actually occurred. But he does not favor us with any evidence to establish that this is necessarily true. For example, he offered no proof that the security cameras exist, that they were operational at the time of the incident, or that they were positioned in a way that would have captured the activity in question. In other words, Vazquez asks us to discard the jury's evidence-based conclusion in favor of his preferred narrative. Given that the jury's verdict constitutes a reasonable conclusion drawn from the evidence adduced at trial, we decline to grant Vazquez the relief he seeks. His conviction for aggravated indecent liberties against E.R.S. for the assault perpetrated at the birthday party is affirmed.

b. The conviction for indecent liberties with E.X.S.

Vazquez next attacks his conviction for the assault of E.X.S. He claims there would be corroborating testimony from witnesses if Vazquez had assaulted her so publicly as she alleged.

For this offense, the State also charged Vazquez with aggravated indecent liberties with a child in violation of K.S.A. 2016 Supp. 21-5506(b)(3)(A). Thus, in order to sustain the conviction, it had the burden to prove that Vazquez engaged in lewd fondling or touching of the person of either E.X.S., who is a child under 14 years of age, or Vazquez, done or submitted to with the intent to arouse or to satisfy the sexual desires of either E.X.S. or Vazquez, or both.

Once again Vazquez encourages us to reweigh the evidence presented at trial. Arguments merely seeking to establish the weakness in a party's evidence are better suited for a jury, not this court. Here, the evidence presented to the jury included testimony from E.X.S.'s friends who testified that Vazquez frequently

touched E.X.S. in an inappropriate way that left them feeling uncomfortable, and that he often expressed his love to both E.X.S. and E.R.S. While this is not direct evidence of the precise act, it constitutes permissible circumstantial evidence of Vazquez' intentions. See *Rosa*, 304 Kan. at 433 ("'A conviction of even the gravest offense can be based entirely on circumstantial evidence and the inferences deducible therefrom.'"). Even without this circumstantial evidence, E.X.S.'s testimony about the incident is enough to sustain the conviction. E.X.S. shared substantially similar versions of the assault with her mother, Kelly Robbins, and the jury. Following a review of that evidence, in a light favoring the State, we have no hesitation in concluding it was sufficient to sustain Vazquez' conviction of aggravated indecent liberties against E.X.S.

DID THE DISTRICT COURT ERR WHEN IT ALLOWED VAZQUEZ' BOOKING PHOTO FROM THE PRESENT CASE INTO EVIDENCE?

At trial, the State moved to admit Vazquez' booking photos into evidence to explain why the child witnesses experienced difficulties when identifying him. The district court overruled an objection from Vazquez' counsel and allowed the photos into evidence. Vazquez now argues the court erred given the irrelevant and overly prejudicial nature of the photographs. This issue is properly preserved for our review under K.S.A. 60-404.

In considering Vazquez' arguments, we apply a multistep analysis. First, we consider whether the photograph is relevant, that is, whether it has a reasonable tendency to prove a material fact. *State v. Morris*, 311 Kan. 483, 492, 463 P.3d 417 (2020). This inquiry contains two components, whether the evidence is (1) material and (2) probative. See *State v. Miller*, 308 Kan. 1119, 1167, 427 P.3d 907 (2018). A material fact is one that has some real bearing on the decision in the case. *State v. Brazzle*, 311 Kan. 754, 758-59, 466 P.3d 1195 (2020). Materiality presents a question of law that appellate courts consider de novo without deferring to the district court judge. *State v. Levy*, 313 Kan. 232, 237, 485 P.3d 605 (2021). Evidence is probative if it has any tendency to prove any material fact. *State v. Gilliland*, 294 Kan. 519, Syl. ¶ 9, 276 P.3d 165 (2012). We examine a probative determination for an

abuse of discretion by the judge. *State v. Boggs*, 287 Kan. 298, 307-08, 197 P.3d 441 (2008). A district court judge commits an abuse of discretion by (1) adopting a ruling no reasonable person would make, (2) making a legal error or reaching an erroneous legal conclusion, or (3) reaching a factual finding not supported by substantial competent evidence. *State v. James*, 309 Kan. 1280, 1305-06, 443 P.3d 1063 (2019).

a. Relevance

The first question we must analyze is the relevancy of Vazquez's booking photo in establishing his identity as the man who perpetrated the unlawful sex acts against E.R.S. and E.X.S. Typically, photographic evidence, like most other pieces of evidence, is relevant and generally admissible if it has a reasonable tendency to prove a material fact in the case. *State v. Rodriguez*, 295 Kan. 1146, 1157, 289 P.3d 85 (2012).

B.O., E.S., and E.R.S. all testified that Vazquez looked different at trial than they remembered from the time he lived in the neighborhood. However, each of them recognized him as the perpetrator. Two of the child witnesses, however, either did not recognize Vazquez in the courtroom, or were not certain on the identification. The State had E.R.S. identify Vazquez' mugshots as his appearance at the time of the offenses, and offered the photographs into evidence to establish that the children did not waffle on the fact that Vazquez committed the acts; they simply did not recognize the man on trial as Vazquez because he had lost a great deal of weight between the time of his arrest and his trial. The identity of the girls' assailant is properly considered a material fact in Vazquez' case. The booking photos undeniably had a reasonable tendency to prove that fact. Thus, the district court arrived at the proper conclusion regarding the relevancy of the disputed evidence given its probative value.

b. Prejudice

That brings us to the second step of our review. At this step, the judge may still exclude relevant evidence if the risk of undue prejudice outweighs the probative value of the evidence. *State v. Seba*, 305 Kan. 185, 213, 380 P.3d 209 (2016). An appellate court

reviews the district court's decision for an abuse of discretion. 305 Kan. at 213. Vazquez, as the party alleging an abuse of discretion, bears the burden to prove such abuse occurred. *State v. Mireles*, 297 Kan. 339, 354, 301 P.3d 677 (2013).

Vazquez contends that the photos were overly prejudicial. When a photograph suggests that a defendant has a criminal history or otherwise had prior exposure to the criminal justice system, it can carry the risk of subjecting that individual to undue prejudice and therefore may be inadmissible. See *State v. Schmidt*, No. 120,770, 2020 WL 2781692, at *3 (Kan. App. 2020) (unpublished opinion) (citing *State v. Davis*, 213 Kan. 54, 58, 515 P.2d 802 [1973]).

In Kansas, the admissibility of such photographs is largely governed by its contents. In *State v. Roberts*, 261 Kan. 320, 328, 931 P.2d 683 (1997), the district court allowed the State to admit Roberts' mugshot from a prior arrest into evidence in his current trial and Roberts challenged that decision on appeal. The Supreme Court upheld the ruling finding that the district court "went out of its way to minimize" the prejudicial effect of the mugshot. 261 Kan. at 329. In so doing, it highlighted the fact the State used the term "photograph" as opposed to "mugshot" and shielded the jury from the information on the back of the photo which included details about Roberts' prior arrest. 261 Kan. at 329. More recently in *Schmidt*, the district court likewise allowed a similarly redacted mugshot into evidence. Following *Roberts'* lead, the *Schmidt* panel held the district court "took sensible, preventive steps to minimize any potentially prejudicial effect the photograph might have had." 2020 WL 2781692, at *3. Thus, it did not abuse its discretion when it allowed the State to admit the photo into evidence. 2020 WL 2781692, at *3.

Kansas courts have also considered the timing of the photo in conducting the prejudice portion of the analysis. In *State v. Green*, No. 90,999, 2004 WL 2578672, at *6 (Kan. App. 2004) (unpublished opinion), the district court admitted the booking photo taken of Green at the time of her arrest for the crime for which she was on trial. On appeal, Green tried to analogize admission of her contemporaneous booking photo with those cases in which courts determined prior mugshots to be inadmissible. But the *Green*

panel held her reliance on those cases was misplaced because a booking photo for the current crime does not carry the same potential for an unduly prejudicial impact as a mugshot from a prior case. Rather, the latter may suggest a history of criminality. And since the mugshot in *Green* showed when it was taken, the jury knew it did not arise from a prior arrest, so its admission was not overly prejudicial. In *State v. Joeckel*, No. 105,117, 2012 WL 307661, at *7-9 (Kan. App. 2012) (unpublished opinion), a panel of this court followed the reasoning set forth in *Green* and held the district court did not abuse its discretion when it allowed booking photos taken both prior and concurrent with Joeckel's arrest for the current crime to be admitted into evidence.

Taken together, *Roberts* and its progeny suggest there are two relevant inquiries when reviewing the admission of booking photos: (1) what measures the district court undertook to minimize the prejudicial effect of the image; and (2) whether it was taken as part of the crime for which the defendant is currently on trial or arose from an earlier encounter the defendant had with law enforcement officers.

With that framework in mind, we conclude that the district court did not abuse its discretion when it allowed the State to admit Vazquez' booking photo into evidence. While he is clearly in custody in the photo, the prosecutor clarified for the jury that it was taken on "January 3, 2018," the date of his arrest in this case. Thus, the photo did not suggest Vazquez had a history of criminality. Rather, it simply memorialized his appearance at the time of his arrest and the State later employed it for legitimate identification purposes. Vazquez did not suffer undue prejudice as a result of the admission of his booking photo. He has failed to sustain his burden to prove the district court abused its discretion in allowing the photo into evidence. The decision of the district court is affirmed.

DID THE PROSECUTOR COMMIT REVERSIBLE ERROR IN CLOSING ARGUMENTS?

The final issue before us involves Vazquez' assertion that reversible error occurred when the prosecutor commented on the credibility of the State's witnesses during closing argument. The State contends that the prosecutor did not commit error and that her closing argument was within the wide latitude allowed under Kansas law.

We apply a two-step analysis to claims of prosecutorial error. First, we must determine whether an error occurred. Second, if an error occurred, we must determine whether the error resulted in prejudice. *State v. Patterson*, 311 Kan. 59, 70, 455 P.3d 792, *cert. denied* 141 S. Ct. 292 (2020). In determining error, we are to consider whether the "prosecutor's actions or statements 'fall outside the wide latitude afforded prosecutors to conduct the State's case and attempt to obtain a conviction in a manner that does not offend the defendant's constitutional right to a fair trial.'" 311 Kan. at 70. Furthermore, we must keep in mind that prosecutorial error is harmless if the State proves beyond a reasonable doubt that the error did not affect the outcome of the trial in light of the entire record. See *State v. Blansett*, 309 Kan. 401, 412, 435 P.3d 1136 (2019).

Three separate statements by the prosecutor provide the foundation for Vazquez' claim. He argues that each of the three statements reflect attempts by the prosecutor to impermissibly bolster the victims' credibility. The first is the prosecutor's remark, "[E.R.S.] did admit the truth and tell her mom that she had been sexually touched by the defendant in this case." The remaining two are captured in the italicized portions from segments of the State's closing reflected below:

"She could have easily said, yeah, it happened right there. *But, no, she wanted to make sure that the truth came out to you and that she was honest with you. She said, no, ma'am, it was not that car. It was a different car*. So take those things into consideration when you are thinking about whether the statements that these girls gave you were true."

". . . . *And remember what you saw*. You saw two very emotional young ladies trying to tell you what happened to them so that you could find him guilty."

To determine whether prosecutorial error occurred, we analyze whether the challenged comments offended Vazquez' right to a fair trial. *State v. Sherman*, 305 Kan. 88, 109, 378 P.3d 1060 (2016). Prosecutors enjoy wide latitude in crafting closing arguments, which allows them to argue reasonable inferences that may be drawn from the evidence. *State v. Pribble*, 304 Kan. 824, 832, 375 P.3d 966 (2016). And while prosecutors are prohibited from offering their personal assessment of a witness's credibility, they may discuss legitimate factors the jury can consider when conducting credibility assessments and may argue why certain factors in the case may lead to a compelling inference of truthfulness. 304 Kan. at 835.

In *State v. Scaife*, 286 Kan. 614, 186 P.3d 755 (2008), comments much like those challenged here were alleged to be unfairly prejudicial. First, in commenting on audio from the victim's 911 call, the prosecutor urged the jury, "'Listen to his voice, listen to his pleading, listen to the manner in which he asked for help. That's how you know he's telling the truth.'" 286 Kan. at 623. Later, the prosecutor argued, "'Why believe [the victim]? Folks, you saw him, you've heard him from the very beginning of this case which was seconds after it began. Evaluate his testimony, evaluate his demeanor, evaluate what he told you, and you don't have any other conclusion.'" 286 Kan. at 623. The Supreme Court found these comments were permissible and held that a prosecutor may explain what the jury should look for when assessing witness credibility, especially when the defense has attacked the credibility of the State's witnesses (as counsel for Vazquez did in this case). 286 Kan. at 624-25.

The complained of remarks here were likewise permissible. First, the prosecutor's comment that E.R.S. "did admit the truth" were in the same vein as the prosecutor's statement in *Scaife*, "'That's how you know that he's telling the truth.'" 286 Kan. at 623. And as in *Scaife*, the prosecutor here sought to explain why the jury could find E.R.S. credible within the broader context of all the witnesses' testimonies. The second comment that Vazquez challenges, where the prosecutor argued that the jury should note that E.R.S. clarified the rape occurred next to a van instead of a car, also bears similarities to *Scaife*. The prosecutor simply crafted a narrative and argued the jury could draw a reasonable inference, that E.R.S. told the truth, from her testimony. See *Scaife*, 286 Kan. at 624. Finally, we conclude that the prosecutor's comment, "You saw two very emotional young ladies trying to tell you what happened to them so that you could find him guilty," is a nonissue. Prosecutions involving sex crimes perpetrated against young children are not stoic, sterile proceedings. Rather, they are frequently, and not surprisingly, emotional undertakings for those directly affected by the perpetrator's unlawful conduct. The complained of comment merely recounts for the jury what it already witnessed from the girls in a way that does not impermissibly pander to the jurors' emotions and sensitivities. We decline to find the statements were erroneous.

Affirmed.

No. 123,444

JENNIFER K. SCHWARZ, *Appellee*, v. JULIE A. SCHWARZ, *Appellant*.

SYLLABUS BY THE COURT

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

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

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

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

5. ATTORNEY FEES—*Grandparent Visitation Appeal—Court's Authority to Award Fees under Rule 7.07(b).* In the appeal of a decision involving grandparent visitation, an appellate court has authority to award attorney fees under Supreme Court Rule 7.07(b) (2022 Kan. S. Ct. R. at 51) because the district court had authority under K.S.A. 2020 Supp. 23-3304 to award attorney fees in the proceedings below.

Appeal from Johnson District Court; ERICA K. SCHOENIG, judge. Opinion filed March 18, 2022. Affirmed.

Ronald W. Nelson, of Ronald W. Nelson, PA, of Overland Park, for appellant.

Stephanie Goodenow, of Goodenow Law, LLC, of Lenexa, and *Dennis Stanchik*, guardian ad litem, of Olathe, for appellee.

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

MCANANY, S.J.: In this appeal the mother (Mother) of two minor boys challenges the district court's order giving her sons' paternal grandmother (Grandmother) visitation rights under K.S.A. 2018 Supp. 23-3301. We first address the issue of jurisdiction and determine that the district court had jurisdiction to consider Grandmother's petition, and this court has jurisdiction to consider Mother's appeal. Next, we determine that the district court did not err in granting Grandmother visitation with her grandchildren. Finally, we decline to assess Mother's attorney fees and costs on appeal against Grandmother.

FACTUAL AND PROCEDURAL BACKGROUND

Mother and the boys' father (Father) were in the midst of a divorce action when Father suddenly died. Father's death obviously ended both the marriage and the pending divorce action. Thereafter, Mother began limiting contact between her sons and Grandmother. As a result, Grandmother filed this action in November 2018 for grandparent visitation rights under K.S.A. 2018 Supp. 23-3301. This statute allows a district court to grant visitation rights to grandparents upon finding "that the visitation rights would be in the child's best interests and when a substantial relationship between the child and the grandparent has been established." K.S.A. 2018 Supp. 23-3301(b). Grandmother contended that visitation was justified because of the strong bond she had formed with her grandsons before Father's death and it would be in her grandsons' best interest to continue that relationship.

Following the hearing on Grandmother's petition, the district court noted that "K.S.A. 23-3301(c) applies because the children's father is deceased and Petitioner is the children's paternal grandmother." The court granted visitation to Grandmother, and Mother appeals, arguing that the district court violated her constitutional

due process rights by infringing on her fundamental right as a parent to make decisions regarding the care, custody, and control of her children.

ANALYSIS

Subject Matter Jurisdiction

Before reaching the merits of Mother's appeal, we must address the issue of jurisdiction. If the district court lacked the jurisdiction to enter the order for grandparent visitation, we do not have jurisdiction to address Mother's claims and must reverse the district court's order. See *In re Care & Treatment of Emerson*, 306 Kan. 30, 39, 392 P.3d 82 (2017). Whether jurisdiction exists is a question of law over which our review is unlimited. 306 Kan. at 34.

Although Mother failed to raise the issue of jurisdiction before the district court, that did not invest the district court with subject matter jurisdiction. *Goldman v. University of Kansas*, 52 Kan. App. 2d 222, 225, 365 P.3d 435 (2015). On appeal, we have an independent duty to question subject matter jurisdiction. *Wiechman v. Huddleston*, 304 Kan. 80, 84-85, 370 P.3d 1194 (2016). Subject matter jurisdiction may be raised at any time, including for the first time on appeal on our own motion. *Emerson*, 306 Kan. at 33. In considering the jurisdiction question we must interpret the relevant statutes, which is an issue of law over which we have unlimited review. *Nauheim v. City of Topeka*, 309 Kan. 145, 149, 432 P.3d 647 (2019).

We recently issued a show cause order directing the parties to address the issue of subject matter jurisdiction, specifically directing the parties' attention to contrary conclusions reached by this court about the correct interpretation of the grandparent visitation statute. The parties responded, and the matter is now ripe for our consideration.

The statute in question, K.S.A. 2018 Supp. 23-3301, provides as follows:

> "(a) In an action under article 27 of chapter 23 of the Kansas Statutes Annotated, and amendments thereto, grandparents and stepparents may be granted visitation rights.

"(b) The district court may grant the grandparents of an unmarried minor child reasonable visitation rights to the child during the child's minority upon a finding that the visitation rights would be in the child's best interests and when a substantial relationship between the child and the grandparent has been established.

"(c) The district court may grant the parents of a deceased person visitation rights, or may enforce visitation rights previously granted, pursuant to this section, even if the surviving parent has remarried and the surviving parent's spouse has adopted the child. Visitation rights may be granted pursuant to this subsection without regard to whether the adoption of the child occurred before or after the effective date of this act."

Article 27 of chapter 23 of our Kansas statutes, which is referred to in K.S.A. 2018 Supp. 23-3301, is the chapter of our revised Kansas Family Law Code entitled "Dissolution Of Marriage." Here, Mother and Father had been involved in a pending divorce action when Father died. Father's death in August 2018 ended the marriage and the divorce action. "A divorce action is purely personal and ends on the death of either spouse." *Wear v. Mizell*, 263 Kan. 175, 180, 946 P.2d 1363 (1997). It was after Father's death that Grandmother initiated this action in November 2018 for grandparent visitation under K.S.A. 2018 Supp. 23-3301. The district court granted relief under K.S.A. 2018 Supp. 23-3301(c).

The most fundamental rule of statutory construction is that the intent of the Legislature governs if that intent can be ascertained. *State ex rel. Schmidt v. City of Wichita*, 303 Kan. 650, 659, 367 P.3d 282 (2016). When interpreting a statute, we must first attempt to ascertain legislative intent through the statutory language enacted, giving common words their ordinary meanings. *Nauheim*, 309 Kan. at 149. When a statute is plain and unambiguous, we do not speculate about the legislative intent behind that clear language. *Ullery v. Othick*, 304 Kan. 405, 409, 372 P.3d 1135 (2016). But if the statute's language is unclear or ambiguous, we turn to the process of statutory construction and review the statute's legislative history to determine legislative intent. *Nauheim*, 309 Kan. at 150.

The conflicting analyses of different panels of our court on the issue of subject matter jurisdiction in a grandparent visitation case indicate an ambiguity in the statute that requires us to resort to

statutory construction and the statute's legislative history in order to determine the legislature's intent in enacting this statute.

In *T.N.Y. ex rel. Z.H.*, 51 Kan. App. 2d 956, 962-63, 360 P.3d 433 (2015), a panel of our court considered a motion by grandparents seeking visitation with their grandchild in a pending paternity action. Grandparent visitation is not a right at common law. The right exists only to the extent it is created by statute. Thus, the court examined the history of the statutes addressing grandparent visitation over the years. The court concluded that subsection (a) of the current version of the visitation statute, K.S.A. 2014 Supp. 23-3301, clearly limited motions for grandparent visitation to pending dissolution of marriage actions.

The court found that the current version of K.S.A. 2014 Supp. 23-3301 was the result of recodification of prior statutes, which the legislature intended to reorganize and combine without making any substantive changes in the law. In spite of the clear legislative intent to the contrary, the *T.N.Y.* court declared that the enactment of K.S.A. 2014 Supp. 23-3301 in its current form did, in fact, affect a substantive change in the law by stripping away the authority of district courts "to grant grandparent visitation in paternity actions—a power that they held for more than 40 years in Kansas—while continuing to grant district courts the authority to allow grandparent visitation in dissolution of marriage actions." 51 Kan. App. 2d at 964. Thus, in response to the grandparents' claim that limiting grandparent visitation to marriage dissolution actions unconstitutionally treated children of unmarried parents differently than children of married parents in violation of equal protection, the court struck the offending language in subsection (a) of K.S.A. 2014 Supp. 23-3301 which limited requests for grandparent visitation to pending marriage dissolution actions. 51 Kan. App. 2d at 968.

The following year our court took up *Baker v. McCormick*, 52 Kan. App. 2d 899, 380 P.3d 706 (2016). There, the grandparents sought visitation in a Protection from Abuse (PFA) case. The court found that the holding in *T.N.Y.* did not extend to PFA actions.

We need not dwell on the holding in *Baker* because of the unique circumstances of PFA actions. PFA actions do not lend themselves to dealing with issues of grandparent visitation. The

Protection From Abuse Act, K.S.A. 60-3101 et seq., makes no mention of grandparent visitation and provides only for temporary custody orders, usually for a period up to one year with the option of a one-year extension. K.S.A. 2020 Supp. 60-3107. The rigid time schedule for PFA actions is incompatible with the time needed to hear and resolve a request for grandparent visitation.

More recently, in *Frost v. Kansas Department for Children and Families*, 59 Kan. App. 2d 404, 413, 483 P.3d 1058, *rev. denied* 313 Kan. 1040 (2021), the court considered K.S.A. 2019 Supp. 23-3301 in the context of an action for grandparent visitation independent of a pending child in need of care (CINC) case. The district court, relying on *T.N.Y.*, dismissed the action for lack of subject matter jurisdiction. On review, our court again examined the history of the various Kansas statutes that provided for grandparent visitation over the years. Like the court in *T.N.Y.*, the *Frost* court determined that the Legislature did not intend to make substantive changes in the recodification of the statutes. But unlike in *T.N.Y.*, the *Frost* court determined that, in fact, no substantive changes resulted from the recodification:

"[T]he *T.N.Y.* panel found that the plain and unambiguous language of the 2012 law restricts grandparent visitation to divorce actions only, because those are article 27 chapter 23 actions. 51 Kan. App. 2d at 962-63. In other words, by compiling the several laws into one statute, grandparents lost their previously recognized right to file an independent action seeking visitation. It is from this holding that we depart." *Frost*, 59 Kan. App. 2d at 411.

The *Frost* court observed that K.S.A. 2019 Supp. 23-3301 is not part of the statutes dealing with divorce but rather is the first statute in the article entitled "Third Party Visitation."

"[T]here are no words in this statute that says it applies only to divorce cases. True, subsection (a) deals with such cases, but subsections (b) and (c) do not. Just because a comes before b and c in the alphabet, it does not follow that (a) controls (b) and (c)." 59 Kan. App. 2d at 412.

The *Frost* court considered K.S.A. 2019 Supp. 23-3301 in the context of the other statutes that make up article 23, particularly K.S.A. 2019 Supp. 23-3303, which states: "An action for reasonable visitation rights of grandparents as provided by this act shall be brought in the county in which the child resides with the child's parent, guardian or other person having lawful custody."

It seems to us—and the *Frost* court agreed—that if the Legislature intended for K.S.A. 2020 Supp. 23-3301 to confine a grandparent's right to request visitation to a pending marriage dissolution action, then it would not have expanded that right in K.S.A. 2019 Supp. 23-3303 to permit an action in the county where "the child resides with the child's parent, guardian or other person having lawful custody." That could be a county other than the county where the child's parents' divorce case was pending.

The *Frost* court concluded that provisions in article 23 such as K.S.A. 2019 Supp. 23-3303 "show a legislative policy of preserving grandparent rights, and they are not limited to divorce cases. In this article, the Legislature has given grandparents all the tools needed to enforce their visitation rights, not limit them." 59 Kan. App. 2d at 412.

In their written responses to the show cause order, both parties supported the *Frost* analysis. We agree. The most fundamental rule of statutory construction is that the intent of the Legislature governs if that intent can be ascertained. The court in *T.N.Y.* found that the recodification of various statutes into K.S.A. 2014 Supp. 23-3301 was a substantive change in the law, in spite of the Legislature's clearly expressed intention not to make any substantive changes. We believe the holding in *Frost*—honoring the clearly expressed legislative intent—is a more sound analysis.

Accordingly, we find that the district court had subject matter jurisdiction to consider Grandmother's independent action for grandparent visitation rights under K.S.A. 2018 Supp. 23-3301.

The District Court's Ruling on Grandmother's Petition

We now turn to Mother's claim on appeal that the district court violated her constitutional due process rights by infringing on her fundamental right as a parent to make decisions about the care, custody, and control of her children.

Additional Facts

We have already set forth the basic facts. K.S.A. 2020 Supp. 23-3301(b) allows for grandparent visitation when "visitation rights would be in the child's best interests and when a substantial

relationship between the child and the grandparent has been established." Grandmother alleged in her petition that she had a substantial relationship with her grandchildren, which included "babysitting the children and taking them on vacations [before Father's death.]" In her reply, Grandmother provided a laundry list of activities she had participated in with the grandchildren. Grandmother asserted in the petition that she would

"defer to any reasonable and known visitation schedule that Mother articulates, but would request at least one weekend per month and a period of time during the summers or school breaks in which to take the children on vacation[, and] be able to attend the children's school and extracurricular activities to support them."

Mother acknowledged Grandmother's ongoing contacts and interactions with the children before Father's death, but she denied that ongoing contact with Grandmother was in the children's best interests. She asserted that Grandmother had a pattern of not seeing her grandchildren "for weeks and months at a time, after she was told by [Father] or [Mother] that various things she had done or said around the children were inappropriate." Mother asked the court to allow her, as a fit parent, to decide whether and to what extent Grandmother should have visitation with the children.

The district court held a hearing at which it determined that a substantial relationship existed and ordered the parties to complete mediation within 60 days to determine a reasonable plan for grandparent visitation.

When mediation was unsuccessful, the court appointed a guardian ad litem (GAL) for the children. After investigating the matter, the GAL recommended a grandparent visitation plan which called for family therapy between Grandmother and the grandchildren for so long as the therapist deemed necessary and up to two hours of visitation per month, after which Grandmother would have visitation one Saturday or Sunday per month for up to eight hours. Grandmother agreed with the GAL's recommendation.

Mother's proposed plan provided that she "should be the one to determine if, when, and under what circumstances, restrictions, limitations, and conditions her children should interact with grandmother." According to Mother, "[a]t this time, . . . it is in her

children's best interests that there should be no contact between the children and [Grandmother]," and that Mother "may determine at some time that it is appropriate for the children to interact with [Grandmother]. But now is not that time."

The district court held another evidentiary hearing to consider the competing visitation plans. Grandmother testified that she scaled back her original requests "to give deference to [Mother's] wants and wishes for her children," but Grandmother argued that not having structured contact with her grandchildren deprived her of the opportunity to continue fostering family ties and traditions on Father's side of the family.

Mother testified that she believed no contact was in her children's best interests based on the history of her relationship with Grandmother and Father's extended family. Mother recalled that she "had a great relationship" with Father's family for the decade they had been together before his death, but that was no longer the case. Mother believed that Grandmother blaming Mother for Father's death led to Father's extended family no longer wanting to have contact with Mother. Mother was concerned that Grandmother would tell her grandchildren that Mother had killed Father, based on similar statements Grandmother made to other individuals and to Mother herself.

Mother described incidents during the marriage when Grandmother would storm away after a disagreement with Father and Mother, and they would not see her for "months or weeks at a time." Mother also said that Grandmother often scheduled activities or made plans with the grandchildren before discussing her plans with Father or Mother. Mother did not believe Grandmother would adhere to any of Mother's guidelines for the children if grandparent visitation were awarded. Mother's position, as articulated by her counsel, was that Mother was a fit parent and a "fit parent has an absolute right to refuse to allow a grandparent to visit that parent's child. It's a fundamental right and the Court cannot invade that constitutional right."

Relying on K.S.A 2018 Supp. 23-3301(b) and (c), the district court determined that the proposed plan presented by Grandmother and the GAL was reasonable and that Mother's plan was not. This brings us to Mother's arguments on appeal.

ANALYSIS

Recognition of the Constitutional Presumptions Favoring a Fit Parent

Grandmother sought visitation with her grandchildren under K.S.A. 2018 Supp. 23-3301, which we have already discussed at length. In this appeal, Mother does not contend that K.S.A. 2018 Supp. 23-3301 is unconstitutional. Rather, she contends that the district court failed to honor Mother's due process rights in applying the statute to the facts at hand. In doing so, she claims the district court infringed on her fundamental right as a parent to make decisions about the care, custody, and control of her children.

More specifically, Mother's first claim is that the district court failed to show that it recognized the presumption that a fit parent is acting in a child's best interests and failed to give any deference to Mother's wishes by giving special weight to her proposed visitation schedule.

Grandmother questions whether Mother preserved this due process challenge for appeal. Generally, issues not raised before the district court—including constitutional grounds for reversal—cannot be raised on appeal. See *Gannon v. State*, 303 Kan. 682, 733, 368 P.3d 1024 (2016); *Bussman v. Safeco Ins. Co. of America*, 298 Kan. 700, 729, 317 P.3d 70 (2014).

But Mother does not challenge the constitutionality of K.S.A. 2018 Supp. 23-3301. Mother's complaint, which she has maintained throughout these proceedings, is that in order to protect her due process rights, the district court, before granting visitation to Grandmother, had to apply the presumption that as a fit parent she was entitled to make decisions which were in her children's best interests. Mother has preserved for review her due process argument.

There is no contest over the due process requirements that apply to this case. The Fourteenth Amendment's Due Process Clause provides that no State shall "deprive any person of life, liberty, or property, without due process of law." The United States Supreme Court has long recognized that the substantive component of the Due Process Clause "provides heightened protection against government interference with certain fundamental rights and liberty interests." *Washington v. Glucksberg*, 521 U.S. 702, 720, 117 S.

Ct. 2258, 138 L. Ed. 2d 772 (1997). In our present context, the Court has stated that "perhaps the oldest of the fundamental liberty interests" is the "the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Troxel v. Granville*, 530 U.S. 57, 65-66, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000). Whether a right to due process has been violated is a question of law over which we have unlimited review. *In re K.E.*, 294 Kan. 17, 22, 272 P.3d 28 (2012).

In her Amended Answer, Mother stated that she "does not believe that the Court should order any grandparent visitation, but should allow her as a fit parent to determine the persons with whom her children will have appropriate contact and connections." Grandmother responded:

"Grandmother affirmatively states that Mother is a fit parent, and as such, that Mother has a fundamental right to parent the children as she sees fit. Mother's proposed visitation plan should be given its due deference, and the court should presume that, absent findings of unreasonableness in the circumstances, Mother's proposed grandparent access schedule is in the children's best interests.

"Further, Grandmother affirmatively states that the court should permit Grandmother to rebut that presumption and find that Mother's total denial of any visitation plan in this case is unreasonable and contrary to the children's best interests as it subjects them to yet another loss in their young lives."

In her proposed grandparent visitation plan—the plan ultimately adopted by the court—Grandmother stated:

"There is no evidence that Mother is legally unfit to parent the children. Thus, to ensure Mother's Constitutional right to parent, this court must presume that Mother, a fit parent, acts in her children's best interests, and give weight to Mother's proposed access schedule. The court may not reject the Mother's proposed access schedule, unless the court finds Mother's proposed access schedule unreasonable.

". . . Grandmother stipulates that the Constitution requires the court to give great weight and even preference to fit parents versus third parties; however, Grandmother rejects Mother's contention that the court cannot examine relevant facts and make the legal conclusions required under the grandparent visitation statute simply because a fit parent does not welcome the inquiry."

In paragraph 9 of the court's journal entry following the trial, the court stated:

"[Mother] argues that because she is a fit parent she has the right to refuse to allow [Grandmother] visitation with the children. It is well-settled that the trial court is 'not required to make a finding of parental unfitness before awarding

grandparent visitation.' *DeGraeve v. Holm*, 30 Kan. App. 2d 865, 867, 50 P.3d 509 (2002). [Mother] cites *In re Paternity of M.V.*, 56 Kan. App. 2d 28, 400 P.3d 1178 (2018) in support of her position. In that case, the Kansas Court of Appeals found that the district court erred by adopting the grandparent's visitation plan without finding that mother's visitation plan was unreasonable. See *id.*, at 36. The Court of Appeals discussed *Troxel v. Granville*, 530 U.S. 57, 65, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000), and its progeny in Kansas and held the following:

'To sum up these decisions, when considering a parent's constitutional due process rights, the best interest of the child standard alone is an insufficient basis to award grandparent visitation. A court must presume that a fit parent is acting in the child's best interests and must give special weight to the parent's proposed visitation schedule. A court cannot reject a fit parent's visitation plan without finding it is unreasonable. But a parent's determination is not always absolute because otherwise the parent could arbitrarily deny grandparent visitation without the grandparent having any recourse.'

"[Mother] is correct that in some cases it would be reasonable for the children's parent(s) to deny visitation to a grandparent. However, in this case [Mother's] position is unreasonable. [Grandmother] has met her burden to prove that grandparent visitation with her is in the children's best interests."

The remainder of the district court's analysis is consistent with these stated principles. The court noted that Mother chose to sever contact between Grandmother and the children after Grandmother openly blamed Mother for Father's death, and Grandmother drove Father's older sons to the family lake house to commit burglary and theft. The court found that Mother was "understandably shaken, hurt, and angry" as a result of Grandmother's actions.

The district court enumerated the five basic reasons why Mother contended that it was reasonable, and in the children's best interests, that they have no visitation with Grandmother. The court noted Mother's position that her relationship with Grandmother after Father's death essentially could not be repaired so as to allow Grandmother to have visitation with the children.

We are satisfied that under the facts of this case, the district court adhered to the constitutional standards it enumerated by giving deference—but not absolute deference—to the decision of Mother as a fit parent regarding her children's contact with their Grandmother. Notwithstanding Mother being a fit parent entitled to all the constitutional deference allowed her in deciding whether and when a third party can spend time with her children, the court found that Mother's proposed visitation plan was unreasonable and not in her children's best interests.

The District Court's Findings and Conclusion Regarding Mother's Visitation Plan

Mother states that the "court must provide sufficient objective findings on which it bases the determination of unreasonableness that can be reviewed by an appellate court." Mother concludes that the district court's findings are insufficient to support the conclusion that her grandparent visitation plan is reasonable. We do not.

Mother does not challenge the sufficiency of the evidence to support the district court's findings of fact. Rather, she contends that the district court's characterization of Mother's grandparent visitation plan as unreasonable is a mischaracterization of the evidence and a conclusion which is not supported by the district court's findings.

In considering this claim, we examine de novo the facts found by the district court to determine if they constitute legal and relevant evidence that a reasonable person could accept as being adequate to support the district court's conclusion, *i.e.*, whether the evidence is sufficient to support the conclusion that Mother's proposed visitation plan was unreasonable. *State v. Doelz*, 309 Kan. 133, 138, 432 P.3d 669 (2019).

Mother argues that "there was no evidence presented that [she] was *not* considering her children's best interests." This misses the point. The issue is not whether Mother intended to protect her children's best interests, but rather whether her plan for doing so was reasonable. That is why the court in *Troxel* separates intent from action. Thus, while the court must presume that a fit parent is acting in the child's best interests and must give special weight to the parent's proposed visitation schedule, the parent's determination is not always absolute and can be overcome by a finding that the plan is unreasonable. *Troxel*, 530 U.S. at 65. Here, as the district court stated, the burden of proving unreasonableness was on Grandmother.

Under K.S.A. 2018 Supp. 23-3301(b), Grandmother must prove the following to obtain visitation rights: (1) a substantial relationship between her and her grandchildren; and (2) that visitation is in the grandchildren's best interests. In addition, Grandmother must overcome the constitutional presumptions we have already addressed.

As to the first element of K.S.A. 2018 Supp. 23-3301(b), Mother does not challenge the district court's finding that a substantial relationship existed between Grandmother and her grandchildren. As to the

constitutional presumptions, Grandmother acknowledges that Mother is a fit parent and recognizes that the district court must give "special weight" to Mother's views on grandparent visitation.

Here, the contest was whether Mother's proposed visitation plan was reasonable so as to be in the children's best interests. Obviously, if the plans presented by Mother and Grandmother were both reasonable under the circumstances, the jump ball goes to Mother under the constitutional presumptions.

We first address Mother's plan because if it is reasonable, we need look no further. Mother proposed that Grandmother have no visitation "at this time," but she allowed that she "may determine at some time that it is appropriate for the children to interact with [Grandmother]. But now is not that time."

This court has declined to apply a bright-line rule that a parent's proposed grandparent visitation plan "must be *totally unreasonable* before it can be rejected," and instead the focus must be on whether the parent's position on grandparent visitation is reasonable in light of the child's best interests when considering the totality of the circumstances. *In re Cathey*, 38 Kan. App. 2d 368, 376, 165 P.3d 310 (2007).

Focusing our attention on the findings made in paragraphs 2 and 8 through 15 of the court's journal entry following the trial, the district court addressed the testimony essential to resolve the issue of the reasonableness of Mother's no-visitation plan.

In paragraph 8 of the journal entry, the district court described the extensive contact Grandmother had with the grandchildren before Father's death.

In paragraph 9, the district court recognized from *Troxel* that the predicate for adopting Grandmother's plan for grandparent visitation is a finding that Mother's visitation plan is unreasonable. Thus, the district court concluded that "in some cases it would be reasonable for the children's parent(s) to deny visitation to a grandparent. However, in this case [Mother's] position is unreasonable. [Grandmother] has met her burden to prove that grandparent visitation with her is in the children's best interests."

In paragraph 10, the district court recited the reasons why Mother contended that it was reasonable, and in the children's best interests, that they have no visitation with Grandmother.

In paragraph 11, the court noted Mother's position that her relationship with Grandmother after Father's death essentially could not be

repaired was "not a reasonable position in light of the facts of this case." The court explained a number of things Mother complained of had not interfered with Grandmother regularly seeing the children and having a close relationship with them prior to Father's death. The court concluded:

"[Mother] is now selectively using [Grandmother's] behaviors against her as a basis to prohibit visits between [Grandmother] and the children. This has resulted in [Mother] arbitrarily denying [Grandmother] grandparent visitation since Father's death. And, ultimately, the children are being deprived of their relationship with their paternal grandmother which they enjoyed before their Father's death. This is not in the children's best interests. In *Davis v. Heath*, 35 Kan. App. 2d 86, 94, 128 P.3d 434 (2006), the Court of Appeals found the parents' decision to 'cut off' grandmother's visitation with their children to be 'unreasonable.'"

In paragraph 12, the court referred to Grandmother's grieving process following her son's death and her "transgressions" against Mother, for which Grandmother apologized. Mother complains on appeal that the district court ignored testimony that undermined the credibility of Grandmother's remorse and apology. But the court found credible Grandmother's remorse and her apology to Mother, along with Grandmother's promise to respect Mother's "boundaries and wishes related to the children." This was supported by the testimony of Grandmother's therapist. We do not redecide on appeal the issue of Grandmother's credibility. See *State v. Chandler*, 307 Kan. 657, 668, 414 P.3d 713 (2018).

In paragraph 13, the court noted the importance of the grandchildren continuing the relationship with their extended paternal family they enjoyed before Father's death.

In paragraph 14, the court noted that while the children had been engaged in therapy since Father's death, there is no evidence that Grandmother's actions or behaviors have necessitated such treatment.

In paragraph 15, the court adopted the GAL's visitation plan, which Grandmother supported, as in the best interests of the children, making particular note of the plan's period of family therapy which will reintegrate Grandmother with her grandchildren. As a reminder, the GAL's plan called for family therapy for Grandmother and the grandchildren for so long as the therapist deems necessary, plus up to two hours of visitation per month; followed by visitation for up to eight hours on one Saturday or Sunday of each month.

Mother questions the district court's characterization of her plan as unreasonable. Mother cites *Southern Kansas Stage Lines Co. v. Public Service Comm.*, 135 Kan. 657, 662, 11 P.2d 985 (1932), and Black's Law Dictionary 1379 (5th ed. 1981) for synonyms for "unreasonable" and notes several, including: foolish, unwise, absurd, silly, preposterous senseless, and stupid. We do not find any of these helpful. Here, we are to resolve the question of reasonableness by considering the totality of the circumstances. *In re Cathey*, 38 Kan. App. 2d at 376.

It goes without saying that reasonableness at its most basic level requires conformity to the requirements of the law. Beyond that, it seems to us that reasonableness requires a balancing of stimulus and response—finding a response that is commensurate with the nature and seriousness of the stimulus. Here, the stimulus is Mother's observations about Grandmother's conduct vis-à-vis her grandchildren. The response is Mother's visitation plan designed to deal with Grandmother's influence on the grandchildren.

Context is everything. Mother's plan of visitation must be a reasonable response when considering her children's best interests in the totality of the circumstances. It is one thing for a concerned Irish father to temporarily lock his young daughter in the tower upon observing the longboats of invading Vikings on a nearby shore. On the other hand, it is quite another for an overzealous guardian to permanently lock Rapunzel in the tower in an effort to protect her forever from the amorous advances of any suitors.

Here, the district court addressed Mother's complaints about Grandmother's conduct and found they were insufficient to deprive the children from having contact with Grandmother. As the court noted, several of Mother's complaints related to conduct that predated Father's death and were not found sufficient at the time to deprive Grandmother of contact with her grandchildren. Further, it is clear from the recommendation of the GAL charged with protecting the interests of the grandchildren that he believed that Mother's plan was not reasonable.

Mother's plan calls for Grandmother to have no contact whatsoever with the grandchildren. Under Mother's plan, it is unlikely that the relationship between Mother and Grandmother ever will be restored so as to permit Grandmother to have visitation. Under the circumstances, denying the grandchildren any access whatsoever to Grandmother is

not a balanced response to Grandmother's conduct. It unreasonably denies the grandchildren the benefits of maintaining a relationship with Grandmother and with their paternal extended family.

On the other hand, Grandmother's recommendation provides for an expert intermediary to try to foster the relationship between Grandmother and grandchildren through family counseling and to monitor its progress before finding it safe to expand Grandmother's visitation. Grandmother will be responsible for paying the family therapist. While clearly Mother is a fit parent, her visitation plan is unreasonable under the totality of the circumstances and is not in her children's best interests. We find no error in the district court's characterization of Mother's visitation plan.

Finally, Mother claims the district court erred in placing the burden on Mother to prove that grandparent visitation would not be in her children's best interests.

Grandmother knew and understood from the outset that the burden of proof was on her. She acknowledged in her pleading that Mother is a fit parent with the fundamental right to parent her children as she sees fit, and that the court must give deference to Mother's visitation plan and must presume that Mother's plan is in her children's best interests absent a showing that it is unreasonable under the circumstances. Moreover, Grandmother acknowledged that it was her burden to show that Mother's plan was "unreasonable and contrary to the children's best interests."

Following this protocol, the district court correctly weighed Grandmother's evidence against the fit-parent presumption and found that Grandmother rebutted the presumption that Mother's proposed visitation plan was in the children's best interests.

We find no error of law in the district court's analysis of the substantive issues raised in this appeal. There is substantial evidence in the record to support the district court's conclusion that Mother's plan—which essentially called for no visitation—was unreasonable under the circumstances. The district court applied the correct legal standards and relied on sufficient objective findings to support its decision.

Motion for attorney fees

After docketing this appeal, Mother moved us to assess Grandmother with Mother's attorney fees and costs incurred in this appeal.

She seeks attorney fees of $18,325 and costs of $2,126.88. She cites Supreme Court Rule 7.07(b) (2022 Kan. S. Ct. R. at 51) as authority for the assessment of fees. She cites no authority for the assessment of costs, but we presume she is basing this claim on Supreme Court Rule 7.07(a)(1).

Mother's counsel attached an affidavit detailing the fees and costs incurred in preparing Mother's appeal. The costs consisted of the court reporter charges for transcribing the proceedings in the district court and the appellate filing fee.

Grandmother opposes the motion. She states that she has already paid Mother's fees incurred in Mother's defense of the proceedings before the district court. Grandmother contends that it would be inequitable to assess appellate fees and costs against her on top of the fees she has already paid for Mother's attorney in the district court proceedings.

Kansas follows the American Rule, meaning the parties to litigation are expected to pay their own attorney fees and expenses unless a statute authorizes the award or there is an agreement between the parties allowing attorney fees. *Snider v. Am. Fam. Mut. Ins. Co.*, 297 Kan. 157, 162, 298 P.3d 1120 (2013); see also *Harder v. Foster*, 58 Kan. App. 2d 201, 206, 464 P.3d 382 (2020) (describing history and adoption of the American Rule). Supreme Court Rule 7.07 is in derogation of that general rule. Supreme Court Rule 7.07(b) states: "An appellate court may award attorney fees for services on appeal in a case in which the district court had authority to award attorney fees." (2022 Kan. S. Ct. R. at 52). Here, the district court had authority to award fees in the proceedings below under K.S.A. 2020 Supp. 23-3304. Under this statute, fees "shall be awarded to the respondent" in Article 33 third-party visitation cases before the district court unless justice and equity require otherwise. K.S.A. 2020 Supp. 23-3304. Thus, we have the authority to assess fees and costs in this appeal.

In doing so we are not bound by the language of K.S.A. 2020 Supp. 23-3304 requiring the assessment of costs and fees for the respondent "unless the court determines that justice and equity otherwise require." K.S.A. 2020 Supp. 23-3304. That statute clearly applies to proceedings before the district court. It does not control the assessment of costs and fees on appeal.

Supreme Court Rule 7.07(b)(2) refers us to Rule 1.5 of the Kansas Rules of Professional Conduct (2022 Kan. S. Ct. R. at 333) to determine the reasonableness of a lawyer's claimed fee when the amount

being sought under Supreme Court Rule 7.07 is being challenged. Here, Grandmother does not challenge the amount of fees now claimed. The issue turns on whether any fees should be awarded to Mother in this appeal.

Mother raises two bases in support of her claim for attorney fees and costs on appeal. First, she cites her various claimed concerns raised at trial about Grandmother having visitation with her children. In paragraph 10 of the district court's journal entry, the court addressed Mother's five principal concerns about Grandmother having visitation. The court dealt with each of Mother's concerns and concluded that they were insufficient to deny visitation to Grandmother. The court stated:

"[M]any of [Grandmother's] behaviors that [Mother] cites as reasons to keep the children away from [Grandmother] were ongoing when Father was alive. Despite this, [Mother] allowed [Grandmother] to regularly see the children and have a close relationship, to travel with the older child, and [Mother] and Father used [Grandmother] as a babysitter. [Mother] testified that Father's death did not cause her relational issues with [Grandmother], but it has 'exacerbated' them. [*Mother*] *is now selectively using* [*Grandmother's*] *behaviors against her as a basis to prohibit visits between* [*Grandmother*] *and the children. This has resulted in* [*Mother*] *arbitrarily denying* [*Grandmother*] *grandparent visitation since Father's death.*" (Emphasis added.)

For her second basis for assessing costs and fees, Mother cites her concerns about "the large value and amount of things that Appellee bought for the children and that she used to fund other expenses of the family which, in Mother's view, Appellee held over the family as leverage against them." This apparently had to do with Grandmother buying toys and gifts for the children and arranging elaborate trips for them, all contrary to Mother's wishes. In considering this claim the district court found credible Grandmother's promise to respect Mother's boundaries and wishes related to the children. The court safeguarded this finding by adopting the visitation plan that called for very limited contact between the Grandmother and her grandchildren—only two hours a month outside of therapy sessions—until the family therapist determined that further therapy was unnecessary.

Considering the totality of the circumstances, we conclude that these two bases that Mother relies upon as support for her claim for appellate fees and costs are inadequate for us to deviate from the American Rule that each party should be responsible for his or her own attorney fees and expenses. Mother's motion for the assessment of attorney fees and costs is denied.

Affirmed.

No. 123,552

KENDALL TURNER, *Appellee/Cross-appellant*, v. PLEASANT ACRES LLC, *Respondent*, and KANSAS WORKERS COMPENSATION FUND, *Appellant/Cross-appellee*.

SYLLABUS BY THE COURT

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

2. APPEAL AND ERROR—*Interpretation of Workers Compensation Statutes—Appellate Review*. Because the interpretation of workers compensation statutes involves a question of law, appellate review is unlimited. In interpreting a statute, appellate courts are not to give deference to the Board's legal analysis or determination.

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

4. WORKERS COMPENSATION—*Employer's Subrogation Rights—Legislative Determination.* The nature and extent of an employer's subrogation rights under the Kansas Workers Compensation Act are matters for legislative determination.

5. SAME—*Dual Purpose of K.S.A. 44-504*. The Kansas Legislature enacted the provisions of K.S.A. 44-504 to serve a dual purpose. First, K.S.A. 44-504(a) preserves an injured worker's right to assert a claim to recover damages caused by third parties. Second, K.S.A. 44-504(b) prevents an injured worker from receiving a double recovery for the same injuries.

6. SAME—*Injured Worker's Recovery under K.S.A. 44-504(b)—Subrogation Rights of Employer against Duplicative Recovery.* Under K.S.A. 44-504(b), if an injured worker receives a judgment, settlement, or other recovery in a claim asserted against any person or entity—other than the employer or a co-employee—who caused the injury for which compensation is payable

under the Kansas Workers Compensation Act, the employer is subrogated to the extent of the compensation and medical benefits provided and has a lien against any duplicative recovery. The subrogation lien does not include any amount paid by a third party for loss of consortium or loss of services to an injured worker's spouse.

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

Appeal from Workers Compensation Appeals Board. Opinion filed March 18, 2022. Affirmed in part, reversed in part, and remanded with directions.

Timothy A. Emerson, of Wallace Saunders Chtd., of Wichita, for appellant/cross-appellee Kansas Workers Compensation Fund.

Randy S. Stalcup, of Law Office of Randy S. Stalcup, of Andover, for appellee/cross-appellant.

Before BRUNS, P.J., MALONE, J., and RICHARD WALKER, S.J.

BRUNS, J.: In this workers compensation action, Kendall Turner sustained a work-related injury when he was involved in a head-on collision while driving a truck hauling grain for Pleasant Acres LLC. Unfortunately, the other driver was killed in the accident. Turner subsequently filed both a workers compensation claim and a lawsuit in the United States District Court for the District of Kansas against his employer's uninsured motorist carrier seeking to recover for injuries arising out of the accident. Ultimately, Turner received an award in his workers compensation action and also received a settlement in his federal lawsuit. Because Turner's employer did not have workers compensation insurance at the time of the accident, the Kansas Workers Compensation Fund (the Fund) is responsible for paying the award under K.S.A. 2020 Supp. 44-532a.

In its petition for judicial review, the Fund contends that the Kansas Workers Compensation Appeals Board (the Board) erred in finding that Turner is permanently and totally disabled, in finding that Turner is entitled to receive future medical benefits upon proper application, and in finding that the Fund does not have a subrogation lien under K.S.A. 44-504 for any duplicative recovery received by Turner in the settlement of his federal lawsuit. In re-

sponse, Turner asks this court to affirm the Board's award. In addition, he has filed a cross-petition for judicial review in which he contends that the Board erred by permitting the independent medical examiner appointed by the administrative law judge to amend his initial opinion regarding Turner's permanent partial impairment rating opinion.

In light of our review of the record as a whole, we find that the Board's award is supported by substantial competent evidence. Likewise, we find that the Board's determination that Turner is entitled to future medical expenses upon proper application is supported by substantial competent evidence. We also find that the Board did not err by allowing the independent medical examiner to amend his initial opinion regarding Turner's permanent partial impairment rating. Even so, we find that the Board did err as a matter of law in finding that the Fund is not entitled to a subrogation lien under K.S.A. 44-504 for any duplicative recovery received in the settlement of his federal lawsuit for injuries arising out of the same accident that is the subject of this workers compensation action. Thus, we affirm in part, reverse in part, and remand this matter to the Board with directions.

FACTS

While hauling grain for Pleasant Acres LLC on the afternoon of December 12, 2016, Turner was involved in an accident in Kiowa County while driving on Highway 54 on his way to Bucklin. According to Turner, a vehicle heading eastbound crossed the center line and struck the tractor-trailer he was driving head-on. As a result of the accident, the driver of the other vehicle was pronounced dead. Turner was evaluated by paramedics for injuries at the scene of the accident and went to the emergency room at Great Bend Regional Hospital the next day.

An MRI revealed that Turner had a 20% compression fracture at the 12th thoracic (T12) vertebra. He was treated by Dr. Vivek Sharma, an orthopedic surgeon, who placed him in a back brace. Turner also reported pain in his lumbar spine, left hip, and his left leg. To help address his pain, Turner's primary care physician prescribed narcotic pain medication.

Approximately 25 years before the accident that is the subject of this appeal, Turner had suffered a previous back injury while working for a different employer. Evidently, Turner fell from a 15-foot stock tank and injured his lower back. He also suffered from a pinched nerve that caused pain from his right shin to his right ankle. At the time of his first deposition, Turner recalled being treated by multiple health care providers at the time of his injury and bringing a workers compensation claim. Still, he could not remember whether he had received an impairment rating.

On December 30, 2016, Turner filed a workers compensation claim against Pleasant Acres LLC. At the time of the accident, Pleasant Acres LLC did not have workers compensation insurance coverage. As a result, Turner provided notice to implead the Fund under K.S.A. 2016 Supp. 44-532a(a), which provides that "the injured worker may apply to the director for an award of the compensation benefits, including medical compensation, to which such injured worker is entitled, to be paid from the workers compensation fund."

Dr. David Hufford—who was appointed as an independent medical examiner by the administrative law judge initially assigned to Turner's claim—examined Turner and confirmed that he had suffered a T12 compression fracture as well as residual lumbar and right sacroiliac pain as a result of the accident. For that reason, Dr. Hufford referred Turner to a neurosurgeon—Dr. Matthew Henry—for further evaluation. On January 19, 2018, Dr. Henry performed a kyphoplasty to help relieve the pain caused by the T12 compression fracture. After the surgery, Turner reported that the pain in his thoracic spine had improved but he reported that the pain in his lower back continued to make it hard to sit, stand, stoop, and sleep.

Unbeknownst to the Fund, Turner also filed a lawsuit in the United States District Court for the District of Kansas against Continental Western Insurance Company on June 7, 2018. *Kendall Turner v. Continental Western Insurance Company*, 2018-CV-02305 (D. Kan. 2018). It is undisputed that Continental Western Insurance Company carried the uninsured motorist coverage on the truck that Turner was driving on behalf of his employer on December 12, 2016. In his complaint, Turner alleged that the other

driver—who died as a result of injuries suffered in the accident—"negligently and carelessly drove his vehicle over the left of center, thereby proximately causing an accident and severe injuries and damages to [Turner]."

Turner also alleged in his complaint that the decedent was "negligent, reckless, wanton and careless" in at least 12 ways, including but not limited to failing to maintain his vehicle in the appropriate lane, driving left of center, inattentive operation of a motor vehicle, and failing to take evasive action. As a result of the decedent's conduct, Turner claimed that he "received injuries to his spine and back" and had suffered damages including "pain and suffering, mental anguish, loss of time, loss of enjoyment of life, medical expenses, economic loss, permanent disfigurement, and permanent disability." Thus, Turner prayed for a judgment against the uninsured motorist carrier to recover the damages caused by the decedent.

The parties to the federal lawsuit executed a "Settlement Agreement and Release" on December 17, 2018. The settlement provides that in exchange for the payment of $230,000 by Continental Western Insurance Company, Turner agreed to release all claims arising out of the injuries, damages, and losses sustained by him in the accident on December 12, 2016. The claims released included—among other things—"all past, present and future damages or benefits for wage loss benefits, essential services, medical bills or benefits, rehabilitation benefits, counseling, pain and suffering, emotional distress, permanent impairment or disfigurement, and any and all other damages" arising out of the accident. However, the settlement agreement does not include an itemization of how much was paid for each element of damage.

Meanwhile in the workers compensation action, Turner retained Dr. Daniel Zimmerman—an internal medicine physician—as an expert witness. In a report dated June 14, 2018, Dr. Zimmerman rendered the following opinion:

> "[Turner] sustained a T12 compression fracture but also sustained injuries affecting the lumbosacral spine which is noted by inference in the emergency department triage report dated December 13, 2016 at which time it was reported that he on that date was complaining of lower and upper back pain.

"The treatment that [Turner] has received was for the compression fracture at T12. He has had little treatment for the persistent pain and discomfort as a consequence of the lumbar spine injury.

"On examination when seen in this office, [Turner] had range of motion restrictions at the lumbar level. He had pain and discomfort in palpation over the lumbar spine and lumbar paraspinous musculature. He had a positive straight leg raising test bilaterally. He had sensory change in the right lower extremity."

Dr. Zimmerman opined that the accident was the prevailing factor causing Turner's thoracic compression fracture as well as the symptomatic lumbar disc narrowing of the lumbar spine. Dr. Zimmerman further opined that Turner had not reached maximum medical improvement and would benefit from future medical treatment. In Dr. Zimmerman's opinion, Turner has a 9% permanent partial impairment of function based on the Sixth Edition of the American Medical Association (AMA) Guides to the Evaluation of Permanent Impairment (6th ed. 2008).

In addition, Dr. Zimmerman rendered the following opinion regarding Turner's permanent work restrictions:

"[Turner] is capable of lifting 10 pounds on an occasional basis and 5 pounds on a frequent basis. He should avoid frequent flexing of the lumbosacral spine and, thus, should avoid frequent bending, stooping, squatting, crawling, kneeling, and twisting activities at the lumbar level as such activities would be likely to increase the pain and discomfort affecting the lumbar spine and lumbar paraspinous musculature.

"He is able to sit for approximately 20 to 30 minutes before back pain and discomfort would cause him to move about to change positions. He is able to stand for approximately 15-20 minutes before pain and discomfort affecting the thoracolumbar spine would cause him to wish to get off his feet. He is able to walk, by his report, approximately 7 blocks before pain and discomfort affecting the thoracolumbar spine and right lower extremity would cause him to wish to get off his feet."

Turner also retained Paul Hardin—a vocational rehabilitation consultant—to evaluate his ability to be gainfully employed. Based on Hardin's report, Dr. Zimmerman found Turner can no longer perform 10 out of 14 job tasks, which results in a 71% task loss. According to Hardin, Turner has a 100% wage loss—based on his work restrictions, age, physical capabilities, education, training, prior experience, and geographical area—and is essentially unemployable. On the other hand, Dr. Hufford—who performed the independent medical examination—found that Turner

can no longer perform 8 out of 14 tasks, which results in a 57% task loss. Nevertheless, Dr. Hufford acknowledged that it would be difficult for Turner to find gainful employment.

Additionally, Turner was evaluated by Steven Benjamin—who is also a vocational rehabilitation consultant—at the Fund's request. Based on Benjamin's report, Dr. Hufford opined that based on his work restrictions, Turner could no longer perform 8 of 16 job tasks, which results in a 50% task loss. In Benjamin's opinion, Turner could potentially perform a truck driving position that did not involve loading and unloading. Yet Benjamin recognized that under his current work restrictions, Turner has 100% wage loss and cannot engage in gainful employment. According to Turner, he has been unemployed since the accident despite having submitted numerous employment applications.

On January 10, 2019, Turner returned to Dr. Hufford for a second independent medical examination. In his written report, Dr. Hufford rendered the opinion that Turner suffered from a T12 compression fracture and residual pain including the right sacroiliac joint as a result of the work-related accident. Further, Dr. Hufford opined that the accident was the prevailing factor for Turner's thoracic and right sacroiliac pain. However, in Dr. Hufford's opinion, the prevailing factor for Turner's low back pain—even if it had increased after the accident—is a preexisting condition. In particular, Dr. Hufford noted that Turner was already taking prescription pain medication for chronic low back pain before the accident at issue in this workers compensation action.

Dr. Hufford assigned Turner a permanent partial impairment rating under the Sixth Edition of the AMA Guides of 8% to the body as a whole. This rating was based on a 6% impairment of the thoracic spine and a 2% impairment relating to the right sacroiliac strain. As for the need for future medical treatment, Dr. Hufford opined:

"No future medical needs are anticipated as a consequence of this injury. Specifically, with the presence of chronic low back pain requiring opioid analgesics prior to the occupational incident of December 12, 2016 there is no further treatment anticipated as a consequence of this specific injury. Certainly one may need to consider apportionment for the dosage and schedule of the analgesics. No future surgical intervention appears warranted. A direct right sacroiliac injection could lessen some of his residual symptomatology but would unlikely be restorative at this point."

On June 11, 2019, an administrative law judge held the regular hearing on Turner's workers compensation claim. Turner testified at the hearing and several exhibits—including various deposition transcripts—were admitted into evidence. At some point following the regular hearing, the Fund learned of Turner's federal lawsuit arising out of the same accident as this workers compensation action. By that time, the lawsuit had been settled without notice being provided to the Fund. In response to learning of the settlement of the lawsuit, the Fund moved for a suspension of the terminal dates in this action in order to obtain additional discovery in an attempt to protect its subrogation and lien rights under K.S.A. 44-504.

The Fund also discovered the records from Turner's previous workers compensation actions after the regular hearing. The Fund provided the additional records to Dr. Hufford, and he was deposed again on January 2, 2020. Dr. Hufford testified that after reviewing the records relating to Turner's 1995 and 1997 workers compensation claims, he had revised his opinion. Dr. Hufford opined that Turner's permanent partial impairment rating under the Sixth Edition of the AMA Guides should be 7%—instead of 8%—of the body as a whole.

On March 11, 2020, the original administrative law judge assigned to Turner's workers compensation action recused, and another administrative law judge was appointed to replace her. About four months later, on July 27, 2020, the new administrative law judge assigned to the claim issued a 22-page award in favor of Turner. In the award, the administrative law judge found that both Dr. Zimmerman's impairment rating of 9% and Dr. Hufford's impairment rating of 7% was supported by the evidence. Giving "equal weight" to each opinion, the administrative law judge determined that Turner sustained an 8% permanent partial functional impairment to the body as a whole arising out of the work-related accident on December 12, 2016.

After reviewing the conflicting opinions rendered by the expert witnesses, the administrative law judge also concluded that Turner is permanently and totally disabled as a result of the accident. In addition, she concluded that Turner "has met his burden to prove that it is more probable than not that he will require future

medical treatment related to his injuries" and ordered that such benefits would be considered "upon proper application." Ultimately, the administrative law judge awarded permanent total disability compensation to Turner at the rate of $578.34 per week but not to exceed $155,000. Finally, the administrative law judge denied the Fund's request for a subrogation credit under K.S.A. 44-504.

Subsequently, the Fund filed a timely application for review to the Board, which held oral argument on November 19, 2020. In an eight-page order entered on December 16, 2020, the Board affirmed the administrative law judge's award in its entirety. Thereafter, the Fund filed a timely petition for judicial review, and Turner filed a timely cross-petition for review.

ANALYSIS

Issues Presented and Standard of Review

There are four issues presented on appeal. First, whether the Board erred in determining that Turner is permanently and totally disabled. Second, whether the Board erred in finding that Turner is entitled to future medical benefits upon proper application. Third, whether the Board erred in concluding that the Fund is not entitled to a right of subrogation and lien under K.S.A. 44-504. Fourth, whether the Board erred in permitting the independent medical examiner to amend his opinion regarding Turner's permanent impairment rating.

We review the Board's decision under the Kansas Judicial Review Act (KJRA), K.S.A. 77-601 et seq. Pursuant to the KJRA, the party challenging the Board's action bears the burden of showing its order was invalid. See K.S.A. 77-621(a)(1). We must review the record to determine whether the decision of the Board is supported by evidence that is substantial when viewed "in light of the record as a whole." K.S.A. 77-621(c)(7). In other words, we are to review the adequacy of the evidence "in light of all the relevant evidence in the record cited by any party" either in support of or detracting from the Board's findings. K.S.A. 77-621(d). We should also take into consideration "any determinations of veracity by the presiding officer who personally observed the demeanor of the witness and the agency's explanation of why the relevant

evidence in the record supports its material findings of fact." K.S.A. 77-621(d). We are not, however, to reweigh the evidence presented to the Board. K.S.A. 77-621(d).

The ultimate determination of whether the Board's findings are supported by substantial competent evidence is a question of law. *Atkins v. Webcon*, 308 Kan. 92, 95, 419 P.3d 1 (2018). Likewise, interpretation of workers compensation statutes involves a question of law, and our review is unlimited. *Hawkins v. Southwest Kansas Co-op Service*, 313 Kan. 100, 107, 484 P.3d 236 (2021). In considering an interpretation of a statute, we owe no deference to the Board's legal analysis or determination. *Estate of Graber v. Dillon Companies*, 309 Kan. 509, Syl. ¶ 2, 439 P.3d 291 (2019).

The fundamental rule of statutory construction is determining the Legislature's intent. In doing so, we "begin with the plain language of the statute, giving common words their ordinary meaning." If a statute is plain and unambiguous on its face, we are not to speculate about the legislative intent behind that clear language. In particular, we are to "refrain from reading something into the statute that is not readily found in its words. [Citation omitted.]" *Johnson v. U.S. Food Service*, 312 Kan. 597, 600-01, 478 P.3d 776 (2021). Only if the language of the statute is ambiguous are we to look to the statutory canons of construction to resolve the uncertainty. 312 Kan. at 601.

Extent of Turner's Impairment

The Fund contends that Turner's workers compensation award should have been based solely on the opinion of the independent medical examiner, Dr. Hufford, who found that Turner suffered a 7% functional impairment. The Fund suggests that because Dr. Hufford was appointed by the administrative law judge and was authorized to provide medical treatment, the Board should have given his opinions "greater weight" than the opinions of Dr. Zimmerman—who was retained as an expert witness by Turner. In particular, the Fund argues that Dr. Zimmerman's opinions should be discounted because he examined Turner on only one occasion,

that he reviews cases "almost exclusively for plaintiffs and claimants," and that his "opinions were bought and paid for by Claimant."

A permanent total disability exists "when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Expert evidence shall be required to prove permanent total disability." K.S.A. 2020 Supp. 44-510c(a)(2). In other words, an employee is permanently and totally disabled when the employee is "'essentially and realistically unemployable.'" *Wimp v. American Highway Technology*, 51 Kan. App. 2d 1073, 1078, 360 P.3d 1100 (2015). Whether an employee is able to engage "in substantial and gainful employment is a question of fact," and the appellate courts "review a challenge to the Board's factual findings in light of the record as a whole to determine whether the findings are supported by substantial evidence." 51 Kan. App. 2d at 1076.

Here, both Dr. Hufford and Dr. Zimmerman rendered opinions about the nature and extent of Turner's functional impairment under the Sixth Edition of the AMA Guides to the Evaluation of Permanent Impairment. Although Dr. Hufford initially assigned Turner a rating of 8% impairment to the body as a whole, he later amended his opinion to a rating of 7% impairment to the body as a whole after reviewing additional medical records from Turner's two prior workers compensation cases. On the other hand, Dr. Zimmerman assigned Turner a rating of 9% impairment to the body as whole based on his examination and review of medical records.

Certainly, reasonable physicians can differ in their opinions regarding the nature and extent of a claimant's work-related injuries. Significantly, the administrative law judge found both Dr. Hufford and Dr. Zimmerman to be credible. She also found "the impairment rating opinions of both Dr. Hufford and Dr. Zimmerman to be reasonable and supported by the evidence." As a result, she accorded both opinions "equal weight" and ultimately concluded that Turner had "sustained an 8% permanent partial functional impairment to the body as a whole as a result of his December 12, 2016, work-related accident."

The administrative law judge then turned her attention to the opinions rendered by the vocational rehabilitation consultants

about Turner's ability to work. In doing so, she considered K.S.A. 2020 Supp. 44-510c(a)(2), which defines "permanent total disability" to mean that "the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment." The administrative law judge found based on her review of the evidence that Turner had "met his burden to prove that he is permanently and totally disabled as a result of his December 12, 2016, work-related accident."

Specifically, the administrative law judge found that Hardin—the vocational rehabilitation expert who was retained by Turner—opined "that Claimant is permanently and totally disabled under both the restrictions of Dr. Zimmerman and Dr. Hufford." In contrast, she found that Benjamin—the vocational rehabilitation expert who was retained by the Fund—"opined that Claimant is permanently and totally disabled under the restrictions of Dr. Zimmerman but stated that Claimant is capable of substantial and gainful employment under Dr. Hufford's restrictions." Nevertheless, Benjamin agreed that if Turner could not find "a non-touch driving position that does not require loading or unloading," he would be considered permanently and totally disabled.

The administrative law judge also reviewed the opinions of Dr. Hufford and Dr. Zimmerman regarding the issue of permanent and total disability. She found that it was Dr. Zimmerman's opinion that Turner is unable to engage in substantial and gainful employment as a result of the injuries suffered in the accident. On the other hand, she found "Dr. Hufford's opinion [on the issue of permanent and total disability] was equivocal." In support of this finding, the administrative law judge pointed to Dr. Hufford's testimony in which he recognized that "it would be 'at least very difficult' for [Turner] to find gainful employment." She also pointed to Dr. Hufford's testimony that he is a certified Department of Transportation examiner and that he did not believe Turner would pass the examination because of safety concerns because of his continuing pain.

Based on our review of the record as a whole—considering both the evidence supporting and detracting from the Board's decision—we find that there is substantial competent evidence to support its finding that Turner is permanently and totally disabled as a result of the work-related accident. Although the Fund would like for us to reweigh the evidence and make credibility determinations, it is not our role to do so. K.S.A. 77-621(d); see *Williams v. Petromark Drilling*, 299 Kan. 792, 795, 326 P.3d 1057 (2014). We therefore conclude that the Board did not err in affirming the administrative law judge's award of permanent total disability compensation.

Future Medical Expenses

Next, the Fund contends that the Board erred in ruling that Turner was entitled to future medical benefits upon application. The Fund argues that Turner "has failed to prove that it is more probable than not that future medical treatment will be required." In support of this argument, the Fund points to Dr. Hufford's opinion that no future medical treatment appears to be warranted and suggests that Dr. Zimmerman's opinion that Turner "might need" additional treatment is speculative.

K.S.A. 2020 Supp. 44-510h(a) provides that it is an employer's duty to provide future medical treatment as may reasonably be necessary to cure or relieve the effects of a work-related injury. Even so, under K.S.A. 2020 Supp. 44-510h(e), there is a statutory presumption that the employer's obligation to provide for future medical treatment "shall terminate upon the employee reaching maximum medical improvement." In turn, K.S.A. 2020 Supp. 44-525(a) provides that this presumption may be overcome if "it is proved by the claimant that it is more probable than not that future medical treatment, as defined in subsection (e) of K.S.A. 44-510h, and amendments thereto, will be required as a result of the work-related injury."

A review of the record reveals that Turner testified that he is in pain most of the day, which limits his activities and often interrupts his sleep. In addition, Turner testified that he continues to take prescribed pain medication under the supervision of his primary care physician. In fact, Dr. Hufford recognized that sacroiliac injections may reduce Turner's symptoms even though they

would not have any restorative benefits. Also, Dr. Zimmerman testified that in his opinion Turner could be treated with medication and injections in the future to manage the symptoms as a result of the injuries sustained in the accident on December 12, 2016.

In reviewing the evidence in light of the record as a whole—including Turner's testimony about his pain and the testimony of the physicians about medication as well as injections—we find that there is substantial competent evidence to support an award of future medical expenses upon proper application. Of course, as the Board found in its order, "[w]hether the work-related accident is the prevailing factor necessitating additional medical treatment can be addressed in post-award medical proceedings under K.S.A. 44-510k." Thus, we conclude that the Board did not err in affirming the administrative law judge's award of future medical expenses upon proper application.

Subrogation Rights under K.S.A. 44-504

The Fund further contends that the Board erred in concluding that the Fund did not have subrogation rights under K.S.A. 44-504 for any duplicative recovery received by Turner from his employer's uninsured motorist carrier for the injuries he sustained in the accident on December 12, 2016. Because it stands in the shoes of the employer in this workers compensation action, the Fund argues that it is entitled to a subrogation credit for the amount received by Turner in the settlement of his federal lawsuit to the extent that his recovery is duplicative of the compensation awarded for the same injuries in this workers compensation action. The Fund recognizes, however, that it is not entitled to a subrogation credit against any portion of the recovery in the federal lawsuit that can be shown to have been paid for loss of consortium or loss of services to Turner's spouse.

As discussed above, our review of the Board's interpretation of a statute involves a question of law. As a result, our review is unlimited under K.S.A. 77-621(c)(4), and we are to give no deference to the Board's statutory interpretation. *Hawkins*, 313 Kan. at 107. Rather, we must determine the Legislature's intent from the plain and unambiguous language used in the statute as written.

Jarvis v. Kansas Dept. of Revenue, 312 Kan. 156, 159, 473 P.3d 869 (2020). In doing so, we are not to "'speculate as to the legislative intent behind it or read into the statute something not readily found in it.'" *Ullery v. Othick*, 304 Kan. 405, 409, 372 P.3d 1135 (2016) (quoting *State v. Keel*, 302 Kan. 560, 572, 357 P.3d 251 [2015]).

In Kansas, "[t]he nature and extent of an employer's subrogation rights under the workers compensation statutes are matters for legislative determination." *Hawkins*, 313 Kan. at 108 (citing *McGranahan v. McGough*, 249 Kan. 328, Syl. ¶ 2, 820 P.2d 403 [1991]). Hence, the Kansas Legislature has enacted the provisions of K.S.A. 44-504 to serve a dual purpose. First, K.S.A. 44-504(a) preserves an injured worker's right to assert a claim to recover damages caused by third parties. Second, K.S.A. 44-504(b) prevents an injured worker from receiving a double recovery for the same injuries. *Loucks v. Gallagher Woodsmall, Inc.*, 272 Kan. 710, Syl. ¶ 2, 35 P.3d 782 (2001); see *Hawkins*, 313 Kan. at 108-09.

K.S.A. 44-504 provides, in relevant part, as follows:

"(a) When the injury or death for which compensation is payable under the workers compensation act was caused under circumstances *creating a legal liability against some person other than the employer* or any person in the same employ to pay damages, the injured worker or the worker's dependents or personal representatives shall have the right to take compensation under the workers compensation act and pursue a remedy by proper action in a court of competent jurisdiction against such other person.

"(b) In the event of recovery from such other person by the injured worker or the dependents or personal representatives of a deceased worker by judgment, settlement or otherwise, the employer shall be subrogated to the extent of the compensation and medical aid provided by the employer to the date of such recovery and shall have a lien therefor against the entire amount of such recovery, excluding any recovery, or portion thereof, determined by a court to be loss of consortium or loss of services to a spouse. The employer shall receive notice of the action, have a right to intervene and may participate in the action. The district court shall determine the extent of participation of the intervenor, including the apportionment of costs and fees. Whenever any judgment in any such action, settlement or recovery otherwise is recovered by the injured worker or the worker's dependents or personal representative prior to the completion of compensation or medical aid payments, the amount of such judgment, settlement or recovery otherwise actually paid and recovered which is in excess of the amount of compensation and medical aid paid to the date of recovery of such judgment,

settlement or recovery otherwise shall be credited against future payments of the compensation or medical aid." (Emphasis added.)

In reviewing the Board's order in this workers compensation action, we find that its interpretation of K.S.A. 44-504 inappropriately reads language into the statute that was simply not included by our Legislature in enacting the statute. In particular, the Board found that K.S.A. 44-504 "only prevents double recovery from a third-party tortfeasor and not contractual rights contained in an employer's automobile policy." However, as our Supreme Court has held, the text of "K.S.A. 44-504(b) makes no distinction between the types of recovery to which the workers compensation subrogation lien attaches." *Loucks*, 272 Kan. at 717-18. In fact, the words "tort" or "contract" are not found in subsections (a) or (b) of the statute. Additionally, as in *Loucks*, the Fund steps into the shoes of the employer under K.S.A. 44-504 and may obtain a lien against a recovery from a third party. 272 Kan. at 711-12.

The plain language of K.S.A. 44-504(a) preserves the right of an injured worker to pursue a claim in court against a person or entity—other than the employer or a co-employee—to enforce "a legal liability" to pay damages to the injured worker for injuries compensable under the Kansas Workers Compensation Act. In Kansas, an uninsured motorist carrier has a legal liability to pay for the damages proximately caused by the fault of an uninsured motorist. K.S.A. 40-284(b). In turn, under K.S.A. 44-504(b), if the injured worker receives a recovery—which includes both judgments and settlements—in an action against a third party that is legally liable to pay damages for the same injuries as those claimed in the workers compensation action, the employer—or in this case the Fund that is standing in the shoes of the employer—has a right of subrogation "to the extent of the compensation and medical aid provided . . . and shall have a lien . . . against the entire amount of such recovery, excluding any recovery, or portion thereof, determined . . . to be loss of consortium or loss of services to a spouse."

Rather than relying on the plain and unambiguous language of the statute as our Supreme Court instructs us to do, the Board interpreted K.S.A. 44-504 based on a 40-year-old opinion issued by the United States Court of Appeals for the Tenth Circuit in

Knight v. Insurance Co. of North America, 647 F.2d 127 (10th Cir. 1981). In a three-page opinion, the *Knight* court suggested that the version of K.S.A. 44-504 in effect at the time applied "to tort claims only, both as to the rights it preserves for employees and the subrogation right it creates for employers." 647 F.2d at 129. Then, citing cases from Georgia and Kentucky, the Board concluded that the statute was "inapplicable" to an uninsured motorist claim. 647 F.2d at 129.

We find that the administrative law judge—and ultimately the Board—erred as a matter of law in finding that *Knight* is "still good law." While cases from other jurisdictions may sometimes provide guidance, they are not controlling on Kansas appellate courts. See *Kansas City Grill Cleaners v. BBQ Cleaner*, 57 Kan. App. 2d 542, 551-52, 454 P.3d 608 (2019) (quoting *State v. Thompson*, 284 Kan. 763, 801, 166 P.3d 1015 [2007]). Likewise, as our Supreme Court has held, an appellate court must give effect to the language used by our Legislature rather than "to perpetuate incorrect analysis of workers compensation statutes [and] it will reject rules that were originally erroneous or are no longer sound. [Citations omitted.]" *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 610, 214 P.3d 676 (2009). Thus, we conclude that *Knight* should not be used as a justification to usurp the plain and unambiguous language of K.S.A. 44-504.

Furthermore, it is important to recognize that the outcome in *Knight* was based on the mistaken premise that "uninsured motorist policies sound in contract." 647 F.2d at 129. As our Supreme Court has held—and as Turner candidly recognizes in his brief—Kansas law treats both uninsured motorist and underinsured motorist claims as hybrids. In other words, such claims are a "combination of contract and tort." *Stemple v. Maryland Casualty Company*, 282 Kan. 405, 408, 144 P.3d 1273 (2006). Regardless, for the reasons discussed above, the plain and unambiguous language of K.S.A. 44-504 does not limit an employer's subrogation rights in a workers compensation action to recoveries obtained in a particular type of action.

Consequently, based on the plain and unambiguous language of K.S.A. 44-504, we find that the Fund has a subrogation lien against any duplicative recovery Turner received by way of settlement in his federal lawsuit against the uninsured motorist carrier arising out of the same work-related accident that is the subject of this workers compensation action. We also find that under K.S.A. 44-504(b), the Fund is "subrogated to the extent of the compensation and medical aid"

awarded in this workers compensation action. Moreover, we find that the Fund's subrogation lien is "against the entire amount of such recovery, excluding any recovery, or portion thereof, determined . . . to be loss of consortium or loss of services to a spouse." K.S.A. 44-504(b).

Under the circumstances presented, we remand this workers compensation action to the Board for determination of the amount of the Fund's subrogation lien. The Board may receive additional evidence to resolve this question or may remand this matter to the administrative law judge for additional fact-finding. After this determination has been made, the Board is directed to give the Fund credit against the workers compensation award to the extent provided by statute. In this way, the intent of the Kansas Legislature will be preserved in that Turner will receive compensation for the injuries that he suffered as a result of the work-related accident, but he will not receive a double recovery.

Cross-appeal

In his cross-appeal, Turner contends that the Board erred by permitting Dr. Hufford—who was appointed by the administrative hearing officer to serve as an independent medical examiner—to amend his initial opinion about Turner's permanent partial impairment rating. Based on our review of the record as a whole, we do not find that the Board erred in allowing Dr. Hufford to testify about his modified opinion. This is because his modified opinion was based on additional information that was not discovered and provided to him until after he had rendered his initial opinion.

The record reflects that Dr. Hufford modified his opinion based on his review of three reports from physicians who examined Turner in his prior workers compensation actions. Although K.S.A. 44-519 generally prohibits the Board from considering reports from other health care providers who do not testify, the statute '"does not prevent a testifying physician from considering medical evidence generated by other absent physicians *as long as* the testifying physician is expressing his or her own opinion rather than the opinion of the absent physician.' (Emphasis added)." *Roberts v. J.C. Penney Co.*, 263 Kan. 270, 279, 949 P.2d 613 (1997) (quoting *Boeing Military Airplane v. Enloe*, 13 Kan. App. 2d 128, Syl. ¶ 3, 764 P.2d 462 [1988]). Here, a review of

the record shows that Dr. Hufford was expressing his own opinion rather than simply mimicking the opinions of the physicians in the prior workers compensation actions.

CONCLUSION

In light of our review of the entire record, we find that there is substantial competent evidence to support the Board's finding that Turner is permanently and totally disabled as a result of the work-related accident on December 12, 2016. Accordingly, we conclude that the Board did not err in affirming the administrative law judge's award of permanent total disability compensation. In addition, we conclude that there is substantial competent evidence to support an award of future medical expenses upon proper application. We also conclude that the Board did not err by permitting the independent medical examiner to amend his opinion regarding Turner's permanent partial impairment rating based on additional information that was discovered following his initial deposition. Thus, we affirm the Board's award as well as its order about future medical expenses.

Furthermore, based on the plain and unambiguous language of K.S.A. 44-504, we conclude that the Fund has a subrogation lien against any duplicative recovery Turner received in his federal lawsuit against the uninsured motorist carrier arising out of the same work-related accident that is the subject of this workers compensation action. Even so, we find that the Fund is not entitled to a subrogation lien on any portion of the recovery that is found to have been paid for loss of consortium or loss of services to Turner's spouse.

For these reasons, we reverse the Board's finding that the Fund was not entitled to a subrogation lien, and we remand this action to the Board for a determination of the amount of the Fund's subrogation lien under K.S.A. 44-504(b). After the amount has been determined, the Board is directed to give the Fund credit against the workers compensation award to the extent provided by the statute.

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

No. 124,100

In the Interest of A.P., A Minor Child.

SYLLABUS BY THE COURT

1. CIVIL PROCEDURE—*Service of Process—Restricted Mail Different than Certified Mail Service.* Service of process by restricted mail is different from service by certified mail.

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

Appeal from Jefferson District Court; GARY L. NAFZIGER, judge. Opinion filed March 18, 2022. Affirmed.

Robert D. Campbell, of Campbell Law Office, P.A., of Atchison, for appellant natural father.

No appearance by appellee.

Before WARNER, P.J., CLINE, J., and RACHEL L. PICKERING, District Judge, assigned.

WARNER, J.: This appeal follows the district court's termination of the appellant's parental rights. The appellant—whom we call Father in this opinion—argues that the notice he received by certified mail concerning the termination hearing was legally defective because someone other than him signed for its receipt. But Kansas law only requires the mailed service of a notice in these circumstances to be followed by a return receipt, not a restricted delivery that could only be acknowledged by Father. Thus, the district court correctly found that service by certified mail was sufficient, and we affirm its judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In May 2019, the State petitioned the district court to find A.P. was a child in need of care (CINC). The petition alleged that A.P.'s Mother was using drugs and had abandoned A.P., who was then about three years old—leaving A.P. with her extended family and not returning. A.P. had been passed between Mother's relatives and friends as their work schedules and health allowed. The petition did not mention A.P.'s Father or allege anything related to his care of A.P.

Even though the petition did not mention Father, he received notice of the pending June 2019 CINC adjudication and attended that hearing in person with his attorney. At the hearing, he entered a no-contest statement in response to the allegations in the petition. The district court found that A.P. was a child in need of the State's care and ordered her into custody of the Kansas Department for Children and Families.

From early in the case, Mother showed no interest in retaining her parental rights, so the court's reintegration plan focused on Father and Stepmother. Initially, the main concerns surrounding reintegration were Father's drug use, Father's and Stepmother's inconsistent compliance with drug testing requirements, and various other legal issues concerning both Father and Stepmother. Despite an early positive drug test, Father later reported six weeks of sobriety and returned multiple negative tests. But his reintegration case team also received troubling reports regarding Father's conduct—that Father had falsified his tests, that he was abusing Stepmother, and that their marriage was unstable.

Because of continued concerns with Father and Stepmother, the district court changed the goal of the case plan in July 2020 from reintegration to adoption. In September 2020, the State moved to terminate Father's and Mother's parental rights.

Until that point, Father had attended several review hearings in person, and his attorney attended any hearings when Father was not present. When the court scheduled the hearing on the State's termination request, the State sent a copy of its motion and the notice of the hearing to Father by certified mail. The State's first envelope was returned undelivered with an indication that Father

had moved to a different address. The State then sent the documents to the new address, again by certified mail. This time, the envelope was received—delivered to "A. H[*****]," Stepmother's first initial and last name. The State also sent a copy of the notice and motion to Father's attorney.

Father did not appear at the termination hearing, but his attorney did. At the hearing, Father's attorney objected to the hearing being held, arguing that service on Father was legally deficient because Stepmother, not Father, signed the delivery receipt. After hearing arguments from Father's attorney and the State, the district court found service was valid. In particular, the court emphasized that service was completed by certified mail and a person with the same last name at Father's address signed for (and received) the notice.

Having found proper service, the district court proceeded with the hearing on the State's request to terminate Father's and Mother's parental rights. The State entered a summary of the case timeline into evidence. The court found Father and Mother in default, as neither were personally present at the hearing and neither presented evidence disputing the State's claims. The court then terminated their parental rights.

DISCUSSION

On appeal, Father does not challenge the merits of the district court's termination decision. Instead, he raises a single, procedural issue—claiming the service of the State's motion and the notice of the termination hearing was invalid. He argues that proper service by mail could only be effected if *he personally* signed for those documents on the return receipt and that an acknowledgment of receipt by anyone else rendered the mail service invalid. Without proper service, Father asserts that the termination hearing could not have gone forward. He thus asks this court to reverse the termination order and remand for a new hearing.

The question Father raises is an important one. Parents have a constitutionally protected liberty interest in their relationship with their children. See *Santosky v. Kramer*, 455 U.S. 745, 753, 758-59, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982); *In re B.D.-Y.*, 286 Kan. 686, 697-98, 187 P.3d 594 (2008). While parental rights are

not absolute, courts have long recognized that when life, liberty, or property is at stake—including Father's liberty interest as A.P.'s parent—basic principles of fairness require certain procedural safeguards be met. In particular, the United States Constitution's Due Process Clause requires that a person must be given "notice" of any potential deprivation of a protected liberty interest, allowing that person "an opportunity to be heard." *In re Adoption of A.A.T.*, 287 Kan. 590, 600, 196 P.3d 1180 (2008). And both the notice and the opportunity to be heard must be "meaningful." 287 Kan. at 600.

In keeping with these constitutional principles, Kansas law requires a court to notify the affected parties (and potentially several other people) in a case before it conducts a hearing on a request to terminate a person's parental rights. See K.S.A. 2020 Supp. 38-2267(b)(1). K.S.A. 2020 Supp. 38-2267(b)(2) indicates that this notice must be "given by return receipt delivery" at least 10 days before the hearing. The outcome of Father's appeal turns on the meaning of this statutory provision.

Appellate courts exercise unlimited review over the interpretation of statutes. See *Fisher v. DeCarvalho*, 298 Kan. 482, 492, 496, 314 P.3d 214 (2013). The ultimate aim of statutory interpretation is to discern legislative intent from the written language the legislature has adopted. *In re T.S.*, 308 Kan. 306, 309, 419 P.3d 1159 (2018). In pursuit of this goal, courts first look to a statute's plain language, using the words' ordinary meanings. *City of Dodge City v. Webb*, 305 Kan. 351, 356, 381 P.3d 464 (2016). When the language of a statute is clear and unambiguous, we will not speculate about legislative intent. And we will not read requirements or limitations into a statute that are not there. *In re T.S.*, 308 Kan. at 310. Instead, we presume that the legislature means what it says and apply the statutory language as written. *State v. Frierson*, 298 Kan. 1005, 1013, 319 P.3d 515 (2014).

As the arguments in this case indicate, the phrase "return receipt delivery," without further context, could have multiple meanings. It could contemplate, for example, delivery by restricted mail—the mode of delivery Father advocates, which restricts delivery to only the person to whom the mail is addressed. Or it could include other forms of delivery that are less restrictive, such as certified mail (used to provide the notice here), priority

mail, or other services that notify the sender when the item has been delivered. Fortunately for us, the Kansas Legislature did not use this phrase in a vacuum. Instead, the plain language of a series of connected statutes leads us to our answer.

K.S.A. 2020 Supp. 38-2267, which governs the procedure for serving the notice of a termination hearing, states that the notice must be given "[t]o the parties and interested parties, as provided in K.S.A. 38-2236 and K.S.A. 38-2237." K.S.A. 2020 Supp. 38-2267(b)(1). K.S.A. 2020 Supp. 38-2236 defines *who* must be served with the notice and thus is inapplicable here. But K.S.A. 2020 Supp. 38-2237 sets forth *how* that service may be accomplished. Most notably for our purposes, K.S.A. 2020 Supp. 38-2237(b) explains that "[s]ervice by return receipt delivery is completed upon mailing or sending only in accordance with the provisions of [K.S.A. 2020 Supp. 60-303(c)]."

K.S.A. 2020 Supp. 60-303(c)(1) states that service by return receipt delivery "is effected by certified mail, priority mail, commercial courier service, overnight delivery service or other reliable personal delivery service to the party addressed." Regardless of the delivery method used, the delivery must be "evidenced by a written or electronic receipt" showing who received service, who delivered it, and when and where the mail was delivered. K.S.A. 2020 Supp. 60-303(c)(1). The statute also requires a return of service specifying "the nature of the process, to whom delivered, the date of delivery, the address where delivered and the person or entity effecting delivery," along with a copy of the return receipt. K.S.A. 2020 Supp. 60-303(c)(4).

Notably absent from these provisions is any restriction limiting delivery of the served mail solely to the person to whom the mail is addressed. Instead, Kansas' service statutes indicate that the mail must be *addressed* "to the person to be served." K.S.A. 2020 Supp. 60-303(c)(2); see also K.S.A. 2020 Supp. 60-304(a) ("Service by return receipt delivery must be addressed to an individual at the individual's dwelling or usual place of abode and to an authorized agent at the agent's usual or designated address."). But service is generally effective if a notice is delivered to the individual addressee *or his or her agent*—that is, someone empowered

by law or practice to accept the documents. See K.S.A. 2020 Supp. 60-304(a).

Father argues that the phrase "to the party addressed" in K.S.A. 2020 Supp. 60-303(c)(1) modifies *all* the forms of service listed in that subsection. In other words, he asserts that the "to the party addressed" language shows the forms of service—including service by certified mail—can only be effective if the addressee *personally signs for the receipt* of the documents. He asserts that the State and the district court confused certified-mail service with residential service, which allows service by leaving the summons at a person's home with "someone of suitable age and discretion who resides there." K.S.A. 2020 Supp. 60-303(d)(1)(B). We do not find this argument persuasive.

As a starting point, we note that the legislature included the specific limitation Father advocates elsewhere, but it did not include those limitations in K.SA. 2020 Supp. 60-303(c). For example, someone can only accomplish personal service—that is, physically handing documents to a person—by delivering those documents "to the person to be served." K.S.A. 2020 Supp. 60-303(d)(1)(A). The legislature also specifically defined "restricted mail"—the method Father claims should have applied here—in K.S.A. 2020 Supp. 60-103. Thus, the legislature was aware that some forms of service could be restricted to a particular person. Yet it did not include such a restriction in the statutory subsection on return-receipt delivery.

Contrary to Father's assertions, the structure of the statutory language in K.S.A. 2020 Supp. 60-303(c)(1) demonstrates that the "to the party addressed" language is *not* the object of each of the forms of service listed in that subsection. Instead, that phrase only makes sense if it is limited to the last, catchall delivery mode—"other reliable personal delivery service *to the party addressed*." (Emphasis added.) K.S.A. 2020 Supp. 60-303(c)(1). Read this way, K.S.A. 2020 Supp. 60-303(c) includes several examples of service that are considered "return receipt delivery":

- "certified mail,"
- "priority mail,"
- "commercial courier service,"
- "overnight delivery service," and
- any "other reliable personal delivery service to the party addressed."

We find this reading controlling for at least two reasons. First, it maintains consistency between K.S.A. 2020 Supp. 60-303(c) and K.S.A. 2020 Supp. 60-303(d)(1)(A)'s requirement that personal service be delivered "to the person to be served." Second, and more importantly, any other reading would require the first four categories of service listed—including service by certified mail—to meet the requirements of *restricted mail* to be effective. But we have long held that restricted mail is a different delivery method with different requirements from those now listed in K.S.A. 2020 Supp. 60-303(c)(1). See *In re B.K.J.*, 27 Kan. App. 2d 849, 851, 9 P.3d 586 (2000).

B.K.J. analyzed a previous service statute for parental-rights cases that authorized service by restricted mail under K.S.A. 60-103. See K.S.A. 38-1534(c). We noted in that case that restricted mail required an endorsement stating, "'deliver to addressee only.'" 27 Kan. App. 2d at 851 (quoting K.S.A. 60-103). In contrast, the statute governing certified mail required a receipt "signed by any person *or* by restricted delivery." (Emphasis added.) K.S.A. 1999 Supp. 61-1803(b). We thus concluded that "[s]ervice of process by restricted mail is different from service by certified mail." 27 Kan. App. 2d at 851. And because the relevant statute required service by restricted delivery, service by certified mail was invalid.

Since *B.K.J.* was decided, the legislature has amended the statutes governing service in CINC adjudications and cases involving the termination of parental rights. While the previous statute authorized service by restricted mail, Kansas law now permits service by "return receipt delivery." Compare K.S.A. 38-1534(c), with K.S.A. 2020 Supp. 38-2237(b) and K.S.A. 2020 Supp. 38-2267(b). Yet statutes in other contexts continue to require notice by restricted mail. See, e.g., K.S.A. 31-150a(a) (requiring restricted mail notice for fire prevention code violations); K.S.A. 2020 Supp. 60-2803(a) (judgment creditor must send satisfaction and release of judgment by restricted mail); K.S.A. 43-166 (requiring restricted mail for jury summons, but with the option to use first-class mail instead at the jury commissioner's discretion).

Continuing to impose restricted-mail requirements on return-receipt-delivery service under K.S.A. 2020 Supp. 38-2237 and

K.S.A 2020 Supp. 38-2267 would render this change meaningless. K.S.A. 2020 Supp. 60-303 does not include any restrictive requirement beyond that the envelope be "addressed to the person to be served" and result in a return receipt. K.S.A. 2020 Supp. 60-303(c)(2), (3). And the legislature has specifically indicated that service by certified mail is sufficient. See K.S.A. 2020 Supp. 38-2237(b); K.S.A. 2020 Supp. 60-303(c).

Applying these principles to the case before us, service was valid when the State sent Father the notice of the termination hearing via certified mail addressed to Father at his residence and obtained a return receipt. The fact that Stepmother appears to have signed the return receipt does not render that service defective. Thus, the district court did not err when it found service proper and proceeded to consider the merits of the State's termination request.

Before we conclude, we pause to address Father's argument that—as a matter of public policy—every effort should be made to ensure that a person receives notice of a court proceeding before his or her parental rights are terminated by the State. While we appreciate the common-sense appeal of Father's claim, questions of public policy are for legislative and not judicial determination. *State v. Spencer Gifts*, 304 Kan. 755, Syl. ¶ 4, 374 P.3d 680 (2016). We also observe that this is not a case where Father was left in the dark about the termination hearing or only learned of that hearing after it occurred. The record indicates that although Father was not personally present at the termination hearing, his attorney attended—and we may reasonably infer from that attendance that Father knew the hearing was taking place. While this fact has no effect on the legal sufficiency of the service of the hearing notice, it mitigates somewhat Father's equitable attacks on the fairness of the proceedings.

Kansas law authorizes notice of hearings concerning the termination of parental rights to be served by return receipt delivery; it does not require that the delivery be restricted to the person to be served. The district court did not err when it found that the service of the notice by certified mail was sufficient in this case.

Affirmed.