OFFICIALLY SELECTED
CASES ARGUED AND DETERMINED

IN THE

COURT OF APPEALS

OF THE

STATE OF KANSAS

Reporter:
SARA R. STRATTON

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2d Series
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JUDGES AND OFFICERS OF THE KANSAS
COURT OF APPEALS

CHIEF JUDGE:

HON. KAREN ARNOLD-BURGER …… Overland Park

JUDGES:

HON. HENRY W. GREEN, JR. ..... Leavenworth
HON. THOMAS E. MALONE ..... Wichita
HON. STEPHEN D. HILL ..... Paola
HON. G. GORDON ATCHESON ..... Westwood
HON. DAVID E. BRUNS ..... Topeka
HON. KIM R. SCHROEDER ..... Hugoton
HON. KATHRYN A. GARDNER ..... Topeka
HON. SARAH E. WARNER ..... Lenexa
HON. AMY FELLOWS CLINE……..……...Valley Center
HON. LESLEY ANN ISHERWOOD……..…….....Hutchinson
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Board of Riley County Comm'rs v. Kilner	125,756	Riley	11/09/2023	Appeal dismissed
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In re A.S.	126,072	Shawnee	09/29/2023	Affirmed
In re Adoption of V.A.	126,006	Seward	10/20/2023	Affirmed
In re C.G.	126,511 126,512 126,513	Butler	12/22/2023	Affirmed in part; dismissed in part
In re C.M.	126,128	Pratt	09/29/2023	Affirmed
In re Care and Treatment of Greene	126,156	Riley	11/22/2023	Affirmed
In re Care and Treatment of Rich	126,123	Barton	11/09/2023	Affirmed
In re Care and Treatment of Thayer	125,848	Pawnee	11/17/2023	Affirmed
In re Estate of Barnes	125,990	Sedgwick	12/22/2023	Affirmed in part; dismissed in part
In re Estate of Bizoe	125,835	Shawnee	12/08/2023	Affirmed
In re H.H.	126,340	Sedgwick	12/08/2023	Affirmed
In re I.H.	126,438	Sedgwick	11/09/2023	Affirmed
In re J.S. and K.G.	125,296	Johnson	11/03/2023	Affirmed
In re J.W.	125,935	Ottawa	12/08/2023	Appeal dismissed
In re L.S.	126,365	Ellis	12/01/2023	Affirmed
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In re Marriage of Stewart	125,850	Crawford	12/08/2023	Affirmed
In re Marriage of Wessley	125,358	Sedgwick	09/15/2023	Affirmed
In re Marriage of Wiebe and Navrat	124,856	Harvey	09/22/2023	Affirmed
In re S.H.	126,533	Sedgwick	12/29/2023	Affirmed
In re S.T.	126,280	Sedgwick	10/20/2023	Reversed; remanded with directions
In re S.W.	126,129	Cowley	09/15/2023	Affirmed
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Jenkins v. State	125,305	Seward	12/08/2023	Reversed; remanded with directions
Johnson County Community College v. Prater	126,163	Johnson	11/17/2023	Appeal dismissed
Kanatzar v. Schnurr	126,052	Butler	09/22/2023	Affirmed
Kane v. State	124,857	Sedgwick	12/01/2023	Affirmed
Karbank Holdings v. Regional Evangelical Alliance of Churches, Inc.	124,892 125,138 125,697	Johnson	09/29/2023	Affirmed in part; reversed; vacated in part; remanded with directions
Laughlin v. Robert A. Washam Construction	125,627	Johnson	09/15/2023	Affirmed
Lee v. State	125,457	Sedgwick	11/09/2023	Affirmed
Lux Building v. Professional Mechanical Contractors, Inc.	125,232	Sedgwick	10/06/2023	Affirmed
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McKinney v. Zmuda	126,143	Leavenworth	10/06/2023	Reversed; remanded
Monye v. Kansas Employment Security Bd. of Review	125,852	Douglas	09/08/2023	Affirmed
Moyer v. State	125,590	Sherman	12/08/2023	Affirmed in part; reversed in part; remanded with directions
Nuessen v. Kansas Heart Hospital	125,586	Sedgwick	12/29/2023	Affirmed
Oliver v. State	125,545	Sedgwick	12/01/2023	Affirmed
O'Quinn v. State	125,583	Sedgwick	12/01/2023	Affirmed

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Powell v. State	125,351	Sedgwick	09/15/2023	Affirmed
Reed v. State	124,279	Sedgwick	11/03/2023	Affirmed
Robertson v. Skidmore	126,538	Leavenworth	12/01/2023	Affirmed
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Rowell v. State	124,977	Geary	10/06/2023	Affirmed
Silverson v. State	125,481	Sedgwick	10/06/2023	Affirmed
State v Lawyer	125,698 125,699	Johnson	12/08/2023	Affirmed
State v. Abercrombie	125,077	Sedgwick	09/08/2023	Affirmed
State v. Alexander	124,875	Leavenworth	12/29/2023	Affirmed
State v. Alexander	124,779	Lyon	09/08/2023	Affirmed in part; remanded with directions
State v. Andazola	125,166	Douglas	11/09/2023	Affirmed in part; reversed in part; vacated in part; remanded with directions
State v. Baker	126,228	Sedgwick	12/01/2023	Affirmed
State v. Beason	126,010	Douglas	12/08/2023	Affirmed
State v. Beireis	125,742	Pratt	12/22/2023	Affirmed
State v. Bishop	126,185	Sedgwick	11/09/2023	Affirmed
State v. Boese	125,691	Marion	12/15/2023	Conviction reversed; sentence vacated
State v. Boyd	124,905	Reno	12/29/2023	Affirmed
State v. Bradley	125,198	Sedgwick	10/06/2023	Appeal dismissed
State v. Breese	125,837	Sedgwick	12/08/2023	Remanded with directions
State v. Brinkley	125,965	Leavenworth	12/15/2023	Affirmed
State v. Brown	125,482	Sedgwick	09/22/2023	Sentence vacated; case remanded with directions
State v. Brown	125,797	Douglas	12/08/2023	Sentence vacated; case remanded with directions
State v. Byers	125,290	Shawnee	09/29/2023	Affirmed
State v. Calvert	125,550	Sedgwick	10/06/2023	Affirmed
State v. Cardona-Rivera	125,777	Lyon	12/01/2023	Affirmed
State v. Chappell	125,549	Sedgwick	11/09/2023	Affirmed
State v. Cipra	125,221	Sedgwick	09/15/2023	Affirmed
State v. Cole	125,730	Johnson	12/22/2023	Affirmed; remanded with directions
State v. Cupp	125,743	Crawford	11/22/2023	Affirmed
State v. Davidson	126,087	Brown	09/29/2023	Affirmed
State v. Davis	124,980	Sedgwick	09/08/2023	Affirmed

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State v. Davis	125,543	Harvey	12/01/2023	Affirmed
State v. Dearmore	125,766	Ness	12/22/2023	Vacated; remanded with directions
State v. DeLeon	125,533	Butler	10/06/2023	Affirmed
State v. Denney	125,250			
	125,251	Sedgwick	12/22/2023	Affirmed
State v. Dinkel	125,224	Ellis	11/22/2023	Affirmed
State v. Dittrick	126,286	Barton	12/15/2023	Affirmed
State v. Eismann	125,904	Wyandotte	11/03/2023	Affirmed
State v. Elliott	126,329	Sedgwick	12/08/2023	Affirmed
State v. Elnicki	123,914	Shawnee	11/03/2023	Affirmed
State v. Epps	126,110	Sedgwick	12/08/2023	Affirmed
State v. Foshag	125,466	Crawford	11/22/2023	Affirmed
State v. Fursov	125,209	Johnson	09/08/2023	Affirmed
State v. Gardner	125,513	Sedgwick	09/29/2023	Affirmed in part; vacated in part; remanded with directions
State v. Greenley	126,368	Sedgwick	12/08/2023	Affirmed
State v. Griffin	125,423	Saline	12/29/2023	Affirmed
State v. Gross	126,170			
	126,171	Barton	11/09/2023	Affirmed
State v. Guillen-Sanchez	126,126	Finney	11/22/2023	Affirmed
State v. Gutierrez	125,073	Finney	09/08/2023	Affirmed in part; vacated in part; remanded with directions
State v. Haddock	126,282			
	126,283			
	126,284	Leavenworth	12/08/2023	Affirmed
State v. Harding	125,335	Ford	09/29/2023	Affirmed
State v. Harpe	124,732	Sedgwick	09/15/2023	Affirmed
State v. Harrington	125,022	Sedgwick	12/29/2023	Conviction affirmed; sentence vacated; case remanded with directions
State v. Harris	126,208	Sedgwick	09/29/2023	Affirmed
State v. Hernandez	126,369	Sedgwick	12/22/2023	Affirmed
State v. Houze	125,630	Sedgwick	12/29/2023	Appeal dismissed
State v. Howard	125,997	Saline	12/08/2023	Affirmed
State v. Hoyt	124,845	Harvey	11/17/2023	Appeal dismissed
State v. Hunt	125,629	Shawnee	11/17/2023	Reversed; remanded with directions

TITLE	DOCKET NUMBER	DISTRICT COURT	DATE OF DECISION	DECISION
State v. Inchaurigo	125,329	Reno	12/01/2023	Reversed; remanded with directions
State v. Jacobson	124,861	Johnson	09/22/2023	Sentence vacated; case remanded with directions
State v. James	125,692	Wyandotte	11/22/2023	Affirmed
State v. Jeffcoat	126,158	Franklin	12/15/2023	Affirmed
State v. Jontra	125,409	Sedgwick	09/08/2023	Affirmed
State v. Kelly	125,061	Leavenworth	09/15/2023	Affirmed
State v. Kessler	125,665	Sedgwick	09/29/2023	Appeal dismissed
State v. King	124,984	Sedgwick	12/22/2023	Affirmed
State v. Kramer	125,700	Barton	11/22/2023	Affirmed
State v. Landis	125,279	Shawnee	09/22/2023	Affirmed
State v. Lankton	125,682	Sedgwick	10/06/2023	Affirmed
State v. Logan	126,057	Sedgwick	12/15/2023	Affirmed
State v. Lovelette	125,599	Sedgwick	10/06/2023	Affirmed
State v. Martin	125,884	Atchison	12/15/2023	Affirmed
State v. May	123,622	Douglas	12/22/2023	Affirmed
State v. McClanahan	125,272	Sedgwick	09/29/2023	Affirmed in part; dismissed in part
State v. McDonald	125,275	Sedgwick	12/22/2023	Affirmed in part; reversed in part; remanded
State v. McMillin	125,589	Wyandotte	12/08/2023	Affirmed
State v. Meuli	125,772	Greeley	12/08/2023	Affirmed
State v. Miller	125,213	Sedgwick	09/08/2023	Appeal dismissed
State v. Munoz	125,455	McPherson	09/29/2023	Reversed; remanded with directions
State v. MvPhie	125,519	Atchison	12/15/2023	Affirmed
State v. Neiswender	125,399	Shawnee	11/22/2023	Affirmed
State v. Nunez	125,141	Lyon	09/22/2023	Affirmed
State v. Nusser	126,043	Reno	12/08/2023	Affirmed
State v. Okwo	125,569	Sedgwick	12/01/2023	Affirmed
State v. Perales	125,690	Sedgwick	12/15/2023	Affirmed
State v. Pertuz	125,514	Leavenworth	10/06/2023	Affirmed
State v. Peterson	125,504	Douglas	12/29/2023	Reversed; remanded with directions
State v. Pfaff	125,980	Ness	12/08/2023	Affirmed
State v. Price	125,577 125,996	Atchison	09/29/2023	Affirmed
State v. Puett	124,887	Shawnee	12/08/2023	Affirmed
State v. Ratzlaff	125,953	Sedgwick	10/06/2023	Affirmed
State v. Ray	124,533	Johnson	12/01/2023	Affirmed
State v. Reynolds	124,238	Shawnee	09/29/2023	Affirmed

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State v. Robinson	126,058	Wyandotte	12/08/2023	Affirmed
State v. Robles	125,687	Sedgwick	11/17/2023	Affirmed
State v. Ross	126,074			
	126,075	Butler	12/08/2023	Affirmed
State v. Rottinghaus	125,773	Johnson	12/15/2023	Reversed; remanded with directions
State v. Schmeidler	125,662	Ellis	09/29/2023	Affirmed
State v. Schmeidler	125,663	Ellis	09/29/2023	Affirmed
State v. Sherrill	125,464	Shawnee	09/22/2023	Sentences vacated; cases remanded with directions
State v. Snow	126,186	Sedgwick	12/01/2023	Affirmed
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State v. Stiner	126,206			
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State v. Torres	125,142	Barton	09/29/2023	Affirmed
State v. Tucker	125,539	Cherokee	11/17/2023	Reversed; remanded with directions
State v. Turner	125,475	Sedgwick	11/09/2023	Affirmed
State v. Vasser	124,780	Shawnee	09/22/2023	Affirmed
State v. Vaughan	125,478	Johnson	09/08/2023	Affirmed
State v. Walker	124,728	Wyandotte	09/29/2023	Affirmed
State v. Walker	126,067	Johnson	12/15/2023	Affirmed
State v. Walker	125,554	Sedgwick	11/17/2023	Affirmed in part; vacated in part; remanded with directions
State v. Walker	125,196			
	125,197	Sedgwick	11/09/2023	Affirmed
State v. Ward	125,421	Sedgwick	11/09/2023	Affirmed in part; reversed in part; remanded with directions
State v. Ward	125,186	Franklin	11/03/2023	Appeal dismissed
State v. Watie	126,013			
	126,014	Sedgwick	10/06/2023	Affirmed
State v. Whitaker	124,704			
	124,705			
	124,706			
	124,707			
	124,708	Saline	11/09/2023	Affirmed
State v. Whitaker	125,763	Saline	12/29/2023	Affirmed
State v. Williams	124,486	Sedgwick	10/06/2023	Affirmed

TITLE	DOCKET NUMBER	DISTRICT COURT	DATE OF DECISION	DECISION
State v. Williams	125,515	Sedgwick	09/22/2023	Affirmed
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State v. Wilson	125,911	Sedgwick	10/06/2023	Affirmed
State v. Wilson	125,283	Sedgwick	12/29/2023	Affirmed
State v. Woodward	125,922	Sedgwick	12/22/2023	Affirmed
State v. Ybarra	125,606	Harvey	12/22/2023	Affirmed
Suchan v. Dome	125,673	Sedgwick	09/08/2023	Reversed; remanded with directions
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Tyler v. State	126,180	Wyandotte	12/29/2023	Affirmed
Vanderpool v. Fisher	125,087	Sedgwick	09/29/2023	Affirmed
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ADMINISTRATIVE LAW:

Burden of Proof of Invalid Agency Action on Challenging Party. The party challenging the validity of an agency's action bears the burden of proving such invalidity under K.S.A. 77-621(a)(1). *Blue Valley Tele-Communications, Inc. v. Kansas Corporation Comm'n* ……..……..…..…. 381

No Deference to Agency's Statutory Interpretation by Appellate Court. The appellate court does not extend deference to an agency's statutory interpretation. *Blue Valley Tele-Communications, Inc. v. Kansas Corporation Comm'n* ……..……..…... 381

Statutory Limited Review of Agency's Action by District Court and Appellate Court. Appellate courts exercise the same statutorily limited review of the agency's action as does the district court, as though the appeal had been made directly to the appellate court. K.S.A. 77-601 et seq. *Blue Valley Tele-Communications, Inc. v. Kansas Corporation Comm'n* ……..……..……. 381

AGRICULTURE:

Courts' Review of Activities under Kansas Right to Farm Act—Considerations. Courts do not view agricultural activities under the right-to-farm laws in a vacuum. Rather, courts' review of agricultural activities under the Kansas Right to Farm Act—including whether those agricultural activities conform with state and federal laws—must necessarily consider related farming practices incidental to the challenged agricultural activities that make the challenged activities possible. *Ross v. Nelson* …….. 634

Kansas Right to Farm Act—Legislative Purpose to Protect Certain Agricultural Activities. The Kansas Right to Farm Act, K.S.A. 2-3201 et seq., recognizes that agricultural activities conducted on farmland in areas in which nonagricultural uses have moved into agricultural areas are often subjected to nuisance lawsuits and that such suits encourage and even force the premature removal of the lands from agricultural uses. The legislature adopted the Act to protect certain agricultural activities from this type of nuisance action. *Ross v. Nelson* ……..…..….. 634

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

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APPEAL AND ERROR:

Constitutional Issues Raised First Time on Appeal—Generally Not Reviewed—Exceptions. An appellate court generally does not review constitutional issues raised for the first time, though the courts have recognized three exceptions to this rule. Even when a litigant demonstrates the applicability of an exception, an appellate court is not bound to consider an unpreserved issue for the first time on appeal. *State v. Spilman* 550

District Court's Grant of Motion to Dismiss for Failure to State a Claim—Appellate Review. Whether a district court erred by granting a motion to dismiss for failure to state a claim is a question of law subject to unlimited review. An appellate court will view the well-pleaded facts in a light most favorable to the plaintiff and assume as true those facts and any inferences reasonably drawn from them. If those facts and inferences state any claim upon which relief can be granted, then dismissal is improper. Dismissal is proper only when the allegations in the petition clearly show the plaintiff does not have a claim.
League of Women Voters of Kansas v. Schwab ……..…….. 187

Punitive-Damage Award—Considerations for Appellate Review. Courts assess three considerations when determining whether a punitive-damage award shocks the conscience and thus violates a party's due-process rights: the reprehensibility of the defendant's conduct; the ratio of punitive damages to actual damages for the injury; and comparable awards for similar conduct.
Ross v. Nelson ……..…..……..... 634

Reviewability of Issue on Appeal—Appellate Review. The reviewability of an issue on appeal generally encompasses considerations of notice, preservation, and timeliness. Appellate jurisdiction defines appellate courts' power to consider an appeal at all. *In re X.L.* …… 853*

APPELLATE PROCEDURE:

Final Decision in Actions Appealed to Court of Appeals by Statute—Exception if Required to Appeal to Supreme Court. A final decision in any action, except in an action where a direct appeal to the Supreme Court is required by law, may be appealed to the Kansas Court of Appeals as a matter of right under K.S.A. 2021 Supp. 60-2102(a)(4).
League of Women Voters of Kansas v. Schwab ……..…….. 187

Order Involving Kansas Constitution Is Appealed to Court of Appeals by Statute. An order that involves the Constitution of this state may be appealed to the Kansas Court of Appeals as a matter of right under K.S.A. 2021 Supp. 60-2102(a)(3).
League of Women Voters of Kansas v. Schwab ……... 187

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ARBITRATION:

Contract Law Determines Whether Agreement to Arbitrate. Whether the parties agreed to arbitrate is determined by contract law.
Duling v. Mid American Credit Union 428

Enforceable Agreement to Arbitrate—Burden on Moving Party to Present Evidence. A party who moves to compel arbitration has the "initial summary-judgment-like burden" of presenting enough evidence to show an enforceable agreement to arbitrate. *Duling v. Mid American Credit Union* 428

Requirement of Agreement to Arbitrate Dispute. A party cannot be required to arbitrate a dispute without an agreement to arbitrate.
Duling v. Mid American Credit Union 428

ATTORNEY AND CLIENT:

Attorney Fees Mandated by Statute—Court Must Award Fees Based on Statute. When the language of an attorney fees statute makes an award mandatory, the district court has no discretion and must award attorney fees according to the statute. *Wickham v. City of Manhattan* 294

District Court an Expert in Area of Attorney Fees—Determination of Reasonableness of Fee—Consideration of KRPC 1.5(a) Factors. The district court is considered an expert in the area of attorney fees and can draw on and apply its own knowledge and expertise in evaluating their worth. However, in determining the reasonableness of a requested attorney fee, the factors in Kansas Rule of Professional Conduct 1.5(a) (2023 Kan. S. Ct. R. at 333) should be considered. *City of Atchison v. Laurie* 310

District Court's Authority to Grant Attorney Fees—Appellate Review. When a district court has the authority to grant attorney fees, its decision whether to award fees is reviewed for an abuse of discretion.
Wickham v. City of Manhattan 294

CITIES AND MUNICIPALITIES:

Conditional-Use Permits Issued by Governing Bodies—Must Be Issued in Compliance with Statute. Since our Supreme Court has held governing bodies must follow the procedures laid out in K.S.A. 2021 Supp. 12-757 when issuing conditional-use permits, conditional-use permits which were not issued in compliance with this statute are void and unenforceable.
American Warrior, Inc. v. Board of Finney 123

Statutory Notice Provision Not Prerequisite to Contract Claim. Substantial compliance with the notice provisions of K.S.A. 12-105b(d) is not a prerequisite to bringing a contract claim against a municipality.
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CIVIL PROCEDURE:

Accrual of Cause of Action under K.S.A. 60-513(b). Under K.S.A. 60-513(b), a cause of action accrues as soon as the right to maintain a legal action arises; that is, when the plaintiff could first have filed and prosecuted his or her action to a successful conclusion. *Lopez v. Davila* ……..……. 147

Actionable Injury—Statute of Limitations Starts When Act and Resulting Injury Reasonably Ascertainable. A substantial injury is an actionable injury. The statute of limitations starts to run when both the act and the resulting injury are reasonably ascertainable by the injured party. The injured party need not have knowledge of the full extent of the injury. But the injured party must have a sufficient ascertainable injury to justify an action for damages. When the evidence is disputed concerning when the injury became reasonably ascertainable, the trier of fact decides.
Aeroflex Wichita, Inc. v. Filardo ……..…….... 588

Actions Are Prosecuted in Name of Real Party in Interest. An action must be prosecuted in the name of the real party in interest. If a city violates a detainee's constitutional rights, then the city is liable to the detainee for damages, not the county sheriff. *City of Atchison v. Laurie* …..…….…. 310

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

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

Kansas Wrongful Death Act—Heir May Participate in Apportionment Proceedings. The Kansas Wrongful Death Act, K.S.A. 60-1901 et seq., does not prohibit an heir who has negligently contributed to the death of the decedent from participating in apportionment proceedings.
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Motion for Dismissal by Defendant—District Court Resolves Factual Disputes in Plaintiff's Favor. When a defendant moves for dismissal under K.S.A. 60-212(b)(6), the district court must resolve every factual dispute in the plaintiff's favor. The court must assume all the allegations in the petition—along with any reasonable inferences from those allegations—are true. The court then determines whether the plaintiff has stated a claim

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based on the plaintiff's theory or any other possible theory. Dismissal is improper when the well-pleaded facts and inferences state *any* claim upon which relief can be granted.
Minjarez-Almeida v. Kansas Bd. of Regents ……..……..225

Motion to Dismiss—District Court's Considerations. In most instances, a district court ruling on a motion to dismiss may only consider the plaintiff's petition and any documents attached to it. But when a petition refers to an unattached document central to the plaintiff's claim, a defendant may submit—and a court may consider—an undisputedly authentic copy of the document without transforming the motion to dismiss into a motion for summary judgment. *Minjarez-Almeida v. Kansas Bd. of Regents* ..…... 225

Negligence Claims—Accrual of Cause of Action under K.S.A. 60-513(b). Under K.S.A. 60-513(b), the cause of action listed in K.S.A. 60-513(a) "shall not be deemed to have accrued until the act giving rise to the cause of action first causes substantial injury, or, if the fact of injury is not reasonably ascertainable until some time after the initial act, then the period of limitation shall not commence until the fact of injury becomes reasonably ascertainable to the injured party." *Lopez v. Davila* ……...…. 147

— File within Two Years from Negligent Act. Under K.S.A. 60-513(a)(4), a plaintiff must commence his or her negligence claims within two years from the date of the negligent act. *Lopez v. Davila* …...……..…. 147

Notice Pleading in Kansas—Ultimate Decision of Legal Issues and Theories in a Case Is Pretrial Order. Under Kansas' notice pleading, the petition is not intended to govern the entire course of the case. Rather, the ultimate decision as to the legal issues and theories on which the case will be decided is the pretrial order.
League of Women Voters of Kansas v. Schwab …….…….. 187

Requirement of Plaintiff's Petition—Statement of Claim Giving Fair Notice to Defendant. The Kansas rules of civil procedure require a plaintiff's petition to include a short and plain statement of a claim that will give the defendant fair notice of what the plaintiff's claim is and the ground upon which it rests. *Minjarez-Almeida v. Kansas Bd. of Regents* ..……..…. 225

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

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

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CONSPIRACY:

Civil Conspiracy—Act Done by Any Conspirator Becomes Act of All. Any act done by any conspirator in furtherance of the common design and in accordance with the general plan becomes the act of all, and each conspirator is responsible for such act. Thus, a plaintiff need not prove that each conspirator committed a wrong giving rise to a cause of action independent of the alleged conspiracy. *Brinker v. McCaslin* ……..…….. 724*

— Liability for Damages Caused by Co-Conspirator. Civil conspiracy is a way to hold a conspirator directly liable for damages caused by an unlawful act of a co-conspirator committed in furtherance of the conspiracy. *Brinker v. McCaslin* …….. 724*

Conspiracy Claim—Fourth Element. To establish the fourth element of their conspiracy claim, a plaintiff need only show that a conspirator's overt wrongful acts were committed in furtherance of an express or implied agreement with a co-conspirator or a unity of purpose shared with a co-conspirator. *Brinker v. McCaslin* ……..…….. 724*

— Meeting of the Minds Element between Co-Conspirators. While a plaintiff need not show that each conspirator committed an overt wrongful act, they must still show a meeting of the minds between co-conspirators which a conspirator's overt wrongful acts were designed to further. This meeting of the minds element of the claim prevents someone from becoming inadvertently liable for another's wrongs. *Brinker v. McCaslin* ….. 724*

— Recovery of Damages. A plaintiff can recover from any conspirator any damages that are the natural and probable result of the conspiracy. *Brinker v. McCaslin* …….. 724*

Liability for Conspiracy—Five Elements. Kansas recognizes five elements to establish liability for conspiracy: (1) at least two people; (2) an object to be accomplished; (3) a meeting of the minds by those people in the object to be accomplished or the course of action; (4) at least one unlawful overt act by one of those people; and (5) damages proximately caused by the act(s). *Brinker v. McCaslin* ……..…….. 724*

CONSTITUTIONAL LAW:

Burden of Proof on Party Asserting Takings Claim. The burden of proving that the taking is confiscatory is on the party asserting the takings claim. *Blue Valley Tele-Communications, Inc. v. Kansas Corporation Comm'n* ……. 381

Claim of Excessive Force during Seizure—Analysis under Fourth Amendment's Objective Reasonableness Standard. The United States Supreme Court has held that all claims that law enforcement used excessive force during a seizure should be analyzed under the Fourth Amendment's objective reasonableness standard. *State v. Cline* ……..... 167

Constitutions Do Not Prohibit Use of Evidence Obtained in Violation of Provisions—Exclusionary Rule Created as Deterrent by United

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States Supreme Court. Neither the Fourth Amendment to the United States Constitution nor section 15 of the Kansas Constitution Bill of Rights expressly prohibits the use of evidence obtained in violation of their respective provisions. Instead, to supplement the bare text of the Fourth Amendment, the United States Supreme Court created the exclusionary rule as a deterrent barring the introduction of evidence obtained in violation of the Fourth Amendment in criminal prosecutions. The exclusionary rule is not an individual right and applies only when it results in appreciable deterrence. *State v. Cline* ……..…….... 167

Defendant's Rights under Apprendi—Appellate Review. Whether a district court violated a defendant's constitutional rights under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), at sentencing raises a question of law subject to unlimited review.
State Conkling ……...… 841*

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

Fifth Amendment's Takings Clause—Application to State and Local Government Entities Through Fourteenth Amendment. The Fifth Amendment to the United States Constitution prohibits the taking of private property for public use without just compensation. The protections of the Takings Clause apply to the actions of state and local government entities through the Fourteenth Amendment to the United States Constitution.
Blue Valley Tele-Communications, Inc. v. Kansas Corporation Comm'n …….381

Objective Facts to Support Public-safety Stop Required to Comport with Fourth Amendment. To comport with the Fourth Amendment to the United States Constitution, public-safety encounters must be supported by objective, specific, and articulable facts which suggest the stop is necessary to serve a caretaking function. *State v. McDonald* ……..……. 75

Presumption State Action Is Constitutional—Dilutes Constitutional Protections. Presuming a state action alleged to infringe a fundamental right is constitutional dilutes the protections established by our Constitution. *League of Women Voters of Kansas v. Schwab* …….…….. 187

Protection from Unreasonable Searches and Seizures under Both Constitutions. Both the United States and Kansas Constitutions protect against unreasonable searches and seizures. *State v. Cline* ……..…..... 167

Punitive Damages May Violate Party's Due Process of Law. The United States Supreme Court has explained that punitive damages may violate a party's constitutional right to due process of law in at least two ways. First,

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the Due Process Clause of the Fourteenth Amendment to the United States Constitution makes the Eighth Amendment's prohibition against excessive fines and cruel and unusual punishments applicable to the States. Second, the Due Process Clause itself prohibits the States from imposing grossly excessive punishments on tortfeasors. *Ross v. Nelson* ……..…….... 634

Reduction of Utility's Profit or Rate of Return Does Not Establish Taking. The mere reduction of a utility's profit or rate of return by some unproven amount does not, without more, establish an unconstitutional taking.
Blue Valley Tele-Communications, Inc. v. Kansas Corporation Comm'n …….381

Right to Testify on One Own's Behalf at Criminal Trial—Due Process Right. The right to testify on one's own behalf at a criminal trial is a right essential to due process of law in an adversary process. *State v. Cantu* …….. 276

Right to Vote Is Foundation of Representative Government. The right to vote is the foundation of a representative government that derives its power from the people. All basic civil and political rights depend on the right to vote. *League of Women Voters of Kansas v. Schwab* …….. 187

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

Sixth Amendment Right to Counsel. It is the task of the district court to ensure that a defendant's right to counsel under the Sixth Amendment to the United States Constitution is honored. In order to fulfill this duty, when the district court becomes aware of a possible conflict of interest between an attorney and a defendant charged with a felony, the court has a duty to inquire further. If an appropriate inquiry is made, the district court's decision is reviewed under an abuse of discretion standard. But a district court abuses its discretion when it makes no inquiry into the nature of the conflict.
State v. Waterman ……. 799*

Supreme Court Holding that Legislature Must Not Deny or Impede Constitutional Right to Vote. The Kansas Supreme Court has held that the Legislature "must not, directly or indirectly, deny or abridge the constitutional right of the citizen to vote or unnecessarily impede the exercise of that right." *State v. Beggs*, 126 Kan. 811, 816, 271 P. 400 (1928).
League of Women Voters of Kansas v. Schwab ……..…….. 187

CONTRACTS:

Acceptance of Contract—Requires Outward Expressions of Assent. Acceptance of a contract is measured not by the parties' subjective intent, but rather by their outward expressions of assent. *Duling v. Mid American Credit Union* …... 428

Breach of Contract Claim against University—Requirements. To maintain a breach-of-contract claim against a university, a plaintiff must do more

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than simply allege that the education was not good enough. But contract claims are not educational-malpractice claims when they point to an identifiable contractual promise that the university failed to honor.
Minjarez-Almeida v. Kansas Bd. of Regents ……..…….. 225

Interpretation of Ambiguous Language—Interpreted against Drafter. We interpret ambiguous language in a written document against the drafter.
Duling v. Mid American Credit Union ……..…….....428

COURTS:

References to State Laws—Kansas Right to Farm Act References to State Law Include Common Law. Kansas courts have consistently recognized that general references to state "laws" include the Kansas Constitution, statutes, regulations, and caselaw unless the legislature has indicated a contrary intention. K.S.A. 2-3202(b) and (c)(1)'s references to Kansas "laws" include the common law governing torts like trespass, developed through Kansas cases. *Ross v. Nelson* ……. 634

CREDITORS AND DEBTORS:

Debtor May Direct How Repayments for Multiple Debts Are Applied under Common Law Rule in Kansas. Kansas courts recognize the common law rule that a debtor who owes a creditor multiple debts may direct how repayments should be applied; otherwise, the creditor may elect to apply any payment as the creditor chooses.
Martin v. Mid-Kansas Wound Specialists, P.A. ……..……..…….. 509

CRIMINAL LAW:

Admissibility of Prior Crimes—Evidence of Sexual Misconduct Must be in 60-455(g) Listing of Acts or Offenses to Be Admissible under 60-455(d). K.S.A. 2021 Supp. 60-455(g) provides an exclusive listing of the acts or offenses which constitute an "'act or offense of sexual misconduct'" as that term is used in K.S.A. 2021 Supp. 60-455(d). Therefore, evidence of the defendant's commission of another act or offense of sexual misconduct must satisfy subsection (g)'s definition before it can be admissible under subsection (d). *State v. Scheetz* ……..……. 1

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

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

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

Counterman v. Colorado *Overrules* State v. Boettger. *Counterman v. Colorado*, 600 U.S. 66, 69, 143 S. Ct. 2106, 216 L. Ed. 2d 775, (2023), holds that the First Amendment requires proof of a defendant's subjective understanding of the threatening nature of a statement to be punished as a crime, but a mental state of recklessness is sufficient to establish a true threat. This decision effectively overrules *State v. Boettger*, 310 Kan. 800, 450 P.3d 805 (2019). The holding in *Counterman* applies to any pending criminal case in Kansas in which the defendant's sentence is not final. *State v. Phipps* ……..…… 698*

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

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

Denial of Assistance of Counsel—Presumed Prejudice. When a defendant is denied the assistance of counsel at a critical stage of the criminal proceedings, prejudice to the defendant is presumed. *State v. Waterman* ... 799*

Economic Stimulus Payments Not Government Benefits Exempt from Forced Savings Account under IMPP. An inmate's COVID-19 economic stimulus payments are not "government benefits" exempt from a forced savings account under the Kansas Department of Corrections' Internal Management Policy and Procedure (IMPP) 04-103A. *Macomber v. State* ……...….. 846*

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Imprisonment for Sexually Violent Crime—Mandatory Period of Postrelease Supervision. Persons sentenced to imprisonment for a sexually violent crime on or after July 1, 2006, when the offender was 18 years of age or older, and who are released from prison, shall be released to a mandatory period of postrelease supervision for the duration of the person's natural life. *State v. Conkling* 841*

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

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

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

— No Requirement that State Prove Independent Legal Duty to Victim. Mistreatment of a dependent adult does not require the State to prove that the offender had any independent legal duty to the victim. Once a person affirmatively assumes the role of caregiver to a dependent adult, and discourages or precludes others from filling that role, that person has the responsibility to act reasonably in fulfilling the obligations required of that role. *State v. Burris* 250

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

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

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

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

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

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

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

— Inquiry of Prior Conviction—Modified Categorical Approach. When a sentencing court is making an inquiry on the nature of an offender's prior conviction, the court may use a modified categorical approach in its search. Such an approach means that the court can examine the charging documents of the old case, any plea agreements, transcripts of plea hearings, findings of fact and conclusions of law from any bench trial, as well as jury instructions and completed verdicts. *State v. Degand* ……...… 457

— Judge's Consideration of Facts. At sentencing, a judge may consider facts reflected in the jury verdict or admitted by the defendant. *State v. Conkling* ……..…… 841*

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

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

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Sentencing Statute Involving Multiple Conviction Cases Not Applicable to Misdemeanor Sentences. K.S.A. 2022 Supp. 21-6819(b), as part of the revised Kansas Sentencing Guidelines Act, applies only to felony sentences and not to misdemeanor sentences. *State v. Phipps* ……..…….. 698*

Sixth Amendment Right to Counsel—Uncounseled Misdemeanor Conviction Not Used for Sentence Enhancement. The Kansas Supreme Court has held that an uncounseled misdemeanor conviction obtained in violation of the defendant's Sixth Amendment right to counsel may not be collaterally used for sentence enhancement in a subsequent criminal proceeding. *State v. Waterman* ……..…… 799*

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

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

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

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

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

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

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

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

DIVORCE:

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

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

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

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EMPLOYER AND EMPLOYEE:

Acts Do Not Warrant Exception to Kansas' At-Will Employment Doctrine. Neither the Freedom from Unsafe Restraint and Seclusion Act (FURSA)—K.S.A. 2022 Supp. 72-6151 et seq.—and the attendant Kansas regulations that mirror it—K.A.R. 91-42-1 et seq.—nor the Paul D. Coverdell Teacher Protection Act of 2001 (Coverdell Act)—20 U.S.C. § 7941 et seq., create a public policy that would warrant an exception to Kansas' at-will employment doctrine. *King v. U.S.D. No. 501* ……..…….. 758*

Retaliatory Discharge Case—Employer Charged With Knowledge of Laws Applicable to Them as Employer. In a retaliatory discharge case, the employee need not prove that they expressly advised the employer of the legal basis for the claim that their actions were protected. The employer is charged with knowledge of the laws that apply to them as an employer. The employee is only required to outline the facts that give rise to the application of any legal protections claimed. *King v. U.S.D. No. 501* …….. 758*

EQUITY:

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

ESTOPPEL AND WAIVER:

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

EVIDENCE:

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

Contemporaneous Objection Rule—Preserves Admissibility Question on Appeal. The contemporaneous objection rule under K.S.A. 60-404 requires a timely and a specific objection to the admission of evidence for the question of admissibility to be considered on appeal. When the rule is

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properly applied, counsel gives the trial judge the opportunity to control the trial without the admission of tainted evidence, and thus avoid a possible reversal and a new trial. *State v. Clingerman* ……..…… 682*

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

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

Timely and Specific Objection Not Made at Trial—Failure to Preserve Issue on Appeal. When a defendant does not make a timely and specific objection to the admission of evidence at trial, the defendant has failed to preserve that issue on appeal. *State v. Clingerman* …… 682*

Timely Objection Required by Statute. K.S.A. 60-404 directs that a verdict shall not be set aside, nor the judgment reversed, without a timely objection. *State v. Clingerman* ……..…… 682*

GARNISHMENT:

Garnishment Is Ancillary to Original Action Seeking Judgment. An action on a judgment is an original cause of action, while garnishment is not an original cause of action, but is ancillary to the original action seeking judgment. Another state's substantive laws cannot provide a de facto exemption from Kansas' garnishment statutes. *M & I Marshall & Ilsley Bank v. Higdon* ……...…..…….. 668*

HIGHWAYS AND STREETS:

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

JUDGMENTS:

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

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JURISDICTION:

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

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

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

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

Question of Subject-Matter Jurisdiction—Requirement of Mechanism to Appeal. Before a party may argue a question of subject-matter jurisdiction on appeal, there must be a procedural mechanism for posing that question to the appellate court. In other words, there must be some vehicle through which the party can present the jurisdictional question to the appellate court. *In re X.L.* ……..……. 853*

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

KANSAS CONSTITUTION:

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

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Standing is a component of subject matter jurisdiction. It presents a question of law and can be raised at any time.
League of Women Voters of Kansas v. Schwab ……..…..…..…….. 187

KANSAS CORPORATION COMMISSION:

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

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

LEGISLATURE:

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

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

KANSAS OFFENDER REGISTRATION ACT:

Catch-All Provision Defines Certain Nonsex Crimes as Sexually Violent Crimes if Act Sexually Motivated—Exception. K.S.A. 2022 Supp. 22-4902(c)(19) contains a catch-all provision defining certain otherwise unenumerated, nonsex crimes as "[s]exually violent crime[s]" if the district court determines beyond a reasonable doubt the criminal act was "sexually motivated." However, the catch-all provision does not apply to convictions when the district court finds on the record that the act underlying the conviction involved non-forcible sexual conduct with a victim at least 14 years of age when the offender was not more than 4 years older than the victim.
State v. Detimore ……..…….. 691*

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

Definition of Sexually Violent Crime in K.S.A 2022 Supp. 22-4902(c)(19)—Exception for Nonsex Crimes Not Named in (c)(1)-(18).

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The exception to the definition of a "[s]exually violent crime" in K.S.A. 2022 Supp. 22-4902(c)(19) for acts that the court determines on the record "involved non-forcible sexual conduct" when "the victim was at least 14 years of age and the offender was not more than four years older than the victim" applies only to convictions for nonsex crimes not otherwise enumerated in K.S.A. 2022 Supp. 22-4902(c)(1)-(18). *State v. Detimore* .. 691*

MANDAMUS:

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

MOTOR VEHICLES:

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

PARENT AND CHILD:

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

No Appeals of Post-Termination Decisions—Legislature's Intent for Permanency in Proceedings. By not providing for appeals of post-termination decisions, the legislature has underscored the parties' responsibility to work toward the child's recognizable need for permanency, instead of struggling back and forth among themselves at every stage in post-termination proceedings. *In re X.L.* ……...…… 853*

Revised Kansas Code for Care of Children Authorizes Appellate Jurisdiction Over Five Types of Decisions. In cases arising under the Revised Kansas Code for Care of Children, the legislature has authorized appellate jurisdiction over only five types of decisions: those involving temporary custody, adjudication, disposition, findings of unfitness, and the termination of parental rights. An order terminating parental rights is the last appealable order in a child-welfare case. A finding of a lack of reasonable efforts to place a child for adoption issued after an order terminating parental rights is not subject to direct appellate review. *In re X.L.* ……..…853*

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PHYSICIANS AND SURGEONS:

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

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

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

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

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

POLICE AND SHERIFFS:

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

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

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PROBATE CODE:

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

PUBLIC HEALTH:

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

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

REAL PROPERTY:

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

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

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

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

Partition Action—Defendant Must File Answer or Respond to Participate in Case. A defendant named in a petition in a partition action and

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served with process must file an answer or a responsive motion before it can participate as a party in that case.
Mog v. St. Francis Episcopal Boys' Home ……...…….. 579

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

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

SEARCH AND SEIZURE:

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

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

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

STATUTES:

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

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the statute's language or text is unclear or ambiguous does the court use canons of construction or legislative history to construe the Legislature's intent. *Blue Valley Tele-Communications, Inc. v. Kansas Corporation Comm'n* 381

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

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

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

SUMMARY JUDGMENT:

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

Disputed Issues of Material Fact May Not Be Decided by Trial Court Judge. A trial court judge may not decide disputed issues of material fact on summary judgment, even if the claims sound in equity rather than law.
Corazzin v. Edward D. Jones & Co. 489

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

Party Cannot Avoid Summary Judgment if Hoping for Later Developments in Discovery or Trial. A party cannot avoid summary judgment on

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the mere hope that something may develop later during discovery or at trial. Mere speculation is similarly insufficient to avoid summary judgment.
Corazzin v. Edward D. Jones & Co. ……..…… 489

TORTS:

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

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

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

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

TRIAL:

Cumulative Trial Error—Requirement to Warrant Reversal of Conviction. To warrant reversal of a criminal conviction for cumulative trial error, the combined effect of the trial errors must convince the reviewing court that the defendant's trial was so prejudiced that the court may not declare the errors harmless. If any of the errors involved constitutional rights, the court must be willing to declare the cumulative error harmless beyond a reasonable doubt. *State v. Spilman* ……...……... 550

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

Expert Witness Testimony Required—Standard of Care for Independent Contractor in this Case Outside Common Knowledge of Juror. Expert witness testimony is necessary to show that an independent contractor hired to brush blast and paint a city's water tower should have used different

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materials or a protective curtain to protect an adjacent landowner from injury. The standard of care for that work is outside the ordinary experience and common knowledge of a juror. *Corbett v. City Kensington* ….….. 466

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

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

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

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

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

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

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

Right to Conflict-Free Counsel—Timely Pro Se Motion for New Trial—Under Facts of This Case Remanded to District Court to Hold New Hearing. Under the facts of this case, when a defendant convicted of a felony at trial files a timely pro se motion for new trial alleging ineffective assistance of trial counsel and the district court fails to appoint conflict-free counsel to assist the defendant in arguing the motion, we must remand for the district court to hold a new hearing with conflict-free counsel appointed to argue the motion. If on remand the district court denies the motion, finding no ineffective assistance of counsel, a new trial is unnecessary. But if the district court grants the motion, finding ineffective assistance of counsel, a new trial must be held and trial counsel appointed.
State v. Waterman 799*

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

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

Special Verdict Findings on Essential Issues—Requirements—Appellate Review. Special verdict findings on essential issues must be certain and definite and not be conflicting or inconsistent. In determining whether jury findings are inconsistent, they are construed in the light of the circumstances and in connection with the pleadings, instructions, and issues submitted. When there is a view of the case that makes the findings consistent, they then must be resolved that way. *Aeroflex Wichita, Inc. v. Filardo* 588

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

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

Zoom Format at Trial—No Violation of Right to Fair Trial. Under the facts of this case, the use of a Zoom format of the trial did not violate the defendant's right to a fair trial. *Stare v. Clingerman* …….. 682*

WORKERS COMPENSATION:

Determination of Functional Impairment Rating for Scheduled Injuries under Statute. To determine a functional impairment rating for scheduled injuries under K.S.A. 44-510d(b)(23), the fact-finder should begin with the Sixth Edition of the American Medical Association Guides to the Evaluation of Permanent Impairment as a starting point and consider competent medical evidence to modify or confirm that rating, accordingly.
Weaver v. Unified Government of Wyandotte County ……..….. 773*

No Reduction for Preexisting Impairment under Statute if Claimant's Injury Different from Previously Compensated Impairments. No reduction for preexisting impairment under K.S.A. 44-501(e) is appropriate when the evidence shows that the claimant's impairment resulting from his or her current injury is different from the impairments for which the claimant has previously been compensated.
Weaver v. Unified Government of Wyandotte County ……..…….. 773*

WRONGFUL DEATH:

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

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(536 P.3d 898)

No. 125,672

M & I MARSHALL & ILSLEY BANK, *Appellee*, v. KEVIN HIGDON (AND GRETCHEN HIGDON), *Appellants*, and EQUITY BANK, *Appellee*.

SYLLABUS BY THE COURT

GARNISHMENT—*Garnishment Is Ancillary to Original Action Seeking Judgment.* An action on a judgment is an original cause of action, while garnishment is not an original cause of action, but is ancillary to the original action seeking judgment. Another state's substantive laws cannot provide a de facto exemption from Kansas' garnishment statutes.

Appeal from Johnson District Court; PAUL C. GURNEY, judge. Opinion filed September 15, 2023. Affirmed.

Kristopher C. Kuckelman, of Payne & Jones, Chartered, of Overland Park, for appellants.

Louis J. Wade, of McDowell Rice Smith & Buchanan, P.C., of Kansas City, Missouri, for appellee M & I Marshall & Ilsley Bank.

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

GARDNER, J.: In 2010, M & I Marshall & Ilsley Bank (M & I Bank) got a judgment against Kevin Higdon from the circuit court in Jackson County, Missouri. M & I Bank later registered its judgment in Johnson County, Kansas, and had a garnishment order entered by the Johnson County District Court. This order was served on Equity Bank in Kansas, where Kevin and his wife, Gretchen Higdon, held an account, and the entire balance of the account was garnished. The couple challenged the garnishment, arguing that Missouri law should apply because they had opened their bank account in Missouri, and under Missouri law the account was not subject to garnishment. The district court disagreed, applied Kansas law, and ordered that Gretchen's half of the account was owed to her and Kevin's half of the account was owed to M & I Bank. The Higdons appeal.

FACTUAL AND PROCEDURAL BACKGROUND

Kevin and Gretchen married in 2009 and remain married. Since 2009 they have continuously resided in Missouri. In 2009 or 2010, they opened an account at Adams Dairy Bank (the account), which was located solely in Missouri.

To open the account, the Higdons signed an account agreement in Missouri. That agreement identified Kevin or Gretchen as the account owners with "Joint (Right of Survivorship)." That account agreement remains unchanged, and the parties do not contend that it incorporates a choice-of-law provision. Years later, around 2016, Adams Dairy Bank merged with Equity Bank, the garnishee, which has locations in Kansas.

In October 2010, M & I Bank obtained a judgment against Kevin (and others), but not Gretchen, from the circuit court in Jackson County, Missouri. In April 2017, M & I Bank registered this judgment in Kansas with the Johnson County District Court, then moved for garnishment. As a result, the Johnson County District Court issued an order of garnishment to attach any account owned by Kevin at Equity Bank. The next day, that order of garnishment was served on Equity Bank at one of its Kansas facilities.

Kevin and Gretchen opposed the garnishment and moved to quash it. While the dispute was pending, the parties stipulated that the garnished funds from the account would be paid into and held by the Clerk of the District Court while the district court resolved the garnishment dispute.

Kevin's motion to quash argued that Missouri substantive law should apply because the Higdons' contract to open the bank account was made in Missouri. And under Missouri law, they argued, their account was owned by them as tenants by the entirety. Because Kevin and Gretchen's ownership interests were indivisible and of the entire account, and Gretchen was not subject to the garnishment order, no portion of the account could be garnished. Alternatively, Kevin argued that if Kansas law applied then only his half of the funds in the account could be garnished.

In response, M & I Bank argued that Kansas law applied because, as a properly registered foreign judgment, under the Full

Faith and Credit Clause of the United States Constitution, all enforcement mechanisms under Kansas law are available to M & I Bank. M & I Bank argued that under Kansas law it was entitled to the portion of the bank account owned by Kevin, and Kevin had the burden to show that some or all the property was not subject to garnishment. Kevin's account agreement showed his interest was as joint tenants with right of survivorship, and Kansas has "a rebuttable presumption of equal ownership between tenants of joint tenancy property." *Walnut Valley State Bank v. Stovall*, 223 Kan. 459, Syl. ¶ 2, 574 P.2d 1382 (1978).

The district court heard the arguments and the evidence summarized above, then denied the Higdons' motion to quash in part.

"Because the foreign judgment i[s] registered in Kansas following the statutory provisions, Kansas procedural law applies rather than Missouri law. It is unclear in Kansas whether the characterization of the property can be attached for a judgment creditor is [a] substantive or procedural matter. . . . [H]owever, relevant Missouri case law indicates that categorization—categorizing property is a procedural matter, and because this case is in Kansas, Missouri procedural law is not applicable.

"Therefore, it is more likely that Kansas procedural law applies, and the garnishment can attach to the Higdons' account. Because a foreign judgment is registered in Kansas, Kansas procedural law will apply. Persuasive case law with similar facts reveals categorizing property for creditor judgment as a procedural matter. Although Mr. and Mrs. Higdon have a joint bank account, the bank can attach the garnishment to the joint account because Kansas law again will classify the account as a joint tenancy with right of survivorship."

The district court judge found that Kansas law does not recognize tenancy by the entirety, and "the subject garnishment can attach to the Higdons' joint bank account because Kansas property classification would find that the bank account held as joint tenants with the right of survivorship rather than tenants in the entirety, and judgment creditors can recover money from joint bank accounts."

The district court left discovery open on ownership of the account and allowed the parties to rebut the presumption of equal ownership that arises under Kansas law. But during discovery, the Higdons and M & I Bank stipulated that the presumption of equal ownership of the account could not be rebutted. Accordingly, the district court found that before the garnishment Kevin owned half of the account and Gretchen owned the other half. The district

court then ordered half the garnished funds, which had been paid into court, paid to Gretchen and the other half paid to M & I Bank. Thus, Gretchen and M & I Bank were each paid $194,455.56.

Kevin and Gretchen timely appeal.

ANALYSIS

Before we address the Higdons' substantive issues, we address a procedural issue that impacts our jurisdiction to hear this appeal—M & I Bank's assertion that the Higdons acquiesced in the judgment.

DOES THE DOCTRINE OF ACQUIESCENCE DEPRIVE THIS COURT OF JURISDICTION TO CONSIDER THIS APPEAL?

M & I Bank argues that under the doctrine of acquiescence, this court lacks jurisdiction to consider this appeal. "Because acquiescence involves jurisdiction, the matter raises a question of law subject to unlimited review by this court." *Alliance Mortgage Co. v. Pastine*, 281 Kan. 1266, 1271, 136 P.3d 457 (2006). "Whether a party intends to waive his or her legal rights, however, depends on the facts." *Heartland Presbytery v. Presbyterian Church of Stanley, Inc.*, 53 Kan. App. 2d 622, 636, 390 P.3d 581 (2017) (citing *Varner v. Gulf Ins. Co.*, 254 Kan. 492, 497, 866 P.2d 1044 [1994]).

"The acquiescence doctrine establishes that parties who voluntarily accept the benefit or burden of a judgment lose their right to appeal. *Alliance Mortgage Co. v. Pastine*, 281 Kan. 1266, 1271, 136 P.3d 457 (2006); see *Hemphill v. Ford Motor Co.*, 41 Kan. App. 2d 726, 728, 733, 206 P.3d 1 (2009)." *Heartland Presbytery*, 53 Kan. App. 2d at 635. "'The gist of acquiescence sufficient to cut off a right to appeal is voluntary compliance with the judgment.'" *Varner v. Gulf Ins. Co.*, 254 Kan. 492, 494, 866 P.2d 1044 (1994) (quoting *Younger v. Mitchell*, 245 Kan. 204, Syl. ¶ 1, 777 P.2d 789 [1989]). When a party's actions "'clearly and unmistakably show an inconsistent course of conduct or an unconditional, voluntary and absolute acquiescence,'" the party waives his or her right to appeal. *Uhlmann v. Richardson*, 48 Kan. App. 2d 1, 17, 287 P.3d 287 (2012).

Courts do not generally find an implied waiver from an appellant's postjudgment measures: "[I]t is generally the rule that a waiver is not implied from [postjudgment] measures taken by an appellant in defense of and to protect his [or her] rights or interest." *McDaniel v. Jones*, 235 Kan. 93, 104, 679 P.2d 682 (1984). For acquiescence to cut off the right to appeal, the acceptance of the burdens or benefits of a judgment debtor must be *voluntary*. Whether a payment of a judgment is voluntary depends on the facts of the particular case, and the ultimate issue is whether the payer intended to waive his or her legal rights. *Varner*, 254 Kan. at 497.

"In a . . . garnishment proceeding, whether the appellant has acquiesced to the extent of extinguishing his right to appeal the garnishment depends upon all the facts of the case, including his conduct in response to the garnishment order." *Younger v. Mitchell*, 245 Kan. 204, 207, 777 P.2d 789 (1989). In *Younger*, the Kansas Supreme Court held that Mitchell's actions did not show acquiescence to the garnishment. There, Mitchell's

"conduct throughout the garnishment proceeding shows that he did not voluntarily comply with this judgment. The bank account balance was paid into court by Farmers State Bank, the garnishee, not by Mitchell. Mitchell contended all along that all of the funds in the account were exempt from garnishment. He filed a reply to the answer of the garnishee, claiming the funds were exempt from garnishment. He participated in the hearing at which the court determined the source of the funds paid into court by the garnishee. He filed a memorandum with the court supporting his claim, citing federal statutes that generally exempt V.A. and social security benefits from garnishment. After the distribution order was issued, he filed a timely notice of appeal." 245 Kan. at 207.

Kevin engaged in similar conduct here. He moved to quash the garnishment, and argued throughout the proceedings that the account was not subject to garnishment under Missouri law, so it was also not subject to garnishment in Kansas. He appeared at the hearing on the motion to quash the garnishment and testified at the evidentiary hearing. During the litigation, the parties stipulated to pay the money in the Higdons' account into the Johnson County District Court, and a court order granted that stipulation. After the court ruled against Kevin, he timely appealed. And the distribution of the funds held by the district court was by court order, with half the account balance paid to Gretchen and half paid to M & I

Bank's counsel. Nothing in the record shows that the bank account balance was paid by Kevin. The actions of record fail to convince us that Kevin acquiesced to the judgment.

M & I Bank also argues that Gretchen's acceptance of the returned funds equates to acquiescence. *Younger* raised a similar issue, and the Kansas Supreme Court rejected the idea that the acceptance of improperly garnished funds after a judgment to distribute the funds to their proper owner constitutes acquiescence to the judgment.

"Although he accepted a check representing that portion of the garnished account balance which was returned to the Mitchells pursuant to the court's order, that payment cannot be considered a 'benefit of the judgment.' The funds in the account were in the court's custody only as a result of the garnishment order requested by the plaintiff. Mitchell protested garnishment of those funds from the beginning, as he was entitled to do under [the garnishment statutes]. Hence, Mitchell's receipt of part of the account balance cannot be considered the sort of acquiescence that would preclude this appeal." 245 Kan. at 207.

Following *Younger*'s guidance, we hold that Gretchen's acceptance of the distributed garnishment funds was not a benefit of the judgment.

We find the doctrine of acquiescence inapplicable. Because our jurisdiction is proper, we now address the Higdons' substantive issues.

DOES KANSAS OR MISSOURI LAW DETERMINE WHETHER THE ACCOUNT IS SUBJECT TO GARNISHMENT?

The Higdons argue that the district court improperly applied Kansas procedural law to classify the account. They assert that Missouri substantive law applies and, under Missouri law, the funds in the account are not subject to garnishment. See *Hanebrink v. Tower Grove Bank & Trust Co.*, 321 S.W.2d 524, 527 (Mo. App. 1959). Put another way, the Higdons' account (or a portion of it) can be garnished in Kansas, but not in Missouri.

Missouri Law Conflicts with Kansas Law

The ability to garnish the Higdons' account in Kansas but not in Missouri arises from the classification of the account's ownership. In Missouri, despite the account agreement's statement that

the account is "Joint (Right of Survivorship)," Kevin and Gretchen's ownership interest in the account would likely be deemed a tenancy by the entirety. This is because a Missouri statute provides that "[a]ny deposit made in the name of two persons or the survivor thereof who are husband and wife shall be considered a tenancy by the entirety unless otherwise specified." Mo. Rev. Stat. § 362.470.5.

Tenancy by the entirety is a "common-law estate in which each spouse is seised of the whole of the property." Black's Law Dictionary 1768 (11th ed. 2019). Under Missouri law, a tenancy by the entirety account is not subject to garnishment when only one party to the account is subject to the garnishment order.

"It has been held in Missouri for some time that where a husband and wife hold personal property as joint owners they are presumed to be tenants by the entirety. Each is presumed to have an undivided interest in the whole of the property. "It is also the law in this state that where a judgment and execution are against the husband alone such judgment cannot in any way affect property held by the husband and wife in the entirety. Neither can it affect any supposed separate interest of the husband, for he has no separate interest. [Citations omitted.]" *Hanebrink*, 321 S.W.2d at 527.

Under Missouri law, because M & I Bank's judgment is against Kevin but not against Gretchen, none of their tenancy by the entirety account can be garnished.

Although the Missouri presumption of tenancy by the entirety is rebuttable, evidence to overcome the presumption must be so strong, clear, positive, unequivocal, and definite as to leave no doubt in the trial judge's mind. *Brown v. Mercantile Bank of Poplar Bluff*, 820 S.W.2d 327, 336 (Mo. App. 1991); see also *Nelson v. Hotchkiss*, 601 S.W.2d 14, 19 (Mo. 1980) (once the presumption of tenancy by entirety arises, party challenging presumption may only rebut it if party can show contrary intention by clear, cogent, and convincing evidence). That is a difficult standard to meet. Even titling the account "Kevin Higdon or Gretchen Higdon, Joint Tenants with Right of Survivorship" is not enough to overcome Missouri's statutory presumption. "[T]o achieve that result, it would be necessary to designate the account 'Joint Tenants with Right of Survivorship *and Not as Tenants by the Entirety*' or words to like effect." *Scott v. Flynn*, 946 S.W.2d 248, 251 (Mo. App. 1997).

Kansas, however, no longer recognizes tenancy by the entirety. See *Stewart v. Thomas*, 64 Kan. 511, 514-15, 68 P. 70 (1902). In Kansas, when two individuals hold property together a tenancy in common is created unless the language used "makes it clear that a joint tenancy was intended to be created." K.S.A. 58-501; see *Kirkpatrick v. Ault*, 177 Kan. 552, 556, 280 P.2d 637 (1955). Our law presumes that tenants in common have equal ownership; that is, the husband and wife each own half of the account. *Walnut Valley State Bank*, 223 Kan. at 462. A joint tenancy "differs from a tenancy in common because each joint tenant has a right of survivorship to the other's share." Black's Law Dictionary 1767 (11th ed. 2019). "When a joint tenant dies, his or her share passes to the surviving joint tenants." *Estate of Darby v. Bettencourt*, No. 120,247, 2019 WL 4558046, at *3 (Kan. App. 2019) (unpublished opinion).

Under Kansas law, a joint tenant's ownership is severable for meeting the demands of creditors, so Kevin's portion of the joint account that he owns with Gretchen may be garnished. See *Walnut Valley State Bank*, 223 Kan. 459, Syl. ¶ 2. Although the ownership is presumed to be half the account, this presumption is rebuttable by either party by proving the debtor owns more or less than half the account. *In re Estate of Lasater*, 30 Kan. App. 2d 1021, 1024, 54 P.3d 511 (2002). But the parties agreed neither could rebut this presumption here.

Accordingly, the parties contend, and we agree, that a conflict of laws has arisen. "In a conflict of law situation, the determination of which state's law applies is a question of law over which this court has unlimited review." *Foundation Property Investments v. CTP*, 37 Kan. App. 2d 890, Syl. ¶ 3, 894, 159 P.3d 1042 (2007), *aff'd* 286 Kan. 597, 186 P.3d 766 (2008); *Farrar v. Mobil Oil Corp.*, 43 Kan. App. 2d 871, 878, 234 P.3d 19 (2010). And if statutory interpretation is necessary for resolution of this issue, this panel's review is also unlimited. See *Nauheim v. City of Topeka*, 309 Kan. 145, 149, 432 P.3d 647 (2019).

We Apply Kansas' Conflict of Law Rules

When addressing conflict-of-law issues, Kansas appellate courts follow the Restatement (First) of Conflict of Laws (1934).

Brenner v. Oppenheimer & Co., 273 Kan. 525, 538, 4 P.3d 364 (2002); *Layne Christensen Co. v. Zurich Canada*, 30 Kan. App. 2d 128, Syl. ¶ 7, 38 P.3d 757 (2002); see *ARY Jewelers v. Krigel*, 277 Kan. 464, 481, 85 P.3d 1151 (2004). Under § 584 of the First Restatement of Conflict of Laws, "'[t]he court at the forum determines according to its own Conflict of Laws rule whether a given question is one of substance or procedure.'" *ARY Jewelers*, 277 Kan. at 481 (quoting Restatement [First] of Conflict of Laws § 584 [1934]). So we must first determine the nature of the problem. See 16 Am. Jur. 2d, Conflict of Laws § 3. Because Kansas is the forum state, we apply Kansas' conflict of laws rules; they direct us to determine whether the issue (whether the Higdons' account may be garnished) is substantive or procedural. See *ARY Jewelers*, 277 Kan. at 472 ("For the procedural issues, Kansas law applies because suit was filed in a Kansas court.").

The Higdons invite us to characterize this issue as purely a contract dispute. In Kansas, the relationship between a bank and its depositor is generally that of a "debtor-creditor" to be governed by the contractual relationship resulting from the signed signature card. *Cairo Cooperative Exchange v. First Nat'l Bank of Cunningham*, 228 Kan. 613, 618, 620 P.2d 805 (1980).

"The Restatement (First) contains two general principles for contracts cases. The primary rule, *lex loci contractus*, calls for the application of the law of the state where the contract is made. *Wilkinson v. Shoney's, Inc.*, 269 Kan. 194, 209-10, 4 P.3d 1149 [2000]; Restatement [First] of Conflict of Laws, § 332 [1934]." *Layne Christensen Co.*, 30 Kan. App. 2d at 142.

So if this were a contract case, we would apply Missouri substantive law to interpret the Higdons' contract, which was made in Missouri. See, e.g., *Novak v. Shane*, No. 90,343, 2004 WL 556758, at *3-5 (Kan. App. 2004) (unpublished opinion) (nongarnishment case applying Missouri law to determine whether Missouri checking account was joint account with right of survivorship or whether it was presumptively joint account subject to intent of depositor when administrator of husband's estate challenged surviving spouse's withdrawal of balance of checking account).

But we have no breach of contract claim and the parties are not trying to enforce or avoid a contract. This is not a common-

law action to enforce a judgment. See K.S.A. 60-3006 (preserving ability to bring common-law action as alternative to action under Foreign Judgments Act). Rather, it was filed as a garnishment, and a garnishment is not a typical contract suit. Here, one party (M & I Bank) is trying to enforce a valid foreign judgment and another party (Kevin) is arguing that his contract with a third party (Equity Bank) prohibits enforcement of that judgment. M & I Bank lacks privity with Equity Bank and thus cannot assert the rights of that third party, nor can Kevin defend against M & I Bank's garnishment based on his contract with Equity Bank. A garnishment action alone does not create privity of contract between a garnishee and a garnisher. *Baisch & Skinner, Inc. v. Bair*, 507 S.W.3d 627, 631-32 (Mo. App. 2016) (citing *Walkeen Lewis Millinery Co. v. Johnson*, 130 Mo. App. 325, 109 S.W. 847, 849 [1908] [finding no privity of contract between garnishee bank and plaintiff who had obtained garnishment against defendant with funds located at bank]). So we decline the Higdons' invitation to apply the law of Missouri under the *lex loci contractus* principle to this garnishment proceeding.

A garnishment is not a cause of action which may lead to a judgment but is a remedial procedural statutory vehicle that may be used as an aid to collect a judgment. See K.S.A. 60-731(a); K.S.A. 61-3504(1). In *DeKalb Swine Breeders, Inc. v. Woolwine Supply Co.*, 248 Kan. 673, 680, 809 P.2d 1223 (1991), the court differentiated between an action on a judgment and an execution or garnishment. Although an action on a judgment is an original cause of action, "a garnishment is not considered a cause of action—it is referred to as an ancillary or auxiliary proceeding." 248 Kan. at 680; see *Associated Wholesale Grocers, Inc. v. Americold Corp.*, 293 Kan. 633, 646, 270 P.3d 1074 (2011); *Master Finance Co. of Texas v. Pollard*, 47 Kan. App. 2d 820, 823, 283 P.3d 817 (2012); 6 Am. Jur. 2d, Attachment and Garnishment § 15 ("As a general rule, an attachment or garnishment is not an original action but is ancillary to the original action seeking judgment."); 1 Am. Jur. 2d, Actions § 2 ("A cause of action is distinguishable from a remedy, which is the means or method by which the cause of action is satisfied."). This is an important distinction.

"Although the substantive rights of the parties to an action are often governed by a foreign law—such as the law of the place

where the right was acquired or the liability was incurred—the law of the forum, or the law of the jurisdiction in which relief is sought, controls as to all matters pertaining to remedial rights, as distinguished from substantive rights." 15A C.J.S., Conflict of Laws § 105; see *Davis v. Furlong*, 328 N.W.2d 150, 153 (Minn. 1983) (describing "the almost universal rule that matters of procedure and remedies [are] governed by the law of the forum state"); *Weston v. Jones*, 160 Minn. 32, 35, 199 N.W. 431 (1924) (describing as "fundamental [the] principle that remedies are governed by the law of the forum").

The Higdons concede that Kansas procedural rules for garnishments apply, and further agree that Kansas exemption statutes would apply to determine what types of assets are exempt from attachment. See, e.g., K.S.A. 60-2313(a)(2), (a)(7); K.S.A. 60-2308(a), (b) (exempting assets such as public assistance benefits, life insurance policy proceeds, pension benefits, and retirement plans from attachment in Kansas). This is correct. See *Hunt v. Remsberg*, 83 Kan. 665, 672, 112 P. 590 (1911) (Benson, J., concurring) ("[E]xemption laws are not a part of the contract; they are subject to the laws of the forum. *Chicago, Rock Island, etc., Ry. v. Sturm*, 174 U.S. 710, 17 Sup. Ct. 797, 43 L. Ed. 1144; Freeman on Execution, § 209."). In *Sturm*, the United States Supreme Court rejected the view that "'if a debt is exempt from a judicial process in the state where it is created, the exemption will follow the debt, as an incident thereto, into any other state or jurisdiction into which the debt may be supposed to be carried.'" *Chicago, Rock Island, etc., Ry. v. Sturm*, 174 U.S. 710, 717, 17 S. Ct. 797, 43 L. Ed. 1144 (1899). Rather, it held that "[e]xemption laws are not a part of the contract. They are part of the remedy and subject to the law of the forum. [Citations omitted.]." 174 U.S. at 717; see *Master Finance Co. of Texas*, 47 Kan. App. 2d at 824 ("Pollard failed to allege any exemption recognized under Kansas law."); *Nagel v. Westen*, 865 N.W.2d 325, 340-42 (Minn. App. 2015) (finding district court properly applied Minnesota's exemption law rather than law of Texas, based on general rule that exemptions are determined solely by law of the forum); *Hughes v. Prudential Lines, Inc.*, 425 Pa. Super. 262, 265, 624 A.2d 1063 (1993) ("It is well established in Pennsylvania that the laws pertaining to procedures and exemptions in attachment and garnishment are governed by

the law of the forum state."); *Garrett v. Garrett*, 30 Colo. App. 167, 171, 490 P.2d 313 (1971) ("Colorado follows the general rule that exemption laws have no extraterritorial effect."); *Sherwin-Williams Co. v. Morris*, 25 Tenn. App. 272, 156 S.W.2d 350, 352 (1941) ("Questions of exemptions are to be determined solely by the laws of the forum.").

But the Higdons assert that Kansas exemption laws do not apply here—the substantive Missouri tenancy by entirety law is not an exemption, so the body of law about exemptions is irrelevant. We disagree. The substantive Missouri decisional law has the same effect as a statutory garnishment exemption not recognized in Kansas. The account agreement under Missouri law, by creating a tenancy by the entirety, places the subject funds beyond the reach of a Kansas garnishment, working as a de facto exemption. Yet "[t]he procedure for obtaining an order of garnishment is entirely statutory.'" *Master Finance Co. of Texas*, 47 Kan. App. 2d at 822-23 (citing *LSF Franchise REO I v. Emporia Restaurants, Inc.*, 283 Kan. 13, 19, 152 P.3d 34 [2007]). The Higdons are essentially asking us to add Missouri tenancy by the entirety accounts to the list of proceeds our Legislature exempted from garnishment under Kansas law. That we cannot do.

Kevin relies on *Farmers Exchange Bank v. Metro Contracting Services, Inc.*, 107 S.W.3d 381, 395 (Mo. App. W.D. 2003). There, the Missouri court considered a writ of attachment on a note and whether that note was held as tenants by the entirety or tenants in common. The judgment debtors had acquired their interests in the note, while Kansas residents. The *Farmers Exchange Bank* court explained:

"[T]he conflict of laws question presented is not a question of what classifications of personal property are subject to attachment and execution, which would be governed by the laws of the forum state as a matter or procedure, but a question of how the appellant's interest in the Eaton note is classified. And, thus, because issues of one's rights and duties are substantive issues, as opposed to procedural issues which relate to enforcement of those rights and duties, *Mo. Nat'l Educ. Ass'n v. Mo. State Bd. of Educ.*, 34 S.W.3d 266, 284 (Mo. App. 2000), the issue in our case as to whether the Eaton note proceeds were subject to attachment and execution is not a procedural issue controlled by the laws of the forum state, as the appellant contends, but a substantive issue." 107 S.W.3d at 391.

There, the issue was whether the debtor owned the proceeds of a note by the entireties with another, making them not subject to attachment. The court found that the debtor's interest in the note proceeds was properly classified as a property interest so it applied Missouri's conflict of laws doctrines for property under the Restatement (Second) of Conflict of Laws (1971). Under that law, the domicile state at the time movable personal property was acquired was controlling; thus, the court found that Kansas law would apply in determining the bank's interest in the note. 107 S.W.3d at 393-94. Using that same law, Missouri law would apply here, assuming it was the domicile state for the Higdons when they acquired the movable property placed into their bank account.

But Kansas does not apply the Second Restatement and we are thus not persuaded to follow *Farmers Exchange Bank*. The forum state, Kansas, as a matter of procedure, controls which classifications of property are subject to attachment and execution. See 16 Am. Jur. 2d, Conflict of Laws § 128; 6 Am. Jur. 2d, Attachment and Garnishment § 14; 15A C.J.S., Conflict of Laws § 41; see, e.g., *Nagel*, 865 N.W.2d at 340 ("[T]he law of the forum governs the remedy in a proceeding to attach property in satisfaction of a debt."); *Hughes v. Prudential Lines, Inc.*, 624 A.2d 1063, 1065 (Pa. Super. 1993) ("It is well established in Pennsylvania that the laws pertaining to procedures and exemptions in attachment and garnishment are governed by the law of the forum state.").

The Kansas Supreme Court relies on the First Restatement of Conflict of Laws, not the Second. Under § 434 of the First Restatement of Conflict of Laws, absent certain inapplicable events:

"[A] valid foreign judgment which imposes a duty to pay money will be enforced by an action if:

"(a) it is final (see § 435);
"(b) it is certain in amount (see § 436);
"(c) it is unconditional (see § 437);
"(d) it has not been vacated (see § 438);
"(e) execution has not been superseded in the state which rendered it."

Neither party disputes that M & I Bank's judgment satisfies these requirements.

Enforcement of foreign judgments is required by the Full Faith and Credit Clause in the United States Constitution and congressional act. The United States Constitution provides that "Full Faith and Credit shall be given in each State to the public Acts, Records and Judicial Proceedings of every other State." U.S. Const. art. IV, § 1. The Restatement elaborates:

"This provision is supplemented by an Act of Congress, which provides that the records and judicial proceedings of a State or Territory 'shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken.' These provisions require the enforcement of a judgment of a sister State which, imposes a duty to pay money if the judgment complies with the requirements stated in this Section." Restatement (First) of Conflict of Laws § 434, comment d (1934).

See also *Padron v. Lopez*, 289 Kan. 1089, 1096, 220 P.3d 345 (2009) ("[O]nce a copy of an authenticated judgment from another state is filed with a clerk of the district court, the foreign judgment 'is then treated as a judgment of [this] state and can be executed upon the same.' 1 Elrod and Buchele, Kansas Law & Practice: Kansas Family Law § 9.71, p. 617 [4th ed. 1999]."). Under K.S.A. 60-3002, a properly filed foreign judgment "has the same effect and is subject to the same procedures, defenses and proceedings as a judgment of a district court of this state and may be enforced or satisfied in like manner."

The district court thus correctly held that Kansas law applied, that the Higdons' account is as a joint tenancy rather than a tenancy by entirety, and that Kevin's half was subject to garnishment. And the district court properly ordered the $388,911.12 garnished from the Equity Bank account to be divided equally between Gretchen and M & I Bank. See *Walnut Valley State Bank*, 223 Kan. 459, Syl. ¶ 2. Finding no error, we affirm the district court's denial of the motion to quash the garnishment and its order of distribution of the garnished funds.

Affirmed.

(536 P.3d 892)

No. 125,695

STATE OF KANSAS, *Appellee*, v. DIANNA L. CLINGERMAN, *Appellant*.

SYLLABUS BY THE COURT

1. EVIDENCE—*Contemporaneous Objection Rule—Preserves Admissibility Question on Appeal.* The contemporaneous objection rule under K.S.A. 60-404 requires a timely and a specific objection to the admission of evidence for the question of admissibility to be considered on appeal. When the rule is properly applied, counsel gives the trial judge the opportunity to control the trial without the admission of tainted evidence, and thus avoid a possible reversal and a new trial.

2. SAME—*Timely Objection Required by Statute.* K.S.A. 60-404 directs that a verdict shall not be set aside, nor the judgment reversed, without a timely objection.

3. SAME—*Timely and Specific Objection Not Made at Trial—Failure to Preserve Issue on Appeal.* When a defendant does not make a timely and specific objection to the admission of evidence at trial, the defendant has failed to preserve that issue on appeal.

4. TRIAL—*Zoom Format at Trial—No Violation of Right to Fair Trial.* Under the facts of this case, the use of a Zoom format of the trial did not violate the defendant's right to a fair trial.

Appeal from Butler District Court; PHYLLIS K. WEBSTER, magistrate judge. Opinion filed September 15, 2023. Affirmed.

Chris J. Pate, of Pate & Paugh, LLC, of Wichita, for appellant.

Brett Sweeney, assistant county attorney, and *Kris W. Kobach*, attorney general, for appellee.

Before ARNOLD-BURGER, C.J., GREEN and HILL, JJ.

GREEN, J.: Dianna L. Clingerman appeals the district court's denial of her motion for a new trial. She argues that one witness failed to audibly acknowledge the oath and, thus, his testimony was unsworn. Because Clingerman failed to make a timely and specific objection at trial to the disputed testimony, she has failed to preserve this issue on appeal. Thus, we affirm.

FACTS

The State charged Clingerman with disorderly conduct, in violation of K.S.A. 2020 Supp. 21-6203(a)(3). Clingerman pleaded not guilty, and the case proceeded to a bench trial via a Zoom format before a magistrate judge.

The State's first witness at trial was Officer Peyton Heidebrecht of the Rose Hill Police Department. The trial court swore in Heidebrecht before he testified, but audio difficulties disrupted the process. Although the trial court administered the oath, Heidebrecht's affirmation was not audible. The trial court noted that it did not hear Heidebrecht's response but did not readminister the oath. Clingerman did not object.

After Heidebrecht's testimony, the trial court received testimony from Kelly McReynolds, a neighbor. McReynolds explained that the neighborhood had a block party, but there was drinking involved. When another man punched Clingerman's husband, Clingerman became "pretty heated" about the fight and started yelling at the neighborhood. McReynolds testified that Clingerman said that she had guns in the basement of her home and that she knew how to use them. McReynolds estimated that Clingerman yelled for 30 minutes to an hour. Alycia McReynolds testified that she was afraid to go home to her sleeping daughter because it required her to walk past Clingerman, who was shouting threats to shoot people. Another neighbor, Travis Cagle, testified that he was walking with a small group of people and Clingerman yelled at them that she had "a house[full] of guns" and she would "just shoot us in the head."

Based on all the evidence, the trial court found Clingerman guilty of disorderly conduct, sentencing her to 6 months of nonreporting probation with an underlying jail sentence of 30 days and a $50 fine.

Clingerman moved for a new trial, claiming she was deprived of her right to a fair trial. She argued that Heidebrecht's testimony was unsworn since he never responded audibly to the oath. The trial court denied the motion, finding that Heidebrecht clearly accepted the oath despite his response being inaudible. The trial court additionally held that because Heidebrecht was the reporting officer who took witness statements, he would not have been the

person who witnessed Clingerman's alleged disorderly conduct and fighting words. Thus, the magistrate judge ruled that testimony of the other witnesses was sufficient to convince her of Clingerman's guilt, even if the trial court disregarded Heidebrecht's testimony as unsworn.

Clingerman timely appeals.

ANALYSIS

Did Clingerman fail to preserve her claim related to unsworn testimony?

Clingerman argues that the trial court erred in considering Heidebrecht's unsworn testimony and in denying her motion for a new trial. The State argues that Clingerman's conviction cannot be set aside because she did not make a timely and specific objection to the evidence at trial.

K.S.A. 60-404 generally precludes an appellate court from reviewing an evidentiary challenge absent a timely and specific objection made on the record. *State v. Ballou*, 310 Kan. 591, 613-14, 448 P.3d 479 (2019) (discussing K.S.A. 60-404 in detail).

As a procedural bar to appellate review, K.S.A. 60-404 requires a party to make a contemporaneous objection to issues involving the erroneous admission or exclusion of evidence. *State v. Hillard*, 313 Kan. 830, 839, 491 P.3d 1223 (2021); see also *State v. Gaona*, 293 Kan. 930, 956, 270 P.3d 1165 (2012) (characterizing contemporaneous-objection rule as a "prudential rather than jurisdictional obstacle to appellate review"). Kansas appellate courts have, on occasion, refused to strictly apply the contemporaneous-objection rule in some contexts upon finding the underlying purpose for the rule has been satisfied. See, e.g., *State v. Hart*, 297 Kan. 494, 510-11, 301 P.3d 1279 (2013); *State v. Spagnola*, 295 Kan. 1098, 1103, 289 P.3d 68 (2012); *State v. Breedlove*, 295 Kan. 481, 490-91, 286 P.3d 1123 (2012).

Clingerman argues that the admission of unsworn testimony deprived her of her constitutional right to confront the witnesses against her. And she argues that the trial court failed to follow K.S.A. 60-418, requiring every witness to "express his or her purpose to testify by the oath or affirmation required by law" before

testifying. She argues that the admission of the unsworn testimony tainted the trial court's view of the evidence.

Clingerman correctly notes that conducting trials by Zoom videoconferencing is a relatively new phenomenon and, therefore, there is no binding or persuasive precedent on this precise issue. And Clingerman further argues that "[w]ith the advent of trials by Zoom, and other electronic means, the issue we are faced with in this case has the likelihood of occurring again."

In *A.I.S. v. N.A.R.*, No. A-1972-21, 2023 WL 2959841 (N.J. App. 2023) (unpublished opinion), a New Jersey court simply neglected to swear in the plaintiff in a final restraining order hearing on the sixth Zoom appearance. The appellate court upheld the final restraining order, noting that defense counsel did not object and in fact cross-examined the unsworn witness. Also, both plaintiff and defendant had been sworn in and admonished to tell the truth at the five previous hearings. 2023 WL 2959841, at *4. Conversely, in *Grimes v. Commonwealth*, No. 2021-CA-1519-MR, 2023 WL 2542273 (Ky. App. 2023) (unpublished opinion), a Kentucky court conducted a probation violation hearing over Zoom and asked the probation officer what violations were at issue without administering an oath. The appellate court reversed and remanded, holding that the probation officer's verbal list of Grimes' violations was unsworn testimony and Grimes had no opportunity to cross-examine. 2023 WL 2542273, at *4-5. But seemingly no case from any federal, state, or other jurisdiction responds precisely to the question of an oath administered with no audible response.

Clingerman insists that a new trial is the remedy for Heidebrecht's inaudible response to the oath. The first flaw in her argument is that she confuses ontology (what is) with epistemology (knowledge of what is). See Engle, Ontology, Epistemology, Axiology: Bases for a Comprehensive Theory of Law, 8 Appalachian J.L. 103, 105 n.9-10 (2008). Four possibilities exist. Either Heidebrecht affirmed the oath or he did not, regardless of whether it was picked up by a microphone (the ontological question). Then, an observer either knows or does not know the truth about Heidebrecht's affirmation (the epistemological question). On appeal, Clingerman consistently refers to Heidebrecht's testimony as

unsworn, but Heidebrecht may have affirmed the oath even if only Heidebrecht knows it.

At the motion for new trial hearing, the magistrate judge answered the ontological question of whether Heidebrecht affirmed the oath. The magistrate judge ruled as follows:

"[T]his motion raises concerns that the . . . answer to the sworn statement by the Court was not audible by the witness. And there was some trouble getting the witness' volume to project for his testimony. It was a deputy involved in the case.

"But the Court had no doubt that it was a sworn statement. That the Court did receive his response—even if it was not audible on the video. And the Court made the comment that she needed to—that she couldn't hear him and that he needed to be audible. But—certainly, this Court can—and any . . . person—can tell the difference between an 'I do', or 'I swear' versus 'I don't' and so forth."

The magistrate judge's statements are not entirely clear about how she received Heidebrecht's response. It may have been through Heidebrecht nodding, through lip-reading, or through hearing at least some audio even if it was too low or distorted to make it into the transcript. But the record gives at least some evidence that Heidebrecht did in fact swear to tell the truth.

But if Heidebrecht affirmed his oath, that affirmation does not directly appear in the trial transcript. Whether a tree falls in a forest or a witness affirms his oath, it may be impossible for a potential observer to know that the event occurred. The magistrate judge provided her positive affirmation on the ontological question: that Heidebrecht's swore oath exists. To the extent there is epistemological doubt about how one can know the existence of Heidebrecht's sworn oath, the statutory burden falls on Clingerman to erase that doubt. Under K.S.A. 60-404, the burden of ensuring that the testimony is properly admitted falls on Clingerman because she is the party complaining of error.

The transcript shows that Clingerman did not timely object to the admission of testimony, despite the defect in administering the oath.

"THE COURT: Do you swear the testimony you're about to give shall be the truth, the whole truth, and nothing but the truth, so help you God? (No audible response from Witness Heidebrecht.)

"DEFENDANT CLINGERMAN: Yes, ma'am.

"THE COURT: Oh—officer—I'm addressing the officer. Thank you.

"DEFENDANT CLINGERMAN: Oh.

"THE COURT: I appreciate your cooperation. That's okay.

"But Officer, I didn't hear your response. (No audible response.) We're gonna have to get your volume straightened out, I can't hear you. Not yet. I had that problem earlier today myself. I had to get assistance to help me out.

"Missy, you didn't happen to notice what Mr. Keen did to get that volume started; did you?

. . . .

"THE COURT: Okay.

"So Ms.—Officer Heidebrecht, do you see your microphone icon?

"WITNESS HEIDEBRECHT: Yes. Does this sound better?

"THE COURT: That's wonderful. Okay.

"Please proceed, Mr. Sweeney.

"MR. SWEENEY: Thank you, Your Honor.

. . . .

"Q. Would you please state your name for the Court please, sir.

"A. Peyton Heidebrecht."

In other words, the transcript clearly shows that everyone present noticed the audio difficulties as they happened. The trial judge even declared, "I didn't hear your response." But Heidebrecht began to testify, and Clingerman did not object to the testimony. Furthermore, Clingerman cross-examined Heidebrecht. In *A.I.S.*, the appellate court upheld the final restraining order because the defendant cross-examined the witness. 2023 WL 2959841, at *4. But in *Grimes*, the appellate court remanded because the probationer had no opportunity to cross-examine the probation officer at the revocation hearing. 2023 WL 2542273, at *4-5. Although Clingerman's ability to cross-examine Heidebrecht is not dispositive, it does undermine Clingerman's claim that she was unable to confront the witnesses against her.

K.S.A. 60-404 states:

"A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless there appears of record objection to the evidence timely interposed and so stated as to make clear the specific ground of objection."

Clingerman's argument fails because she did not meet the K.S.A. 60-404 timely objection rule. This contemporaneous objection rule "requires timely and specific objection to the admission of evidence in order for the question of admissibility to be considered on appeal." *Baker v. State*, 204 Kan. 607, 611, 464 P.2d 212 (1970). When the rule is properly applied, counsel gives

the trial judge the opportunity to control the trial without the admission of tainted evidence, and thus avoid a possible reversal and a new trial. 204 Kan. at 611.

K.S.A. 60-404 directs that the verdict "shall not" be set aside, nor the judgment reversed, without a timely objection.

Also, it is a well-settled rule that a timely and specific objection to the admission of evidence at trial must be made to preserve that issue on appeal. *State v. Sims*, 265 Kan. 166, 174-75, 960 P.2d 1271 (1998); see *State v. Horton*, 283 Kan. 44, 63, 151 P.3d 9 (2007). Here, Clingerman did not make a timely and specific objection to the admission of Heidebrecht's alleged unsworn testimony at trial. Thus, she has failed to preserve this issue on appeal.

Finally, we see no irregularities with the Zoom format of the trial that would have violated Clingerman's right to a fair trial. See *In re C.T.*, 61 Kan. App. 2d 218, 231-32, 501 P.3d 899 (2021) ("[T]he district court did not deprive Mother of due process by holding the termination of parental rights hearing through Zoom.").

If the trial court erred, was the error harmless?

Clingerman argues that the inclusion of Heidebrecht's unsworn testimony tainted the trial court's view of the evidence during the bench trial. The State argues that the evidence from the other witnesses was more important than Heidebrecht's testimony and was overwhelming, making any error harmless.

The erroneous admission or exclusion of evidence is subject to review for harmless error under K.S.A. 2022 Supp. 60-261. *State v. Lowery*, 308 Kan. 1183, 1235-36, 427 P.3d 865 (2018). Nevertheless, if the error implicates a constitutional right, the effect of that error must be assessed under the constitutional harmless error standard. *State v. Thornton*, 312 Kan. 829, 832, 481 P.3d 1212 (2021) (applying constitutional harmless error standard to evidence obtained in violation of Fourth Amendment to the United States Constitution).

In *State v. Ward*, 292 Kan. 541, 565, 256 P.3d 801 (2011), our Supreme Court held that to find an error harmless under K.S.A. 60-261, K.S.A. 60-2105, and the United States Constitution, a Kansas court must be able to declare the error "did not affect a party's substantial rights, meaning it will not or did not affect the

trial's outcome." Under either test, the party benefiting from the error bears the burden of proving harmlessness. See *State v. McCullough*, 293 Kan. 970, 983, 270 P.3d 1142 (2012) (nonconstitutional error); *Ward*, 292 Kan. at 568-69 (constitutional error). The level of certainty by which a court must be convinced depends upon whether the error implicates a federal constitutional right. 292 Kan. at 565.

When an error infringes upon a party's federal constitutional right, a court will declare a constitutional error harmless only when the party benefiting from the error persuades the court "beyond a reasonable doubt that the error complained of will not or did not affect the outcome of the trial in light of the entire record, *i.e.*, proves there is no reasonable possibility that the error affected the verdict." *Ward*, 292 Kan. at 569 (citing *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 [1967]).

Clingerman argues that Heidebrecht's testimony was unsworn, and it unfairly bolstered the other witnesses' testimony. The obvious weakness of Clingerman's argument is demonstrated by the State's counter argument. There, the State argues that the testimony of the other witnesses did not need bolstering. And it argues that the neighbors' testimony was overwhelming evidence that would independently support Clingerman's conviction for disorderly conduct.

In denying Clingerman's new trial motion, the magistrate judge stated the following:

> "It is this Court's opinion that, although the officer[']s affirmation was not heard on the recording, that he did clearly accept the oath, or he would not have been allowed to proceed. But even if the Court were to find that his oath was not sufficient, and that his testimony cannot be relied upon, there is still ample evidence from the other witnesses that this crime was committed, beyond a reasonable doubt.
>
> "There were the witnesses that were the first-hand witnesses in this case that testified, clearly, under oath, to the charge of disorderly conduct/fighting words. The officer would not have been the one to hear those words in the first place. He was simply reporting what was told to him by the other witnesses at the scene. And those witnesses all confirmed, under oath testimony, that this defendant did behave in a disorderly fashion at the neighborhood block party.
>
> "So I am going to deny the motion."

In most cases, appellate courts reviewing for harmless error do not have the benefit of the fact-finder explicitly outlining which

evidence was more persuasive and which evidence was less useful in arriving at a verdict. Clingerman cites *Ward* in support of her claim that the State had failed to satisfy the constitutional harmless error requirement. In *Ward*, Yvonne Ward claimed that she was prejudiced because two witnesses appeared in jail clothing at trial and other witnesses identified them by their orange jumpsuits. The *Ward* court reviewed the evidence against Ward and was convinced beyond a reasonable doubt that the error of identifying two witnesses by their jail clothing did not affect the outcome of the trial. 292 Kan. at 579.

But the *Ward* court did not have the benefit of on-the-record statements from the fact-finder, the jury in that case, saying that the error did not affect its outcome and that the verdict would have been the same without the error. Most harmless error review does not have the benefit of such explicit statements from the finder of facts. See, e.g., *State v. Smith*, 317 Kan. 130, 137-38, 526 P.3d 1047 (2023); *State v. Brown*, 316 Kan. 154, 163, 513 P.3d 1207 (2022). Here, the record provides the unusual benefit of having the fact-finder, the magistrate judge, explicitly state on the record the rationale behind the conviction and which evidence was most relevant to her factual conclusion. We know directly from the record that Heidebrecht's testimony—whether erroneously admitted or not—did not affect the verdict. Because there is no reasonable possibility that the error, if any, affected the verdict, we conclude that this is an independent alternative ground for affirming this decision.

Affirmed.

(537 P.3d 853)

No. 125,119

STATE OF KANSAS, *Appellee*, v. AUSTIN WAYNE DETIMORE, *Appellant.*

SYLLABUS BY THE COURT

1. KANSAS OFFENDER REGISTRATION ACT—*Catch-All Provision Defines Certain Nonsex Crimes as Sexually Violent Crimes if Act Sexually Motivated – Exception*. K.S.A. 2022 Supp. 22-4902(c)(19) contains a catch-all provision defining certain otherwise unenumerated, nonsex crimes as "[s]exually violent crime[s]" if the district court determines beyond a reasonable doubt the criminal act was "sexually motivated." However, the catch-all provision does not apply to convictions when the district court finds on the record that the act underlying the conviction involved non-forcible sexual conduct with a victim at least 14 years of age when the offender was not more than 4 years older than the victim.

2. SAME—*Definition of Sexually Violent Crime in K.S.A 2022 Supp. 22-4902(c)(19)—Exception for Nonsex Crimes Not Named in (c)(1)-(18*). The exception to the definition of a "[s]exually violent crime" in K.S.A. 2022 Supp. 22-4902(c)(19) for acts that the court determines on the record "involved non-forcible sexual conduct" when "the victim was at least 14 years of age and the offender was not more than four years older than the victim" applies only to convictions for nonsex crimes not otherwise enumerated in K.S.A. 2022 Supp. 22-4902(c)(1)-(18).

Appeal from Shawnee District Court; STEVEN R. EBBERTS, judge. Opinion filed September 29, 2023. Affirmed.

Corrine E. Gunning, of Kansas Appellate Defender Office, for appellant.

Jodi Litfin, deputy district attorney, Michael F. Kagay, district attorney, and *Kris W. Kobach*, attorney general, for appellee.

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

HURST, J.: After being convicted for one count of aggravated indecent liberties with a child, the district court ordered Austin Wayne Detimore to register as an offender pursuant to the Kansas Offender Registration Act (KORA), K.S.A. 22-4901 et seq. Although Detimore does not attack his conviction, he argues that the district court erred by ordering him to register as an offender under

KORA. Detimore alleges that his conduct underlying his conviction for aggravated indecent liberties with a child meets an exception to the definition of "sexually violent crime" and thus excepts him from KORA registration. Although Detimore's argument is not without logical nuance, it is unsupported by the ordinary and plain reading of the applicable statute. The district court properly found that Detimore's conviction for indecent liberties with a child met the definition of a "sexually violent crime" that requires him to register under KORA.

FACTUAL AND PROCEDURAL BACKGROUND

The details supporting Detimore's conviction are mostly irrelevant to this court's determination and the material facts necessary for this review are undisputed. Detimore entered a guilty plea to one count of aggravated indecent liberties with a child for acts he committed in December 2018. At the plea hearing, upon Detimore's request, the district court made uncontested factual findings that: (1) the crime of conviction was sexually motivated, (2) the underlying sexual conduct was non-forcible, (3) the victim was 15 years old at the time of intercourse, and (4) Detimore was fewer than four years older than the victim. The district court also notified Detimore of his duty to register under KORA. Detimore agreed to provisionally comply with KORA registration requirements subject to further litigation.

Before sentencing, Detimore challenged the district court's order requiring him to register under KORA. Detimore argued that the facts underlying his conviction satisfied an exception to the registration requirement. At sentencing, the district court overruled Detimore's objection and entered an order requiring his lifetime registration.

DISCUSSION

KORA requires "[o]ffenders," including "sex offenders," to register with a statewide database that holds information about them, including their address, and their offense(s) requiring registration. K.S.A. 2022 Supp. 22-4902(a)(1). Under KORA, a "[s]ex offender" is any person convicted of any "sexually violent crime" on or after April 14, 1994. K.S.A. 2022 Supp. 22-4902(b)(1).

KORA lists several "[s]exually violent crime[s]" for which a conviction triggers the registration requirement. Among those identified are:

> "(3) aggravated indecent liberties with a child, as defined in K.S.A. 21-3504, prior to its repeal, or K.S.A. 2022 Supp. 21-5506(b), and amendments thereto;
>
> . . . .
>
> "(19) any act that has been determined beyond a reasonable doubt to have been sexually motivated, unless the court, on the record, finds that the act involved non-forcible sexual conduct, the victim was at least 14 years of age and the offender was not more than four years older than the victim. As used in this paragraph, 'sexually motivated' means that one of the purposes for which the defendant committed the crime was for the purpose of the defendant's sexual gratification." K.S.A. 2022 Supp. 22-4902(c).

An offender's required registration duration varies based on current and prior convictions. K.S.A. 2022 Supp. 22-4906. Certain convictions—including a conviction for aggravated indecent liberties with a child—trigger a lifetime registration requirement. K.S.A. 2022 Supp. 22-4906(d)(3).

Detimore argues that despite the registration requirement for persons like him who are convicted of aggravated indecent liberties with a child—the facts underlying his conviction meet the exception from registration under K.S.A. 2022 Supp. 22-4902(c)(19). This court exercises unlimited review of questions of law, including interpreting statutory language such as KORA. *Nauheim v. City of Topeka*, 309 Kan. 145, 149, 432 P.3d 647 (2019). When interpreting a statute, this court first looks to "the plain language of the statute, giving common words their ordinary meaning" to determine the Legislature's intent. *In re M.M.*, 312 Kan. 872, 874, 482 P.3d 583 (2021).

The issue appears simple. KORA requires persons convicted or adjudicated guilty of certain offenses to register as an offender with the appropriate law enforcement agency. K.S.A. 2022 Supp. 22-4905. Persons convicted of a "sexually violent crime" are included in the registration requirement, and KORA plainly and unambiguously defines convictions for aggravated indecent liberties with a child as a conviction for a "sexually violent crime." K.S.A. 2022 Supp. 22-4902(c)(3); K.S.A. 2022 Supp. 22-4906(d)(3). "As used in the Kansas offender registration act, unless the context

otherwise requires: . . . (b) 'Sex offender' includes any person who: (1) on or after April 14, 1994, is convicted of any sexually violent crime." K.S.A. 2022 Supp. 22-4902. The statute further provides that "(c) '[s]exually violent crime' means: . . . (3) aggravated indecent liberties with a child, as defined in K.S.A. 21-3504, prior to its repeal, or K.S.A. 2022 Supp. 21-5506(b), and amendments thereto." K.S.A. 2022 Supp. 22-4902. Therefore, a plain reading of KORA demonstrates that Detimore's conviction for aggravated indecent liberties with a child carries a registration requirement.

Rather than accepting this clear reading of the statute, Detimore relies on subsection (c)(19) of K.S.A. 2022 Supp. 22-4902 to claim that the facts underlying his conviction make him excepted from registration:

> "(c) 'Sexually violent crime' means. . . . (19) any act that has been determined beyond a reasonable doubt to have been sexually motivated, *unless the court, on the record, finds that the act involved non-forcible sexual conduct, the victim was at least 14 years of age and the offender was not more than four years older than the victim*." (Emphasis added.) K.S.A. 2022 Supp. 22-4902(c)(19).

The first part of subsection (c)(19) is a catch-all provision under which a conviction for an otherwise-unenumerated sexually motivated crime can trigger an offender's duty to register under KORA. K.S.A. 2022 Supp. 22-4902(c)(19); *State v. Coman*, 294 Kan. 84, 92, 273 P.3d 701 (2012) (addressing the catch-all provision in a prior version of the statute). This means that even if a particular conviction is not defined as a sexually violent crime in K.S.A. 22-4902(c)(1)-(18), it could still be classified as a "sexually violent crime" for KORA registration purposes if the district court determines "beyond a reasonable doubt" that the crime was "sexually motivated." However, the subsection also contains an exception to its application for those unenumerated offenses if "the court, on the record, finds that the act involved non-forcible sexual conduct, the victim was at least 14 years of age and the offender was not more than four years older than the victim." K.S.A. 2022 Supp. 22-4902(c)(19).

Detimore argues that the statutory language is ambiguous as to whether the exception contained in subsection (c)(19) applies to *all* sexually violent crimes—including those enumerated as such in subsections (c)(1)-(18)—or just the category of crimes

pulled into the definition of sexually violent crimes by the catch-all in subsection (c)(19). According to Detimore, the ambiguity requires this court to resort to the statute's legislative history and canons of statutory construction to resolve that ambiguity in favor of applying the (c)(19) exception to *all* sexually violent crimes. Although a logical argument could be made that by including the specific factors in subsection (c)(19) that undermine a finding that a conviction is a sexually violent crime, the Legislature intended to omit convictions meeting those factors from the definition of "sexually violent crimes." Under this reasoning, the factors creating an exception to registration in subsection (c)(19) should then be considered for any conviction—even if enumerated as sexually violent in the statute—not just the unenumerated convictions drawn in by the catch-all provision in (c)(19). In any event, this argument does not render the statute ambiguous.

Detimore argues the ambiguity arises because the catch-all in subsection (c)(19) only includes "sexually motivated" offenses, while the exception applies to crimes with "sexual conduct." He claims that if a nonsex crime is found to be "sexually motivated" as required by the catch-all provision in (c)(19), then it cannot also have "sexual conduct" as to make the exception apply. However, Detimore misreads the exception to somehow require a finding that the offender engaged in sexual conduct. Rather, the exception merely prohibits its application to offenses involving "forcible sexual conduct." Prohibiting application of the exception for crimes involving "forcible sexual conduct" does not create an inverse requirement that the crime itself involve sexual conduct for the catch-all provision to apply. Moreover, this court cannot say it is impossible to be convicted of a "sexually motivated" nonsex crime that also involves "sexual conduct." There is no need to create hypothetical applications of this subsection to establish its viability, as Kansas appellate courts have upheld several cases requiring defendants to register under KORA using the sexually violent crime catch-all provision. See *Coman*, 294 Kan. at 95 (identifying a series of cases where Kansas appellate courts have upheld application of the catch-all provision to find a crime sexually motivated for KORA registration purposes). The exception from registration under the catch-all provision for certain crimes in-

volving non-forcible sexual conduct does not require that convictions for crimes meeting the catchall provision involve "sexual conduct" and does not render K.S.A. 22-4902(c)(19) ambiguous.

Finally, under the plain language of the statute, a conviction for aggravated indecent liberties with a child always requires registration. As the Kansas Supreme Court has recognized, "KORA's definition provision, K.S.A. 22-4902, includes a list of crimes that are per se 'sexually violent crimes,' i.e., crimes which always require KORA registration." *Coman*, 294 Kan. at 85. Nothing in the plain language of the statute indicates that the Legislature intended for the exception in subsection (c)(19) to apply to the litany of crimes specifically identified as sexually violent crimes.

The individual subsections in K.S.A. 2022 Supp. 22-4902(c) enumerating the various sexually violent crimes are separated from the catchall provision in subsection (c)(19) by the word "or," indicating that subsections (1) through (18) each identifies a different sexually violent crime. If the exception contained in the catch-all provision in subsection (19) was intended to apply to each sexually violent crime in the list—rather than just sexually violent crimes roped in by the catch-all provision—the exception would not have just been included with the catch-all subsection. Rather, the exception would have been included in the statute to demonstrate its application to all the separately enumerated crimes. For example, in a different section of the statute that provides another definition of who constitutes a "[s]ex offender" and is thus subject to registration, the Legislature made clear that the very same exception contained only in the catch-all subsection applies to all the separately enumerated crimes in that section:

> "(b) 'Sex offender' includes any person who. . . (2) on or after July 1, 2002, is adjudicated as a juvenile offender for an act which, if committed by an adult, would constitute the commission of a sexually violent crime, *unless the court, on the record, finds that the act involved non-forcible sexual conduct, the victim was at least 14 years of age and the offender was not more than four years older than the victim.* (Emphasis added)." K.S.A. 2022 Supp. 22-4902(b)(2).

Unlike the universal application of the exception in subsection (b)(2), in subsection (c)(19) at issue here the Legislature chose to not make the exception applicable to the list of enumerated crimes. Had the Legislature intended for the exception in (c)(19) to apply to the entire list of enumerated crimes defined as sexually violent

therein, the (c)(19) exception would have been written as it is in subsection (b)(2). Instead, the Legislature chose to limit the applicability of the exception in this content to the catch-all provision.

The plain and unambiguous reading of KORA demonstrates that the exception in subsection (c)(19) limits the reach of the catch-all provision and does not somehow negate the categorization of the litany of enumerated offenses in subsections (c)(1) through (18) as sexually violent. The (c)(19) exception merely narrows the category of sexually motivated nonsex offenses that could trigger KORA registration despite the offense not being expressly defined as a sexually violent crime. This result is not only consistent with the plain language of the statute but consistent with its intent.

CONCLUSION

Detimore was convicted of aggravated indecent liberties with a child, an offense expressly designated a sexually violent crime under KORA. Having found no ambiguity related to Detimore's allegations, this court declines to consider KORA's legislative history or employ the canons of statutory construction to interpret Detimore's registration requirements. Therefore, under the plain and unambiguous language of KORA, Detimore is a sex offender subject to lifetime KORA registration. Nothing in subsection (c)(19) alters or contradicts that result, and the district court's judgment is affirmed.

Affirmed.

(539 P.3d 227)

No. 125,269

STATE OF KANSAS, *Appellee*, v. JASON W. PHIPPS, *Appellant*.

SYLLABUS BY THE COURT

1. CRIMINAL LAW—Counterman v. Colorado *Overrules* State v. Boettger. *Counterman v. Colorado*, 600 U.S. 66, 69, 143 S. Ct. 2106, 216 L. Ed. 2d 775, (2023), holds that the First Amendment requires proof of a defendant's subjective understanding of the threatening nature of a statement to be punished as a crime, but a mental state of recklessness is sufficient to establish a true threat. This decision effectively overrules *State v. Boettger*, 310 Kan. 800, 450 P.3d 805 (2019). The holding in *Counterman* applies to any pending criminal case in Kansas in which the defendant's sentence is not final.

2. SAME—*Sentencing Statute Involving Multiple Conviction Cases Not Applicable to Misdemeanor Sentences.* K.S.A. 2022 Supp. 21-6819(b), as part of the revised Kansas Sentencing Guidelines Act, applies only to felony sentences and not to misdemeanor sentences.

Appeal from Sumner District Court; WILLIAM R. MOTT, judge. Submitted without oral argument. Opinion filed October 20, 2023. Affirmed.

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

Natalie Chalmers, assistant solicitor general, and *Kris W. Kobach*, attorney general, for appellee.

Before SCHROEDER, P.J., MALONE, J., and MARY E. CHRISTOPHER, S.J.

MALONE, J.: Jason W. Phipps appeals his sentences following his no contest pleas to two felonies and two misdemeanors. Phipps objected to his criminal history score, arguing that his prior Kansas conviction for criminal threat could not be included in his criminal history because the State failed to show the conviction was based only on intentional conduct. The district court denied his objection and sentenced Phipps using a criminal history score of B. On appeal, Phipps claims the district court's ruling is contrary to the Kansas Supreme Court's decision in *State v. Boettger*, 310 Kan. 800, 823, 450 P.3d 805 (2019), holding the reckless criminal threat provision of K.S.A. 2018 Supp. 21-5415(a)(1) unconstitutionally overbroad. The State argues, and we agree, that

the Kansas Supreme Court's holding in *Boettger* has been effectively overruled by the United States Supreme Court in *Counterman v. Colorado*, 600 U.S. 66, 69, 143 S. Ct. 2106, 216 L. Ed. 2d 775 (2023). Thus, we find the district court did not err by using Phipps' prior criminal threat conviction to calculate his criminal history score.

Phipps also claims the district court violated K.S.A. 2022 Supp. 21-6819(b) by ordering him to serve his misdemeanor sentences in the county jail consecutive to his felony sentences, contrary to the statute's double rule that limits the total prison sentence imposed in multiple conviction cases. But we find that K.S.A. 2022 Supp. 21-6819 applies only to felony sentences and not to misdemeanor sentences. Thus, we reject Phipps' statutory construction argument and affirm the district court's judgment.

FACTS

On April 4, 2022, Phipps pleaded no contest to burglary of a vehicle and theft of a firearm—both severity level 9 nonperson felonies—and two misdemeanors—theft and criminal trespass. Phipps committed these crimes on January 3, 2022. Phipps' presentence investigation (PSI) report calculated a criminal history score of B, based in part on a 2010 Kansas conviction for criminal threat.

Phipps objected to the criminal history score and argued that his prior criminal threat conviction could not be used for criminal history purposes because the PSI report did not establish whether his conviction was for intentional or reckless criminal threat. Because the Kansas Supreme Court in *Boettger* had invalidated the portion of Kansas' criminal threat statute proscribing reckless criminal threats as unconstitutional, and because Kansas law forbids convictions arising under statutes that have since been found unconstitutional from being used for criminal history purposes, Phipps argued that his prior criminal threat conviction could not be included in his criminal history score absent proof that his conviction was for intentional criminal threat.

The district court held a hearing on Phipps' criminal history objection, and the State presented a transcript of Phipps' 2010 plea

hearing describing the factual basis for his no contest plea to criminal threat. The transcript reflected that Phipps went to a woman's home and demanded that she open a gun safe. When she refused, Phipps said, "'You will if you have a gun to your head.'" Phipps also asked her if she wanted to die there and said that other people were going to die. The district court found that the factual basis for the plea supported a conviction of both intentional and reckless criminal threat. As a result, the district court determined the criminal threat conviction was properly scored as a person felony and overruled Phipps' objection to his criminal history score.

On June 13, 2022, the district court sentenced Phipps to 14 months' imprisonment for burglary of a vehicle, 6 months' imprisonment for felony theft of a firearm, 12 months in the county jail for misdemeanor theft, and 6 months in the county jail for misdemeanor criminal trespass, with all sentences to run consecutive, for a controlling sentence of 20 months with the Kansas Department of Corrections (KDOC) followed by 18 months in the county jail. Phipps timely appealed the district court's judgment.

DID THE DISTRICT COURT ERR IN SCORING PHIPPS' PRIOR CRIMINAL THREAT CONVICTION?

Phipps' appellate brief claims the district court erred by using his prior criminal threat conviction to calculate his criminal history score, resulting in an illegal sentence, because the State failed to prove the conviction was based only on intentional conduct. He argues that his prior criminal threat conviction may have stemmed from a reckless criminal threat found unconstitutional in *Boettger*. Phipps asserts the district court engaged in improper judicial fact-finding when it found that the prior criminal threat conviction was based on intentional conduct. He asks us to vacate his sentences and remand for resentencing with a criminal history score of D.

The State's brief, filed in April 2023, argues that reckless criminal threat is not unconstitutional and points out that the United States Supreme Court was addressing the issue in the then-pending case of *Counterman v. Colorado*. The brief also argues that Phipps' criminal history challenge is moot because he has already completed the prison portion of his sentence. On the merits, the State argues that Phipps' criminal history was correctly calculated because his no contest plea established that his prior criminal

threat conviction was based on both intentional and reckless conduct, and the statute does not require the State to prove that Phipps' conduct was *only* intentional. Finally, the State argues that Phipps should not be allowed to collaterally attack the constitutional validity of his prior criminal threat conviction through a challenge to his criminal history score.

Phipps filed a reply brief addressing the State's mootness claim but not the State's argument about *Counterman*. The State filed a Supreme Court Rule 6.09 (2023 Kan. S. Ct. R. at 40) letter of additional authority when the *Counterman* decision was issued, asserting that the decision effectively overrules *Boettger* and eliminates any concerns over the constitutionality of Phipps' prior criminal threat conviction. Phipps did not respond to the letter of additional authority as permitted under Rule 6.09(d).

Given that *Counterman* was filed after briefing was completed, this court directed the parties to file supplemental briefing on (1) whether *Counterman* effectively overrules *Boettger* and (2) whether the holding in *Counterman* applies to Phipps' criminal history challenge on direct appeal. Phipps' supplemental brief answers no to both questions. As to the first question, Phipps argues that *Counterman* is readily distinguishable because the Colorado statute addressed in that case is different from the Kansas reckless criminal threat statute declared unconstitutional in *Boettger*. He adds that even if the effect of *Counterman* is that the Kansas reckless criminal threat provision does not violate the First Amendment to the United States Constitution, the provision violates section 11 of the Kansas Constitution Bill of Rights. As to the second question, Phipps argues that because reckless criminal threat had been declared unconstitutional in *Boettger* at the time he committed his current crimes, any change in the law cannot affect his sentence.

The State reasserts its previous argument that based on the holding in *Counterman*, the "reckless disregard" portion of the Kansas criminal threat statute does not violate the First Amendment—contrary to the holding in *Boettger*—and eliminates any concerns over the constitutionality of Phipps' prior criminal threat conviction. The State also argues that the holding in *Counterman* applies to Phipps' criminal history challenge and sentence which is pending on direct appeal and not final.

Phipps' criminal history challenge presents an illegal sentence claim subject to unlimited appellate review. *State v. Roberts*, 314 Kan. 316, 319-20, 498 P.3d 725 (2021). Resolution of the parties' arguments requires us to examine the revised Kansas Sentencing Guidelines Act (KSGA), K.S.A. 2022 Supp. 21-6801 et seq. Statutory interpretation presents a question of law over which appellate courts have unlimited review. *State v. Stoll*, 312 Kan. 726, 736, 480 P.3d 158 (2021).

This appeal presents a criminal history challenge.

Before addressing the parties' arguments, we will review how a defendant's sentence is determined under the KSGA. Under the KSGA, a defendant's sentence depends on the severity of the crime of conviction and the defendant's criminal history score. K.S.A. 2022 Supp. 21-6804(d). The severity level for every felony crime in Kansas is determined by the Legislature and is fixed for sentencing purposes as of the date the offender commits the crime. See K.S.A. 2022 Supp. 21-6807 (crime severity scale for nondrug crimes); K.S.A. 2022 Supp. 21-6808 (crime severity scale for drug crimes). The defendant's criminal history is admitted in open court by the offender or determined by a preponderance of the evidence at the sentencing hearing by the sentencing judge. K.S.A. 2022 Supp. 21-6814(a). It is not fixed for sentencing purposes as of the date the offender commits the crime. K.S.A. 2022 Supp. 21-6810(a). The State bears the burden to prove a defendant's criminal history at sentencing. The State can satisfy this burden by preparing a PSI report. K.S.A. 2022 Supp. 21-6814(b). But if the defendant identifies an error and provides a written objection to the PSI report, then the State must prove the disputed portion of the defendant's criminal history. See K.S.A. 2022 Supp. 21-6814(c).

Generally, all prior convictions must be counted in determining a defendant's criminal history score unless the convictions constitute an element of the present crime, enhance the severity level, or elevate the classification from a misdemeanor to a felony. K.S.A. 2022 Supp. 21-6810(d)(10); *State v. Fowler*, 311 Kan. 136, 142, 457 P.3d 927 (2020). But "[p]rior convictions of a crime defined by a statute that has since been determined unconstitutional by an appellate court shall not be used for criminal history scoring purposes." K.S.A. 2022 Supp. 21-6810(d)(9).

When Phipps committed the acts underlying his criminal threat conviction, Kansas law defined the crime as any threat to "[c]ommit violence communicated with intent to terrorize another, . . . or in reckless disregard of the risk of causing such terror . . . ." K.S.A. 2009 Supp. 21-3419(a)(1). The same language is found in the current criminal threat statute. K.S.A. 2022 Supp. 21-5415(a)(1). After Phipps' criminal threat conviction, the Kansas Supreme Court held in *Boettger* that the "reckless disregard" portion of the criminal threat statute was unconstitutionally overbroad. 310 Kan. at 823.

One problem with the Kansas criminal threat statute is that the proscription against an intentional criminal threat and the proscription against a reckless criminal threat are interwoven into the same subsection of the statute. See K.S.A. 2022 Supp. 21-5415(a)(1). So, when a defendant's prior criminal threat conviction is included in a PSI report, it is impossible for the sentencing court to tell only from the PSI report whether the prior criminal threat conviction is based on the intentional version of the offense or on the unconstitutional reckless version of the offense. Because Phipps objected to his PSI report and challenged the inclusion of his prior criminal threat conviction in his criminal history, the State bore the burden of proving that the criminal threat conviction was for the intentional, rather than the reckless, version of the offense. We will now address the specific arguments the parties have made in this appeal about Phipps' criminal history challenge and his prior criminal threat conviction.

Mootness

To begin, the State argues that Phipps' criminal history challenge is moot because he has already completed the prison portion of his sentence and his criminal history score does not affect his postrelease term or his misdemeanor sentences. An appellate court exercises unlimited review in deciding whether an appeal is moot. *State v. Roat*, 311 Kan. 581, 590, 466 P.3d 439 (2020).

Phipps concedes that he has completed the prison portion of his sentence but argues that his claim on this issue is not moot because he is still serving his misdemeanor jail sentences and will

receive credit for excess time served on his illegal prison sentences if his challenge is successful. In support, he cites *Jackson v. State*, 204 Kan. 841, 846, 466 P.2d 305 (1970) (prisoner whose partially executed sentence is found to be void is entitled to credit for time already served on the void sentence).

At sentencing, a district court must grant a defendant credit for the time which the defendant spent incarcerated pending the disposition of their case. K.S.A. 2022 Supp. 21-6615. The provisions of K.S.A. 2022 Supp. 21-6615 are mandatory and require that a criminal defendant sentenced to incarceration be given credit for all time spent in custody solely on the charges for which they are being sentenced. *State v. Davis*, 312 Kan. 259, 287, 474 P.3d 722 (2020). When a defendant is sentenced for both felony and misdemeanor convictions, the district court should apply the defendant's credit for time spent incarcerated first to the felony sentences, with any remainder credit applying to the misdemeanor sentences. *State v. Harper*, 275 Kan. 888, 892, 69 P.3d 1105 (2003).

After finding that Phipps' criminal history score was B, the district court sentenced him to 14 months' imprisonment for his primary crime of conviction. But if Phipps' prior criminal threat conviction was not properly classified as a person felony, his criminal history score would have been D, and the longest possible presumptive sentence for his primary crime of conviction would have been 13 months. K.S.A. 2022 Supp. 21-6804. Thus, if Phipps' claim is successful, he will receive credit for the excess time served on his illegal prison sentences to be applied to his misdemeanor sentences, reducing his jail sentence by at least one month. Phipps' challenge on this issue is not moot.

Does the holding in Boettger *still control?*

Turning to the merits, Phipps claims the district court erred by using his prior criminal threat conviction to calculate his criminal history score because the State failed to prove the conviction was based only on intentional conduct. He asserts the district court engaged in improper judicial factfinding when it found that the prior criminal threat conviction was based on intentional conduct. Phipps argues the conviction may have stemmed from a reckless criminal threat found unconstitutional in *Boettger*.

In response, the State first argues that the Kansas Supreme Court's holding in *Boettger* has been effectively overruled by the United States Supreme Court's decision in *Counterman*, 600 U.S. at 69 (holding a mental state of recklessness can establish a true threat, unprotected by the First Amendment). Thus, the State argues there is no question about the constitutional validity of Phipps' prior criminal threat conviction.

Boettger was a direct appeal of Timothy C. Boettger's conviction of reckless criminal threat in which he challenged the constitutionality of the Kansas criminal threat statute. Our Supreme Court held that the "reckless disregard" portion of Kansas' criminal threat statute violates the First Amendment of the United States Constitution. 310 Kan. at 823. To reach this conclusion, the court applied the United States Supreme Court's "true threat" doctrine, as laid out in *Virginia v. Black*, 538 U.S. 343, 359, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003). The court determined that for a threat to be constitutionally proscribed conduct under *Black*, the speaker must make the threat with an intent to place the victim in fear of bodily harm or death. *Boettger*, 310 Kan. at 817. Because the "reckless disregard" portion of Kansas' criminal threat statute could apply to statements made without the intent to cause fear of violence, the Kansas Supreme Court held that it was unconstitutionally overbroad. 310 Kan. at 823. The court reversed Boettger's reckless criminal threat conviction because it was based *solely* on the unconstitutional reckless provision of the statute. 310 Kan. at 823.

Before conducting the above analysis, the Kansas Supreme Court noted that the United States Supreme Court had never explicitly considered whether a conviction for recklessly making a threat can be a true threat or instead violates the First Amendment. 310 Kan. at 809. But the United States Supreme Court has now explicitly addressed this question in *Counterman*. In that case, Billy Raymond Counterman sent hundreds of Facebook messages to C.W., a local singer and musician. The two had never met, and C.W. never responded to the messages. Some messages were benign, but other messages expressed anger at C.W. and caused her to fear for her safety: "'Fuck off permanently.'" And "'Staying in cyber life is going to kill you.'" 600 U.S. at 70. C.W. contacted authorities, and Colorado charged Counterman under a stalking

statute making it unlawful to repeatedly make any form of communication with another person in "a manner that would cause a reasonable person to suffer serious emotional distress and does cause that person . . . to suffer serious emotional distress." Colo. Rev. Stat. § 18-3-602(1)(c) (2022).

Counterman moved to dismiss on First Amendment grounds, arguing that his messages were not true threats and could not support a criminal prosecution. The trial court denied the motion, reasoning the statute applied an "objective reasonable person" standard to decide whether conduct constituted a threat and whether Counterman had any subjective intent to threaten did not matter. 600 U.S. at 71. The jury found Counterman guilty as charged. The Colorado Court of Appeals affirmed the conviction, rejecting Counterman's First Amendment claim, and the Colorado Supreme Court denied review. The United States Supreme Court granted certiorari, observing that courts are divided about (1) whether the First Amendment requires proof of a defendant's subjective mindset in true-threats cases, and (2) if so, what mens rea standard is sufficient. 600 U.S. at 72. The opening paragraph of the Court's opinion succinctly stated:

> "True threats of violence are outside the bounds of First Amendment protection and punishable as crimes. Today we consider a criminal conviction for communications falling within that historically unprotected category. The question presented is whether the First Amendment still requires proof that the defendant had some subjective understanding of the threatening nature of his statements. We hold that it does, but that a mental state of recklessness is sufficient. The State must show that the defendant consciously disregarded a substantial risk that his communications would be viewed as threatening violence. The State need not prove any more demanding form of subjective intent to threaten another." 600 U.S. at 69.

The Court in *Counterman* began its analysis by observing that "[t]rue threats of violence, everyone agrees, lie outside the bounds of the First Amendment's protection." 600 U.S. at 72. The Court also observed that the existence of a threat depends not on the mental state of the author, but on what the statement conveys to the person on the other end. 600 U.S. at 72. Still, the Court held that the First Amendment requires proof that a defendant must have some subjective understanding of the threatening nature of their statements to be prosecuted for a crime. 600 U.S. at. 76-78.

As for what level of subjective understanding is required, the Court held that a recklessness standard—a showing that a person consciously disregards a substantial and unjustifiable risk that their conduct will cause harm to another—is the appropriate *mens rea*. 600 U.S. at 79-82.

Because the statute allowed Colorado to convict Counterman of a crime without proving any awareness on his part that his statements could be understood as threatening, even a reckless disregard of the risk of causing such a threat, the Court concluded that the statute violated the First Amendment. 600 U.S. at 82. Thus, the Court vacated the judgment of the Colorado Court of Appeals and remanded for further proceedings. 600 U.S. at 83. Justice Sotomayor filed a concurring opinion agreeing with the Court's conclusion that the First Amendment requires a subjective *mens rea* in true threat cases and that "recklessness [was] amply sufficient for this case," but she would have limited the holding to the facts of Counterman's case. 600 U.S. at 104. Justices Barrett and Thomas dissented and would have held that the objective standard in the Colorado statute was constitutional under the First Amendment. 600 U.S. at 106.

Phipps argues that *Counterman* is readily distinguishable because the Colorado stalking statute addressed in that case is different from the Kansas reckless criminal threat statute declared unconstitutional in *Boettger*. On the surface, Phipps is correct that the statutes are different. But Phipps goes on to argue that "[t]he differences in the stalking statute at issue in *Counterman* and our criminal threat statute demonstrate that *Boettger* and *Counterman* can occupy the same First Amendment universe without conflict." We disagree. While the Colorado statute the Court struck down in *Counterman* is different from the Kansas criminal threat statute, the fact remains that *Counterman* holds that reckless mens rea is sufficient to establish a true threat that is not protected by the First Amendment. *Boettger* holds the opposite. On the central issue of whether a mental state of recklessness is sufficient to establish a true threat that is not protected by the First Amendment, *Counterman* effectively overrules *Boettger*.

Phipps also argues that even if the effect of *Counterman* is that the Kansas reckless criminal threat provision does not violate

the First Amendment, the provision violates section 11 of the Kansas Constitution Bill of Rights. Section 11 of the Kansas Constitution Bill of Rights provides that "all persons may freely speak, write or publish their sentiments on all subjects, being responsible for the abuse of such rights." We presume that in the appropriate case a party may argue that the crime of reckless criminal threat violates the Kansas Constitution, although we observe that the Kansas Supreme Court has stated that the First Amendment and section 11 of the Kansas Constitution Bill of Rights are "generally considered coextensive." *State v. Russell*, 227 Kan. 897, 899, 610 P.2d 1122 (1980). But this issue will need to be raised in another case—a direct appeal of a defendant's conviction of reckless criminal threat. Phipps cannot collaterally attack the constitutional validity of his 13-year-old criminal threat conviction in this sentencing appeal; he can only challenge his criminal history calculation. For Phipps to argue that the crime of reckless criminal threat violates the Kansas Constitution would be going well beyond a challenge to his criminal history score.

The Kansas Supreme Court's holding in *Boettger* was grounded on its interpretation of the First Amendment, not on any provision of the Kansas Constitution. The United States Supreme Court is the final arbiter of the federal Constitution. See *State v. Lawson*, 296 Kan. 1084, Syl. ¶ 1, 297 P.3d 1164 (2013) ("The United States Supreme Court's interpretation of the United States Constitution is controlling upon and must be followed by state courts."). *Counterman* holds that the First Amendment requires proof of a defendant's subjective understanding of the threatening nature of a statement to be punished as a crime, but a mental state of recklessness is sufficient to establish a true threat. 600 U.S. at 69. The Kansas criminal threat statute, including the reckless disregard portion of the statute, would pass constitutional muster under *Counterman*. See K.S.A. 2022 Supp. 21-5202(j) (defining recklessness under the Kansas criminal code with the same common law meaning subscribed to the term in *Counterman*).

This court is duty bound to follow Kansas Supreme Court precedent unless there is some indication that the Supreme Court is departing from its previous position. *State v. Rodriguez*, 305 Kan. 1139, 1144, 390 P.3d 903 (2017). But we are also duty bound to follow controlling United States Supreme Court precedent.

Lawson, 296 Kan. 1084, Syl. ¶ 1. In *Boettger*, the Kansas Supreme Court interpreted the federal Constitution in the absence of a controlling United States Supreme Court opinion. The United States Supreme Court has now directly addressed the question at issue in *Boettger* and reached a contrary result. Given that the court's analysis in *Boettger* was based solely on the First Amendment and given that the United States Supreme Court has the final say when interpreting the federal Constitution, we are justified in not following *Boettger* here.

Finally, Phipps argues that because reckless criminal threat had been declared unconstitutional in *Boettger* at the time he committed his current crimes, any change in the law cannot affect his sentence. Phipps quotes *State v. Keel*, 302 Kan. 560, Syl. ¶ 9, 357 P.3d 251 (2015): "[I]t is a fundamental rule of sentencing that the penalty parameters for a crime are established at the time the crime was committed." In *Keel*, the issue was whether the defendant's pre-KSGA out-of-state convictions should be classified as person or nonperson for criminal history purposes based on the classification in effect for comparable Kansas offenses when the prior offenses occurred or when the current crime of conviction was committed. 302 Kan. at 563-64. That is not the issue here.

This is Phipps' direct sentencing appeal. We apply the longstanding rule that "changes in the law apply prospectively and only to cases on direct review." *State v. Murdock*, 309 Kan. 585, 591, 439 P.3d 307 (2019); see also *State v. Ford*, 302 Kan. 455, 471, 353 P.3d 1143 (2015); *State v. Mitchell*, 297 Kan. 118, 124-25, 298 P.3d 349 (2013); *State v. Berry*, 292 Kan. 493, 514, 254 P.3d 1276 (2011). Indeed, this court ruled that the holding in *Boettger* was a change in the law that applied to cases on direct appeal. *State v. Stevenson*, 59 Kan. App. 2d 49, 60, 478 P.3d 781 (2020). Phipps does not explain why the holding in *Boettger* was applied to cases pending on direct appeal but the holding in *Counterman* should not be applied to cases pending on direct appeal.

The State cannot collaterally attack and challenge any sentence in which the defendant's criminal history score was determined based on *Boettger* if that sentence is final, even though the United States Supreme Court has now issued a decision contrary to *Boettger*. See *State v. Dawson*, 310 Kan. 112, Syl. ¶ 2, 444 P.3d 914 (2019) ("After a direct appeal is final, a movant seeking the

correction of an illegal sentence under K.S.A. 22-3504[1] will have the sentence's legality determined by the law in effect at the time the sentence was pronounced, unaffected by any subsequent change in the law."). But Phipps' sentence is not final and is on direct review. Or perhaps the holding in *Counterman* is what the Kansas Supreme Court calls a "subsequent development[] in the law," rather than a true change in the law, that shows that an earlier determination—the holding in *Boettger*—was wrong on the merits. *Murdock*, 309 Kan. at 592. In this situation, whether Phipps' sentence was legal or illegal would not be controlled by the law in effect at the time his sentence was pronounced. Either way, the holding in *Counterman* should apply to Phipps' criminal history challenge on direct appeal.

More importantly, there is a statutory basis for applying a change in the law to any sentence that is not final and still pending on direct appeal, if that change in the law affects how a defendant's criminal history score is calculated. Under the KSGA, the severity level for every felony crime in Kansas is determined by the Legislature and is fixed for sentencing purposes as of the date the offender commits the crime. But the defendant's criminal history is admitted in open court by the offender or determined by a preponderance of the evidence at the sentencing hearing by the sentencing judge. K.S.A. 2022 Supp. 21-6814(a). It is *not* fixed for sentencing purposes as of the date the offender commits the crime. K.S.A. 2022 Supp. 21-6810(a). Phipps' sentence is not final, and his criminal history calculation remains an open question. As a result, when the United States Supreme Court issues a decision interpreting the federal Constitution, and the decision affects the determination of an offender's criminal history score, the decision should apply to any pending criminal case in which the offender's sentence is not final.

Here the district court determined from the evidence presented at the sentencing hearing that Phipps' prior criminal threat conviction was properly scored as a person felony because the factual basis for the plea supported a conviction of both intentional and reckless criminal threat. Phipps argues on appeal that the ruling was wrong because the State failed to show that the prior conviction was based *only* on intentional conduct. Before this court could

review the propriety of the district court's non-final sentencing order in Phipps' direct appeal, the United States Supreme Court decided *Counterman* which makes it irrelevant whether Phipps' prior criminal threat conviction was based on intentional or reckless conduct. The holding in *Counterman* applies in this direct appeal of Phipps' criminal history challenge because Phipps' sentence is not final.

Any other ruling would raise even more questions about calculating criminal history scores when a defendant has a prior Kansas criminal threat conviction. Does the holding in *Counterman* apply only to crimes committed after June 27, 2023, the date *Counterman* was decided? But is it that simple? Must courts also wait until the Kansas Supreme Court expressly overrules *Boettger* before knowing how to score prior criminal threat convictions, even when sentencing defendants for crimes committed after June 27, 2023? Or for that matter, can reckless criminal threat convictions *ever* be included in a defendant's criminal history because at one point in time, the Kansas Supreme Court determined that the reckless criminal threat statute violated the First Amendment? A literal reading of K.S.A. 2022 Supp. 21-6810(d)(9) would seem to lead to this result.

Phipps *was* sentenced according to the penalty parameters in effect when he committed his current crimes of conviction on January 3, 2022. On that date, burglary of a vehicle and theft of a firearm were severity level 9 felonies and Phipps was sentenced as such. See K.S.A. 2021 Supp. 21-5807(a)(3), (c)(1)(A)(iii) and K.S.A. 2021 Supp. 21-5801(a)(1), (b)(7). As for his criminal history score, criminal threat was classified as a person felony when Phipps committed the offense in 2010 and also when he committed his current crimes. See K.S.A. 2009 Supp. 21-3419(b) and K.S.A. 2021 Supp. 21-5415(c)(1). According to the penalty parameters in effect on January 3, 2022, the district court properly sentenced Phipps to 14 months' imprisonment for burglary of a vehicle and to 6 months' imprisonment for theft of a firearm. Phipps received a legal sentence.

In sum, Phipps' criminal history score is still being reviewed and his sentence is not final. Phipps' 2010 criminal threat conviction arose when he either intentionally or recklessly threatened to put a gun to a woman's head and asked her if she wanted to die.

Under the holding in *Counterman*, there are no First Amendment concerns about the constitutionality of Phipps' prior criminal threat conviction. As a result, the district court did not err by using Phipps' prior criminal threat conviction to calculate his criminal history score. Based on this finding, we need not reach the State's remaining arguments on this issue. See *State v. Overman*, 301 Kan. 704, 712, 348 P.3d 516 (2015) (district court's decision will be upheld if it is correct for any reason).

DID THE DISTRICT COURT VIOLATE K.S.A. 2022 SUPP. 21-6819(b) IN SENTENCING PHIPPS?

Phipps next claims the district court erred by violating K.S.A. 2022 Supp. 21-6819(b) in sentencing him. K.S.A. 2022 Supp. 21-6819, a provision of the KSGA, governs sentencing in multiple conviction cases. The district court sentenced Phipps to 14 months' imprisonment for burglary of a vehicle, his primary crime of conviction, 6 months' imprisonment for felony theft of a firearm, 12 months in the county jail for misdemeanor theft, and 6 months in the county jail for misdemeanor criminal trespass. The district court ordered all sentences to run consecutive for a controlling sentence of 20 months with the KDOC followed by 18 months in the county jail. Phipps argues that the district court violated K.S.A. 2022 Supp. 21-6819(b) by: (1) ordering him to serve his misdemeanor sentences in the county jail; and (2) sentencing him to a total sentence (38 months) that exceeded twice the base sentence.

While Phipps did not raise this issue before the district court, he is serving an illegal sentence if his argument is correct. An appellate court may correct an illegal sentence at any time while the defendant is serving the sentence. K.S.A. 2022 Supp. 22-3504(a); *State v. Louis*, 305 Kan. 453, 466, 384 P.3d 1 (2016). As we noted before, appellate courts exercise unlimited review over the legality of a sentence. *Roberts*, 314 Kan. at 319-20. And statutory interpretation presents a question of law over which appellate courts have unlimited review. *Stoll*, 312 Kan. at 736.

The most fundamental rule of statutory construction is that the intent of the Legislature governs if that intent can be determined. *State v. LaPointe*, 309 Kan. 299, 314, 434 P.3d 850 (2019). An appellate court must first try to determine legislative intent

through the statutory language enacted, giving common words their ordinary meanings. *State v. Ayers*, 309 Kan. 162, 163-64, 432 P.3d 663 (2019). When a statute is plain and unambiguous, an appellate court should not speculate about the legislative intent behind that clear language, and it should avoid reading something into the statute that is not readily found in its words. 309 Kan. at 164. Where there is no ambiguity, the court need not resort to statutory construction. Only if the statute's language or text is unclear or ambiguous does the court use canons of construction or legislative history to construe the Legislature's intent. *State v. Pulliam*, 308 Kan. 1354, 1364, 430 P.3d 39 (2018).

Under K.S.A. 2022 Supp. 21-6819(b)(6): "If the sentence for [a defendant's] primary crime is a prison term, the entire imprisonment term of the consecutive sentences will be served in prison." Also, K.S.A. 2022 Supp. 21-6819(b)(4) provides:

> "The total prison sentence imposed in a case involving multiple convictions arising from multiple counts within an information, complaint or indictment cannot exceed twice the base sentence. This limit shall apply only to the total sentence, and it shall not be necessary to reduce the duration of any of the nonbase sentences imposed to be served consecutively to the base sentence."

Phipps argues that, under the plain language of K.S.A. 2022 Supp. 21-6819(b)(6), the district court erred by ordering him to serve his misdemeanor sentences in the county jail. Because his primary crime of conviction required a prison term, Phipps contends that K.S.A. 2022 Supp. 21-6819(b)(6) requires his entire sentence to be served in prison, even the sentences for the misdemeanor convictions. Phipps also asserts that the total length of his consecutive sentences violates K.S.A. 2022 Supp. 21-6819(b)(4) because it exceeds twice the base sentence. If Phipps is correct, his total sentence cannot exceed 28 months, twice the base sentence, and he should serve the total sentence in prison.

The State urges us to reject Phipps' argument out of hand, as the Kansas Supreme Court has instructed that K.S.A. 2022 Supp. 21-6819, as part of the KSGA, only applies to felony sentences. See *State v. Huff*, 277 Kan. 195, 197-98, 83 P.3d 206 (2004) (discussing K.S.A. 2002 Supp. 21-4720[b], now codified at K.S.A. 2022 Supp. 21-6819[b]); see also *State v. Snow*, 282 Kan. 323, 346, 144 P.3d 729 (2006) (relying on *Huff*), *abrogated on other*

grounds by State v. Guder, 293 Kan. 763, 267 P.3d 751 (2012). K.S.A. 2022 Supp. 21-6819(b) governs imposing consecutive presumptive felony sentences and does not apply to misdemeanor sentences. *Huff*, 277 Kan. at 197-98. K.S.A. 2022 Supp. 21-6606(a), meanwhile, authorizes a district court to impose consecutive sentences in misdemeanor convictions. *Huff*, 277 Kan. at 206-07 (discussing K.S.A. 2002 Supp. 21-4608[a], now codified at K.S.A. 2022 Supp. 21-6606[a]).

Phipps acknowledges the decisions in *Huff* and *Snow*. He also acknowledges that this court has repeatedly rejected the arguments he raises here, consistently holding that K.S.A. 2022 Supp. 21-6819(b) does not apply to misdemeanors. See *State v. Reed*, 23 Kan. App. 2d 661, 663, 934 P.2d 157 (1997); *State v. Scott*, No. 118,979, 2019 WL 2559515, at *8-10 (Kan. App. 2019) (unpublished opinion); *State v. Maggett*, No. 118,057, 2018 WL 4840311, at *3-4 (Kan. App. 2018) (unpublished opinion); *State v. Lowe*, No. 117,943, 2018 WL 4655619, at *4-5 (Kan. App. 2018) (unpublished opinion); *State v. Flores*, No. 116,853, 2018 WL 1022843, at *2 (Kan. App. 2018) (unpublished opinion).

Phipps argues that the discussion of K.S.A. 2002 Supp. 21-4720(b) (now K.S.A. 2022 Supp. 21-6819[b]) in *Huff* and *Snow* is incorrect and judicial dictum, at best. And he argues that the decisions of previous panels of this court relying on *Huff* and *Snow* should, as such, be disregarded. Judicial dictum is an expression of opinion on a question directly involved in a particular case, argued by counsel, and deliberately ruled on by the court, although not necessary to a decision. While not binding as a decision, judicial dictum is entitled to greater weight than obiter dictum and should not be lightly disregarded. It is issued with the intent to guide lower courts. *Jamerson v. Heimgartner*, 304 Kan. 678, 686, 372 P.3d 1236 (2016).

In *Huff*, the court addressed whether statutory authority exists for the imposition of consecutive jail sentences on misdemeanor offenses. 277 Kan. at 195. The issue in *Snow* was whether the misdemeanor sentences bringing the total sentence above the double rule violated the Eighth Amendment to the United States Constitution. 282 Kan. at 346-47. In both cases, the court's discussion of K.S.A. 21-4720(b) (now K.S.A. 2022 Supp. 21-6819[b]) was not

strictly necessary to the decision. While *Huff* and *Snow* are instructive, the decisions are not binding precedents that control the outcome of Phipps' claims.

But even if we disregard the analysis in all prior cases that have construed the applicable statutes, we reject Phipps' statutory interpretation. Phipps argues that the plain text of K.S.A. 2022 Supp. 21-6819 and K.S.A. 2022 Supp. 21-6606, when construed *in pari materia*, indicates that K.S.A. 2022 Supp. 21-6819(b) applies to misdemeanor sentences imposed consecutively to felony sentences. In support of this interpretation, he notes that K.S.A. 2022 Supp. 21-6819 and K.S.A. 2022 Supp. 21-6606 are not mutually exclusive. See K.S.A. 2022 Supp. 21-6819(a) (specifically incorporating portions of K.S.A. 2022 Supp. 21-6606). Phipps also argues that there is nothing in the text of K.S.A. 2022 Supp. 21-6819(b) limiting its provisions to presumptive felony sentences. And he argues that since K.S.A. 2022 Supp. 21-6606 is a more general provision and K.S.A. 2022 Supp. 21-6819 is a more specific provision, K.S.A. 2022 Supp. 21-6819 should control in any conflict between the two provisions.

Phipps thus argues that while K.S.A. 2022 Supp. 21-6606 provides the district court general discretion to order sentences imposed on the same defendant on the same date to run consecutive, K.S.A. 2022 Supp. 21-6819 provides additional provisions that apply to when there are multiple convictions and at least one of them is a felony, implicating the KSGA. Phipps also argues that reading K.S.A. 2022 Supp. 21-6819(b) as applying only to felony convictions, which are already served in prison, makes K.S.A. 2022 Supp. 21-6819(b)(6) a redundant provision. He argues that there is no other possible meaning for K.S.A. 2022 Supp. 21-6819(b)(6) than as applying to both misdemeanors and felonies—i.e., as requiring misdemeanor sentences imposed consecutively to felony sentences to be served in prison as well.

Phipps' textual arguments are unavailing. While Phipps is correct that K.S.A. 2022 Supp. 21-6819(a) incorporates portions of K.S.A. 2022 Supp. 21-6606, this fact does not support his interpretation of the statutes. K.S.A. 2022 Supp. 21-6819 is part of the KSGA. K.S.A. 2022 Supp. 21-6802(c) states the sentencing guidelines and prosecuting standards of the KSGA apply to felony crimes committed on or after July 1, 1993. Thus, K.S.A. 2022

Supp. 21-6819, which governs sentencing in multiple conviction cases, applies to felony sentences. On the other hand, K.S.A. 2022 Supp. 21-6606, a general sentencing statute not part of the KSGA, governs multiple sentences for misdemeanor convictions.

As a result, the double rule found in K.S.A. 2022 Supp. 21-6819(b)(4) applies only to consecutive felony sentences. K.S.A. 2022 Supp. 21-6606, which applies to multiple sentences for misdemeanor convictions, contains no limitation to the total sentence like the limitation found in K.S.A. 2022 Supp. 21-6819(b)(4). Thus, a defendant like Phipps convicted of both felony crimes and misdemeanor crimes can receive multiple consecutive misdemeanor sentences even if the total sentence is more than double the base felony sentence without violating K.S.A. 2022 Supp. 21-6819(b)(4).

Similarly, K.S.A. 2022 Supp. 21-6819(b)(6) only applies to felony sentences. The provision means that if the sentence for the primary felony crime is a prison term, then the entire term for the consecutive felony sentences will be served in prison, even if the consecutive felony sentences are otherwise presumptive probation. K.S.A. 2022 Supp. 21-6819(b)(6) does not mean that consecutive misdemeanor sentences must be served in prison instead of jail. To the contrary, K.S.A. 2022 Supp. 21-6604(a)(1), a general sentencing statute not part of the KSGA, explicitly provides that confinement for misdemeanors shall be in jail for the term provided by law. Phipps' assertion that he should be serving his misdemeanor sentences in prison subject to the double rule is contrary to Kansas' statutory sentencing scheme.

Affirmed.

* * *

SCHROEDER, J., concurring in part and dissenting in part: While I join in the majority's opinion as to Issue II, I respectfully dissent from Issue I in the majority's opinion.

I write separately to express my concern with the majority's conclusion the district court did not err in determining Phipps' criminal history in light of *Counterman v. Colorado*, 600 U.S. 66, 72-73, 143 S. Ct. 2106, 216 L. Ed. 2d 775, (2023). I believe the

district court did err under the law in existence at the time of original sentencing by making a factual determination about a disputed point—the nature of Phipps' prior criminal threat conviction—based on the factual basis set forth by the State at Phipps' no-contest plea colloquy.

The United States Supreme Court has clearly held that a sentencing judge who makes his or her own factual determinations about a prior conviction from the factual basis provided at the time of the plea engages in impermissible judicial fact-finding:

"[A] judge cannot go beyond identifying the crime of conviction to explore the manner in which the defendant committed that offense. See *Shepard*, 544 U.S., at 25 (plurality opinion); *id*., at 28 (Thomas, J., concurring in part and concurring in judgment) (stating that such an approach would amount to 'constitutional error'). He is prohibited from conducting such an inquiry himself; and *so too he is barred from making a disputed determination about 'what the defendant and state judge must have understood as the factual basis of the prior plea*' or 'what the jury in a prior trial must have accepted as the theory of the crime.' See *id*., at 25 (plurality opinion); *Descamps*, 570 U.S., at 269. *He can do no more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of*." (Emphases added.) *Mathis v. United States*, 579 U.S. 500, 511-12, 136 S. Ct. 2243, 195 L. Ed. 2d 604 (2016).

While transcripts of plea hearings are among the limited class of documents a sentencing court is allowed to examine in determining a defendant's criminal history, the court's inquiry is limited to determining whether the transcript reflects the specific elements of the crime to which the defendant pled. See *State v. Dickey*, 301 Kan. 1018, 1037-38, 350 P.3d 1054 (2015). Here, the district court went beyond its authority by looking at the transcript and making its own factual determination that the factual basis for the plea supported both reckless and intentional conduct.

Mathis controls how a defendant's criminal history is analyzed. I find numerous cases persuasively address the calculation of a defendant's criminal history involving convictions for criminal threat after our Supreme Court's decision in *State v. Boettger*, 310 Kan. 800, 450 P.3d 805 (2019). Prior panels of this court, as well as our Supreme Court, found the convictions for criminal threat had to be scored as nonperson felonies because the district court was not allowed to make its own determination the prior conviction was the result of intentional conduct and not reckless. See *State v. Garza*, 290 Kan. 1021, 1035-36, 236 P.3d 501 (2010)

(when charged alternatively a defendant can only be convicted of one crime); *State v. Holloman*, No. 125,062, 2023 WL 3143656, at *4 (Kan. App. 2023) (unpublished opinion) (sparse record insufficient to establish defendant pleaded guilty to intentional criminal threat rather than reckless criminal threat); *State v. Martinez-Guerrero*, No. 123,447, 2022 WL 68543, at *6 (Kan. App. 2022) (unpublished opinion) (conduct can only constitute—and give rise to a conviction of—either reckless or an intentional criminal threat); *State v. Jackson*, No. 124,271, 2022 WL 1906940, at *5 (Kan. App. 2022) (unpublished opinion) (in a no contest plea there is nothing in the record to show whether the plea was to an intentional act or a reckless act of criminal threat), *rev. denied* 316 Kan. 761 (2022); *State v. Howell*, No. 124,650, 2022 WL 4003626, at *3-4 (Kan. App. 2022) (unpublished opinion) (the State must prove under which version of the offense he was convicted of), *rev. denied* 316 Kan. 761 (2022).

I am further hesitant to join in the majority's conclusion our Supreme Court will most likely find *Counterman* overrules *Boettger* at its next opportunity to examine the issue. When our Supreme Court has previously considered and decided an issue, we are duty bound to follow its holding on the issue unless we have some indication our Supreme Court is departing from its previous position. *State v. Meyer*, 51 Kan. App. 2d 1066, 1072, 360 P.3d 467 (2015). I agree *Boettger* was decided based on the First Amendment to the United States Constitution. The United States Supreme Court's interpretation of the United States Constitution is controlling. *State v. Kornelson*, 311 Kan. 711, 715, 466 P.3d 892 (2020). However, as Phipps points out, our Supreme Court has the authority to interpret the Kansas Constitution as providing greater or different protections than the United States Constitution. *State v. Albano*, 313 Kan. 638, 644-45, 487 P.3d 750 (2021). Unlike the majority, I do not see Phipps' argument as an attempt to relitigate the validity of his prior conviction. Rather, he is pointing out a very real possibility that reckless criminal threat will remain unconstitutional in Kansas irrespective of *Counterman*.

Our Supreme Court has previously found § 11 of the Kansas Constitution Bill of Rights generally provides the same protections as the First Amendment. *State v. Russell*, 227 Kan. 897, 899,

610 P.2d 1122 (1980). But that does not necessarily mean the protections under the Kansas Constitution have lessened because the United States Supreme Court set a lower bar under the United States Constitution. "It is elementary that States are free to provide greater protections in their criminal justice system than the Federal Constitution requires." *California v. Ramos*, 463 U.S. 992, 1013-14, 103 S. Ct. 3446, 77 L. Ed. 2d 1171 (1983). If, as our Supreme Court found in *Boettger*, reckless criminal threat under K.S.A. 2018 Supp. 21-5415(a)(1) violated the First Amendment, it necessarily violated § 11 of the Kansas Constitution Bill of Rights. See *Russell*, 227 Kan. at 899. Our Supreme Court is free to interpret § 11 of the Kansas Constitution Bill of Rights to provide broader protection for Kansans than the United States Constitution provides.

In *State v. Tatro*, 310 Kan. 263, 272, 445 P.3d 173 (2019), our Supreme Court recognized its prior ruling in *State v. Moralez*, 297 Kan. 397, 300 P.3d 1090 (2013), was effectively overruled by *Utah v. Strieff*, 579 U.S. 232, 237-43, 136 S. Ct. 2056, 195 L. Ed. 2d 400 (2016), insofar as the Court's interpretation of the Fourth Amendment to the United States Constitution was controlling. However, the *Tatro* court noted there may be a separate basis to continue applying the rationale in *Moralez* under the Kansas Constitution, but the argument had not been properly briefed. *Tatro*, 310 Kan. at 272-73. Notably, our Supreme Court has recently interpreted other provisions of the Kansas Constitution as providing greater protections than the United States Supreme Court has recognized under the United States Constitution. Compare *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215, 231, 142 S. Ct. 2228, 213 L. Ed. 2d 545 (2022) (holding federal Constitution does not provide right to abortion), with *Hodes & Nauser, MDs v. Schmidt*, 309 Kan. 610, 624, 440 P.3d 461 (2019) (Kansas Constitution Bill of Rights guarantees women right to personal autonomy).

As Phipps also points out, the language of K.S.A. 2022 Supp. 21-5415(a)(1) and the conduct prohibited thereunder differs from Colo. Rev. Stat. § 18-3-602(1)(c). Our Supreme Court has previously found its specific interpretation of a Kansas statute—K.S.A. 2016 Supp. 8-1025—rendered it unconstitutional, notwithstanding broader constitutional propositions as applied to other states'

statutes. *State v. Ryce*, 306 Kan. 682, 691-99, 396 P.3d 711 (2017) (based on statutory interpretation, K.S.A. 2016 Supp. 8-1025 unconstitutional notwithstanding the United States Supreme Court's Fourth Amendment analysis of Minnesota and North Dakota criminal refusal/implied consent statutes in *Birchfield v. North Dakota*, 579 U.S. 438, 136 S. Ct. 2160, 195 L. Ed. 2d 560 [2016]). The Colorado statute addressed in *Counterman* prohibits stalking through repeated acts of communication. In other words, a repeated pattern of conduct is the target of the law. See Colo. Rev. Stat. § 18-3-602(1)(c). In contrast, K.S.A. 2022 Supp. 21-5415(a)(1) criminalizes pure speech based on its content and requires no repetitive acts. This distinction seems to be the point of Justice Sotomayor's concurrence suggesting *Counterman*'s application should be limited to the Colorado statute at issue there. *Counterman*, 600 U.S. at 85-86 (Sotomayor, J., concurring). Accordingly, I cannot conclude the reckless criminal threat provision of K.S.A. 2022 Supp. 21-5415(a)(1) will necessarily be found constitutional by our Supreme Court in light of *Counterman*.

Further, the majority's application of *Counterman* allows the State to benefit from a perceived change in the law. I see a significant problem here in allowing the State to benefit from a change in the law while Phipps' direct appeal is pending. Kansas appellate courts have often discussed extending the benefit of a change in the law *to a defendant* on direct appeal. See, e.g., *State v. Dawson*, 310 Kan. 112, 117, 444 P.3d 914 (2019) ("*Murdock II* clarified that it was not changing the longstanding rule that a defendant will receive the benefit of a change in the law that occurs while his or her case is pending on direct appeal."). A thorough review of pertinent authority has not revealed any cases in Kansas where the same benefit has been explicitly extended to the State. In other cases, our Supreme Court generally referred to the rule as applying prospectively to cases pending on direct appeal without specifically saying to whom the benefit of the new rule of law may apply. See *State v. Boggs*, 287 Kan. 298, 306, 197 P.3d 441 (2008) (noting "'a new rule for the conduct of criminal prosecutions is to be applied . . . to all cases, state or federal, *pending on direct review or not yet final*'" [emphasis added] before applying rule in favor of defendant).

The closest our Supreme Court has come to suggesting this rule *could* extend to the State is in dicta from *Murdock II*: "Put simply, *a party* may seek and obtain the benefit of a change in the law during the pendency of a direct appeal, but a party moving to correct an illegal sentence is stuck with the law in effect at the time the sentence was pronounced." (Emphasis added.) *State v. Murdock*, 309 Kan. 585, 591-92, 439 P.3d 307 (2019) (*Murdock II*). There, our Supreme Court held the State was not entitled to the benefit of the change in the law because Murdock had been resentenced under the mandate in *Murdock I* and the State challenged his new sentence through a motion to correct illegal sentence. That is, our Supreme Court's statutory interpretation of when the legality of a sentence is determined precluded such an application, irrespective of whether such application would be legally sound given the underlying rationale for the rule. *Murdock II*, 309 Kan. at 591-93. And given our Supreme Court's subsequent explanation of this point in *Dawson*, I am extremely reluctant to conclude our Supreme Court's passing reference in *Murdock II* was intended to mean the State could, in fact, benefit from prospective application of a new rule of law on direct appeal to the defendant's detriment. See *Dawson*, 310 Kan. at 117.

At the time Phipps was sentenced, his sentence was illegal based on impermissible judicial fact-finding under *Mathis* and his prior criminal threat conviction should have been scored as a nonperson felony based on the controlling law at the time of sentencing. That is, had the district court properly sentenced Phipps in June 2022, his prior criminal threat conviction would have been scored as a nonperson felony under *Boettger*. But for the majority's determination *Counterman* was an intervening change in the law, prior opinions from other panels of our court should have led us to remand his sentence with instructions for the district court to resentence him with the prior criminal threat conviction scored as a nonperson felony.

Because Phipps pled no contest, we are generally limited to considering the legality of his sentence. See K.S.A. 2022 Supp. 21-6820(e); K.S.A. 2022 Supp. 22-3602(a) and (f). That is, Phipps could have pursued the same relief through a motion to correct illegal sentence and would be entitled to the benefit of the law as it existed at the time of his original sentencing. The State would

not be entitled to the benefit of *Counterman* had Phipps not directly appealed his sentence. See K.S.A. 2022 Supp. 22-3504(c)(1) (defining an illegal sentence); K.S.A. 2022 Supp. 22-3504(c)(2) (defining a change in the law); K.S.A. 2022 Supp. 21-6820(i) (district court has jurisdiction to consider motion to correct illegal sentence while direct appeal is pending; changes in the law will apply to such motion while direct appeal is pending); *Murdock II*, 309 Kan. at 591-92. Here, Phipps is being treated differently from other defendants because he chose to pursue relief through a direct appeal rather than a motion to correct illegal sentence.

In looking at the constitutional underpinnings of the rule allowing defendants the benefit of a change in the law on direct appeal, the focuses are on the due process rights of the accused and not treating one class of defendants differently from another. This rationale comes from the United States Supreme Court's decision in *Griffith v. Kentucky*, 479 U.S. 314, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987), which was adopted by our Supreme Court in *Gaudina v. State*, 278 Kan. 103, 106, 92 P.3d 574 (2004). The *Griffith* Court explained:

"[T]he use of a 'clear break' exception creates the same problem of not treating similarly situated defendants the same. James Kirkland Batson, the petitioner in *Batson v. Kentucky*, and Randall Lamont Griffith, the petitioner in the present Kentucky case, were tried in Jefferson Circuit Court approximately three months apart. The same prosecutor exercised peremptory challenges at the trials. It was solely the fortuities of the judicial process that determined the case this Court chose initially to hear on plenary review. Justice POWELL has pointed out that it 'hardly comports with the ideal of "administration of justice with an even hand,"' when 'one chance beneficiary—the lucky individual whose case was chosen as the occasion for announcing the new principle—enjoys retroactive application, while others similarly situated have their claims adjudicated under the old doctrine.' *Hankerson v. North Carolina*, 432 U.S. 233, 247, 97 S. Ct. 2339, 2347, 53 L. Ed. 2d 306 (1977) (opinion concurring in judgment), quoting *Desist v. United States*, 394 U.S., at 255, 89 S. Ct., at 1037 (Douglas, J., dissenting). See also *Michigan v. Payne*, 412 U.S. 47, 60, 93 S. Ct. 1966, 1973, 36 L. Ed. 2d 736 (1973) (MARSHALL, J., dissenting) ('Different treatment of two cases is justified under our Constitution only when the cases differ in some respect relevant to the different treatment'). The fact that the new rule may constitute a clear break with the past has no bearing on the 'actual inequity that results' when only one of many similarly situated defendants receives the benefit of the new rule. *United States v. Johnson*, 457 U.S., at 556, n. 16, 102 S. Ct., at 2590, n. 16 (emphasis omitted)." 479 U.S. at 327-28.

In other words, these issues go to due process and equal protection guaranteed by § 1 of the Fourteenth Amendment to the United States Constitution. See *Chambers v. Florida*, 309 U.S. 227, 236, 60 S. Ct. 472, 84 L. Ed. 716 (1940) (Due Process Clause of Fourteenth Amendment intended to protect criminal defendants). Notably, the Fourteenth Amendment confers no rights to the states. Rather, it restricts state action that infringes upon the rights of citizens. See U.S. Const. amend. XIV, § 1. That is, the State has no constitutional due process right to a fair trial or the same even-handed treatment as the accused.

I understand part of the rationale for the rule in *Griffith* is that courts cannot ignore existing law. See 479 U.S. at 326-27. But I am not convinced *Counterman* should be applied to Phipps' detriment under these facts. "'Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.' *Shelley v. Kraemer*, 334 U.S. 1, 22, 68 S. Ct. 836, 846, 92 L. Ed. 1161 (1948)." *Sweatt v. Painter*, 339 U.S. 629, 635, 70 S. Ct. 848, 94 L. Ed. 1114 (1950). I do not see it as equitable that those defendants who were sentenced and filed a direct appeal before *Counterman* was decided should be penalized based on a change in the law. Only by waiving one right—direct appeal—can a defendant like Phipps protect another—application of *Boettger* through a motion to correct illegal sentence. In my view, this runs dangerously close to violating the doctrine of unconstitutional conditions. See *State v. Mueller*, 271 Kan. 897, 901, 27 P.3d 884 (2001) (State cannot condition receipt of a privilege or benefit on the waiver of another right).

I am somewhat troubled by Phipps' failure to address whether it is legally sound as a general matter to prospectively apply *Counterman*. An appellant is required to adequately brief the controlling points of law relevant to the issues before us or risk the issues being waived or abandoned. *State v. Gallegos*, 313 Kan. 262, 277, 485 P.3d 622 (2021). But as I have explained, I am not convinced our Supreme Court has indicated it will depart from its previous position. I would vacate Phipps' sentence based on his prior criminal threat conviction being scored as a person felony and remand for him to be resentenced using a criminal history score of D.

(538 P.3d 1101)

No. 125,657

STEVEN K. BRINKER and CUSTOM SPECIALTIES, LLC, *Appellants*, v. ROBERT J. MCCASLIN et al., *Defendants*, and JACK MUHLSTEIN, SPROUT CAPITAL GROUP, LLC, and ACCESS ASIA USA, LLC,*Appellees*.

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SYLLABUS BY THE COURT

1. CONSPIRACY—*Civil Conspiracy—Liability for Damages Caused by Co-Conspirator*. Civil conspiracy is a way to hold a conspirator directly liable for damages caused by an unlawful act of a co-conspirator committed in furtherance of the conspiracy.

2. SAME—*Civil Conspiracy—Act Done by Any Conspirator Becomes Act of All.* Any act done by any conspirator in furtherance of the common design and in accordance with the general plan becomes the act of all, and each conspirator is responsible for such act. Thus, a plaintiff need not prove that each conspirator committed a wrong giving rise to a cause of action independent of the alleged conspiracy.

3. SAME—*Liability for Conspiracy—Five Elements.* Kansas recognizes five elements to establish liability for conspiracy: (1) at least two people; (2) an object to be accomplished; (3) a meeting of the minds by those people in the object to be accomplished or the course of action; (4) at least one unlawful overt act by one of those people; and (5) damages proximately caused by the act(s).

4. SAME—*Conspiracy Claim—Fourth Element.* To establish the fourth element of their conspiracy claim, a plaintiff need only show that a conspirator's overt wrongful acts were committed in furtherance of an express or implied agreement with a co-conspirator or a unity of purpose shared with a co-conspirator.

5. SAME—*Conspiracy Claim—Meeting of the Minds Element between Co-Conspirators.* While a plaintiff need not show that each conspirator committed an overt wrongful act, they must still show a meeting of the minds between co-conspirators which a conspirator's overt wrongful acts were designed to further. This meeting of the minds element of the claim prevents someone from becoming inadvertently liable for another's wrongs.

6. SAME—*Conspiracy Claim—Recovery of Damages.* A plaintiff can recover from any conspirator any damages that are the natural and probable result of the conspiracy.

Appeal from Johnson District Court; PAUL C. GURNEY, judge. Oral argument held July 11, 2023. Opinion filed October 20, 2023. Affirmed in part, reversed in part, and remanded with directions.

Jack D. McInnes, of McInnes Law, LLC, of Prairie Village, and *Anthony W. Bonuchi*, pro hac vice, of Bonuchi Law, LLC, of Kansas City, Missouri, for appellants.

Daniel R. Luppino and *Scott A. Wissel*, of Lewis Rice LLC, of Kansas City, Missouri, for appellees.

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

CLINE, J.: Steven K. Brinker contends his former business partner, Robert J. McCaslin, sabotaged their business so McCaslin could start up a competing business (M2 Promotional Products LLC, or M2PP) with a new partner, Jack Muhlstein. Brinker sued McCaslin, Muhlstein, M2PP, and several companies controlled by Muhlstein, alleging claims for breach of fiduciary duty, conspiracy to breach fiduciary duty, tortious interference with contract and business expectancies, and violations of the Kansas Uniform Trade Secrets Act (KUTSA). The district court allowed the claims against McCaslin and M2PP to go forward but granted summary judgment as to the claims against Muhlstein and his companies. Plaintiffs appeal that decision.

We find no error in the district court's order granting summary judgment on the claims against Muhlstein's companies, so we affirm that portion of its decision. But we find genuine questions of material fact exist which prevent summary judgment on the claims against Muhlstein. We therefore reverse the court's decision granting summary judgment on those claims and remand the case for further proceedings.

FACTS

This matter is densely factual, which is ultimately reflected in our decision to reverse the district court's summary judgment order based on the existence of genuine and material factual disputes. While we address additional facts as pertinent to our decision on the various claims, we outline the dispute as follows.

Plaintiff Custom Specialties, LLC (CSI) is a promotional products company. Its business involves purchasing products

from suppliers, decorating them with a customer's company logos and the like, and then packaging and delivering them according to the customer's specifications.

After working at CSI for several years, Brinker and a former coworker, Pat Hughes, bought out the founder's interest and became 50/50 co-owners in 2005. After Hughes passed away in July 2017, Brinker purchased his interest and became the sole owner of the company.

Brinker met McCaslin in 2013 through CSI's relationship with the bank where McCaslin worked. After Hughes' death, McCaslin contacted Brinker and expressed an interest in becoming a partner in CSI. While they continued to discuss this possibility, Brinker provided McCaslin with CSI financial documents to help McCaslin evaluate a potential deal.

McCaslin told Brinker that since McCaslin was a service-disabled veteran, CSI could potentially become eligible for certification as a Service-Disabled Veteran-Owned Small Business (SDVOSB). Status as an SDVOSB would give CSI contracting advantages in the market, including the ability to bid on certain government contracts. Yet for CSI to qualify for this certification, McCaslin would have to be the majority owner.

In April 2018, Brinker and McCaslin entered an agreement for McCaslin to buy a 51% interest in CSI, with Brinker retaining a 49% ownership interest. The purchase agreement called for McCaslin to pay Brinker $100,000 in exchange for his ownership interest, plus an additional deferred payment to be calculated and come due on or about May 15, 2022. At closing, McCaslin failed to pay the full purchase price, but Brinker allowed him to pay $50,000 up front and agreed to accept the remainder later.

Along with the purchase agreement, Brinker and McCaslin executed a new CSI operating agreement naming McCaslin as a member with a 51% ownership interest and the manager of the company. Because McCaslin became the majority owner and manager, the operating agreement granted him almost unlimited authority to manage the business as he saw fit. That said, the operating agreement required McCaslin to "exercise such rights and duties in the capacity of a fiduciary" and "govern the Business and affairs of [CSI] based upon those standards."

CSI's financial struggles

McCaslin took over as CSI's manager at the beginning of May 2018. From the start of his tenure, the company was undergoing financial difficulties. While 2014 and 2015 saw CSI post its highest gross revenues since Brinker became owner, 2016 was an average year and 2017 was a down year, with CSI posting its lowest gross revenues during Brinker's ownership. As a result, comparing 2014 and 2018, revenues declined nearly $4 million—a 40% reduction.

As of April 20, 2018, CSI owed $221,046 in vendor accounts that were more than 60 days past due and an additional $158,393 in vendor accounts that were more than 90 days past due. In July 2018, McCaslin and Brinker received a letter from CIBC Bank which declared a default under CSI's line of credit with the bank, referenced an existing default in February 2017, and demanded immediate payment of $486,269.93. Also in September 2018, Brinker and McCaslin received an e-mail from Facilisgroup, a third-party vendor that provided CSI with order processing services, indicating that CSI had a past due account of more than 90 days. In December 2018, CSI's landlord notified CSI that it was three months behind on its rent. And on February 4, 2019, the landlord contacted CSI about its continued default, stating that it needed to pay its balance by that week, or the matter would be sent to outside counsel for collection.

Brinker had personally guaranteed CSI's line of credit with CIBC Bank, credit card debt with American Express, and the lease agreement.

Yet, there were also positive developments. In September 2018, CSI signed a five-year contract with Evergy that McCaslin described as a "big deal" for the company. Further, as of October 2018, McCaslin admitted that CSI had landed 18 new clients, which he estimated would increase sales by $2.5 to $3 million. In November 2018, CSI was certified as a SDVOSB by the Department of Veterans Affairs. And on February 12, 2019, CSI signed a new five-year contract to supply promotional products to employees of Terracon Consultants, Inc.

During this period, McCaslin and Brinker were also working to secure a new line of credit with Core Bank to consolidate CSI's outstanding debt into a more favorable loan and provide CSI with more operating capital to fulfill larger orders.

McCaslin meets Muhlstein

In November 2018, McCaslin was introduced to Jack Muhlstein. According to McCaslin, Muhlstein served on the board of the company for which McCaslin's wife worked, and she mentioned to Muhlstein in conversation that McCaslin had bought a promotional products company. Muhlstein told her that he would like to meet McCaslin, and the two spoke over the phone shortly after. McCaslin said he originally sought out Muhlstein's advice about the situation at CSI and hoped Muhlstein would offer help if McCaslin was having financial trouble with the business.

In the following days, McCaslin sent Muhlstein various documents, including CSI tax returns, year-end financials, company debts, and information about CSI's sales commission structure. Muhlstein responded by asking about the structure of the partnership and who guaranteed the company debt, among other things.

In December 2018, McCaslin provided Muhlstein with his Facilisgroup login credentials, which gave Muhlstein access to all of CSI's sales and customer and sales representative information. In late January 2019, McCaslin shared with Muhlstein the preliminary year-end numbers for 2018 as well as a sales analysis for 2019. And on February 3, 2019, McCaslin shared with Muhlstein the presentation CSI used to land Evergy as a client.

Muhlstein described his activities during this initial period as providing uncompensated mentoring to McCaslin. He said neither party intended at the start of the relationship for Muhlstein to become a partner in the business. Muhlstein said McCaslin shared information with him so that he would understand the nature and the standing of the company and its history, with the aim of helping CSI. Muhlstein further stated that he understood the information McCaslin sent him was confidential and he treated it as such.

Muhlstein's proposal to buy an ownership interest in CSI

On February 11, 2019, McCaslin told Brinker that Muhlstein was interested in acquiring a significant portion of Brinker's ownership interest in CSI. McCaslin followed up on this discussion the next day by e-mailing Brinker terms of the proposed agreement. These terms included Brinker transferring 35% of his 49% ownership share in CSI to Sprout Capital Group LLC (one of

Muhlstein's companies) for $1. Brinker was to serve as an executive salesperson on a commission basis with no further compensation or expense reimbursements and no management involvement unless otherwise requested by McCaslin or Sprout. And McCaslin would be granted the option to buy Brinker's remaining shares at any time for the net asset value of the shares in the company. In his e-mail to Brinker, McCaslin referred to himself as "Mr. M II" and Muhlstein as "Mr. M I."

The proposed agreement explicitly did not integrate the bank debt personally guaranteed by Brinker but stated that McCaslin would "work with the current banking relationship and keep them happy or to gain a new one (if possible)."

Brinker rejected this offer.

Muhlstein's increased involvement in CSI

In late February 2019, Muhlstein became more involved in the day-to-day operations of the company, at McCaslin's request.

On February 18, Muhlstein e-mailed McCaslin a list of topics for discussion at an upcoming meeting between the two. These included replacing Julie Bitner as CSI's controller, providing Muhlstein with financial data for January and CSI's current accounts receivable list, setting up an e-mail address for Muhlstein, and "Landlord, Move lease etc."

On February 20, Muhlstein began advancing the cost of purchasing goods to fulfill certain orders on behalf of CSI, as well as charging CSI consulting fees. The record contains five invoices that Muhlstein, through Access Asia USA, LLC, submitted to CSI between February 22 and April 9, 2019. Two of these invoices were linked to purchases of specific merchandise, but the other three were notated merely as a "consulting" or "management" fee.

While the invoice itself is not contained in the record, Muhlstein also apparently submitted a sixth invoice to CSI on April 4, as shown by an e-mail thread between Bitner and McCaslin. While the invoice was for $18,742, Bitner stated that Muhlstein had only contributed $11,340 and the $7,402 fee he was charging seemed "a little steep to [her]." She presumed the fee

must have either been calculated incorrectly or the result of a misunderstanding on Muhlstein's part, and she asked McCaslin to review the invoice before CSI paid it.

On February 24, McCaslin e-mailed a copy of CSI's current lease agreement to Muhlstein. McCaslin claims he asked Muhlstein to contact the landlord on his behalf, and Muhlstein talked to the landlord about a plan to move into a smaller space and catch up on back rent. Later that day, however, McCaslin contacted another company, Mather Real Estate, requesting more information about a potential new location for the business.

Also that same day, McCaslin e-mailed Muhlstein CSI's December 2019 financials and once again referred to himself as "Mr. M2" and Muhlstein as "Mr. M1."

On February 25, McCaslin and Muhlstein met with Bitner. They told her there were new procedures she must follow as controller, including: (1) she would not be making any decisions about payments; (2) all decisions would be made by McCaslin or Muhlstein; and (3) she was not to discuss any financial information with anyone other than McCaslin or Muhlstein, not even Brinker. She found this very concerning as Brinker had not mentioned that he would be completely out of the picture on financial decision-making. Bitner said when she raised these concerns with McCaslin, he told her Brinker was aware of the changes and implied that he and Brinker were on the same page regarding the changes. Bitner did not discuss any of this with Brinker in accordance with McCaslin's instruction that she was not to discuss financial information with anyone other than him or Muhlstein.

Muhlstein also asked Bitner to submit a "cash report" to him. That evening, slightly after midnight, she e-mailed him a first attempt at the requested report. Muhlstein replied to this e-mail the next morning by reminding Bitner to not make any disbursements, transfers, or payments of any kind without McCaslin's express permission. He asked for her cell phone number and said he would contact her with questions.

Also on February 25, McCaslin directed Bitner to reverse a payment on CSI's American Express card that was made several days earlier, after Bitner told McCaslin the bank had informed her that two checks were about to bounce. Bitner said McCaslin never explained why he cancelled the American Express payment. She

stated that it was not strictly necessary for cash flow reasons, as they had a large recurring customer payment scheduled to come in that day, and although it was late, it came soon after, giving them enough cash to cover both the American Express payment and the checks.

According to Bitner, the cessation of payments on the American Express card made running the business much more difficult and, in her opinion, was harmful to CSI because they then had to prepay all orders and therefore could not deliver on orders. The situation snowballed quickly from what Bitner felt was a reasonable situation to an "unmanageable" one. When they could not process sales as a result and had to push back orders, they began losing customers.

On February 28, McCaslin asked Mather Real Estate to send information on the new prospective location to "me and my partner . . . Jack [Muhlstein]" and copied Muhlstein on the e-mail. From there, Muhlstein took over negotiations for McCaslin to sign a new lease at a property owned by Mather Real Estate. Brinker was not involved in these discussions. According to Brinker, this new property did not have enough space to house CSI's existing inventory or allow the company to fulfill the orders for contracts it had recently landed.

McCaslin creates M2PP

On March 12, McCaslin organized and registered M2PP with the Kansas Secretary of State. McCaslin said Muhlstein's involvement in M2PP was much the same as his involvement in CSI and that he was "advising" M2PP. He denied that Muhlstein was an investor or creditor in M2PP. And he testified that while the two did not have a formal agreement, he hoped Muhlstein would eventually provide financing to M2PP.

Brinker knew nothing about M2PP's creation.

On March 25, Muhlstein sent McCaslin a "to-do" list with items for McCaslin to accomplish, including opening new bank accounts for both CSI and M2PP, managing all financial activity to sweep into the new CSI account, and blocking all payments without McCaslin's express permission. The e-mail also contained these directions:

"New Hy-Vee order AS TEST TO TRANSITION TO m2[.]
"Run simultaneously for 90-120 days and assess situation[.]
"High gear to M2 and book through ASI[.]
"Cut CSI costs to survive[.]"

McCaslin claimed this discussion related to CSI's potential use of a new order processing software system, ASI, because of the threat of Facilisgroup cutting off access to their current order processing software. The "test" was to make sure that the new system could service Hy-Vee should Facilisgroup cut them off. He added that the purpose of running them simultaneously for 90-120 days was to make sure that if Facilisgroup cut them off they would have a fully functioning replacement system in place.

That said, when pressed about forming M2PP to test and ultimately switch to a new order processing software, McCaslin stated the purpose of forming a new company to run the software was not only to address the potential Facilisgroup issue but also to solve CSI's working capital and credit issues with their suppliers. Upon further questioning, McCaslin stated that M2PP was formed to be a distributor for CSI, which itself would have been turned into a "sales organization," with the plan being that CSI would process orders through M2PP so that they could avoid credit and working capital issues. According to McCaslin, the software needed to be in M2PP's name, or they would not be able to obtain new capital or favorable credit terms from suppliers.

On March 28, Bitner e-mailed McCaslin about ensuring they had sufficient funds to cover various outgoing payments with the American Express payment coming due. McCaslin responded by informing her that he had "smoked the Amex."

On April 3, Muhlstein e-mailed McCaslin stating, "Please let me know outcome when you call Hy-Vee this morning re M2[.] This is a critical step[.]"

McCaslin's departure from CSI

On April 5, McCaslin e-mailed Brinker to inform him that "due to financial reasons and [Brinker's] new role as a 1099 Sub Contractor," CSI would no longer be providing him with health insurance.

Three days later, CSI's corporate counsel sent a letter to McCaslin, apparently at Brinker's direction, telling McCaslin he

had breached the CSI purchase agreement by failing to pay Brinker the remaining $50,000 of the purchase price. The letter further demanded McCaslin resign from his position as manager of CSI immediately and return his ownership interest to Brinker.

Upon receiving this letter, it appears McCaslin e-mailed it to Muhlstein. He then sent four e-mails to his personal Hotmail account with various attachments containing what appear to be CSI company information.

On April 9, Access Asia sent an invoice to CSI for $23,912, purportedly for an order of pens for Hy-Vee. Muhlstein admitted that this figure included a markup like the other invoices he sent to CSI, but explained that whatever markup he was charging, as with the other invoices, was added to build up a cash reserve he could use to buy more items for CSI.

That same day, McCaslin e-mailed Muhlstein stating: "Here is a splashing of a few of my accounts." He attached a spreadsheet titled: "Client Movement to M2." This spreadsheet included a list of 14 CSI clients—including Evergy, Terracon, and Hy-Vee—as well as the name and title of the contact person and the projected revenue associated with each client. Using an M2PP company e-mail address, Muhlstein responded with "FYI," and included an M2PP company logo and signature block at the bottom of his e-mail. The logo signified that M2PP was certified as an SDVOB. And the M2PP contact information in the signature block included the same telephone number Muhlstein listed as a contact number for one of his companies, Golden Fortune Industries, LLC, and a post office box address in Morris Plains, New Jersey, which is the same town where Golden Fortune was located.

McCaslin claimed he sent this e-mail to show Muhlstein the accounts they could move to M2PP to process orders. He admitted these were CSI's largest customer accounts and maintained that moving the largest clients was necessary because they posed the biggest capital issues for CSI.

On April 10, McCaslin e-mailed Dan Strait, an employee of Hy-Vee, seemingly requesting that Strait switch the vendor to be paid on at least some of Hy-Vee's promotional products orders from CSI to M2PP. McCaslin admitted that he updated Muhlstein about his discussions with Hy-Vee after e-mailing Strait.

Also on April 10, McCaslin apparently presented a proposal for a new inventory program to Terracon.

On April 12, Muhlstein and McCaslin met with the two CSI salespeople in charge of the Hy-Vee account. McCaslin said the purpose of this meeting was to talk to them about working with McCaslin and Muhlstein to "get the Hy-Vee orders placed and to make them aware that because of the size of the orders, [CSI] didn't have the strength or the financial capacity to process the orders." McCaslin admitted they spoke to the sales staff about using M2PP to process all Hy-Vee orders as a solution to this problem.

Three days later, on April 15, both salespeople resigned their employment with CSI. They took Hy-Vee with them as a client when they left.

During this same period, McCaslin was engaged in an e-mail conversation with a representative of Arrived Outdoors—a CSI customer—about McCaslin paying an outstanding invoice. After failing to respond to several of the representative's e-mails from April 9-19, McCaslin wrote back on April 20: "Sorry about the delay. I've been shutting one company down while starting another, so life has been a little crazy."

On April 26, a Terracon representative sent a letter to McCaslin stating:

"[M]y emails and voice mails to you recently have been going unanswered. I have specifically requested information regarding our account representation, knowing there was a change, which was not communicated to us from [CSI] directly. I want to know how this update impacts our account and how our pending orders are being transitioned and managed."

The letter then informed McCaslin that Terracon was formally rejecting the proposal for the inventory program presented on April 10 but would move forward purchasing existing inventory from CSI. It stated that Terracon would no longer be participating in the monthly pre-order program and asked McCaslin to cancel any planned sales. The letter reiterated that Terracon would continue engaging CSI for transactional orders and would like to continue business as usual but would not be spending resources to implement new technologies. The letter concluded by stating: "Our hope is that CSI takes this opportunity to make considerable

improvements on how our account is managed, including customer service, response time, and general communication. I would like to regroup in approximately 30 days to discuss next steps."

On April 29, McCaslin sent Brinker his formal written resignation as manager and returned his ownership interest in CSI.

Two days later, McCaslin sent a letter to CSI's contact person at Evergy. This letter stated that McCaslin had resigned his management and ownership in CSI and had contacted the Veterans Administration to let them know CSI was no longer veteran owned and therefore ineligible for SDVOSB certification. McCaslin explained that

"[a]fter a year of fighting that fight, I decided that if I am going to go through a daily financial battle like that, it['s] going to be for a company which could operate more cleanly and simply on day one. Therefore, we proudly announce the launch and execution of, 'M2 Promo Products, LLC.'"

The letter mentioned that McCaslin had formed an informal partnership with Muhlstein and touted Muhlstein's years of business experience in imports and exports, adding it would provide "tremendous value for what we are preparing for."

The letter then informed the Evergy representative that M2PP was headquartered in Kansas City with sales offices in Kansas City and New Jersey and was a "100% Disabled Veteran Owned Small Business." It stated that while a formal press release on the launch of the company was forthcoming, they wanted to let their closest friends and associates know they were open for business. He invited the Evergy representative to stop by and visit and revealed that M2PP's offices were in the same building as Arrived Outdoors.

Additional developments following McCaslin's departure

In May, CIBC Bank sent a letter to McCaslin and Brinker stating that CSI had defaulted on its line of credit with the bank. The letter added:

"Since that time, the Bank has learned that [CSI's] financial condition has significantly deteriorated, that Brinker may intend to initiate litigation against a principal of [CSI], and that [CSI] has lost the benefit of a critical contractual and business relationship, the facts and circumstances of which have added to the [existing] defaults communicated in July . . . 2018."

The bank demanded immediate and full payment of $471,610.78 or it would initiate lawsuits against CSI and any guarantors.

On May 6, Evergy notified CSI that it was terminating its contract with CSI. On July 31, Terracon e-mailed Brinker to discuss terminating their relationship with CSI. The e-mail referenced "severe shipping delays" which Terracon had experienced after choosing not to move forward with the new inventory model CSI had proposed.

CSI's landlord eventually sued CSI and Brinker for breach of CSI's lease agreement and was ultimately awarded a judgment for $146,850.85. And American Express obtained two judgments against Brinker as guarantor for a total of $132,978.98.

Brinker and CSI file suit

Brinker and CSI (Plaintiffs) sued McCaslin, Muhlstein, M2PP, Access Asia, and Sprout (Defendants) in September 2019. Defendants eventually moved for summary judgment on all claims. The district court denied summary judgment on Plaintiffs' claims against McCaslin and M2PP but granted it on their claims against Muhlstein, Sprout, and Access Asia. And it certified its judgment as a final and appealable order under K.S.A. 60-254(b) after finding no just reason for delay of an appeal of this order.

ANALYSIS

On appeal, Plaintiffs challenge the district court's decision granting summary judgment on their claims against Muhlstein and his two companies for: (1) conspiracy to breach McCaslin's fiduciary duty and his duty of loyalty to Plaintiffs; (2) tortious interference with Plaintiffs' contract and business expectancies; and (3) violations of the KUTSA.

Standard of review

We owe no deference to the district court's summary judgment decision or rationale when reviewing that decision on appeal. Instead, we look at the facts and law anew, applying the same standards which district courts must apply when reviewing summary judgment motions:

"Summary judgment is appropriate only when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Any court considering the motion must resolve all facts and inferences which may reasonably be drawn from the evidence in favor of the party against whom summary judgment is sought. When opposing a motion for summary judgment, an adverse party must come forward with evidence to establish a dispute as to a material fact. To preclude summary judgment, the facts subject to the dispute must be material to the conclusive issues in the case. The court must deny a motion for summary judgment if reasonable minds could differ over the conclusions drawn from the evidence. [Citations omitted.]" *Hernandez v. Pistotnik*, 58 Kan. App. 2d 501, 505, 472 P.3d 110 (2020).

Did the district court err in granting summary judgment on Plaintiffs' conspiracy claim against Muhlstein?

Plaintiffs maintain that McCaslin and Muhlstein conspired to transition CSI's business and value to M2PP and leave Brinker saddled with hundreds of thousands of dollars of debt that he personally guaranteed on behalf of CSI. They sued McCaslin for breaching his duty of loyalty and his fiduciary duties to Plaintiffs, and they sued Muhlstein for conspiring with McCaslin to breach those duties.

In granting summary judgment for Muhlstein, the district court determined M2PP was not created to compete with CSI and there was no evidence in the record that Muhlstein had contact with any of CSI's customers or acted to divert any customer away from CSI. It also found Plaintiffs could not establish Muhlstein committed any "overt act" or engaged in any independently actionable conduct to further McCaslin's alleged breaches of his duties. Therefore, it held that the conspiracy claim was factually unsupported and legally invalid.

Whether Plaintiffs properly challenge the district court's Rule 141 comments

The district court announced its ruling on the summary judgment motions on the record before later issuing a journal entry. When explaining its ruling on Muhlstein's motion, the district court made two general observations. It noted at one point that many of Plaintiffs' additional statements of fact in their response

were not supported by the referenced record. It also remarked that Plaintiffs did not actually controvert Defendants' fact statements.

Defendants first argue that Plaintiffs' appeal is futile because Plaintiffs did not challenge these general statements on appeal. Defendants claim this means we must assume that each of the facts on which the district court relied was properly supported and uncontroverted as a matter of law. See, e.g., *Lopez v. Davila*, 63 Kan. App. 2d 147, 152-53, 526 P.3d 674 (2023) (party who presented no argument over the district courts findings on compliance with Supreme Court Rule 141 [2022 Kan. S. Ct. R. at 224] failed to meet his burden to show abuse of discretion by the district court).

Yet as Plaintiffs note, the district court did not specify any particular statements which it found were uncontroverted or unsupported based on application of Rule 141. Given the generic nature of the district court's comments, we do not find Plaintiffs are foreclosed from proceeding, nor do we find our standard of review altered. We review the district court's ruling in the same way we review all summary judgment rulings and similarly apply Rule 141 when analyzing each party's pleadings. This includes reviewing Plaintiffs' responses to Defendants' statements of fact and Plaintiffs' additional statements of fact to determine both whether the statements are supported by the record and whether they controvert the responsive statements—and vice versa.

Civil conspiracy

Civil conspiracy is a way to hold a conspirator directly liable for damages caused by an unlawful act of a co-conspirator committed in furtherance of the conspiracy. Kansas recognizes five elements to establish liability for conspiracy: (1) at least two people; (2) an object to be accomplished; (3) a meeting of the minds by those people in the object to be accomplished or the course of action; (4) at least one unlawful overt act by one of those people; and (5) damages proximately caused by the act(s). *Stoldt v. City of Toronto*, 234 Kan. 957, 967, 678 P.2d 153 (1984); *Vaughan v. Hornaman*, 195 Kan. 291, 299, 403 P.2d 948 (1965).

Any act done by any conspirator in furtherance of the common design and in accordance with the general plan becomes the act of all, and each conspirator is responsible for such act. Thus, not only is a conspirator liable for his own actions in the commission of a

conspiracy, but he will also be held accountable for his co-conspirator's conduct. 195 Kan. at 299 (A conspiracy "'may be pleaded and proved . . . for the purpose of holding one defendant responsible for the acts of his co-conspirators.'") (quoting *Nardyz v. Fulton Fire Ins. Co.*, 151 Kan. 907, 911, 101 P.2d 1045 [1940]; 15 C.J.S., Conspiracy § 25); *Vetter v. Morgan*, 22 Kan. App. 2d 1, 7, 913 P.2d 1200 (1995) ("One person may be liable for the tortious conduct of another when they act in concert.").

Plaintiffs contend that Muhlstein conspired with McCaslin to transition CSI's business and value to M2PP, while leaving Brinker saddled with CSI's debts, which he had personally guaranteed. They argue McCaslin created M2PP as part of this plot to siphon clients away from CSI, and Muhlstein instructed McCaslin in the commission of various acts which sabotaged CSI. Plaintiffs claim these acts breached McCaslin's fiduciary duties under the operating agreement, which required him to act in the best interests of CSI and to refrain from self-dealing, including using company property and assets for his own benefit. See *Becker v. Knoll*, 291 Kan. 204, 208, 239 P.3d 830 (2010) (fiduciary duty requires that corporate directors act in their shareholders' best interests and not enrich themselves at their expense); see also *Carson v. Lynch Multimedia Corp.*, 123 F. Supp. 2d 1254, 1264 (D. Kan. 2000) (limited liability corporation operating agreement can impose fiduciary duties on an LLC manager or member). Plaintiffs allege damages from these acts in the form of debts which Brinker must now pay and the loss of CSI's value.

Defendants, for their part, contend Plaintiffs cannot establish most of the required elements of conspiracy. They claim innocent motives for their actions and dispute both the existence of a conspiracy and the connection between Plaintiffs' damages and those actions.

But Defendants rely on a myopic view of the evidence and a mistaken understanding of Kansas conspiracy law. When resolving all disputed facts and all inferences which may be reasonably drawn from the evidence in Plaintiffs' favor, we find reasonable minds could differ on the conclusions drawn from the evidence. This means summary judgment should have been denied on Plaintiffs' conspiracy claim against Muhlstein.

Plaintiffs have established a triable issue of fact as to the conspiracy's existence.

Defendants first argue that Plaintiffs have failed to establish the existence of the alleged conspiracy, i.e., an object to be accomplished and a meeting of minds to accomplish the object. Defendants contend McCaslin created M2PP to assist CSI, not steal its business. In support, they allege that McCaslin claimed M2PP was created to help with processing orders if Facilisgroup cut off CSI's access to its software. They contend this reasoning makes sense, given the financial difficulties CSI was experiencing at the time.

Defendants maintain that their allegations about M2PP's purpose are uncontroverted because Brinker admitted he knew nothing about M2PP's creation or purpose and Plaintiffs failed to present testimony from other witnesses to support Plaintiffs' allegations about the purpose behind M2PP and Muhlstein's involvement. They also allege that the e-mails Plaintiffs cite to support their conspiracy claim align with Defendants' position on M2PP's purpose, not Plaintiffs'.

Our Supreme Court has cautioned against granting a motion for summary judgment when resolution of the issue requires determining the state of mind of a party. *Hustead v. Bendix Corp.*, 233 Kan. 870, 873, 666 P.2d 1175 (1983). We find such caution appropriate here. We do not read the record as conclusively establishing McCaslin and Muhlstein's motives and intent in forming M2PP and dealing with CSI and its customers. A reasonable person could conclude they intended M2PP to be a standalone company they could use to compete with CSI, rather than merely a way to test a potential new software system. Since there remains a genuine issue of material fact on this crucial point, summary judgment was improper.

To begin, Defendants' assertion that M2PP was created solely as a software processing platform, as a precautionary measure in case Facilisgroup cut off services due to nonpayment from CSI, is undercut by McCaslin's own testimony. McCaslin said the reason he needed to start a *separate company* to run the new order processing software was not because of the threat of Facilisgroup being cut off, but so that he could use M2PP to process sales from CSI's customers while avoiding CSI's credit and working capital

issues. Muhlstein's testimony corroborates this explanation by suggesting that he and McCaslin developed the idea for M2PP in response to Brinker's rejection of Muhlstein's offer to buy into CSI.

Next, while Defendants fault Plaintiffs for failing to produce direct evidence to support their allegations of conspiracy, the absence of direct evidence of an alleged conspiracy is quite common. Such evidence is ordinarily in the possession and control of the alleged conspirators and often out of reach of the opposing party. *Beverly v. McCullick*, 211 Kan. 87, 98, 505 P.2d 624 (1973). For this reason, a conspiracy may be proven by either showing the conspiracy itself or by showing the separate acts of the conspirators involving the same purpose or object. *York v. InTrust Bank, N.A.*, 265 Kan. 271, 295, 962 P.2d 405 (1998). And the connection between these acts may be shown using circumstantial evidence. *Beverly*, 211 Kan. at 98.

Plaintiffs support their conspiracy claim by pointing to several acts, statements, and e-mails by McCaslin and Muhlstein from which they contend a reasonable person could infer a conspiracy between them to form a new company (M2PP) to steal CSI's most valuable clients and leave Brinker with its debt. We find these inferences reasonably drawn from the evidence and plausible enough to preclude summary judgment.

For instance, McCaslin formed M2PP about a month after Brinker declined Muhlstein's purchase offer. Soon after, Muhlstein instructed McCaslin on opening new bank accounts for both CSI and M2PP, managed all financial activity to sweep into the new CSI account, and blocked all payments without McCaslin's express permission. Muhlstein and McCaslin also discussed "transitioning" CSI clients to M2PP, with McCaslin disclosing specific accounts and their projected revenue in a document entitled "Client Movement to M2."

McCaslin was referring to Muhlstein as his "partner" as early as February 2019, even dubbing them "Mr. M I" and Mr. "M II." He also entrusted Muhlstein with negotiating the new lease. As for Muhlstein, he was using an M2PP company e-mail address in April to send McCaslin e-mails, which included an M2PP logo and signature block that shared contact information with one of

Muhlstein's companies. And he instructed CSI's controller to cut Brinker out of financial decisions.

McCaslin's May 1 letter to Evergy evidences that by at least April he intended to operate M2PP as a full-fledged company providing the same services as CSI. As the letter made clear, by that point M2PP had secured office space (in the same building as a CSI customer) and was open for business. He explained that the reason he formed M2PP was he realized he wanted to spend his energy working for "a company which could operate more cleanly and simply on day one." In this letter, McCaslin said he had "formed an informal partnership" with Muhlstein "[i]n the past few months" and touted Muhlstein's business expertise and experience as a valuable addition to the M2PP venture. Finally, McCaslin also told one of CSI's customers that his delay in responding to that customer's e-mails was because he had been busy "shutting one company down while starting another."

Ultimately, the central question is whether Plaintiffs have alleged sufficient facts from which a jury could reasonably find the existence of the alleged conspiracy. Because answering this question involves resolving conflicting factual inferences drawn from the same evidence as well as assessing the credibility of McCaslin and Muhlstein's assertions about their motives and intent, we believe, like the court in *Professional Investors Life Ins. Co. v. Roussel*, 528 F. Supp. 391 (D. Kan. 1981), that it is a job best left to a jury.

"'The existence or nonexistence of a conspiracy is essentially a factual issue that the jury, not the trial judge, should decide. In this case petitioner may have had to prove her case by impeaching the store's witnesses and appealing to the jury to disbelieve all that they said was true in the affidavits. The right to confront, cross-examine and impeach adverse witnesses is one of the most fundamental rights sought to be preserved by the Seventh Amendment provision for jury trials in civil cases. The advantages of trial before a live jury with live witnesses, and all the possibilities of considering the human factors, should not be eliminated by substituting trial by affidavit and the sterile bareness of summary judgment.'" 528 F. Supp. at 395 (quoting *Fisher v. Shamburg*, 624 F.2d 156, 162 [1980]).

Plaintiffs have established a triable issue of fact as to whether the alleged conspiracy was the proximate cause of their damages.

Defendants also argue that summary judgment was appropriate on Plaintiffs' conspiracy claim against Muhlstein because nothing in the record suggests that Muhlstein's alleged conduct caused Plaintiffs to suffer any damages. They claim CSI failed due to existing and ongoing financial difficulties, rather than any conduct by McCaslin or Muhlstein. And they maintain CSI's clients Evergy, Hy-Vee, and Terracon left for other reasons.

Defendants claim the evidence shows Hy-Vee stopped doing business with CSI because the sales staff who managed the account left CSI and took the account with them. They contend Evergy signed its contract with CSI based on CSI's SDVOSB status and terminated its contract with CSI when the company lost that status following McCaslin's departure. And they maintain that Terracon terminated its relationship with CSI largely because the parties could not reach an agreement on a new "company store" inventory model.

To begin, Plaintiffs correctly note that Defendants improperly frame the legal question by focusing on whether Muhlstein's actions directly caused CSI to lose customers or value. Kansas law provides that in the context of civil conspiracy, plaintiffs can recover any damages that are the natural and probable result of the conspiracy, including loss in business value. This is true even if a defendant is only liable to a plaintiff as a co-conspirator. See *Beverly*, 211 Kan. at 98-99.

The district court allowed the claims against McCaslin which were the object of the conspiracy to go forward. These included claims for breach of fiduciary duty and breach of duty of loyalty, which alleged that McCaslin's actions related to M2PP and decision to breach the lease and cease payments on the American Express card caused Plaintiffs' damages. As a co-conspirator, Muhlstein would be liable for all damages that were the natural and probable result of the conspiracy. Thus, Plaintiffs argue that Muhlstein is liable for all the damages stemming from both his conduct and McCaslin's, including the loss in CSI's value and the roughly $750,000 in debts that Brinker must now pay due to McCaslin's actions and the failure of CSI.

As explained below, Kansas views the act of one conspirator as the act of all conspirators, and an act by one conspirator is enough to create liability for the rest. *York*, 265 Kan. at 285. Thus,

"all participants [in a conspiracy] are directly liable for injuries to others which are the objects of the conspiracy, regardless of whether the participants were active or passive conspirators." 265 Kan. 271, Syl. ¶ 4; see *Beverly*, 211 Kan. at 98-99.

Under Kansas law, breach of fiduciary duty is an "unlawful overt act" upon which a claim of civil conspiracy may be based. See, e.g., *Beverly*, 211 Kan. at 99 (finding co-conspirators liable for breach of fiduciary relationship); *Gillespie v. Seymour*, 14 Kan. App. 2d 563, 571-72, 796 P.2d 1060 (1990), *aff'd in part, rev'd in part* 250 Kan. 123, 823 P.2d 782 (1991); *Idstrom v. Alliance Radiology, P.A.*, No. 115,099, 2017 WL 129926, at *7 (Kan. App. 2017) (unpublished opinion). The district court found a triable issue of fact on whether McCaslin violated his fiduciary duties and whether that violation caused Plaintiffs damages. Since we find a triable issue of fact as to whether Muhlstein conspired with McCaslin to violate those duties, the jury must decide whether Muhlstein is liable for damages caused by that violation.

Next, Defendants' argument that there is no question of fact as to whether McCaslin or Muhlstein's conduct caused CSI to lose Hy-Vee, Evergy, and Terracon as clients ignores important evidence in the record.

For one, there is a genuine issue of material fact as to whether McCaslin and Muhlstein's conduct caused CSI to lose Hy-Vee as a customer. As Defendants note, CSI lost the Hy-Vee account because the sales staff in charge of the Hy-Vee account resigned from CSI. But the record also shows that three days before these employees resigned, McCaslin and Muhlstein met with them and told them that CSI no longer had the financial capacity to process their orders. McCaslin and Muhlstein suggested that, as a solution, these employees begin processing all Hy-Vee orders through M2PP. We find a reasonable jury could infer from this evidence that this meeting was the reason the employees left, taking Hy-Vee's account with them.

Secondly, contrary to Defendants' suggestion, the evidence also does not conclusively establish that CSI lost Evergy as a client due to CSI losing its SDVOSB certification. While Defendants claim that CSI gained Evergy as a client in November 2018 because CSI gained SDVOSB certification, the evidence shows that

CSI gained Evergy as a client in September 2018, two months before it received this certification.

Brinker's deposition testimony also controverts Defendants' assertion. Brinker testified that he met with Evergy in May 2019 and told them CSI was still able to satisfy the contract and, at that point, there was no reason for them not to go forward with the contract. And Defendants fail to acknowledge that CSI's loss of Evergy as a client came shortly after McCaslin sent a letter to Evergy stating that he had left CSI and started a competing promotion products company. Resolving these facts and the inferences that can be drawn from them in Plaintiffs' favor, there likewise is a question of fact about the cause of the loss of Evergy's account.

As for Terracon, Bitner testified the primary reason it terminated its contract with CSI was the parties' inability to agree on a new inventory model. Terracon's letters to CSI suggest that McCaslin's failure to respond to Terracon's e-mails and voicemails or to provide information on a change in Terracon's account representation that resulted in a transition of their pending orders was damaging its relationship with CSI. And McCaslin was the one who instigated the parties' renegotiation of their inventory model. Given this evidence, we also find a question of fact as to whether the turmoil at CSI, along with McCaslin's actions towards Terracon, contributed to CSI's loss of Terracon as a client.

Finally, Defendants' assertion that the most plausible explanation for CSI's failure is the company's ongoing financial difficulties misapprehends the summary judgment standard. The question is not whether McCaslin and Muhlstein's conduct is the most plausible explanation for Plaintiffs' alleged damages. Rather, the question is whether, resolving the facts and the inferences in Plaintiffs' favor, an issue of fact exists as to whether Plaintiffs were damaged because of the alleged conspiracy. Given the questions about McCaslin's role in the loss of these clients—some of CSI's largest accounts—we cannot find there is no question about whether CSI's failure was proximately caused by the conspiracy.

As for the American Express debt, the record shows McCaslin directed CSI's controller to reverse a payment on that card the same day that he and Muhlstein met with her and instructed her that McCaslin and Muhlstein would be making all the decisions on payments. This reversal was ordered even though the controller

said it was not necessary for cash flow reasons. And Muhlstein took part in negotiating a new lease, leaving Brinker liable for the one he had personally guaranteed.

Given the evidence and applying the proper legal standard, we find questions of material fact exist as to whether Plaintiffs' claimed damages were caused by the alleged conspiracy and therefore the district court's summary judgment decision on this claim should be reversed.

The district court incorrectly required Plaintiffs prove that Muhlstein committed a wrong giving rise to a cause of action independent of the alleged conspiracy.

Since we are reversing the district court's decision as to Plaintiffs' conspiracy claim against Muhlstein and remanding the claim for further proceedings, we must address a legal mistake in the district court's summary judgment order that could impact those future proceedings. Citing *Stoldt*, 234 Kan. 957, the district court concluded that Kansas law requires Plaintiffs prove that Muhlstein committed a wrong giving rise to a cause of action independent of the alleged conspiracy. But the court misread *Stoldt*. Even though our Supreme Court held in *Stoldt* that an action for civil conspiracy must be supported, as one of its elements, by one or more unlawful overt acts, it did not hold that *each conspirator* must commit an unlawful overt act. 234 Kan. at 967-68.

To establish this element of their conspiracy claim, Plaintiffs need only show that McCaslin's overt wrongful acts were committed in furtherance of an express or implied agreement with Muhlstein or unity of purpose shared with Muhlstein. *Aeroflex Wichita, Inc. v. Filardo*, 294 Kan. 258, 275, 275 P.3d 869 (2012) ("A civil conspiracy claim generally requires a plaintiff to establish "'concert of action or other facts and circumstances from which the natural inference arises that the unlawful, overt acts were committed in furtherance of a common design, intention, or purpose of the alleged conspirators.'"'). That is, while Plaintiffs need not show that Muhlstein committed an overt wrongful act, they must still show a meeting of the minds between Muhlstein and McCaslin which McCaslin's overt wrongful acts were designed to further. This meeting of the minds element of the claim

prevents someone from becoming inadvertently liable for another's wrongs. *Redelmann v. Claire Sprayway, Inc.*, 375 Ill. App. 3d 912, 924, 874 N.E.2d 230 (2007) (explaining that "'[a]ccidental, inadvertent, or negligent participation in a common scheme does not amount to conspiracy'" and precluding liability under a theory of civil conspiracy for someone "'who innocently performs an act which happens to fortuitously further the tortious purpose of another'").

Defendants advocate for the district court's interpretation of *Stoldt* by pointing to a Tenth Circuit case, *Meyer v. Christie*, 634 F.3d 1152 (10th Cir. 2011), which agreed with the district court's interpretation of Kansas conspiracy law. But Defendants' reliance is misplaced. Not only is *Meyer*'s interpretation inconsistent with Kansas precedent which does control our decision, but the Tenth Circuit cited no Kansas caselaw to support its interpretation. Instead, it supported its ruling by citing another Tenth Circuit case, *Pepsi-Cola Bottling Co. of Pittsburg, Inc. v. PepsiCo, Inc.*, 431 F.3d 1241 (10th Cir. 2005). Yet *Pepsi-Cola Bottling Co. of Pittsburg, Inc.* never explained its erroneous interpretation of Kansas law. It simply summarily upheld a district court's decision granting summary judgment for one defendant because the plaintiff had not established an actionable tort committed by that defendant without offering any explanation. 431 F.3d at 1268. Like *Meyer*, we find *Pepsi-Cola Bottling Co. of Pittsburg, Inc.* is unpersuasive and does not control our decision.

That said, we note that the Kansas federal district court properly interpreted Kansas conspiracy law in *Intern. U., United Auto., etc. v. Cardwell Mfg. Co.*, 416 F. Supp. 1267 (D. Kan. 1976) (which is not mentioned in either *Meyer* or *Pepsi-Cola*). Citing several Kansas Supreme Court decisions, the court in *Cardwell Mfg. Co.* remarked that "Kansas has long recognized there may be recovery against all members of a civil conspiracy by one who has suffered damages as a result of actionable conduct done by one or more of the conspirators pursuant to the conspiracy." 416 F. Supp. at 1290 (citing *Beverly*, 211 Kan. 87; *Vaughan*, 195 Kan. 291; *Mosley v. Unruh*, 150 Kan. 469, 95 P.2d 537 [1939]; *Stoner v. Wilson*, 140 Kan. 383, 36 P.2d 999 [1934]; *Hutson v. Imperial Royalties Co.*, 135 Kan. 718, 13 P.2d 298 [1932]). And while

Cardwell Mfg. Co. is not controlling, it is a proper statement of Kansas conspiracy law.

Our Supreme Court reaffirmed this rule in *York*, when it described the fourth element of a conspiracy claim as requiring a plaintiff to prove "that an unlawful or overt act was committed by one or more of the conspirators." 265 Kan. at 295. The court also found that "all participants are directly liable for injuries to others which are the objects of the conspiracy, regardless of whether the participants were active or passive conspirators." 265 Kan. 271, Syl. ¶ 4. We followed this rule in *Freight Rate Service Co. v. Phil Williams & Assocs., Inc.*, No. 78,408, 1998 WL 36035488, at *5 (Kan. App. 1998) (unpublished opinion), when we held there may be recovery against all members of a conspiracy even though an overt act is performed by only one of the conspirators. 1998 WL 36035488, at *5 (citing *Vaughan*, 195 Kan. 291, Syl. ¶ 3; "Where two or more persons enter into a conspiracy, any act done by either in furtherance of the common design and in accordance with the general plan becomes the act of all, and each conspirator is responsible for such act.").

While, under these circumstances, the district court's legal mistake may not provide an independent reason to reverse its summary judgment ruling, we find it necessary to correct this mistake so the court can properly apply the law on remand.

Did the district court err in granting summary judgment as to Plaintiffs' tortious interference with contract and business expectancies claims against Muhlstein?

Plaintiffs next challenge the district court's decision granting summary judgment on their claims of tortious interference with contract and business expectancies against Muhlstein. They contend the evidence is sufficient for a reasonable jury to find that Muhlstein procured McCaslin's breach of CSI's operating agreement and actively worked with McCaslin to move CSI's clients and business to M2PP.

Defendants claim Plaintiffs' tortious interference claims are merely a repackaging of their civil conspiracy claims and argue that these claims must fail for the same reasons as the civil conspiracy claims. Additionally, they argue Plaintiffs cannot establish the independent requirements of their tortious interference claims.

Tortious interference with contract

The elements of tortious interference with contract are: (1) a contract; (2) the wrongdoer's knowledge of it; (3) intentional procurement of its breach; (4) the absence of justification; and (5) damages resulting. *Cohen v. Battaglia*, 296 Kan. 542, 546, 293 P.3d 752 (2013).

No one disputes that the operating agreement is an enforceable contract or that Muhlstein was aware of it. Plaintiffs contend there is also no serious dispute that McCaslin breached the operating agreement, since the district court denied McCaslin's motion for summary judgment on their claim against him for breach of fiduciary duty.

In arguing that summary judgment was appropriate on this claim, Defendants first incorporate their arguments related to Plaintiffs' civil conspiracy claims, specifically their arguments that Plaintiffs fail to establish the existence of the alleged conspiracy or that their damages were caused by the alleged misconduct.

As explained in addressing Plaintiffs' civil conspiracy claims, however, Plaintiffs have established a triable issue of fact as to whether McCaslin formed M2PP to steal clients aways from CSI. And Defendants do not contend that, if true, this alleged conduct would not breach McCaslin's fiduciary duties under the operating agreement. And as explained above, Plaintiffs have established a triable issue of fact as to whether McCaslin and Muhlstein's conduct was the cause of the alleged damages.

The parties' main point of argument then is whether Muhlstein intentionally procured McCaslin's alleged breach of the operating agreement.

As Plaintiffs note, in ruling that their claims for tortious interference with the operating agreement failed as a matter of law, the district court found that Muhlstein only gave advice to McCaslin. There was no evidence Muhlstein did anything to procure McCaslin's breach or otherwise impede McCaslin's ability to perform.

In challenging this ruling on appeal, Plaintiffs essentially argue Muhlstein played such a commanding role in the conspiracy

between him and McCaslin that this conduct also amounted to intentional procurement of McCaslin's breach of fiduciary duties. They point out that Muhlstein played an active role in M2PP's creation and the effort to "transition" the Hy-Vee account to M2PP. As they note, Muhlstein gave McCaslin directions about changing CSI's bank account, setting up an account for M2PP, and moving CSI clients to M2PP, and took command of negotiations for CSI's new lease. Plaintiffs refer to the timing of M2PP's creation as well as Muhlstein's admission that while he was not legally a partner in M2PP, the plan was for him to raise investment capital for M2PP or invest in the company himself. And he stated that this became his goal after he could not invest in CSI.

Plaintiffs argue that, faced with this evidence, a jury could reasonably conclude Muhlstein procured McCaslin's breach of his fiduciary duties.

Defendants argue that the issue here is not whether Muhlstein wanted CSI to fail or whether he helped to bring about that result, but whether he took any particular action that impeded McCaslin's ability to perform under the operating agreement. In support, Muhlstein points to American Jurisprudence for the contention that a "defendant may not be held liable where it is found that the breach by the party to the contract rather than the actions by the defendant was the proximate cause of the plaintiff's damage." 44B Am. Jur. 2d, Interference § 12. Muhlstein argues that summary judgment was thus appropriate here because Plaintiffs have identified no evidence in the record that could support a finding that Muhlstein *caused* McCaslin to breach the operating agreement.

The timing of M2PP's creation in relation to Muhlstein's offer to buy into CSI, along with the offer's terms—when viewed alongside the other evidence supporting the existence of the alleged conspiracy—supports an inference that Muhlstein advised McCaslin to create M2PP as a reaction to Brinker's rejection of Muhlstein's offer. These facts, along with the role Muhlstein took in directing McCaslin's actions regarding M2PP and the transition of clients to M2PP, would likewise support an inference that Muhlstein intentionally procured McCaslin's breach of the operating agreement. A reasonable person could conclude that Muhlstein caused McCaslin to breach his fiduciary duties by holding out the potential of investing in M2PP, advising McCaslin as

to its creation, and then directing the process of transitioning CSI's clients to M2PP.

We therefore find that a question of fact exists as to whether Muhlstein caused McCaslin to breach his fiduciary duty under the operating agreement. Summary judgment was granted in error on this claim as well.

Tortious interference with business expectancies

The elements of tortious interference with an existing or prospective business advantage or relationship are: (1) the existence of a business relationship or expectancy with the probability of future economic benefit to the plaintiff; (2) knowledge of the relationship or expectancy by the defendant; (3) a reasonable certainty that, except for the conduct of the defendant, plaintiff would have continued the relationship or realized the expectancy; (4) intentional misconduct by defendant; and (5) incurrence of damages by plaintiff as a direct or proximate result of defendant's misconduct. *Cohen*, 296 Kan. at 546.

Plaintiffs' tortious interference with business expectancies claim is based on allegations that McCaslin and Muhlstein interfered with CSI's business relationships and expectancies with Hy-Vee, Terracon, and Evergy. In opposing summary judgment below, Plaintiffs argued they provided evidence that McCaslin and Muhlstein's actions directly led to the sales staff in charge of the Hy-Vee account to leave CSI, taking the account with them. They also argued McCaslin and Muhlstein's decision to move CSI to a smaller space impeded CSI's ability to fulfill its contracts with Evergy and Terracon and the internal turmoil created by their actions caused these clients to terminate their contracts with CSI.

In granting summary judgment on this claim, the district court found there was no evidence Muhlstein took any action directed at CSI's customers, interfered with any CSI customer relationships, or engaged in intentional misconduct that caused customers to leave CSI. The district court further found that CSI lost these clients for reasons other than intentional misconduct by McCaslin and Muhlstein.

On appeal, Plaintiffs restate the general facts supporting their conspiracy and tortious interference with contract claims and argue this evidence can defeat summary judgment on both their tortious interference claims against Muhlstein. But since they do not identify any direct action by Muhlstein which caused them to lose Evergy or Terracon as clients, we find whether Muhlstein tortiously interfered with CSI's business expectancies with these clients to be a closer question. We agree with the district court that Plaintiffs' general allegations of internal turmoil and office space are too tenuous to present a triable jury question.

Still, we find a triable question of fact as to whether Muhlstein's intentional misconduct caused CSI to lose Hy-Vee as a client. Following their attempts to convince Hy-Vee to add M2PP as another vendor as part of their plan to transition all Hy-Vee orders to M2PP (purportedly to avoid CSI's credit and working capital issues), McCaslin and Muhlstein met with the two salespersons in charge of the account. McCaslin stated that the purpose of this meeting was to inform them that, because of the size of the orders, CSI lacked the financial capacity to process the orders, and to discuss switching the Hy-Vee account to M2PP to solve this problem. Three days later, both salespeople resigned, taking the Hy-Vee account with them.

These facts could lead to an inference that the salespeople in charge of the Hy-Vee account left CSI in response to Muhlstein and McCaslin's effort to get them to switch the account to M2PP. As explained in the discussion of Plaintiffs' conspiracy claim, a question of fact exists about whether McCaslin and Muhlstein were engaged in a conspiracy to shift CSI's customers to M2PP for their own benefit. Accordingly, we find there is a question of fact on whether Muhlstein's intentional misconduct caused these employees to resign and CSI to lose Hy-Vee as a client as a result.

Thus, we find that summary judgment was not appropriate on Plaintiffs' tortious interference with business expectancies claim, but only regarding Plaintiffs' business expectancies with Hy-Vee. We affirm the decision granting summary judgment on Plaintiffs' claims related to their business expectancies with Evergy and Terracon.

Did the district court err in granting summary judgment on Plaintiffs' KUTSA claims against Muhlstein?

Plaintiffs also argue the district court erred in granting summary judgment on their claims against Muhlstein for violating the KUTSA. They maintain the evidence is sufficient for a jury to find that Muhlstein, along with McCaslin, misappropriated CSI's trade secrets to help them in starting a new, competing business.

Defendants contend these claims must fail because Plaintiffs have not shown the information at issue constituted "trade secrets" or that Muhlstein "misappropriated" this information under the KUTSA.

Under the KUTSA, plaintiffs are entitled to recover damages for misappropriation of trade secrets. K.S.A. 60-3322(a). The KUTSA defines '"[m]isappropriation"' as:

"(i) [A]cquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or

"(ii) disclosure or use of a trade secret of another without express or implied consent by a person who

(A) used improper means to acquire knowledge of the trade secret; or

(B) at the time of disclosure or use, knew or had reason to know that his knowledge of the trade secret was

(I) derived from or through a person who had utilized improper means to acquire it;

(II) acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or

(III) derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or

(C) before a material change of his position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake." K.S.A. 60-3320(2).

'"Trade secret,"' in turn, is defined as:

"[I]nformation, including a formula, pattern, compilation, program, device, method, technique, or process, that:

(i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and

(ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy." K.S.A. 60-3320(4).

In granting summary judgment on Plaintiffs' KUTSA claims against Muhlstein, the district court found that McCaslin was authorized by the operating agreement to share the information at issue with

Muhlstein, Muhlstein maintained the confidentiality of this information, and the evidence did not support the existence of Plaintiffs' alleged conspiracy.

A question of fact exists as to whether the information at issue constitutes trade secrets.

To begin, Defendants argue Plaintiffs identify no information at issue that meets the definition of a "trade secret." They compare this case to *Dodson Intern. Parts, Inc. v. Altendorf*, 347 F. Supp. 2d 997, 1012 (D. Kan. 2004), *modified on reconsideration* No. 00-4134SAC, 2005 WL 475363 (D. Kan. 2005) (unpublished opinion), which found summary judgment appropriate when a plaintiff made no effort to identify the specific information involving a trade secret or the specific act constituting misappropriation. They also rely on *Dow Chemical Canada Inc. v. HRD Corp.*, 909 F. Supp. 2d 340, 347-48 (D. Del. 2012), which held that vague and conclusory statements that a "concept" shared with a competitor constituted a trade secret were not sufficient to survive summary judgment.

In response, Plaintiffs contend they have consistently identified the alleged trade secrets at issue and cite specific e-mail attachments sent from McCaslin to Muhlstein, which included CSI information such as company financial records, tax records, internal financial statements, a PowerPoint laying out CSI's business tactics and strategy for landing Evergy as a client, and client account information and projected revenue.

Looking to the definition of "trade secret" under the KUTSA, we find a jury could reasonably conclude these documents constitute information that (1) derived independent economic value from not being generally known and not readily ascertainable by proper means by other persons who could obtain economic value from its disclosure or use and (2) was the subject of reasonable efforts to maintain its secrecy.

A question of fact exists as to whether Muhlstein misappropriated this information.

Turning to the definition of "misappropriation," Defendants note the parties agree that McCaslin voluntarily sent the information at issue to Muhlstein while he was acting as CSI's manager. Thus, they claim, the first question is whether McCaslin used improper means to acquire

the information or owed a duty to CSI to maintain its secrecy or limit its use. They argue he did not, pointing out the operating agreement granted McCaslin unlimited authority to share information about CSI with third parties.

Defendants also contend that, even if McCaslin exceeded his authority under the operating agreement in sharing this information with Muhlstein, Plaintiffs would still need evidence that Muhlstein *used* an alleged trade secret for him to be liable under the KUTSA. They argue no such evidence exists, as the record does not support Plaintiffs' alleged conspiracy and instead shows that McCaslin provided the information at issue to Muhlstein to advance CSI's business operations.

Plaintiffs argue that, given Defendants' unlawful conspiracy, Muhlstein knew or had reason to know the financial records and other trade secrets he was receiving from McCaslin were being provided by improper means—i.e., in violation of the operating agreement. They argue that if there is a question of fact on the existence of their alleged conspiracy, a question of fact must also exist as to whether McCaslin exceeded his authority under the operating agreement in providing Muhlstein with this information. And they claim the timeline of Muhlstein's receipt of CSI trade secrets, from November 2018 through April 2019, when combined with the evidence tending to show that McCaslin and Muhlstein were scheming to steal CSI's business, is enough for a jury to find that McCaslin and Muhlstein were not using this information for CSI's benefit. We agree.

As a starting point, Defendants' suggestion that the operating agreement granted McCaslin unlimited authority to share information about CSI with third parties is based on an unreasonably narrow view of that agreement. Although the operating agreement granted McCaslin wide authority to engage third parties for CSI's benefit, it also imposed a duty on him to act as CSI's fiduciary. Accordingly, he could not disclose CSI trade secrets to third parties if his purpose in disclosing the information was to harm CSI and benefit himself.

Thus, a jury could find Muhlstein violated the KUTSA if it finds McCaslin disclosed trade secrets to Muhlstein for use in starting M2PP and stealing CSI's value and business and Muhlstein used them for this purpose.

Resolving the facts and inferences that can reasonably be drawn from them in Plaintiffs' favor, we find a question of fact exists as to whether Muhlstein misappropriated the alleged trade secrets. Because of the overlap between the challenged disclosures and the time during which McCaslin and Muhlstein were setting up M2PP and attempting to transition clients—as well as the fact that one of the documents was titled "Client Movement to M2"—a jury could find at least some of these disclosures were made to help form M2PP. And given that McCaslin stated he and Muhlstein were focusing on moving the largest clients to M2PP, it is reasonable to infer that they used CSI company information in prioritizing which clients to transition.

As a result, we find there is also a triable question of fact as to whether Muhlstein misappropriated CSI trade secrets. The district court erred in granting summary judgment on this claim.

Did the district court err in granting summary judgment on Plaintiffs' claims against Sprout and Access Asia?

As a final matter, we must address Plaintiffs' claims against Muhlstein's companies, Sprout and Access Asia.

Across all issues on appeal, Plaintiffs mainly focus their arguments on their claims against Muhlstein. Yet, they also appeal from the district court's grant of summary judgment as to their claims against Sprout and Access Asia. But rather than making specific arguments on these claims, they merely seek through a footnote to incorporate their arguments about Muhlstein for each claim against his companies. They argue that, given the district court's judgment, their points on appeal apply equally to Muhlstein, Sprout, and Access Asia. Thus, they claim, if the judgment for Muhlstein is reversed, so too must be the judgment for these entities.

Defendants correctly note that Sprout and Access Asia are separate entities from Muhlstein, and Plaintiffs are required to tailor their allegations to support claims against those companies. Plaintiffs cite no evidence which shows or from which a reasonable inference could be drawn that shows: (1) Access Asia participated in the alleged conspiracy; (2) Access Asia's act of submitting invoices caused CSI to lose customers as would be necessary to support a claim for tortious interference with business expectancies; or (3) Sprout or Access Asia had any involvement with

any alleged trade secret. Further, no matter what Muhlstein is alleged to have done as an individual, for Sprout or Access Asia to be vicariously liable for his actions, there would need to be evidence that Muhlstein was acting within the scope of his agency on behalf of those entities when he took those alleged actions. See, e.g., Restatement (Third) of Agency § 7.04, comment b (2006). But again, Plaintiffs cite no such evidence.

Plaintiffs have not separately briefed their arguments about Sprout and Access Asia, and the success of these claims does not merely turn on the success of their claims against Muhlstein. Plaintiffs have offered no argument to explain why the district court's decision on their claims against these companies, specifically, was in error. We thus consider their arguments as to Sprout and Access Asia abandoned for lack of sufficient briefing. We affirm the district court's decision granting summary judgment to these companies.

CONCLUSION

The purpose of summary judgment is to avoid the delay and expense of a trial when there are no factual disputes for a jury to determine. *Lawrence v. Deemy*, 204 Kan. 299, 301, 461 P.2d 770 (1969); *Secrist v. Turley*, 196 Kan. 572, 575, 412 P.2d 976 (1966).

Where, like here, we have conflicting inferences drawn from the same evidence and credibility assessments which must be made about parties' motives and intent, then we are presented with the very factual disputes for which jury trials were created to determine.

We therefore reverse the district court's summary judgment decision as to Plaintiffs' claims against Muhlstein for conspiracy, tortious interference with contract, tortious interference with Plaintiffs' business expectancy with Hy-Vee, and violation of the KUTSA. We remand these claims for further proceedings. But we affirm its decision on Plaintiffs' claims against Sprout and Access Asia and Plaintiffs' claims against Muhlstein for tortious interference with their business expectancies with Terracon and Evergy.

Affirmed in part, reversed in part, and remanded for further proceedings.

No. 125,117

JOHNNY KING, *Appellant/Cross-Appellee*, v. UNIFIED SCHOOL DISTRICT 501, *Appellee/Cross-Appellant*.

SYLLABUS BY THE COURT

1. EMPLOYER AND EMPLOYEE—*Retaliatory Discharge Case—Employer Charged With Knowledge of Laws Applicable to Them as Employer.* In a retaliatory discharge case, the employee need not prove that they expressly advised the employer of the legal basis for the claim that their actions were protected. The employer is charged with knowledge of the laws that apply to them as an employer. The employee is only required to outline the facts that give rise to the application of any legal protections claimed.

2. SAME—*Acts Do Not Warrant Exception to Kansas' At-Will Employment Doctrine.* Neither the Freedom from Unsafe Restraint and Seclusion Act (FURSA)—K.S.A. 2022 Supp. 72-6151 et seq.—and the attendant Kansas regulations that mirror it—K.A.R. 91-42-1 et seq.—nor the Paul D. Coverdell Teacher Protection Act of 2001 (Coverdell Act)—20 U.S.C. § 7941 et seq., create a public policy that would warrant an exception to Kansas' at-will employment doctrine.

Appeal from Shawnee District Court; THOMAS G. LUEDKE, judge. Oral argument held August 15, 2023. Opinion filed November 9, 2023. Case dismissed.

Theodore J. Lickteig, of Lickteig Law Firm, LLC, of Lenexa, and *Terence E. Leibold* and *Alex B. Atchison*, of Petefish, Immel, Hird, Johnson & Leibold, L.L.P., of Lawrence, for appellant/cross-appellee.

J. Phillip Gragson, of Henson, Hutton, Mudrick, Gragson & Vogelsberg, L.L.P., of Topeka, for appellee/cross-appellant.

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

ARNOLD-BURGER, C.J.: Johnny King, a paraprofessional for Unified School District 501 (the District), was called to help with a disruptive student. Based on his response, the District terminated King for failing to follow emergency safety intervention policies and training. King sued the District for wrongful termination.

Prior to trial, the district court found that there is a public policy exception to Kansas' employment-at-will doctrine which protected King's continued employment for the District. Accordingly, the case was allowed to proceed to trial. After the close of King's

evidence, the district court granted the District's motion for judgment as a matter of law. The district court found that King failed to establish that he took a protected action and that his termination was not pretextual.

King appeals the granting of the motion for judgment as a matter of law. The District cross-appeals the district court's finding that a public policy exception existed to override Kansas' employment at will doctrine. Although we find that the district court was correct in holding that King failed to establish his termination was pretextual, we also find that the district court erred in not dismissing the case based on King's failure to establish a public policy exception to the Kansas employee-at-will doctrine. Accordingly, King was not entitled to bring a wrongful discharge action in the first place and his case must be dismissed.

FACTUAL AND PROCEDURAL HISTORY

Johnny King was hired as a paraprofessional for the District, and in 2017 was assigned to Hope Street Elementary School (Hope Street). One of the job duties assigned to King was to assist with behavior control as needed. According to King, that ended up being a fairly significant portion of what he did in his day-to-day employment. Hope Street was considered a school for at-risk children—children who had little control of their behavior at times and were often disruptive.

The District's policy for emergency safety interventions, such as seclusion and restraint, called for limited safety interventions. Employees were encouraged "to utilize other behavioral management tools, including prevention techniques, de-escalation techniques, and positive behavioral intervention strategies." To that end, emergency safety interventions were "not [to] be used unless a student's conduct presents an immediate danger to self or others." The emergency safety interventions policy stated that all staff members were prohibited, in part, from using faceup or supine physical restraints.

As part of his employment, the District required King to be trained in the Mandt system. The Mandt System "is a relationally based program that uses a continuous learning and development

approach to prevent, de-escalate, and if necessary, intervene in behavioral interactions that could become aggressive." The Mandt system prohibits using pain compliance, trigger points, or pressure points. It also prohibits hyperextension of any part of the student's body. The Mandt system also prohibits doing anything that potentially risks the hyperextension of any part of the student's body. In addition, any technique that involves substantial risk of injury, forces the student to the floor, chair, or wall is prohibited. As is any manual restraint that maintains the student on the floor in any position or any technique which puts or keeps the student off balance. In general, the least restrictive interaction needed to protect the student or others should be used.

When discussing the Mandt system and the training he received in it, King said that it never covered what to do in a situation where a student was hitting another person.

A few months after King started at Hope Street, student J.C., began acting out by "verbalizing and otherwise being disruptive." Ashley West, J.C.'s paraprofessional, told J.C. to take a break with her so they could discuss his behavior in a timeout room. West sat in a chair outside the timeout room while J.C. walked down the hallway toward her. As J.C. got close to West, he yelled at her and struck her with his fist. King attempted to get J.C. into the timeout room and J.C. resisted. J.C. tried to escape the timeout room while King attempted to close the door.

King said that he was not applying pressure to J.C. or trying to take his breath away when he attempted to put him in the timeout room. He did acknowledge pulling on J.C.'s foot to keep him into the timeout room. He also acknowledged that he might have tried pulling on J.C.'s shirt to keep him in the room. J.C. escaped the timeout room, and a social worker took him away and got him settled down.

A short video of the situation was recorded and is included in the record. The video shows J.C. attempting to get out of the timeout room while King shuts the door on him. J.C. ends up lying on his back, or supine, as he exits the room, although it is unclear if he was put on his back as a result of King grabbing him or if he stumbles as he leaves the room. The video ends with J.C. on his back with King pulling on J.C.'s shirt.

After the incident, Paula Swartzman-Waters, the Hope Street Coordinator and a Mandt trainer between 2012 and 2014, recommended that King be terminated for not following proper Mandt de-escalation techniques. In June 2017, Carla Nolan, the General Director of Human Resources for the District, sent King a letter notifying him of his proposed termination. The Board of Education approved the recommendation, and King's employment was terminated. King unsuccessfully appealed his termination.

King sued the District alleging one count of wrongful discharge in violation of public policy. The District moved for summary judgment arguing, in part, that King could not establish that he exercised a statutory or constitutional right that was recognized as a basis for a retaliatory discharge claim.

The district court denied the motion, recognizing a public policy exception to Kansas' at-will employment doctrine exists when a school employee takes reasonable actions to provide a safe environment for students and educators.

A jury trial was held in January 2022. At the close of King's evidence, the District filed a motion for judgment as a matter of law. In its motion, the District argued, in large part, that King failed to show that the District had knowledge of King's exercise of a right—which, according to the District's motion, is a necessary element of a claim for wrongful discharge.

The district court granted the motion for judgment as a matter of law.

King timely appealed arguing that the district court erred by finding that he failed to establish select elements of a retaliatory discharge claim. The District filed a timely notice of cross-appeal seeking review of the district court's finding that a public policy exception existed to override Kansas' employment at will doctrine.

ANALYSIS

I. OUR STANDARD OF REVIEW ON BOTH THE APPEAL AND CROSS-APPEAL IS DE NOVO

A trial court's denial of a motion for judgment as a matter of law is reviewed de novo determining "whether evidence existed from

which a reasonable jury 'could properly find a verdict for the nonmoving party.'" *Siruta v. Siruta*, 301 Kan. 757, 766, 348 P.3d 549 (2015).

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

In addition, to the extent we are required to interpret statutes, we also have unlimited review. *Nauheim v. City of Topeka*, 309 Kan. 145, 149, 432 P.3d 647 (2019).

II. WE EXAMINE KING'S CLAIMS AS THEY RELATE TO THE ELEMENTS OF WRONGFUL DISCHARGE

To establish a prima facie case for wrongful discharge King was required to show: (1) he took a protected action; (2) the District knew about the protected action; (3) the District took an adverse employment action; and (4) a causal connection between the protected action and the adverse employment action. See *Hill v. State*, 310 Kan. 490, 495, 514, 448 P.3d 457 (2019) (listing elements for a retaliatory transfer).

Once a prima facie case is established, the burden shifts to the defendant to provide evidence of a legitimate reason for terminating the plaintiff. Once the defendant has done so, the plaintiff is then required to prove that the reasons offered were merely pretextual. 310 Kan. at 513.

The first question before this court is whether, when all facts and reasonable inferences are made in favor of King, the district court erred when it found that King (1) failed to establish that the District knew King took a protected action and (2) that King failed to establish a causal connection between the protected action and King's termination.

A. *King claims his action was protected by both state and federal statutes.*

King claims that his action was protected by the Freedom from Unsafe Restraint and Seclusion Act (FURSA)—K.S.A. 2022 Supp.

72-6151 et seq.—and the Paul D. Coverdell Teacher Protection Act of 2001 (Coverdell Act)—20 U.S.C. § 7941 et seq.

FURSA set out rules on emergency safety interventions. For example, under FURSA "[e]mergency safety interventions shall be used only when a student presents a reasonable and immediate danger of physical harm to such student or others with the present ability to effect such physical harm." K.S.A. 2022 Supp. 72-6153(a). Local school boards were required to "develop and implement written policies to govern the use of emergency safety interventions in schools." K.S.A. 2022 Supp. 72-6153(g). FURSA set the floor for the local school boards, as any policy implemented by the board "shall conform to the standards, definitions and requirements of [FURSA]." K.S.A. 2022 Supp. 72-6153(g).

FURSA expired on June 30, 2020. K.S.A. 2022 Supp. 72-6158. However, the Kansas Department of Education adopted regulations that largely mirrored the substance of FURSA. K.A.R. 91-42-1 et seq.

The Coverdell Act is meant "to provide teachers, principals, and other school professionals the tools they need to undertake reasonable actions to maintain order, discipline, and an appropriate educational environment." 20 U.S.C. § 7942. The Coverdell Act preempts state laws to the extent that state laws are inconsistent with the Coverdell Act, but it does not preempt any state law that provides additional protection from liability. 20 U.S.C. § 7945(a).

In substantive part, the Coverdell Act limits liability "for harm caused" by teachers in school if:

"(1) the teacher was acting within the scope of the teacher's employment or responsibilities to a school or governmental entity;

"(2) the actions of the teacher were carried out in conformity with Federal, State, and local laws (including rules and regulations) in furtherance of efforts to control, discipline, expel, or suspend a student or maintain order or control in the classroom or school;

"(3) if appropriate or required, the teacher was properly licensed, certified, or authorized by the appropriate authorities for the activities or practice involved in the State in which the harm occurred, where the activities were or practice was undertaken within the scope of the teacher's responsibilities;

"(4) the harm was not caused by willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed by the teacher; and

"(5) the harm was not caused by the teacher operating a motor vehicle, vessel, aircraft, or other vehicle for which the State requires the operator or the owner of the vehicle, craft, or vessel to–

(A) possess an operator's license; or

(B) maintain insurance." 20 U.S.C. §7946(a).

B. *King was able to establish that his legal justification for appealing his termination was based on the FURSA or the Coverdell Act.*

Both parties, and the district court, acknowledge that the District was aware of King's actions. However, the district court noted that "there was no evidence introduced that the [District] was aware [King's] action was taken pursuant to [FURSA or the Coverdell Act] or under the protection of said law." The district court went on to note that there was no evidence that information was provided to the District that King was purporting to act under the protection of the law or that he raised the issue of legal justification during the investigation or any proceedings prior to his current suit.

The district court went on to find that knowledge of the action taken by King "does not equate to knowledge of the exercise of a right" and that in a retaliatory discharge case, the employee must prove that the employer had knowledge of the right exercised prior to the termination. On appeal, King disagrees, arguing that the employee need only show that the employer must only know about the protected activity of the employee.

The district court based its finding on the Kansas Supreme Court's decision in *Palmer v. Brown*, 242 Kan. 893, 752 P.2d 685 (1988), where the court addressed a wrongful discharge claim in a whistleblower case. The only knowledge element set out by the Kansas Supreme Court in *Palmer* is that "the employer had knowledge of the employee's reporting of such violation prior to discharge of the employee." 242 Kan. at 900.

The district court's decision that King was required to show that the District had knowledge of the right exercised reads too much into *Palmer*. See 242 Kan. at 900. Requiring a plaintiff to prove that that a defendant in a retaliatory discharge case had knowledge of the right exercised provides a perverse incentive to defendants to remain ignorant of the law.

The Tenth Circuit addressed a similar issue in *Bausman v. Interstate Brands Corp.*, 252 F.3d 1111, 1121-22 (10th Cir. 2001), a retaliatory discharge case involving workers compensation, where the circuit court found that Kansas' "'knew or should have known' standard charges an employer with knowledge of those *facts* concerning an employee's workplace injury reasonably available to the employer at the time."

As the court in *Bausman* put it, "an employer cannot adopt a workplace policy by which the employer abdicates its duty to see, to hear, and to think." 252 F.3d at 1121. The same standard should apply here. King was not required to prove that the District was aware of the rights that King purported to act under. And even if the District did need to know about the claimed rights, the District should have known about them given its position as an employer of teachers and paraprofessionals.

The district court erred when it determined that King did not meet his evidentiary burden. In a retaliatory discharge case, the employee need not prove that they expressly advised the employer of the legal basis for the claim that their actions were protected. The employer is charged with knowledge of the laws that apply to them as an employer. The employee is only required to outline the facts that give rise to the application of any legal protections claimed. Accordingly, King was not required to prove that the District knew he had exercised a right. Instead, he was only required to show that the District knew about the action that he took. There is no question that the District knew about King's actions in this case.

C. *King established a causal connection between the protected activity and his termination.*

The district court also found that King failed to prove there was a causal connection between the protected activity and his termination. In the district court's decision, the court equated the causal connection element with King's duty to prove that any justification for his termination offered by the District was pretextual.

On its face, there was a causal connection between King's actions and his termination. King was terminated because of the actions he took to secure J.C.

Once King has established a prima facie case, which we find he has here, the burden shifts to the District to provide evidence of a legitimate reason for terminating King. If the District is able to meet its burden, King is then required to prove that the reasons offered were merely pretextual. *Hill*, 310 Kan. at 513.

D. *The District established that King was terminated solely for his failure to follow the MANDT system, and King failed to establish that the reason given was pretextual.*

"To raise a triable issue of whether the employer's reason is mere pretext, the employee's evidence may include that the employee was treated differently than others similarly situated; the employer's treatment of the employee before the protected action; and the employer's response to the protected action." *Hill*, 310 Kan. at 518.

King argues that he showed the reason for his termination was pretextual because he was treated differently than other similarly situated employees. The evidence does not support disparate treatment.

King was not similarly situated to any other employee involved in the incident with J.C. King was the only employee to physically engage with J.C. He was the only employee to grab J.C. by the leg and drag him into the timeout room. And he was the only employee who attempted to close the timeout room door on J.C. To say that the reason for termination was pretextual because similarly situated employees were treated differently is a step too far when there were no similarly situated employees. The situation would be different if King, like the other employees, had not physically intervened and then been terminated. But that is not what happened here. King was the only employee to physically intervene with J.C., and King was the only employee terminated.

Nor does King raise any other factors to establish that the termination was pretextual in his brief. He notes that other factors exist, such as the temporal proximity between the act and the termination, evidence that the stated reason for termination was false, or evidence that the defendant acted contrary to a written company policy. But he does not point to any evidence or argument on his part that the other factors support a finding that his termination was pretextual. Instead, he hangs his hat on the similarly situated

employee factor which, as discussed above, has limited weight here.

E. *Kansas does not require that an employee establish the employer's decision was made in bad faith to prove it was pretextual.*

The district court in this case also found that there was no evidence to show that the District's decision to terminate King was not done with a good-faith belief that King violated the Mandt guidelines.

In *Rivera v. City and County of Denver*, 365 F.3d 912, 924-25 (10th Cir. 2004), the Tenth Circuit discussed the role of whether the employer acted in good faith in terminating an employee's employment in the context of whether the termination was pretextual. There, the court stated that the "'relevant inquiry is not whether [the employer's] proffered reasons were wise, fair or correct, but whether [it] honestly believed those reasons and acted in good faith upon those beliefs.'" 365 F.3d at 924-25 (quoting *Bullington v. United Air Lines, Inc.*, 186 F.3d 1301, 1318 [10th Cir. 1999], *overruled on other grounds by National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 122 S. Ct. 2061, 153 L. Ed. 2d 106 [2002]).

Kansas appellate courts have not yet adopted the honest belief doctrine, and we are not prepared to do so here.

F. *The district court was not bound by its earlier summary judgment decision.*

Prior to trial the district court denied the District's motion for summary judgment finding there was evidence that King's termination was pretextual.

The court noted that other employees were present at the incident and were not terminated. As the court put it in its order, had the other employees "followed the appropriate Mandt de-escalation procedures at the early stages given its alleged invariable success, it is possible that the Plaintiff's emergency intervention would have been rendered unnecessary." The court went on to say "the [District] places the sole onus on [King] for application of these guidelines. The evidence could suggest that [King] inherited a situation where Mandt was no longer applicable and J.C. was not susceptible to its effect." The court acknowledged that King

was "the only person who physically intervened in response to the physically aggressive conduct of J.C., but it is equally true that the others who were present apparently also failed to appropriately apply de-escalation procedures, assuming their inevitable success." Ultimately, in its order denying the motion for summary judgment, the district court believed that King "provided evidence sufficient to create a legitimate question as to whether the [District's] stated reason for [King's] termination was pretextual."

On appeal, King argues the district court should have been bound by its earlier decision in its order denying the motion for summary judgment and, as a result, should have found that there was sufficient evidence to deny the motion for judgment as a matter of law, at least on this particular issue. Alternatively, he argues that he presented sufficient evidence at trial to establish that his termination was pretextual, even if the district court was not required to follow its prior decision.

The law of the case doctrine is a discretionary policy which generally means that a court will refuse to reopen a matter that has already been decided in the case, without limiting the court's power to do so. The law of the case is used, in part, to avoid indefinite relitigation of the same issue. *State v. Collier*, 263 Kan. 629, 631, 952 P.2d 1326 (1998).

King's argument regarding the law of the case doctrine, and its application in the current case, is extremely limited. He gives a brief overview of the doctrine and then states, without specific citations backing up his assertion, that the doctrine should have barred the district court from determining that King failed to establish a causal connection between his action and his termination because he failed to show that the termination was pretextual. But as stated above, the law of the case doctrine is discretionary and does not prevent a court from readdressing an issue it has already decided. In this case, the court decided the issue at the summary judgment stage and then revisited its decision after hearing evidence at trial.

And after looking at the evidence as outlined above, we do not believe that the district court was wrong to reconsider its earlier decision.

In sum, King fails to establish that the reason for his termination was pretextual. He only argues that he was similarly situated

to other employees who were not terminated. But King alone engaged in a physical altercation with J.C., which the District believed violated Mandt guidelines under the circumstances. The other employees involved were not accused of violating Mandt guidelines and were not terminated.

Accordingly, the district court did not err by granting the District's motion for judgment as a matter of law on King's wrongful discharge claim.

Even though we affirm the district court's ultimate decision as it relates to King's failure to meet his burden of proof, it all becomes irrelevant when we examine the District's cross-appeal.

III. KING WAS AN AT-WILL EMPLOYEE WHO COULD BE TERMINATED FOR ANY REASON

The District claims the district court erred in recognizing a public policy exception to Kansas' at-will employment doctrine when a school employee takes reasonable actions to provide a safe environment for students and educators. We agree.

"Kansas employment law is grounded in the doctrine of employment-at-will. In the absence of an express or implied contract of duration or where recognized public policy concerns are raised, employment is terminable at the will of either party." *Riddle v. Wal-Mart Stores, Inc.*, 27 Kan. App. 2d 79, 86, 998 P.2d 114 (2000). The public policy exceptions are limited. In *Hill*, 310 Kan. at 501, the Kansas Supreme Court listed the six exceptions recognized at the time: (1) filing a claim under the Kansas Workers Compensation Act; (2) filing a claim under the Federal Employers Liability Act; (3) whistleblowing; (4) exercising a public employee's First Amendment right to free speech on an issue of public concern; (5) filing a claim under the Kansas Wage Payment Act; and (6) invoking rights under the Fair Labor Standards Act or the Kansas Minimum Wage and Maximum Hours Law.

When determining whether a public policy exception to Kansas' at-will employment exists, three scenarios exist:

"(1) The legislature has clearly declared the state's public policy; (2) the legislature enacted statutory provisions from which public policy may reasonably be implied, even though it is not directly declared; and (3) the legislature has neither made a clear statement of public policy nor can it be reasonably implied." *Campbell v. Husky Hogs*, 292 Kan. 225, 230, 255 P.3d 1 (2011).

The recognition of a public policy exception

"has rested on a principle of deterrence against employer reprisal for an employee's exercise of a legal right. And in those instances in which an employee is exercising a statutory right created by the legislature, we have noted that such deterrence serves not only the employee's interests but also those of the state and its people. This is because statutory rights exist only because of the legislature's determination that such a right is in the public interest." *Pfeifer v. Federal Express Corporation*, 297 Kan. 547, 556, 304 P.3d 1226 (2013).

FURSA, and the similar Kansas regulations, do not create a public policy that would warrant an exception to Kansas' at-will employment doctrine. First, it does not clearly state that it is the public policy of the State, let alone clearly state that it is the public policy of the State to protect the continued employment of teachers and other school professionals who restrain a student. See K.S.A. 2022 Supp. 72-6151 et seq. Nor can a public policy protecting the continued employment of teachers or other professionals who restrain students be reasonably implied.

FURSA limits emergency safety interventions to "only when a student presents a reasonable and immediate danger" to self or others, but it does not focus on protecting the teacher or other professional restraining the student. K.S.A. 2022 Supp. 72-6153(a). Instead, it requires protection for the students who might potentially be restrained. And if an emergency restraint occurs, it provides a procedure for parents "to file a complaint with the local board" if the parent believes "that an emergency safety intervention has been used on the parent's child in violation of the act, rules and regulations or the local board's emergency safety intervention policy." K.S.A. 2022 Supp. 72-6153(g)(2)(A); see K.A.R. 91-42-4(f).

FURSA does not operate like the recognized public policy exceptions set out in *Hill*. It does not provide protections for a teacher who restrains a student, nor does it offer some sort of appeal process for a teacher disciplined for restraining a student. This is not a situation like a classic workers compensation retaliation case where an employee is injured, files a claim, and is retaliated against because he or she took the statutorily authorized action of filing a claim. Instead, FURSA and the similar regulations provide protections for students.

Similarly, the Coverdell Act does not protect King in this situation. The Coverdell Act protects a teacher from liability "for harm caused by an act or omission of the teacher on behalf of the school" if certain conditions are met. 20 U.S.C. § 7946(a). Those conditions require the teacher to act in a manner consistent with federal, state, and local laws, rules, and regulations. 20 U.S.C. § 7946(a)(2). But the Coverdell Act does not limit an employer's ability to terminate a teacher for restraining a student in a manner inconsistent with school policy. Instead, the Coverdell Act's main protection for teachers is that it prohibits punitive damages to be awarded against the teacher unless the teacher's actions constituted "willful or criminal misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed." 20 U.S.C. § 7946(c)(1). In addition, the Coverdell Act limits a teacher's liability to "only for the amount of noneconomic loss allocated to that [teacher] in direct proportion to the percentage of responsibility of that [teacher]" for the harm claimed. 20 U.S.C. § 7947(b)(1)(A).

The Coverdell Act, like FURSA and the similar regulations, does not operate like the recognized public policy exceptions. It limits a teacher's liability in certain circumstances, but it does not provide a teacher carte blanche in restraining a student. King was still required to act within the confines of the law and regulations, both of which required the local board to create and implement written policies to govern the use of emergency safety interventions in schools. See K.S.A. 2022 Supp. 72-6153(g); K.A.R. 91-42-3(a). The Coverdell Act, FURSA, and the Kansas regulations do not protect a teacher from termination after the teacher has violated district policy and statutory requirements.

FURSA, the similar regulations, and the Coverdell Act do not operate to create a public policy exception to Kansas' employment-at-will doctrine. Neither the laws nor the regulations clearly state that it is a public policy for Kansas. Nor can a public policy protecting teachers from termination be reasonably implied.

This is especially true when considering that King did not appear to act within the confines of the law and the regulations when he was restraining J.C. K.S.A. 2022 Supp. 72-6153(f)(1) prohibits "supine, or face-up physical restraint." K.A.R. 91-42-2(e)(2) also prohibits supine restraints. And the Coverdell Act requires teachers' actions to conform with State and local laws and regulations. 20 U.S.C. § 7946(a)(2). In the district court's order denying the motion for summary judgment,

King admitted that J.C. was supine in the video of their altercation. There is not a public policy protecting teachers or paraprofessionals from termination after using a prohibited restraint on a student.

The district court makes much of the "[e]mergency safety interventions *shall* be used only when a student presents a reasonable and immediate danger of physical harm" in its order denying the District's motion for summary judgment. (Emphasis added.) K.S.A. 2022 Supp. 72-6153(a); see K.A.R. 91-42-2(a). The district court read that language as essentially imposing a duty on King to restrain J.C. But the language in K.S.A. 2022 Supp. 72-6153(a) and K.A.R. 91-42-2(a) does not impose a duty to act on teachers and paraprofessionals. Instead, when read in the context of the rest of the law and regulations, the "shall" operates to stop teachers and paraprofessionals from acting unless absolutely necessary and, if necessary, in a safe manner. To read otherwise ignores the clear protections that FURSA and the similar regulations afford students.

The district court erred when it determined that FURSA, the similar regulations, and the Coverdell Act established a public policy which created an exception to the employment-at-will doctrine of Kansas. Because there is not a public policy exception, King cannot show that his continued employment was protected under Kansas law. As an employee in Kansas, without a demonstrable contract stating otherwise, King's employment was at-will, and he could not sue for wrongful termination. See *Riddle*, 27 Kan. App. 2d at 86.

In sum, although we find that the district court was correct in holding that King failed to establish his termination was pretextual, we also find that the district court erred in not dismissing the case based on King's failure to establish a public policy exception to the Kansas employee-at-will doctrine. Accordingly, King was not entitled to bring a wrongful discharge action in the first place and his case must be dismissed.

Case dismissed.

(539 P.3d 617)

No. 125,592

WILLIAM WEAVER, *Appellant/Cross-appellee*, v. UNIFIED GOVERNMENT OF WYANDOTTE COUNTY, *Appellee/Cross-appellant*.

SYLLABUS BY THE COURT

1. WORKERS COMPENSATION—*Determination of Functional Impairment Rating for Scheduled Injuries under Statute.* To determine a functional impairment rating for scheduled injuries under K.S.A. 44-510d(b)(23), the fact-finder should begin with the Sixth Edition of the American Medical Association Guides to the Evaluation of Permanent Impairment as a starting point and consider competent medical evidence to modify or confirm that rating, accordingly.

2. SAME—*No Reduction for Preexisting Impairment under Statute if Claimant's Injury Different from Previously Compensated Impairments*. No reduction for preexisting impairment under K.S.A. 44-501(e) is appropriate when the evidence shows that the claimant's impairment resulting from his or her current injury is different from the impairments for which the claimant has previously been compensated.

Appeal from Workers Compensation Appeals Board. Oral argument held August 15, 2023. Opinion filed November 17, 2023. Affirmed in part, reversed in part, and remanded with directions.

Keith L. Mark, of Mark & Burkhead, of Mission, for appellant/cross-appellee.

Denise E. Tomasic, of Tomasic & Rehorn, of Kansas City, for appellee/cross-appellant.

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

GARDNER, J.: William Weaver appeals from his workers compensation award. The Workers Compensation Appeals Board (the Board) interpreted K.S.A. 44-510d(b)(23) of the Workers Compensation Act, K.S.A. 44-501 et seq. (the Act), to exclude the use of competent medical evidence when assessing an impairment rating for scheduled injuries. The Board held that the relevant statute requires use of the American Medical Association Guides to the Evaluation of Permanent Impairment (6th ed. 2008) alone.

Weaver counters, and Wyandotte County agrees, that the Sixth Edition of the Guides is merely a starting point and that competent medical evidence may be considered in calculating an impairment rating of a scheduled injury. We agree as well.

The Unified Government of Wyandotte County cross-appeals, arguing that Weaver's award should have been reduced due to his preexisting impairment, in accordance with K.S.A. 44-501(e). But we find no error here. We thus affirm in part, reverse in part, and remand for further proceedings.

Weaver's Work Injury

In August 2018, Weaver was employed by Kansas City Water Pollution Control, which is part of the Unified Government of Wyandotte County (Wyandotte County), as a full-time plant maintenance mechanic. At the time of his relevant accident, he had worked for Wyandotte County for over 30 years.

On August 20, 2018, while working, Weaver and coworkers were trying to remove a wall made of cinder blocks and a steel beam. The beam was so heavy that machinery was needed to lift it. While removing the wall, the steel beam shifted and wedged Weaver's right hand between the beam and the wall. Because of the beam's weight, Weaver could not remove his hand. His coworkers had to use the machine to move the beam so Weaver's hand could be extricated. Because of this accident, both sides of Weaver's right hand were injured below his pinky and ring fingers, as well as his right wrist and thumb. During and after the accident, Weaver experienced pain in his right hand and wrist and timely reported the accident to his supervisors.

Because of this injury, Weaver said he had significant pain and considerable swelling in his right hand, from the back to the front of his hand in the area below his pinky and ring fingers, and in his right wrist and thumb. The injury led to a lack of circulation and sensitivity to touch. As a result, Weaver has difficulty performing basic self-hygiene activities such as brushing his teeth, brushing his hair, and washing his body. Activities requiring pushing or pulling with his right hand increase his symptoms. Prolonged activities also increase his pain. Weaver described his pain as a deep throbbing, which limits his ability to hold and grasp objects. This struggle with his grip and the pain makes tasks at work such as

using power tools, a hammer, and other objects, difficult. The thumb pain and decreased function impair his ability to perform his job because it affects his use of tools and compromises his ability to push, pull, and climb, and decreases his range of motion.

Weaver received medical treatment for his injuries then returned to his regular work duties on September 15, 2018. At the time of his accident, Weaver's wages entitled him to the maximum benefit rate of $645 a week.

Weaver's Prior Work-Related Injuries

Weaver had four work injuries to his right upper extremity before his current (August 2018) injury to that same extremity:

1. March 2009, settled based on a 10% permanent partial impairment to Weaver's right middle finger;
2. May 2011, settled based on a 12% permanent partial impairment to Weaver's right wrist;
3. March 2016 (injury to his right elbow), settled based on a 10% permanent partial impairment to his right arm; and
4. May 2016 (injury to his first and second fingers on his right hand), settled based on a 10% permanent impairment to his right hand.

Weaver testified there was no overlap between his injuries or symptoms from his August 2018 accident and those from any prior injury.

Weaver's Medical Evaluations

When Weaver reported his injury to his supervisors, Wyandotte County directed him to receive medical treatment with its selected clinic (State Avenue Health Care), and then with its selected orthopedic specialist (Dr. J. B. Moore). Wyandotte County referred Weaver to Dr. Bruce Toby, an orthopedic physician at the University of Kansas Hospital. Weaver was also evaluated by Dr. Anne Rosenthal for treatment recommendations and by Dr. Michael Poppa for an independent injury rating. Later, Weaver was also evaluated by Dr. Vito Carabetta, who performed an independent medical evaluation (IME) of Weaver's injuries, as ordered by the administrative law judge (ALJ).

Drs. Poppa, Toby, and Carabetta all testified that Weaver had sustained new functional impairment because of his August 2018 work accident, over and above any previous impairments. We discuss their evaluations below.

1. *Dr. Poppa's Evaluation*

Dr. Poppa, Weaver's chosen doctor, testified that Weaver sustained a permanent partial impairment because of the August 2018 accident. Dr. Poppa determined that Weaver had

- a 19% permanent partial impairment to the right upper extremity if he applied only the Sixth Edition of the Guides; and
- a 28% permanent partial impairment to the right upper extremity if he applied the Sixth Edition of the Guides and used all other competent medical evidence.

When assessing these impairment ratings, Dr. Poppa considered all of Weaver's ongoing symptoms and limitations.

Dr. Poppa determined that Weaver had

- a 30% combined overall impairment of the right upper extremity before his August 2018 work related injury, using Weaver's prior settlements and the Guides as a basis;
- after the August 2018 injury, Weaver had an overall combined impairment from his prior and current injury of 43% permanent partial impairment of his right upper extremity by using the Sixth Edition alone; and
- a 50% permanent partial impairment of his right upper extremity by
using the Sixth Edition as a starting point and then adding competent medical evidence.

2. *Dr. Toby's Evaluation*

Dr. Toby, Wyandotte County's selected physician, testified that Weaver had

- a 3% impairment rating to his right upper extremity if he applied only the Sixth Edition of the Guides; and

- a 6% impairment rating if he used the Sixth Edition as a starting point and considered all the competent medical evidence.

3. *Dr. Carabetta's Evaluation*

Dr. Carabetta, the court-appointed physician who conducted an IME, found that Weaver had

- a 30% combined overall impairment of the right upper extremity before the August 2018 work related injury using Weaver's prior settlements and the Guides as a basis;
- an 8% impairment rating to his right upper extremity using the Sixth Edition of the Guides alone;
- a 10% impairment rating to his right upper extremity using the Fourth Edition of the Guides alone; and
- after the August 2018 injury, an overall combined impairment from his prior and current injury of 36% to 37% permanent partial impairment of his right upper extremity, depending on if the 8% or 10% rating, respectively, is imposed.

The ALJ's Award

The ALJ credited Dr. Carabetta's testimony, being persuaded by his neutral and unbiased opinion. Crediting Dr. Carabetta's rating using the Sixth Edition, the ALJ found that Weaver's August 2018 work-related injury resulted in a permanent partial impairment of 8% to his right upper extremity. In doing so, the ALJ declined to consider any ratings that were not based strictly on the Sixth Edition. The ALJ held that K.S.A. 44-510d(b)(23) requires one to use only the Sixth Edition when determining the impairment of function related to a scheduled injury, thus "competent medical evidence" is not to be considered.

The ALJ also declined to reduce Weaver's benefits for preexisting functional impairment under K.S.A. 44-501(e). Wyandotte County argued Weaver should not receive any benefits for his current injury because of his preexisting 30% impairment. But the ALJ disagreed, finding Wyandotte County "point[ed] to no expert medical evidence to support this position." Rather, the ALJ found that all three physicians testified that their impairment ratings did

not include Weaver's preexisting impairment in their assessed ratings. In other words, their ratings were in addition to or independent of his preexisting impairment.

Accordingly, the ALJ awarded Weaver $10,320 in benefits; 16 weeks of permanent partial disability compensation at $645 per week. It also found that Weaver was not entitled to future medical treatment.

The Board's Decision

Neither party was content with the ALJ's decision. Wyandotte County sought review of the ALJ's award by the Workers Compensation Appeals Board (the Board), and Weaver did the same.

In a split decision, the Board, by a majority of three members, affirmed the ALJ's award in part and reversed in part. The Board concluded that the ALJ had erred by finding Weaver was not entitled to future medical treatment, but it affirmed the award in all other respects. Two conclusions of the Board's holding are crucial to this appeal: its application of K.S.A. 44-510d(b)(23) and K.S.A. 44-501(e).

K.S.A. 44-510d(b)(23)

The Board held that Weaver sustained an 8% permanent partial impairment to his right upper extremity from his August 2018 work-related accident. As had the ALJ, the Board found Dr. Carabetta's rating most persuasive because he was the court-appointed neutral evaluator.

The Board read K.S.A. 44-510d(b)(23) (the statute used to determine Weaver's impairment rating for a scheduled injury) as requiring that rating to be based solely on the Sixth Edition, to the exclusion of "competent medical evidence." The Board relied on its decision in *Butler v. The Goodyear Tire and Rubber Co.*, No. AP-00-0456-096, 2021 WL 2287732, at *4-5 (Kan. Work. Comp. App. Bd. May 27, 2021), which pointed out the differences in the plain language between the scheduled injury statute applicable here (K.S.A. 44-510d[b][23]), which does not reference "competent medical evidence," and the non-scheduled injury statute (K.S.A. 44-510e[a][2][B]), which requires use of "competent medical evidence." In *Butler*, the Board held, based on the plain

language of K.S.A. 44-510d(b)(23), that only the Sixth Edition may be used to rate scheduled injuries. Under that rationale, an impairment rating for a non-scheduled injury under K.S.A. 44-510e(a)(2)(B) could be based on both the Guides and competent medical evidence, see *Johnson v. U.S. Food Service*, 312 Kan. 597, 600, 478 P.3d 776 (2021), but an impairment rating for a scheduled injury under K.S.A. 44-510d(b)(23) must be based solely on the Guides.

Two Board members dissented. John Carpinelli disagreed with the Board's interpretation of K.S.A. 44-510d(b)(23). He found use of "competent medical evidence" was mandated in part by the Sixth Edition's use of terms such as "accuracy," "precision," and "skill," stating:

> "Therefore, an impairment rating assessed using the Guides must also be based on a physician's medical knowledge, skill, and abilities, in addition to validity, accuracy, precision, consistency, objectivity, medical science, measurements, test results, and medical records, not merely looking at the Guides and assigning a number."

His view is reflected in the Sixth Edition itself, which states: "The accurate use of the *Guides* requires a fundamental understanding of anatomy, physiology, pathology, and other appropriate clinical sciences along with a good understanding of the issues related to impairment and disability assessment." AMA Guides Sixth Edition, p. 23. And he found the disparate effect—that an impairment rating for a non-scheduled injury would be based on both the Guides and competent medical evidence, but an impairment rating for a scheduled injury must be determined solely on the Guides—absurd.

K.S.A. 44-501(e)

Wyandotte County argued that the ALJ had erred by not reducing Weaver's award under K.S.A. 44-501(e), based on his preexisting impairments. The Board disagreed. The majority held:

> "Under K.S.A. 44-501(e), an award of compensation shall be reduced by the amount of functional impairment determined to be preexisting. Under K.S.A. 44-501(e)(2)(A), in order to apply the credit for preexisting impairment, the Board must consider the percentage of functional impairment determined to be preexisting. Each physician testified their assessment of impairment was over

and above Claimant's prior impairments. As such, no amount of the impairment awarded by the ALJ was preexisting."

Board member William Belden disagreed with that analysis. He argued that the Board's approach (that K.S.A. 44-501[e] did not apply because the medical evidence gave Weaver a rating above and beyond his prior injuries) improperly ignored the plain language of the statute.

Ultimately, the Board affirmed the award but remanded for the inclusion of future medical expenses—an issue not raised on appeal. Again, neither party is content with the Board's decision. Weaver timely petitioned for judicial review of the Board's order affirming his award, and Wyandotte County timely cross-petitioned for judicial review of the Board's decision relating to preexisting impairments.

I. K.S.A. 44-510d(b)(23) PERMITS CONSIDERATION OF COMPETENT MEDICAL EVIDENCE AND THE SIXTH EDITION OF THE GUIDES WHEN ASSESSING A FUNCTIONAL IMPAIRMENT RATING FOR A SCHEDULED INJURY.

We first consider Weaver's argument that the Board must determine a functional impairment rating under K.S.A. 44-510d(b)(23) (scheduled injuries) by looking at competent medical evidence about the claimant's condition and at the Sixth Edition of the Guides, yet it failed to do so here. Wyandotte County agrees that the functional impairment rating under K.S.A. 44-510d(b)(23) should consider both the Sixth Edition of the Guides and competent medical evidence, but it contends that Dr. Carabetta, and thus the Board by adopting his analysis, did so here.

But the Board held that K.S.A. 44-510d(b)(23) prohibits one from considering competent medical evidence when assessing an impairment rating for a scheduled injury under K.S.A. 44-510d(b)(23). The Board based its decision on the contrast between the plain language of K.S.A. 44-510d(b)(23), which governs scheduled injuries, to K.S.A. 44-510e(a)(2)(B), which governs whole body/nonscheduled injuries. The latter refers to "competent medical evidence," while the former does not.

K.S.A. 44-510e(a)(2)(B), which governs whole body/non-scheduled injuries, states:

"The extent of permanent partial general disability shall be the percentage of functional impairment the employee sustained on account of the injury *as established by competent medical evidence and* based on the fourth edition of the American medical association guides to the evaluation of permanent impairment, if the impairment is contained therein, until January 1, 2015, but *for injuries occurring on and after January 1, 2015, based on the sixth edition of the American medical association guides* to the evaluation of permanent impairment, if the impairment is contained therein." (Emphasis added.) K.S.A. 44-510e(a)(2)(B).

The Board found that the plain language of K.S.A. 44-510d(b)(23) requires the functional impairment for a scheduled member to be determined solely by using the Sixth Edition, as it says so and omits any reference to "competent medical evidence":

"Loss of or loss of use of a scheduled member shall be based upon permanent impairment of function to the scheduled member as determined using the fourth edition of the American medical association guides to the evaluation of permanent impairment, if the impairment is contained therein, until January 1, 2015, but *for injuries occurring on and after January 1, 2015, shall be determined by using the sixth edition of the American medical association guides* to the evaluation of permanent impairment, if the impairment is contained therein." (Emphasis added.) K.S.A. 44-510d(b)(23).

Both parties agree that the Board's interpretation of K.S.A. 44-510d(b)(23) was erroneous. K.S.A. 44-556(a) directs that final orders of the Workers Compensation Board are subject to review under the Kansas Judicial Review Act (KJRA), K.S.A. 77-601 et seq., as amended. The standard of review varies depending on the issue raised. See K.S.A. 77-621(c)(4) (permitting relief if the agency has erroneously interpreted or applied the law). Because this issue presents a question of statutory interpretation, we review it de novo. See *Johnson*, 312 Kan. at 600.

The most fundamental rule of statutory construction is that the intent of the Legislature governs if that intent can be determined. An appellate court first tries to ascertain legislative intent through the statutory language enacted, giving common words their ordinary meanings. When a statute is plain and unambiguous, an appellate court should not speculate about the legislative intent behind that clear language. *Montgomery v. Saleh*, 311 Kan. 649, 654-55, 466 P.3d 902 (2020). Where there is no ambiguity, the

court need not resort to statutory construction. Only if the statute's language or text is unclear or ambiguous does the court use canons of construction or legislative history to construe the Legislature's intent. *In re M.M.*, 312 Kan. 872, 874, 482 P.3d 583 (2021).

A. *Statutory Text*

We begin with the text of the statutes, set out above. We have no quarrel with the Board's reliance on the plain language of the two statutes, or its finding that the two statutes use different language.

K.S.A. 44-510e(a)(2)(B) requires functional impairment to be "established by competent medical evidence" and "based on the sixth edition" of the Guides," while K.S.A. 44-510d(b)(23) states that impairment of function "shall be determined by using the sixth edition" of the Guides and includes no reference to competent medical evidence. And although non-scheduled injuries are in part "based on" the Guides (K.S.A. 44-510e[a][2][B]), scheduled injuries "shall be determined" by using the Guides, K.S.A. 44-510d(b)(23). We agree with the Board that the language is distinctively different. Although the phrase "based on" typically signifies a starting place or a guideline, *Johnson*, 312 Kan. at 602, "determined by" seems more restrictive. And in interpreting parallel statutes, we have noted that the language in one statute may illustrate that the Legislature knows how to state something omitted in another statute. See *State v. Nambo*, 295 Kan. 1, 4-5, 281 P.3d 525 (2012). That is where our analysis begins.

But unlike the Board, we do not stop there. As always, we must read the statute in its proper context. To do that, we rely on the doctrine of *in pari materia*. Appellate courts must consider various provisions of an act *in pari materia* with a view of reconciling and bringing the provisions into workable harmony if possible. *Miller v. Board of Wabaunsee County Comm'rs*, 305 Kan. 1056, 1066, 390 P.3d 504 (2017). We must construe statutes to avoid unreasonable or absurd results, and we presume the Legislature does not intend to enact meaningless legislation. *In re Marriage of Traster*, 301 Kan. 88, 98, 339 P.3d 778 (2014).

Recently, the Kansas Supreme Court explained that to determine the plain meaning of an unambiguous statute, we look not only to the statute's language, but also to the specific context in

which that language is used, as well as to the broader context of the statute as a whole:

"But even when the language of the statute is clear, we must still consider various provisions of an act *in pari materia* to reconcile and bring those provisions into workable harmony, if possible. *Neighbor v. Westar Energy, Inc.*, 301 Kan. 916, 919, 349 P.3d 469 (2015); *Northern Natural Gas Co. v. ONEOK Field Services Co.*, 296 Kan. 906, 918, 296 P.3d 1106 (2013). Thus, the doctrine of *in pari materia* has utility beyond those instances where statutory ambiguity exists. It can be used as a tool to assess whether the statutory language is plain and unambiguous in the first instance, and it can provide substance and meaning to a court's plain language interpretation of a statute." *Bruce v. Kelly*, 316 Kan. 218, 224, 514 P.3d 1007 (2022).

We thus read the Act's statutory definitions together with the statute in question to determine its plain meaning.

The Workers Compensation Act, K.S.A. 44-501 et seq., defines "functional impairment" as

"the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American medical association guides to the evaluation of impairment, if the impairment is contained therein." K.S.A. 44-508(u).

Although this statute refers to the Fourth Edition rather than the Sixth, the parties agree that the Sixth applies to Weaver's injury. There is thus no dispute before us as to which edition applies.

"Functional impairment," as defined in K.S.A. 44-508(u), is the logical equivalent of "impairment of function," as used in K.S.A. 44-510d(b)(23). Using K.S.A. 44-508(u)'s definition, our evaluation of functional impairment must be established by competent medical evidence and be based on the relevant edition of the Guides. That definition applies regardless of whether a worker has suffered a scheduled or non-scheduled injury.

The broader context of the Act also supports that conclusion. The ALJ, by referring Weaver for an IME, tacitly found that two medical opinions *based on competent medical evidence* disagreed as to the percentage of his functional impairment. See K.S.A. 44-516(b) ("If at least two medical opinions based on competent medical evidence disagree as to the percentage of functional impairment, such matter may be referred by the administrative law judge

to an independent health care provider who shall be agreed upon by the parties.").

The plain language of K.S.A. 44-510d(b)(23), read in context, thus counsels that ratings for scheduled injuries may consider competent medical evidence and need not be based solely on the relevant edition of the Guides. The Guides serve as a starting point, yet not necessarily an ending point.

B. *Relevant Caselaw*

No Kansas appellate case has examined this issue relating to scheduled injuries. Yet we find guidance from two recent cases on the same issue in the context of non-scheduled injuries. Recently, the Kansas Supreme Court considered the constitutionality of K.S.A. 44-510e(a)(2)(B), which governs non-scheduled injuries. See *Johnson*, 312 Kan. 597. That appeal arose because the phrase "competent medical evidence" does not appear in the portion of the statute referring to post-January 1, 2015 injuries, but does appear in the portion of the statute referring to pre-2015 injuries.

K.S.A. 44-510e(a)(2)(B), regarding non-scheduled injuries, states:

> "The extent of permanent partial general disability shall be the percentage of functional impairment the employee sustained on account of the injury as established by competent medical evidence and based on the fourth edition of the American medical association guides to the evaluation of permanent impairment, if the impairment is contained therein, until January 1, 2015, but for injuries occurring on and after January 1, 2015, based on the sixth edition of the American medical association guides to the evaluation of permanent impairment, if the impairment is contained therein."

Johnson alleged that this statute was unconstitutional because a worker's right to an adequate remedy under section 18 of the Kansas Constitution Bill of Rights would be denied if only the Sixth Edition were considered. The Court of Appeals agreed, holding K.S.A. 2015 Supp. 44-510e(a)(2)(B) unconstitutional on its face. *Johnson v. U.S. Food Service*, 56 Kan. App. 2d 232, 257, 427 P.3d 996 (2018), *rev'd* 312 Kan. 597, 478 P.3d 776 (2021). But the Kansas Supreme Court rejected that argument, found the statute ambiguous, and applied the doctrine of constitutional avoidance.

The *Johnson* court observed that the 2013 changes to the Act did not alter the legal requirement that functional impairment must always consider competent medical evidence:

"The 2013 amendments merely reflect an update to the most recent set of guidelines—which serve as a starting point for any medical opinion. K.S.A. 2019 Supp. 44-510e(a)(2)(B) has never dictated that the functional impairment is set by guides. This has not changed. The key fact—percentage of functional impairment—must always be proved by competent medical evidence." 312 Kan. at 603.

We are not dealing with that non-scheduled injury statute here because Weaver's is a scheduled injury controlled by K.S.A. 44-510d(b)(23). Yet the same logic applies. The definition for "functional impairment" in the Act has always required that it be "established by competent medical evidence." See K.S.A. 44-508(u). So for scheduled injuries as well as for non-scheduled injuries, the key fact—the percentage of functional impairment—must always be proved by competent medical evidence.

Similarly, in *Garcia v. Tyson Fresh Meats, Inc.*, 61 Kan. App. 2d 520, 506 P.3d 283 (2022), another panel of this court discussed the purpose of the Act's quid pro quo by which workers forfeit their right to bring a tort case in return for an adequate set of substitute benefits. To achieve that purpose, the impairment rating process must consider all relevant information:

"A process which ensures that all relevant information is represented in the impairment rating equation safeguards the injured worker's right to receive a 'viable and sufficient substitute remedy' for the relinquishment of their ability to pursue a tort-based claim. See *Lemuz v. Fieser*, 261 Kan. 936, 959, 933 P.2d 134 (1997)." *Garcia*, 61 Kan. App. 2d at 530.

Weaver makes a facially valid argument that prohibiting consideration of relevant competent medical evidence about his injury would violate his procedural due process rights. See K.S.A. 44-501b(c) ("The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record."). And under the rule of constitutional avoidance, it is our "duty to construe a statute as constitutionally valid when [we are] faced with more than one

reasonable interpretation." *Hoesli v. Triplett, Inc.*, 303 Kan. 358, 367, 361 P.3d 504 (2015).

In *Garcia*, the Board had adopted an impairment rating for a non-scheduled injury based solely on the Sixth Edition without considering competent medical evidence. A panel from this court remanded the case for reevaluation with the directive that ratings be grounded in a comprehensive assessment of competent medical evidence, with the Sixth Edition as a starting point. 61 Kan. App. 2d at 531-32. The panel ultimately concluded that its analysis may require recalculation of Garcia's impairment rating and, in doing so,

> "the evaluating physicians' starting point for Garcia's rating must be the Sixth Edition. If, in a physicians' expert medical opinion, the Guides provide too narrow a view of Garcia's ability to work and a similarly understated functional impairment, they may (and should) augment their evaluations using those tests, exams, reports, or resources they determine in their professional expertise will yield a more accurate result." 61 Kan. App. 2d at 533.

We recognize that *Johnson* and *Garcia* dealt with non-scheduled injuries, yet we find the broad language and the logic of those cases apply to scheduled injuries as well. We see no good reason one should use competent medical evidence for non-scheduled injuries, but not for scheduled injuries. True, because we are dealing with a scheduled injury, the statutory percentage rating of impairment has primary importance, since the Legislature has translated the percentage into a fixed rate of permanent disability. See *Redd v. Kansas Truck Center*, 291 Kan. 176, 196-97, 239 P.3d 66 (2010) (finding the AMA Guides are a "general instruction manual" for physicians to provide some objectivity for evaluating workers compensation injuries, but the Legislature did not intend them to supplant the Act's use of scheduled benefits).

Still, Wyandotte County does not show us why reliance on the Guides should be conclusive for scheduled injuries but not for non-scheduled injuries. Because both statutes seek to determine the percentage of functional impairment sustained on account of the work-related injury—a determination heavily dependent on medical evidence—competent medical evidence may be considered for both scheduled and non-scheduled injuries.

C. *Competent Medical Evidence*

Our conclusion that "competent medical evidence" may be considered under K.S.A. 44-510d(b)(23) leads us to the parties' first true dispute on appeal: Was Weaver's award based on such evidence? Wyandotte County contends that Dr. Carabetta's testimony, which the Board found to be most credible, was based on a reasonable degree of medical certainty so the Board's finding was necessarily based on competent medical evidence. On the other hand, Weaver argues that Dr. Carabetta's rating was based solely on the Sixth Edition rating of 8% and excluded other competent medical evidence.

The Act mentions yet does not define "competent medical evidence." But several cases have discussed what constitutes such evidence. In *Clayton v. University of Kansas Hosp. Auth.*, 53 Kan. App. 2d 376, 382, 388 P.3d 187 (2017), the parties agreed "the term 'competent medical evidence' in the context of workers compensation would normally mean an opinion asserted by a health care provider that is expressed in terms of 'reasonable degree of medical probability' or similar language." The Kansas Supreme Court has similarly classified competent medical evidence, holding that the opinion of a health care provider stated with a reasonable degree of medical certainty is sufficient competent medical evidence of causation. See *Webber v. Automotive Controls Corp.*, 272 Kan. 700, 704-05, 35 P.3d 788 (2001); see also *Mulder v. Menard, Inc.*, No. AP-00-0458-678, 2021 WL 6275018, at *5 (Kan. Work. Comp. App. Bd. December 29, 2021) (holding "'competent medical evidence' is the opinion of a physician given within a 'reasonable degree of medical probability'"). It is undisputed that Dr. Carabetta's testimony was based on a reasonable degree of medical certainty.

But the amorphous definition above largely relates to the admissibility of expert medical opinions and does not provide much, if any, practical guidance as to what competent medical evidence is. See *Bacon v. Mercy Hosp. of Ft. Scott*, 243 Kan. 303, 307-08, 756 P.2d 416 (1988) (expert medical opinion requires at least professional probability). Opinions, including medical expert opinions, must be based on facts. K.S.A. 2022 Supp. 60-456(b) (sufficient facts and reliable principles or methods). For more practical guidance, we look to *Garcia*, 61

Kan. App. 2d at 531-32, which directed a physician to use the Sixth Edition and, if applicable, to "incorporate[] whatever exams, patient reports, tests, or research that their training and experience directs them to use so they might arrive at a fair and comprehensive result."

We agree with the *Garcia* panel that an examining physician may find that the relevant edition of the Guides alone provides, or fails to provide, a sufficient basis for the physician's assessment:

> "In some circumstances, an examining physician might conclude the Sixth Edition provides a sufficient basis alone to make a medically competent assessment of a worker's impairment rating. By the same token, however, in other circumstances, the Sixth Edition may be insufficient, requiring the examining physician to consider other reliable sources to make a professionally informed rating. And, as with other things in the workers compensation field, medical experts may disagree on the universe of information underpinning 'competent medical evidence' in a particular case." 61 Kan. App. 2d at 532.

See generally *W.A. Krueger Co. v. Industrial Comm'n of Arizona*, 150 Ariz. 66, 67, 722 P.2d 234 (1986) (The Guides are not to be blindly applied regardless of a claimant's actual physical condition. Rather, their purpose is to serve as a *guideline* in rating an impairment and are valid when the stated percentage truly reflects the claimant's loss.); *Gomez v. Industrial Comm'n of Arizona*, 148 Ariz. 565, 570, 716 P.2d 22 (1986) (the Guides alone were sufficient when the physicians agreed they accurately measured the employee's scheduled loss).

The parties disagree as to what Dr. Carabetta's testimony meant, so we set it out at length:

> "[WEAVER'S COUNSEL]: . . . So according to Johnson, you don't give a 4th rating. You start with the 6th and then you come up with what you believe to be the most accurate rating for the individual's impairment that he sustained—or he or she sustained in the work accident. Fair statement?
>
> "[DR. CARABETTA]: Fair statement. And the way I do it is I have to back it up by something.
>
> "[WEAVER'S COUNSEL]: Mm-hmm.
>
> "[DR. CARABETTA]: I can't say, 'Hey, in the Bible somewhere it says,' and then just make up something, because I guess you can piece words together, but it may not be exactly accurate. So I view it as one where if I just think it should be higher, that's not enough for me. I want some proof for myself. So I want to go and look at a past edition or another book that gives additional information, such as the VA puts out, and get some additional information and then apply it.
>
> "[WEAVER'S COUNSEL]: Well, if in this particular case you used the AMA Guides 6th Edition as a standard starting point, but you then take into consideration the more important and decisive competent medical evidence as established in the Johnson

case—and that would include your own expertise, your own training, knowledge, expertise, also considering the thoroughness of your clinical examination, your review of medical records including any diagnostic studies, as well as Mr. Weaver's subjective complaints, as well as reviewing any other manuals, treatise, medical journal articles, or anything else available to you that would be in your toolbox as a practicing physiatrist at the level that you do it—what do you believe would be the appropriate level of permanent impairment that Mr. Weaver sustained as a result of the August 20, 2018, work accident in isolation?

"[Objection from Weaver's counsel]

"[DR. CARABETTA]: Okay. From my clinical perspective, I don't see a significant difference between the 10 percent and the 8 percent. They're actually pretty darn close—you could average them out to 9—and if you told me is 9 more correct, and the answer is they're roughly about the same.

. . . .

"They're pretty similar. I hope you can work that out, but the question I ask myself is is there a major difference between them, and from my perspective, there is not. They're both fairly close. 10 percent is just as accurate as the 8 percent."

While Dr. Carabetta discussed the accuracy of his Fourth Edition rating and the Sixth Edition rating (a discussion we omit above), it is unclear whether he considered anything other than the Guides when making his impairment rating. True, Dr. Carabetta testified that it is his practice, when determining an impairment rating, to look beyond the Guides, to back up the rating with additional information, and to apply that information. But when asked whether he followed that practice when rating Weaver, Dr. Carabetta dodged answering that question. He instead compared the Sixth and Fourth Editions of the Guides, assessed their two ratings as "pretty darn close," and concluded that he did not "see a significant difference between" them.

We cannot find based on this record that Dr. Carabetta started with the Sixth Edition and then considered other competent medical evidence in determining an 8% impairment. Nor can we find that Dr. Carabetta determined that the Sixth Edition alone provided a sufficient basis for his medically competent assessment, so he decided he had no need to consider other reliable sources in making a professionally informed rating. We simply cannot tell from his testimony what he did or did not consider. The Board and the ALJ interpreted Dr. Carabetta's testimony to mean that he did not look beyond the Sixth Edition to consider other competent medical evidence and both relied on Dr. Carabetta's impairment rating based on the Sixth Edition. The Board's award was thus erroneously based on a functional impairment rating that considered solely the Sixth Edition of the Guides.

Accordingly, we remand this case for reevaluation consistent with our holding that to determine a functional impairment rating for scheduled injuries, the fact-finder begin with the Sixth Edition as a starting point and consider competent medical evidence to modify or confirm that rating.

II. DID THE BOARD CORRECTLY FIND K.S.A. 44-501(e) INAPPLICABLE WHEN CALCULATING WEAVER'S AWARD?

On cross-appeal, Wyandotte County argues that the Board violated K.S.A. 44-501(e) by failing to reduce Weaver's award by the dollar amount of Weaver's conclusively established preexisting impairment. It argues that Weaver had prior work injuries to the right upper extremity which were settled for a total of 30% permanent partial impairment, so Weaver should not receive any permanent partial impairment benefits for his current work injury to that same extremity. Weaver counters that the statute requires reduction of benefits only for preexisting injuries to the exact same body part, not for all body parts in the same general region, thus no reduction of benefits is warranted.

Although we are remanding this case based on the first issue, we address this second issue because it is likely to arise on remand. This issue presents an issue of statutory interpretation, so our review is de novo. *Johnson*, 312 Kan. at 600.

It is undisputed that Weaver had these prior work injuries and impairments:

Injury date	Injured body part	Impairment rating
March 2009	Right middle finger	10% impairment
May 2011	Right wrist below first and second fingers	12% impairment
March 2016	Right elbow	10% impairment
May 2016	First and second fingers of right hand	10% impairment

Weaver's current injury in August 2018 was to both sides of Weaver's right hand below his pinky and ring fingers, and to his right wrist and thumb.

The pertinent statute reads:

"(e) An award of compensation for permanent partial impairment, work disability, or permanent total disability shall be reduced by the amount of functional impairment determined to be preexisting. . . .

"(1) Where workers compensation benefits have previously been awarded through settlement or judicial or administrative determination in Kansas, the percentage basis of the prior settlement or award shall conclusively establish the amount of functional impairment determined to be preexisting." K.S.A. 44-501(e).

Both the ALJ and the Board found this statute inapplicable because no physician found any of Weaver's current functional impairment to be preexisting. The ALJ stated that the

"respective impairment ratings did not include any preexisting impairments to [Weaver's] right upper extremity, but rather were reflective of only the permanent partial impairment [Weaver] sustained as a result of the August 20, 2018, work injury alone. Given that none of the expert physicians have included preexisting impairment in their ratings, it cannot be said that any of the current functional impairment can be deemed to be preexisting, as is required under K.S.A. 44-501(e)(2)(A) for Respondent to obtain a credit."

Similarly, the Board held that each physician's impairment rating was "over and above" Weaver's prior impairments:

"Under K.S.A. 44-501(e), an award of compensation shall be reduced by the amount of functional impairment determined to be preexisting. Under K.S.A. 44-501(e)(2)(A), in order to apply the credit for preexisting impairment, the Board must consider the percentage of functional impairment determined to be preexisting. Each physician testified their assessment of impairment was over and above Claimant's prior impairments. As such, no amount of the impairment awarded by the ALJ was preexisting.

"Respondent is not entitled to a credit for preexisting impairment."

Dr. Carabetta determined that Weaver had a 30% combined overall impairment of his right upper extremity before the August 2018 work related injury using Weaver's prior settlements and the Guides as a basis. Because Weaver had previously been awarded workers compensation benefits through settlement in Kansas, the

percentage basis of his prior settlements "conclusively establish[es] the amount of functional impairment determined to be preexisting." K.S.A. 44-501(e)(1). The parties do not dispute that 30% reflects the correct amount of Weaver's prior combined impairment of his right upper extremity before his current work injury.

But Dr. Carabetta testified that Weaver's 8% impairment rating resulted from a new functional impairment due to his August 2018 work accident. In other words, Weaver's 8% impairment was over and above any impairments he had sustained in the past. Dr. Carabetta testified that he took great care not to include impairment ratings that would be associated with Weaver's prior injuries. His rating of 8% permanent impairment was for Weaver's new and distinct injury and impairment from the August 2018 accident, not from any preexisting impairment. The other physicians similarly stated their impairment ratings as in addition to those Weaver had previously sustained.

Both parties agree that K.S.A. 44-501(e) requires a reduction of benefits, when applicable, but they disagree as to what part of the body must be previously impaired. Wyandotte County argues that because Dr. Carabetta found that Weaver had a 30% combined overall impairment of his right upper extremity before the August 2018 work related injury, Weaver's 8% award for impairment to his right upper extremity should be reduced by 30%, as the plain language of the statute requires. To the contrary, Weaver argues that K.S.A. 44-501(e) requires a reduction only for the preexisting functional impairment caused by a prior injury of the exact same body part; and because the physicians agreed that their impairment ratings were above and beyond any preexisting impairment, no reduction should be made.

A. *Weaver's interpretation is too narrow.*

As discussed above, our goal is to determine the legislative intent of the statute. To do so through the statutory language enacted, we give common words their ordinary meanings. *Montgomery*, 311 Kan. at 654. Again, we determine legislative intent by looking at the statutory language enacted, including the definitions provided within the Act. See *Bruce*, 316 Kan. at 224. So we return to the definition of "functional impairment":

"the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American medical association guides to the evaluation of impairment, if the impairment is contained therein." K.S.A. 44-508(u).

A functional impairment thus consists of "the loss of a portion of the total physiological capabilities of the human body." The statute does not define functional impairment as the loss of a portion of the human body but speaks more generally to some loss of the body's "total physiological capabilities." This language recognizes that an injury to one part of the body may functionally impair a different part of the body. Similarly, it permits the conclusion that successive injuries to the same body part may cause different impairments of that same body part.

Weaver's interpretation, which would limit a preexisting impairment to one based on an injury to the same exact body part, is too narrow. This is because an injury to one's right hand and a later injury to one's right finger may cause separate or overlapping functional impairments, despite the separate anatomical situs of the injuries. Yet Weaver would have us find that an injury to one part of the body can never share a functional impairment with a different part of the body, injured separately. Without any medical support for that general proposition, we decline to adopt it.

Workers compensation benefit determinations in Kansas are based on the location of the impairment manifestation, not on the situs of the injury. "It is the situs of the resulting disability, not the situs of the trauma, which determines the workers' compensation benefits available in this state." *Fogle v. Sedgwick County*, 235 Kan. 386, 386, 680 P.2d 287 (1984). Thus, even though Fogle had injured a nerve root in his back, he sustained no back disability; instead, the disability manifested itself in his arm, warranting compensation under K.S.A. 44-510d for a scheduled disability. That same principle controlled in *Bryant v. Excel Corp.*, 239 Kan. 688, 692, 722 P.2d 579 (1986). There, an injury to a nerve in the arm manifested itself by disability in both the arm and shoulder, so Bryant was entitled to recover for an unscheduled injury under K.S.A. 44-510e. See also *Scheuerman v. Learjet, Inc.*, No. 109,400, 2014 WL 1795999, at *4 (Kan. App. 2014) (unpublished

opinion) (affirming award of whole-body injury for neck pain caused by a shoulder injury and not a distinct injury to the neck). Although these cases examined predecessor statutes, they illustrate the practical problems with Weaver's definition that limits preexisting impairment to impairment from two successive workplace injuries to the exact same body part.

B. *Wyandotte County's interpretation is too broad.*

But neither do we adopt Wyandotte County's interpretation, as it would lead to unreasonable results. "Generally, courts should construe statutes to avoid unreasonable results and should presume that the legislature does not intend to enact useless or meaningless legislation." *Milano's, Inc. v. Kansas Dept. of Labor*, 296 Kan. 497, 501, 293 P.3d 707 (2013); see *State v. Eckert*, 317 Kan. 21, 31, 522 P.3d 796 (2023) ("A court 'must construe a statute to avoid unreasonable or absurd results.' [Citation omitted.]").

Under Wyandotte County's proposed reading, Weaver's prior elbow injury would reduce his current injury to his wrist, ring and pinky fingers, and thumb because all "right upper extremity" awards are per se preexisting impairments to any current injury to that same general area. That overly broad reading would require a reduction of benefits for a new impairment even though it is unrelated to a preexisting impairment, just because the impairments are in the same bodily extremity.

Although that interpretation may uphold any intent of the legislation to prevent claimants from double recovery for an injury, it would bar claimants from receiving benefits for unrelated injuries that happen in the same region of the body. And barring a worker from receiving an award for a new and distinct work-related impairment smacks of unfairness, seems to violate the legislative intent to permit recovery for injury from workplace accidents, and may violate the worker's due process rights. See *Pardo v. United Parcel Service*, 56 Kan. App. 2d 1, 20, 422 P.3d 1185 (2018) (finding K.S.A. 44-510d[b][23] unconstitutional as applied when Pardo's award was zero for a second rotator cuff injury because he got "*nothing* in exchange for the removal of his right under § 18 to seek a common-law award from his employer, which flies directly in the face of the quid pro quo foundation that makes the Act constitutional").

K.S.A. 44-510d(b)(23) states that "[l]oss of or loss of use of a scheduled member shall be based upon permanent impairment of function to the scheduled member." The Legislature could have chosen to reduce the permanent partial impairment award for scheduled injuries by the amount of preexisting impairment to the same scheduled member, or to the exact same body part, or to the same bodily extremity, or to the same region of the same extremity, or otherwise, yet it did not do so. Instead, it merely said that such an award "shall be reduced by the amount of functional impairment determined to be preexisting." K.S.A. 44-501(e). In the absence of any specific anatomical limitations in this statute, we decline to write any in. *Montgomery,* 311 Kan. at 654-55 (court should avoid reading something into the statute that is not readily found in its words). We find it reasonable that the Legislature intended the use of medical expertise to address the nuances involved in determining impairments of the human anatomy.

C. *Preexisting functional impairment is a medical determination.*

The determination whether a claimant's functional impairment, or any part of it, is preexisting, is a medical determination. As Dr. Carabetta explained, a person's previous injury to the same body part may or may not cause a preexisting impairment:

"Because you can break your wrist and be compensated for it, but you could break the wrist again and suffer more deformity such that it doesn't move the same way and we can say you had a wrist fracture before we compensated you, but it's actually further damaged.

. . . .

"But if they have an injury to the same hand but different parts of the hand, as we have in the case of Mr. Weaver, each one has to be dealt with individually. But if the same exact area has been traumatized and there is no difference in its mobility, its strength, et cetera, then that one is a wash. That one doesn't count. So I medically have to look at it specifically in isolation."

The determination that a claimant has a preexisting impairment cannot simply be made by finding that a claimant's prior awards all establish preexisting functional impairment, regardless of the situs of the impairment resulting from the current injury. It is merely the *amount* of functional impairment that is conclusively established by prior awards, once the medical expert determines that the impairment caused by the current injury existed before the

current injury occurred so it is, in fact, preexisting. The employer thus no longer bears the burden to establish the amount of preexisting impairment to be deducted. Compare K.S.A. 44-501(e)(1) (When workers compensation benefits have previously been awarded "the percentage basis of the prior settlement or award shall conclusively establish the amount of functional impairment determined to be preexisting.") with *Ward v. Allen County Hospital*, 50 Kan. App. 2d 280, 324 P.3d 1122 (2014) (finding that under K.S.A. 44-510e[a], once it is established that workers compensation claimant's current injury is an aggravation of the preexisting injury, employer has the burden of proving the amount of preexisting impairment to be deducted, and this determination must be based upon the AMA Guides). Because Dr. Carabetta determined that no functional impairment from Weaver's August 2018 injury was preexisting, the amount of Weaver's prior awards is immaterial.

D. *Relevant Caselaw*

The Board has dealt with this issue before and has seemingly based its determination of preexisting impairments on the location of the impairment's manifestation, not on the situs of the injury. In *Jackson v. Amsted Rail Co.*, No. 1,058,952, 2013 WL 5521839, at *6-7 (Kan. Work. Comp. App. Bd. September 12, 2013), the Board applied K.S.A. 44-501(e) to reduce the claimant's second injury award by the present value of the first injury's impairment. Jackson had injured his right shoulder twice during his course of employment. In 2003, he was awarded permanent partial disability benefits based on an 18% impairment to the shoulder. He then reinjured that same shoulder in 2011. Both injuries were labral tears of the right shoulder, although the second also tore his rotator cuff. The Board upheld an award of permanent partial disability benefits based on a 20% functional impairment to his right upper extremity at the level of the shoulder, then reduced it at the current dollar value of his preexisting 18% impairment rating. This case illustrates proper application of K.S.A. 44-501(e)—reducing benefits when preexisting impairments are shown. Still, Wyandotte County fails to show that Weaver's impairments caused by his current injury existed before his current injury.

In *Keenan v. State*, No. AP-00-0462-203, 2022 WL 1057711, at *6 (Kan. Work. Comp. App. Bd. March 22, 2022), the Board found a 23% impairment to the body as a whole for a 2019 accident for various injuries (not including carpal tunnel injury) to the claimant's upper right extremity. Keenan had received a prior workers compensation award for bilateral carpal tunnel injuries. Yet the Board made no reduction under K.S.A. 44-501(e) for preexisting impairments, reasoning:

> "Claimant's award of compensation in her first claim was limited to bilateral carpal tunnel injuries. The new claim is for new and distinct body parts for which compensation has not been awarded. Therefore, there is no 'functional impairment determined to be preexisting' as contemplated by the credit contained under K.S.A. 44-501(e) for the newly injured body parts and the credit does not apply." 2022 WL 1057711, at *6.

This case cuts against Wyandotte County's assertion that all prior awards for right upper extremity impairment are per se preexisting impairments under K.S.A. 44-501(e) to a later impairment of the right upper extremity.

Weaver's case is more like *Keenan* than *Jackson*. Weaver's prior injuries were to his right middle finger, right wrist below the first and second fingers, right elbow, and right first and second fingers. Weaver's current injury was to his right hand and wrist below his ring and pinky fingers, his right thumb, and his wrist below his thumb. No physician testified that these injuries caused any overlapping impairment, or that Weaver's right hand and wrist below his ring and pinky fingers, his right thumb, or his wrist below his thumb were previously impaired. The record lacks any evidence that Weaver's prior impairments had any relation to the impairments caused by his current accident. Thus, Wyandotte County has not shown that any impairments from Weaver's August 2018 injury were preexisting as that term is used in K.S.A. 44-501(e).

Wyandotte County relies on two other cases to argue the Board erred by not reducing Weaver's benefits under K.S.A. 44-501(e): *Payne v. Boeing Co.*, 39 Kan. App. 2d 353, 180 P.3d 590 (2008), *abrogated by Ballard v. Dondlinger & Sons Const. Co.*, 51 Kan. App. 2d 855, 355 P.3d 707 (2015), and *Ward v. Allen County Hospital*, 50 Kan. App. 2d 280, 324 P.3d 1122 (2014). Both cases applied K.S.A. 44-501(e) to reduce the claimant's

award by their preexisting impairment. But in those cases, as in *Jackson* and *Willoughby*, the preexisting and later injuries were to the same body part, see *Ward*, 50 Kan. App. 2d at 282 (injuries to the same vertebra); *Payne*, 39 Kan. App. 2d at 355-56 (injuries to lower back), and no one contended that the impairments were unrelated or different. Not so here. No reduction under K.S.A. 44-501(e) in Weaver's award is supported by the evidence.

We find it unnecessary to adopt either party's desired wording. We find no reversible error in the Board's analysis. The Board considered K.S.A. 44-501(e) and made a reasoned decision that no reduction under the statute could be made because it had no evidence of preexisting impairment. The physicians agreed that Weaver's current impairment was different from the impairments for which he had previously been compensated. The record includes no medical testimony to the contrary. Cf. *Hanson v. Logan U.S.D. 326*, 28 Kan. App. 2d 92, 96, 11 P.3d 1184 (2000) (applying previous "aggravation" statute, finding that because the record lacked any evidence of the amount of preexisting disability or impairment, the Board had no choice but to deduct zero from the total).

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

No. 124,725

STATE OF KANSAS, *Appellee*, v. BRIAN MICHAEL WATERMAN, *Appellant*.

SYLLABUS BY THE COURT

1. CONSTITUTIONAL LAW—*Sixth Amendment Right to Counsel*. It is the task of the district court to ensure that a defendant's right to counsel under the Sixth Amendment to the United States Constitution is honored. In order to fulfill this duty, when the district court becomes aware of a possible conflict of interest between an attorney and a defendant charged with a felony, the court has a duty to inquire further. If an appropriate inquiry is made, the district court's decision is reviewed under an abuse of discretion standard. But a district court abuses its discretion when it makes no inquiry into the nature of the conflict.

2. CRIMINAL LAW—*Denial of Assistance of Counsel—Presumed Prejudice.* When a defendant is denied the assistance of counsel at a critical stage of the criminal proceedings, prejudice to the defendant is presumed.

3. SAME—*Sixth Amendment Right to Counsel—Uncounseled Misdemeanor Conviction Not Used for Sentence Enhancement*. The Kansas Supreme Court has held that an uncounseled misdemeanor conviction obtained in violation of the defendant's Sixth Amendment right to counsel may not be collaterally used for sentence enhancement in a subsequent criminal proceeding.

4. TRIAL—*Right to Conflict-Free Counsel—Timely Pro Se Motion for New Trial—Under Facts of This Case Remanded to District Court to Hold New Hearing.* Under the facts of this case, when a defendant convicted of a felony at trial files a timely pro se motion for new trial alleging ineffective assistance of trial counsel and the district court fails to appoint conflict-free counsel to assist the defendant in arguing the motion, we must remand for the district court to hold a new hearing with conflict-free counsel appointed to argue the motion. If on remand the district court denies the motion, finding no ineffective assistance of counsel, a new trial is unnecessary. But if the district court grants the motion, finding ineffective assistance of counsel, a new trial must be held and trial counsel appointed.

Appeal from Cherokee District Court; ROBERT J. FLEMING, judge. Oral argument held September 19, 2023. Opinion filed November 22, 2023. Affirmed in part, reversed in part, sentence vacated, and case remanded with directions.

Ethan Zipf-Sigler, of Zipf-Sigler Law Office, LLC, of Shawnee, for appellant, and *Brian Michael Waterman*, appellant pro se.

Natalie Chalmers, assistant solicitor general, and *Kris W. Kobach*, attorney general, for appellee.

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

MALONE, J.: A jury convicted Brian Michael Waterman of attempted first-degree murder, aggravated kidnapping, and aggravated burglary after he stormed into the home of Bob Hopkins and repeatedly stabbed him. Waterman and his appointed appellate attorney have both filed briefs, alleging many errors at trial and during his sentencing. They challenge his convictions and the sentence he received, arguing:

(1) the State presented insufficient evidence to support his aggravated kidnapping conviction;
(2) the district court erred by excluding witnesses he intended to call in his defense;
(3) the district court violated his right to confrontation by permitting the State to use the preliminary hearing testimony of his victim, who died before the trial;
(4) the district court erred by refusing to give an instruction on criminal restraint as a lesser included offense of aggravated kidnapping;
(5) the district court erred in denying his motion to dismiss based on the State's access to confidential attorney-client communications;
(6) the district court abused its discretion in denying his motion to appoint substitute counsel;
(7) cumulative error deprived him of his right to a fair trial;
(8) he received an illegal sentence because the district court miscalculated his criminal history score;
(9) the district court abused its discretion by failing to ask about potential biases held by jurors;
(10) his right to due process was violated because the State introduced perjured testimony; and
(11) the district court erred by denying his posttrial motion for mistrial alleging ineffective assistance of counsel.

We have reviewed the record on appeal consisting of 40 volumes and over 2,700 pages of documents, transcripts, and exhibits. The parties agree that Waterman received an illegal sentence due to the improper use of an uncounseled misdemeanor in calculating his criminal history score. As for the claims affecting Waterman's convictions, we find only one reversible error: Waterman was denied the appointment of conflict-free counsel to argue his motion for new trial alleging ineffective assistance of counsel. As a result, we remand the case for the district court to appoint new counsel to represent Waterman on the posttrial motion and for further proceedings consistent with this opinion.

FACTUAL AND PROCEDURAL BACKGROUND

A near fatal stabbing

In the early evening hours of May 8, 2016, Bob was at home, sitting in his recliner and enjoying a drink, when a man appeared at his door. Bob's door was always open, weather permitting, and he asked the man, "[C]an I help you?" The man, whom Bob did not know but recognized as a relative of one of his neighbors, responded, "I'm here to kill you." The intruder would later be identified as Waterman. Bob told Waterman to leave, but he did not; instead, Waterman stepped in the room, locked the door behind him, and stabbed Bob in the chest, sides, and back with a pocketknife. After stabbing Bob 17 times, Waterman began pouring bleach over his head and spraying him with bug spray.

Not long after the attack began, Bob's son, Dwayne Hopkins, came home and went to check on his father. He was surprised to find that the door to Bob's place was not only closed but locked. He called out to his father, who responded in a weak and tired voice, "[J]ust a moment." Once the door opened, Dwayne walked in the one-room residence and saw Bob propped up in his bed. The door then shut behind him and he turned around to see Waterman. Dwayne asked him, "[W]hat are you doing?" and Waterman replied, "I'm here to watch him bleed out." Confused, Dwayne turned back to look at his father and noticed that Bob was covered in blood. He then realized that Waterman, whose hand was in his pocket, was probably holding a weapon. Dwayne knew he needed to escape and call an ambulance as quickly as possible, so he fled

past Waterman and was able to tell his neighbor to call an ambulance. By the time he looked back, he saw Waterman leaving his father's residence, heading toward the train tracks.

Several paramedics and police officers soon arrived on the scene. They immediately noted the strong smell of bleach and the blood splattered all over Bob's room. Despite his injuries, Bob remained awake and coherent. He told the officers that he did not know the name of the man who had stabbed him but knew what he looked like. When the officers asked about the man's motive, Bob told them the attacker had accused him of "messing around with his daughter." Dwayne also provided a description of Waterman—he noted that he thought his name was either Brian or Ryan and that he was related to a woman named Judy Bossolono. Bossolono would later confirm Waterman's identity, telling police that Waterman had told her that he would attack Bob and that he was likely going to flee to Oklahoma.

Once the paramedics got Bob bandaged, they took him to the hospital where the trauma surgeon treated his wounds, several of which were potentially fatal, including two punctures of his heart and one to his lung. At some point while Bob was in the emergency room, he suffered a cardiopulmonary arrest and lost all vital signs. Luckily, the doctors stabilized him, and Bob survived the ordeal.

After Waterman fled Bob's home, he managed to get a ride from a nearby stranger who drove him to the house of a friend. But upon finding out that Waterman may have been involved in the attack on Bob, the friend kicked Waterman out and alerted police. At that point, Waterman fled to Oklahoma, where he was soon apprehended by local law enforcement and returned to Kansas.

Pretrial proceedings in district court

The State initially charged Waterman with one count of attempted first-degree murder, one count of aggravated kidnapping, one count of aggravated battery, and one count of aggravated burglary. At the preliminary hearing, held on February 24, 2017, the State called both Bob and Dwayne to testify. Waterman's counsel cross-examined both men, but the district court restricted questioning about whether Bob was suffering from dementia. That

said, Waterman's counsel still elicited testimony that Bob was having trouble remembering things following the attack and did not recall the details of the night. After hearing the evidence, the district court bound Waterman over for trial.

Over the following years, Waterman proceeded to have conflicts with each of the many attorneys appointed to represent him and repeatedly requested continuances of his trial date. Waterman's first appointed attorney, Candace Brewster Gayoso, withdrew before the preliminary hearing. Steven Stockard represented Waterman at his preliminary hearing and also filed a notice of defense of lack of mental state on Waterman's behalf. Stockard then withdrew in February 2018, after requesting two continuances of the trial. Robert Myers was appointed after Stockard withdrew; he requested another continuance of the trial and withdrew a month after he was appointed. The court then appointed Forrest Lowry to represent Waterman, but Waterman promptly requested his removal, and the court appointed Sara Beezley. When Beezley began her representation, she realized that Lowry had turned Waterman's casefile into the State upon his withdrawal, and she was informed that the county attorney intended "to go through the box." Beezley promptly moved to dismiss on Waterman's behalf, alleging confidential attorney-client communications and trial strategy related materials were contained within his file. After the file was returned, Waterman would claim that certain materials were missing.

At the hearing on the motion to dismiss, Waterman expressed concerns that he was being deprived of a fair trial because the State had examined confidential communications that he had with his attorneys about his intended defense. He also broadly alleged that the State and his prior attorneys were all conspiring against him. The State countered that it had not reviewed any confidential materials and merely went through the box to ensure that Beezley received the entire discovery in the case. A legal assistant from the county attorney's office testified that she initially thought Waterman's casefile was just discovery materials, but soon noticed that it also contained attorney-client communications. She asserted that she placed all such communications facedown and did not review them, nor did anyone else in the county attorney's office.

After hearing the evidence, the district court denied Waterman's motion to dismiss, explaining that while the State could have handled the matter more carefully, there was no evidence that it had actually reviewed Waterman's confidential communications or that he would suffer any prejudice from the State's actions. Waterman also moved to disqualify the lead prosecutor on the same grounds, which the district court denied. Once the motions were denied, Beezley withdrew as Waterman's counsel. The district court then appointed Frederick Smith to represent Waterman, but he withdrew after representing Waterman at one hearing. The district court then appointed James Campbell, who would be the final attorney assigned to Waterman's case.

A few months into Campbell's representation, Waterman asserted his desire to proceed pro se, but he soon changed his mind while trying to argue several motions at a pretrial hearing. The district court then reinstated Campbell. But as Campbell resumed his representation, Waterman began to accuse him of providing ineffective assistance of counsel and working on behalf of the State. At that point, Campbell requested to withdraw, but Waterman clarified that he was not asking to resume representing himself or for Campbell to withdraw. The district court ordered Campbell to continue his representation, and Campbell requested the court order a competency evaluation, which the court granted. The district court later found Waterman competent to stand trial.

Waterman later filed motions requesting substitute counsel. Campbell also filed a motion requesting the district court to grant his withdrawal. At a hearing on the motions, Campbell stated that Waterman did not believe he was working in his best interests and that there had been a breakdown in communications between Waterman and Campbell. The district court noted that Campbell had a sterling reputation as a criminal defense attorney and explained that Waterman had been provided several attorneys and expressed doubts about finding another attorney to represent him. In response to the district court's hesitation to appoint a new attorney, Waterman claimed that he was suing Campbell in federal court, although the record is unclear whether any action had been filed. The district court took the matter under advisement and contacted Board of Indigents' Defense Services (BIDS) about the possibility

of finding another attorney. The district court later denied the motions, explaining that the mere fact that Waterman refused to get along with Campbell—or any of his prior attorneys—was not a sufficient reason to grant the motion.

Trial and sentencing

Finally, on November 16, 2021, the trial began on charges of attempted first-degree murder, aggravated kidnapping, and aggravated burglary. Unfortunately, after surviving Waterman's attack, Bob had died before the case proceeded to trial. Accordingly, the State sought to use his testimony from the preliminary hearing. The district court permitted the use of Bob's prior testimony over Waterman's objection that its use would violate his rights under the Confrontation Clause because he had not been given a full opportunity to cross-examine Bob during the preliminary hearing.

Along with presenting Bob's preliminary hearing testimony and Dwayne's testimony, the State called over a dozen other witnesses and introduced over 40 exhibits at trial. One witness, Rick Mayberry, recalled seeing Waterman on the afternoon of the attack and being concerned with his behavior. Mayberry testified that Waterman told him that he was going to "take care of some things" and then flee the state. Waterman also borrowed Mayberry's phone to text Waterman's ex-wife, T.B., about his plans. In the message, Waterman told T.B. that he would be "taking care" of the man who had touched their daughter. T.B. testified and explained that two years before the attack, Waterman and T.B.'s daughter, A.W., had confided that A.W. thought she had been touched by an old man—she did not reveal the man's name, although Waterman came to believe the man was Bob. T.B. also testified that Waterman had sent her letters from jail before the trial in which he described feeling justified in his actions because of what the man had done to their daughter. The State also called Dr. David Baker, a trauma surgeon who had treated Bob for his knife wounds. Dr. Baker described the severity of the wounds and the fact that some wounds were potentially fatal.

Waterman testified in his defense. Waterman admitted stabbing Bob but testified that he had not wanted to kill him. Water-

man asserted that he was driven to a rage when Bob not only admitted to touching his daughter but then told him that she had "liked it." On the second day of trial, Waterman's counsel proposed that he planned to call a psychologist, Dr. Mitchell Flesher, to testify about Waterman's various mental health issues and how they influenced his behavior on the night of the attack. The State objected and argued that any evidence about Waterman's mental health conditions was irrelevant and inadmissible because Dr. Flesher had concluded that none of Waterman's conditions were debilitating enough to negate his criminal intent. The district court agreed with the State and excluded Dr. Flesher's testimony. Waterman also sought to call his daughter, A.W., and another woman to testify that Bob had sexually abused them. The district court excluded the testimony on the grounds that it was irrelevant to the issues at trial and would not constitute a defense to the charges.

The district court instructed the jury on the charges including the lesser offenses of attempted second-degree murder and attempted voluntary manslaughter. The district court denied Waterman's request for an instruction on criminal restraint as a lesser offense of aggravated kidnapping. After considering the evidence and the closing arguments, the jury found Waterman guilty as charged on all counts.

Following the trial, Waterman filed a pro se "Motion for Mistrial for Ineffective Assistance of Counsel." In his motion, Waterman argued that a mistrial was required for his attorney's deficient performance. He argued that Campbell should have presented more evidence on the varying sizes of the knife wounds (which he alleged suggested that Dwayne had stabbed Bob after he did) and that Campbell did not sufficiently impeach the credibility of Bob and Dwayne's testimony. Campbell also moved for a new trial on Waterman's behalf based on violation of court orders relating to the treatment of Waterman during the trial and for improper contact between the jurors and law enforcement. Waterman later filed a formal ethical complaint against Campbell with the Disciplinary Administrator's office and named him as a party in a federal lawsuit, causing Campbell to again move to withdraw from the case due to a conflict.

At a hearing on the posttrial motions, the district court first addressed Campbell's motion to withdraw. Campbell told the

court that because of the complaint Waterman filed against him, "I believe that I am ethically required to request the Court permission to withdraw as representation for Mr. Waterman." The district court responded by asking Campbell whether he could "set that aside and argue this motion for a new trial." Campbell replied, "I dispute the allegations that he filed in his motion for ineffective assistance. I dispute what he alleged in the disciplinary complaint. I'm going to continue to zealously advocate for my client so long as I am his attorney in the case." After some additional discussion, the district court denied Campbell's motion to withdraw.

Next, the district court addressed Waterman's pro se motion for a mistrial. Without asking Campbell whether he could argue the motion on Waterman's behalf, the district court simply asked Waterman if he was ready to proceed with his motion. Waterman argued his motion and explained his dissatisfaction with Campbell due to his failure to impeach Bob and Dwayne and his belief that Campbell provided poor representation in retaliation against him. He focused his argument on Campbell's failure to highlight the different sizes of the knife wounds Bob suffered. The State responded that it believed Campbell had provided effective representation and refuted Waterman's claim that evidence about the size of the knife wounds would have exonerated him.

In making its ruling, the district court noted that although Waterman had framed parts of his argument as an ineffective assistance of counsel claim under K.S.A. 60-1507, he was arguing for a mistrial. The district court disagreed with Waterman's contention that Campbell was ineffective, explaining: "I can tell you I thought Mr. Campbell did a very effective job of cross-examining Dwayne Hopkins." Ultimately, the district court concluded: "So I'm going to deny your motion. I think you were provided with very effective assistance of counsel. Unfortunately for you, you had bad facts."

The district court next addressed Campbell's motion for new trial. Campbell argued many points covered in the written motion and introduced exhibits without objection from the State to support one of the issues. After hearing the State's response, the district court denied the motion for new trial.

At the sentencing hearing on January 4, 2022, the parties disagreed on Waterman's criminal history score due to the aggregation of several prior misdemeanors—the State asserted it was C and Waterman contended it should be F. The district court sided with the State and determined Waterman's criminal history score was C. The district court sentenced Waterman to 285 months' imprisonment for attempted first-degree murder, 155 months' imprisonment for aggravated kidnapping, 32 months' imprisonment for aggravated burglary, and it ran the attempted murder and aggravated kidnapping sentences consecutive for a controlling sentence of 440 months' imprisonment. Waterman timely appealed the district court's judgment.

DID THE STATE PRESENT SUFFICIENT EVIDENCE TO SUPPORT WATERMAN'S AGGRAVATED KIDNAPPING CONVICTION?

Waterman asserts that the State presented insufficient evidence to support his aggravated kidnapping conviction because—under *State v. Buggs*, 219 Kan. 203, 547 P.2d 720 (1976)—the State failed to show that any confinement of his victim occurred separate and distinct from the actions that supported his attempted first-degree murder conviction. The State responds that Waterman's argument is misplaced because the Kansas Supreme Court has held that *Buggs* does not apply to the subsection of the aggravated kidnapping statute under which Waterman was charged. See *State v. Burden*, 275 Kan. 934, 69 P.3d 1120 (2003). After briefing, the State filed a Supreme Court Rule 6.09 (2023 Kan. S. Ct. R. at 40) letter of additional authority asserting that the holding in *Burden* was reaffirmed in *State v. Butler*, 317 Kan. 605, 533 P.3d 1022 (2023).

When presented with a challenge to the sufficiency of evidence to support a conviction, this court must decide whether—when reviewing the evidence in the light most favorable to the State—it is convinced that a rational fact-finder could have found the defendant guilty beyond a reasonable doubt. In making this inquiry, an appellate court will not reweigh evidence, resolve evidentiary conflicts, or reassess witness credibility. *State v. Aguirre*, 313 Kan. 189, 209, 485 P.3d 576 (2021).

The State alleged that Waterman committed aggravated kidnapping by confining his victim "by force, threat, or deception and with the intent to hold said person to inflict bodily injury or to terrorize the victim" and that bodily harm was inflicted upon the person who was kidnapped. The language in the charging document mirrors that found in K.S.A. 2022 Supp. 21-5408(a)(3), along with the element of the infliction of bodily harm found in K.S.A. 2022 Supp. 21-5408(b). Waterman focuses his argument on the "confinement" element of the offense. He asserts that because any confinement of Bob was incidental to his commission of attempted first-degree murder "the evidence at trial did not support a separate conviction for aggravated kidnapping."

To support his sufficiency argument, Waterman cites *Buggs*, 219 Kan. at 214-17, which restricted the meaning of the term confinement in the context of the crime of kidnapping when the alleged confinement was committed in facilitation of another crime. The *Buggs* court held that a confinement must "not be slight, inconsequential and merely incidental to" or "of the kind inherent in the nature of the other crime." 219 Kan. at 216. Rather, the confinement "[m]ust have some significance independent of the other crime in that it makes the other crime substantially easier [to commit] or substantially lessens the risk of detection." 219 Kan. at 216. But the Kansas Supreme Court later clarified that the *Buggs* test only applied to those cases where the State alleged that the victim was confined with the intent to facilitate the commission of another crime—this subsection is found in K.S.A. 2022 Supp. 21-5408(a)(2). *Burden*, 275 Kan. 934, Syl. ¶ 3. And as the State points out, the *Burden* court's holding recently has been upheld by the Kansas Supreme Court in *Butler*, 317 Kan. 605.

Because Waterman was charged under section (a)(3) of the kidnapping statute, and not under section (a)(2), the *Buggs* test has no application, and we need only proceed under the typical sufficiency-of-the-evidence standard to determine whether the evidence the State presented at trial could support Waterman's aggravated kidnapping conviction. To prove Waterman guilty of aggravated kidnapping beyond a reasonable doubt, the State had to prove that he confined Bob with the intent "to inflict bodily injury or to terrorize the victim or another," plus the added element that

Waterman inflicted bodily harm on Bob. See K.S.A. 2022 Supp. 21-5408(a)(3) and (b).

Viewed in the light most favorable to the State, there was sufficient evidence to show that Waterman confined Bob with the intent to inflict bodily injury on him. Bob's testimony established that Waterman came into his house, locked the door, and told him that he was there to kill him before he proceeded to continually stab him. Bob's son, Dwayne, confirmed that the door to Bob's residence was shut and locked when he went to check on his father, which was abnormal because Bob usually left his door open until he went to bed. Dwayne described knocking on the door and calling out to his father until the door then opened. Before Dwayne even noticed his father's stab wounds, Waterman told him, "'I'm here to watch him bleed out.'" For his part, Waterman did not directly testify about whether he had closed and locked the door when he entered Bob's residence—he did state that Dwayne simply walked in, not that he opened the door for him. In any event, this court cannot reweigh the evidence presented to the jurors, who were entitled to credit or discredit Bob and Dwayne's testimony that Waterman locked the door. See *State v. Kettler*, 299 Kan. 448, 471, 325 P.3d 1075 (2014). Thus, the State presented sufficient evidence that Waterman confined Bob before stabbing him and dumping bleach on him. We conclude that a rational factfinder could have found beyond a reasonable doubt that Waterman was guilty of aggravated kidnapping.

DID THE DISTRICT COURT ERR BY EXCLUDING CERTAIN WITNESSES?

Waterman argues the district court erred by excluding testimony from (1) a treating psychologist about his mental conditions and (2) two witnesses who alleged that Bob had committed acts of sexual abuse against them. He asserts that by excluding these crucial witnesses the district court violated his right to present his chosen defense. The State counters that the district court properly excluded the evidence Waterman sought to admit, and, even if the testimony were relevant, any error was harmless.

While criminal defendants have a right to present relevant evidence to support their theory of defense under both the federal

and Kansas Constitutions, that right is subject to reasonable restrictions. *State v. Frantz*, 316 Kan. 708, 720-21, 521 P.3d 1113 (2022) (quoting *United States v. Scheffer*, 523 U.S. 303, 308, 118 S. Ct. 1261, 140 L. Ed. 2d 413 [1998] ["(S)tate and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials."]). Rules of procedure and evidence are designed to assure both fairness and reliability in the ascertainment of guilt and innocence, and therefore must be abided. *Frantz*, 316 Kan. at 721. Thus, a criminal defendant's fundamental right to a fair trial is only violated where "'relevant, admissible, and noncumulative evidence which is an integral part of the theory of the defense is excluded.'" *State v. Roeder*, 300 Kan. 901, 927, 336 P.3d 831 (2014). Whether a defendant was denied their constitutional right to present a defense by the exclusion of evidence is a question of law subject to unlimited review. *State v. White*, 316 Kan. 208, 212, 514 P.3d 368 (2022).

When examining issues about the admission or exclusion of evidence, an appellate court must first consider whether the evidence was relevant. *State v. Levy*, 313 Kan. 232, 237, 485 P.3d 605 (2021). Relevant evidence must be both material—meaning it has some real bearing on the decision in the case—and probative—meaning it tends to prove a material fact. *State v. Alfaro-Valleda*, 314 Kan. 526, 533, 502 P.3d 66 (2022). Whether a piece of evidence is material presents a question of law, which this court considers under a de novo standard of review; whether evidence is probative is reviewed for an abuse of discretion. 314 Kan. at 533. "'Once relevance is established, evidentiary rules governing admission and exclusion may be applied either as a matter of law or in the exercise of the district judge's discretion, depending on the contours of the rule in question.'" *Roeder*, 300 Kan. at 927.

Proposed testimony of Dr. Flesher

Waterman first contends that Dr. Flesher, who performed psychological evaluations on him, should have been permitted to testify as an expert regarding the effect of his various mental health conditions on his ability to form the requisite intent to commit the crimes charged. He argues: "Doctor Flesher's testimony was critical in the defense's theory that [his] intention was not to commit

a crime or to kill [Bob] when he went in to confront him that day." The State asserts Dr. Flesher's testimony was irrelevant and properly excluded by the district court under K.S.A. 2022 Supp. 21-5209, the statute governing the defense of lack of mental state. Issues involving a district court's admission or exclusion of expert testimony offered under the mental disease or defect statute are reviewed de novo. *State v. Pennington*, 281 Kan. 426, 433-34, 132 P.3d 902 (2006).

Waterman filed a notice of his intent to assert a defense based on his alleged disease or defect, under K.S.A. 22-3219, to support his defense that he could not form the requisite intent to commit the crimes. At trial, Waterman's counsel stated that he intended to call Dr. Flesher to testify because to receive an instruction on "an imperfect mental health defense," Waterman needed to present testimony from an expert who evaluated him. The district court initially ruled that it would permit Dr. Flesher's testimony and that the State could raise objections once he was on the stand.

But the next day, the State filed a motion in limine, alleging Dr. Flesher's testimony was inadmissible. The State's motion relied on two cases: *State v. McLinn*, 307 Kan. 307, 319, 409 P.3d 1 (2018), which held that premeditation is not a culpable mental state that can be negated by the mental disease or defect defense under K.S.A. 2013 Supp. 21-5209, and *Pennington*, 281 Kan. at 435-36, which held that evidence of the existence of mental disease or defects must relate to the defendant's ability to possess the required intent for the crimes charged. After hearing the parties' arguments, the district court ruled that Dr. Flesher would not be permitted to testify at trial but that his testimony could be presented as mitigating evidence during sentencing if Waterman were convicted.

Before addressing the grounds of the district court's ruling, we observe that Waterman's argument about Dr. Flesher's proposed testimony does not square with the substance of his report. While Waterman correctly states that Dr. Flesher found that he suffered from "various mental health issues," Waterman's assertion at the motion in limine hearing that Dr. Flesher had determined that he was "potentially incapable of forming the intent necessary for him to be found guilty" is not supported by Dr. Flesher's written report.

In his report, Dr. Flesher found that Waterman suffered from several mental disorders—such as psychosis, paranoia, persecutory beliefs, substance abuse disorder, and manic and impulsive behavior. But he still concluded:

> "Based on his statements to others prior to the offense, his present recollection of the offense, and his behavior following the offense, it appears that Mr. Waterman did not, due to mental disease or defect, lack the ability to form the intent required as an element of the offense.
>
> . . . .
>
> "It is likely that those conditions strongly influenced his behavior at the time of the offense, but based on his actions prior to, during, and after the offense, the conditions did not result in such confusion or disorientation as to negate his criminal responsibility under Kansas law."

K.S.A. 2022 Supp. 21-5209 states: "It shall be a defense to a prosecution under any statute that the defendant, as a result of mental disease or defect, lacked the culpable mental state required as an element of the crime charged. Mental disease or defect is not otherwise a defense." To prove Waterman guilty of all three charged crimes, the State was required to prove three different culpable mental states: (1) for attempted premeditated murder, that he intended to kill Bob; (2) for aggravated kidnapping, that he intended to inflict bodily harm or to terrorize Bob; and (3) for the aggravated burglary, that he intended to commit a felony when he entered Bob's residence. Thus, for any evidence of Waterman's alleged mental defects to constitute a viable defense, it would have to show that because of a mental disease or defect, he lacked the intent required as an element of the three charged crimes. See *Pennington*, 281 Kan. at 434.

Dr. Flesher did not believe that Waterman's mental defects precluded him from forming the requisite intent to commit any of the charged crimes. Although Dr. Flesher outlined his belief that Waterman's intoxication, prior methamphetamine use, and bipolar disorder "likely . . . strongly influenced his behavior at the time of the offense," he concluded that, in his opinion, those factors did not "negate [Waterman's] criminal responsibility under Kansas law."

Waterman's case is similar to *Pennington*. There, a psychologist performed two examinations and found that the defendant suffered from mental defects, but still stated that the defendant could

form the intent necessary to commit his crimes. The *Pennington* court upheld the district court's exclusion of the expert's testimony to support a mental disease or defect defense reasoning that the testimony was irrelevant because the expert's opinion was that the defendant had the ability to form the criminal intent required to commit the crimes charged—despite any disease or defect he may have suffered. 281 Kan. at 432, 441. The same rationale applies here. Although Dr. Flesher's report shows that Waterman suffered from various mental diseases or defects at the time of the offense, Dr. Flesher made clear that those ailments did not prevent Waterman from forming the requisite criminal intent to commit the charged crimes.

"'Relevant evidence' means evidence having any tendency in reason to prove any material fact." K.S.A. 60-401(b). To be relevant, evidence of Waterman's mental ailments would need to tend to show that they prevented him from forming (1) the intent to kill Bob, (2) the intent to inflict injury or terrorize Bob by confining him, or (3) the intent to commit a felony inside Bob's house. Dr. Flesher's expert opinion does not support such a conclusion—it supports the exact opposite. Dr. Flesher explained that despite his distorted perceptions and impaired judgment, the conditions that Waterman suffered did not cause sufficient confusion or disorientation to negate his ability to form the requisite criminal intent. Thus, any evidence that Waterman was suffering from various mental conditions was not relevant to a determination of whether he committed attempted premeditated murder, aggravated kidnapping, or aggravated burglary. We conclude the district court did not err in excluding Dr. Flesher's expert testimony about Waterman's mental disorders because such evidence failed to meet the standard in K.S.A. 2022 Supp. 21-5209.

Proposed testimony of A.W. and C.H.

Next, Waterman argues that the district court erred when it excluded testimony of A.W. and C.H., both of whom would have testified that Bob had sexually abused them years earlier. He asserts their testimony was relevant because it would have challenged the credibility of Bob, and Dwayne and would "support [his] mental state at the time he entered the house." He also asserts that A.W.'s testimony would have corroborated his claim that he

acted in a heat of passion when Bob said that A.W. "liked" the abuse. The State again maintains the evidence was properly excluded because it was not relevant.

At trial, Waterman informed the court that he intended to call both A.W. and C.H. to testify about being abused by Bob, but the district court excluded such testimony on the ground of relevance, noting that whether Bob was a sexual abuser was not a defense to Waterman's actions. Although Waterman was not permitted to call A.W. and C.H. as witnesses, he was still able to introduce evidence about Bob allegedly molesting his daughter. Waterman personally testified that he only stabbed Bob after he admitted touching A.W., and Waterman's ex-wife, T.B. described A.W. telling her—two years before the attack—that an old man had touched her.

The proposed testimony of A.W. and C.H. had little or no relevance to the trial. Neither A.W. nor C.H. were at the scene of the attack and their alleged abuse occurred years before the attack. Waterman was allowed to present evidence of his belief that Bob may have molested A.W. to establish his intent in confronting Bob. Whether Bob was guilty of actually molesting A.W. was immaterial. For the same reason, Waterman did not need A.W.'s testimony to corroborate his claim that he acted in a heat of passion when Bob said that A.W. "liked" the abuse. Assuming there was any relevance to A.W.'s proposed testimony, it would have been cumulative to the evidence Waterman was permitted to introduce on the subject. The proposed testimony of C.H. was even less relevant as there was no evidence that Waterman knew about this alleged abuse.

Waterman's blanket assertion that the testimony would have cast doubt on Bob's credibility is also unconvincing. While Bob denied abusing, or even knowing A.W., he told the responding officers that Waterman had stabbed him because Waterman believed that he had touched his daughter. Likewise, the testimony of A.W. and C.H. had no bearing on Dwayne's credibility—he testified that he was unaware of any allegations against Bob. The district court properly excluded the testimony of A.W. and C.H. because evidence of Bob's alleged abuse was not relevant before the jury and would not have impeached the credibility of the witnesses against

Waterman. We need not address the State's argument that any error in the exclusion of this testimony was harmless.

DID THE DISTRICT COURT VIOLATE WATERMAN'S RIGHT TO CONFRONTATION?

Waterman next contends that his right to confrontation was violated when the district court admitted Bob's preliminary hearing testimony at trial after his death. Although Waterman was present at the preliminary hearing and was represented by counsel (who cross-examined Bob at that time), he still asserts that this prior cross-examination was constitutionally inadequate because the district court restricted his questioning about any disorders that may have affected Bob's memory of the events. The State counters that Waterman's argument is meritless because he could delve into Bob's general memory issues, just not his alleged medical conditions.

The Sixth Amendment's Confrontation Clause provides that an accused "shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend VI; see also *Pointer v. Texas*, 380 U.S. 400, 403, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965) (holding Sixth Amendment's Confrontation Clause binds States through the Fourteenth Amendment). In *Crawford v. Washington*, 541 U.S. 36, 68, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), the United States Supreme Court held the Sixth Amendment right to confrontation provides that testimonial hearsay statements are inadmissible unless the declarant is unavailable to testify, and the defendant was afforded a prior opportunity to cross-examine the declarant. We review a claim that a defendant's right to confrontation was violated de novo. *State v. Stano*, 284 Kan. 126, 139, 159 P.3d 931 (2007).

The Kansas Supreme Court has explained the contours of a defendant's rights under the Confrontation Clause as follows:

"[T]his court has not indicated that a defendant must have the opportunity to cross-examine a witness as to every allegation that may arise during the course of a trial in order to protect his constitutional rights under the Confrontation Clause. Previous Kansas cases recognize that there may be details at trial that have not been the subject of cross-examination in prior proceedings. As this court explained in [*State v.*] *Terry*, [202 Kan. 599, 451 P.2d 211 (1969)] '[t]his exception [of admitting preliminary hearing testimony] has been explained as arising

from practical necessity and justified on the ground that the right of cross-examination initially afforded provides substantial compliance with the purposes behind the confrontation requirement.' 202 Kan. 599, Syl. ¶ 3." *Stano*, 284 Kan. at 144.

In *State v. Noah*, 284 Kan. 608, 613, 162 P.3d 799 (2007), the Kansas Supreme Court squarely addressed the question of what constitutes a constitutionally adequate opportunity for cross-examination. The *Noah* court explained that a defendant must be given the *opportunity* to conduct cross-examination but noted that a district court may still impose reasonable limits on defense counsel's questioning—"'"[T]he Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish."' [Citation omitted.]" 284 Kan. at 616 (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S. Ct. 1431, 89 L. Ed. 2d 674 [1986]). Ultimately, the *Noah* court concluded the determination of whether the opportunity for cross-examination was sufficient is a case-by-case basis inquiry and depends on the type and extent of limitations placed on the defendant's cross-examination. 284 Kan. at 616-17

Waterman had the opportunity to cross-examine Bob at the preliminary hearing. Waterman's cross-examination focused on Bob's poor memory, including his difficulty remembering the details of the attack, his inability to recall what happened in the months following the stabbing, and his failure to recall giving a statement to the police. But the State objected when Waterman's counsel questioned whether Bob knew "what the term dementia means." The State argued that there was no foundation to question Bob about dementia and that he was not a medical expert on the subject. The district court sustained the State's objection, to which Waterman's counsel asked whether he would be permitted "to examine [Bob's] medical condition that may affect his memory concerning these events," and asserted, "I'm just trying to make a record of any medical condition that he has that may affect his ability to recall." The district court clarified that it was permitting questions about what Bob could remember, but it would not allow questions about Bob's specific medical condition because they were more properly raised to Bob's doctor.

Despite the district court's limitation on asking about Bob's medical conditions, Waterman probed the credibility of Bob's version of events through his admitted inability to remember the particulars of the night of the incident. Through Waterman's cross-examination, he established that Bob forgot what he had done on the day of the attack. Bob also admitted that he forgot the timeline of events, nor did he remember exactly what Waterman told him other than that he said, "I'm here to kill you." Finally, Bob described going "blank" sometime during the attack and that the next thing he remembered was being in a nursing home, six months later. In short, the record from the preliminary hearing, which was eventually read to the jury during trial, displayed that Bob had severe memory issues—regardless of whether he suffered from a medical condition. Thus, to the extent that Waterman contends the district court disallowed inquiry into issues of Bob's memory, and therefore his credibility about the stabbing, his argument fails.

The sole line of inquiry the district court denied to Waterman during his cross-examination was whether Bob suffered from a medical condition such as dementia. While Waterman's cross-examination was restricted, he was not prevented from probing Bob's memory of the events. The district court also did not deprive Waterman of the opportunity of introducing evidence about whether Bob suffered from dementia at a later date. Waterman could have questioned Bob's doctor about any possible medical issues impacting Bob's cognitive abilities or called him at trial, but he did not do so. The record shows that Waterman could ask detailed questions about Bob's memory and recollection of events, even if he could not confirm whether Bob suffered from dementia. As such, we conclude that Waterman had an opportunity for effective cross-examination of Bob at the preliminary hearing sufficient to satisfy the requirements of the Confrontation Clause.

DID THE DISTRICT COURT ERR IN FAILING TO GIVE AN INSTRUCTION ON CRIMINAL RESTRAINT?

Waterman next argues the district court erred by not giving an instruction on criminal restraint as a lesser included offense of aggravated kidnapping. Interestingly, Waterman did not seek an instruction for the lesser offense of kidnapping, but he requested an instruction for the lesser offense of criminal restraint. The State

responds that an instruction on criminal restraint was legally appropriate and "may have been" factually appropriate, but any error in not giving the instruction was harmless.

This court analyzes claims of jury instruction errors using a three-step process to determine whether: (1) there is a lack of appellate jurisdiction or a failure to preserve the issue for appeal; (2) the instruction was factually and legally appropriate; and (3) any error requires reversal. *State v. Crosby*, 312 Kan. 630, 638-39, 479 P.3d 167 (2021). Here, Waterman requested the district court provide a jury instruction on criminal restraint. As such, if this court finds that the court erred in not giving the instruction, it must determine whether the error was harmless—that is, whether there is no reasonable possibility that the error contributed to the verdict. *State v. Holley*, 313 Kan. 249, 256-57, 485 P.3d 614 (2021). The burden is on the State to prove harmless error. 313 Kan. at 257.

Jury instructions on lesser included offenses are generally legally appropriate. *State v. Gentry*, 310 Kan. 715, 721, 449 P.3d 429 (2019). And criminal restraint is a lesser included offense of aggravated kidnapping. *State v. Simmons*, 282 Kan. 728, 742, 148 P.3d 525 (2006). Thus, as both parties agree, a jury instruction on criminal restraint at Waterman's trial would have been legally appropriate. But we observe that in our stepladder approach to instructing the jury on lesser included offenses, the district court would have instructed on criminal restraint only after instructing on kidnapping, and Waterman did not even request an instruction on kidnapping.

Turning to whether a criminal restraint instruction was factually appropriate, a jury instruction for a lesser included offense must be given "[i]n cases where there is *some* evidence which would reasonably justify a conviction of some lesser included crime . . . the judge shall instruct the jury as to the crime charged and any such lesser included crime." (Emphasis added.) K.S.A. 2022 Supp. 22-3414(3). Alongside this statutory directive, Kansas courts have repeatedly held that "[a] district court has a duty to instruct the jury on any lesser included offense established by the evidence, even if that evidence is weak or inconclusive." *State v. Nelson*, 291 Kan. 475, Syl. ¶ 1, 243 P.3d 343 (2010).

For a rational fact-finder to find Waterman guilty of criminal restraint, it would have to find that he "knowingly and without

legal authority restrain[ed] another person so as to interfere substantially with such person's liberty." K.S.A. 2022 Supp. 21-5411(a). Waterman argues that a jury instruction on criminal restraint would have been factually appropriate because the evidence on confinement "was minimal" and disputed. He points out there was some evidence that he never locked the door at Bob's residence but even if he did, that level of confinement "was not severe enough to warrant a conviction for kidnapping."

We are not convinced that a jury instruction on criminal restraint would have been factually appropriate here. But if an instruction on criminal restraint would have been factually appropriate, we agree with the State that any error in failing to give the instruction was harmless. The difference between criminal restraint and aggravated kidnapping is that aggravated kidnapping required Waterman to confine Bob by force with intent to hold Bob to inflict bodily injury on him and bodily harm was inflicted on him. The State presented overwhelming evidence that Waterman confined Bob by force to inflict bodily injury on him and, after stabbing Bob 17 times, Waterman stayed in the room "to watch him bleed out." The weight of the evidence presented at trial leaves little doubt that the jury would have convicted Waterman of aggravated kidnapping even if an instruction on criminal restraint had been given. We are comfortable in finding the State has shown there is no real possibility that any error contributed to the verdict. Thus, we conclude that any error in failing to instruct the jury on criminal restraint was harmless.

DID THE DISTRICT COURT ERR IN DENYING WATERMAN'S MOTION TO DISMISS BASED ON THE STATE'S ACCESS TO CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATIONS?

Waterman contends the district court abused its discretion by refusing to dismiss the charges against him because his right to counsel was violated through a breach of his attorney-client relationship by the State's handling of his casefile after it was left with the county attorney's office by his former attorney. He argues that the district court should have at least disqualified the Cherokee County Attorney's Office for the alleged violation. In his pro se brief, Waterman also claims the district court erred in denying his

motion to dismiss based on a breach of attorney-client communications. Waterman alleges the State used the confidential communications from his casefile to formulate its trial strategy—he does not provide record citations to support his conclusory allegations. In response, the State argues the district court did not abuse its discretion in denying the motions because the county attorney's office properly dealt with the casefile after realizing it contained confidential materials and its actions did not prejudice Waterman in any meaningful way.

Appellate courts review a district court's decision on whether to dismiss criminal charges for an abuse of discretion. *State v. Bolen*, 270 Kan. 337, 342-43, 13 P.3d 1270 (2000). Similarly, a court's decision on whether to disqualify an attorney is reviewed for an abuse of discretion. This court will only find an abuse of discretion if the district court's ruling was based on an error of fact, an error of law, or if no reasonable person would agree with its decision. *State v. Miller*, 308 Kan. 1119, 1148, 427 P.3d 907 (2018).

After finding out that his former attorney had left his casefile with the county attorney's office, Waterman moved to dismiss. He alleged that the casefile contained confidential communications and the State prejudiced his case by failing to promptly return the casefile. His motion asserted a violation of his right to due process, not his right to counsel—although he later moved to suppress and alleged the State's actions violated his rights under the Sixth Amendment to the United States Constitution.

In *Bolen*, the Kansas Supreme Court discussed the standards for dismissing a criminal case based on the State's misconduct. The *Bolen* court noted that while a district court has discretion to dismiss criminal charges, such a ruling should be made with caution, and only when no other remedy will serve the ends of justice. 270 Kan. at 342-43. For the State's actions to merit such a remedy, it must be shown that intentional misconduct occurred, that the misconduct prejudiced the defendant, and that no lesser sanction would suffice. 270 Kan. at 342-43. The United States Supreme Court has similarly found that a mere intrusion into an attorney-client relationship, standing alone, cannot constitute a Sixth Amendment violation. *Weatherford v. Bursey*, 429 U.S. 545, 550-58, 97 S. Ct. 837, 51 L. Ed. 2d 30 (1977) ("There being no tainted

evidence in this case, no communication of defense strategy to the prosecution, and no purposeful intrusion[] . . . there was no violation of the Sixth Amendment . . . .").

Waterman contends the district court applied the incorrect standard when addressing the claims within his motion to dismiss, citing several cases in which other jurisdictions have presumed prejudice to a defendant where the State has intruded into the attorney-client relationship. See *Shillinger v. Haworth*, 70 F.3d 1132, 1142 (10th Cir. 1995); *United States v. Costanzo*, 740 F.2d 251, 254 (3d Cir. 1984); *State v. Bain*, 292 Neb. 398, 418-19, 872 N.W.2d 777 (2016); *State v. Lenarz*, 301 Conn. 417, 435-37, 22 A.3d 536 (2011). But these cases are distinguishable as each centered on *intentional* intrusions into the attorney-client relationship by the government. The facts here do not support Waterman's claim that the State's actions in handling Waterman's casefile were intentional.

Although Waterman insists that the State nefariously searched his casefile and used his confidential communications to thwart his defense, the record does not support this conclusion. At the hearing, the State presented the testimony of the legal assistant who inventoried the box, believing it to be discovery—she was the sole person in the county attorney's office to handle the casefile. She stated that when she found letters with Waterman's former attorney's letterhead, she did not review them. She also explained that she did not make any copies or documentation of the letters, and simply returned them to the box, which she then provided to Waterman's attorney.

In ruling on the motion to dismiss, the district court implicitly found the State's evidence more credible than Waterman's testimony. The district court found that it was reasonable for the State to assume that Waterman's former attorney had delivered a box of discovery upon his withdrawal from the case and that it was reasonable for the State to ensure that the discovery materials were complete before providing them to Waterman's new counsel. The district court found that Waterman had made no showing that any of the State's attorneys had reviewed the material—the only person in the county attorney's office who went through the casefile was the legal assistant, who upon finding what appeared to be con-

fidential communications quarantined them without review. Finally, the district court found that Waterman had not shown that he was prejudiced in any way by the State's inadvertent receipt of the casefile.

The district court's factual findings are supported by the record. It is undisputed that the State only received the casefile inadvertently when Waterman's former attorney gave it to them. No evidence supports Waterman's claim that the State's actions were intentional or designed to discover Waterman's trial strategies. Waterman could not show that the State's actions prejudiced him in any way. And any potential risk of prejudice at trial was negated by the district court's decision to permit Waterman to raise objections at trial should the State attempt to use any information derived from his confidential communications. After his initial motion to dismiss was denied, Waterman moved to suppress any materials found in his casefile as being obtained in violation of his attorney-client privilege, and in the alternative to dismiss the case. The district judge declined Waterman's request to dismiss the case or make any suppression ruling at that time, but it ruled: "In the event during the trial the State attempts to introduce evidence from your file that you think is prejudicial, you may at that time object, and I will rule on it." Despite this ruling, Waterman raised no such objection during the trial.

Waterman did not provide any communication, transcript, or documentation showing that the State obtained any evidence or content from his casefile, let alone that it used such information. He merely provides conclusory and speculative accusations that the State engaged in intentional and egregious illegal conduct. The record provides no basis from which this court can presume that he suffered any prejudice.

The district court did not abuse its discretion in denying Waterman's motion to dismiss. While the county attorney's office's handling of the casefile after it became clear that there were privileged materials could have been more forthcoming, the record does not support that Waterman suffered any prejudice. Waterman has not shown that the district court's ruling on his motion was based on an error of fact or law, and, considering the extreme remedy Waterman sought, it cannot be said that no reasonable person

would agree with the district court's denial of his motion to dismiss.

Waterman also alleges the district court abused its discretion by denying his motions seeking the disqualification of the lead prosecutor. In his motions, he argued that the only way to ensure that the State did not use the private communications and trial strategies found in his casefile was to disqualify the prosecutor. As with his arguments about the denial of his motion to dismiss, Waterman makes conclusory allegations that are not supported by the record. As noted above, the only person within the county attorney's office that handled Waterman's casefile was a legal assistant. She testified that she did not review any items that she thought could be confidential communications, and that no one else in the office—including the prosecutor whom Waterman argues should have been disqualified—reviewed the materials either. Waterman could object at trial if he believed the State was trying to use any information derived from its exposure to confidential communications, but he raised no objections. The district court did not abuse its discretion by denying the motions to disqualify the prosecutor.

DID THE DISTRICT COURT ABUSE ITS DISCRETION BY REFUSING TO PERMIT WATERMAN'S TRIAL COUNSEL TO WITHDRAW?

Waterman contends the district court abused its discretion when it denied his pretrial request for new counsel due to a deterioration of his relationship with Campbell, the seventh attorney assigned to represent him. The State asserts that the district court did not abuse its discretion when it refused to permit Campbell to withdraw. The State argues that the district court sufficiently inquired about any conflict and found that the deterioration in the relationship between Waterman and Campbell was not complete.

Both the federal and Kansas Constitutions guarantee indigent criminal defendants the right to effective assistance of counsel. But neither guarantees the right to *choose* which attorney will be appointed to represent him or her. *State v. Breitenbach*, 313 Kan. 73, 90-91, 483 P.3d 448, *cert. denied* 142 S. Ct. 255 (2021). The rules governing a defendant's motion for substitute counsel are well established:

"'[T]o warrant substitute counsel, a defendant must show "justifiable dissatisfaction" with appointed counsel. Justifiable dissatisfaction includes a showing of a conflict of interest, an irreconcilable conflict, or a complete breakdown in communications between counsel and the defendant. But ultimately, '"[a]s long as the trial court has a reasonable basis for believing the attorney-client relation has not deteriorated to a point where appointed counsel can no longer give effective aid in the fair presentation of a defense, the court is justified in refusing to appoint new counsel."'

"Further, when the defendant's dissatisfaction emanates from a complaint that cannot be remedied or resolved by the appointment of new counsel—such that replacement counsel would encounter the same conflict or dilemma—the defendant has not shown the requisite justifiable dissatisfaction. [Citations omitted.]" 313 Kan. at 90-91.

After receiving many substitute counsel appointments, Waterman filed two pro se motions to remove Campbell—the first was titled "Conflict of Interest On Counsel" and the second, "Motion to Recuse James Campbell." Waterman alleged that the attorney-client relationship was no longer workable, and that Campbell was refusing to litigate on his behalf. He also claimed that Campbell was conspiring with the State and the district court to deny him his fundamental rights (an accusation he made against his prior attorneys), and that he had filed a civil complaint against Campbell. Waterman did not ask the district court to allow him to proceed pro se; instead, he insisted that the district court appoint another attorney to represent him in the case. Campbell filed his own motion to withdraw, explaining that he and Waterman had a contentious relationship and that Waterman refused to communicate with him.

The district court held a hearing on the motions. Campbell explained that Waterman did not believe that he was working on his behalf and outlined the difficulties in his representation. The district judge made these comments before taking the matter under advisement:

"Here is the—here is the problem I have. I'm not sure I've got the order correct but I think Mr. Campbell is your eighth attorney, and I know Candace Brewster was the first. I think Robert Myers was the second. I don't know the sequence after that. Steve Stockard was your attorney, Forest Lowry was your attorney, Sara Beezley was your attorney, Rick Smith—and I think I'm leaving out someone. That's because a—and then Mr. Campbell would be seventh and I think you've had eight attorneys.

"And just by way of background, and for your information because in your letter to me requesting that Mr. Campbell be recused, you refer to him as Judge Lynch's lawyer, and you say Judge Lynch assigned him.

"That's not the case. If you remember, we were set to try this case, there were 97 jurors I think here ready to be voir dired and we had a meeting in chambers with the State and you and your attorney, Rick Smith, and you were in the same position with Mr. Smith it appears you are in now with Mr. Campbell.

"And so I, at your request, granted a continuance, relieved—let Mr. Smith out of the case. And then I called the lady that was in charge of the Board of Indigent Defense Service, she's since retired, but her name was Patricia Scalia. And I told her that you had, I think, seven attorneys, and there wasn't anybody in Southeast Kansas that I would think would agree to take this. And I just said can you appoint somebody.

"And she called me back later and said I'm going to appoint James Campbell, he's—he has a reputation for being a topnotch trial lawyer and he has experience in dealing with difficult clients and he's tried over 100 jury trials.

"So that's how Mr. Campbell was selected. It didn't have anything to do with Judge Lynch. And I'm concerned now that if I allow him to withdraw, I don't know who I can get to represent you. And so there is a new director at BIDS, and so what I think I'm going to do is take this motion under advisement and contact that person tomorrow . . . ."

The parties reconvened for another hearing two weeks later, and the district court announced its ruling on the motions. The district court began by finding that neither Waterman nor Campbell had established that the issues between them were affecting the quality of Campbell's representation. The district court continued:

"The fact is, from my observations, the defendant has been provided—well, with the last two attorneys he's had, Mr. Campbell and Mr. Smith, both of whom provided, in my judgement, professional and effective assistance. But defendant—I think the problem is he couldn't get along with either of them and apparently couldn't get along with the ones who preceded him.

"And that's—not being able to get along with someone is not grounds to have a—to support your motion, Mr. Waterman, or Mr. Campbell's motion to withdraw.

. . . .

"So I find as follows: The fact that defendant refuses to cooperate with Mr. Campbell and aide in his defense is his doing—Mr. Waterman's doing. Mr. Campbell is, from my observation and from what I understand from others, highly qualified. He has to date—and I think would likely in the future—continue to represent Mr. Waterman in a manner and custom consistent with the highest degree of professional norms in the State of Kansas.

"Not one thing about Mr. Campbell's performance in my judgment has adversely affected Mr. Waterman's status in this case to date.

"Now, I'm mindful, Mr. Campbell, of your concerns about ethical issues. I don't know specifically what they are, but, as I indicated, that's just something you will have to deal with.

"Mr. Waterman has already had either seven or eight, I have forgotten, lawyers. And I think it is unlikely that any other lawyer would be—turn out to be satisfactory with you, Mr. Waterman.

"So the bottom line is, Mr. Waterman, your motion to disqualify Mr. Campbell, and Mr. Campbell, your motion to withdraw, are each denied."

On appeal, Waterman insists that (1) the district court failed to make an appropriate inquiry into his concerns about Campbell's continued representation and (2) he established a breakdown in communication and Campbell had a conflict of interest because he had filed a complaint and a civil suit against him. We review a claim that a district court erred by refusing to appoint new counsel to a criminal defendant for an abuse of discretion. *Breitenbach*, 313 Kan. at 90. The defendant bears the burden of showing an abuse of discretion. *State v. Hulett*, 293 Kan. 312, 319, 263 P.3d 153 (2011).

Waterman's adequacy-of-the-inquiry argument focuses on his contention that the district court allegedly neglected to address the potential conflict and communication breakdown between himself and Campbell. He contends that the district court refused to allow him to present evidence during the hearing and did not inquire into the nature of the disciplinary complaint or lawsuit he filed against Campbell.

If a defendant provides an articulated statement of attorney dissatisfaction, the district court has a *duty* to make an inquiry into the matter to ensure the defendant's right to counsel is honored. *State v. Brown*, 300 Kan. 565, 575, 331 P.3d 797 (2014). "A district court abuses its discretion if it becomes aware of a potential conflict of interest between a defendant and his or her attorney but fails to conduct an inquiry." *State v. Pfannenstiel*, 302 Kan. 747, Syl. ¶ 5, 357 P.3d 877 (2015). "An appropriate inquiry requires fully investigating (1) the basis for the defendant's dissatisfaction with counsel and (2) the facts necessary for determining if that dissatisfaction warrants appointing new counsel, that is, if the dissatisfaction is 'justifiable.'" 302 Kan. at 761.

Relevant here, the court's inquiry does not require "a detailed examination of every nuance of a defendant's claim of inadequacy

of defense and conflict of interest." *State v. Staten*, 304 Kan. 957, 972, 377 P.3d 427 (2016). Rather, the Kansas Supreme Court has found that "'[a] single, open-ended question by the trial court may suffice if it provides the defendant with the opportunity to explain a conflict of interest, an irreconcilable disagreement, or an inability to communicate with counsel.'" *State v. Toothman*, 310 Kan. 542, 554, 448 P.3d 1039 (2019).

We find the district court made a sufficient inquiry into the basis for Waterman's dissatisfaction with Campbell. The record reflects that the district court had read the motions filed by Waterman and Campbell, and the court was aware of the stated concerns. The district court held a hearing, and Waterman and Campbell were allowed to elaborate on their problems. The district court also was aware of Waterman's purported civil claim against Campbell and the alleged ethical complaint. The district court made findings on all these matters in denying the motions for substitute counsel.

Waterman also argues that the district court abused its discretion in finding he did not establish a justifiable dissatisfaction supporting the appointment of new counsel because he established both a breakdown of communication and a conflict of interest.

The Kansas Supreme Court has noted that disagreements or a lack of communication between a defendant and counsel will not always rise to the level of justifiable dissatisfaction. *State v. Brown*, 305 Kan. 413, 425, 382 P.3d 852 (2016). "'"[A]s long as the trial court has a reasonable basis for believing the attorney-client relation has not deteriorated to a point where appointed counsel can no longer give effective aid in the fair presentation of a defense, the court is justified in refusing to appoint new counsel."' [Citation omitted.]" *State v. Bryant*, 285 Kan. 970, 986-87, 179 P.3d 1122 (2008).

Waterman and Campbell both alleged a breakdown in communication. Although Campbell asserted that his relationship with Waterman was contentious and stated he was unsure if he could continue effectively representing Waterman, he explained that over the two years of his representation they had been able to correspond and meet about the case and various motions. Campbell classified Waterman's displeasure with his representation to be "both real and perceived." He clarified that Waterman simply did

not want to communicate and did not trust him because he believed Campbell worked for the court and the State's interests. Despite Campbell's own request to withdraw, the district court focused on the fact that Campbell had continued to provide effective representation, which had not been adversely affected by the communication issues.

After going over the difficulties of Waterman and Campbell's relationship, the district court explained that Waterman's inability to get along with Campbell was not sufficient to constitute justifiable satisfaction. It noted that Waterman had displayed a pattern of such behavior with all his other appointed attorneys. The district court found that it was unlikely that Waterman could get along with a different attorney even if it could find substitute counsel and permitted Campbell to withdraw. The Kansas Supreme Court has noted that "when the defendant's dissatisfaction emanates from a complaint that cannot be remedied or resolved by the appointment of new counsel—such that replacement counsel would encounter the same conflict or dilemma—the defendant has not shown the requisite justifiable dissatisfaction." *Breitenbach*, 313 Kan. at 90-91.

Waterman's claim of a communication breakdown was a recurring problem with all the attorneys appointed to represent him—the record suggests that Waterman would likely have developed the same communication problems with any attorney representing him. The district court did not abuse its discretion in finding that Waterman's complaints did not rise to the level of a complete breakdown of communication.

Waterman also alleges that he established he and Campbell had a conflict that necessitated the appointment of substitute counsel. His argument mainly relies on the fact that he sued Campbell and filed a disciplinary complaint against him.

A conflict of interests exists when an attorney is put in a position where divided loyalty is likely, "and can include situations in which the caliber of an attorney's services 'may be substantially diluted.'" *Pfannenstiel*, 302 Kan. at 758. Ultimately, "[c]onflict of interest and divided loyalty situations can take many forms, and whether an actual conflict exists must be evaluated on the specific facts of each case." 302 Kan. at 758.

In his initial motion, Waterman asserted a far broader claim of conflict of interest than against merely Campbell. He argued that essentially everyone involved in the case was conflicted because he had "civil suits pending against the entire county." His main complaint against Campbell was that he "has refused an[d] will not provide or secure relevant evidence or information in my best interest." He later stated that he sued Campbell and filed a disciplinary complaint against him and threatened to do so again when the district court stated it was inclined to deny his motion for substitute counsel.

Even though Waterman may have initiated litigation and filed complaints against Campbell, this court has previously held that a defendant's pending disciplinary case against their counsel does not automatically create an irrevocable conflict of interest, depending on the nature of the complaint. *State v. Robertson*, 30 Kan. App. 2d 639, 644-49, 44 P.3d 1283 (2002). Waterman is correct that the district court did not ask him to expound on the grounds for his lawsuit or disciplinary complaint against Campbell. Still, the district court observed that Campbell was highly qualified and had been representing Waterman "in a manner and custom consistent with the highest degree of professional norms." Waterman presented no allegations showing that these actions taken against Campbell affected the quality of Campbell's representation or that the friction between them resulted in any divided loyalty on Campbell's part.

In sum, Waterman was a difficult defendant who went through seven court-appointed attorneys and complained that most had conspired with the prosecutor to secure his convictions. An asserted breakdown in communication will not rise to the level of justifiable dissatisfaction if the district court's observation is that counsel can still provide effective representation of the defendant. On this point, we must give substantial deference to the district court. Here, the district court properly observed that Waterman's refusal to cooperate with Campbell was a problem of his own making and that any new counsel would have the same problems with Waterman as Campbell was having. Even a defendant filing an ethical complaint or a civil lawsuit against counsel will not automatically create an irrevocable conflict of interest because oth-

erwise any criminal defendant could always disqualify their lawyer by filing such proceedings. Considering all the circumstances of Waterman's case, we conclude the district court did not abuse its discretion by denying the motions for substitute counsel.

DID THE DISTRICT COURT ABUSE ITS DISCRETION BY FAILING TO ASK JURORS ABOUT THEIR POTENTIAL BIASES?

In his pro se supplemental brief, Waterman argues the district court abused its discretion by not asking jurors about their relationships to law enforcement, which he contends deprived him of a fair trial. Waterman raised these concerns at trial when he filed a pro se "Motion for a Mistrial due to Premeditated prejudice to violate Voir dire." Waterman asked the district court to grant him a new trial or set a new jury although he offered no details evincing any juror bias beyond alleged friendship with police officers.

Waterman does not cite any portions of the record to support his claim that any jurors were allegedly biased against him. Nor does he explain why any such jurors could not have simply been removed for cause under K.S.A. 22-3410 or with a peremptory challenge under K.S.A. 2022 Supp. 22-3412. Because Waterman has not provided record citations to bolster his claim or legal support for his argument that it was the district court's job to address the matter sua sponte, we treat this issue as waived or abandoned. See *State v. Liles*, 313 Kan. 772, 783-84, 490 P.3d 1206 (2021).

DID THE STATE INTRODUCE PERJURED TESTIMONY?

Also, in his pro se supplemental brief, Waterman argues this court should order a new trial because the State knowingly used perjured testimony from Dwayne to secure his convictions. Waterman cites no authority to support his argument and cites no portion of the record to support his conclusory allegations. Waterman's argument is best characterized as an attempt to impeach the credibility of Dwayne's testimony by pointing out inconsistencies between his testimony at the preliminary hearing and at trial, which he contends was encouraged by the State.

To show that his due process rights were violated by the State's introduction of perjured testimony, Waterman would need

to show "(1) the prosecution knowingly solicited the perjured testimony, or (2) the prosecution failed to correct testimony it knew was perjured." *State v. Betts*, 272 Kan. 369, Syl. ¶ 5, 33 P.3d 575 (2001), *overruled on other grounds by State v. Davis*, 283 Kan. 569, 158 P.3d 317 (2006). Waterman addresses neither point beyond simply stating that Dwayne was making false statements and the State knew of the falsity. He has not sufficiently briefed this issue, and an issue not briefed is waived or abandoned. *State v. Davis*, 313 Kan. 244, 248, 485 P.3d 174 (2021).

DID THE DISTRICT COURT ABUSE ITS DISCRETION IN DENYING WATERMAN'S MOTION FOR MISTRIAL BASED ON INEFFECTIVE ASSISTANCE OF COUNSEL?

In his supplemental brief, Waterman asserts that he received ineffective assistance of counsel from his trial counsel, Campbell. The State argues that this court should not reach this issue because it is being raised for the first time on appeal, but its argument is misplaced. Waterman filed a posttrial, pro se motion for a mistrial in which he alleged that his counsel was ineffective. The district court addressed the motion and denied it at a posttrial hearing on December 28, 2021. Thus, the issue is preserved for appeal.

To briefly review the pertinent facts, six days after the trial, Waterman filed a pro se "Motion for Mistrial for Ineffective Assistance of Counsel." In his motion, Waterman argued that a "mistrial" was required for his attorney's deficient performance. He argued that Campbell should have presented more evidence on the varying sizes of the knife wounds (which he alleged suggested that Dwayne had stabbed Bob after he did) and that Campbell did not sufficiently impeach the credibility of Bob and Dwayne's testimony. Campbell also moved for a new trial on Waterman's behalf based on violation of court orders relating to the treatment of Waterman during the trial and for improper contact between the jurors and law enforcement. But because Waterman filed a formal disciplinary complaint against Campbell and also named Campbell as a party in a federal lawsuit, Campbell moved to withdraw from the case due to a conflict.

At the hearing on the posttrial motions, the district court first addressed Campbell's motion to withdraw. Campbell explained to

the court that he believed he needed to request to withdraw because of the disciplinary complaint. In response to the court's questioning, Campbell stated that he would do his best to continue to zealously advocate for Waterman. But Campbell also added, "I dispute the allegations that he filed in his motion for ineffective assistance. I dispute what he alleged in the disciplinary complaint." The district court denied Campbell's motion to withdraw.

Next, the district court addressed Waterman's pro se motion for a mistrial. Without asking Campbell whether he could argue the motion on Waterman's behalf, the district court simply asked Waterman to address the motion. Waterman argued the motion himself, reasserting his claim that he should receive a "mistrial" because of Cambell's ineffective representation at trial. Waterman focused his argument on Campbell's failure to highlight the different sizes of the knife wounds Bob suffered. The district court denied Waterman's motion, finding that Waterman had received "very effective assistance of counsel" at his trial. Finally, the district court addressed Campbell's motion for new trial and after hearing arguments from counsel, the district court denied that motion, as well.

On appeal, Waterman's pro se supplemental brief argues only that the district court abused its discretion in denying his motion for mistrial based on ineffective assistance of counsel. But the brief filed by Waterman's counsel claims the district court committed structural error by denying the appointment of conflict-free counsel to argue Waterman's posttrial motion and requiring Waterman to argue the motion himself. Waterman argues that at the posttrial hearings, "Campbell was forced to choose to defend himself or his client. In the end, Campbell stood silent. [Waterman] was left to argue his motion for ineffective assistance of counsel without the aid of counsel." He asserts "[t]he failure to appoint new counsel was structural error and cannot be passed over as harmless error."

The State responds that "new counsel should not be required every time a defendant mentions the words ineffective assistance of counsel." The State asserts that the allegations in Waterman's pro se motion were conclusory and not supported by the evidence. As a result, Campbell's performance was not deficient. The State also argues that "no prejudice occurred because . . . Waterman's

confession on the stand and the incriminating texts and letter unquestionably establish his guilt of attempted murder."

It is the task of the district court to ensure that a defendant's right to counsel under the Sixth Amendment to the United States Constitution is honored. *State v. Sharkey*, 299 Kan. 87, 96, 322 P.3d 325 (2014). In order to fulfill this duty, when the district court becomes aware of a possible conflict of interest between an attorney and a defendant charged with a felony, the court has a duty to inquire further. 299 Kan. at 96. If an appropriate inquiry is made, the district court's decision is reviewed under an abuse of discretion standard. 299 Kan. at 96-97. But a district court abuses its discretion when it makes no inquiry into the nature of the conflict. 299 Kan. at 97.

We begin by finding that Waterman's pro se motion for "mistrial" clearly should be construed as a motion for new trial alleging ineffective assistance of counsel. "'[P]ro se pleadings are to be liberally construed to give effect to their content rather than adhering to any labels and forms used to articulate the pro se litigant's arguments.' [Citation omitted.]." *State v. Gilbert*, 299 Kan. 797, 798, 326 P.3d 1060 (2014). And Waterman filed his motion six days after the trial, so it was timely. See K.S.A. 22-2301(1) (providing that a motion for new trial generally must be filed within 14 days after the verdict or finding of guilt). Thus, the issue in this appeal is whether the district court committed structural error by denying the appointment of conflict-free counsel to argue Waterman's motion for new trial alleging ineffective assistance of counsel.

The Kansas Supreme Court addressed this issue in *Sharkey*, 299 Kan. at 91-101. Sharkey was found guilty by a jury of aggravated indecent liberties with a child. Seven days after the trial, he filed a pro se motion for new trial based on ineffective assistance of counsel and also a motion for new counsel. Sharkey's counsel also filed a motion for new trial. At the hearing, the district court made no inquiry into the nature of the conflict between Sharkey and his counsel and simply asked Sharkey to argue his own motion, which the district court denied. Sharkey's counsel also argued his motion for new trial which the district court denied. On appeal, Sharkey argued the district court should have appointed conflict-free counsel to assist him in arguing his pro se motion for new trial.

Our Supreme Court began its analysis by finding that a timely motion for new trial is a critical stage of the criminal proceedings, and because Sharkey's motion was timely, he had a right under the Sixth Amendment to be represented by conflict-free counsel at the hearing on his pro se motion for new trial. 299 Kan. at 96. Next, the court observed that the potential of a conflict of interests between Sharkey and his counsel was apparent because Sharkey was alleging ineffective assistance of counsel. Faced with this conflict, the trial judge was required to make an appropriate inquiry into the conflict, and the failure to do so was an abuse of discretion. 299 Kan. at 98.

Our Supreme Court then addressed the effect of the district court's abuse of discretion and, specifically, whether Sharkey must show he was prejudiced by having to represent himself on his pro se motion for new trial. In this analysis, the court observed that there are three categories of ineffective assistance of counsel claims brought under the Sixth Amendment according to *Mickens v. Taylor*, 535 U.S. 162, 166, 122 S. Ct. 1237, 152 L. Ed. 2d 291 (2002). 299 Kan. at 100.

> "The first category includes cases in which it is claimed that counsel's performance was so deficient that the defendant was denied a fair trial. These claims are controlled by *Strickland* [*v. Washington*, 466 U.S. 668, 687, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)]. . . . The second category applies when the assistance of counsel was denied entirely or denied at a critical stage of the proceedings. *United States v. Cronic*, 466 U.S. 648, 658-59, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984), defines the standard that applies to these claims. The third category includes situations where the defendant's counsel 'actively represented conflicting interests.' *Mickens*, 535 U.S. at 166." 299 Kan. at 100.

Our Supreme Court found that Sharkey's situation where he was denied conflict-free counsel to argue his motion for new trial alleging ineffective assistance of counsel fell under the second *Mickens* category—the *Cronic* exception—where the denial of the assistance of counsel at a critical stage of the proceedings presented circumstances of such magnitude that prejudice to the defendant is presumed. 299 Kan. at 100-01. The court found that "[u]nder *Cronic*, Sharkey was constructively denied his right to counsel because of his attorney's conflict of interests; he effectively had no legal representation at the motions hearing. . . . This leads to a presumption of prejudice." 299 Kan. at 101. As a result,

our Supreme Court remanded the case to district court with instructions to hold a new hearing on Sharkey's pro se motion for new trial with conflict-free counsel appointed to argue the motion. 299 Kan. at 101. See *Fuller v. State*, 303 Kan. 478, 495-503, 363 P.3d 373 (2015) (holding the same as *Sharkey* in a case arising under K.S.A. 60-1507).

Sharkey controls the outcome of Waterman's case. After Waterman was found guilty at trial, he filed a timely pro se motion for new trial alleging ineffective assistance of counsel. At the hearing, the district court conducted enough of an inquiry with Campbell to learn that Waterman had filed a disciplinary complaint against Campbell. But the district court only seemed concerned with whether Campbell could argue his own motion for new trial. The district court ignored the more obvious conflict that Waterman was alleging that Campbell provided ineffective assistance at his trial. On the pro se motion, the district court simply addressed Waterman and asked him to argue his motion without the assistance of counsel. Campbell not only stood silent on this motion, but he argued against it by saying, "I dispute the allegations that [Waterman] filed in his motion for ineffective assistance." As in *Sharkey*, Waterman "was constructively denied his right to counsel because of his attorney's conflict of interests; he effectively had no legal representation at the motions hearing." 299 Kan. at 101.

The State argues that no prejudice occurred here because Waterman's claims in his motion were conclusory and because of the overwhelming evidence of Waterman's guilt. But Waterman's situation falls under the *Cronic* exception for a claim of ineffective assistance of counsel. *Sharkey*, 299 Kan. at 100-01. Because Waterman was denied conflict-free counsel at a critical stage of his criminal proceedings, he need not show prejudice to receive relief. We do not dispute the notion that this may be considered a harsh result. But it is not our court's function at this stage of the proceedings to evaluate the merits of Waterman's motion, nor do we weigh the evidence against him at trial. Perhaps if the district court had found some procedural reason not to address Waterman's motion, for instance if the motion had been untimely, then Waterman might not be entitled to any relief on appeal. But here the district court required Waterman to argue his timely motion for new trial

without the assistance of legal counsel. Under *Cronic* and *Sharkey*, legal precedents that this court is duty bound to follow, this procedure amounted to structural error and Waterman need not show prejudice to receive relief.

This is not to say that the district court must appoint counsel to represent a criminal defendant on all pro se motions. In fact, the district court, at its discretion, need not address every pro se motion filed in a criminal case when the defendant is represented by counsel. *State v. Pollard*, 306 Kan. 823, 843, 397 P.3d 1167 (2017). In Kansas, a party has the right to represent themselves or to be represented by counsel, but they have no right to hybrid representation. *State v. Holmes*, 278 Kan. 603, 620, 102 P.3d 406 (2004). It is only when a defendant's pro se motion alleges a possible conflict of interest between the defendant and counsel does the district court have a duty to inquire into the nature of the conflict to determine if substitute counsel is needed. *Sharkey*, 299 Kan. at 96.

Waterman's pro se motion alleging ineffective assistance of counsel raised a conflict of interest between Waterman and Campbell, and the district court erred by requiring Waterman to argue the motion without further inquiry into the nature of the conflict. As in *Sharkey*, we must remand this case to district court to hold a new hearing on Waterman's pro se motion for new trial alleging ineffective assistance of counsel, with new conflict-free counsel appointed to argue the motion. To be clear, to receive relief at this hearing, Waterman *will* be required to show that he was prejudiced by the alleged ineffective assistance of counsel, as that claim will be controlled by *Strickland*, 466 U.S. at 687. If on remand the district court denies the motion, finding no ineffective assistance of counsel, a new trial is unnecessary. But if the district court grants the motion, finding ineffective assistance of counsel, a new trial must be held and trial counsel appointed.

DID CUMULATIVE ERROR DEPRIVE WATERMAN OF HIS RIGHT TO A FAIR TRIAL?

Waterman argues cumulative error denied him a fair trial. Cumulative trial errors, when considered together, may require re-

versal of the defendant's conviction when the totality of the circumstances establish that the defendant was substantially prejudiced by the errors and denied a fair trial. *Alfaro-Valleda*, 314 Kan. at 551-52.

We have identified only two possible trial errors. First, we found that any error in failing to instruct the jury on the lesser offense of criminal restraint was harmless. Second, we found the district court committed structural error by requiring Waterman to argue his pro se motion for new trial without the assistance of conflict-free legal counsel, and we have granted relief for this error. Even when these errors are viewed collectively, we find that Waterman is entitled to no relief under the cumulative error rule.

DID WATERMAN RECEIVE AN ILLEGAL SENTENCE?

Waterman argues that his sentence is illegal because the district court improperly included three prior misdemeanors (which it aggregated into a felony) when calculating his criminal history score. The State concedes that Waterman's sentence is illegal.

The court may correct an illegal sentence at any time while the defendant is still serving the sentence. K.S.A. 2022 Supp. 22-3504. An illegal sentence claim may be raised for the first time on appeal. *State v. Dickey*, 301 Kan. 1018, 1031, 350 P.3d 1054 (2015). Whether a sentence is illegal under K.S.A. 22-3504 is a question of law subject to unlimited review. *State v. Mitchell*, 315 Kan. 156, 158, 505 P.3d 739 (2022).

Waterman raises separate challenges to the inclusion of misdemeanor convictions from Missouri and Oklahoma that were used to calculate his criminal history score. As for the Missouri conviction, Waterman argues the conviction was uncounseled and obtained in violation of his Sixth Amendment right to counsel and, therefore, could not be used in calculating his criminal history score. The Kansas Supreme Court has noted that "[a]n uncounseled misdemeanor conviction obtained in violation of the misdemeanant's Sixth Amendment right to counsel may not be collaterally used for sentence enhancement in a subsequent criminal proceeding." *State v. Youngblood*, 288 Kan. 659, Syl. ¶ 3, 206 P.3d 518 (2009). Here, the State agrees that based on the current record, Waterman's Missouri misdemeanor conviction was uncounseled.

Thus, the district court erred by including this conviction in Waterman's criminal history score.

Waterman next argues that his accelerated deferred judgment for domestic assault and battery from Oklahoma should not have been included in his criminal history score. He relies on *State v. Hankins*, 304 Kan. 226, 233-39, 372 P.3d 1124 (2016), in support of his argument that the Oklahoma offense is a deferred judgment and cannot be included in his criminal history score. Waterman's reliance on *Hankins* is misplaced, as it fails to address the difference between a deferred judgment and an accelerated deferred judgment under Oklahoma law. In *Hankins*, the defendant received a deferred judgment, which, as the Kansas Supreme Court explained, operates similarly to diversion and defers not only a defendant's sentence but also judgment. A deferred judgment, similar to a diversion agreement, cannot be included in a defendant's criminal history score. 304 Kan. at 238-39.

Waterman's conviction was not a deferred judgment, it was an accelerated deferred judgment under Okla. Stat. Ann. § 991c(G), which operates as a judgment of guilt. The statute provides: "Upon any violation of the deferred judgment, other than a technical violation, the court may enter a judgment of guilt . . . ." Okla. Stat. Ann. § 991c(G). Thus, it appears that Waterman violated the conditions of his deferred judgment and received an accelerated deferred judgment—that is, a conviction/judgment of guilt. As a result, the Oklahoma conviction was properly included in his criminal history score.

Because the district court improperly included Waterman's uncounseled Missouri misdemeanor conviction, his sentence is illegal. Thus, we vacate Waterman's sentence and remand for resentencing using a correct criminal history score.

CONCLUSION AND REMAND ORDER

Waterman's sentence is vacated. We remand this case to district court for resentencing and to hold a new hearing on Waterman's pro se motion for new trial alleging ineffective assistance of counsel, with new conflict-free counsel appointed to argue the motion. If on remand the district court denies the motion, finding no ineffective assistance of counsel, a new trial is unnecessary and

the district court can resentence Waterman using a correct criminal history score. But if the district court grants the motion for new trial, finding ineffective assistance of counsel, a new trial must be held and trial counsel appointed.

Affirmed in part, reversed in part, sentence vacated, and case remanded with directions.

No. 126,093

STATE OF KANSAS, *Appellee*, v. JOSEPH JAMES CONKLING, *Appellant*.

SYLLABUS BY THE COURT

1. CONSTITUTIONAL LAW—*Defendant's Rights under* Apprendi—*Appellate Review*. Whether a district court violated a defendant's constitutional rights under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), at sentencing raises a question of law subject to unlimited review.

2. CRIMINAL LAW—*Sentencing—Judge's Consideration of Facts*. At sentencing, a judge may consider facts reflected in the jury verdict or admitted by the defendant.

3. SAME—*Imprisonment for Sexually Violent Crime—Mandatory Period of Postrelease Supervision*. Persons sentenced to imprisonment for a sexually violent crime on or after July 1, 2006, when the offender was 18 years of age or older, and who are released from prison, shall be released to a mandatory period of postrelease supervision for the duration of the person's natural life.

Appeal from Bourbon District Court, MARK ALAN WARD, judge. Submitted without oral argument. Opinion filed December 15, 2023. Affirmed.

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

Brandon D. Cameron, assistant county attorney, and *Kris W. Kobach*, attorney general, for appellee.

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

SCHROEDER, J.: Following Joseph James Conkling's no-contest plea to one count of rape and one count of aggravated indecent liberties with a child, the district court sentenced him to a total of 226 months in prison and imposed lifetime postrelease supervision. Conkling timely appeals, claiming the district court engaged in unconstitutional judicial fact-finding in violation of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), to determine he was over 18 years of age at the time of his crimes and impose lifetime postrelease supervision. Conkling admitted he was 40 years old at the time he was charged shortly after

the crimes were committed, and he testified under oath he was 41 years old at the time of his sentencing. We find his multiple admissions of his age sufficient to support the district court's finding that Conkling was over the age of 18 when he committed his crimes without engaging in unconstitutional fact-finding in violation of *Apprendi*, and the district court correctly imposed lifetime postrelease supervision at sentencing. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In October 2021, the State charged Conkling with 98 counts of various sex offenses, including 50 counts of rape, 10 counts of aggravated criminal sodomy, 8 counts of aggravated indecent liberties with a child, and 30 counts of sexual exploitation of a child. Conkling pled no contest to one count of rape in violation of K.S.A. 2021 Supp. 21-5503(a)(1)(A) and one count of aggravated indecent liberties with a child who is 14 or more years of age but less than 16 years of age in violation of K.S.A. 2021 Supp. 21-5506(b)(1). In exchange for Conkling's plea, the State dismissed the remaining charges. The plea agreement stated Conkling could receive up to 36 months' postrelease supervision related to each charge and he understood the district court was not bound by the terms of the plea agreement.

At the plea hearing, Conkling stated he freely and voluntarily signed the plea agreement. The State provided a factual basis for the charges and included information about the victim's age and date of birth but not Conkling's. Conkling agreed the State's factual recitation was the evidence the State would have presented against him. The district court accepted the factual basis and found Conkling guilty of both charges.

At sentencing, the district court imposed consecutive sentences of 165 months' imprisonment for the rape conviction and 61 months' imprisonment for the aggravated indecent liberties with a child conviction and ordered lifetime postrelease supervision.

ANALYSIS

On appeal, Conkling raises only one issue, claiming the district court violated *Apprendi* by engaging in judicial fact-finding

to extend his postrelease supervision to a term of life. Conkling specifically argues the district court's determination he was over the age of 18 when he committed his sexually violent crimes was a factual finding in violation of *Apprendi*. Conkling asks us to vacate his lifetime postrelease sentence and remand the case to the district court to impose a postrelease supervision term of 60 months. The State asserts the district court did not violate *Apprendi* by ordering lifetime postrelease supervision and any constitutional error was harmless.

Although Conkling failed to raise the issue before the district court, the parties agree the issue is properly before us as it is purely a legal question that is determinative of the case and concerns fundamental rights. See *State v. Godfrey*, 301 Kan. 1041, 1043, 350 P.3d 1068 (2015). Our appellate courts have addressed the same issue for the first time on appeal on the basis the claim was a purely legal question based on undisputed facts. See *State v. Phillips*, 299 Kan. 479, 493, 325 P.3d 1095 (2014); *State v. Schmeal*, No. 121,221, 2020 WL 3885631, at *8 (Kan. App. 2020) (unpublished opinion). We will address the issue under the same exception.

In *Apprendi*, the United States Supreme Court determined: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. But, in *Blakely v. Washington*, 542 U.S. 296, 303, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), the United States Supreme Court noted, for *Apprendi* purposes, a sentencing judge can consider "facts reflected in the jury verdict or admitted by the defendant." Whether a district court violated a defendant's constitutional rights under *Apprendi* at sentencing raises a question of law subject to unlimited review. *State v. Huey*, 306 Kan. 1005, 1009, 399 P.3d 211 (2017).

K.S.A. 2022 Supp. 22-3717(d)(1)(G)(i) states: "[P]ersons sentenced to imprisonment for a sexually violent crime on or after July 1, 2006, when the offender was 18 years of age or older, and who are released from prison, shall be released to a mandatory period of postrelease supervision for the duration of the person's natural life." K.S.A. 2022 Supp. 22-3717(d)(1)(G)(ii) states: "Persons sentenced to imprisonment for a sexually violent crime . . .

when the offender was under 18 years of age, and who are released from prison, shall be released to a mandatory period of postrelease supervision for 60 months."

Conkling contends his convictions "did not require proof that he was over the age of 18" when the crimes were committed and a judicial admission regarding his age does not equate to a guilty plea or elemental stipulation. The State responds Conkling filed an application for appointed defense counsel at the beginning of his case stating he was 40 years old, later admitted under oath at his plea hearing he was 41 years old, and submitted a signed petition to enter plea agreement stating he was 41 years old.

Conkling acknowledges other panels of this court have rejected similar arguments. See *State v. Entsminger*, No. 124,800, 2023 WL 2467058, at * 8 (Kan. App. 2023) (unpublished opinion), *petition for rev. filed* April 10, 2023; *State v. Reinert*, No. 123,341, 2022 WL 1051976, at *3 (Kan. App.) (unpublished opinion), *rev. denied* 316 Kan. 762 (2022); *State v. Kewish*, No. 121,793, 2021 WL 4352531, at *4 (Kan. App. 2021) (unpublished opinion); *State v. Haynes*, No. 120,533, 2020 WL 741458, at *2-3 (Kan. App. 2020) (unpublished opinion); *Schmeal*, 2020 WL 3885631, at *8-9; *State v. Zapata*, No. 120,529, 2020 WL 741486, at *8-9 (Kan. App. 2020) (unpublished opinion). While these unpublished opinions are not binding on our decision, we find the analyses set forth therein persuasive.

Conkling's admissions lead us to conclude there is no *Apprendi* violation here. In fact, Conkling's admissions are like those in *Haynes*, where Haynes admitted his age (1) in a financial affidavit he signed and submitted to the district court, (2) in his signed plea document, and (3) at the plea hearing itself. 2020 WL 741458, at *3. Here, Conkling filed an application for appointed defense services in October 2021, stating under penalty of perjury he was born in 1981 and was 40 years old. Conkling also submitted a signed petition to enter plea agreement, which stated: "The Defendant represents to the Court: . . . My true name is: JOSEPH JAMES CONKLING and I am 41 years of age." In the plea agreement, Conkling stipulated sufficient facts existed which, if presented to the fact-finder in a trial, could result in convictions for the offenses charged in the State's amended complaint. At the plea hearing, while under oath, the district court directly asked

Conkling how old he was, to which Conkling responded, "41." Conkling also completed his offender registration under the Kansas Offender Registration Act, K.S.A. 2022 Supp. 22-4901 et seq., confirming he was born in January 1981.

The record is clear. By Conkling's own admissions, he was over 18 years old when he committed his crimes. The district court's finding that Conkling was over the age of 18 when he committed his crimes did not violate *Apprendi*. As such, we find it unnecessary to reach the State's alternative argument of harmless error.

Affirmed.

No. 126,356

STEPHEN ALAN MACOMBER, *Appellant*, v. STATE OF KANSAS and JEFF ZMUDA, SECRETARY OF CORRECTIONS, et al., *Appellees*.

SYLLABUS BY THE COURT

1. CRIMINAL LAW—*Economic Stimulus Payments Not Government Benefits Exempt from Forced Savings Account under IMPP*. An inmate's COVID-19 economic stimulus payments are not "government benefits" exempt from a forced savings account under the Kansas Department of Corrections' Internal Management Policy and Procedure (IMPP) 04-103A.

Appeal from Shawnee District Court, LORI D. DOUGHERTY-BICHSEL, judge. Submitted without oral argument. Opinion filed December 15, 2023. Affirmed.

Stephen Alan Macomber, appellant pro se.

Fred W. Phelps, Jr., deputy chief legal counsel, of Kansas Department of Corrections, for appellees.

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

GARDNER, J.: In 2021, Stephen Alan Macomber, a prisoner at the El Dorado Correctional Facility, was sent funds from the United States Department of the Treasury under various COVID-19 pandemic relief acts passed by the United States Congress. When the prison received those funds, it diverted one tenth of their amount into Macomber's forced savings trust account which Macomber cannot access until he is released from prison. Macomber then filed a pro se Petition to Remedy a Breach of Trust seeking to get those funds out of forced savings. The State of Kansas responded by moving to dismiss the petition and the Shawnee County District Court granted that motion, giving rise to this appeal. After careful review, we affirm the dismissal.

FACTUAL AND PROCEDURAL BACKGROUND

At the height of the COVID-19 pandemic, the United States Congress enacted three pieces of legislation aimed at blunting the pandemic's potential fallout. First, in March 2020, it enacted the Coronavirus Aid, Relief, and Economic Security Act (CARES),

which provided funds up to $1,200 to all citizens, permanent residents, and qualifying resident aliens. 26 U.S.C. § 6428(a)(1). Second, in December 2020, Congress enacted the Consolidated Appropriations Act (CAA), which provided funds up to $600. 26 U.S.C. § 6428A(a)(1). Third, in March 2021, Congress passed the American Rescue Plan Act (ARPA), which provided funds up to $1,400. 26 U.S.C. § 6428B(a), (b)(1). We refer to these collectively as the COVID-19 economic stimulus payments. In 2021, Macomber received two deposits totaling $3,200 from the United States Department of the Treasury from these three COVID-19 relief acts.

On behalf of Macomber and other inmates, the Kansas Department of Corrections (KDOC) maintains "forced savings" accounts. These accounts are set up as a trust and are regulated under the Kansas Uniform Trust Code, K.S.A. 58a-101 et seq. See K.S.A. 58a-102; K.S.A. 75-5211(c)(1); IMPP 04-103A, p. 1. The KDOC's Internal Management Policy and Procedure (IMPP) defines forced savings as a "savings account in which 10 percent of incoming monies less any outstanding obligations is deposited and maintained until the resident's release from custody." IMPP 04-103A, p. 1. Under this forced savings procedure, KDOC deposited $320 of the $3,200 that Macomber received from the COVID-19 economic stimulus payments into Macomber's forced savings account.

Macomber filed grievances about this with the KDOC. When those failed, he filed suit in the district court alleging a breach of trust under K.S.A. 58a-101 et seq., arguing that the stimulus money was a "government benefit" exempt from forced savings under IMPP 04-103A. The State responded by moving to dismiss Macomber's petition, arguing that the COVID-19 economic stimulus payments were not exempt from forced savings.

The district court held a hearing on the State's motion to dismiss. Although we have no transcript of this hearing in the record on appeal, we see from the district court's register of actions that the parties, including Macomber, appeared via Zoom and that the May 2022 version of IMPP 04-103A was admitted into evidence. The parties agreed that this IMPP was substantively the same as the version in effect when the forced savings of Macomber's COVID-19 economic stimulus payments occurred.

The district court granted the State's motion to dismiss Macomber's petition. It held that the KDOC had the authority to withhold 10 percent of the COVID-19 economic stimulus payments to Macomber because that money was an advanced tax credit and not an exempt "government benefit." Additionally, the district court held that Macomber had not lost the $320 because it would be returned to him under K.S.A. 58a-801 and K.S.A. 2022 Supp. 58a-802 upon his release from incarceration.

Macomber timely appeals, raising solely a question of statutory interpretation and no constitutional issues.

DID THE DISTRICT COURT ERR IN DISMISSING MACOMBER'S PETITION?

Macomber argues that the KDOC mismanaged his trust account (his forced savings account) under the Kansas Uniform Trust Code by subjecting an exempt government benefit to forced savings under IMPP 04-103A. The Code places a duty on a trustee to administer a trust "in good faith, in accordance with its terms and purposes and the interests of the beneficiaries, and in accordance with this code." K.S.A. 58a-801. The Code further requires a trustee to "administer the trust consistent with the terms of the trust and solely in the interests of the beneficiaries." K.S.A. 2022 Supp. 58a-802(a).

Resolution of this substantive issue involves interpretation of several statutes, which presents a question of law over which we have unlimited review. *Nauheim v. City of Topeka*, 309 Kan. 145, 149, 432 P.3d 647 (2019). When interpreting statutes or regulations, we apply the fundamental rule of statutory construction that the intent of the Legislature governs if that intent can be determined. To ascertain legislative intent, we give common words their ordinary meaning. *John Doe v. M.J.*, 315 Kan. 310, 320, 508 P.3d 368 (2022). "Dictionary definitions are good sources for the 'ordinary, contemporary, common' meanings of words." *Midwest Crane & Rigging, LLC v. Kansas Corporation Comm'n*, 306 Kan. 845, 851, 397 P.3d 1205 (2017).

And the procedural posture of the case compels a similar standard of review. "Whether a district court erred by granting a motion to dismiss for failure to state a claim is a question of law subject to unlimited review." *Jayhawk Racing Properties v. City*

of Topeka, 313 Kan. 149, 154, 484 P.3d 250 (2021). We view the well-pleaded facts in a light most favorable to the plaintiff and assume as true those facts and any inferences reasonably drawn from them. If those facts and inferences state any claim upon which relief can be granted, then dismissal is improper. Dismissal is proper only when the allegations in the petition demonstrate the plaintiff does not have a claim. *Kudlacik v. Johnny's Shawnee, Inc.*, 309 Kan. 788, 790, 440 P.3d 576 (2019); see K.S.A. 2022 Supp. 60-212(b)(6).

The Kansas Legislature authorized the Secretary of Corrections to implement a forced savings account program for inmates' compensation. See K.S.A. 75-5211(b). That statute provides that the Secretary "shall establish programs . . . for withdrawing amounts from the compensation paid to inmates from all sources." K.S.A. 75-5211(b). Although the district court relied on this statute, the COVID-19 economic stimulus payments are not "compensation," as Macomber did not receive them in return for services rendered. See Black's Law Dictionary 354 (11th ed. 2019) (defining compensation as "[r]emuneration and other benefits received in return for services rendered; esp., salary or wages"). Neither party points to a statute authorizing the KDOC to withdraw any amount from funds inmates receive that are not compensation.

Instead, both parties rely on a regulation—IMPP 04-103A. Kansas has promulgated regulations for its administration of the KDOC, and administrative regulations adopted in accordance with the procedures set forth by the Legislature have the force and effect of law. K.S.A. 77-425; *Village Villa v. Kansas Health Policy Authority*, 296 Kan. 315, 320, 291 P.3d 1056 (2013). Neither party challenges the validity of IMPP 04-103A, so we consider it to be valid.

This regulation defines "Forced Savings" as "[a] savings account in which 10 percent of incoming monies less any outstanding obligations is deposited and maintained until the resident's release from custody." IMPP 04-103A. The IMPP requires the prison to divert 10 percent of all funds an inmate receives from outside the facility into forced savings except for child support payments, government benefits, and money from certain state property claims. IMPP 04-103A.VI.A.

The parties tacitly agree that the COVID-19 payments were funds that inmate Macomber received from outside the facility. The parties dispute only whether those funds are "[g]overnment benefits." See IMPP 04-103A.VI.A. That term is not defined in IMPP 04-103A.

We find some guidance, however, in another regulation which prohibits certain government benefits from being used to pay an inmate's fines, fees, or payments: "No resident funds shall be subjected to collection for fines, fees or payments if those funds were accrued from any of the following sources: 1. Social security benefits; 2. Veterans' Administration benefits; or, 3. Workers' compensation benefits paid to the resident garnishee." IMPP 04-106A.II.D.

Under this regulation, funds paid by social security, Veterans Administration, and workers compensation are each stated to be "benefits," and since they are paid by the government, they are "[g]overnment benefits." See IMPP 04-106A.II.D.; IMPP 04-103A.VI.A. Thus those funds cannot be used for fines, fees, or payments. And because those funds are government benefits, in addition to being exempt from being used to pay an inmate's fines, fees, or payments under IMPP 04-106A, they are also exempt from forced savings under IMPP 04-103A.

We next look to the statutes that authorized Macomber's receipt of the COVID-19 economic stimulus payments to determine whether they are similarly "government benefits." All three statutes style the COVID-19 economic stimulus payments as advances of a credit toward income tax refunds. 26 U.S.C. § 6428(a)(1) states "[i]n the case of an eligible individual, there shall be allowed as a credit against the tax imposed by subtitle A for the first taxable year beginning in 2020 an amount equal to the sum of . . . $1,200." Likewise, 26 U.S.C. § 6428A(a)(1) states "in the case of an eligible individual, there shall be allowed as a credit against the tax imposed by subtitle A for the first taxable year beginning in 2020 an amount equal to the sum of . . . $600." Similarly, 26 U.S.C. § 6428B(a) states "there shall be allowed as a credit against the tax imposed by subtitle A for the first taxable year beginning in 2021 an amount equal to the 2021 rebate amount determined for such taxable year." 26 U.S.C. § 6428B(b)(1) elaborates, in pertinent part, "the term '2021 rebate amount' means,

with respect to any taxpayer for any taxable year, the sum of . . . $1,400." The plain language of these statutes shows that the disputed COVID-19 relief money is a tax credit.

So is a tax credit a "[g]overnment benefit" as that term is used in IMPP 04-103A.VI.A.? A "tax credit" is "[a]n amount subtracted directly from one's total tax liability, dollar for dollar, as opposed to a deduction from gross income." Black's Law Dictionary 1762 (11th ed. 2019). Described differently, "[a] tax credit is the public sector equivalent of a coupon; it reduces the amount that is otherwise owed." *United States v. Hoffman*, 901 F.3d 523, 538 (5th Cir. 2018). On the other hand, a "benefit" is defined as "[f]inancial assistance that is received from an employer, insurance, or a public program (such as social security) in time of sickness, disability, or unemployment." Black's Law Dictionary 194 (11th ed. 2019). See Government benefits, https://www.usa.gov/benefits (including retirement benefits, TANF, food stamps, Medicaid and CHIP, and survivor benefits).

Arguably, the COVID-19 economic stimulus payments were financial assistance from a public program in time of sickness or unemployment, within the broadest definition of government benefits. But they were not funds sent to Macomber individually to assist *him* with his sickness or unemployment, or after he qualified for government financial assistance, unlike social security benefits, Veterans Administration benefits, or workers compensation benefits. Rather, the COVID-19 economic stimulus payments were paid to all qualifying citizens, permanent residents, and resident aliens, and were paid regardless of that person's need or their qualification for assistance, as the district court aptly explained:

"A tax credit or advanced tax refund is arguably not the same as a benefit derived under, for example, the Temporary Assistance for Needy Families (TANF) or Social Security Disability Insurance (SSDI) programs, which both maintain strict eligibility requirements. In contrast to these needs-based programs, stimulus monies were paid to all citizens, permanent residents, and qualifying resident aliens, according to the IRS. Those earning above a set threshold received less money, but they still maintained their eligibility. So, while typical government benefit programs are arguably aimed at shoring up a low-income or disabled person's safety net, *stimulus* payments are designed to *stimulate* the economy. See *In re Arthur*, No. 09-04332-ALS7, 2010 WL 4674450, at *4 (Bankr. S.D. Iowa Oct. 20, 2010) (primary motive for 2008 stimulus payment was to stimulate the

economy during a recession); see also *In re Wooldridge*, 393 B.R. 721, 728 (Bankr. D. Idaho 2008) (same)."

We agree with this reasoned analysis. The COVID-19 economic stimulus payments to Macomber are not "government benefits" as that term is used in IMPP 04-103A.VI.A., or as included in IMPP 04-106A.II.D. Rather, they are tax credits designed to stimulate the economy.

"[T]he very name 'COVID-19 economic stimulus payments' suggests that the payments were intended to stimulate the economy by providing additional money for consumer spending rather than establish a government-sponsored program akin to public assistance. *See* Benjamin Curry, Korrena Bailie, *What Is Fiscal Stimulus? How Does It Work?*, Feb. 19, 2022, https://www.forbes.com/advisor/personal-finance/fiscal-stimulus-packages ('Direct Subsidies—aka Stimulus Checks[:] Perhaps the most effective means of providing fiscal stimulus is via direct payments to citizens. Give a person money, and chances are they'll spend it on something, so the theory goes'). Indeed, '[o]ne of the cornerstones of the CARES Act were the much-lauded stimulus checks[.]' *Id*. While I recognize that many recipients used the COVID-19 economic stimulus payments on household expenses, that reality does not transform the stimulus payments into public assistance." *Groff v. Groff*, No. 956 MDA 2021, 2022 WL 1641002, at *11 (Pa. Super. Ct. 2022) (unpublished opinion) (Bowes, J., dissenting).

Thus, under the authority of IMPP 04-103A, KDOC properly deposited "10 percent of incoming monies" from the COVID-19 economic stimulus payments into Macomber's forced savings account and can maintain it until his release from custody.

Because the allegations in the petition demonstrate that Macomber does not have a claim, we affirm the district court's decision to dismiss Macomber's petition.

Affirmed.

No. 126,025

In the Interest of X.L., a Minor Child.

SYLLABUS BY THE COURT

1. PARENT AND CHILD—*Revised Kansas Code for Care of Children Authorizes Appellate Jurisdiction Over Five Types of Decisions*. In cases arising under the Revised Kansas Code for Care of Children, the legislature has authorized appellate jurisdiction over only five types of decisions: those involving temporary custody, adjudication, disposition, findings of unfitness, and the termination of parental rights. An order terminating parental rights is the last appealable order in a child-welfare case. A finding of a lack of reasonable efforts to place a child for adoption issued after an order terminating parental rights is not subject to direct appellate review.

2. SAME—*No Appeals of Post-Termination Decisions—Legislature's Intent for Permanency in Proceedings*. By not providing for appeals of post-termination decisions, the legislature has underscored the parties' responsibility to work toward the child's recognizable need for permanency, instead of struggling back and forth among themselves at every stage in post-termination proceedings.

3. APPEAL AND ERROR—*Reviewability of Issue on Appeal—Appellate Review*. The reviewability of an issue on appeal generally encompasses considerations of notice, preservation, and timeliness. Appellate jurisdiction defines appellate courts' power to consider an appeal at all.

4. JURISDICTION—*Question of Subject-Matter Jurisdiction—Requirement of Mechanism to Appeal*. Before a party may argue a question of subject-matter jurisdiction on appeal, there must be a procedural mechanism for posing that question to the appellate court. In other words, there must be some vehicle through which the party can present the jurisdictional question to the appellate court.

Appeal from Wyandotte District Court; JANE A. WILSON, judge. Oral argument held August 15, 2023. Opinion filed December 22, 2023. Appeal dismissed.

Marc Altenbernt and *Melanie D. Caro*, Kansas Department for Children and Families, for appellant.

Kate Zigtema, of Zigtema Law Office LC, of Shawnee, and *Rae A. Nicholson*, of Rae Nicholson Law, LLC, of Overland Park, for appellees.

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

WARNER, J.: Appellate courts review the decisions of district courts and agency tribunals to ensure those decisions are consistent with the governing law and supported by the evidence presented. But not all decisions are subject to appellate review. Rather, the contours and extent of the right to appeal—including appellate courts' power to review certain decisions at all—are defined by the legislature.

One example of our limited appellate jurisdiction arises under the Revised Kansas Code for Care of Children, K.S.A. 38-2201 et seq. In cases where children have been removed from their parents' homes and placed in State custody, the legislature has determined that finality and permanency for children in need of care should be prioritized over the right to unfettered appellate review. Our legislature has thus statutorily limited litigants' ability to appeal child-welfare cases to only five kinds of decisions, ending with the termination of parental rights. There is no right to appeal rulings after termination.

The case before us illustrates this limitation. X.L. lived with a foster family for the first three years of her life, while her siblings were in other foster placements. After the district court terminated her biological parents' rights, the Department for Children and Families planned to place X.L. and her siblings together with a family that wanted to adopt all of them. X.L.'s foster parents—who wanted to adopt only X.L.—were unsuccessful in challenging the Department's placement plan in court and turned to other avenues to advance their interests, including the media and the legislature. These efforts eventually led Department Secretary Laura Howard to personally direct that X.L. should be adopted by the foster parents. The previously planned adoptive parents then moved for a finding that this abrupt shift was not the result of reasonable efforts by the Department to achieve permanency for X.L. because it made the decision with limited information and circumvented its own policies. The district court granted the adoptive parents' motion and placed X.L. with her siblings.

The Department appeals that post-termination decision. Likely recognizing there is no right to appeal this type of ruling, the Department creatively frames its question for review as involving a different kind of judicial power—namely, did the district court have subject-matter jurisdiction to consider the adoptive

parents' motion? But regardless of whether this question is framed as one involving the district court's authority or the soundness of its ruling, the challenged ruling is a post-termination decision. We do not have the appellate jurisdiction to review that decision. Thus, we dismiss the appeal.

FACTUAL AND PROCEDURAL BACKGROUND

The child at the center of this case, X.L., is the youngest of several siblings. When X.L. was born in 2019, her brothers and sisters had already been adjudicated children in need of care and were the subjects of ongoing cases regarding their welfare. The district court placed X.L. into the custody of the Department for Children and Families three days after her birth, and the Department immediately placed her with a foster family.

The district court terminated the parental rights of X.L.'s biological parents in January 2021. The court ruled that X.L. would remain in the Department's custody under K.S.A. 38-2270(a)(1) following that termination until a permanent placement could be made. In the meantime, X.L. remained with the same foster family she had lived with since her birth. Her three youngest siblings lived with a different foster family; her oldest siblings were aging out of the foster-care system.

The Department seeks a family to adopt the four youngest children together

Though X.L. had never lived with her siblings, they had visited each other regularly since shortly after termination. X.L., who was under two years old in January 2021, was too young to recognize her siblings for the first several months of visits. But by mid-2022, X.L. saw six of her older siblings at least twice per month and began developing closer relationships with them.

As the children's cases progressed toward permanency plans, the caseworkers at the Department and at Cornerstones of Care—an agency contracted to oversee X.L.'s case—believed it was in X.L.'s best interests to strengthen these relationships and ultimately live with her three youngest siblings. This belief was consistent with Department procedures that generally prioritized plac-

ing siblings together when possible. But neither X.L.'s foster parents nor the other children's foster placement could adopt all four siblings together. So the caseworkers continued to look for a family that could.

X.L.'s foster parents were unhappy with the Department's plan to find one adoptive family for all four children; they had raised X.L. since birth and wanted to adopt her alone. Thus, in April 2022, X.L.'s foster parents filed a motion claiming the Department had not made reasonable efforts to find a permanent placement for X.L., seeking to immediately adopt her. The Department and caseworkers opposed this motion, detailing everything that had been done to find a family that could adopt X.L. and her three siblings together.

The district court held an evidentiary hearing in early August 2022 and denied the foster parents' motion later that month. The court explained that the caseworkers should continue to explore options that would keep X.L. with her siblings.

The foster parents' efforts to adopt X.L. and the Secretary's change in position

That month, the caseworkers found a family in another part of the state that was willing and able to adopt the four children. Caseworkers held a meeting to discuss the case and officially selected that family to adopt X.L. and her siblings. They then began the transition process, which included visits with the adoptive family. X.L. was "very excited" about the transition and—now almost three years old—had developed closer relationships with her siblings.

X.L.'s foster parents opposed this placement. After the district court denied their motion to adopt X.L., they engaged in various efforts outside the legal process to persuade the Department to change its position. The foster parents spoke with the news media, and stories about the case began to appear. They also approached the Kansas Legislature, which later held a closed legislative session about the issue. And the foster parents, along with others, directly contacted the planned adoptive parents (who for ease of reference we merely call "the adoptive parents"), pleading with them not to adopt X.L.

In October 2022, Department Secretary Laura Howard—who learned about the case through the media coverage—intervened in X.L.'s case and directed the Department to place X.L. with the foster parents for adoption. This was the first time in the Secretary's four-year tenure that she had personally directed the outcome of an adoption case. She based her decision on portions of X.L.'s file but did not otherwise consult caseworkers, the guardian ad litem, X.L.'s siblings, the foster parents, or the adoptive parents.

The motion that is the subject of this appeal

About a week after the Secretary's decision, the adoptive parents requested the district court to find that the Department's sudden change in position did not result from reasonable efforts and to order that X.L. be placed directly with them for adoption. They argued that the Secretary's abrupt decision to permanently place X.L. with her foster parents was inconsistent with various internal procedures and the previous case plan.

The district court stayed its previous order authorizing the Department to consent to X.L.'s adoption pending a hearing and decision on the motion. The court also granted the foster parents interested-party status. But it admonished them for sharing confidential information about X.L. and her case with the media, barring them from attending or participating in upcoming proceedings.

In January 2023, the district court held a hearing on the adoptive parents' motion. All involved recognized that this was a difficult case. A therapist and X.L.'s most recent guardian ad litem had previously indicated that they believed X.L. should be placed with her foster parents, though neither testified. Several others disagreed. The court heard testimony from the siblings' case manager and the Department's foster-care liaison assigned to the case; both thought it would be best for X.L. to live with her siblings. The caseworkers also explained that many Department policies had been circumvented by the Secretary's decision—for example, there was no sibling-split staffing meeting or proper best-interests staffing waiver before the placement decision was made. In fact,

the case manager had refused to sign the sibling-split request because she was concerned by the Department's abrupt change in position.

In addition, the court heard testimony from one of X.L.'s older sisters, who would soon age out of foster care. The sister testified that she was concerned that she might not be able to see X.L. again if the foster parents adopted her, based on the sister's past experiences with X.L.'s foster parents. In contrast, the family that had planned to adopt X.L. and her three siblings had developed a relationship with the older sister, organized visits with her, and encouraged her to move nearby.

The Secretary also testified. She admitted that her decision was unusual and based on limited information. But she explained that she strayed from Department policies—including generally keeping siblings together—because X.L.'s case was an "extreme circumstance" that warranted a sibling split.

A few weeks after the hearing, the district court granted the adoptive parents' motion and ordered that X.L. be placed with them for adoption, along with her siblings. The court found that it was in X.L.'s best interests to be with her siblings, and it concluded that the Secretary acted against those interests by making a unilateral decision under media pressure. The court also found the Department's decision to place X.L. with her foster parents instead of with her siblings was not the result of reasonable placement efforts. The court explained that the Secretary's decision had circumvented internal policies and procedures, including splitting siblings without a staffing meeting, and had been made without consulting anyone directly involved in the case. And despite the Secretary's belief otherwise, this case was unfortunately not an extreme circumstance; foster parents often care for children from birth, and have close bonds with them, before they are adopted by someone else. The Department—not the foster parents—now appeals this decision.

DISCUSSION

The procedural posture of this case, coupled with the nature of the parties' arguments on appeal, have created quite the quagmire. From a procedural standpoint, we note that it is unusual for the Department to challenge a district court's ruling regarding the adoptive placement of

a child, particularly when that placement was one the Department had, until relatively recently in the case, already been working toward. It is also unusual for the Department to advocate for placement with parties who have chosen, for whatever reason, not to participate in the appeal. But no one contests the Department's right as an interested party to participate in these proceedings. And there is no rule compelling the foster parents' continued participation—particularly when their participation had been previously limited by district court.

The Department's arguments on appeal are also somewhat confounding. The Department's brief makes clear it believes the district court erred when it found that the Department had not engaged in reasonable efforts or made reasonable progress toward a permanent placement for X.L. But it purports to not directly challenge the substance of that decision. Instead, the Department argues that the district court lacked subject-matter jurisdiction to rule on the adoptive parents' motion at all. The Department asserts that we should reverse the district court's decision and remand the case so the Secretary's plan of placing X.L. with her former foster parents may move forward.

The adoptive parents counter that we lack appellate jurisdiction to consider this appeal, which involves a decision rendered about two years after the parental rights of X.L.'s biological parents were terminated. They also assert that, even if we could consider the Department's claim, the district court had authority to act and did so properly.

So despite all that has happened leading up to this point, this appeal presents only two questions for our consideration, examining the jurisdiction of two different courts to hear the parties' claims: Does this court have jurisdiction to review a direct appeal of the district court's post-termination decision? And if so, did the district court have jurisdiction to make that decision? We answer the first question "no"—we do not have authority to review the district's court ruling—and thus do not reach the second question.

1. *Post-termination decisions, the fifth and last phase of a child-welfare case, seek to find a permanent placement that is in the child's best interests.*

The contours of our jurisdiction in this case are guided by the procedural framework in the Kansas child-welfare statutes. We review this unique structure before considering the parties' arguments.

The Revised Kansas Code for Care of Children, K.S.A. 38-2201 et seq., is "a legislatively designated framework of sequential steps of judicial proceedings with each step occurring in a specific order leading toward permanency in the child's placement." *In re N.A.C.*, 299 Kan. 1100, Syl. ¶ 5, 329 P.3d 458 (2014). This framework, consisting of five phases, unfolds "in a specific, temporal order." *In re N.E.*, 316 Kan. 391, 393, 516 P.3d 586 (2022).

- First, when an acute need arises, putting a child in jeopardy, a district court must decide who will have temporary custody of the child. The court must determine "whether it should temporarily place the child in the custody of specific persons or entities listed by statute, such as the Secretary of [the Department]." 316 Kan. at 393; see K.S.A. 38-2243(f), (g)(1).

- Second, the case enters the "adjudication phase," where the district court adjudicates "whether the child meets one or more statutory definitions of a 'child in need of care.'" 316 Kan. at 393; see K.S.A. 38-2251; see also K.S.A. 38-2202(d)(1)-(14) (defining what it means to be a child in need of care).

- Third, if the child has been adjudicated to be in need of care, the case turns to the "dispositional phase," where the court decides who should have custody of the child as the case continues and also enters orders regarding plans on how the child's needs should be addressed—like possible reintegration with the child's parents. 316 Kan. at 393; see K.S.A. 38-2253(a).

- Fourth, if a party has alleged that reintegration is no longer a feasible option, the case enters the "termination phase." 316 Kan. at 393. At this point, the court must determine whether the parents are fit to care for the child and, if not, whether this unfitness will continue for the foreseeable future. K.S.A. 38-2269(a)-(c). The court must also decide whether terminating parental rights would be in the child's best interests. K.S.A. 38-2269(g)(1).

- Fifth, if parental rights have been terminated, the case enters the "post-termination phase." 316 Kan. at 394. The court enters orders that "facilitate[] placement of the child in a permanent family setting, whether through adoption or the appointment of a permanent custodian." 316 Kan. at 394; see K.S.A. 38-2269(g)(2). A district court's jurisdiction over a child-welfare case continues until the child turns 18, gets discharged from the case, or gets adopted. K.S.A. 38-2203(c).

If a district court has terminated parental rights to a child, the court must determine who will care for the child as the court and caseworkers seek a permanent placement solution. The court may immediately grant custody of the child to proposed adoptive parents, or it may grant custody to the Department Secretary. K.S.A. 38-2270(a). In making this decision, the court must consider the child's best interests. K.S.A. 38-2270(b). If the court grants custody to the Department, then the Secretary "shall have authority to place the child in a family home"—such as a foster home—and to "give consent for the legal adoption of the child." K.S.A. 38-2270(a)(1). And because parental rights have already been terminated, meaning the child does not have a legal parent to consent to an adoption, the Secretary's consent is "the only consent required to authorize the entry of an order or decree of adoption." K.S.A. 38-2270(a)(1).

We note, as an aside, that when the Department has post-termination custody of a child, its consent is the only consent necessary to *authorize* an adoption, but not the only step needed to *finalize* it. That is, the Department's consent is necessary, but not sufficient, for the child to be adopted. An adoption is not final until the court approves the placement and enters an adoption decree. See K.S.A. 2022 Supp. 59-2134(a) ("If the adoption is granted, the court shall enter a final decree of adoption."); see also K.S.A. 38-2270(c) ("When an adoption decree has been filed with the court in the child in need of care case, the secretary's custody shall cease, the court's jurisdiction over the child shall cease and the court shall enter an order to that effect."); *In re T.S.W.*, 294 Kan. 423, 432-34, 276 P.3d 133 (2012).

The district court's jurisdiction during the post-termination phase continues "until an adoption or appointment of a permanent custodian has been accomplished." K.S.A. 38-2264(j); see also K.S.A. 38-2270(c) (Department's custody and court's jurisdiction cease upon filing of adoption decree). While some older decisions have referred to the court's role as "supervisory" during the post-termination phase, this description merely distinguished the court's actions there from the evidentiary termination hearing. See *In re A.F.*, 38 Kan. App. 2d 742, 743, 172 P.3d 63 (2007); *In re J.D.*, 31 Kan. App. 2d 658, 664, 70 P.3d 700 (2003). A district court may modify its post-termination orders as the needs in the case adjust. Most notably, if the court finds that "efforts or progress have not been made toward finding an adoptive placement" as the case progresses, the court has the authority to "rescind its prior orders and make others regarding custody and adoption that are appropriate under the circumstances." K.S.A. 38-2264(j).

Together, this statutory framework lays out a clear process in post-termination proceedings—a process aimed at finding the best permanent placement for the child as expeditiously as possible under the circumstances. The focus throughout the post-termination phase is on what is best for the child. Indeed, consideration of the child's best interests permeates the case, from the court's initial temporary-custody ruling through its post-termination orders. See, e.g., K.S.A. 38-2201(b)(1), (3) (directing courts to "make the ongoing physical, mental and emotional needs of the child decisive considerations in proceedings under this code"); K.S.A. 38-2270(b) (noting preferences for post-termination placement "to the extent that the court finds [those preferences to be] in the best interests of the child"); see also *In re D.C.*, 32 Kan. App. 2d 962, 966, 92 P.3d 1138 (2004) (holding that "a reasonable permanent placement decision necessarily implies a decision that is in the best interests of the child under the circumstances").

In one final stop on this procedural sojourn, we note that the five phases in child-welfares cases, though sequential, are not of equal duration. The temporary-custody and adjudication phases are designed to be short, allowing the child's immediate needs to be addressed. The dispositional phase may last longer—months or even over a year—as the court assesses whether the parents will be able to make changes that would allow them to care for the

child. The termination phase is a targeted endeavor, allowing the parties to present evidence and testimony. The post-termination phase can be narrowly focused if an adoptive family or permanent custodian is already known, or it may last longer if decisions relating to the child's placement are more complicated.

This case illustrates such a complication. The district court entered an order terminating parental rights in January 2021. It rendered the post-termination ruling now on appeal about two years later. With the Department's appeal, that phase has now extended an additional year. We now turn to the jurisdictional arguments the parties have presented in that appeal.

2. *Kansas appellate courts do not have jurisdiction over appeals from a district court's post-termination decisions.*

The Department argues that the district court did not have subject-matter jurisdiction to consider the adoptive parents' motion under K.S.A. 38-2264(j) (alleging the Department had not engaged in reasonable efforts to find a permanent placement for X.L.). In its brief, the Department attacks the district court's ruling from several angles: It asserts the court lacked any ability to disagree with the Secretary's placement decision once it was made; it asserts there was not evidence before the district court to support its decision, as the adoptive parents challenged the Secretary's action less than two weeks after it was announced; and it asserts that the district court should not have considered X.L.'s interests in assessing whether the Department's change in position was reasonable. We note that most of these arguments concern whether the district court's decision was correct, not whether the court had the ability to enter that decision in the first place. The adoptive parents argue, however, that we need not—in fact, cannot—consider these points further because we do not have appellate jurisdiction to review a district court's post-termination decision. We agree.

"The right to appeal derives from statute." *State v. Clark*, 313 Kan. 556, Syl. ¶ 1, 486 P.3d 591 (2021). This means that appellate courts may exercise jurisdiction only when a statute authorizes it. 313 Kan. 556, Syl. ¶ 1.

In cases arising under the Revised Kansas Code for Care of Children, the legislature has authorized appellate jurisdiction over

only five types of decisions: those involving "temporary custody, adjudication, disposition, finding of unfitness[, and the] termination of parental rights." K.S.A. 38-2273(a). This limited class of appealable orders reflects the timeline of child-welfare cases; each order "occurs in a sequence leading to permanent placement for the child in need of care." *In re N.A.C.*, 299 Kan. at 1116. An order terminating parental rights is "the last appealable order" in these cases. 299 Kan. at 1118. Any order after that—including a finding of a lack of reasonable efforts to place a child for adoption—is not subject to appellate review. 299 Kan. at 1103-04, 1122; see *In re N.E.*, 316 Kan. at 404 (reaffirming this conclusion).

While the legislature has limited some appellate review, it did so to balance the many interests at play in child-welfare cases, ensuring "timely closure" for the children involved. *In re N.A.C.*, 299 Kan. at 1121. Allowing post-termination appeals "could leave children exposed to an endless circle of appellate custody battles." 299 Kan. at 1120. By not providing for direct appeals of post-termination decisions, the legislature has underscored the parties' responsibility to work toward "the child's recognizable need for permanency," instead of "struggl[ing] back and forth among themselves at every stage in post-termination proceedings." 299 Kan. at 1121.

Based on these principles, the parties here agree that the substance of the district court's post-termination ruling is beyond our review. That is, we do not have appellate jurisdiction to consider the district court's reasoning as to whether the Department's abrupt change of position constituted reasonable efforts to find a permanent placement for X.L. and her siblings.

The Department seeks to distinguish its jurisdictional claims from the merits of the district court's decision, however. It asserts that we *may* consider its claim that the district court lacked subject-matter jurisdiction to enter those rulings in the first place. After all, the Department claims, appellate courts may always consider whether subject-matter jurisdiction exists in a case. *Williams v. Lawton*, 288 Kan. 768, 779, 207 P.3d 1027 (2009). Indeed, we have a duty to consider that question, even when the parties do not raise it. *Kaelter v. Sokol*, 301 Kan. 247, Syl. ¶ 1, 340 P.3d 1210 (2015). And if a district court lacked jurisdiction to render a judgment, its judgment is void. *In re Adoption of A.A.T.*, 287 Kan. 590,

Syl. ¶ 2, 196 P.3d 1180 (2008). Thus, the Department argues the district court exceeded its statutory authority in how it handled the reasonable-efforts motion, rendering its decision void.

We are not persuaded by the Department's attempt to forge a new appellate path for at least two reasons. *First*, as we have noted, despite the Department's efforts to frame these questions as jurisdictional, it attacks both the ultimate result of the district court's ruling and the way it was reached—claims that do not implicate jurisdiction. There is a difference between misapplying or misconstruing statutes (the allegations underlying most of the Department's claims) and lacking all authority to hear a case. See *In re Estate of Wolf*, 32 Kan. App. 2d 1247, 1251, 96 P.3d 1110 (2004) ("The question before us is whether the trial court exceeded its statutory authority, not whether the trial court lacked subject matter jurisdiction."), *aff'd* 279 Kan. 718, 112 P.3d 94 (2005). Deciding something incorrectly is different from lacking jurisdiction to decide it at all.

A district court's jurisdiction over a child-welfare case continues until the child turns 18, gets discharged from the case, or gets adopted. K.S.A. 38-2203(c). An adoption is not final until the court enters an adoption decree. See K.S.A. 2022 Supp. 59-2134(a) ("If the adoption is granted, the court shall enter a final decree of adoption."); see also *In re T.S.W.*, 294 Kan. at 432-34. When the district court here ruled on the adoptive parents' reasonable-efforts motion, X.L. had not turned 18, been discharged, or been adopted. No court had entered an adoption decree. Thus, the district court retained jurisdiction over the case.

Second, and more important from a procedural standpoint, the mere fact that a party may review a district court's subject-matter jurisdiction at any time, including for the first time on appeal, does not automatically confer appellate jurisdiction to hear that claim. The reviewability of a specific issue on appeal—including an issue relating to subject-matter jurisdiction—generally encompasses considerations of notice, preservation, and timeliness. Appellate jurisdiction defines our power to consider an appeal *at all*, regardless of the issues raised.

Before a party may argue a question of subject-matter jurisdiction on appeal, there must be a procedural mechanism for posing that question to the appellate court. Accord *State v. Trotter*,

296 Kan. 898, 905, 295 P.3d 1039 (2013) (holding that a person could not use a K.S.A. 60-1507 motion to present subject-matter jurisdiction argument for the first time on appeal when he was procedurally barred from bringing that motion in the first place). In other words, there must be some vehicle through which the party can present the jurisdictional question to the appellate court.

Here, the Department has attempted to bring its jurisdictional claim in an appeal from a post-termination decision. But post-termination decisions in child-welfare cases—including a lack-of-reasonable-efforts finding—are not appealable in this manner. See *In re N.A.C.*, 299 Kan. at 1121-22. Thus, the vehicle the Department has chosen is flawed; regardless of the issues raised, we do not have appellate jurisdiction over the case before us. The appeal must be dismissed.

We pause before concluding to provide a closing observation and address one remaining loose end. *The observation*: While the absence of an appeal in these instances may seem harsh, the Kansas Supreme Court has recognized and grappled with this reality, noting that "district court judges who are tasked with presiding over these difficult [child-welfare] cases are well aware of the stakes." 299 Kan. at 1122. And the lack of a statutory right to appeal does not leave interested parties without any recourse if an extraordinary situation warrants intervention by the appellate courts. When Kansas law does not provide a remedy by appeal, a party can seek a writ of mandamus if it believes the district court has exceeded its authority. See *Kansas Medical Mut. Ins. Co. v. Svaty*, 291 Kan. 597, Syl. ¶ 11, 244 P.3d 642 (2010). Here, the Department did not file a request for a writ of mandamus to address the district court's post-termination ruling.

The loose end: Following oral argument in this case, the adoptive parents filed a motion seeking costs and attorney fees incurred during the course of this appeal. They assert that the Department's efforts to bring this appeal when the Kansas Supreme Court has held in *In re N.A.C.* and *In re N.E.* that there is no appellate jurisdiction to consider post-termination motions rendered its appeal frivolous. We question the assertion that because post-termination appeals have previously been rejected by the Kansas Supreme Court, the Department's appeal here was frivolous on its face. But

our discussion need go no further. Because we lack appellate jurisdiction to consider the case before us, we similarly lack appellate jurisdiction to consider a request for appellate costs and attorney fees. See *Kaelter*, 301 Kan. at 250. We therefore deny the adoptive parents' motion for costs and attorney fees.

In limiting appeals in child-welfare cases, the legislature struck a balance. To ensure finality for the children involved, it did not provide for appeals of post-termination decisions. This court thus lacks jurisdiction to review the district court's post-termination decision finding that the Department lacked reasonable efforts and the court's placement of X.L. with her siblings.

Appeal dismissed.