

No. 129,890

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IN THE COURT OF APPEALS OF THE STATE OF KANSAS

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K.P.,  
on behalf of B.S., a minor child,

*Plaintiff/Appellee,*

vs.

UNIFIED SCHOOL DISTRICT NO. 394,

*Defendant/Appellant.*

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BRIEF OF APPELLANT

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District Court of Butler County  
Hon. Chad M. Crum, Judge  
District Court Case No. BU-2023-CV-000212

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BRIEF OF APPELLANT

---

**NATURE OF THE CASE**

This is a negligence case asserted on behalf of a minor child by his adoptive mother, after his biological mother took him, without authorization, from USD 394's premises. It is undisputed that the child did not suffer any physical injury either during or resulting from the incident. Plaintiff's sole theory of recovery throughout this case, and as stated in the pretrial order, is "negligence," and plaintiff only seeks damages for future counseling and emotional distress.

Because the minor child did not suffer any physical injury during or resulting from the incident, USD 394 moved for summary judgment based on Kansas' physical injury requirement for negligence claims. The district court denied the motion, holding that plaintiff

had sufficiently stated a claim for “wanton negligence,” and thus did not need to show a physical injury.

USD 394 then filed a timely motion to reconsider, which the court also denied. However, the court granted USD 394’s request to certify its decision on USD 394’s motion for summary judgment, as well as its decision on the motion to reconsider, for interlocutory review pursuant to K.S.A. 60-2102(c) and Kan. Sup. Ct. R. 4.01. On December 16, 2025, this Court granted USD 394’s request for interlocutory review.

## **STATEMENT OF FACTS AND PROCEDURAL HISTORY**

### ***The Parties***

Plaintiff K.P. is an individual residing in Derby, Kansas. She has brought this lawsuit on behalf of her adopted minor child, B.S., who was born in September of 2016. On or around November 1, 2021, B.S. was removed from his biological parents’ custody and shortly thereafter began living with plaintiff. (R. Vol. 1, p. 134).<sup>1</sup>

USD 394 is a school district incorporated and existing under the laws of Kansas and operates the schools in Rose Hill, Kansas. (R. Vol. 1, p. 134).

### ***The Incident***

“Kids Klub” is a daycare program operated by USD 394. (R. Vol. 1, p. 135). B.S. began attending Kids Klub in January of 2022. (R. Vol. 1, p. 247). On Thursday, May 19,

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<sup>1</sup> USD 394 cites to the statement of uncontroverted facts in its motion for summary judgment (R. Vol. 1, pp. 134-138) for many of the facts recited herein. Plaintiff controverted only three of USD 394’s facts, none of which are included in this narrative. (R. Vol. 1, pp. 195-196).

2022, B.S. attended his first day of summer Kids Klub which was located in the Rose Hill Primary School. (R. Vol. 1, pp. 135-136). Kyla Beavers was the Director of Early Childhood/Kids Klub. (R. Vol. 1, p. 136).

At approximately 2:35 p.m. on May 19, 2022, Ms. Beavers received a call from a woman who identified herself as “Dani” and who stated that “Amanda from St. Francis” would be picking up B.S. for a Zoom visit with B.S.’s biological parents, and for an end-of-year evaluation. (R. Vol. 1, p. 136). Soon after the phone call, a woman wearing a white and red dress and glasses, and carrying a laptop computer and what appeared to be a case file, arrived at Kids Klub and identified herself as “Amanda.” (R. Vol. 1, p. 136). Unbeknownst to Ms. Beavers, this person was actually D.B., B.S.’s biological mother. (R. Vol. 1, pp. 136-137).

B.S. was asleep at this time, so Ms. Beavers walked to his class and asked his teacher, Ms. Devena, to wake him up. Ms. Devena woke B.S. and he walked to the woman calling herself Amanda, but he did not say anything. (R. Vol. 1, p. 136). Approximately 30 minutes later, B.S.’s biological grandmother, A.B., arrived at Kids Klub and told Ms. Beavers she was there to pick up B.S. (R. Vol. 1, p. 136). After being told that B.S. had already been picked up by “Amanda,” A.B. informed Ms. Beavers that B.S. was not scheduled for a meeting with St. Francis that day. (R. Vol. 1, p. 136). Ms. Beavers immediately called plaintiff and also 911 to inform them of what had occurred. (R. Vol. 1, p. 136). Law enforcement later located B.S. with his biological parents, D.B. and Z.S. He had been with them for approximately seven hours. (R. Vol. 1, p. 137).

### ***Plaintiff's Claim***

Plaintiff filed this action on September 6, 2023. (R. Vol. 1, pp. 1-4). Plaintiff admits that B.S. did not suffer any physical injury from the incident. (R. Vol. 1, p. 137). Instead, plaintiff alleges that B.S. suffered mental distress from the incident, manifesting as a worsening of B.S.'s preexisting issues with fecal incontinence. (R. Vol. 1, pp. 137-138).

In both her original petition and the pretrial order entered in this case, plaintiff characterized her theory of recovery as "negligence." (R. Vol. 1, pp. 3, 110). Plaintiff has never sought to assert a claim for intentional infliction of emotional distress. Moreover, the words "wanton," "reckless," or "grossly negligent" do not appear in the pretrial order. (R. Vol. 1, pp. 106-120). Because B.S. did not suffer any physical injury, plaintiff limited her claimed damages to "Medical expenses for future counseling" and "Pain and suffering and emotional distress." (R. Vol. 1, p. 111).

### ***USD 394's Motion for Summary Judgment and the District Court's Rulings***

On July 25, 2025, USD 394 moved for summary judgment based on plaintiff's failure to identify any physical injury which B.S. suffered from the incident. (R. Vol. 1, pp. 131-187). In response, plaintiff argued that an "exception" to the physical injury requirement applied because she had alleged sufficient facts for a jury to find that USD 394 acted wantonly. (R. Vol. 1, pp. 192-233).

On October 8, 2025, the district court denied USD 394's motion. (R. Vol. 1, pp. 259-261). In pertinent part, the court found that:

1. The Pretrial Order, which supersedes the pleadings in this case, adequately states a claim for wanton negligence;
2. A physical injury is not required to recover for claims of wanton negligence; and
3. Issues of material fact concerning what USD 394 knew of the parent's situation and whether USD 394 acted with wanton negligence are in dispute and preclude summary judgment.

(R. Vol. 1, pp. 260-261).

On October 8, 2025, as allowed by Supreme Court Rule 4.01(b), USD 394 filed a timely motion seeking to have the district court reconsider its decision or, in the alternative, amend its journal entry to include the language necessary for an interlocutory appeal. (R. Vol. 1, pp. 262-279). On November 10, 2025, the district court declined to reconsider its ruling but granted USD 394's request to certify its ruling for interlocutory appeal. (R. Vol. 1, pp. 300-303). Relevant here, the district court made the following findings:

First, the issue of whether Plaintiff's wanton negligence claim can survive summary judgment despite Plaintiff's admission that B.S. has no physical injury is a dispositive issue of law in this case.

Second, the Court finds that there is a substantial ground for a difference of opinion that is evidenced by the different positions of Plaintiff and USD 394.

Third, the Court finds that an immediate appeal may materially advance the ultimate termination of the litigation because if the appellate court agrees with USD 394's position, USD 394 will be entitled to summary judgment and a trial will not be necessary. If, on the other hand, the appellate court disagrees with USD 394, the parties will know which legal theory is at issue and what elements Plaintiff must prove at trial.

(R. Vol. 1, p. 302).

## **ISSUE ON APPEAL**

Did the district court err in holding that a claim for “wanton negligence” exists under Kansas law which would allow a plaintiff to recover emotional distress damages in the absence of a physical injury?

## **ARGUMENT AND AUTHORITIES**

### **I.**

#### **STANDARD OF REVIEW**

“In an appeal from the district court’s ruling on a summary judgment motion, the appellate court considers the motion de novo.” *Hammond v. San Lo Leyte VFW Post #7515*, 311 Kan. 723, 727, 466 P.3d 886 (2020). Further, [w]here the facts are undisputed, appellate review of an order granting summary judgment is de novo.” *Baska v. Scherzer*, 283 Kan. 750, 755, 156 P.3d 617 (2007).

### **II.**

#### **NEGLIGENCE CLAIMS REQUIRE PLAINTIFFS TO PROVE A PHYSICAL INJURY FOR EMOTIONAL DISTRESS DAMAGES**

From the inception of this case, plaintiff’s sole theory of recovery against USD 394 has been “negligence.” Further, the only damages which plaintiff claims in this case are emotional in nature, i.e., “Medical expenses for future counseling” and “Pain and suffering and emotional distress.”(R. Vol. 1, p. 111). Plaintiff does not seek any damages for any physical injury. Thus, under the pretrial order, the only claim before the district court was a claim for negligence or, more specifically, negligent infliction of emotional distress (“NIED”).

“Kansas has long held that a plaintiff cannot recover for emotional distress caused by the defendant’s negligence unless that emotional distress is accompanied by or results in physical injury to the plaintiff.” *Majors v. Hillebrand*, 51 Kan. App.2d 625, 628, 349 P.3d 1283 (2015), *rev. denied*, 303 Kan. 1078 (2016) (citing *Hoard v. Shawnee Mission Med. Ctr.*, 233 Kan. 267, 274, 662 P.2d 1214 (1983) and *Grube v. Union Pacific R.R. Co.*, 256 Kan. 519, 522, 886 P.2d 845 (1994)). As summarized by the Kansas federal court:

The purpose of the physical injury rule is to guard against fraudulent or exaggerated emotional distress claims. The rule also recognizes that emotional distress is a common experience in life and is usually trivial. Recovery is thus available only in those cases involving severe emotional distress evidenced ***and substantiated by actual physical injury***.

*Schweitzer-Reschke v. Avnet, Inc.*, 874 F. Supp. 1187, 1196 (D. Kan. 1995) (emphasis added).

In applying the physical injury rule, Kansas courts distinguish between “generalized physical symptoms of emotional distress, such as those associated with PTSD” and “actual physical injury.” *Majors*, 51 Kan. App. 2d at 628 (citations omitted). Accordingly, Kansas courts consistently decline to find that “weight gain . . . headaches, diarrhea, nausea, crying, shaking, sexual problems . . . depression, anxiety, insomnia, and nightmares” constitute qualifying physical injuries. 51 Kan. App. 2d at 629-30 (collecting cases).

A narrow exception to the physical injury rule resides in the cause of action for intentional infliction of emotional distress (IIED), also known as the tort of outrage. *Hallam v. Mercy Health Center of Manhattan, Inc.*, 278 Kan. 339, 340, 97 P.3d 492 (2004). A

physical injury is not required for an outrage claim because “the tort requires that the intentional conduct so far exceed societal norms that it may be fairly characterized as exceptionally vile or reprehensible or utterly intolerable.” *Estate of Randolph v. City of Wichita*, 57 Kan. App. 2d 686, 719, 459 P.3d 802 (2020).

### **III. KANSAS COMMON LAW DOES NOT RECOGNIZE A CLAIM FOR “WANTON NEGLIGENCE”**

In this case, despite the Pretrial Order explicitly identifying Plaintiff’s claim as one of “negligence,” the district court determined that “[t]he Pretrial Order, which supersedes the pleadings in this case, adequately states a claim for wanton negligence.” (R. Vol. 1, pp. 260). The district court further determined that plaintiff need not show a physical injury in order to proceed on a claim of “wanton negligence.” (R. Vol. 1, p. 261). The problem with the district court’s decision is that there is no claim for “wanton negligence” under Kansas law, let alone one that creates an exception to the physical injury requirement for emotional distress damages.

The Kansas Supreme Court has clearly stated that, “Kansas does not recognize degrees of negligence and, thus, has no category for ‘gross negligence.’” *Danisco Ingredients United States v. Kansas City Power & Light Co.*, 267 Kan. 760, 772, 986 P.2d 377 (1999). Instead, Kansas law “draws a distinction between ordinary negligence and wanton conduct, which is defined as the reckless disregard for the rights of others with a total indifference to the consequences.” *Id.* at 772. These “two types of conduct (negligent conduct and wantonness) differ in kind and not degree.” *Cadwallader v. Bennett*, 187 Kan. 246, 251, 356

P.2d 862 (1960); accord *Koster v. Matson*, 139 Kan. 124, 128, 30 P.2d 107 (1934); *Bowman v. Doherty*, 235 Kan. 870, 876, 686 P.2d 112 (1984); *Heritage Tractor, Inc. v. Evergy Kansas Cent., Inc.*, 64 Kan. App.2d 511, 545, 552 P.3d 1266, rev. denied, 319 Kan. 833 (2024).

“Wanton conduct is distinguished from a mere lack of due care by the fact that the actor realized the imminence of injury to others from his acts and refrained from taking steps to prevent the injury. This reckless disregard or complete indifference rises substantially beyond mere negligence.” *Bowman*, 235 Kan. at 876; see also *Doe v. United States*, No. 16-2544, 2017 U.S. Dist. LEXIS 80193, at \*26, 2017 WL 2289612 (D. Kan. May 25, 2017) (“Generally, negligence has no application to willful or wanton wrongs.”).

To be sure, the Kansas Tort Claims Act (“KTCA”) recognizes “gross and wanton negligence” as an exception under the recreational use immunity exception to municipal liability. See K.S.A. 75-6104(a)(15); see also *Zaragoza v. Johnson Cty. Board of Comm’rs*, 320 Kan. 691, 711-12, 571 P.3d 545 (2025) (defining “gross and wanton negligence” under K.S.A. 75-6104(a)(15)). But this statutorily created “gross and wanton negligence” standard finds no parallel in Kansas common law, and thus, does not apply to common law claims such as negligent infliction of emotional distress. Cf. *Frazier v. Cities Serv. Oil Co.*, 159 Kan. 655, 664, 157 P.2d 822 (1945) (“Notwithstanding the fact the legislature used the words ‘gross and wanton negligence’ in our automobile guest statute (G. S. 1935, 8-122b) our decisions have noted the essential difference between negligence and wantonness . . . . We are therefore concerned now with whether the allegations of the petition charged the defendants with wanton conduct.”).

**IV.**  
**THE KANSAS COURT OF APPEALS HAS ALREADY REJECTED**  
**PLAINTIFF’S PROPOSED THEORY OF “WANTON NEGLIGENCE”**  
**AS BEING SUFFICIENT TO AVOID THE PHYSICAL INJURY RULE**

As demonstrated above, Kansas caselaw has consistently held that claims for “wanton negligence” do not exist. Nevertheless, the basis for the district court’s denial of USD 394’s motions was that it believed plaintiff’s negligence claim could survive without evidence of a physical injury based on perceived allegations of “wanton conduct” in the pretrial order.<sup>2</sup> It based this ruling on a single sentence of *dicta* from *Majors v. Hillebrand*, where this Court mentioned, without further analysis, that the “physical injury rule is inapplicable where the injurious conduct is willful or wanton, or the defendant acts with intent to injure.” 51 Kan. App. 2d at 628 (citing *Hoard* , 233 Kan. at 274).<sup>3</sup> However, multiple other decisions have actually conducted that analysis and uniformly concluded that this “exception” is nothing more than another way of describing IIED. The district court erred by ignoring that binding precedent.

In a thorough examination of this exact issue, this Court noted that “[s]everal Kansas cases, some hoary with age (*see In re Estate of Bernatzki*, 204 Kan. 131, 133, 460 P.2d 527 [1969]), have mentioned this ‘exception’ to the physical injury requirement.” *Curts v. Dillard’s, Inc.*, 30 Kan. App. 2d 814, 815, 48 P.3d 681 (2002). Notably, “[t]he exception to

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<sup>2</sup> As noted above, the pretrial order never uses the word “wanton” (or, for that matter “gross” or “reckless” or “willful”). The district court apparently found allegations as to this type of conduct lurking between the lines.

<sup>3</sup> *See Law v. Law Co. Bldg. Assocs.*, 295 Kan. 551, 564, 289 P.3d 1066 (2012) (“Nobody is bound by dictum[.]” [citation omitted]).

the physical injury requirement must have an allegation of willful or wanton conduct.” *Id.* “‘Wanton conduct’ is an act performed with a realization of the imminence of danger and reckless disregard or complete indifference to the probable consequences of the act.” *Id.*; *see also Hoard*, 233 Kan. at 281 (“The person who is reckless must have prior knowledge; he must know or have reason to know of facts which create a high degree of risk of harm to another, and then, indifferent to what harm may result, proceed to act.” [cleaned up]).

The *Curts* panel, however, determined that it “must conclude the exception to the physical injury requirement of a claim for negligent infliction of emotional distress is nothing more—nor less—than the tort of outrage, an intentional tort.” 30 Kan. App. 2d at 815. In so doing, the court stated:

The plaintiffs in *Anspach v. Tomkins Industries, Inc.*, 817 F. Supp. 1499 (D. Kan. 1993), *aff’d* 51 F.3d 285 (10th Cir. 1995), attempted to make the same argument plaintiffs make here. Applying Kansas law, Judge O’Connor rejected the claim:

“Plaintiffs assert that their claim for negligent infliction of emotional distress is viable, even absent resultant physical injury, because the conduct of the defendants was wanton. If plaintiffs’ theory is to be accepted, it is not clear how the negligence claim would be anything but a reiteration of plaintiffs’ intentional infliction of emotional distress claim, which asserts liability on the basis of intentional or reckless disregard of plaintiffs’ rights. In fact, the authority plaintiffs cite in support of their position exposes the infirmity of their theory: ‘The general rule of negligence has no application to willful or wanton wrongs.’ *Bowman v. Doherty*, 235 Kan. 870, Syl. ¶ 2, 686 P.2d 112 (1984). It is not clear whether plaintiffs also take the position that the defendants

are liable for simple negligent infliction of emotional distress (arising out of conduct that was not wanton). To the extent the negligence claims are not based upon intentional or wanton conduct, in the absence of contemporaneous resultant physical injury, the claims cannot stand.” 817 F. Supp. at 1509.

We agree with this analysis of Kansas law. ***The exception to the physical injury requirement in a negligent infliction of emotional distress claim is nothing more than the tort of outrage.*** The trial court did not err in dismissing plaintiffs’ claim of negligent infliction of emotional distress for failing to allege physical injury.

*Id.* at 815-16 (emphasis added).

*Curts* is by no means alone in its holding. More recently this Court recognized that:

In *Hoard*, the court mentioned an exception to the physical injury rule when the defendant’s conduct is “willful or wanton” or undertaken “with intent to injure.” 233 Kan. at 274. ***The exception, however, does not expand the tort of negligent infliction of emotional distress. Rather, it suggests intentional infliction of emotional distress as the legally appropriate claim,*** consistent with the court’s citation to *Lantz v. City of Lawrence*, 232 Kan. 492, 500, 657 P.2d 539 (1983). The cited passage of *Lantz* specifically refers to the intentional infliction of emotional distress, which requires no physical injury. 232 Kan. at 500.

*Estate of Randolph v. City of Wichita*, 57 Kan. App. 2d 686, 720, 459 P.3d 802, rev. denied, 312 Kan. 891 (2020) (emphasis added); accord *Doe v. USD No. 237*, No. 16-2801-JWL, 2019 U.S. Dist. LEXIS 188317, at \*42, 2019 WL 5576929 (D. Kan. Oct. 29, 2019); *Mantick v. United States*, No. 18-2146-CM, 2018 U.S. Dist. LEXIS 182855, at \*6, 2018 WL 5295893 (D. Kan. Oct. 25, 2018).

Also pertinent here is *Hopkins v. State*, 237 Kan. 601, 702 P.2d 311 (1985). In that case, while attempting to apprehend a suspect, law enforcement officers had extensively damaged the plaintiffs' mobile home. Plaintiffs sued for property damage and emotional distress and the district court granted summary judgment to the officers based upon immunity provisions in the KTCA. 237 Kan. at 602-04.

The Supreme Court reversed the grant of summary judgment as to the property damage claim. It held that there was sufficient evidence that the officers' conduct had been wanton so as to take them outside the protection of the KTCA. 237 Kan. at 611-12. However, the Court affirmed judgment on plaintiffs' emotional distress claim because "there can be no recovery for emotional distress suffered by a plaintiff unless it is accompanied by or results from physical injury to the plaintiff" and plaintiffs alleged no such injury. 237 Kan. at 612-13. Thus, even though the Court found sufficient evidence of wanton conduct, it did not allow a claim for emotional distress to go forward without a physical injury.

These decisions make clear that the only "exception" to an NIED claim is an IIED claim. So the statement in *Majors* that the physical injury rule does not apply to wanton conduct is correct. But only because wanton conduct is not negligent conduct, it is conduct that invokes IIED. The district court's determination that plaintiff's allegations in the pretrial order, "adequately states a claim for wanton negligence" and that a "physical injury is not required to recover for claims of wanton negligence" is erroneous.

This is important, because NIED and IIED are separate and distinct legal theories with entirely different elements. To prove an IIED claim, the plaintiff show: "(1) The conduct of

the defendant was intentional or in reckless disregard of the plaintiff; (2) the conduct was extreme and outrageous; (3) there was a causal connection between the defendant's conduct and the plaintiff's mental distress; and (4) the plaintiff's mental distress was extreme and severe." *Valadez v. Emmis Communs.*, 290 Kan. 472, 476, 229 P.3d 389 (2010). In contrast, an NIED claim requires the plaintiff to "show that (1) she suffered physical injury, (2) as a direct result from the emotional distress caused by the defendant's negligence, and (3) the injury appeared within a short span of time after the emotional disturbance." *Ngiendo v. Asset Campus USA, LLC*, No. 20-02393-HLT, 2023 U.S. Dist. LEXIS 59423, at \*34, 2023 WL 2770192 (D. Kan. Apr. 4, 2023) (citing *Majors*, 51 Kan. App. at 628).

The elements for these two separate legal theories contain very little overlap. Allowing plaintiff to proceed with a theory of "wanton negligence," would effectively erase the second and fourth elements of an IIED claim. This is not the law. *Curts, Estate of Randolph*, and *Hopkins* all show that the district court clearly erred by allowing plaintiff to proceed with a "wanton negligence" claim.

## **CONCLUSION**

The district court's denial of USD 394's motion for summary judgment impermissibly expands Kansas tort law beyond its recognized borders. The court essentially recognized a new common law tort and exception to the physical injury rule that has heretofore been specifically rejected. This is beyond the authority of a district court. *See Noone v. Chalet of Wichita, L.L.C.*, 32 Kan. App. 2d 1230, 96 P.3d 674 (2004). The district court's decision

should be reversed and the case remanded with directions to enter summary judgment in favor of USD 394.

Respectfully submitted,

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### **CERTIFICATE OF SERVICE**

I hereby certify that on this 10th day of April, 2026, I filed the above and foregoing with the Clerk of the Appellate Courts through the eFlex system which, pursuant to Supreme Court Rule 1.11, will provide service to the following:

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