

No. 129,890

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

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

Plaintiff/Appellee,

vs.

UNIFIED SCHOOL DISTRICT NO. 394,

Defendant/Appellant.

REPLY BRIEF OF APPELLANT

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

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REPLY BRIEF OF APPELLANT

ARGUMENTS AND AUTHORITIES

I.

**PLAINTIFF’S RESPONSE BRIEF FAILS TO COMPLY
WITH KANSAS BRIEFING REQUIREMENTS**

An appellee’s brief is governed by Kansas Supreme Court Rule 6.03. Subsection (a)(3) of that rule requires that an appellee’s brief contain:

A statement, without argument of the facts or a statement acknowledging the correctness of the appellant’s statement of facts or adding corrections and supplemental statements to the extent necessary. *The statement must be supported by references to the record in the same manner as required of the appellant under rule 6.02.*

(emphasis added). Appellee here did not acknowledge the correctness of appellant’s statement of facts, but provided her own statement. (Appellee’s Brief, pp. 1-6). This, then,

implicates Rule 6.02 and specifically Rule 6.02(a)(4), which provides that the brief must include:

A concise but complete statement, without argument, of the facts that are material to determining the issues that are to be decided in the appeal. ***The facts included in the statement must be keyed to the record on appeal by volume and page number. The court may presume that a factual statement made without reference to volume and page number has no support in the record on appeal.***

(emphasis added). These rules have been strictly enforced by the appellate courts, even as to pro se litigants. *See, e.g., City of Neodesha v. BP Corp. North America*, 50 Kan. App. 2d 731, 770, 334 P.3d 830 (2014), *rev. denied*, 302 Kan. 1008 (2015); *State v. Kettler*, 299 Kan. 448, 465, 325 P.3d 1075 (2014); *Friedman v. Kansas State Board of Healing Arts*, 296 Kan. 636, 644, 294 P.3d 287 (2013); *D.M.R. v. B.R.S.*, No. 127,229, 2025 Kan. App. Unpub. LEXIS 283, at *5-6 (Kan. Ct. App. July 25, 2025); *Crawford County Board of Comm’rs v. Clelland*, No. 126,910, 2025 Kan. App. Unpub. LEXIS 257, at *5-6 (Kan. Ct. App. July 18, 2025), *pet. for review dismissed*, (Dec. 23, 2025).

Here, plaintiff’s entire brief contains a total of ***one*** reference to the record on appeal, and that reference is not even found in her factual statement. (Appellee’s Brief, p. 7). Plaintiff’s introductory sentence to her statement of facts—“The following facts are taken from the Plaintiff’s Response to Appellant’s Motion for Summary Judgment” (Appellee’s Brief, p. 1)—is not an adequate substitute for compliance with Rule 6.02(a)(4). *See Friedman*, 296 Kan. at 644 (“When facts are necessary to an argument, the record must supply those facts and a party relying on those facts must provide an appellate court with a

specific citation to the point in the record where the fact can be verified.” [emphasis added]); *Dawson v. BNSF Railway Co.*, 309 Kan. 446, 452, 437 P.3d 929 (2019) (brief that referred generally to medical records but did not offer a pinpoint citation to the record did not comply with Rule 6.02(a)(4)).

Applying Rule 6.02(a)(4), the Court may presume that the facts asserted in plaintiff’s brief are without support unless those facts are also found in the factual statement of defendant’s brief, which was properly keyed to the record.

II.
THE WILLFUL OR WANTON CONDUCT EXCEPTION
TO THE PHYSICAL-INJURY RULE IS LEGALLY EQUIVALENT TO
THE TORT OF INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

The physical-injury rule does not apply when the injurious conduct is willful or wanton, or when the defendant acts with the intent to injure. *Hoard v. Shawnee Mission Med. Ctr.*, 233 Kan. 267, 274, 662 P.2d 1214 (1983). That exception does not, however, preserve a claim based in negligence such as plaintiff’s claim here. Rather, an allegation of this sort shifts the claim away from negligence entirely, because “the general rule of negligence has no application to willful or wanton wrongs.” *Bowman v. Doherty*, 235 Kan. 870, 876, 686 P.2d 112 (1984). The Kansas Court of Appeals has accordingly held that the exception to the physical-injury requirement “is nothing more—nor less—than the tort of outrage, an intentional tort.” *Curts v. Dillard’s, Inc.*, 30 Kan. App. 2d 814, 815, 48 P.3d 681 (2002). The exception thus points to a claim for outrage/intentional infliction of emotional distress (IIED) as the sole method for recovering emotional-distress damages in the absence of physical injury— not to a claim of “wanton negligence.” *Id.*

Plaintiff attempts to distinguish the clear holding of *Curts* by pointing to what she characterizes as “one simple incredibly important fact, **the tort of outrage had already been pled and dismissed.**” (Appellee’s Brief, p. 9) (emphasis in original). Plaintiff fails to show, however, what is “incredibly important” about this fact. The plaintiff in *Curts* attempted to pursue an IIED claim but failed, perhaps because plaintiff could not meet the “stringent requirements” of showing that the defendant’s conduct was “extreme and outrageous” or that the plaintiff’s emotional injuries were “so severe that no reasonable person should be expected to endure it.” *See T.U. v. Baker*, No. 129,047, 2026 Kan. App. Unpub. LEXIS 378, *18-19 (Kan. Ct. App. June 18, 2026), *pet. for review filed*, (July 8, 2026) (quoting, in part, *Valadez v. Emmis Communications*, 290 Kan. 472, 477, 229 P.3d 389 (2010)).

Having failed on her IIED claim, the plaintiff in *Curts* shifted her focus on appeal to a claim for negligent infliction of emotional distress and, like plaintiff here, argued that it was not necessary for her to have a physical injury because she had alleged willful or wanton conduct. *Curts*, 30 Kan. App. 2d at 815. But the court recognized this effort for what it was—an attempt to repackage the failed IIED claim. As the court concluded, “[t]he exception to the physical injury requirement in a negligent infliction of emotional distress claim *is nothing more than the tort of outrage.*” 30 Kan. App. 2d at 816 (emphasis added).¹

¹ Plaintiff also attempts to discount the decision in *Curts* by characterizing it as a “short affirmation.” (Appellee’s Brief, p. 9). But short and to-the-point opinions were the hallmark of the late Judge Jerry Elliott, and the fact that he wasted no words in reaching his clear and concise conclusion does nothing to lessen the persuasive value of the opinion.

The fact that the plaintiff in *Curts* unsuccessfully pled an IIED claim before attempting to create a “wanton negligence” claim provides no assistance to plaintiff here. Here, plaintiff apparently recognized that she could not establish the elements of an IIED and so went directly to a “wanton negligence” claim. As shown in *Curts*, a litigant cannot avoid the burden of establishing an IIED claim by relabeling the claim as “wanton negligence.”

That the physical injury exception is synonymous with IIED is logical because a wanton mental state aligns with the elements of the intentional tort. To recover for IIED, a plaintiff must plead and prove four elements: (1) the defendant’s conduct was intentional or in reckless disregard of the plaintiff; (2) the conduct was extreme and outrageous; (3) a causal connection exists between the conduct and the plaintiff’s mental distress; and (4) the plaintiff’s mental distress was extreme and severe. *Estate of Randolph v. City of Wichita*, 57 Kan. App. 2d 686, 718, 459 P.3d 802, *rev. denied*, 312 Kan. 891 (2020). Willful conduct is an act performed with a designed purpose or intent to do wrong or to cause injury; wanton conduct, by contrast, is an act performed with a realization of the imminence of danger and a reckless disregard of, or complete indifference to, the probable consequences. *Paida v. Leach*, 260 Kan. 292, 297, 917 P.2d 1342 (1996). Wanton conduct is therefore “something more than ordinary negligence but . . . something less than willful injury.” *Bowman*, 235 Kan. at 876.

The first element of IIED is satisfied by conduct that is intentional or in reckless disregard of the plaintiff. *Estate of Randolph*, 57 Kan. App. 2d at 718. Wanton conduct, which is characterized as a reckless disregard of the probable consequences, links directly

to the recklessness prong of the first element of IIED. A plaintiff who invokes the willful-or-wanton exception to the physical injury rule must therefore satisfy the elements Kansas requires for IIED (i.e. the tort of outrage). *Hallam v. Mercy Health Ctr. of Manhattan, Inc.*, 278 Kan. 339, 340, 97 P.3d 492 (2004).

Plaintiff cannot avoid having to establish the elements of IIED by characterizing the defendant's conduct as "wanton negligence" which, as discussed below, is not a recognized cause of action in Kansas.

III. "WANTON NEGLIGENCE" IS NOT AN INDEPENDENT CAUSE OF ACTION UNDER KANSAS LAW

Plaintiff's contention that Kansas recognizes "wanton negligence" as a distinct cause of action, separated from the physical-injury requirement, lacks support. Wantonness is a state of mind that elevates the threshold of proof for an existing cause of action; it is not itself an independent tort. *See Heritage Tractor, Inc. v. Evergy Kansas Central, Inc.*, 64 Kan. App. 2d 511, 545, 552 P.3d 1266, *rev. denied*, 319 Kan. 833 (2024). Wantonness is distinct from negligence and differs from it in kind rather than merely in degree. *Kniffen v. Hercules Powder Co.*, 164 Kan. 196, 206, 188 P.2d 980 (1948). No Kansas court has construed the willful-or-wanton language as creating a hybrid "wanton negligence" tort permitting recovery of emotional-distress damages within an ordinary negligence framework, and the plaintiff's contrary interpretation misinterprets the authorities upon which she relies.

When a plaintiff has not suffered any physical injury, she "must prove a claim for emotional distress based upon willful and wanton or intentional conduct *but not upon*

negligence.” *Morrison v. Stormont-Vail Regional Medical Center*, No. 64,276, 1990 Kan. App. LEXIS 251, at *9 (Kan. Ct. App. Apr. 13, 1990) (emphasis added). The block of cases plaintiff cites in her brief at pages 7-8 do not establish otherwise, or that wanton negligence is a separate cause of action.

In *Soto v. City of Bonner Springs*, 291 Kan. 73, 81-82, 238 P.3d 278 (2010), the court addressed only whether wanton conduct fell within the discretionary function immunity defense to governmental liability under the Kansas Tort Claims Act. It did not hold that “gross and wanton negligence” is a standalone cause of action. The same is true of *Winters v. State*, No. 124,211, 2022 Kan. App. Unpub. LEXIS 359, at *2 (Kan. Ct. App. July 8, 2022), *rev. denied*, 317 Kan. 851 (2023), *Muxlow v. City of Topeka*, No. 117,428, 2018 Kan. App. Unpub. LEXIS 442, at *13 (Kan. Ct. App. June 15, 2018), *rev. denied*, 309 Kan. 1349 (2019), and *Gruhin v. Overland Park*, 17 Kan. App.2d 388, 393-94, 836 P.2d 1222 (1992).

The Kansas Supreme Court, in *Adamson v. Bicknell*, 295 Kan. 879, 882, 287 P.3d 274 (2012), addressed whether a plaintiff had sufficient evidence of the defendant’s wanton conduct so as to entitle the plaintiff to punitive damages. Once again, the Court did not hold there was a standalone claim for “wanton negligence.” This same issue regarding wanton conduct necessary to support punitive damages was addressed in *Post v. Hanchett*, No. 21-2587-DDC, 2024 U.S. Dist. LEXIS 1859, at *29 (D. Kan. Jan. 4, 2024), *Reeves v. Carlson*, 266 Kan. 310, 318, 969 P.2d 252 (1998), and *Bowman*, 235 Kan. at 882.

Plaintiff’s citation to *Johnson v. Huskey*, 186 Kan. 282, 350 P.2d 14 (1960), a wrongful death action, is also unpersuasive. In *Johnson*, the court addressed “wanton

negligence” within the context of Kansas’s since-repealed guest statute, K.S.A.8-122b. *Id.* at 283. “Wanton negligence” was not treated as a standalone cause of action but was instead used as the threshold of culpability required under the guest statute for a guest passenger to recover damages. *Id.* at 283-86.

Plaintiff also incorrectly relies upon the Kansas Tort Claims Act, K.S.A. 75-6104(a)(15)(A), for the proposition that “wanton negligence” is a recognized claim. But the statute’s references to “gross and wanton negligence” do not create a cause of action—they simply establish the threshold a plaintiff must satisfy to overcome governmental immunity for certain claims involving recreational facilities. The exception is an alternative route by which a plaintiff may invalidate immunity—it is not an expansion of substantive tort liability. Plaintiff’s argument conflates a limitation on immunity with the creation of a tort, when it is clear that the two are not the same.

CONCLUSION

In her conclusion, plaintiff boldly proclaims that “[t]he Kansas Supreme Court has been clear: the physical injury doctrine of negligence does not apply in situations involving willful or wanton conduct.” If that were true in the context of a negligence claim, plaintiff would have come forward with at least once case in which a plaintiff asserting only a negligence claim—such as plaintiff has done here—was allowed to recover emotional distress damages in the absence of a physical injury. Plaintiff has not been able to do so because no such case exists under Kansas law.

For the reasons stated above and in defendant's opening brief, 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,

FLEESON, GOOING, COULSON & KITCH, L.L.C.

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of July 2026, the above and foregoing Brief was submitted to the Clerk of the Appellate Courts for filing through the eFlex system which, pursuant to Kan. Sup. Ct. R. 1.11, will provide service to the following:

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ATTACHMENT A

D.M.R. v. B.R.S.,
No. 127,229, 2025 Kan. App. Unpub. LEXIS 283
(Kan. Ct. App. July 25, 2025)

D.M.R. v. B.R.S.

Court of Appeals of Kansas

July 25, 2025, Opinion Filed

No. 127,229

Reporter

2025 Kan. App. Unpub. LEXIS 283 *; 573 P.3d 284; 2025 LX 203933

D.M.R., Appellee, v. B.R.S., Appellant.

Notice: NOT DESIGNATED FOR PUBLICATION.

PLEASE CONSULT THE KANSAS RULES FOR CITATION OF UNPUBLISHED OPINIONS.

PUBLISHED IN TABLE FORMAT IN THE PACIFIC REPORTER.

Prior History: [*1] Appeal from Dickinson District Court; BENJAMIN J. SEXTON, judge. Submitted without oral argument.

Disposition: Appeal dismissed.

Counsel: B.R.S., Appellant, Pro se.

C. Charles Ault-Duell, of CAD Law, LC, of Salina, for appellee.

Judges: Before SCHROEDER, P.J., HILL and GARDNER, JJ.

Opinion

PER CURIAM: When neighbors disagree, they both suffer. Here, neighbors D.R. and B.R.S. each filed petitions for protection from stalking orders against one another. The district court held a consolidated hearing on both cases and determined each party was entitled to a protection from stalking order against the other. B.R.S. timely appeals only the district court's protection from stalking order against him and in favor of D.R. After careful review,

we find we do not have jurisdiction over the majority of the issues raised by B.R.S. We further find B.R.S. failed to properly brief the remaining point and deem it waived or abandoned. Therefore, we must dismiss the appeal.

FACTUAL AND PROCEDURAL BACKGROUND

In August 2023, D.R. filed a petition for protection from stalking, sexual assault, or human trafficking order on behalf of herself and her minor child against her neighbor, B.R.S. In her petition, D.R. asserted she bought her house in September [*2] 2022 and had numerous uncomfortable interactions with B.R.S. since then. D.R.'s petition listed several specific incidents with B.R.S. from August 2022 to August 2023. D.R. asked the district court to issue an ex parte temporary order of protection and final order of protection in her favor against B.R.S.

B.R.S. also filed a petition for protection from stalking, sexual assault, or human trafficking order against D.R., but his petition is not in the record on appeal. The district court set both cases for hearing at the same time, declined to enter temporary orders, and scheduled the matters for hearing.

At the combined hearing, each party presented evidence. The district court determined both were entitled to a protection from stalking order against the other. The only order in the record is the order in favor of D.R. and against B.R.S., which was effective until October 31,

2024. Shortly after the district court issued the order, B.R.S. filed a motion to correct/modify protection from stalking order, essentially claiming the district court's protection order issued against him and in favor of D.R. was not specific as to what was discussed at the hearing.

After B.R.S. appealed, he filed [*3] another unnamed motion, and the district court noted it lacked jurisdiction with his pending appeal. D.R. moved to strike B.R.S.'s brief for failure to comply with Supreme Court Rules and for involuntary dismissal and fees. D.R. also submitted an amended protection from stalking order in her favor, extending the order until October 31, 2025. In granting the extended order, the district court explained B.R.S. had violated the protection order; B.R.S. was required to pay court costs associated with that hearing; and if B.R.S. violated the order again, the district court would consider awarding attorney fees in favor of D.R. Our motions panel of this court denied D.R.'s motion to strike and for involuntary dismissal and fees.

ANALYSIS

B.R.S. raises four issues on appeal: (1) The district judge was biased and prejudiced against B.R.S. and should have recused from the case; (2) the district court erred in failing to issue a temporary order of protection from stalking in favor of B.R.S. before conducting a hearing on the issue; (3) D.R. failed to present sufficient evidence to support her petition for protection from stalking order against B.R.S.; and (4) the district court erred in failing [*4] to include all the terms of the protection order pronounced from the bench in its written order. B.R.S. now seeks remand to the district court for rehearing before another judge. D.R. asks us to sanction B.R.S. by striking his brief,

finding the appeal frivolous, and ordering B.R.S. to pay D.R.'s attorney fees and costs associated with defending the appeal.

Jurisdiction

Three of B.R.S.'s claims—the district judge should have recused himself, the judge failed to issue a temporary restraining order before holding a hearing, and the district court failed to include all of the terms in the written protection order—relate to a different case, DK-2023-DM-000128, which was not included in B.R.S.'s notice of appeal. We therefore lack jurisdiction to address these claims. See *Northern Natural Gas Co. v. ONEOK Field Services Co.*, 296 Kan. 906, 916, 296 P.3d 1106 (2013) (appellate court has "a duty to question jurisdiction on [its] own initiative and, when the record discloses a lack of jurisdiction, [the appellate court has] a duty to dismiss the appeal"); *Associated Wholesale Grocers, Inc. v. Americold Corp.*, 293 Kan. 633, 637, 270 P.3d 1074 (2011) ("It is a fundamental proposition of Kansas appellate procedure that an appellate court only obtains jurisdiction over the rulings identified in the notice of appeal.").

Failure to Follow Supreme Court Rules

The only issue properly [*5] before us is B.R.S.'s claim that there was insufficient evidence presented to support D.S.'s petition for protection from stalking order.

Pro se pleadings are to be liberally construed, though pro se litigants must still follow procedural rules. In fact, a pro se litigant in a civil case must follow the same procedural rules as a litigant represented by counsel. *Joritz v. University of Kansas*, 61 Kan. App. 2d 482, 498, 505 P.3d 775 (2022).

Supreme Court Rule 6.02(a)(4) specifically states: "The facts included in the statement [of facts] must be keyed to the record on appeal by volume and page number. The court may presume that a factual statement made without a reference to volume and page number has no support in the record on appeal." 2025 Kan. S. Ct. R. at 36.

Rule 6.02(a)(5) explains: "Each issue must begin with citation to the appropriate standard of appellate review and a pinpoint reference to the location in the record on appeal where the issue was raised and ruled on." 2025 Kan. S. Ct. R. at 36. Failure to comply with Rule 6.02(a)(5) "risk[s] a ruling that an issue improperly briefed will be deemed waived or abandoned." *State v. Williams*, 298 Kan. 1075, 1085, 319 P.3d 528 (2014). Our Supreme Court has warned litigants Rule 6.02(a)(5) would be "strictly enforced." *State v. Godfrey*, 301 Kan. 1041, 1044, 350 P.3d 1068 (2015).

While we liberally construe B.R.S.'s arguments on appeal, he is not exempt from following Rule 6.02(a)(4) or (a)(5) because he briefed the issue pro se. See *Joritz*, 61 Kan. App. 2d at 498. The entirety [*6] of B.R.S.'s brief contains three citations to the record on appeal, and they fail to support his arguments. Under Rule 6.02(a)(4), we presume B.R.S.'s statements are unsupported by the record.

Next, B.R.S. failed to provide any standard of review for the issue raised on appeal and failed to provide pinpoint references to the record showing where the issue was raised and ruled on before the district court. B.R.S. provides no explanation why the issue is properly before us. See Rule 6.02(a)(5) (2025 Kan. S. Ct. R. at 36) ("If the issue was not raised below, there must be an explanation why the issue is properly before the court."). B.R.S. improperly and inadequately briefed the issue raised on appeal and, therefore, his arguments are deemed waived and

abandoned. See *Godfrey*, 301 Kan. at 1043-44; *Williams*, 298 Kan. at 1085.

Attorney Fees

D.R. asks us to order B.R.S. to pay her attorney fees and costs associated with defending the appeal under Supreme Court Rule 5.05(a) and 5.05(c) (2025 Kan. S. Ct. R. at 33). Rule 5.05(a) states: "An appellate court may dismiss an appeal due to a substantial failure to comply with these rules or for any other reason requiring dismissal by law: (1) on a motion of a party with at least 14 days' notice to the appellant." 2025 Kan. S. Ct. R. at 33. An appellate court has discretion to dismiss a case under Rule 5.05. *In re Matter of Zahradnik's Estate*, 6 Kan. App. 2d 84, 89, 626 P.2d 1211 (1981) [*7]. Here, B.R.S. substantially failed to comply with Rules 6.05(a)(4) and (a)(5).

Rule 5.05(c) explains:

"When an appeal is dismissed under this rule, the court on motion and reasonable notice may assess against the appellant the costs and expenses incurred by the appellee before the dismissal date that would have been assessed against the appellant if the case had not been dismissed and the judgment or order had been affirmed." 2025 Kan. S. Ct. R. at 33.

Before D.R. filed her brief on appeal, she moved to strike B.R.S.'s brief and for involuntary dismissal and attorney fees, providing B.R.S. with reasonable notice D.R. sought her costs and expenses incurred from the appeal before the dismissal date. But D.R. failed to state what those costs and expenses amounted to or even provide an estimate. It is unclear what costs and expenses "would have been assessed against the appellant if the case had not been dismissed and the

judgment or order [was] affirmed." Rule 5.05(c).

The only caselaw discussing Rule 5.05(c), *Tharrett v. Everett*, 547 P.3d 628, 2024 WL 1954298, at *6 (Kan. App.) (unpublished opinion), *rev. granted* 319 Kan. 836 (2024), also addresses a request for attorney fees under Supreme Court Rule 7.07(c) (2025 Kan. S. Ct. R. at 52) if the appeal is frivolous or taken "for the purpose of harassment or delay." D.R. did not cite Rule 7.07 in her motion for involuntary [*8] dismissal or in her brief. And, in *Tharrett*, the parties had asked for a specific amount of costs and attorney fees. 547 P.3d 628, 2024 WL 1954298, at *6.

Rule 7.07(b)(2) explicitly states the party seeking attorney fees must file an affidavit discussing the "nature and extent of the services rendered," "the time expended on the appeal," and "the factors considered in determining the reasonableness of the fee." 2025 Kan. S. Ct. R. at 52. D.R. did not present the required information and failed to meet her "burden of providing a record on which this court may meaningfully assess" her request for attorney fees and expenses. See *Doan Family Corp. v. Arnberger*, 62 Kan. App. 2d 769, 786, 522 P.3d 364 (2022). In D.R.'s response to our show cause order, she asks us to "rule on the attorney's fees issue reserved by previous motion and in the Appellee's Brief, or at least reserve jurisdiction for the parties to present argument on that point if the Court decides to dismiss the appeal as moot." We do not dismiss the appeal as moot, and D.R. should have filed a motion and affidavit under Rule 7.07(b)(2).

Our Supreme Court has also held an appellate court lacks jurisdiction to consider a request for appellate costs and attorney fees—from either the appellant or the appellee—when the appeal is dismissed for lack of jurisdiction. *Kaelter v. Sokol*, 301 Kan. 247, 250, 340 P.3d

1210 (2015); *In re X.L.*, 63 Kan. App. 2d 853, 867, 540 P.3d 369 (2023) (following *Kaelter* [*9]). Three of the issues B.R.S. raised relate to the companion case, over which we do not have jurisdiction. Thus, D.R. would not be entitled to appellate costs and attorney fees related to defending those three issues. And D.R. did not properly comply with Rule 7.07(b)(2) in seeking attorney fees in relation to the remaining issue. We deny D.R.'s request for appellate attorney fees and expenses.

Appeal dismissed.

End of Document

ATTACHMENT B

Crawford County Board of Comm'rs v. Clelland,
No. 126,910, 2025 Kan. App. Unpub. LEXIS 257
(Kan. Ct. App. July 18, 2025),
pet. for review dismissed, (Dec. 23, 2025)

Bd. of Crawford Cnty. Comm'rs v. Clelland

Court of Appeals of Kansas

July 18, 2025, Opinion Filed

No. 126,910

Reporter

2025 Kan. App. Unpub. LEXIS 257 *; 572 P.3d 801; 2025 LX 244652; 2025 WL 2016773

BOARD OF CRAWFORD COUNTY
COMMISSIONERS, Appellee, v. THOMAS L.
CLELLAND, Appellant.

Notice: NOT DESIGNATED FOR
PUBLICATION.

PLEASE CONSULT THE KANSAS RULES
FOR CITATION OF UNPUBLISHED
OPINIONS.

PUBLISHED IN TABLE FORMAT IN THE
PACIFIC REPORTER.

Prior History: [*1] Appeal from Crawford
District Court; FRED W. JOHNSON JR., judge.
Submitted without oral argument.

Disposition: Affirmed.

Counsel: Thomas Lee Clelland, appellant, Pro
se.

James L. Emerson, county counselor, for
appellee Board of Crawford County
Commissioners.

Judges: Before PICKERING, P.J.,
ISHERWOOD and HURST, JJ.

Opinion

MEMORANDUM OPINION

PER CURIAM: Thomas L. Clelland appeals from
the district court's denial of his motion to
vacate the sale of his property in this tax lien
foreclosure case. Clelland argues the relief he
requested was warranted because numerous

jurisdictional and procedural deficiencies, as
well as fraudulent acts perpetrated throughout
the course of the foreclosure proceeding,
rendered the sale unlawful. We have carefully
analyzed Clelland's claims in conjunction with
a thorough review of the record and are
satisfied the motion to vacate was properly
denied. Accordingly, the decision of the district
court is affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

In 2015, the Board of County Commissioners
of Crawford County (the Board) instituted an
action for judicial foreclosure of a tax lien
against a property Larry Clelland owned in
Pittsburg, Kansas. The Board asserted that
Larry failed to pay property taxes,
specifically [*2] alleging he owed \$7,550.36 in
unpaid taxes, charges, interest, and penalties
on the property.

Larry passed away in 2017, and the property
at issue transferred by intestate succession to
his son, Thomas Clelland. In an affidavit filed
with the Crawford County Register of Deeds,
Clelland asserted that as Larry's sole living
beneficiary and named heir, he had a right to
ownership of the decedent's real property. In
2019, Clelland was personally served with a
summons in the foreclosure action and
accepted service on behalf of Larry.

The matter went to trial in 2021 but despite
having received personal service, Clelland did
not appear. The district court determined that
based upon the evidence, the Board properly

had a lien against the property for unpaid taxes, charges, penalties, and court costs. It ordered that the property be sold at a sheriff's sale to recover the arrearages and its associated expenses, with any excess proceeds paid to Clelland.

A notice of sale appeared in *The Morning Sun*, a weekly newspaper of general circulation in Crawford County, for three consecutive weeks in August and September 2021. The sale proceeded at the time and place identified in that notice and Bob Offutt [*3] successfully bid \$8,100 for the Clelland property.

Clelland filed a motion to vacate the tax sale asserting various grounds for relief. The district court held a pretrial conference to lay the groundwork for resolution of the motion, but Clelland neglected to appear. Even so, the district court accepted stipulated facts based on admissions contained within the parties' respective filings, including that while Clelland could properly claim an interest in the property, he had not paid taxes under protest or filed a valuation appeal since the property was found to be subject to judicial foreclosure.

The district court ultimately denied Clelland's motion, noting that he failed to rebut the prima facie evidence of the regularity of the judicial foreclosure and sale as provided by K.S.A. 79-2804. In explaining its ruling, the district court first clarified that K.S.A. 79-2801 properly vested it with subject matter jurisdiction over the property, that Clelland received personal service, and he accepted residential service on behalf of his deceased father, Larry. The district court noted that since a judicial foreclosure action is an in rem proceeding against real property, Larry's death did not cast a pall over the court's [*4] jurisdiction. Thus, Clelland's varied challenges to jurisdiction, the propriety of service, and sufficiency of notice were without merit. Clelland's claim that his post-sheriff's sale redemption rights were

violated also did not demand relief in the eyes of the district court because no such rights exist in a judicial foreclosure action. Finally, the district court concluded that due to Clelland's failure to exhaust his administrative remedies, it lacked jurisdiction to consider any contention that he was overtaxed, assessed taxes for nonexistent property, and/or taxed differently than other property owners.

Clelland now brings his case before this court for analysis and determination of whether the district court erred in denying his motion to vacate the tax sale.

LEGAL ANALYSIS

Clelland submitted an appellate brief which outlined nine separate claims of error that he contends demonstrate that the district court's denial of his motion should be reversed. For reasons discussed in greater detail below, not every issue raised by Clelland is properly before us for review. Therefore, those claims with procedural deficiencies will not be considered in our overall analysis of the district court's [*5] decision.

I. A pro se appellant is required to follow the same appellate procedures and standards as a licensed attorney.

Before outlining the facts and delving into the issues Clelland raised for our consideration, it is necessary to make some preliminary observations concerning the rules that guide appellate briefing. As a panel of this court previously noted: "A party untrained in the law takes considerable risk in attempting self-representation because failing to comply with court rules or failing to appreciate standards of review and other legal principles can hamper and often derail an argument." *In re Marriage of Smith and Lohman*, 2011 WL 5526565, at *1 (Kan. App. 2011) (unpublished opinion). We

acknowledge that courts construe pleadings of pro se litigants liberally so that their substance controls over their labels. *Joritz v. University of Kansas*, 61 Kan. App. 2d 482, 498, 505 P.3d 775 (2022). But this rule does not insulate these individuals from the application of procedural requirements. *In re Estate of Broderick*, 34 Kan. App. 2d 695, 701, 125 P.3d 564 (2005).

Our ability to review Clelland's claims is significantly hampered by his failure to comply with Kansas Supreme Court Rule 6.02 (2025 Kan. S. Ct. R. at 35). To begin, Rule 6.02(a)(4) (2025 Kan. S. Ct. R. at 36) requires an appellant's brief to contain a statement of facts "keyed to the record on appeal by volume and page number." By contrast, throughout the statement of facts and at [*6] the outset of each issue, Clelland merely cites broad sections of the record, for example, pages "276-294" or "187-270" of a particular volume instead of individually linking his assertions to the record through identification of the specific volume and precise page number where that information can be located as required by the rule. Any material statement lacking these identifying characteristics "'may be presumed to be without support in the record.'" *Kansas Medical Mut. Ins. Co. v. Svaty*, 291 Kan. 597, 623, 244 P.3d 642 (2010).

Next, Kansas Supreme Court Rule 6.02(a)(5) (2025 Kan. S. Ct. R. at 36) requires an appellant to include the "arguments and authorities relied on" in their appellate brief. Past courts have made clear that an appellant is not in compliance with this rule when he or she fails to cite relevant legal authority or merely raises a point incidentally rather than engage in substantial analysis. *State v. Clay*, 300 Kan. 401, 416, 329 P.3d 484 (2014). Failure to comply with this rule results in abandonment of the claims raised on appeal. See *Friedman v. Kansas State Bd. of Healing*

Arts, 296 Kan. 636, 645, 294 P.3d 287 (2013). A portion of the issues Clelland raises also fall short of meeting this standard. Much of the legal authority he references takes the form of quotes with minimal, if any, clarification as to their source or the context in which the highlighted statement was made by the deciding court. Clelland [*7] does make note of particular cases at various points throughout his brief, but he simply references the case by name and neglects to identify any criteria for the resource where it can be found, thereby compromising our ability to review those authorities and properly analyze his claims.

The Kansas Supreme Court has held that Rule 6.02(a)(5) is to be strictly enforced. *State v. Godfrey*, 301 Kan. 1041, 1043-44, 350 P.3d 1068 (2015). An appellant who fails to comply with this rule risks a determination that the issue is improperly briefed and, therefore, waived and abandoned. See *State v. Williams*, 298 Kan. 1075, 1085-86, 319 P.3d 528 (2014). While we are mindful of the difficulties faced by a pro se litigant, we must scrupulously honor our duty to remain impartial and not take up the reins to assist those individuals in fleshing out their challenge to a ruling made by the district court. *In re Marriage of McMorris v. Hoostal*, 172 P.3d 1221, 2007 WL 4578004, at * 1 (Kan. App. 2007) (unpublished opinion) (Appellate courts have a duty to remain impartial and not advocate on behalf of a pro se litigant in reviewing challenged rulings of the district court.). Thus, while we should give arguments a broad interpretation when they are properly raised, we are not free to bolster arguments that are inadequately briefed. See *In re Adoption of T.M.M.H.*, 307 Kan. 902, Syl. ¶ 6, 416 P.3d 999 (2018) (holding that a point raised without pertinent authority or without analysis explaining why it is [*8] sound despite a lack of supporting authority is inadequately briefed and thus abandoned). To do otherwise is to risk stepping into the shoes

of the party before us, which we are expressly prohibited from doing. "A pro se litigant in a civil case cannot be given either an advantage or a disadvantage solely because of proceeding pro se." *Joritz*, 61 Kan. App. 2d at 498 (quoting *In re Estate of Broderick*, 34 Kan. App. 2d at 701).

A fair reading of Clelland's brief leads to the conclusion that six of the nine issues he asked us to resolve are not properly before us for review as they fail to satisfy the standards dictated by Supreme Court Rules 6.02(a)(4) and (a)(5). Clelland's three remaining issues will be addressed in turn.

II. A judicial foreclosure action is not the appropriate proceeding in which to challenge alleged valuation errors.

In this first claim, Clelland contends that the district court erred in finding that it lacked jurisdiction to address his claims that his property tax assessment was inaccurate and his tax payment history was flawed.

Whether jurisdiction exists is a question of law over which this court's scope of review is unlimited. *Shipe v. Public Wholesale Water Supply Dist. No. 25*, 289 Kan. 160, 165, 210 P.3d 105 (2009). Whether a party has failed to exhaust administrative remedies likewise presents a question of law over which we exercise unlimited review. *Miller v. Kansas Dept. of S.R.S.*, 275 Kan. 349, 353, 64 P.3d 395 (2003).

Key to [*9] our resolution of this issue is the finding by the Kansas Supreme Court that questions arising "[i]n the realm of taxes, matters of assessment, exemption, equalization, and valuation" present questions that are properly classified as "administrative." *Dean v. State*, 250 Kan. 417, 421, 826 P.2d 1372 (1992). The Legislature has established two possible avenues of relief for taxpayers who, like Clelland, wish to contest issues

related to these administrative categories. First, a taxpayer may appeal the valuation to the county appraiser within 30 days of the mailing of the valuation notice as provided in K.S.A. 79-1448. If the taxpayer is aggrieved by the outcome of an informal meeting with the county appraiser, they may appeal that determination to either a hearing officer or panel as provided in K.S.A. 79-1611, or to the small claims and expedited hearings division of the Board of Tax Appeals (BOTA) according to K.S.A. 79-1448. To the extent the final determination of either a hearing officer or panel fails to provide the taxpayer with a satisfactory resolution of their claim, the taxpayer may appeal to BOTA. K.S.A. 79-1448.

The second legislatively enacted option for relief requires the taxpayer to pay their taxes and file a written protest with the county treasurer at the time of payment to [*10] protect their right to a refund of the taxes. K.S.A. 79-2005(a). Within 30 days of the results of an informal meeting with the county appraiser, the taxpayer may then appeal to BOTA. K.S.A. 79-2005(g).

By contrast, again, in a tax foreclosure action under K.S.A. 79-2801, the district court *only* determines "the amount of taxes, charges, interest and penalties chargeable to each particular tract, lot or piece of real estate, the name of the owner or party having any interest therein" and then enters an order for the public sale of that real estate to satisfy the resulting lien. K.S.A. 79-2801(a). Accordingly, the district court does not have the latitude, or jurisdiction, to conduct a judicial review of a taxpayer's challenge concerning any of the administrative issues outlined above until that individual has first pursued the remedies which are statutorily provided for. *J. Enterprises, Inc. v. Board of Harvey County Comm'rs*, 253 Kan. 552, 555, 857 P.2d 666 (1993).

Clelland attempted to raise a valuation challenge before the district court as his first step toward relief. Specifically, his property tax assessment and the documentation outlining his payment history and arrearages were not accurate. These contentions prompted a finding by the district court that judicial foreclosure proceedings are not the appropriate forum in which to resolve [*11] such issues; thus, it did not have jurisdiction to address the merits of Clelland's assertions. The judge explained that the statutory procedure which governs the resolution of those issues requires Clelland to first pay the taxes under protest and redeem the property, then pursue the appropriate tax protest mechanism. That is, it was only after Clelland demonstrated that those administrative remedies were exhausted, or that he satisfied each of those steps, that the district court would be properly situated to review his claims.

Clelland's argument on appeal is that the district court applied the wrong analysis because pursuant to K.S.A. 79-2801(a), the district court was free to consider any type of evidence which tended to indicate that Clelland's foreclosure proceedings and the corresponding sale of his property conflicted with established evidence concerning valuation. The foundation for Clelland's assertion is formulated from language he extracted from that provision which states that the district court may "determine the amount of taxes, charges, interest and penalties chargeable to each particular tract, lot or piece of real estate." K.S.A. 79-2801(a). It is essentially Clelland's position that until the district [*12] court analyzed all available evidence which touched upon the property tax assessment and his tax payment history it could not make a valid, adequately informed decision regarding foreclosure.

A similar argument was previously rejected by this court in *Bd. of Harvey Cnty. Comm'rs v. Wheatridge Second*, No. 112, 072, 2015 Kan. App. Unpub. LEXIS 503, 2015 WL 4094306 (Kan. App. 2015) (unpublished opinion). In that case, Wheatridge argued that in order for the district court to successfully fulfill its obligation to investigate and decide the amount of taxes legally assessed, as required by K.S.A. 79-2803, it was critical for the district court to first ensure that a correct valuation of the properties at issue was established for several preceding tax years. 2015 Kan. App. Unpub. LEXIS 503, 2015 WL 4094306, at *3. This court was not persuaded and concluded that Wheatridge "fail[ed] to recognize its obligation to both exhaust its administrative remedies and appeal any grievances" to BOTA. 2015 Kan. App. Unpub. LEXIS 503, 2015 WL 4094306, at *4.

Both the *Wheatridge Second* court and the district court here relied on *Board of Osage County Comm'rs v. Schmidt*, 12 Kan. App. 2d 812, 758 P.2d 254 (1988), as the legal foundation for their respective conclusions. *Wheatridge Second*, 2015 Kan. App. Unpub. LEXIS 503, 2015 WL 4094306, at *3. *Schmidt* reiterates the "'well-recognized rule'" that when taxpayers faced with a foreclosure action also have claims which concern the valuation or assessment of their property, the "full" remedy available to them for resolving the issue is set out under K.S.A. 79-2005. 12 Kan. App. 2d at 813-14. The *Schmidt* court, consistent [*13] with what is now K.S.A. 79-2005(a) and (d), explained that the first step of this remedy demands payment of the taxes under protest, followed by a written statement from the taxpayer to the county treasurer that specifies the grounds or details of the taxpayer's protest and the exact portion of their taxes that they contest, as well as the precise valuation or assessment the taxpayer admits is valid. 12 Kan. App. 2d at 813-14. The county treasurer

then forwards a copy of this written statement of protest to the county appraiser, who will schedule an informal meeting. If the taxpayer is not satisfied with the results of the informal meeting, he or she must—within 30 days—appeal to BOTA. K.S.A. 79-2005(a), (g).

BOTA is the paramount taxing authority in this state and as such, tax questions such as those raised by Clelland must be decided in the first instance by that agency. See *J. Enterprises, Inc.*, 253 Kan. at 555. Accordingly, we are likewise persuaded that *Schmidt* guides the outcome of this issue. Thus, "where a full and adequate administrative remedy is provided in tax matters by statute, such remedy must ordinarily be exhausted before a litigant may resort to the courts." 253 Kan. at 561 (quoting *State ex rel. Smith v. Miller*, 239 Kan. 187, Syl. ¶ 1, 718 P.2d 1298 [1986]).

Clelland has not alleged that he has even pursued any administrative remedies in this matter, let alone [*14] exhausted them. Accordingly, the district court properly concluded that it lacked jurisdiction to consider Clelland's valuation related claims.

III. *The district court did not err in determining that the foreclosure action against Clelland's property was an in rem proceeding.*

The next claim of error we must resolve arises out of Clelland's contention that the judicial foreclosure hearing resulted in an entry of judgment against him and Larry personally; thus, the district court's designation of the matter as solely an in rem proceeding was incorrect. Jurisdictional inquiries raise questions of law over which we exercise unlimited review. *Associated Wholesale Grocers, Inc. v. Americold Corporation*, 293 Kan. 633, 637, 270 P.3d 1074 (2011).

Clelland directs our attention to the United States Supreme Court's opinion in *Shaffer v. Heitner*, 433 U.S. 186, 97 S. Ct. 2569, 53 L.

Ed. 2d 683 (1977), to buttress his claim for relief. He offers a quote from a passage that he attributes to the Court but the citation he provides in support thereof fails to lead us to any such language. Nevertheless, the principle Clelland intends to convey is that "the court has long acknowledged that an adverse judgment 'In Rem' directly effects [sic] the property owners by divesting him of his rights in the property."

The language isolated by Clelland was taken out of context as *Shaffer* does [*15] not bear on the issue Clelland has asked us to resolve. Rather, the *Shaffer* Court analyzed the degree of contact that nonresident corporate officers and directors must have with a state in order for that state to exercise jurisdiction over those individuals and seize their corporate holdings in connection with a private antitrust suit. *Shaffer* is too far afield to inform our decision here.

Clelland's reliance on *Shaffer* reflects a fundamental misunderstanding of the distinguishing characteristics between various legal procedures. As the Kansas Supreme Court previously clarified, "G.S. 1941 Supp. 79-2801 et seq. since amended, is a complete and independent code for the collection of taxes" levied against real estate, and one which demands its own distinct judicial proceeding, involving its own unique procedures and limitations, and "a tax foreclosure action instituted thereunder is a proceeding *in rem*." *Board of County Commissioners v. Matlock*, 192 Kan. 272, 273, 387 P.2d 211 (1963). Additional insight can be gleaned from *Sherman County Comm'rs v. Alden*, 158 Kan. 487, 492-93, 148 P.2d 509 (1944), in which the court explained the distinctions between judicial sales under the civil code and delinquent tax sales. That is, sales under the civil code involve a debtor and creditor relationship of some sort, whereas tax

matters are not classified as debts in the typical sense, so the recovery [*16] mechanisms outlined by the civil code do not apply. A county cannot take a deficiency judgment in a tax foreclosure sale because the proceeding is against the property, it is an action in rem. 158 Kan. at 492. Accordingly, we identify no error in the district court's designation of Clelland's judicial foreclosure matter as an in rem proceeding.

Clelland also asserts that even if his argument fails and the issue is properly classified as in rem, he was still entitled to due process, the least of which required that he receive proper notice concerning the date and time of the property sale. We agree that a judicial foreclosure action does not require an involved party to dispense with their due process protections. "The requirements of due process contemplate that, where feasible, notice of legal proceedings be given by means reasonably calculated to inform all parties having legal rights which might be directly and adversely affected thereby." *Pierce v. Board of County Commissioners*, 200 Kan. 74, Syl. ¶ 5, 434 P.2d 858 (1967).

The record before us reflects that the Board, as required by K.S.A. 79-2801(a), named "the owners or supposed owners of the real estate and all persons having or claiming to have any interest therein or thereto" in its petition at the outset of this litigation. Thus, at the [*17] time of Larry's death, Clelland was already a party to the action, as someone with an interest in the subject property. "After a party's death, if the right sought to be enforced survives only to or against the remaining parties, the action does not abate, but proceeds in favor of or against the remaining parties." K.S.A. 2023 Supp. 60-225(a)(2). The record on appeal additionally discloses that as a direct result of Clelland's status as a party to the action, a Crawford County Sheriff's Deputy executed

personal service of the summons and amended petition to Clelland at his residence. Receipt of a copy of the amended petition will suffice when the amended pleading arose out of the same occurrence set forth in the original pleading and service is timely; service of the original pleading is not required. See *Housh v. Hay*, 35 Kan. App. 2d 100, 106, 128 P.3d 409 (2006). "Requiring the plaintiffs to serve the original petition in addition to the amended petition would have been confusing and duplicative. The purpose of the service of process statutes had been satisfied with the service of the amended petition." 35 Kan. App. 2d at 106.

Clelland received actual notice as required by law. Neither the sheriff, county attorney, treasurer, nor clerk of the district court had a duty to provide any additional [*18] notice. Accordingly, we are satisfied that Clelland's rights were honored and that he received all of the process to which he was due.

IV. *Administrative Order 2020-PR-047 did not toll the redemption deadline.*

Finally, Clelland asks us to determine whether the district court failed to observe Kansas Supreme Court Administrative Order 2020-PR-047, effective May 1, 2020, that was issued by the Chief Justice of the Kansas Supreme Court to address the COVID-19 pandemic. Clelland argues that the order tolled the deadline for the exercise of his redemption rights and thereby prevented execution of the tax sale involving his property. Although Clelland did not raise this issue before the district court, we may exercise our discretion to resolve unpreserved claims for the first time on appeal. See *State v. Rhoiney*, 314 Kan. 497, 500, 501 P.3d 368 (2021) (recognizing exceptions under which the appellate court has prudential authority to review unpreserved claims, including when "the new claim raises only a question of law based on uncontested

facts").

The first paragraph of the COVID-19 Administrative Order states:

"All statutes of limitation and statutory time standards or deadlines applying to the conduct or processing of judicial proceedings are suspended until further order or the termination of this [*19] order under the terms of H. Sub. for S.B. 102." Paragraph (1) of Order 2020-PR-047.

The order also allows for an exemption from its operation under narrow circumstances:

"Except as to a statute of limitation or any proceeding covered by Governor Laura Kelly's Executive Order No. 20-10 temporarily prohibiting certain foreclosures and evictions, any district court judge, appellate judicial officer, or hearing officer may exempt a case from the suspension of a statutory or other deadline by (a) entering an order in a case or issuing a notice of hearing that imposes a deadline or time requirement and (b) specifically stating that the deadline or time requirement is not subject to the suspension of time in this order." Paragraph (3) of Order 2020-PR-047.

Clelland relies on *Unified Gov't of Wyandotte Co./KCK v. Hulse*, No. 124, 153, 527 P.3d 585, 2023 WL 3028179 (Kan. App. 2023) (unpublished opinion), where a panel of this court was called upon to analyze a claim nearly identical to that which Clelland now raises. The *Hulse* panel reviewed the matter independently, with no deference to the district court's conclusion, and exercised unlimited review over the interpretation of statutes and administrative orders. It ultimately concluded that Administrative Order 2020-PR-047 tolled the redemption deadline in the judicial foreclosure action that occurred in that case.

And, since the district court in *Hulse* did not make any overtures to pursue an exemption [*20] that would remove the subject property from application of the Administrative Order, the property at issue was not properly subject to a tax sale in December 2020. 527 P.3d 585, 2023 WL 3028179, at *2-5.

Clelland's case does not demand the same outcome, however, because on April 15, 2021, Kansas Supreme Court Administrative Order 2021-PR-020, effective March 30, 2021, directed most deadlines and time limitations to resume. Exceptions to this order were limited and only included statutory speedy trial deadlines under K.S.A. 22-3402; statutory trial and hearing deadlines under K.S.A. 22-4303; time requirements for filing actions under K.S.A. 60-1501 and 60-1507; and time requirements for a defendant's appearance in limited action cases under K.S.A. 61-3002(b). Paragraph (3) of Order 2021-PR-020. Thus, the redemption deadline in Clelland's judicial foreclosure action was not tolled at the time the tax sale involving his property occurred in September 2021.

Clelland brought this appeal because he believed the tax lien foreclosure process and resulting sale of his property were plagued with deficiencies. Following a careful review of his claims, in conjunction with the record, we are not persuaded that the foreclosure involving his property was tainted by error. Accordingly, the district court's denial of Clelland's motion to vacate the tax sale is affirmed.

Affirmed.

End of Document

ATTACHMENT C

T.U. v. Baker,
No. 129,047, 2026 Kan. App. Unpub. LEXIS 378
(Kan. Ct. App. June 18, 2026),
pet. for review filed, (July 8, 2026)

T.U. v. Baker

Court of Appeals of Kansas

June 18, 2026, Opinion Filed

No. 129,047

Reporter

2026 Kan. App. Unpub. LEXIS 378 *; 2026 LX 396228; 2026 WL 1758517

T.U. and X.X., Appellants, v. KATHLEEN
BAKER, et al., Appellees.

Notice: NOT DESIGNATED FOR
PUBLICATION.

PLEASE CONSULT THE KANSAS RULES
FOR CITATION OF UNPUBLISHED
OPINIONS.

Prior History: [*1] Appeal from Johnson
District Court; RHONDA K. MASON, judge.
Submitted without oral argument.

Disposition: Affirmed in part and dismissed in
part.

Counsel: T.U. and X.X., appellants, Pro se.
Michael J. Fleming, of Lee's Summit, Missouri,
for appellees.

Judges: Before GARDNER, P.J., ARNOLD-
BURGER and SCHROEDER, JJ.

Opinion

MEMORANDUM OPINION

PER CURIAM: T.U. and X.X. sued several
defendants for false light invasion of privacy,
intentional infliction of emotional distress, and
civil conspiracy. The district court dismissed
these claims based on lack of standing and
insufficient pleadings. Appellants challenge
each ruling and claim judicial bias. Finding no
error, we affirm in part and dismiss in part.

FACTUAL AND PROCEDURAL BACKGROUND

In February 2023, students at Wolf Springs
Elementary School (WSE), which is part of the
Blue Valley School District, told their parents
that they had overheard a classmate, D.U.,
saying he had made a "murder list." This list
allegedly named certain students in D.U.'s
class that D.U. threatened to kill. D.U. also
allegedly talked about guns while at school.

Several parties reported these allegations to
school officials and law enforcement. Kathleen
Baker, a school nurse, learned about the
allegations [*2] from a WSE teacher and
believed that as a Blue Valley School District
employee and a mandatory reporter, she had
a duty to report the information. So she
reported it to a school resources officer. Baker
did not know the name of the student accused
and thus did not provide a name in her report.
Brittany Jacobson, a parent of a WSE student
in D.U.'s grade, heard about the allegations
from her daughter. She then reported the
matter to WSE and law enforcement.

Another parent, Catherine Singleton, learned
about the alleged murder list during a meeting
with her child and WSE's principal. She did not
report the allegations but at some later point,
"had an exchange" with T.U. (Father) on a
Facebook page used by parents of WSE
students in D.U.'s class. Singleton did not use
D.U.'s name during the exchange, which was
visible to others. But, she admittedly told
Father that his son threatened to use guns and
harm others and that Father needed to take
those threats seriously.

With the assistance of law enforcement, WSE launched an investigation. Without naming D.U. specifically, the principal announced to parents and WSE staff that she received reports of the alleged murder list allegations and an [*3] investigation was being conducted. D.U. was temporarily suspended from WSE pending the investigation. He was later permanently removed and transferred to a different school. Before these events, D.U.'s brother also attended WSE and D.U.'s mother worked at WSE as a teacher's aide. But like D.U., they were transferred to a different school following these events.

Father filed a pro se petition—individually and on D.U.'s behalf—suing Baker, Jacobson, Singleton, and 10 unnamed individuals (Appellees). The suit alleged defamation, invasion of privacy, intentional infliction of emotional distress, and civil conspiracy. The unnamed individuals were listed in the petition as "Does 1 through 10 all of whom are members of the [WSE] 2019 parent cohort but who remain unidentified at the time of this petition."

Appellees moved to strike under K.S.A. 60-5320, arguing the petition was filed to harass them and in violation of the anti-SLAPP Act. At a hearing on the motion, the district court informed Father that as a nonlawyer, he could not pursue legal claims on anyone else's behalf, including D.U. The district court allowed Father 30 days to hire counsel to represent D.U. before D.U.'s claims would be dismissed. [*4] Father did not hire an attorney within that time, so the district court dismissed the petition without prejudice. But Father filed an amended pro se petition, which named Mother and Father (Appellants) as the petitioners and Appellees as the defendants.

The amended petition did not assert a claim for defamation but claimed false light invasion of privacy, intentional infliction of emotional

distress, and civil conspiracy. To support the claims, Appellants provided nearly identical facts as previously pleaded in their original petition.

Highly summarized, Appellants alleged that after moving to Kansas in 2022, D.U. began attending WSE and X.X. (Mother) started working there as an aide. D.U. was allegedly treated differently and unfairly by his teacher and certain classmates. Before the murder list allegations arose, D.U. was not reported or disciplined for having any significant behavioral issues. Then in February 2023, Appellees learned about the reported murder list allegations. These accusations were allegedly reported by one child to their parent. Appellees then broadly reported the allegations to WSE, law enforcement, and others. And at least Singleton posted about the matter on [*5] social media. In doing all this, Appellees allegedly instigated and later prolonged the investigations of D.U. Appellees also did this purposefully and as a part of a conspiracy to have D.U. expelled from WSE. According to the amended petition, Appellees acted like a "witch hunting mob" in trying to ensure D.U.'s expulsion. Eventually, D.U. and his family members had to transfer to a different school. Damages also included "embarrassment and severe emotional distress."

Father informed the district court that after these events, D.U. missed several months of school between April and December 2023. The State initiated a truancy case, and D.U. was appointed a guardian ad litem. Then, "[p]artly due to the pressure from the truancy court, and partly due to relentless harassment of D.U. by school staff and peers," Father registered D.U. for homeschooling in February 2024.

Appellants also moved for a change of venue. They argued that one of the Johnson County

district judges was a named defendant in this case; another Johnson County district judge showed prejudice against Appellants' family while presiding over D.U.'s truancy case; and the Blue Valley School District had great influence throughout [*6] Johnson County, including over judicial employees and potential jurors. The district court denied the motion, finding Appellants' arguments factually and legally unsupported.

Appellees moved to dismiss the amended petition under K.S.A. 60-212(b)(6), arguing Appellants failed to state any justiciable claims. The district court granted this motion, finding Appellants lacked standing to bring a false light invasion of privacy claim against Appellees and failed to sufficiently state a claim for intentional infliction of emotional distress and civil conspiracy. Regarding Appellants' lack of standing, the court explained that the amended petition alleged only that Appellees' conduct resulted in a breach of D.U.'s privacy rather than Appellants' privacy. Appellants also failed as a matter of law to allege facts showing that Appellees' conduct was extreme and outrageous enough to make a claim for intentional infliction of emotional distress. Finally, because Appellants failed to sufficiently argue the first two torts, the district court determined that Appellants' civil conspiracy claim also necessarily failed. As explained in the order, a civil conspiracy requires proof that the defendants committed at least [*7] one separate, actionable tort.

Appellants timely appeal. They filed a joint, pro se appellate brief, challenging each of the district court's rulings and claiming judicial bias.

I. DID THE DISTRICT COURT ERR IN DISMISSING APPELLANTS' FALSE LIGHT INVASION OF PRIVACY CLAIM BY FINDING APPELLANTS LACK STANDING TO LITIGATE THE CLAIM?

Appellants assert that the district court erred in finding they lack standing to sue Appellees for false light invasion of privacy. They argue that in deciding this, the district court considered only some of the facts alleged in the amended petition, which related to D.U., and ignored the allegations that related specifically to their rights of privacy.

Standard of Review

Standing is a component of the district court's subject matter jurisdiction. Whether a party has standing is a question of law over which this court has unlimited review. *In re L.L.*, 315 Kan. 386, 390, 508 P.3d 1278 (2022).

Whether a district court erred by granting a motion to dismiss for failure to state a claim is also subject to unlimited review. *Jayhawk Racing Properties v. City of Topeka*, 313 Kan. 149, 154, 484 P.3d 250 (2021). This court views the well-pleaded facts in a light most favorable to the plaintiff and assumes as true those facts and any inferences reasonably drawn from them. If those facts and inferences state [*8] 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 has no claim. *Kudlacik v. Johnny's Shawnee, Inc.*, 309 Kan. 788, 790, 440 P.3d 576 (2019); K.S.A. 60-212(b)(6).

But an appellate court need not accept conclusory allegations as to the legal effects of the events if the allegations are not supported or are contradicted by the description of events. *McCormick v. Board of Shawnee County Comm'rs*, 272 Kan. 627, 646, 35 P.3d 815 (2001).

Appellants Lack Standing

Basically, standing means a party must have a personal stake in the outcome of a case. There are two types of standing: traditional and statutory. *Baker v. Hayden*, 313 Kan. 667, 672-73, 490 P.3d 1164 (2021). When standing is determined on a motion to dismiss without an evidentiary hearing, the plaintiff need only make a prima facie showing, and the court must resolve factual disputes in the plaintiff's favor. *KNEA v. State*, 305 Kan. 739, 747, 387 P.3d 795 (2017).

K.S.A. 60-217(a)(1) states that "[a]n action must be prosecuted in the name of the real party in interest." Under Kansas' traditional, two-part standing test, a party must demonstrate they have suffered a cognizable injury and that there is a causal connection between the injury and the challenged conduct. A party establishes a cognizable injury—i.e., an injury in fact—when they personally suffer some actual or threatened injury as a result of the challenged conduct. *Hodes & Nauser v. Stanek*, 318 Kan. 995, 1002, 551 P.3d 62 (2024). For **[*9]** a matter to be justiciable, the parties must have "adverse legal interests that are immediate, real, and amenable to conclusive relief." 318 Kan. at 1002.

Appellants accuse Appellees of false light invasion of privacy, which is one of four types of invasion of privacy claims. *Dominguez v. Davidson*, 266 Kan. 926, 937, 974 P.2d 112 (1999); see Restatement (Second) of Torts §§ 652B-652E. A party claiming false light invasion of privacy must show these elements: (1) a publication to a third party; (2) that the publication falsely represented the person; and (3) that the representation would be highly offensive to a reasonable person. *Dominguez*, 266 Kan. at 937.

Again, the district court found Appellants lack standing to bring this claim because they alleged only that Appellees' conduct breached

D.U.'s privacy, rather than their own. In making this determination, the district court specified the following facts alleged in the amended petition:

- "Singleton posted on social media about D.U. portraying him as a safety threat, as a sociopathic bully who uses profanity and who intimidates students."
- "Baker instigated a criminal investigation against D.U. by filing a police report."
- "Defendants 'themselves did not witness anything nor had any evidence' (about D.U.). They just circulated secondhand information . . . to others."
- "Defendants **[*10]** put pressure on the school administrators and the District bureaucrats to continue the school investigation against D.U. and force him out of school."
- "Defendants took concerted actions at around the same time against the District to make the District change its policies regarding the Chinese Immersion Program. 'These actions . . . gave Defendants a sense of triumph and which made them feel powerful enough to get the District to do some other things they wanted, such as declaring D.U. guilty of a heinous wrongdoing and expelling him from WSE.'"
- "The Defendants 'acted like a witch-hunting mob on and around February 10, 2023, and would not be satisfied with any outcome but the elimination of D.U. from WSE.'"
- "Defendants 'conspired to make D.U. out to be a threat and purge him from the school by using police and school investigation [as] weapons.'"

- "Singleton was the leader of the campaign against N.B. (a classmate of D.U.'s) [and] . . . Jacobson was at least one of the leaders in the campaign against D.U."

Appellants tacitly concede that these allegations do not show that they have standing to pursue a privacy claim.

Still, Appellants argue that the district court focused too narrowly [*11] on these allegations and improperly ignored these two facts alleged in their amended petition: (1) "Singleton 'blamed [Father's] parenting for D.U.'s alleged disorderly conduct [in a Facebook post]"; and (2) "[Father] and [Mother] also experienced embarrassment and severe emotional distress when . . . Singleton and some other Defendants blamed their parenting, on social media, for D.U.'s alleged disorderly conduct." Appellants contend that, because these facts allege that they were also targets of and affected by Appellees' conduct, they have standing to pursue their invasion of privacy claim.

Appellees do not acknowledge these facts. They instead contend that Appellants simply repackaged the argument previously made on D.U.'s behalf in an attempt to litigate a claim that belongs to D.U.

Although Appellants added the two allegations that reference them specifically, the allegations only summarily and tangentially suggest that Appellees also targeted them by blaming them for D.U.'s behavior. Appellants base their invasion of privacy claim primarily on their relationship to D.U. and the public's reaction to his alleged conduct, not on Appellees' conduct directed toward them. Regardless [*12] of these additions, the crux of Appellants' invasion of privacy claim alleges that on February 12, 2023, "Defendant Singleton posted on social media about D.U., portraying him as a safety threat, as a sociopathic bully

who uses profanity and who intimidates students. She also blamed [Father's] parenting for D.U.'s alleged disorderly conduct."

And Appellants fail to state what D.U.'s "alleged disorderly conduct" is, so the reader cannot tell whether they are claiming this conduct is bullying, using profanity, and intimidating students, or something else. The false light invasion of privacy count, read together, fails to state that D.U.'s parents personally suffered some actual or threatened injury as a result of the social media post on February 12.

To establish standing, a party must demonstrate they have suffered a cognizable injury and that there is a causal connection between the injury and the challenged conduct. A cognizable injury is shown when the party *personally* suffers some actual or threatened injury as a result of the challenged conduct. *Hodes & Nauser*, 318 Kan. at 1002. Appellants have not alleged any actual or threatened harm that Appellants caused them. The district court thus correctly determined Appellants' [*13] lack of standing to make this claim, which actually belongs to D.U.

Appellants' allegations about the social media posts purportedly blaming their parenting are also unsupported. Even more, Appellants' own evidence contradicts their allegations. The amended petition cites an exhibit attached to the petition as support for their claim. That exhibit includes screenshots of comments made on a Facebook post on WSE's Facebook page by Singleton and another person who is not a party here. The screenshots show that Father made the initial post that Singleton and the other person commented on.

Singleton's comment begins by characterizing Father's post as a "sad attempt [to] deflect . . . [D.U.]'s behavior." It then states, "Nobody

wants to send our kids to a school that is unsafe. I think we can all agree. *That change starts within each of our homes.*" (Emphasis added.) Singleton also suggested in this comment that D.U. needed to take "ownership of the behavior" and parents "can role model for [their children] how . . . [to] handle bullying [and] talk[] about emotions." The comment ends by stating: "Your kid is saying he's going to kill other kids [and] shoots them with his finger. He talks of [*14] guns. Own it—let us know you[re] working on it. Let us know you are taking this serious[ly]."

Below this, the other commentor stated: "We know that even the best of parents can have children that act out. However, I'm sadden[ed] to hear that teachers are expected to teach in an environment where parents turn accountability into 'politics.' Seems to be the answer to everything when someone isn't being accountable."

Contrary to Appellants' characterization, neither of these comments directly blamed Appellants' parenting for D.U.'s actions, refuting the basis of their invasion of privacy claim. And as already noted, Appellants only summarily alleged that Singleton and others blamed their parenting on social media. This type of allegation—unsupported and contradicted by the description of the events—is conclusory, so this court need not accept it as true. See *McCormick*, 272 Kan. at 646. Because these are the only facts that Appellants alleged to show Appellees' conduct harmed or threatened to harm them, we affirm the district court's finding that Appellants lack standing.

Alternative Basis for Dismissal Under K.S.A. 60-212(b)(6)

The record shows an alternative basis for affirming the district court's dismissal of this

claim. We can [*15] affirm the district court's judgment as correct for a different reason. See *Nicholson v. Mercer*, 319 Kan. 712, 717, 559 P.3d 350 (2024) (affirming Kansas Court of Appeals as right for the wrong reason); *Midfirst Bank v. Sipple*, No. 128, 054, 583 P.3d 934, 2026 WL 482568, at *7 (Kan. App. 2026) (unpublished opinion) (citing *Nicholson* for "right for the wrong reason" rule and affirming trial court's judgment of foreclosure).

Standard of Review

This court's review of the district court's order dismissing Appellants' petition for failure to state a claim is unlimited. *Jayhawk Racing Properties*, 313 Kan. at 154. The well-pleaded facts are viewed in a light most favorable to the plaintiff, and we assume as true those facts and any inferences reasonably drawn from them. If these facts and inferences state any claim upon which relief can be granted, dismissal is improper. *Kudlacik*, 309 Kan. at 790; K.S.A. 60-212(b)(6).

Kansas is a notice-pleading state. See *Williams v. C-U-Out Bail Bonds*, 310 Kan. 775, 784, 450 P.3d 330 (2019). So generally, a petition needs only "(1) [a] short and plain statement of the claim showing that the pleader is entitled to relief; and (2) a demand for the relief sought." K.S.A. 60-208(a). A legal theory of relief need not be detailed, so long as the petition apprises the defendant of the facts on which the plaintiff claims to be entitled to relief. *Beck v. Kansas Adult Authority*, 241 Kan. 13, 25, 735 P.2d 222 (1987); see also K.S.A. 60-208(e) (directing courts to construe pleadings "so as to do justice").

Appellants' petition fails to state facts meeting all elements of false [*16] light invasion of privacy. Those elements are:

"(1) that publication of some kind must be

made to a third party; (2) that the publication must falsely represent the person; and (3) that representation must be highly offensive to a reasonable person." *Byers v. Snyder*, 44 Kan. App. 2d 380, 396, 237 P.3d 1258 (2010) (citing *Dominguez v. Davidson*, 266 Kan. 926, 937, 974 P.2d 112 [1999]).

In their amended petition, Appellants allege that Singleton and other Defendants blamed their parenting, on social media, for D.U.'s alleged disorderly conduct. This satisfies the first element of false light invasion of privacy—publication to a third party. But Appellants' amended petition fails to allege that Singleton falsely blamed their parenting for D.U.'s alleged disorderly conduct, or that her blaming their parenting was highly offensive to a reasonable person, as this tort requires. Appellants alleged that Appellees caused "widespread rumors" that Appellants were "horrible parents with horrible children." And although Appellants suggested that Appellees' statements about D.U. were false and highly offensive, alleging elsewhere that D.U. was subjected to "false accusations" of "heinous wrongdoing," nowhere does the amended petition include two necessary elements—that the social media statements falsely represented them [*17] or that the false representations are highly offensive to a reasonable person.

Appellants thus failed to allege facts necessary to show false light invasion of privacy. Cf. *Hart v. U.S.D. #244 Bd. of Educ.*, No. 110, 172, 327 P.3d 1052, 2014 WL 3020476, at *8 (Kan. App. 2014) (unpublished opinion) (affirming summary judgment on false light invasion of privacy claim for failing to allege that statements made by employer were false or highly offensive to a reasonable person and petition admitted the statements did not offend her). They thus failed to state a claim for that

tort. See *Zhu v. St. Francis Health Ctr.*, No. 94,900, 2007 WL 316805, at *5 (Kan. App. 2007) (unpublished opinion) ("Zhu does not allege the report was false; thus, Zhu failed to state a claim for false light invasion of privacy.").

So even if Appellants had standing to bring a false light invasion of privacy claim against Appellees, the district court's dismissal of this claim is still correct.

II. DID THE DISTRICT COURT ERR BY DISMISSING APPELLANTS' CLAIM FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS FOR FAILURE TO ALLEGE FACTS SHOWING SUFFICIENTLY EXTREME AND OUTRAGEOUS CONDUCT?

Appellants next challenge the district court's conclusion that Appellees' conduct, as alleged in the amended petition, was not sufficiently extreme and outrageous to support a viable claim for intentional infliction of [*18] emotional distress. Appellants contend that whether Appellees' conduct met this standard raised a question of fact that should have been submitted to a jury, so the district court erred by deciding this as a matter of law. In a separate but related issue, Appellants also argue that when reviewing their claims, the district court did not assume the facts alleged in their petition were true, as K.S.A. 60-212(b)(6) requires, and did not view the facts in a light most favorable to them.

Discussion

To establish a claim of intentional infliction of emotional distress (or outrage), a plaintiff must prove four elements:

"(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 Commc'ns*, 290 Kan. 472, 476, 229 P.3d 389 (2010) (citing *Taiwo v. Vu*, 249 Kan. 585, 592, 822 P.2d 1024 [1991]).

See PIK Civ. 4th 127.70.

To determine whether a plaintiff has stated a viable claim for intentional infliction of emotional distress, the district court must find two threshold requirements are met: (1) the court can reasonably regard defendant's conduct as so extreme and outrageous as to permit recovery; [*19] and (2) the emotional distress suffered by plaintiff is in such extreme degree the law must intervene because the distress inflicted is so severe that no reasonable person should be expected to endure it. *Valadez*, 290 Kan. at 477 (citing *Roberts v. Saylor*, 230 Kan. 289, 292-93, 637 P.2d 1175 [1981]).

These are stringent requirements and, contrary to Appellants' argument on appeal, the allegedly tortious conduct may be reviewed first by the district court as a matter of law. See *Dotson v. McLaughlin*, 216 Kan. 201, 211, 531 P.2d 1 (1975) ("[I]t is for the court to determine in the first instance, whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery, or whether it is necessarily so, and where reasonable men may differ, the question is for the jury to determine.").

No Extreme and Outrageous Conduct

To support this claim, a petitioner must allege conduct that is "so outrageous in character and so extreme in degree as to go beyond the bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized society." *Miller v. Sloan, Listrom, Eisenbarth, Sloan & Glassman*, 267 Kan. 245, 257, 978

P.2d 922 (1999). Extreme and outrageous conduct does not arise from "mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." *Bradshaw v. Swagerty*, 1 Kan. App. 2d 213, 216, 563 P.2d 511 (1977) (quoting *Dotson v. McLaughlin*, 216 Kan. 201, 210, 531 P.2d 1 [1975]). Conduct may be considered to be extreme and outrageous "when the recitation of the facts [*20] to an average citizen would arouse resentment against the actor and lead that citizen to spontaneously exclaim, 'Outrageous!'" *Fusaro v. First Family Mtg. Corp.*, 257 Kan. 794, 805, 897 P.2d 123 (1995).

This sets a high bar, thus most Kansas cases have found the alleged facts insufficiently outrageous to meet that test. *Lindemuth v. Goodyear Tire & Rubber Co.*, 19 Kan. App. 2d 95, 100-01, 864 P.2d 744 (1993); see, e.g., *Moore v. State Bank of Burden*, 240 Kan. 382, 388, 729 P.2d 1205 (1986) (no outrage claim where bank erroneously set off funds against a legitimate indebtedness owed to bank); *Burgess v. Perdue*, 239 Kan. 473, 475-77, 721 P.2d 239 (1986) (no outrage claim where doctor phoned mother after son's death to tell her she "had her son's brain in a jar"); *Neufeldt v. L.R. Foy Constr. Co.*, 236 Kan. 664, 668-69, 693 P.2d 1194 (1985) (no outrage claim allowed by a wife recovering from a miscarriage who was falsely told that an arrest warrant had been issued for her husband); *Roberts*, 230 Kan. at 295 (no outrage claim when doctor expressed dislike of patient right before patient underwent surgery); *Ely v. Hitchcock*, 30 Kan. App. 2d 1276, 1289, 58 P.3d 116 (2002) (funeral director allowing plaintiff to view his mother's body with a cut to her forehead and blood on her face and hair not sufficient to support claim of outrage); *Henderson v. Ripperger*, 3 Kan. App. 2d 303, 305-06, 594 P.2d 251 (1979) (waitress falsely accusing patron of leaving without paying in

front of other customers not sufficient to support a claim of outrage). But see *Gomez v. Hug*, 7 Kan. App. 2d 603, 610-11, 645 P.2d 916 (1982) (claim for intentional infliction of emotional distress sufficient to survive summary judgment where plaintiff was subject to vulgar, racist expressions and threats [*21] of violence resulting in potentially serious medical problems).

But here, we are not reviewing the facts, as factual disputes cannot be resolved or decided on a motion to dismiss for failure to state a claim. The trial court's review, and ours, is limited to a review of the pleadings. *John Doe v. M.J.*, 315 Kan. 310, 313, 508 P.3d 368 (2022). A party typically moves to dismiss early in a case "when many of the facts have not yet been discovered and legal theories may be in flux." *Rector v. Tatham*, 287 Kan. 230, 232-33, 196 P.3d 364 (2008); *Pioneer Ridge Nursing Facility Operations v. Ermev*, 41 Kan. App. 2d 414, 418-19, 203 P.3d 4 (2009). See *Curts v. Dillard's, Inc.*, 30 Kan. App. 2d 814, 815-16, 48 P.3d 681 (2002) (finding the trial court properly dismissed plaintiffs' claim of negligent infliction of emotional distress for failure to state a claim for relief because the petition failed to allege physical injury, an essential element of that claim), *disapproved of on other grounds by Hallam v. Mercy Health Center of Manhattan, Inc.*, 278 Kan. 339, 97 P.3d 492 (2004).

In support of their claim, Appellants alleged that Appellees spread unsubstantiated rumors and spurred unnecessary investigations, which led to D.U. and his family members' removal from WSE:

- "Many Defendants framed a case against D.U. in an attempt to force D.U. out of WSE. Defendant Baker instigated a criminal investigation against D.U. by filing a police report. Defendant Jacobson followed suit."

- "One of the school resource officers who investigated the allegations against D.U. told [*22] [Father] that 'Parents were firing up everyone', and that parents' reports were not useful at all. In that regard, Defendants themselves did not witness anything nor had any evidence. They were just circulating secondhand information about the allegations, i.e., what they had heard from each other and/or from their children, who were similarly passing along what they had heard from others."

- "The aforementioned school resource officer unequivocally told [Father] that he found no threat on February 10, 2023, and that D.U. could go back to the educational setting on the same day."

- "However, some of the Defendants put pressure on the school administrators and the District bureaucrats to continue the school investigation against D.U. and force him out of school."

- "In that regard, the district bureaucrat Shelly Nielsen told the Parents on February 17, 2023 that they received calls and emails from 10-15 families regarding the murder list."

- "In the email she sent to the Parents on February 11, 2023, [WSE's principal] mentions the widespread disruption the 'murder list incident' caused in the community."

- "In the email she sent to the Parents on February 24, 2023, the District bureaucrat [*23] Amy Farthing says that the transfer of D.U. and [Mother] to another school was to 'avoid disruption to their education process that was foreseeable if they remained at Wolf Springs.'"

Citing *Taiwo*, Appellants assert that these statements allege that Appellees' conduct was

extreme and outrageous, so they should have been granted discovery on this claim. In *Taiwo*, our Supreme Court found the alleged tortious conduct was extreme and outrageous and affirmed a jury verdict in favor of Sherry and Obafemi Taiwo on their claim of intentional infliction of emotional distress. Sherry worked for Kim Phan Thi Vu at a daycare center. After her employment ended, Sherry got into an argument with Vu about her final paycheck. During the argument, Vu shoved Sherry in the chest and then locked her inside the daycare center. Vu subsequently made repeated false accusations to police about Sherry and Obafemi, accusing them of vandalism and battery. She also filed a false police report and induced another employee to lie to the police about the Taiwos' involvement in the alleged vandalism. 249 Kan. at 587-89, 593.

Our Supreme Court found Vu's conduct "intentional and malicious" and distinguished other similar cases, explaining:

"Vu's liability [*24] did not arise from mere insults, indignities, threats, annoyances, petty expressions, or other trivialities. This was not a matter of the Taiwos' feelings merely being hurt. Ms. Vu's conduct cannot be explained as simply expressing her opinion or the result of a mistaken belief. She abused the criminal justice process to her own ends. Even when the police gave her the opportunity to correct her story, she refused. Reasonable people could regard her behavior as atrocious and utterly intolerable in a civilized society. If reasonable people do not agree on whether Ms. Vu's behavior was outrageous, then the question should be submitted to the jury." 249 Kan. at 593.

The *Taiwo* court held that Vu's conduct could reasonably be regarded as so extreme and outrageous as to permit recovery, so the

district court had properly submitted the claim to the jury. 249 Kan. at 593.

Yet the facts here are not so similar to *Taiwo* to persuade us that Appellants should have been allowed to proceed on this claim. True, somewhat like *Taiwo*, Appellants alleged that Appellees reported D.U. to the police and school officials based on false or unsubstantiated rumors. They also claim they witnessed their young child undergo a criminal investigation and endured [*25] its related effects, including D.U. and Mother's transfers to another school. But unlike *Taiwo*, Appellants' allegations fall short of alleging any intentional abuse of the criminal justice system similar to the abuse shown by Vu. And even if the amended petition could be reasonably read as alleging such an abuse, Appellants still do not claim that Appellees reported them to the police. Appellants' case is thus unlike *Taiwo* in important respects.

And Appellants' assertions regarding Appellees' social media posts also fail to allege extreme and outrageous conduct. Again, extreme and outrageous conduct does not arise from "'mere insults, indignities, threats, annoyances, petty expressions, or other trivialities.'" *Bradshaw*, 1 Kan. App. 2d at 216. Our society expects citizens to be thicker-skinned. See *Fusaro*, 257 Kan. at 805.

The facts presented here do not meet this standard. As alleged in Appellants' amended petition, Appellees made social media posts blaming Appellants' parenting for unspecified behavior of D.U. Even assuming that the behavior D.U. was accused of was egregious, an average citizen would not spontaneously exclaim, "Outrageous!" upon learning about Appellees' online statements. *Bradshaw*, 1 Kan. App. 2d at 216. Appellees' conduct could easily be explained as simply [*26] expressing their opinion or the result of a mistaken belief. Cf. *Hanrahan v. Horn*, 232 Kan. 531, 657 P.2d

561 (1983). Thus their conduct was not sufficiently extreme and outrageous to show intentional infliction of emotional distress.

No Severe Emotional Distress

Appellants also fail to allege facts showing they suffered severe emotional distress. Liability arises only when the plaintiff's distress is so severe that no reasonable person should be expected to endure it. *Taiwo*, 249 Kan. at 594 (citing Restatement [Second] of Torts § 46[1], comments j and k [1963]). "Elevated fright, continuing concern, embarrassment, worry, and nervousness do not by themselves constitute sufficient harm to a plaintiff to warrant the award of damages for outrage." *Valadez*, 290 Kan. at 478.

But physical symptoms or mental symptoms that are long lasting and debilitating may meet that standard.

"There is no laundry list of what qualifies as the requisite level of severity [of emotional distress] . . . [I]t is fair to say that headaches, sleeplessness, irritability, anxiety, depression, listlessness, lethargy, intermittent nightmares, and the like would probably not suffice anywhere.

"On the other hand, physical symptoms probably would suffice, and if purely mental symptoms are all that apply . . . those symptoms should at least be long [*27] lasting and debilitating." *Valadez*, 290 Kan. at 479 (quoting Boston, Kline & Brown, *Emotional Injuries: Law and Practice* § 22:7 [1998]).

Our Supreme Court has found the absence of psychiatric or medical treatment, including medication, weighs against a finding of extreme emotional distress. 290 Kan. at 479. It concluded in *Valadez* that even though

newscasters had publicly falsely accused Valadez of being the BTK serial murderer, the evidence did not show Valadez had suffered severe or extreme emotional distress beyond what he experienced because of the defendants' constitutionally protected activities. He testified that when he watched the false publicity about himself, he felt like he had been hit in the gut and became physically ill, and that he could not return home due to unwanted attention. But he had not shown that he sought medical treatment or psychological counseling or that he had any long-lasting mental effects from the accusations. See 290 Kan. at 473-74, 478. Valadez thus failed to prove that he suffered extreme or severe emotional distress because of the news coverage of his arrest and thus could not sustain an action for outrage. See also *Roberts*, 230 Kan. at 296 (no outrage shown where plaintiff's emotional distress was not so severe that plaintiff had to seek psychiatric or further medical treatment); *Dana v. Heartland Management Co.*, 48 Kan. App. 2d 1048, 1060, 301 P.3d 772 (2013) (Plaintiffs failed [*28] to prove extreme or severe emotional distress when there was no evidence that plaintiffs sought medical or psychological treatment as a result of defendants' conduct.).

With that legal framework established by the cases above, which were decided by the facts on summary judgment or at trial, we turn to whether Appellants' petition stated the required severe emotional distress. In identifying their damages stemming from Appellees' actions, Appellants claimed that they "experienced embarrassment and severe emotional distress" based on the following:

- "Singleton announced on social media that the student who was accused of having a murder list was their son."
- "Singleton and some other Defendants blamed their parenting, on social media,

for D.U.'s alleged disorderly conduct."

- Mother "witnessed D.U. being treated like a threat at school on February 10, 2023[,] . . . [seeing his] seclusion and . . . being questioned about having a murder list[,] [and] . . . was told that a school resource officer was waiting outside to question . . . her naïve and innocent 8-year-old son."
- Appellants went "through a school investigation and a re-entry meeting that resulted in a forced transfer to another [*29] elementary school in the middle of the Spring semester."
- "[W]idespread rumors about Plaintiffs being horrible parents with horrible children, denied . . . [Mother] the opportunity to work in the community."

But "[c]onduct that rises to the level of tortious outrage must transcend a certain amount of criticism, rough language, and occasional acts and words that are inconsiderate and unkind. The law will not intervene where someone's feelings merely are hurt." *Valadez*, 290 Kan. at 477. Embarrassment alone is not sufficient harm. See 290 Kan. at 478. And Appellants provide no information about the severity of their distress. Cf. *Spencer v. Ziegler*, No. 126, 848, 559 P.3d 1238, 2024 WL 5102669, at *12 (Kan. App. 2024) (unpublished opinion) (finding the following testimony "not particularly strong" but sufficient to affirm the district court's decision to allow the tort of outrage claim to go to the jury: the acts caused him "'ill effects'" and "'physical problems'"; he went to the VA numerous times; he was prescribed medication for anxiety; and the acts had a "'big-time'" impact on his blood pressure).

Even claiming that one's reputation was destroyed by the defendant's conduct fails to allege the extreme emotional distress required to state a claim for outrage. See *Ellibee v.*

Biggs, No. 104,368, 2011 WL 1878153, at *3 (Kan. App. 2011) (unpublished opinion) (finding court properly [*30] dismissed outrage claim for failure to allege extreme emotional distress when the petition claimed only that Ellibee's reputation was destroyed and damaged by the defendant's conduct). Appellants failed to meet the threshold requirements for stating a claim for intentional infliction of emotional distress. We thus affirm the district court's order dismissing this claim.

III. DID THE DISTRICT COURT ERR BY DISMISSING APPELLANTS' CIVIL CONSPIRACY CLAIM?

Appellants next claim the district court did not apply the appropriate standard of review for deciding a motion to dismiss. As noted in the previous issue, Appellants contend that the district court did not view the facts pleaded in their amended petition in a light most favorable to them or assume those facts are true as K.S.A. 60-212(b)(6) requires. Appellants focus primarily on the district court's analysis of their civil conspiracy claim but seemingly challenge each of the district court's rulings on this basis. Having found no error in the district court's analysis of Appellants' first two claims, we limit this analysis to Appellants' only remaining claim—civil conspiracy.

Discussion

Appellants contend that the district court applied a different standard [*31] of review than prescribed under K.S.A. 60-212(b)(6) because it adopted the opposite view of the facts than alleged in the amended petition. Appellants assert that the district court began its review of their conspiracy claim by incorrectly assuming their suit was in retaliation for Appellees' reporting.

But this assertion mischaracterizes the district court's findings and is unsupported by the

record. This argument appears to misinterpret these preliminary findings that the district court made in its order dismissing Appellants' claims:

"This case involves some alleged statements made by a student at [WSE]. The student who is alleged to have made the statements is the minor son of the Plaintiffs and he is alleged to have said that he had a 'murder list.' Plaintiffs have initiated this lawsuit against the Defendants *for their reaction and response* to the alleged statements made by their son, D.U." (Emphasis added.)

Although the district court's wording is somewhat confusing, the district court found Appellants brought these claims against Appellees based on "their reaction and response" to D.U.'s alleged statements, i.e., the Appellees' reaction and response. The district court did not find that Appellants [*32] filed this lawsuit based on "their" own reactions and responses. And the district court used no other language supporting the alleged "retaliation" theory. Appellants do not point out any other specific instances in which they believe the district court applied an improper legal standard to decide their claims.

Having clarified the district court's initial findings, we review the district court's ruling on Appellants' conspiracy claim. The elements of a civil conspiracy are: (1) two or more persons; (2) an object to be accomplished; (3) a meeting of the minds in the object or course of action; (4) one or more unlawful overt acts; and (5) damages as the proximate result thereof. *Stoldt v. City of Toronto*, 234 Kan. 957, 967, 678 P.2d 153 (1984). Civil conspiracy is an actionable tort. But a claim for civil conspiracy requires the commission of some wrong giving rise to a cause of action independent of the conspiracy. In other words, to prove the conspiracy, the plaintiff must also

show an underlying tort was committed. See 234 Kan. at 967; *Knight v. Neodesha Police Dept.*, 5 Kan. App. 2d 472, 476, 620 P.2d 837 (1980).

Appellants accused Appellees of committing two other torts: false light invasion of privacy and intentional infliction of emotional distress. But as discussed above, the district court properly dismissed those claims based on [*33] Appellants' lack of standing and insufficient pleading. And Appellants did not argue any separate, actionable tort, so they cannot prove a civil conspiracy under these facts. See *Stoldt*, 234 Kan. at 967; *Knight*, 5 Kan. App. 2d at 476.

The district court thus correctly determined that because Appellants' first two claims failed, their conspiracy claim necessarily failed. Dismissal was thus appropriately granted. Cf. *Jarvis v. Nationwide Ins. Co. of Am.*, No. 120, 332, 449 P.3d 454, 2019 WL 4725239, at *6-7 (Kan. App. 2019) (unpublished opinion) (affirming dismissal of civil conspiracy claim when petitioner could not show damages).

IV. DID THE DISTRICT COURT ERR BY DENYING APPELLANTS' MOTION FOR A CHANGE OF VENUE?

Appellants' final issue alleges judicial bias, challenging Johnson County District Judge Rhonda Mason's impartiality. Judge Mason presided over these proceedings and another case involving Appellants, which they refer to as a companion case. Appellants assert that throughout both cases, Judge Mason consistently ruled against them, denying their many requests for discovery and preventing them from serving subpoenas. Yet she regularly ruled in favor of the opposing parties' motions, including Appellees' motion to dismiss their claims.

Appellants separately argue that Judge Mason erred by denying their request for a change of venue. In that [*34] motion, Appellants argued

two other Johnson County district judges exhibited bias against them. As relief for these alleged errors and allegedly biased rulings, Appellants ask this court to reverse the district court's order dismissing their amended petition and remand these matters with direction to transfer venue to a different county.

Claim of Bias

Preservation

A litigant may argue that a judge's recusal is required in accordance with (1) the statutory factors set forth in K.S.A. 20-311d(c); (2) the standards of the Kansas Code of Judicial Conduct, Supreme Court Rule 601B, Canon 2, Rule 2.2 (2026 Kan. S. Ct. R. at 489); and (3) the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *State v. Moyer*, 306 Kan. 342, 370, 410 P.3d 71 (2017). But Appellants did not raise such a claim in the district court, and they cite none of these authorities to support such a claim. The argument is thus unpreserved and improperly briefed. See *In re Adoption of T.M.M.H.*, 307 Kan. 902, 912, 416 P.3d 999 (2018) (failure to support a point with pertinent authority is like failing to brief the issue); *In re N.E.*, 316 Kan. 391, 407, 516 P.3d 586 (2022) (an issue not raised before the district court cannot be raised on appeal).

We recognize that Appellants' argument falls somewhat in line with K.S.A. 20-311d, which allows a party to move for a change of judge based on the belief "that the judge to whom an action is assigned cannot afford that party a fair trial in the action." K.S.A. 20-311d(a). Under this provision though, "a party must first file a motion for change [*35] of judge; if that motion is denied, then the party must immediately file a legally sufficient affidavit alleging grounds set forth in the statute." *State*

v. Sawyer, 297 Kan. 902, 908, 305 P.3d 608 (2013). Appellants did neither, so we decline to exercise appellate review of this claim. See *In re Marriage of Bush*, 62 Kan. App. 2d 284, 291-92, 513 P.3d 494 (2022) (declining to consider bias claim on appeal when claimant failed to follow the proper statutory procedure).

Appellants did not raise their judicial bias argument about Judge Mason in the district court and, even if they had, they cite no legal authority for the claim. We thus dismiss this claim of error.

Denial of Motion for Change of Venue

Appellants summarily challenge the district court's denial of their motion for a change of venue under K.S.A. 60-609(b). We review a court's decision to change venue under K.S.A. 60-609 for an abuse of discretion. *Bicknell v. Kan. Dep't of Revenue*, 315 Kan. 451, 462, 509 P.3d 1211 (2022). A judicial action constitutes an abuse of discretion if (1) it is arbitrary, fanciful, or unreasonable; (2) it is based on an error of law; or (3) it is based on an error of fact. *In re A.S.*, 319 Kan. 396, 400, 555 P.3d 732 (2024).

No Error in Denial of Motion to Change Venue

Appellants raised three arguments in support of their motion for a change of venue under K.S.A. 60-609(b). First, Appellants alleged that another Johnson County district court judge, Joann Woltman, was named as a "primary [d]efendant [*36] in this case." Appellants explained that Woltman had children who attended WSE and suggested that other Johnson County judges may have already heard about the underlying matters, "from the Defendants' perspective." Second, Appellants alleged that the Blue Valley School District had "immense influence and prestige in Johnson

County" and could thus influence judicial employees and prospective jurors. Third, Appellants alleged that yet another Johnson County district magistrate judge, Jenifer Ashford, displayed a "great deal of prejudice" while presiding over D.U.'s truancy case.

The district court denied each argument, correctly finding Judge Woltman was not a named defendant and judicial bias was not a valid reason to change venue under K.S.A. 60-609(b). The district court also declined Appellants' implied invitation to rule on the merits of their judicial bias arguments. The court instead found that Appellants failed to follow the proper procedure under K.S.A. 20-311d for requesting a change of judge and alleged insufficient facts to show bias.

K.S.A. 60-609(b) specifically excludes the disqualification of a judge as a reason for a change of venue:

"In any action in the district court . . . in which it shall be made to appear that [*37] a fair and impartial trial cannot be had in the county where the action is pending, *for reasons other than the disqualification of the judge*, the court, upon application of either party, may change the place of trial to some county where the objection does not exist." (Emphasis added.)

So Appellants could not raise judicial bias by filing the type of motion they filed.

The district court correctly determined that Appellants' arguments purportedly made in support of a change of venue alleged judicial bias throughout Johnson County. Appellants could have sought Judge Mason's recusal by filing a motion under K.S.A. 20-311d but elected to move for a change of venue under K.S.A. 60-609(b). Yet that provision specifically excludes judicial disqualification as grounds for granting relief. So the district court correctly rejected these arguments and denied

Appellants' motion for a change of venue.

Affirmed in part and dismissed in part.

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ATTACHMENT D

Morrison v. Stormont-Vail Regional Medical Center,
No. 64,276, 1990 Kan. App. LEXIS 251
(Kan. Ct. App. Apr. 13, 1990)

Morrison v. Stormont-Vail Regional Medical Center

Court of Appeals of Kansas

April 13, 1990, Filed

No. 64,276

Reporter

1990 Kan. App. LEXIS 251 *; 791 P.2d 753

TAMARA MORRISON, a minor, et al.,
Appellants, v. STORMONT-VAIL REGIONAL
MEDICAL CENTER, et al., Appellees

in part, reverse in part, and remand for further proceedings.

Notice: [*1] NOT DESIGNATED FOR PUBLICATION

Prior History: Appeal from Shawnee District Court; THOMAS W. REGAN, judge. Affirmed in part, reversed in part, and remanded for further proceedings.

Counsel: Leland E. Cox and Dale F. Kelso, of Topeka, for appellant.

Bert S. Braud, of Popham, Conway, Sweeny, Fremont & Bundschu, P.C., of Kansas City, Missouri, and Charles L. Davis, Jr., of Topeka, for appellee Comprehensive Care Corporation.

Harold Youngentob, of Goodell, Stratton, Edmonds & Palmer, of Topeka, for appellee Stormont-Vail Regional Medical Center.

Judges: Before RULON, P.J., BRAZIL, J., and DAVID W. KENNEDY, District Judge, assigned.

Opinion

Per Curiam: Tamara Morrison and her parents Larry and Linda Morrison, plaintiffs, appeal from the district court's order granting summary judgment in favor of Stormont-Vail Regional Medical Center and Comprehensive Care Corporation, defendants, in this action for negligence and emotional distress. We affirm

FACTUAL AND PROCEDURAL HISTORY

In September 1986, Tamara Morrison, the then 14-year-old daughter of Linda and Larry Morrison, was admitted to the adolescent care unit at Stormont-Vail Regional Medical Center for treatment of alcohol and drug abuse. [*2] Comprehensive Care Corporation (Compcare) operated the unit under a contract with Stormont-Vail. Upon admission, Tamara and her parents received information detailing treatment procedures and rules.

The rules expressly forbid patients from interacting with other patients who are in bed for the night. Further, the rules provide that "[u]nder no circumstances will explicit sexual behavior be allowed on the Unit."

At approximately 5:00 a.m. on October 11, 1986, a male adolescent patient entered Tamara's room. Tamara told the boy that he should leave because they would get in trouble, but she did not tell him to get out of her room. The boy sat down on Tamara's bed, they kissed, and he intimately touched Tamara. A nurse looked in Tamara's room and asked if she was all right. Tamara did not inform the nurse of the boy's presence. After the nurse left her room, Tamara told the boy to leave, which he did.

Hospital personnel did not tell Tamara's parents about the incident, and they learned

about it through a friend in whom Tamara confided. When Linda Morrison asked a nurse on the unit why she had not been informed of the incident when it occurred, the nurse told her that it was the policy [*3] of the program to allow the patient to tell her parents. Additionally, at the time of the incident, the unit's policy was to have a hallway monitor stationed to observe patients' movements at times when the rules required patients to remain in their rooms. Compcare did not know whether a hallway monitor was on duty when the boy was in Tamara's room.

Later, Tamara, by her parents, and Linda and Larry Morrison filed suit against Stormont-Vail and Compcare. In Count I, Tamara alleged that her sexual contact with the boy was caused by defendants' negligence and resulted in physical, mental, emotional, and psychological damages. The Morrisons alleged their own cause of action in Count II, claiming they suffered emotional and monetary damages because of defendants' gross and wanton negligence and/or their intentional acts or omissions. The Morrisons alleged that because of defendants' acts or omissions they had to move Tamara to another treatment facility.

Defendants filed a motion for summary judgment, arguing that expert testimony was necessary to establish defendants' negligence and that Tamara had failed to present any expert medical testimony. The district court sustained the motion [*4] as to Count I, thus rejecting Tamara's argument that this was not a medical malpractice case but, rather, simple negligence involving defendants' failure to properly monitor the hallway.

Defendants subsequently filed a motion to dismiss Count II of plaintiffs' petition or, alternatively, for summary judgment. Defendants argued that the parents' claim in Count II was derivative of the claim in Count I,

on which defendants were granted summary judgment, and, thus, Count II should also be dismissed. Defendants additionally asserted that since the Morrisons could show no physical impact, the Morrisons could not maintain an action for negligent infliction of emotional distress. Further, defendants contended that their conduct was neither wanton and willful nor intentional and, thus, the Morrisons could not recover based on a theory of intentional infliction of emotional distress.

The district court found the Morrisons' claim in Count II was independent of Count I and that the Morrisons could maintain an action for emotional distress based on wanton and willful or intentional conduct.

Later, defendants renewed their motion for summary judgment as to Count II, and the district court sustained [*5] the motion. The court found the Morrisons had failed to meet the two threshold requirements for proceeding to trial on an emotional distress claim. First, because the Morrisons failed to present any expert testimony concerning the treatment program for adolescent drug and alcohol abusers, the court could not find defendants' conduct so extreme and outrageous so as to permit recovery. Second, the court found no evidence in the record showing that the Morrisons' emotional distress was so extreme that no reasonable person should have been expected to endure it. The court noted that the Morrisons had not sought psychological or medical treatment and that no long-term distress was suffered.

TAMARA'S NEGLIGENCE ACTION

Tamara contends the district court erred in granting summary judgment based on her failure to present medical expert testimony to establish defendants' negligence. She maintains this is a simple negligence case

and, therefore, no medical expert is needed.

The rules governing the granting of summary judgment are well established.

"A moving party is entitled to summary judgment if the pleadings, depositions, answers to interrogatories, and admissions on file, together [*6] with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. The burden is on the moving party to demonstrate that no genuine issue of material fact exists when the record is viewed in a light most favorable to the nonmoving party." *Crooks v. Greene*, 12 Kan. App. 2d 62, Syl. para. 1, 736 P.2d 78 (1987).

"The plain language of K.S.A. 1987 Supp. 60-256(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is 'entitled to a judgment as a matter of law' because the nonmoving party has failed to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof." *Heinsohn v. [*7] Motley*, 13 Kan. App. 2d 66, Syl. para. 1, 761 P.2d 796 (1988).

To recover in a negligence action, a plaintiff must establish the following: (1) a duty was owed by the defendant to the plaintiff; (2) defendant breached that duty; (3) plaintiff was

damaged; (4) the breach of duty was a cause in fact of the damage; (5) and the breach of duty was the "proximate" or "legal" cause of the damage. *Baker v. City of Garden City*, 240 Kan. 554, 731 P.2d 278 (1987).

Generally, expert testimony is required in medical malpractice cases to establish the standard of medical and hospital care and to prove causation. *Crooks v. Greene*, 12 Kan. App. 2d at 65. Here, Tamara sought to avoid summary judgment for lack of evidence by arguing that this is not a true medical malpractice case involving scientific or technical procedures. Instead, she asserts this is a negligence action concerning defendants' failure to provide adequate security and to follow their hallway monitoring policy. We agree. No medical expert is needed to establish defendants' negligence in failing to monitor the adolescent care unit pursuant to defendants' own policy. We conclude the district court erred in granting summary [*8] judgment on Count I. Tamara's negligence action is remanded for further proceedings.

THE MORRISONS' ACTION FOR EMOTIONAL DISTRESS

The Morrisons contend the district court erred in granting summary judgment on their claim for emotional distress. They maintain defendants' conduct was willful and wanton and caused them severe emotional distress.

The district court initially denied defendants' motion for summary judgment, finding the Morrisons stated an independent action for negligent or intentional infliction of emotional distress. The court stated that the Morrisons' inability to show physical impact and injury did not prevent recovery because they claimed defendants' conduct was willful and wanton. Later, the district court granted summary judgment, finding the Morrisons had failed to

meet the two threshold requirements for recovery for extreme emotional distress: (1) defendants' conduct must be extreme and outrageous; and (2) plaintiffs' emotional distress must be extreme.

In Kansas, a plaintiff cannot recover for negligent infliction of emotional distress unless that distress is accompanied by or results in physical injury to the plaintiff. *Anderson v. Scheffler*, 242 Kan. [*9] 857, 860, 752 P.2d 667 (1988). However, this physical injury rule does not apply where the injurious conduct is willful or wanton, or the defendant acts with intent to injure. *Hoard v. Shawnee Mission Medical Center*, 233 Kan. 267, 274, 662 P.2d 1214 (1983). Here, the Morrisons have not suffered any physical injury; therefore, they must prove a claim for emotional distress based upon willful and wanton or intentional conduct but not upon negligence.

For conduct to be wanton, the actor must realize the imminence of danger and indicate a reckless disregard or complete indifference or unconcern for the probable consequences of the wrongful act. *Bowman v. Doherty*, 235 Kan. 870, 876-7, 686 P.2d 112 (1984). A wanton wrong involves an intentional act but not an intentional injury. 235 Kan. at 876. The term "willful" as used in the phrase "willful and wanton conduct," refers to action indicating a design, purpose, or intent on the part of the actor to do wrong or to cause an injury to another. *Burdick v. Southwestern Bell Tel. Co.*, 9 Kan. App. 2d 182, Syl. para. 2, 675 P.2d 922 (1984).

Four elements must be proved to establish a cause of action for emotional distress resulting [*10] from intentional or reckless conduct: (1) The defendant's conduct must be intentional or in reckless disregard of plaintiff; (2) the conduct must be extreme and outrageous; (3) there must be a causal connection between the conduct and plaintiff's

mental distress; and (4) the mental distress must be extreme and severe. *Roberts v. Saylor*, 230 Kan. 289, 292, 637 P.2d 1175 (1981).

There are two threshold requirements which the trial court must determine are met before liability for extreme emotional distress can be imposed: (1) The defendant's conduct must reasonably be regarded as so extreme and outrageous as to permit recovery; and (2) the emotional distress suffered is of such extreme degree the law must intervene because the distress inflicted is so severe that no reasonable person should be expected to endure it. *Roberts v. Saylor*, 230 Kan. at 292-93. If the trial court determines from the pleadings, stipulations, admissions, and deposition of the plaintiff that reasonable factfinders might differ as to whether the defendant's conduct was sufficiently extreme and outrageous and as to whether the plaintiff's emotional distress was genuine and sufficiently severe and extreme, [*11] then the case may proceed to trial. 230 Kan. at 294.

Under the first threshold requirement, the trial court must find that the defendant's conduct was "so outrageous in character, and so extreme in degree as to go beyond the bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized society." 230 Kan. at 293. Alternatively stated, the conduct is sufficiently extreme when the recitation of facts to the average person would cause that person to spontaneously exclaim, "Outrageous!" 230 Kan. at 293.

In the present case, neither threshold requirement has been met by the Morrisons. First, Tamara's sexual contact with another patient and defendants' failure to inform the Morrisons of the incident does not rise to the level of extreme and outrageous conduct required to establish liability. As the district

court noted, without expert medical testimony, it is impossible to determine if defendants' conduct was extreme and outrageous. Defendants claim that, as part of Tamara's treatment program, they wanted Tamara to tell her parents about the incident. A determination of whether this type of treatment is reasonable or extreme cannot be determined without expert [*12] medical testimony. As to the second threshold requirement, the record fails to reveal any evidence indicating that the Morrisons' emotional distress resulting from the incident and from defendants' failure to inform the Morrisons about its occurrence was so severe that no reasonable person should be expected to endure it. Notably, the Morrisons did not seek psychological or medical treatment for their distress. Undoubtedly, they were genuinely upset, angry, and worried about their daughter. However, this type of emotional distress is not so extreme and severe as to be actionable. Therefore, the district court correctly entered summary judgment for defendants after finding neither threshold requirement had been met by the Morrisons.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

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ATTACHMENT E

Winters v. State,
No. 124,211, 2022 Kan. App. Unpub. LEXIS 359
(Kan. Ct. App. July 8, 2022),
rev. denied, 317 Kan. 851 (2023)

Winters v. State

Court of Appeals of Kansas

July 8, 2022, Opinion Filed

No. 124,211

Reporter

2022 Kan. App. Unpub. LEXIS 359 *; 512 P.3d 233; 2022 WL 2542848

KATHERINE M. WINTERS, Appellant, v.
STATE OF KANSAS, Appellee.

denying her motion to reconsider. We thus affirm both rulings.

Notice: NOT DESIGNATED FOR
PUBLICATION.

PLEASE CONSULT THE KANSAS RULES
FOR CITATION OF UNPUBLISHED
OPINIONS.

PUBLISHED IN TABLE FORMAT IN THE
PACIFIC REPORTER.

Prior History: [*1] Appeal from Johnson
District Court; ROBERT J. WONNELL, judge.

Disposition: Affirmed.

Counsel: Katherine M. Winters, appellant, Pro
se.

Bryan Ross, assistant attorney general, and
Derek Schmidt, attorney general, for appellee.

Judges: Before CLINE, P.J., ISHERWOOD
and HURST, JJ.

Opinion

MEMORANDUM OPINION

PER CURIAM: Katherine M. Winters challenges the district court's dismissal of her personal injury lawsuit on summary judgment and its denial of her motion to reconsider that ruling. We cannot evaluate the summary judgment ruling because she failed to provide an adequate record, and she did not establish the district court abused its discretion when

The district court found the State immune from liability for Winters' injuries under the recreational use exception of the Kansas Tort Claims Act.

Winters sued the State for injuries she sustained after tripping on the south steps of the Kansas Capitol building while attending a rally. The State moved for summary judgment, arguing it was immune from liability to Winters under the recreational use exception to the Kansas Tort Claims Act (KTCA). See K.S.A. 75-6104(o). This exception immunizes a governmental entity from liability for injuries [*2] resulting from the use of any public property intended or permitted to be used as a park, playground, or open area for recreational purposes, unless the governmental entity is guilty of gross and wanton negligence that proximately caused the injury. Winters countered by arguing the State was grossly and wantonly negligent. She claimed the State had begun placing warning tape across the step where she tripped at some point, but the tape was not there when she fell.

The district court entered summary judgment for the State. It found it was uncontroverted that the steps were public property permitted for use as an open area for recreational purposes, and Winters failed to provide evidence of gross and wanton negligence by the State. The court noted that to establish

wanton conduct, "[f]irst, a plaintiff must show that the act was 'performed with a realization of the imminence of danger,' and, second, that the act was performed with 'reckless disregard or complete indifference to the probable consequences of the act.'" *Adamson v. Bicknell*, 295 Kan. 879, 890, 287 P.3d 274 (2012). The court found that even if it accepted Winters' argument, she provided no evidence as to why the State applied the tape. It pointed out that "[t]here may have been a multitude [*3] of reasons for tape having been applied to that step prior to the date of [Winters'] fall, including reasons entirely unrelated to an alleged hazard." It also found Winters failed to show the State had a realization of an imminence of danger, nor did she provide any evidence on the State's mental attitude or indifference toward the same.

Winters' counsel withdrew after the summary judgment decision. Acting pro se, Winters moved for reconsideration of that decision, raising claims of ineffective assistance of counsel and newly discovered evidence. The district court denied her motion. It found Winters had no constitutional right to counsel in a civil case, also noting she had selected and chosen to be represented by her former counsel. It also found that Winters' proposed newly discovered evidence still did not establish gross and wanton negligence by the State. Winters challenges both decisions on appeal.

Winters failed to provide a sufficient record to address her appeal of the district court's summary judgment decision.

We review a district court's ruling on a motion for summary judgment de novo, applying the same standards the district court applies:

"Summary judgment is appropriate [*4]

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. The trial court is required to resolve all facts and inferences which may reasonably be drawn from the evidence in favor of the party against whom the ruling 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. In order to preclude summary judgment, the facts subject to the dispute must be material to the conclusive issues in the case. On appeal, we apply the same rules and *where we find reasonable minds could differ as to the conclusions drawn from the evidence, summary judgment must be denied.*' [Citations omitted.]" *Hammond v. San Lo Leyte VFW Post #7515*, 311 Kan. 723, 727, 466 P.3d 886 (2020).

To conduct such a review, we must have the evidence considered by the district court. And Winters has the burden to provide this evidence in the record on appeal. See *Friedman v. Kansas State Bd. of Healing Arts*, 296 Kan. 636, 644, 294 P.3d 287 (2013).

Unfortunately, Winters failed to designate a sufficient record to allow us to consider her arguments on appeal. None of the summary judgment briefing is in the record [*5] on appeal. And while she filed a copy of the State's memorandum in support of its summary judgment motion and her response with the appellate court's electronic filing system, she included none of the exhibits. She also did not provide a copy of the State's reply brief (which the court's summary judgment order references).

The absence of these exhibits and reply brief

is important because Winters claims on appeal that she properly controverted some of the State's facts in support of its motion (paragraphs 8 and 29), and that she provided additional uncontroverted facts in her response which should have prevented summary judgment. But we cannot evaluate her claims without the evidence the parties relied on to support and controvert the proposed uncontroverted facts or the State's reply to her response.

Because Winters did not provide the evidence that the district court relied on to make its factual findings and ultimate decision, we cannot review the sufficiency of that evidence or determine whether its decision was appropriate. Winters' challenge of that decision fails. *Evergreen Recycle v. Indiana Lumbermens Mut. Ins. Co.*, 51 Kan. App. 2d 459, 488, 350 P.3d 1091 (2015) (citing *Friedman*, 296 Kan. at 644-45) ("The burden is on the party making a claim to designate facts in the record to support that claim; without [*6] such a record, the claim of error fails.").

Winters establishes no error in the district court's denial of her motion to reconsider its summary judgment decision.

Arguably, Winters' failure to properly support her appeal of the district court's summary judgment decision also dooms her challenge to the district court's denial of her motion to reconsider that decision. If we cannot evaluate the propriety of the original decision, we cannot say whether that decision should be reconsidered for the reasons Winters claims (her attorney failed to offer evidence she claims would have impacted that decision). Still, even considering the merits of the district court's denial of Winter's motion, we see no error.

Motions to reconsider are generally treated as

motions to alter or amend a judgment under K.S.A. 2021 Supp. 60-259(f). *In re Estate of Lentz*, 312 Kan. 490, Syl. ¶ 2, 476 P.3d 1151 (2020). But Winters relies on K.S.A. 2021 Supp. 60-259(a)(1)(E) ("newly discovered evidence that is material for the moving party which it could not, with reasonable diligence, have discovered and produced at the trial") as one of the grounds for her motion. And K.S.A. 2021 Supp. 60-259(a) sets forth reasons a district court may grant a motion for a new trial. In any event, we review a district court's denial of either of these motions—a motion to alter or amend [*7] or a motion for a new trial under K.S.A. 2021 Supp. 60-259(a)—for an abuse of discretion. See *Bd. of Cherokee County Comm'rs v. Kansas Racing & Gaming Comm'n*, 306 Kan. 298, 323, 393 P.3d 601 (2017) (citing *Exploration Place, Inc. v. Midwest Drywall Co.*, 277 Kan. 898, 900, 89 P.3d 536 [2004]); *Exploration Place, Inc.*, 277 Kan. at 900 (providing motions to reconsider generally treated as motions to alter or amend under K.S.A. 60-259[f] and standard of review for denial of motion to alter or amend is abuse of discretion); *King v. Casey's General Stores, Inc.*, 57 Kan. App. 2d 392, 400, 450 P.3d 834 (2019) (providing that standard of review for denial of motion for a new trial under K.S.A. 60-259[a] is abuse of discretion). A district court abuses its discretion if: (1) no reasonable person would take the view adopted by the court, (2) its decision stems from an error of law, or (3) its decision stems from an error of fact. *Kansas Racing & Gaming Comm'n*, 306 Kan. at 323; *King*, 57 Kan. App. 2d at 400.

Winters asked the district court to reconsider its summary judgment decision because she claimed her counsel was ineffective in responding to the State's summary judgment motion (and in handling various other aspects of the case). She also claimed she had evidence her attorney did not offer which would have altered the court's decision. She

tried to use this evidence to controvert proposed statements of fact from the State's motion for summary judgment which she did not previously controvert. She attached: (1) photos of the steps and her injuries, (2) an unsigned affidavit (which she claimed her attorney tried to convince her [*8] to sign for use in responding to the State's motion for summary judgment, but she refused), (3) an e-mail from the State's attorney to her attorney (in which the State's attorney said: "[i]n 2010, the State apparently began placing colored tape on certain steps, which would be within 10 years of the date of loss"), and (4) three nonconsecutive pages from what looks like the State's reply brief. She also stated she had witnesses who could testify that warning and handicap signs were not present at the Capitol building on the day she fell and who felt the steps on which Winters fell were dangerous. She repeats these arguments on appeal.

First, the district court did not abuse its discretion in finding that Winters has no constitutional right to counsel in a civil case. Only criminal defendants have a constitutional right to effective assistance of counsel. See *Khalil-Alsalaami v. State*, 313 Kan. 472, 484-85, 486 P.3d 1216 (2021) ("The Sixth Amendment to the United States Constitution guarantees that '[i]n all *criminal prosecutions*, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.' . . . The right to counsel . . . 'guarantees the right to effective assistance from the attorney.' . . . 'The purpose of the effective assistance guarantee "is simply to ensure that [*9] *criminal defendants* receive a fair trial.'" [Emphases added.]); *McIntyre v. State*, 54 Kan. App. 2d 632, 637, 403 P.3d 1231 (2017). As the district court aptly noted, Winters picked her counsel. She did not have to use that attorney's services, and she could have terminated her relationship with that attorney at any time. Thus, this argument provided no

basis for the district court to reconsider its summary judgment decision.

The district court also did not abuse its discretion in denying Winters' request for a new trial or reconsideration based on newly discovered evidence. First, the district court could have disregarded all the evidence Winters cited in her motion to reconsider because none of it qualified as newly discovered under K.S.A. 2021 Supp. 60-259(a)(1)(E) (newly discovered evidence must be material and that which the moving party could not, with reasonable diligence, have discovered and produced at trial). Instead, the court considered all the evidence and found it immaterial, since it would not change the summary judgment decision.

The district court noted that none of the evidence Winters cited in her motion demonstrated gross and wanton negligence by the State. We agree. None of the new evidence demonstrated why the State applied the tape in the past, that the State [*10] had a realization of an imminence of danger, or demonstrated the State's mental attitude or indifference toward the same. For these reasons, we cannot say that no reasonable person would agree with the district court's decision to deny Winters' motion.

Winters did not preserve the remaining three issues in her brief since she raises them for the first time on appeal.

Matters not raised before the district court generally cannot be raised for the first time on appeal. *Gannon v. State*, 303 Kan. 682, 733, 368 P.3d 1024 (2016). Three of Winters' issues on appeal were not raised and ruled on by the district court:

"ISSUE IV[:] The judge took the Defendant's statements as factual, which

was proven in the Reconsideration hearing as not factual and quoted as such in his summation in granting the Summary Judgment for Defendant, thus, violating my 'DUE PROCESS' based on false information given by Defendant. (2017); *Joritz*, 61 Kan. App. 2d at 498-99.

Affirmed.

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"ISSUE V: The Defendant prevented Plaintiff's ability to use the American Disability Act of 1990 as amended, Title 42-The public health and welfare, Chapter 126, Sub Chapter II-public services, Prohibition against discrimination and other generally applicably conditions.

....

"ISSUE VII: DEPRIVATION OF RIGHTS UNDER COLOR OF LAW, TITLE 18, U.S.C., [*11] SECTION 242."

While there are exceptions to the general rule that issues cannot be raised for the first time on appeal, Supreme Court Rule 6.02(a)(5) (2022 Kan. S. Ct. R. at 35) requires Winters to explain why the newly raised issue is properly before us. She did not. And even if we exercised our discretion to find that one of the recognized exceptions applied, Winters did not adequately brief any of these three issues. *State v. Gray*, 311 Kan. 164, 170, 459 P.3d 165 (2020). She did not provide an argument with supporting legal authority for any of these issues. Instead, she simply discussed some of the facts surrounding her claim of being denied due process in the statement of the facts section of her brief. This is insufficient to obtain appellate review. *Joritz v. University of Kansas*, 61 Kan. App. 2d 482, 501, 505 P.3d 775 (2022) (declining to address pro se litigant's arguments made in facts section, finding them impermissible under Supreme Court Rule 6.02[a](4)). As a result, we find Winters has waived or abandoned appellate review of these three issues. See *Russell v. May*, 306 Kan. 1058, 1089, 400 P.3d 647

ATTACHMENT F

Muxlow v. City of Topeka,
No. 117,428, 2018 Kan. App. Unpub. LEXIS 442
(Kan. Ct. App. June 15, 2018),
rev. denied, 309 Kan. 1349 (2019)

Muxlow v. City of Topeka

Court of Appeals of Kansas

June 15, 2018, Opinion Filed

No. 117,428

Reporter

2018 Kan. App. Unpub. LEXIS 442 *; 420 P.3d 503; 2018 WL 2999618

KELLY MUXLOW, Appellant, v. CITY OF TOPEKA, Appellee.

Notice: NOT DESIGNATED FOR PUBLICATION.

PLEASE CONSULT THE KANSAS RULES FOR CITATION OF UNPUBLISHED OPINIONS.

PUBLISHED IN TABLE FORMAT IN THE PACIFIC REPORTER.

Prior History: [*1] Appeal from Shawnee District Court; TERESA L. WATSON, judge.

Disposition: Affirmed.

Counsel: Robert E. Keeshan, of Scott, Quinlan, Willard, Barnes & Keeshan, LLC, of Topeka, for appellant.

Nicholas H. Jefferson, assistant city attorney, for appellee.

Judges: Before LEBEN, P.J., GARDNER, J., and BURGESS, S.J.

Opinion

MEMORANDUM OPINION

PER CURIAM: Kelly Muxlow was injured when she fell into an unmarked culvert with no guardrails while walking through the grassy area between a Topeka city park and the street beside it. She sued the City of Topeka to recover for her injuries.

The City moved for summary judgment, claiming immunity from liability under the Kansas Tort Claims Act. While the Act generally allows tort suits against state and local governments to proceed, there's an exception for recreational use. Under that exception, a two-part analysis applies. The government is generally immune from claims for injuries resulting from the use of public property intended or permitted to be used as a park, playground, or open area for recreational purposes. But there's no immunity if the governmental entity committed the highest level of negligence, what's called gross and wanton negligence.

The district court found that the recreational-use [*2] exception applied because the place where Muxlow fell, which is adjacent to a park, was permitted to be used for recreational purposes. The court separately concluded that Muxlow had not provided sufficient evidence to show gross and wanton negligence by the City. Based on these conclusions, the district court granted the City's motion.

On appeal, Muxlow argues that summary judgment wasn't appropriate for two reasons: First, that the place where she fell wasn't a recreational area, and second, that there was evidence that the City acted with gross and wanton negligence. But neither party disputes that the area was public property permitted to be used for recreational purposes—such as jogging and walking dogs. And gross and wanton negligence requires some evidence that the City knew of the danger the culvert

presented, but Muxlow has not presented any evidence that the City knew of any danger. Thus, the district court correctly held that summary judgment was appropriate because the City was immune from Muxlow's claim under the recreational-use exception. We therefore affirm the district court's judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Kelly Muxlow took her dogs out for a walk one evening [*3] in June 2013 near the Governor's mansion in Topeka, Kansas. Shortly before sundown, Muxlow reached an area along Fairlawn Road that didn't have a sidewalk, so she walked through a grassy area that sits between the road and MacLennan Park. While crossing through, she saw a fox approach. Muxlow picked up one of her dogs and started backing up—she soon fell into a 4-foot deep unmarked concrete culvert that sits in the grassy area. There were no guardrails around the culvert.

Muxlow's fall resulted in cuts and bruising to her face, as well as a heel fracture that required two surgeries. The City placed temporary barricades around the culvert two days after Muxlow's fall, and a few months later it installed metal guardrails.

Muxlow sued the City in June 2015, alleging that the City was negligent for failing to put barriers or signs around the culvert. The City of Topeka argued that the culvert was installed in the 1960's by the State of Kansas, so it wasn't responsible for Muxlow's injuries. Muxlow tried to join the State of Kansas, the Kansas Department of Transportation, and the Kansas Secretary of Transportation to her lawsuit. But Muxlow brought her claims against the additional defendants [*4] outside of the two-year statute of limitations, so the district court granted their motion to dismiss them from the suit.

After discovery (the process in which parties to litigation can learn the facts by exchanging information and deposing witnesses), the City moved for summary judgment. One basis for the motion was recreational-use immunity under the Kansas Tort Claims Act.

After hearing oral arguments on the City's motion, the district court issued a written decision granting the City's motion and entering judgment in its favor. The district court found that one issue was dispositive in the case—that the City of Topeka was immune from suit under the Kansas Tort Claims Act.

Muxlow then appealed to our court. We too have heard oral argument from the parties. We have also reviewed both their filings in the district court and briefs filed on appeal.

ANALYSIS

On appeal, Muxlow argues that the City wasn't entitled to recreational-use immunity because the place where Muxlow fell wasn't a recreational area and there was some evidence that the City acted with gross and wanton negligence. Before we get into Muxlow's arguments, we must first review a bit of procedure.

After parties to a dispute [*5] have had a chance to discover evidence, but before their case goes to trial, a party may submit a motion to the trial court seeking summary judgment. K.S.A. 2017 Supp. 60-256(a). The party seeking summary judgment must show, based on both parties' evidence, that there is no dispute as to any significant fact and that they are entitled to judgment as a matter of law. In other words, the moving party must show that there's nothing for a jury or a trial judge sitting as fact-finder to decide that would make any difference to the outcome of the case. See *Armstrong v. Bromley Quarry & Asphalt, Inc.*,

305 Kan. 16, 24, 378 P.3d 1090 (2016).

The party opposing summary judgment must point to evidence calling into question some significant fact—if they do so, summary judgment must be denied so a fact-finder can resolve the dispute. When ruling on a summary-judgment motion, the district court must view the evidence in the light most favorable to the party opposing the motion. On appeal from the grant of summary judgment, we apply the same standards the trial court applied. *Fawcett v. Oil Producers, Inc. of Kansas*, 302 Kan. 350, 358-59, 352 P.3d 1032 (2015).

Because entry of summary judgment amounts to a question of law—it entails the application of legal principles to uncontroverted facts—we owe no deference to the trial court's decision and our review is unlimited. Resolving the summary-judgment [*6] issue in this case also involves the interpretation of a statute. That too is a question of law over which we have unlimited review. *Poston v. U.S.D. No. 387*, 286 Kan. 809, 812, 189 P.3d 517 (2008).

We now turn to Muxlow's first argument on appeal—that the district court erred when it found that the City was entitled to recreational-use immunity at all.

Because at common law, the state or national government could not be sued, negligence claims against the government are allowed only as provided by statute. The Kansas Tort Claims Act provides that negligence claims usually may be brought against the government, but the Act also provides several exceptions to liability. K.S.A. 2017 Supp. 75-6103(a). Liability is the rule and immunity the exception, however, and the burden is on the State to show that it is immune from liability under one of the Act's exceptions. *Keiswetter v. State*, 304 Kan. 362, 366, 373 P.3d 803 (2016).

The exception to liability that's central in this case is known as the recreational-use exception. Under the Act, an individual can't bring a claim against the government "for injuries resulting from the use of any public property intended or permitted to be used as a park, playground or open area for recreational purposes, unless the governmental entity or an employee thereof is guilty of gross and wanton negligence [*7] proximately causing such injury." K.S.A. 2017 Supp. 75-6104(o). In other words, the government can't be sued for injuries on public property used for recreational purposes unless it acted with gross and wanton negligence.

The legislative purpose behind the recreational-use exception was explained by our Supreme Court in *Jackson v. U.S.D.* 259, 268 Kan. 319, 331, 995 P.2d 844 (2000):

"The purpose of K.S.A. 75-6104(o) is to provide immunity to a governmental entity when it might normally be liable for damages which are the result of ordinary negligence. This encourages governmental entities to build recreational facilities for the benefit of the public without fear that they will be unable to fund them because of the high cost of litigation. The benefit to the public is enormous. The public benefits from having facilities in which to play such recreational activities as basketball, softball, or football, often at a minimal cost and sometimes at no cost. The public benefits from having a place to meet with others in its community."

Because of the strength of the legislative purpose behind this exception, our Supreme Court has held that recreational-use immunity is to be broadly applied to accomplish that legislative purpose. *Poston*, 286 Kan. at 812; *Lane v. Atchison Heritage Conf. Center, Inc.*, 283 Kan. 439, 445, 153 P.3d 541 (2007); *Wilson v. Kansas State University*, 273 Kan.

584, 592, 44 P.3d 454 (2002).

Muxlow argues that it would be an absurd result if we considered [*8] the place where she fell to be a recreational area subject to the recreational-use exception. The area was not specifically designated or intended by the City to be used for recreational activities. But "[i]n order for a location to fall within the scope of K.S.A. 75-6104(o), the location must merely be 'intended or *permitted* to be used . . . for recreational purposes.'" (Emphasis added.) *Jackson*, 268 Kan. at 326; see *Lane*, 283 Kan. at 440 (finding recreational-use immunity barred suit by plaintiff injured after slipping on city conference center's loading dock); *Boaldin v. University of Kansas*, 242 Kan. 288, 291, 747 P.2d 811 (1987) (finding recreational-use immunity barred suit by plaintiff injured while sledding on hill at the University of Kansas).

The language of the statute is clear—to be entitled to recreational-use immunity, the public land need only be *permitted* to be used for recreational purposes. And here, the evidence shows—and neither party disputes—that the area was permitted to be used for recreational purposes:

- Muxlow testified that people walk dogs, jog, and walk there.
- As Muxlow's attorney recounted at the hearing on the summary-judgment motion, "There's Easter egg hunts, kid fitness, et cetera, which attract large numbers of people."
- Muxlow was injured while enjoying a recreational activity [*9] herself—walking her dogs.
- The grassy area where Muxlow was injured runs along the edge of MacLennan Park. See *Lane*, 283 Kan. at 446 (explaining that an area "must be viewed collectively to determine whether it is used

for recreational purposes."); *Dye v. Shawnee Mission Sch. Dist.*, 184 P.3d 993, 2008 Kan. App. Unpub. LEXIS 435, 2008 WL 2369847, at *2 (Kan. App. 2008) (unpublished opinion) ("Courts do not segregate parts of the property to determine whether the recreational use exception applies; instead, they examine the collective character of the property in question."). So you would expect people to use it to access the park, and its location next to the park underscores the testimony that people regularly used it to walk, jog, or to walk a dog there.

Muxlow argues that the City wasn't entitled to recreational-use immunity under the Act for three other reasons, none of which are persuasive. First, Muxlow argues that the area can't be considered part of MacLennan Park because it isn't "integral" to the park itself. Kansas appellate courts have extended recreational-use immunity to property *integral* to or near a recreational facility. See *Poston*, 286 Kan. at 817-19; *Wilson*, 273 Kan. at 590-92 (holding that the exception applies to restrooms located in a football stadium); *Nichols v. U.S.D. No. 400*, 246 Kan. 93, 95-97, 785 P.2d 986 (1990) (applying exception where plaintiff was injured in a grassy area near football field); *Dye*, 2008 Kan. App. Unpub. LEXIS 435, 2008 WL 2369847, at *2-3. But the area [*10] itself is an open space permitted to be used for recreational purposes, so it is unnecessary to determine whether it is "integral" to the adjacent park. That the area was adjacent to the park merely reinforces the separate conclusion that the area between the park and the road was itself used recreationally.

Next, Muxlow argues that cities have a common-law duty to maintain safe streets and right-of-ways, and that the City of Topeka breached this duty by constructing an

unmarked concrete culvert in that spot. Even assuming that the City owes this duty, it is still immune from claims arising from injuries that occur on public land that the government permits to be used for recreational purposes. K.S.A. 2017 Supp. 75-6104(o).

Last, Muxlow says the district court ignored several important facts when it granted summary judgment—that there are no comparable open culverts in Topeka, that the bulk of the culvert is in the City's right of way, and that an expert concluded in his report that the culvert "was akin to an open grave and that the growth of the neighborhood now compelled the use of safety features." But these facts, even if true, don't go to whether this space was public property permitted to be used for recreational [*11] purposes. See *Mitchell v. City of Wichita*, 270 Kan. 56, 59, 12 P.3d 402 (2000) ("The disputed question of fact which is immaterial to the issue does not preclude summary judgment.").

So the district court correctly concluded that the recreational-use exception to liability applied here. That meant that the City was immune from claims of ordinary negligence. The City can only be liable here if Muxlow shows that the City's acts amounted to gross and wanton negligence. See K.S.A. 2017 Supp. 75-6104(o).

Normally, whether a party has been negligent (even grossly and wantonly so) is a factual question to be submitted to a jury, but summary judgment is proper if a plaintiff has presented no evidence of gross and wanton negligence. See, e.g., *Vaughn v. Murray*, 214 Kan. 456, 459, 521 P.2d 262 (1974); *Jackson v. City of Norwich*, 32 Kan. App. 2d 598, Syl. ¶ 3, 85 P.3d 1259 (2004). In response to a summary-judgment motion, the non-moving party must set forth specific facts showing that there is a genuine issue for trial. K.S.A. 2017 Supp. 60-256(e)(2).

Gross and wanton negligence requires more than the mere carelessness of ordinary negligence but doesn't require a willful intent to injure. *Soto v. City of Bonner Springs*, 291 Kan. 73, 82, 238 P.3d 278 (2010). Wanton acts are those showing that the defendant realized the imminence of injury to others and still didn't take steps to prevent injury because of indifference to the ultimate outcome. Wanton conduct is established by the mental attitude of the wrongdoer rather [*12] than by the particular negligent acts. *Adamson v. Bicknell*, 295 Kan. 879, 890, 287 P.3d 274 (2012); *Soto*, 291 Kan. 73, 238 P.3d 278, Syl. ¶ 9; *Jackson*, 32 Kan. App. 2d at 601.

To amount to gross and wanton negligence under the Kansas Tort Claims Act, there must be some evidence that the government *knew* of the *danger* the condition presented and chose not to address it. See *Lee v. City of Fort Scott*, 238 Kan. 421, 425, 710 P.2d 689 (1985) (finding no evidence of gross and wanton negligence in case involving injury from steel cables strung between trees because there were no prior injuries to alert city to danger); *Jackson*, 32 Kan. App. 2d at 601 (affirming summary judgment in case where woman stepped into a depression around covered-water valve in park because there was no evidence the city realized the danger it presented); see also *Gruhin v. City of Overland Park*, 17 Kan. App. 2d 388, 392-93, 836 P.2d 1222 (1992) (finding that summary judgment was not proper because city knew of prior injury, so city had actual knowledge of the danger). That makes sense because it's the mental attitude of the wrongdoer that's at issue, not whether, as in ordinary negligence, a reasonable person would have realized there was a danger present.

Muxlow points on appeal to several facts to support her claim of gross and wanton negligence: (1) the minimal cost to install a

guardrail around the culvert; (2) that many other culverts in the City had guardrails or were covered; (3) that an expert said that [*13] the culvert was roughly the same size as an open grave; and without warning signs or safety measures, it posed a serious hazard to pedestrians; and (4) Paul Muxlow's affidavit claiming that the City was grossly and wantonly negligent.

We have also reviewed the specific statements of uncontroverted fact, as supported by evidence, that were supplied by Muxlow on summary judgment to the district court. There is some testimony that city workers doing street sweeping or snow plowing might have noticed the culvert. And there was evidence that the City placed guard rails at some other culverts.

But none of this showed that the City knew that the culvert presented a danger. Since the time the culvert was first installed in the 1960's, no one alerted the City to any injuries involving the culvert. Although Muxlow's husband submitted an affidavit stating that he believed "an open culvert without covering or guard rails in an area frequented by [people] is gross and wanton negligence," a party opposing summary judgment must set forth *specific facts* showing that there is a genuine issue for trial—bare opinions or unsupported conclusions will not suffice. K.S.A. 2017 Supp. 60-256(e)(2); *RAMA Operating Co. v. Barker*, 47 Kan. App. 2d 1020, 1031, 286 P.3d 1138 (2012). Thus, Muxlow has failed to present any [*14] evidence that the City acted with gross and wanton negligence and summary judgment on this point was also proper. See *Lee*, 238 Kan. at 425; *Jackson*, 32 Kan. App. 2d at 601; *Winn v. City of Leawood*, No. 91,210, 2004 Kan. App. Unpub. LEXIS 641, 2004 WL 835991, at *3 (Kan. App. 2004) (unpublished opinion) (affirming summary judgment for city when no evidence showed it

knew of danger to children from disassembled backstop at city park even though parks officials knew children often climbed various objects in parks).

In sum, there is no evidence that the City's failure to place guardrails or warning signs rose to the level of gross and wanton negligence, and the area where Muxlow fell was public property permitted to be used for recreational purposes. So the district court correctly concluded that the City was immune from liability for Muxlow's injuries under the recreational-use exception of the Kansas Tort Claims Act as a matter of law.

We therefore affirm the district court's judgment.

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