NOT DESIGNATED FOR PUBLICATION

No. 125,853

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

ROBERT PAUL DUNCAN
and
DENISE SUE DUNCAN,
Appellants,

v.

DAVID BRYAN MARTIN, DAVE BRUNER, RICHARD ZINGRE,
RANDY NICHOLS, JOLYNNE MITCHELL, CINDY BARTELSMEYER,
CHERYL ADAMSON, JEANIE PARKER, RHONDA DUNN, and
CITY OF FORT SCOTT, KANSAS.
Appellees.

MEMORANDUM OPINION

Appeal from Bourbon District Court; ANDREA PURVIS, judge. Opinion filed September 15, 2023. Affirmed.

Robert Paul Duncan and *Denise Sue Duncan*, appellants pro se.

Andrew D. Holder, of Fisher, Patterson, Sayler & Smith, LLP, of Overland Park, and *Phillip D. Albrecht* and *Kenton E. Snow*, of Rouse Frets White Goss Gentile Rhodes, P.C., of Leawood, for appellees.

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

PER CURIAM: Appellants Robert and Denise Duncan owned the Beaux Arts Centre (the Centre), an historic building in Fort Scott, Kansas. In February 2020, they brought a tort claim against several officials of the City of Fort Scott (the City) asserting that the officials negligently and fraudulently determined the Centre was required to

comply with a fire code "footprint." The district court dismissed this first petition without prejudice, finding that the court lacked subject matter jurisdiction because the Duncans did not substantially comply with the notice requirements of K.S.A. 12-105b(d). The Duncans appealed the dismissal, and a panel of this court affirmed the district court's decision. *Duncan v. Zingre*, No. 123,091, 2021 WL 4032864, at *1-3 (Kan. App. 2021) (unpublished opinion), *rev. denied* 315 Kan. 968 (2022) (*Duncan I*).

While the Duncans' petition for Supreme Court review of *Duncan I* was pending, they filed a second petition in district court, bringing similar claims based upon substantially the same factual allegations as in their first lawsuit. The district court dismissed the second petition for failure to state a viable claim, finding the Duncans' claims were barred by the statute of limitations. The Duncans now appeal raising multiple issues. However, after careful review of the record on appeal and the applicable law, we likewise find the Duncans' claims are time-barred and affirm the district court's dismissal. The Duncans filed their K.S.A. 12-105b(d) notice more than two years after their claims accrued, and the savings statute, K.S.A. 60-518, does nothing to save their untimely claims.

FACTUAL AND PROCEDURAL BACKGROUND

More detailed facts regarding the contention between the Duncans and the City are detailed in this court's opinion in *Duncan I*, 2021 WL 4032864, at *1-3. Essentially, the Duncans owned the historic Beaux Arts Centre and were told by the City Manager in 2015 that they could proceed with renovations to the Centre without needing to obtain a fire code "footprint." This "'code footprint' is 'a building and life safety code compliance document that contains both graphic and narrative information and that meets the requirements of the Kansas Fire Prevention Code. K.A.R. 22-1-7(a)(1)." 2021 WL 4032864, at *1. The Duncans allege that, based upon this assurance from the City Manager, they spent the next couple of years renovating the building.

The Duncans claim that in 2017, the City adopted an update to the building codes, but their building should have been grandfathered in as complying with earlier versions of the code. The Duncans contend that Dave Bruner, of the City Fire Department, "set about using the [updated code] like a club on many building owners." In January 2018, an architect inspected the Centre on behalf of the City to assess code compliance. During a meeting between Mr. Duncan and City officials on February 14, 2018, the City provided Duncan with a letter outlining the inspector's evaluation, which identified multiple issues with the building that must be corrected for the occupants' safety. The letter told the Duncans they had 30 days to provide a plan to accomplish the required changes outlined in the evaluation. The Duncans then closed the Centre to the public on February 16, 2018.

Within days following the closure, the City Manager met the Duncans at the Centre, but the group was unable to come to an agreement on required changes to the building. The Duncans complained that there were errors in the City's footprint and the City failed to understand the applicable building codes. The Duncans attended several city commission meetings to voice their concerns and claimed several public officials gave incorrect or inaccurate information to the local newspaper about the footprint dispute.

After the Duncans' complaints to the City were unsuccessful, and the Duncans and City officials failed to reach a compromise, the Duncans filed the first petition (*Duncan I*) on February 5, 2020, against eight defendants: (1) City Manager Dave Martin; (2) City Deputy Fire Chief Dave Bruner; (3) City Commissioner Randy Nichols; (4) City Commissioner Cindy Bartelsmeyer; (5) City Commissioner Cheryl Adamson; (6) City Commissioner Jean Parker; (7) Fort Scott Mayor JoLynne Mitchell; and (8) Richard Zingre, the architect who inspected the Duncans' building on behalf of the City. In their petition, the Duncans claimed negligence and fraud. This first petition made no reference to whether the Duncans complied with K.S.A. 12-105b(d).

All eight defendants eventually filed or joined in a motion to dismiss *Duncan I*, essentially arguing the district court lacked subject matter jurisdiction over the case because the Duncans had not complied with the notice requirements of K.S.A. 12-105b(d) as required by the Kansas Tort Claims Act (KTCA), K.S.A. 75-6101 et seq. The district court granted the motion, finding that K.S.A. 12-105b(d) applied, it was undisputed that the Duncans did not comply with the notice requirements of K.S.A. 12-150b(d), and this failure deprived the district court of subject matter jurisdiction. *Duncan I* was dismissed without prejudice.

The Duncans timely appealed the district court's decision pro se. A panel of this court affirmed the district court's decision, finding that the district court did not err in dismissing the case for lack of subject matter jurisdiction. *Duncan I*, 2021 WL 4032864, at *1.

The Duncans then petitioned for review by our Supreme Court. Around the same time, the Duncans filed a second petition in the district court on September 15, 2021 (*Duncan II*). The new petition named the same eight defendants from *Duncan I*, plus one additional former City building official, Rhonda Dunn. In the *Duncan II* petition, the Duncans stated that their "original suit was dismissed without prejudice, therefore [they] now bring" causes of action, including—as in *Duncan I*—claims of fraud and negligence. The City official defendants in *Duncan II* jointly moved to stay proceedings in the district court because our Supreme Court had not issued a ruling on the review of *Duncan I*, and as that case was not yet final, it could affect the proceedings of the second petition in *Duncan II*. Although the stay was granted, the Supreme Court soon issued an order denying the petition for review, and the mandate was issued on April 7, 2022, for *Duncan I*.

After *Duncan I* was concluded by the mandate, the defendants in *Duncan II* moved to dismiss the case. After a hearing on the motion, the district court dismissed the

Duncans' second petition, finding that the Duncan's claims were barred by the statute of limitations. The district court found that

> "the act that was fraudulent here was the defendants allegedly knowingly 'imposing an errant [code footprint] upon the plaintiffs and their building, in order to deprive the [Duncans] of their ability to use the property for lawful purposes.' The negligent action occurred when the City of Fort Scott allowed its employees to impose the erroneous code footprint."

The district court found that the earliest the Duncans knew about the imposition of the code footprint was in 2018, so that is when the timeline began to run for the statute of limitations. The district court noted that the substantial injury triggering the limitations period was the Duncans' closing of the building.

The Duncans timely appealed.

THE DISTRICT COURT DID NOT ERR IN DISMISSING THE CASE AS UNTIMELY

On appeal, the Duncans present three primary claims: (1) Their right to a jury trial was violated when the district court dismissed *Duncan II*; (2) the district court erred by finding their claims were barred by the statute of limitations; and (3) the district court failed to address the defendant's criminal offenses they claim occurred and the corresponding statutes as evidence in determining the case. They also secondarily claim the district court erred by failing to reprimand the City's counsel for a variety of alleged errors. On our review, we find the dismissal of *Duncan II* was proper based on the statute of limitations; therefore, we find all other issues moot.

Applicable Standard of Review

"Whether a district court erred by granting a motion to dismiss for failure to state a claim is a question of law subject to unlimited review." *Jayhawk Racing Properties v. City of Topeka*, 313 Kan. 149, 154, 484 P.3d 250 (2021). When reviewing such a dismissal, this court must accept as true any facts alleged by the plaintiff, along with any reasonable inferences which may be drawn from those facts. *Hill v. State*, 310 Kan. 490, 500, 448 P.3d 457 (2019). Although we must accept the Duncans' description of what happened, this does not mean we are required to "'accept conclusory allegations on the legal effects of events the [Duncans have] set out if these allegations do not reasonably follow from the description of what happened.'" See *Ripley v. Tolbert*, 260 Kan. 491, 493, 921 P.2d 1210 (1996).

We ultimately decide this case on its timeliness, and we exercise unlimited review over questions of law, including interpretation and application of a statute of limitations. *Nauheim v. City of Topeka*, 309 Kan. 145, 149, 432 P.3d 647 (2019). Applying these standards, we turn to the timeliness of the *Duncan II* lawsuit.

The statute of limitations bars the Duncans' claims.

We begin with the basic requirements of a lawsuit. For a party to present a claim in district court it must first satisfy several legal requirements, the first of which is a proper pleading. Under K.S.A. 2022 Supp. 60-208(a), a party asserting a claim for relief must present a pleading, including a short and plain statement of the claim and relief sought. Once a pleading is filed, the defending party must then assert affirmative defenses, if any, including the statute of limitations. K.S.A. 2022 Supp. 60-208(c). An affirmative defense is "[a] defendant's assertion of facts and arguments that, if true, will defeat the plaintiff's . . . claim, even if all the allegations in the [petition] are true." Black's Law Dictionary 528 (11th ed. 2019). If an affirmative defense, such as the statute

of limitations, is clearly raised on the face of the petition, the claim is subject to dismissal for a failure to state a claim under K.S.A. 60-212(b)(6). *Weaver v. Frazee*, 219 Kan. 42, 52, 547 P.2d 1005 (1976).

Here, the City presented the statute of limitations as an affirmative defense to the claims in *Duncan II*, and the district court found the lawsuit to be untimely under K.S.A. 60-513(a) and (b). Under this statute, actions for fraud or negligence must be brought within two years of when the "act giving rise to the cause of action first causes substantial injury, or, if the fact of injury is not reasonably ascertainable until some time after the initial act, then the period of limitation shall not commence until the fact of injury becomes reasonably ascertainable to the injured party." K.S.A. 60-513(b).

On appeal, the Duncans argue that both their first and second lawsuits were timely filed, because their injury was only ascertainable after they decided to sell their property in March 2020. The Duncans assert that neither their dispute with the City nor the closing of their building amount to injury because they believed if the City would rescind its code requirements, the parties could come to an agreement. They claim that their substantial injury was not discoverable until they were assured that resolution with the City would not occur in January 2020 and were then compelled to sell their property at a loss in March 2020.

The City appellees disagree and contend the date of injury should be fixed either at the time the City first notified the Duncans of the code deficiencies, on February 14, 2018, or when the Duncans decided to close the building to the public as a result of the deficiency notice on February 16, 2018. Because K.S.A. 60-513(a) requires the claims of fraud and negligence to be filed within two years from the date the injury becomes reasonably ascertainable, the City appellees argue the Duncans were required by statute to file their claims no later than February 16, 2020. And because the *Duncan II* lawsuit was filed on September 15, 2021, it is time-barred.

The district court agreed with the City defendants and determined the Duncans' claims were barred by K.S.A. 60-513(a) since the injury started to accrue either when the City imposed the 30-day warning on the Duncans' building or when they closed their building. The district court further found that *Duncan II* was based upon substantially similar facts as *Duncan I*. In its findings, then, the district court determined the legal effect (the date of accrual) of the agreed facts found in the *Duncan II* petition.

As explained above, although we must accept the Duncans' description of what happened, this does not mean we are required to accept their conclusions on the legal effect of those events. And, in our unlimited review of the issue, we find the Duncans' arguments wholly unconvincing. According to their appellate briefing, their substantial injury did not occur until they either learned of the extent of their injury during a January 2020 City Commission meeting that resulted in damaging newspaper coverage, or when they had to sell their property at a substantial loss in March 2020. But their first petition, in *Duncan I*, was filed in February 2020, which makes the argument that their injury first became ascertainable in March 2020 untenable—they must have known they were injured prior to filing their first lawsuit. Finding the March 2020 accrual date impossible, we examine the potential injury date of January 2020, when the City meeting and local news article allegedly made them aware of the extent of their injury. Yet this argument is also unpersuasive, because neither that City meeting nor the article changed the status of their property—it had remained closed since February 2018.

On our review of the record, we find the legal injury for the purpose of the Duncans' fraud and negligence claims occurred when the City restricted the free use of their property through the notice letter dated February 14, 2018. At latest, the Duncans admit they closed their building to public access on February 16, 2018, fearing a potential lawsuit. The Duncans also acknowledged that they were forced to ultimately sell their property because they had to "stop [their] money hemorrhage." Because the loss of money logically began at some earlier time, since it was something they needed to "stop,"

their injuries must have begun before the sale. And both of the Duncans' claims repeatedly point back to the imposition of the allegedly errant code footprint by the City and the injury resulting from the imposition of that code footprint.

This indicates that *Duncan I*, which was filed in the district court on February 5, 2020, was filed within the two-year statutory deadline. But that case was dismissed without prejudice by the district court on June 2, 2020, for the Duncans' failure to comply with K.S.A. 12-105b(d), because they failed to properly notify the City as required by the KTCA. At first glance, under K.S.A. 60-518, it appears the Duncans might have saved their claims by providing the K.S.A. 12-105b notice and then refiling their claims within six months of *Duncan I*'s dismissal. See *Roy v. Young*, 278 Kan. 244, 249, 93 P.3d 712 (2004) (discussing K.S.A. 60-518; "[i]t saves an action that was originally timely filed, dismissed, and then refiled within 6 months of dismissal regardless of whether the limitation period had expired in the meantime"). But even this savings statute is no help to the Duncans.

The saving statute, K.S.A. 60-518, requires that the first action be timely "commenced." Our own Supreme Court has stated its "longstanding rule" that "'[t]he filing of proper notice under [K.S.A.] 12-105b(d) is a condition precedent to the filing of an action'" against a municipality. *Gessner v. Phillips County Comm'rs,* 270 Kan. 78, 81-82, 11 P.3d 1131 (2000). Because *Duncan I* was dismissed for failure to comply with K.S.A. 12-105b(d), this first case was not timely commenced. See *Gessner*, 270 Kan. at 82 (A claimant cannot have commenced an action, within the meaning of the saving statute, without first having complied with K.S.A. 12-105b[d].). So, the first case is considered, for limitations purposes, to have never occurred, and without that filing, there was no initial petition to be "saved" by K.S.A. 60-518. Actual commencement of the Duncans' claims could not occur until the City was provided legal notice under K.S.A. 12-105b and refused relief.

Another panel of our court has applied *Gessner* when examining the interplay between the 60-518 saving statute and the 12-105b(d) notice statute. *Christopher v. State*, 36 Kan. App. 2d 697, 703-04, 143 P.3d 685 (2006). There, a juvenile brought a negligence action against the State and the Juvenile Justice Authority operated by the school district's Southeast Kansas Education Service Center (SKESC), seeking damages for injuries to his hand, arising out of use of electric saw while participating in an educational activity as a resident of the facility. His initial lawsuit was filed within the limitations period, but without the statutory notice to SKESC required under the KTCA. After his claims against SKESC were dismissed, the juvenile provided the statutory notice and moved to amend his petition against SKESC, arguing the saving statute, K.S.A. 60-518, operated to extend the time in which he could file his claims. The district court denied the juvenile' motion to refile against SKESC and found the saving statute did not apply. On review, our court affirmed the district court, finding that "Christopher's filing within the limitation period, but without prior notice to SKESC, was void *ab initio* given the district court's lack of jurisdiction. . . . The savings statute did not change this fact." 36 Kan. App. 2d at 704 (citing *Zinke & Trumbo, Ltd. v. Kansas Corporation Comm'n*, 242 Kan. 470, 490, 749 P.2d 21 [1988]).

Here, the Duncans admit they provided their K.S.A. 12-105b(d) notice to the City on July 1, 2020—within a month of their first lawsuit's dismissal. Unfortunately, though, this notice was given more than two years after the limitations period accrued on, at the latest, February 16, 2018. Their second petition, *Duncan II*, the focus of this appeal, was filed on September 15, 2021—more than three years after the accrual of their fraud and negligence claims.

Following the logic of *Gessner* and its progeny, the Duncans' first-filed case (*Duncan I*) was void for failure to comply with the notice statute. See *Christopher*, 36 Kan. App. 2d at 704. Put simply, it is as if *Duncan I* were never filed. So, we then look at the date the Duncans gave the K.S.A. 12-105b(d) notice—July 1, 2020—and, most

importantly, the date their *Duncan II* lawsuit was commenced to determine whether their claims were timely. Because both the statutory notice and the filing of *Duncan II* occurred more than two years after the accrual of their fraud and negligence claims, their claims are untimely under K.S.A. 60-513(b) and the saving statute—K.S.A. 60-518—cannot change this.

All other issues raised by the Duncans on appeal are rendered moot by our decision, and we need not reach those issues.

APPELLANTS' PENDING MOTION IS DENIED

On July 20, 2023—after this matter was submitted for decision on July 12—the Duncans filed a document titled "Appellant Objection" which we perceive to be a motion. The Duncans claim that their previous motion for the appellate court to correct its online case record—filed May 1, 2023—had been "noted" by the court on May 8, but the online case record was not corrected. In both the earlier motion and their present motion, the Duncans misinterpret that their appellate brief was due on March 1, 2023, but was not marked received until April 6, 2023, which they believe could be misleading to the judges considering their case. The Duncans also contend that the appellees' brief is misleading because appellees' counsel represents only eight of the nine appellees—that Zingre, the architect, did not respond to this appeal, and so they should be granted judgment against Zingre for his failure to appear.

A review of the Clerk of the Kansas Appellate Courts' electronic filing system reveals no such errors. The filing system shows that this court ordered the filing of the Duncans' briefs by March 1, 2023, and the Duncans' initial appellate brief was timely filed on February 24, 2023. The appellees' brief was timely filed on March 27, 2023. See Supreme Court Rule 6.01(b)(2) (2023 Kan. S. Ct. R. at 35) (requiring the appellee brief to be filed no later than 30 days following the appellant's brief). On April 6, 2023, the

Duncans' reply to the appellees' brief was timely filed. See Supreme Court Rule 6.01(b)(5) (requiring that a reply brief be filed "no later than 14 days after service of the brief to which the reply is made"). Whether the reply brief was properly filed is not an issue which was raised by any party, and we do not reach it here. See Supreme Court Rule 6.05 (2023 Kan. S. Ct. R. at 38) (noting the instances in which a reply brief may be submitted and requirements of reply briefs). It seems the Duncans have conflated the date of the filing of their reply brief (April 6) with the filing of their initial appellate brief (February 24).

Because all briefs were timely filed, we see no records that require correction related to filing dates. As for appellee Zingre, although his counsel's name does not appear on the title page of the appellees' brief, his counsel joined the brief on the signature page of the appellees' brief, which constitutes an appearance for Zingre in this appeal.

For these reasons, the Duncans' motion is denied.

Affirmed.