No. 23-126732-AS

IN THE

SUPREME COURT OF THE STATE OF KANSAS

BRENDA ZARAGOZA,

Plaintiff/Appellant,

vs.

BOARD OF JOHNSON COUNTY COMMISSIONERS,

Defendant/Appellee,

BRIEF OF *AMICUS CURIAE* KANSAS ASSOCIATION OF DEFENSE COUNSEL

Appeal from the District Court of Johnson County
Hon. Rhonda K. Mason, Judge
District Court Case No. 21-CV-3636

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Having been granted leave by this Court's Order on November 27, 2024, the Kansas Association of Defense Counsel (KADC), submits this brief as *amicus curiae* herein.

INTRODUCTION

In 1883, the United States Supreme Court of the United States stated, "[i]t may be accepted as a point of departure unquestioned, that neither a State nor the United States can be sued as defendant in any court in this country without their consent . . . ." *Cunningham v. Macon & Brunswick R. Co.*, 109 U.S. 446, 451 (1883). But plaintiff claims things were different in Kansas. Based on a single territorial Supreme Court case from 1860, plaintiff argues—for the first time in her supplemental brief—that the last century and a half of this Court's cases upholding the doctrine of sovereign immunity were all wrongly decided. This incredible assertion cannot withstand even a modicum of scrutiny. Instead of bowing to plaintiff's unprecedented and historically inaccurate characterization of the sovereign immunity doctrine at common law, this Court should find that the State of Kansas—and arms of the State such as defendant Johnson County—possess sovereign immunity, and that the only waiver of that immunity may be found in the Kansas Tort Claims Act (KTCA).

The other argument addressed by the KADC herein is plaintiff's unsupported argument that the term "open areas" in the KTCA's recreational use exception (K.S.A 75-6104(o)) applies solely to "outdoor areas." This argument is contrary to this Court's unambiguous and well-reasoned precedents and plaintiff has advanced no valid reason to depart from those holdings.

ARGUMENT AND AUTHORITIES

I.
PLAINTIFF'S UNTIMELY CONSTITUTIONAL ARGUMENT IS WITHOUT MERIT

In *Hilburn v. Enerpipe Ltd.*, 309 Kan. 1127, 442 P.3d 509 (2019), this Court struck down, for at least some purposes, the non-economic damage cap found in K.S.A. 60-19a02. The Court held that because the right to have a jury determine these damages existed at common law at the time the Kansas Constitution was enacted, the cap deprived plaintiffs of their right to a trial by jury enshrined in Kansas Constitution Bill of Rights Section 5.

Hilburn has spawned a cottage industry of litigation aimed at employing a similar analysis to challenge all manner of long-established legal principles. In this case, plaintiff argues that the recreational use exception to liability under the KTCA violates Section 5 because it deprives her of a jury trial for her tort claim against a government entity.

But plaintiff's request is actually much broader. Based on her argument, if the recreational use exception is unconstitutional then every KTCA exception—indeed, sovereign immunity itself—would necessarily be unconstitutional. Plaintiff's entire argument in this regard is based on *City of Leavenworth v. Casey*, McCahon 124 (1860), a territorial Supreme Court case in which a citizen of Leavenworth sued the city for grading its streets in such a way that caused flooding in his cellar. From this case, plaintiff gleans that, at the time the Kansas Constitution was enacted, ***all*** government entities could be sued for ***any and all*** claims. In other words, in plaintiff's view, the concept of sovereign immunity is a fraud that has been perpetrated on Kansans for the past 150 years. Plaintiff is wrong.

A. Plaintiff's Argument Is Not Preserved.

Plaintiff did not raise her constitutional argument in district court. She did not raise it the Court of Appeals. She did not even raise it in her Petition for Review. The primary issue presented in the Petition for Review was that the recreational use exception had been improperly applied to the facts of this case. Once the Court granted review, plaintiff, for the first time in her supplemental brief, raised and argument challenging the constitutionality of the exception. This Trojan Horse approach to appellate practice is not allowed. *See Trotter v. State*, 288 Kan. 112, Syl. ¶ 2, 200 P.3d 1236 (2009) ("Generally, issues not raised before a district court, including constitutional grounds for reversal, cannot be raised for the first time on appeal."); KAN. SUP. CT. R. 6.02(a)(5).

Plaintiff relies on the three exceptions to this general rule. (Supp. Br., p. 3). But here, the constitutional issue was not only not raised in the courts below, it was not raised in plaintiff's petition for review. That implicates Rule 8.03(b)(6)(C)(i), which states that "[t]he Supreme Court will not consider issues not raised before the Court of Appeals or issues not presented or fairly included in the petition for review, cross-petition, or conditional cross-petition." The only exception to this rule is "plain error"—a standard that plaintiff makes no effort to meet. This case, then, is like *In re Baby Girl G.*, 311 Kan. 798, 801-02, 355 P.3d 1207 (2020), where this Court declined to entertain an issue not previously raised:

> In the present case, the constitutional issue was raised in neither the district court nor the Court of Appeals. An argument that was raised in neither the district court nor the Court of Appeals and is raised for the first time before the Supreme Court "fails on more than one level." *State v. Dooley*, 308 Kan. 641, 651, 423 P.3d 469 (2018). In such cases, including the present one, the party

> has already had two opportunities to raise an issue and failed to do so. The only apparent impediment was the choice of attorneys and their respective election of litigation and appellate strategies; the statute did not become more or less constitutional during the course of the litigation and appeal.

Moreover, even if Rule 8.03(b)(6)(C)(i) were not considered, plaintiff has failed to show that this case meets the high bar for forgiving the failure to preserve. As this Court has stated, "[w]e should address constitutional questions raised for the first time in this court only when 'we cannot intelligently dispose of this litigation without considering and discussing' those constitutional questions." *State v. Childs*, 275 Kan. 338, 342, 64 P.3d 389 (2003) (quotation omitted). That is not the case here.

B. Sovereign Immunity Is Inherent in the State of Kansas.

It is important to note what plaintiff's constitutional afterthought is ***not*** about. It is not about the wisdom or fairness of the ancient doctrine of sovereign immunity. It is not about the wisdom or fairness of the KTCA or its various exceptions from liability. It is not even about whether sovereign immunity has been waived.[1] Rather, the sole question that must be answered in connection with the constitutional issue, as framed by plaintiff, is whether, at

[1] The *amicus* brief of the Kansas Trial Lawyers Association (KTLA) attempts to make an argument that K.S.A. 12-1223(a) waives sovereign immunity for the Johnson County Library Board because that subsection states that library boards may "sue and be sued." (KTLA Br., pp. 4-6). This is somewhat misguided in that Johnson County's library is dealt with separately in K.S.A. 12-1223(b). At any rate, the statute does not constitute a waiver of sovereign immunity with regard to tort claims—it only establishes a library board's capacity to be sued in conjunction with its power to contract. The plaintiff in this case has not argued to the contrary (Supp. Br., pp. 8-9), and the KTLA's *amicus* brief is not the proper vehicle by which to raise a new issue. *See Sierra Club v. Moser*, 298 Kan. 22, 87-88, 310 P.3d 360 (2013) ("Kansas appellate procedure does not allow a nonparty, including an *amicus curiae*, to raise an issue for appellate review[.]").

the time the Kansas Constitution was enacted, a plaintiff could sue a county for negligence. Contrary to plaintiff's argument, the answer to that question is "no."

Before Kansas became a state, the United States Supreme Court stated that "[i]t is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission." *Beers v. Arkansas*, 61 U.S. 527, 529 (1858). Sovereign immunity "applies with even greater force in the context of a suit prosecuted against a sovereign in its own courts, for in this setting, more than any other, sovereign immunity was long established and unquestioned." *Alden v. Maine*, 527 U.S. 706, 742 (1999). Accordingly, "[b]asic tenets of sovereign immunity teach that courts may not ordinarily hear a suit brought by any person against a nonconsenting State." *Torres v. Texas Dept. of Pub. Safety*, 597 U.S. 580, 587 (2022).

This Court's post-*Alden* decisions consistently recognize that "[s]overeign immunity is inherent, existing prior to the ratification of the Constitution." *Purvis v. Williams*, 276 Kan. 182, 193, 73 P.3d 740 (2003); *accord Schall v. Wichita State Univ.*, 269 Kan. 456, 466, 7 P.3d 1144 (2000); *Goldbarth v. Kansas State Bd. of Regents*, 269 Kan. 881, 893-94, 9 P.3d 1251 (2000); *Prager v. State*, 271 Kan. 1, 33, 20 P.3d 39 (2001); *Connelly v. State*, 271 Kan. 944, 962, 26 P.3d 1246 (2001).

C. Common Law Sovereign Immunity Extended to Counties Such as Defendant.

This Court has consistently and explicitly held that counties possess sovereign immunity as a matter of law because of their roles as "an agent of sovereignty." *Caywood v. Sedgwick Cnty. Bd. of Comm'rs*, 194 Kan. 419, 422, 399 P.2d 561 (1965) (quoting

Rosebaugh v. Allen Cnty. Bd. of Comm'rs, 120 Kan. 266, 267, 243 P. 277 (1926)); *Fisher v. Delaware Twp.*, 87 Kan. 674, 678, 679, 125 P. 94 (1912); *Anderson v. Cloud Cnty. Bd. of Comm'rs*, 90 Kan. 15, 18, 132 P. 996 (1913); *Thomas v. Ellis Cnty. Bd. of Comm'rs*, 91 Kan. 443, 445-46, 138 P. 409 (1914); *Woolis v. Montgomery Cnty. Bd. of Comm'rs*, 116 Kan. 96, Syl. ¶ 1, 226 P. 244 (1924); *Kebert v. Wilson Cnty. Bd. of Comm'rs*, 134 Kan. 401, Syl. ¶ 1, 5 P. 2d 1085 (1931); *Clapham v. Miami Cnty. Bd. of Comm'rs*, 158 Kan. 685, 149 P. 2d 344 (1944); *Wolf v. Fidelity & Deposit Co. of Maryland*, 174 Kan. 402, 406, 256 P. 2d 862 (1953); *Wommack v. Lesh*, 180 Kan. 548, 551, 552, 305 P. 2d 854 (1957).

In an early case applying the doctrine of sovereign immunity, the Kansas Supreme Court made clear that the sovereign immunity enjoyed by the state at common law extended to other governmental entities, including counties:

> In the absence of an express statute imposing the liability, the authorities uniformly hold that organizations, such as ***counties, townships, school districts, road districts, and the like***, though possessing corporate capacity and power to levy taxes and raise money, have been considered not to be liable for neglect of public duty. The theory of these various decisions is in effect, that ***such organizations, though corporations, exist as such only for the purposes of the general political government of the state***; that all the powers with which they are intrusted are the powers of' the state, and all the duties with which they are charged are the duties of the state; that in the performance of governmental duties, the sovereign power is not amenable to individuals, and therefore ***these organizations are not liable at the common law for such neglect, and can only be made liable by statute***.

Eikenberry v. Twp. of Bazaar, 22 Kan. 556, 561, 31 Am. Rep. 198 (1879) (emphasis added); *see also Brown v. State Highway Comm'n*, 206 Kan. 49, 50, 476 P.2d 233 (1970)

(noting the "sweeping character of the doctrine of sovereign immunity" and the "principle that a state (or a county as an arm of the state) can be sued only with its consent").

It cannot seriously be argued that counties such as defendant Johnson County did not have sovereign immunity at common law,

D. *City of Leavenworth v. Casey* Has No Application Here

The case upon which plaintiff's entire argument is constructed—*City of Leavenworth v. Casey*, McCahon 124 (1860)—does not further plaintiff's assault on sovereign immunity. As noted above, in that case the plaintiff sued the city for improperly grading a street, resulting in flooding in the plaintiff's cellar. *Id*. at 126-27. The case contains no discussion of sovereign immunity but simply states that "[t]he city having elected to grade a street or build a sewer, is legally responsible for such damage as accrues from the wrongful and negligent manner in which the work was done by the city or her agents." *Id*. at 125, Syl. ¶ 6.

City of Leavenworth was based on the narrow rule at common law that cities are liable for improperly maintaining streets and sidewalks. While not precedential, the observation of the court in *Goodwin v. City of Topeka*, No. 2019-CV-730, 2021 Kan. Dist. LEXIS 940, at *6-7 (Shawnee Cty., Kan., Dist. Ct. June 17, 2021) (Attachment A hereto), is accurate:

> Historically, while a city enjoyed the protections of sovereign immunity, there was an exception imposing liability where a city failed to keep its streets in reasonably safe condition. *See Gould v. City of Topeka*, 32 Kan. 485, 4 P. 822, 824, 826 (1884) (city streets to be kept in a "safe and proper condition" for the "traveling public"); *Taggart v. Kansas City*, 156 Kan. 478, 134 P.2d 417, 418 (1943) (the city "is not an insurer of the safety of those who use its streets and walks," but must keep them "reasonably safe for use"); *Grantham v. City of Topeka*, 196 Kan. 393, 398, 411 P.2d 634 (1966) (city streets to be kept "in a condition reasonably safe for their intended use" by the "traveling public").

> The parties agree that the City has a duty to keep its streets in a reasonably safe condition.

This exception extends back to British common law. *See Weightman v. Corp. of Washington*, 66 U.S. 39, 51-53 (1862); *see also Jansen v. City of Atchison*, 16 Kan. 358, 380-83 (1876).

As noted, the exception was very narrow. First, it applied only to municipal corporations—cities. *See Eikenberry*, 22 Kan. at 561-62 (differentiating between cities and townships/counties for purposes of street maintenance liability and stating, "[t]he difference between these two classes of corporations is well established, and a principle applicable to the one class is not necessarily applicable to the other").

And second, the exception applied only to the maintenance of streets and sidewalks and similar public works. This was recognized in *Harper v. City of Topeka*, 92 Kan. 11, 13, 139 P. 1018 (1914):

> Ordinarily, cities and other municipal corporations in the exercise of their governmental functions are not liable in damages for any neglect, or even wrongdoing, of their officers in the discharge of such duties unless such liability is expressly imposed upon them by law. (citations omitted). An exception to the rule has been made which holds cities liable for damages resulting from defects in their highways or certain conditions of notice.

(citing *Jansen, supra*). *See also Hibbard v. City of Wichita*, 98 Kan. 498, 501, 159 P. 399 (1916) (quoting 6 MCQUILLIN ON MUNICIPAL CORPORATIONS § 2720 (1913) and referring to the streets and sidewalks rule as "an illogical exception to the general rule of the common law prohibiting actions against municipalities for negligence").

The bottom line is that the *City of Leavenworth* basket into which plaintiff casts all her constitutional eggs does nothing more than document the narrow common law exception

to sovereign immunity for cities in their maintenance of streets and sidewalks. Perhaps ***if*** the present case involved a city defendant, and ***if*** it involved an alleged failure to properly maintain a street, and ***if*** there was a KTCA exemption that purported to immunize the city for liability in that situation, it would be necessary to engage plaintiff's analysis and arguments. But that is not the case. Because a county enjoyed sovereign immunity at common law, plaintiff's argument that Section 5 of the Kansas Constitution Bill of Rights enshrined the right to sue a county is without merit.[2]

II.
EVEN IN THE ABSENCE OF COMMON LAW SOVEREIGN IMMUNITY, THE RECREATIONAL USE EXCEPTION WOULD NOT VIOLATE SECTION 5

Even if, as plaintiff incorrectly argues, counties were amenable to suit for torts at common law, that does not mean that the recreations use exception violates Section 5's right

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[2] The introductory portion of plaintiff's Supplemental Brief includes cursory references to Section 18 of the Kansas Constitution Bill of Rights. (Supp. Br., pp. 2, 4). Any argument under that Section fails at the outset for the same reason as the Section 5 argument. "As with section 5, section 18—which preserves the right to remedy by due course of law—applies only to civil causes of action that were recognized as justiciable by the common law as it existed at the time our Constitution was adopted. . . . Stated differently, section 18 'does not create rights of action. It preserves the right to remedy by due process of law for civil causes of action recognized as justiciable by the common law as it existed at the time the Kansas Constitution was adopted.'" *Higginbotham v. State*, No. 126,764, 2024 Kan. App. Unpub. LEXIS 268, at *10-11 (Kan. Ct. App. July 19, 2024) (Attachment B) (citing *Leiker v. Gafford*, 245 Kan. 325, 362, 778 P.2d 823 (1989) and quoting *Tillman v. Goodpasture*, 313 Kan. 278, 279, 485 P.3d 656 (2021)).

Even if Section 18 otherwise applied, *Hilburn* made clear that the quid pro quo test abandoned for Section 5 still applies to Section 18. *Hilburn*, 309 Kan. at 1144. Plaintiff makes no effort to engage that test or demonstrate how Section 18 is implicated here. *See State v. Davis*, 284 Kan. 728, 740, 163 P.3d 1224 (2007) (points incidentally raised but not argued are deemed abandoned). The fact that the *amicus* brief of the KTLA does attempt to develop the argument (KTLA Br., pp. 6-8) cannot cure this defect. *See Ross v. Nelson*, 63 Kan. App. 2d 634, 656, 534 P.3d 634 (2023), *aff'd*, 319 Kan. 266, 554 P.3d 636 (2024) ("an *amicus* brief generally may not raise an issue not raised by the parties" [citing *Hensley v. Bd. of Educ. of U.S.D. No. 443*, 210 Kan. 858, 864, 504 P.2d 184 (1972)).

to a jury trial. In this regard, plaintiff's arguments are a square peg trying to fit into the round hole created by *Hilburn*.

As *Hillburn* held, "Section 5 preserves the jury trial right as it historically existed at common law when our state's constitution came into existence." 309 Kan. at 1133. Thus, in determining whether Section 5's protections attach to a factual issue in a case, the court must determine whether that issue comprised "a fundamental part of a jury trial at common law." 309 Kan. at 1134. *Hilburn* struck down the statutory cap on noneconomic damages because the amount of noneconomic damages available to a plaintiff was a question of fact over which the jury had complete discretion at common law. 309 Kan. at 1149-50.

Plaintiff's attempt to use *Hilburn* to support her argument regarding the recreational use exception ignores that this Court "has consistently noted that when the Section 5 jury trial right is implicated, it applies no further than to give the right of such trial *upon issues of fact so tried at common law*." *State v. Love*, 305 Kan. 716, 735, 387 P.3d 820 (2017) (emphasis in original). Thus, the *Love* Court held that Section 5 "does not affect the pleading stage of the case." *Id.*; *accord State v. Robison*, 314 Kan. 245, 252, 496 P.3d 892 (2021) ("The right to have the jury determine issues of fact is contrasted with the determination of issues of law, which have always been left to the court.").

Section 5 does not preserve *causes of action* that existed at common law—that is the function of Section 18. Section 5 merely preserves the right to have certain issues of fact within a cause of action determined by a jury. As stated by Justice Stegall in his pivotal *Hilburn* concurrence:

> [T]here is a clear difference between section 5 and section 18 in the Kansas Constitution Bill of Rights. . . . The section 5 "right of trial by jury" that "shall be inviolate" is a procedural right to ***who decides contested questions in Kansas courts. It does not guarantee or prescribe the substantive matter of which questions Kansas courts can decide***. A different provision of the Kansas Constitution—section 18—governs the latter. So the procedural right to have a jury (rather than, say, the Legislature) decide the kinds of contested questions juries historically decided is sacrosanct under the Kansas Constitution. ***But the substantive decision about what kinds of questions—in legalese, what causes of action—Kansas courts have the power to resolve is untouched by the section 5 guarantee.*** Put another way, just because a jury would have resolved a particular substantive question under Kansas common law in 1859 does not mean that a party has a constitutional right to a jury resolution of that question today. This is because the scope of contested questions that Kansas courts may answer can and does change—and this does not violate section 5.

Hilburn, 309 Kan. at 1151 (Stegall, J. concurring) (emphasis added).

Plaintiff has presented a Section 18 argument in Section 5 clothing. And that matters. Because in contrast to a Section 18 analysis, there is no longer a presumption of constitutionality under Section 5. *Hilburn*, 309 Kan. at 1132-33. And further, a quid pro quo analysis is required under Section 18, but is no longer applicable to Section 5. *Hilburn*, 309 Kan. at 1144.

As noted in footnote 2, plaintiff makes a nod to Section 18 and then attempts to avoid the burdens imposed by that section by conducting her analysis wholly under Section 5. But this case does not present the question of who decides contested fact questions, such as the amount of damages—the right protected by Section 5. Rather, it implicates the legislature's ability to decide what causes of action Kansas courts have the power to resolve—the right protected by Section 18. By failing to make the necessary arguments under Section 18, plaintiff has lost the ability to challenge the recreational use exception under that section.

III.
THE RECREATIONAL USE EXCEPTION APPLIES TO A LIBRARY PARKING LOT.

As to the issue on which the Court actually granted review, the KADC submits that the district court and Court of Appeals both correctly held that because plaintiff's injury occurred in the parking lot of the Johnson County Public Library's Monticello Branch, the recreational use exception to liability under the KTCA applies. That exception provides that a governmental entity will not be liable for damages 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 proximately causing such injury." K.S.A 75-6104(o).

This Court applies the recreational use exception "broadly . . . to accomplish the legislative purpose of the exception." *Poston v. U.S.D. No. 387*, 286 Kan. 809, 812, 189 P.3d 517 (2008). The Court has analyzed this exception frequently, and has explained that:

> 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.

Lane v. Atchison Heritage Conf. Ctr., Inc., 283 Kan. 439, 444, 153 P.3d 541 (2007) (quoting *Jackson v. U.S.D. No. 259*, 268 Kan. 319, 331, 995 P.2d 844 (2000)). Thus, the language of K.S.A. 75-6104(o) broadly encompasses "'any public property intended or permitted to be used as a park, playground, or open area for recreational purposes,' and is not limited to '*any*

portion of public property utilized for recreational activities.'" *Wilson v. Kansas State Univ.*, 273 Kan. 584, 592, 44 P.3d 454 (2002) (emphasis in original).[3]

Plaintiff's primary attack on the lower courts' application of the recreational use exception is her contention that the Library is not an "open area" used for recreational purposes. She argues that, as an indoor facility, the Library cannot constitute an "open area" under a "plain reading" of that term. (Supp. Br., pp. 10-16).

This Court has consistently held that the indoor/outdoor distinction which plaintiff urges is without merit. *See, e.g., Jackson*, 268 Kan. at 325 ("It defies common sense to hold that K.S.A. 75-6104(o) provides immunity from injuries which occur on a football field, a baseball field, a track and field area, and a sledding area, but not on an indoor basketball court solely because it is indoors."); *accord Lane*, 283 Kan. at 451-52 (applying recreational use exception to indoor conference center); *Wilson*, 273 Kan. at 591-92 (applying recreational use exception to restrooms at a football stadium); *Poston*, 286 Kan. at 812 (applying recreational use exception to common areas of a school). Thus, there is no cognizable argument under Kansas law that an "open area" be an outdoor area instead of a simply "an area open to the public."

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[3] In a section supported by scant legal authority, plaintiff suggests that a library's use is not "recreational." (Supp. Br., pp. 16-18). But the Court of Appeals panel conducted a thorough analysis of this argument and rejected plaintiff's narrow construction of the term, concluding that "[u]ncontroverted evidence establishes that the library was intended to be, has been, and continues to be used for recreational purposes, qualifying the library for recreational use immunity." *Zaragoza v. Bd. of Johnson Cnty. Comm'rs*, 64 Kan. App. 2d 358, 370, 551 P.3d 175 (2024), *rev. granted* (9/24/24). This holding is consistent with cases from other jurisdictions. *See, e.g.*, *City of McKinney v. Eldorado Land Co., LP*, No. 05-15-00067-CV, 2016 Tex. App. LEXIS 4675, at *32-33 (Tex. Ct. App.—Dallas May 3, 2016, pet denied); *Friends of Appleton-Wolfard Libraries v. City & Cnty. of S. F.*, No. A136409, 2014 Cal. App. Unpub. LEXIS 3384, at *8-9 (Cal. Ct. App. May 13, 2014).

Moreover, "the recreational use immunity extends to" all areas "necessarily connected to the property." *Wilson*, 273 Kan. at 590. This is because "[a] particular facility must be viewed collectively to determine whether it is used for recreational purposes." *Lane*, 283 Kan. at 446. For example, this Court has applied the recreational use exception to restrooms at a football stadium (*Wilson*) and the commons area of a public school (*Poston*). Similarly, the Court of Appeals has noted that "Kansas appellate courts have extended recreational-use immunity to property integral to or near a recreational facility." *Muxlow v. City of Topeka*, No. 117,428, 2018 Kan. App. Unpub. LEXIS 442, at *9 (Kan. Ct. App. June 15, 2018), *rev. denied*, 309 Kan. 1349 (2019) (Attachment C) (finding that an open area between the City park and a street fell within the recreational use exception because the area between the park and the road was intended to be used recreationally); *Robinson v. State*, 30 Kan. App. 2d 476, 479, 43 P.3d 821 (2002) (extending recreational use immunity in slip and fall accident in a wet hallway between a swimming pool and a locker room of the Parsons State Hospital); *Dye v. Shawnee Mission Sch. Dist.*, No. 98,379, 2008 Kan. App. Unpub. LEXIS 435, at *4-5 (Kan. Ct. App. June 6, 2008), *rev. denied*, 287 Kan. 765 (2008) (Attachment D) (finding a grassy area between a fenced-in soccer field and parking lot that served both the field and the school fell within the recreational use exception, noting that "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."); *see also Sylvester v. Chicago Park Dist.*, 689 N.E.2d 1119, 1123-24 (Ill. 1997) (applying nearly identical recreational use exception to hold that a parking lot for a football field falls within the exception).

Here, it is undisputed that a facility such as the Library cannot function without sufficient parking and the parking lot is therefore integral to the Library. Extending the recreational use exception to the Library's parking lot accomplishes the purpose underlying the exception—encouraging governmental entities to build places for the community to participate in recreational activities and to gather for the benefit of the public.

The fact that the legislature has not acted to narrow the recreational use exception in the wake of judicial decisions construing its application and scope indicates that the legislature believes the courts have properly read its intent. *See Kudlacik v. Johnny's Shawnee, Inc.*, 309 Kan. 788, 797, 404 P.3d 576 (2019). The Court should decline plaintiff's invitation to depart from its established precedents and find that the recreational use exception applies to immunize defendant from any negligence claims arising from its care of the Library's parking lot.

CONCLUSION

It is difficult to comprehend that the last 163 years of Kansas caselaw upholding the State of Kansas's sovereign immunity were all wrongly decided. And yet, that is exactly what plaintiff argues before this Court. The Court should ignore plaintiff's unsupported argument and reaffirm the common law doctrine of sovereign immunity.

Similarly, it is difficult to comprehend why the "plain interpretation" of K.S.A 75-6104(o) requires finding that "open areas" refers solely to "outdoor areas." Instead of ignoring precedent, altering history, and rewriting the rulebook from scratch, the Court should find that recreational use immunity bars plaintiff's negligence claim.

Respectfully submitted,

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

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of December, 2024, a true and correct copy of the above and foregoing brief was filed with the Clerk of the Appellate Courts via the eFlex system, which will provide service to all counsel of record.

/s/ Lyndon W. Vix
Lyndon W. Vix

ATTACHMENT A

Goodwin v. City of Topeka,
No. 2019-CV-730, 2021 Kan. Dist. LEXIS 940
(Shawnee Cty., Kan., Dist. Ct. June 17, 2021)

Goodwin v. City of Topeka

Third Judicial District, District Court of Shawnee County, Kansas

June 17, 2021, Decided; June 17, 2021, Filed

2019-CV-630

Reporter
2021 Kan. Dist. LEXIS 940 *

CLINTON GOODWIN, Plaintiff v. CITY OF TOPEKA, KANSAS, Defendant

Core Terms

pothole, streets, alley, public duty doctrine, summary judgment, government entity, inspections, discretionary function, immunity, sovereign immunity, asserts, reasonably safe condition, government agency, negligence claim, special duty, defects, traffic, walking, clearly defined, public at large, mandatory duty, uncontroverted, employees, guideline, resources, notice, trash, safe

Judges: **[*1]** Teresa L Watson, District Court Judge.

Opinion by: Teresa L Watson

Opinion

MEMORANDUM DECISION AND ORDER

Plaintiff Clinton Goodwin stepped in a pothole in a Topeka alley and was injured. He filed a negligence claim against Defendant City of Topeka. The City moved for summary judgment on the claim against it. The matter has been fully briefed, and the Court heard argument on the motion at the pretrial conference. The Court is ready to rule.

STATEMENT OF UNCONTROVERTED FACTS

1. On or about November 13, 2017, Goodwin was walking in an alley behind 1034 S. Kansas Avenue in Topeka, Kansas. He stepped in a pothole and was injured.

2. The incident occurred late at night. The weather was cold, but it was not snowing, raining, or foggy.

3. Goodwin does not know or remember if there was anything that might have prevented him from seeing the hole.

4. At his deposition Goodwin had no knowledge or memory of the hole's physical dimensions or characteristics, except to say that he thought it "had to be pretty deep."

5. Goodwin does not remember where he was coming from when he stepped in the pothole, but does recall he was walking from the south to the north through the alley east of Hanover Pancake House to the Landmark Plaza **[*2]** Apartments.

6. Goodwin chose to walk through the alley in order to access a back door at the apartment building.

7. After the fall, Goodwin got up and made his way to his girlfriend who was waiting in a van in the parking lot south of the apartment building.

8. Goodwin said that he and his girlfriend went immediately to the emergency room at a local

hospital.

9. Tony Trower is the Street Operations Manager for the City.

10. Trower testified that the alley in question is not a designated pedestrian walkway, and there are sidewalks available on all sides of the block. However, Trower said that pedestrians "probably will" walk in the alley because there are parking lots on both sides of it, and walking in the alley is not prohibited.

11. Goodwin said he was aware of the existence of pedestrian sidewalks along both SW Kansas Avenue and SE Quincy Avenue nearby.

12. Goodwin's attorney hired an investigator who measured the pothole to be approximately 4 feet 6 inches wide and 4 3/8 inches deep.

13. Trower said a pothole of that size is considered a "large pothole."

14. The City does not have a policy regarding the lighting of alleys, and does not typically provide lighting in alleys.

15. The City is **[*3]** responsible for fixing potholes on City property, and this incident occurred on City property.

16. The City does not have a specific program of routinely checking alleys for potholes, and it does not have the resources to do so.

17. The City receives notice of street defects, such as potholes, from the public through a mobile application called "See, Click, Fix," through the call center, or from employees traveling throughout the City who happen to see defects.

18. Once a pothole is reported, the City assesses its severity and determines its priority for repair. Trower testified that various factors contribute to this analysis, including the size of the pothole, it location, and the type of traffic in the area, among others.

19. Trower said that a pothole 2 feet by 2 feet and six inches deep would be a "big pothole" and one that would need to be fixed.

20. Trower testified that the City did not receive notice of a pothole at the location in question prior to Goodwin's fall. Goodwin's assertion to the contrary in his summary judgment response is not supported by his cite to the record.

21. Trower said trash trucks damage some of the alleys in the City. Goodwin asserts that the City operates **[*4]** a trash service and has trash trucks and trash service employees. This is not supported by his cite to the record. His assertion that such non-existent City trash service employees should have seen and reported the pothole is likewise not supported by the evidence. Rather, photos in the record indicate the dumpster near the pothole is marked with the name of a private waste company.

22. Goodwin asserts that there is a water meter in the alley near the pothole, a City employee would be required to read it on a regular basis, and such employee should have seen and reported the pothole. This is likewise not supported by his cite to the record. Rather, Trower testified at his deposition that the utility boxes on a building in a photo taken near the pothole were electric meters and not water meters that a City employee would read. Further, an affidavit in the record indicates there are no water meters in the alley where Goodwin fell.

23. Goodwin asserts that there was a 9 to 10 month delay in repairing this pothole "subsequent to a formal report to the City." This is not supported by his cite to the record. The cite is to a question asked of Trower by

Goodwin's counsel which was whether it **[*5]** was acceptable to Trower that the pothole existed on the date of the incident in November 2017 until it was fixed in August 2018. Trower's response was: "If we had known, we would have fixed it." Further, evidence in the record indicates that Goodwin filed his notice of claim with the City in late May 2018. Trower testified that the City had no knowledge of the pothole until the claim was filed. He testified that a work order was then issued, and the pothole was repaired.

CONCLUSIONS OF LAW

Standard of review.

> "Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, admissions on file, and supporting affidavits show that no genuine issue exists as to any material fact and the moving party is entitled to judgment as a matter of law. The district court must resolve all facts and reasonable inferences drawn from the evidence in favor of the party against whom the ruling [is] sought. When opposing summary judgment, a party must produce 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 issue in the case." *GFTLenexa, LLC v. City of Lenexa, 310 Kan. 976, 981-82, 453 P.3d 304 (2019)*.

Analysis.

This is a personal injury claim **[*6]** grounded in negligence. "Kansas law does not presume negligence, nor does it allow negligence to be established by conjecture, surmise, or speculation." *Yount v. Deibert, 282 Kan. 619, 624, 147 P.3d 1065 (2006)*. A plaintiff in a negligence action must demonstrate the existence of a duty, its breach, causation, and damages. *Shirley v. Glass, 297 Kan. 888, 894, 308 P.3d 1 (2013)*. If a plaintiff fails to present evidence of an essential element of negligence, summary judgment is appropriate. *Hammig v. Ford, 246 Kan. 70, 73, 785 P.2d 977 (1990)*.

The existence of a duty is a question of law to be determined by the court. *Lamb v. State, 33 Kan. App. 2d 843, 846-47, 109 P.3d 1265 (2005)*. If a duty exists, breach and causation are generally questions for the jury. *Thomas v. Cty. Com'rs of Shawnee Cty., 293 Kan. 208, 221, 262 P.3d 336 (2011)*. This is so "unless reasonable minds could not differ" on the existence of facts entitling the defendant to judgment as a matter of law. *Deal v. Bowman, 286 Kan. 853, 867, 188 P.3d 941 (2008)*.

A. Public duty doctrine.

Historically, while a city enjoyed the protections of sovereign immunity, there was an exception imposing liability where a city failed to keep its streets in reasonably safe condition. See *Gould v. City of Topeka, 32 Kan. 485, 4 P. 822, 824, 826 (1884)* (city streets to be kept in a "safe and proper condition" for the "traveling public"); *Taggart v. Kansas City, 156 Kan. 478, 134 P.2d 417, 418 (1943)* (the city "is not an insurer of the safety of those who use its streets and walks," but must keep them "reasonably safe for use"); *Grantham v. City of Topeka, 196 Kan. 393, 398, 411 P.2d 634 (1966)* (city streets to be kept "in a condition reasonably safe for their intended use" by the **[*7]** "traveling public"). The parties agree that the City has a duty to keep its streets in a reasonably safe condition.

The City asserts it owes no duty to Goodwin based on the public duty doctrine. The public duty doctrine dictates that, generally speaking, government agencies owe a duty to the public at large rather than to individuals. *Kirk v. City*

of Shawnee, 27 Kan. App. 2d 946, 950, 10 P.3d 27 (2000). "[T]he first hurdle that a plaintiff suing a governmental entity in negligence generally must overcome is establishing that the entity owed a duty to the plaintiff individually rather than a duty to the public at large." Williams v. C-U-Out Bail Bonds, 310 Kan. 775, 788, 450 P.3d 330 (2019). "The mere fact that a governmental entity owes a legal duty to the public at large does not establish that the governmental entity owed a duty to an individual member of the public." *Id.* "To warrant an exception to the public duty doctrine, a plaintiff suing a governmental entity must establish either a special relationship or a specific duty owed to the plaintiff individually." *Id.*

A special duty may arise in various situations. See Williams, 310 Kan. at 789.

> "Generally, a special duty may exist between a government agency and an injured person, rendering the public duty doctrine inapplicable to their encounter, when: (1) a special relationship existed between **[*8]** the governmental agency and the wrongdoer (i.e., the wrongdoer was in the State's custody or care); (2) a special relationship existed between the governmental agency and the injured person (i.e., the injured person was in the State's custody or care); or (3) the government agency performed an affirmative act that caused injury or made a specific promise or representation that under the circumstances created a justifiable reliance on the part of the person injured. [Citation omitted.]" Potts v. Board of Leavenworth County Com'rs, 39 Kan. App. 2d 71, 81, 176 P.3d 988 (2008).

None of these situations apply here. In Montgomery v. Saleh, 311 Kan. 649, 466 P.3d 902 (2020), the Kansas Supreme Court said a special duty may also arise by operation of a statute. The statute in question, K.S.A. 8-1506, excused drivers of emergency vehicles from enumerated traffic laws while on an emergency call or in pursuit of a suspect but said the statute "shall not relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons, nor shall such provisions protect the driver from the consequences of reckless disregard for the safety of others." The court held that through this language the legislature intended to hold drivers of emergency vehicles liable for the consequences of reckless conduct, creating **[*9]** a special duty owed specifically to individuals, and the public duty doctrine did not apply. Id. at 654-55.

But Goodwin points to no such statute here. Rather, he argues that the City's common law duty to keep its streets in a reasonably safe condition prevents application of the public duty doctrine. He cites Schmeck v. City of Shawnee, 232 Kan. 11, 651 P.2d 585 (1982). It is not helpful to Goodwin.

During the time leading up to Schmeck's accident and the court's consideration of the jury verdict on appeal, the courts and the legislature played a bit of tug-of-war over the concept of sovereign immunity. Id. at 17-20. In Schmeck, the court was obligated to apply the law in effect at the moment in time of plaintiff's accident to her negligence claim involving the failure to place proper traffic signals. The law at the time of plaintiff's accident - which predated the adoption of the Kansas Tort Claims Act ("KTCA") - was as follows: "A city is immune from liability for governmental activities except for the failure to keep streets reasonably safe." Id. at 20. In other words, the law applicable to Schmeck's claim was sovereign immunity with a safe streets exception.

There was no discussion of the public duty doctrine in *Schmeck.* There was no application of the KTCA. The city argued it was **[*10]** not liable because its decision regarding what signals to place and when was an act of government discretion inherent in the notion of sovereign immunity. *Id.* at 17. But based on the law in effect at the time of plaintiff's accident, the Kansas Supreme Court applied the exception to sovereign immunity to hold the city liable for failure to keep its streets in a reasonably safe condition. *Id. at 21*.

In 1979, the legislature abolished common law sovereign immunity and replaced it with the KTCA, which included *K.S.A. 75-6103(a)*:

> "Subject to the limitations of this act, each governmental entity shall be liable for damages caused by the negligent or wrongful act or omission of any of its employees while acting within the scope of their employment under circumstances where the governmental entity, if a private person, would be liable under the laws of this state."

Goodwin acknowledges that the KTCA controls here, and points out that the City may be held liable for negligence because a private person may be held liable for negligence. *Thomas, 293 Kan. at 233*. This includes a negligence claim arising out of injuries sustained stepping into a pothole. See *Calvert v. Pevehouse*, 2006 WL 3056509 (Kan. App. 2006) (summary judgment for nursing home reversed on pothole claim). But Goodwin does not explain **[*11]** how this blocks the application of the public duty doctrine. Indeed, "[w]hen a negligence claim is asserted against a governmental agency, the court *must* consider the so-called public duty doctrine" to determine whether the duty at issue is owed to the public as a whole, or to an individual. (Emphasis added, quotation marks omitted.) *Kirk, 27 Kan. App. 2d at 950*.

Sovereign immunity and its liability exception were superseded by the KTCA. Since the adoption of the KTCA, no Kansas case has addressed whether the public duty doctrine applies to a negligence claim based on a street defect. There is nothing inherent in the KTCA that prevents application of the public duty doctrine. Rather, the analysis is whether there exists any duty to keep city streets in a reasonably safe condition owed directly to Goodwin rather than to the public at large. Goodwin points to no special relationship, no special duty owed specifically to him, and no undertaking or affirmative act upon which he relied to his detriment. He points to no statute or other post-KTCA legal authority that creates a special duty owed by the government to an individual in this situation. Any duty to keep city streets in a reasonably safe condition is owed **[*12]** to the public at large, not specifically to Goodwin. The Court concludes that the public duty doctrine applies to bar Goodwin's negligence claim.

The City is entitled to summary judgment based on the public duty doctrine.

B. Discretionary function immunity.

But even if the public duty doctrine did not apply, or if this Court assumed for purposes of this analysis that it did not, there is still the matter of whether an exception to liability would apply. The KTCA contains many exceptions to liability, including *K.S.A. 75-6104(e)*, which says a governmental entity shall not be liable for damages resulting from "any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a governmental entity or employee, whether or not the discretion is abused and regardless of the level of discretion involved." The burden is on the government entity to establish an exception to liability under the KTCA. *Patterson v. Cowley Cty., 307 Kan.*

616, 630, 413 P.3d 432 (2018). Where material facts are uncontroverted, the question of whether an exception applies is a question of law for the Court. *Id.*

"Discretionary function immunity under the KTCA comes into play when a government actor makes a choice among discretionary **[*13]** options in addressing a given set of circumstances." *Henderson v. Montgomery Cty. Bd. of Com'rs, 57 Kan.App.2d 818, 831, 461 P.3d 64*, *rev. denied* (2020). Discretionary immunity does not depend on the status of the person exercising discretion; it applies to decisions made at the operational and planning levels. *Thomas, 293 Kan. at 235*.

When a "clearly defined mandatory duty or guideline" dictates the government's conduct, the discretionary function exception generally does not apply. This mandatory guideline "can arise from agency directives, case law, or statutes" and is one that "leaves little to no room for individual decision making, exercise of judgment, or use of skill, and qualifies a defendant's actions as ministerial rather than discretionary." *Henderson, 57 Kan.App.2d at 830-31*.

Goodwin's claims are two-fold. First, he says the City actually knew about the pothole prior to Goodwin's fall and was negligent in failing to fill it. There is no evidence of actual knowledge in the record; the only evidence is that the City did not have actual knowledge. Second, Goodwin asserts that the City should have known about the pothole and should have filled it prior to his fall. The City argues that the discretionary function exception applies.

Goodwin focuses on the function of the maintenance crew. He argues that assessing **[*14]** the severity of potholes does not involve a great deal discretion, and the City has a rule that the crew must investigate a pothole within 24 hours of its report. There is no uncontroverted fact presented as such by the City or Goodwin regarding the 24-hour rule. Ostensibly, Goodwin refers to a passage in the argument section of the City's opening brief, which says:

> "Beyond its arterials, collectors, residential streets, and sidewalks, the City owns and maintains 'roughly 600 alleys ….' (Ex. B, Trower Depo., p. 41:17-25). Within 24 hours of notice of a pothole, the City sends someone out to evaluate it and give it a priority number. This priority number is affected by a number of factors, primarily size and location, which might affect its propensity to cause damage. (Ex. B, Trower Depo., pp. 42:15-44:17) ('what we really look at is, is there going to be a claim on this'). Potholes on arterial routes and emergency routes, or busy intersections, are a higher priority than an alley such as the one in question. (Ex. B, Trower Depo., pp. 42:15-44:17)."

Even accepting the existence of the 24-hour rule as an uncontroverted fact, Goodwin is not complaining about the rule or any violation of **[*15]** it. Indeed, he cannot complain of a violation because there is no evidence the City had notice of the pothole prior to Goodwin's fall. Goodwin's real complaint is that the City should have known about the pothole prior to his fall; in other words, that the City was negligent in its method of identifying potholes in need of repair. The evidence is that the City has developed a notification system for street defects that includes public input through "See, Click, Fix" and the call center, as well as input from employees who observe defects while working throughout the City, which naturally results in reports from higher traffic areas. The City does not have the resources to routinely inspect back alleys for potholes. The City urges that its system for identifying potholes is a policy decision based on the need to use

government resources wisely with emphasis on the areas more traveled.

The City points to *BNSF Ry. Co. v. City of Augusta, 2018 WL 5617814 (D.Kan. 2018)*. There, a city power line fell across the railroad tracks, and its current damaged railroad signal equipment. The railroad claimed the city was negligent in failing to properly inspect and maintain the power line. The city argued that, although as municipal utility operator it owed the **[*16]** highest duty of care, it was entitled to discretionary function immunity under the KTCA because there was "no clearly defined mandatory duty or guideline governing the frequency or method of line inspections." (Internal quotations omitted.) *Id. at *6*. The federal district court agreed, saying "[t]he frequency and method of inspections is a general, policy-oriented decision" that requires weighing various factors including the resources available to do such inspections. *Id.*

Goodwin cites *Huseby v. Bd. of Cty. Com'rs of Cowley Cty., 754 F. Supp. 844 (D.Kan. 1990)*. There, two parents sued for the death of their son at a railroad crossing alleging negligence in the county's maintenance of a sign painted on the pavement and rumble strips at the crossing. The court said that while there was a duty to maintain highways, the "scope of that duty must vary with the facts of each case as no specific rule could adequately address every conceivable highway situation." *Id. at 847*. The court noted that the Manual on Uniform Traffic Control Devices ("MUTCD") provided detailed guidelines on the placement of warning signs. The MUTCD also required that traffic signs "be kept in proper position, clean and legible at all times" and subject to a "suitable schedule for inspection, cleaning and replacement." **[*17]** *Id.* Thus, because the MUTCD required the pavement sign and required its inspection and maintenance, there was no room for exercise of discretion. Likewise, the court held that though the rumble strips were not required by the MUTCD, once the county installed them it had a non-discretionary duty under the MUTCD to maintain them. *Id. at 848*.

Huseby is distinguishable. Goodwin asserts no clearly defined mandatory duty based on the MUTCD or any other guideline or statute. The court in *BNSF*, on the other hand, granted immunity for negligent failure to inspect where there was no clearly defined mandatory duty regarding the frequency or method of inspections. As in BNSF, there is no clearly defined mandatory duty here. Goodwin asserts generally that the City should have found and filled the pothole prior to his fall. But the uncontroverted evidence is that the City does not have the resources to routinely check alleys for potholes. Instead, the City has a system for identifying street defects through public and employee reports. This system is the result of a policy decision about how best to address potholes and other street defects weighed against the best use of the City's limited resources. This is the essence **[*18]** of a discretionary function, and the City is entitled to immunity under the KTCA.

The City is entitled to summary judgment based on discretionary function immunity under the KTCA. This basis for summary judgment is independent of and in addition to the grant of summary judgment based on the public duty doctrine.

C. Remaining issues.

Given the Court's grant of summary judgment to the City on the bases as set forth above, there is no need to address the City's remaining arguments.

CONCLUSION

For the reasons set forth above, the City's motion for summary judgment is granted. The litigation is concluded in favor of the City.

This order is effective on the date and time shown on the electronic file stamp.

IT IS SO ORDERED.

HON. TERESA L. WATSON

DISTRICT COURT JUDGE

SO ORDERED.

/s/ [Signature]

/s/ Honorable Teresa L Watson, District Court Judge

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ATTACHMENT B

Higginbotham v. State,
No. 126,764, 2024 Kan. App. Unpub. LEXIS 268
(Kan. Ct. App. July 19, 2024)

Higginbotham v. State

Court of Appeals of Kansas

July 19, 2024, Opinion Filed

No. 126,764

Reporter
2024 Kan. App. Unpub. LEXIS 268 *; 551 P.3d 806

GARY HIGGINBOTHAM, surviving spouse of MELISSA HIGGINBOTHAM, deceased, Appellant, v. STATE OF KANSAS and STATE SELF-INSURANCE FUND, Appellees.

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 Workers Compensation Board. Submitted without oral argument.

Disposition: Affirmed.

Core Terms

damages, common law, workers' compensation, right to a jury trial, wrongful death, cause of action, common-law, cap, exclusive remedy provision, right to trial, benefits, argues

Counsel: Matthew L. Bretz, of Bretz Injury Law, LLC, of Hutchinson, for appellant.

Dwight R. Carswell, deputy solicitor general, and Kris W. Kobach, attorney general, for appellees.

Judges: Before HURST, P.J., GREEN and ATCHESON, JJ.

Opinion

MEMORANDUM OPINION

PER CURIAM: Melissa Higginbotham died during the course of her employment. Her husband filed for survivor's benefits under the *Kansas Workers Compensation Act, K.S.A. 44-501 et seq.* (the Act). He was awarded benefits, as statutorily permitted. Higginbotham appeals this award, arguing that the Act is unconstitutional because it does not provide for a right to a jury trial and it caps the amount of compensation payable to a claimant's spouse, dependents, or heirs when the claimant's injury results in the claimant's death. We affirm Higginbotham's workers compensation award and hold the constitutional challenges presented are unwarranted under the law.

FACTS

Higginbotham was employed by the State of Kansas at Larned State Hospital, located in Larned, Kansas. On September 16, 2021, Higginbotham was traveling for work when an oncoming vehicle drove onto the shoulder, lost control, and then crossed the centerline of the road, striking Higginbotham's **[*2]** vehicle. As a result of the crash, Higginbotham lost her life.

Higginbotham's surviving spouse, Gary Higginbotham, filed for workers compensation benefits on behalf of Higginbotham. Higginbotham's spouse was awarded a lump sum payment of $60,000 and a weekly death benefit of $737 to be paid by the State Self-Insurance Fund. These benefits were capped at $300,000 based on K.S.A. 44-510b(h). A portion of these weekly payments were ordered to be paid in a lump sum, with the remainder continuing until the statutory cap of $300,000 was reached or until Gary Higginbotham's death. Higginbotham applied for review of the award with the Workers Compensation Appeals Board, which affirmed the award.

Before both the administrative law judge (ALJ) and the Workers Compensation Appeals Board, Higginbotham challenged the constitutionality of the statutory cap on the award and the denial of a trial by jury. Both determined that they could not entertain constitutional challenges to the Act.

Higginbotham timely petitioned this court for judicial review of the Kansas Workers Compensation Appeals Board's order affirming the award.

ANALYSIS

Just as before the ALJ and the Workers Compensation Appeals Board, on appeal Higginbotham **[*3]** raises two constitutional challenges to the Act. First, he argues that the Act is unconstitutional because it does not provide for a right to a jury trial. Second, he argues that the statutory cap on the permissible award in the Act is unconstitutional. Higginbotham's arguments primarily challenge the Act under sections 5 and 18 of the Kansas Constitution Bill of Rights.

Standard of review and other legal principles applicable to our review

The standard of review for both issues on appeal, which challenge the constitutionality of a statute, is identical, making recitation of the standard repeatedly for each unnecessary. Thus, our standard of review is as follows:

> "Determining whether a statute violates the constitution is a question of law subject to unlimited review. Under our state's separation of powers doctrine, courts presume a statute is constitutional and resolve all doubts in favor of the statute's validity. A statute must clearly violate the constitution before it may be struck down." Miller v. Johnson, 295 Kan. 636, Syl. ¶ 1, 289 P.3d 1098 (2012).

We note that Higginbotham raised these arguments before the ALJ and the Board, but both lack the authority to rule on the constitutionality of any statute, including those found in the Act. See Pardo v. United Parcel Service, 56 Kan. App. 2d 1, 10, 422 P.3d 1185 (2018).

If Higginbotham's arguments require statutory interpretation, **[*4]** that presents a question of law over which appellate courts have unlimited review. Nauheim v. City of Topeka, 309 Kan. 145, 149, 432 P.3d 647 (2019). Generally, appellate courts presume statutes are constitutional and must resolve all doubts in favor of a statute's validity. Typically, courts must interpret a statute in a way that makes it constitutional if there is any reasonable construction that would maintain the Legislature's apparent intent. Solomon v. State, 303 Kan. 512, 523, 364 P.3d 536 (2015). Nevertheless, this presumption of constitutionality does not apply to a statute dealing with a "fundamental interest" or rights protected by the Kansas Constitution. See

Hilburn v. Enerpipe Ltd., 309 Kan. 1127, 1132-33, 442 P.3d 509 (2019).

We now address Higginbotham's arguments in turn.

I. *Does the Act violate section 5's right to a trial by jury, rendering it unconstitutional*?

Higginbotham argues that the Act's exclusive remedy provision—*K.S.A. 44-501b(d)*—is unconstitutional under *section 5 of the Kansas Constitution Bill of rights* because it infringes on the right to a jury trial and to have a jury determine the damages. In response, the State argues that Higginbotham's right to a jury trial under section 5 is not violated because that section guarantees only a right to a jury trial in cases that were properly triable by a jury before adoption of the Kansas Constitution, and his claim is not one of those claims.

An employer who is subject to the Act is **[*5]** liable to pay compensation to an employee who suffers personal injury by accident or death arising out of and in the course of employment. *K.S.A. 44-501b(b)*. In return, the employee receiving workers compensation benefits cannot bring a civil action for damages against the employer or another employee. *K.S.A. 44-501b(d)*. In other words, the remedy provided by the Act is exclusive. *Scott v. Hughes, 281 Kan. 642, 645, 132 P.3d 889 (2006)*.

Higginbotham argues that this exclusivity of remedy available under *K.S.A. 44-501b(d)* violates *section 5 of the Kansas Constitution Bill of rights*. *K.S.A. 44-501b(d)* reads:

> "Except as provided in the workers compensation act, no employer, or other employee of such employer, shall be liable for any injury, whether by accident, repetitive trauma, or occupational disease, for which compensation is recoverable under the workers compensation act nor shall an employer be liable to any third party for any injury or death of an employee which was caused under circumstances creating a legal liability against a third party and for which workers compensation is payable by such employer."

Section 5 of the Kansas Constitution Bill of Rights reads: "The right of trial by jury shall be inviolate." This right not only includes the right to impanel a jury, but rather, "[i]t is a process that includes the right to assemble a jury, a right to present evidence, a right to have the jury determine **[*6]** and award damages, and the right to a judgment for the full damages as determined by the jury and supported by the evidence." *Miller, 295 Kan. at 696* (Beier, J., concurring in part and dissenting in part); see *Smith v. Printup, 254 Kan. 315, 324, 866 P.2d 985 (1993)* ("There is no question in Kansas that the right to trial by jury includes the right to have a jury determine actual damages.").

The rights secured under section 5 are fundamental. *Hilburn, 309 Kan. at 1133* ("[W]e have little difficulty deciding that the right protected by section 5 is a 'fundamental interest' expressly protected by the Kansas Constitution Bill of Rights. As such, we will not apply a presumption of constitutionality to challenges brought under section 5.").

Higginbotham's argument is based on our Supreme Court's holding in *Hilburn, 309 Kan. 1127*. In that case, Hilburn was injured when the car she was riding in was rear-ended by a semi-truck. Hilburn sued the truck's owner, alleging that the truck driver's negligence caused the collision, and therefore, the owner was vicariously liable for the semi-truck driver's actions. The truck's owner admitted the semi-truck driver's negligence and conceded its vicarious liability in its answer to Hilburn's

petition, and the case proceeded to trial on the issue of damages.

The jury awarded Hilburn $335,000 in damages, of which $33,490.86 was medical expenses **[*7]** and $301,509.14 was for noneconomic damages. Nevertheless, the district court entered judgment for $283,490.86, lowering the noneconomic damages to $250,000 per K.S.A. 60-19a02, which at the time capped noneconomic damages to $250,000.

Hilburn appealed, arguing, in part, that K.S.A. 60-19a02 was unconstitutional because it violated section 5 of the Kansas Constitution Bill of Rights. This court rejected Hilburn's arguments and affirmed the district court's reduced judgment. Hilburn v. Enerpipe, Ltd., 52 Kan. App. 2d 546, 554-56, 560, 370 P.3d 428 (2016). In so doing, this court applied the quid pro quo test to section 5 and held that K.S.A. 60-19a02's modification of the right to a jury trial, which includes the right of a jury to determine an individual's damages, was permissible. 52 Kan. App. 2d at 554-56. Hilburn appealed to our Supreme Court, which agreed to consider the matter.

In short, our Supreme Court overruled this court and "abandon[ed] the quid pro quo test for analyzing whether the noneconomic damages cap is unconstitutional under section 5 of the Kansas Constitution Bill of Rights." Hilburn, 309 Kan. at 1144.

We now turn to the question at hand under the facts of this case: Does the Act's exclusive remedy statute impermissibly infringe on Higginbotham's right to a jury trial under section 5 of the Kansas Constitution Bill of Rights?

To begin, we must determine if the exclusive remedy provision violates Higginbotham's common-law rights as they historically existed when Kansas' Constitution came into existence **[*8]** in 1859. See Miller, 295 Kan. at 696 (Beier, J., concurring in part and dissenting in part) ("This language preserves the right to jury trial in those causes of action that were triable to a jury under the common law extant in 1859, when the Kansas Constitution was ratified by the people of our state."); see also In re L.M., 286 Kan. 460, 476, 186 P.3d 164 (2008) (Luckert, J., concurring) ("The uncompromising language of [section 5] applies if an examination of history reveals there was a right at common law to a jury trial under the same circumstances. *E.g.*, Craig v. Hamilton, 213 Kan. 665, 670, 518 P.2d 539 [1974].").

When the Kansas Constitution came into existence and until the first version of the workers compensation system was established in 1911, employees had a common-law right to sue employers for injuries. See Injured Workers of Kansas v. Franklin, 262 Kan. 840, 882-83, 942 P.2d 591 (1997). But we must decide the case on the facts before us, not in generalities. See Montoy v. State, 279 Kan. 817, 844, 112 P.3d 923 (2005) ("This case is extraordinary, but the imperative remains that we decide it on the record before us."); State v. Parrish, No. 123, 891, 514 P.3d 398, 2022 WL 3135318, at *2 (Kan. App. 2022) (unpublished opinion) ("[C]ourts decide concrete questions that will have an actual impact on the parties before us.").

Here, Higginbotham does not bring a cause of action for injuries. Rather, he seeks compensation for his spouse's death, which was no fault of the employer. When the Kansas Constitution came into existence, **[*9]** there was no common-law right to recover for wrongful death. Leiker v. Gafford, 245 Kan. 325, Syl. ¶ 14, 778 P.2d 823 (1989) ("The longstanding rule in Kansas is that there was

no right at common law to recover for wrongful death. A cause of action for wrongful death is a creature of statute in Kansas."), *overruled in part on other grounds by* Martindale v. Tenny, 250 Kan. 621, 829 P.2d 561 (1992); see Tillman v. Goodpasture, 313 Kan. 278, 291, 485 P.3d 656 (2021) (citing with approval Leiker's holding that no claim for wrongful death existed at common law).

Section 5 "applies to give the right to trial by jury on issues of fact so tried at common law as it existed at the time the Kansas Constitution was adopted, but no further." Tillman, 313 Kan. 278, 485 P.3d 656, Syl. ¶ 2. Higginbotham's argument here urges this court to go beyond the parameters of section 5 and the facts before us. While a worker's common-law right to try a case against the employer for *injuries* via a jury and have a jury determine the damages was impinged upon by the Act's exclusive remedy provision, there was no right to bring a claim for wrongful death.

Thus, the discussion in Hilburn, 309 Kan. at 1142-43, supports the conclusion that the Act's exclusive remedy provision does not violate section 5. There, our Supreme Court disagreed with the assertion in the Miller majority that overruling our past application of the quid pro quo test to excuse violation of the right to jury trial would require dismantling **[*10]** of the workers compensation scheme. Hilburn, 309 Kan. at 1142 (quoting Miller, 295 Kan. at 712-13, [Beier, J., concurring in part and dissenting in part]). The *Hilburn* court expressly disagreed that its new analysis of section 5 would affect the constitutionality of the Act, stating "the dismantling" of the Act is "far from assured for several reasons." 309 Kan. at 1142.

To summarize, section 5 of the Kansas Constitution Bill of Rights is applicable to give the right to trial by jury on common-law causes of actions that existed when the Kansas Constitution was adopted. There was no common-law cause of action for wrongful death then or now.

In conclusion, as stated earlier, a wrongful death action is purely a creature of statute in Kansas. So, section 5 of the Kansas Constitution Bill of Rights does not limit how the Kansas Legislature may regulate or limit death claims in the Workers Compensation Act that was not a common-law cause of action that existed when the Kansas Constitution was adopted. Under the facts of this case, the Act's exclusive remedy provision (K.S.A. 44-501b[d]) does not violate section 5 of the Kansas Constitution Bill of Rights' right to present a case to a jury and have a jury determine damages.

II. *Does the Act violate section 18's right to equal protection*?

But we again run into the same issue as we did with the previous argument—there was no wrongful death cause of action originally recognized at common law. As **[*11]** with section 5, section 18—which preserves the right to remedy by due course of law—applies only to civil causes of action that were recognized as justiciable by the common law as it existed at the time our Constitution was adopted. See Leiker, 245 Kan. at 362. Stated differently, section 18 "does not create rights of action. It preserves the right to remedy by due process of law for civil causes of action recognized as justiciable by the common law as it existed at the time the Kansas Constitution was adopted." Tillman, 313 Kan. 278, 485 P.3d 656, Syl. ¶ 4.

As previously discussed, Kansas common law did not recognize a civil claim for wrongful death when our Bill of Rights was adopted. Leiker, 245 Kan. at 361-62. In Kansas, a wrongful death action is purely a creature of

statute. *245 Kan. at 362*. Thus, section 18 cannot be invoked to challenge the statutory cap on the award given for Higginbotham's death. See *K.S.A. 44-510b(h)*; *Karhoff v. National Mills, Inc., 18 Kan. App. 2d 302, Syl. ¶ 5, 851 P.2d 1021 (1993)* ("*Kan. Const. Bill of Rights § 18*, which preserves the right to remedy by due course of law, applies only to civil causes of action that were recognized as justiciable by the common law as it existed at the time our constitution was adopted. Kansas common law did not recognize a civil claim for wrongful death at the time our Bill of Rights was adopted. In Kansas, a wrongful death action is purely a creature of statute. So, § 18 cannot be invoked by heirs of an employee to challenge **[*12]** lack of a remedy against an employer by operation of the Workers Compensation Act.").

For these reasons, *K.S.A. 44-501b(d)* and *K.S.A. 44-510b(h)* do not violate *section 18 of the Kansas Constitution Bill of Rights*.

Affirmed.

End of Document

ATTACHMENT C

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.

Core Terms

culvert, immunity, summary judgment, wanton negligence, recreational-use, district court, recreational purposes, recreational, walk, injuries, public property, guardrails, argues, dogs, grassy area, no evidence, Kansas Tort Claims Act

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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ATTACHMENT D

Dye v. Shawnee Mission Sch. Dist.,
No. 98,379, 2008 Kan. App. Unpub. LEXIS 435
(Kan. Ct. App. June 6, 2008),
rev. denied, 287 Kan. 765 (2008)

Dye v. Shawnee Mission Sch. Dist.

Court of Appeals of Kansas

June 6, 2008, Opinion Filed

No. 98,379

Reporter
2008 Kan. App. Unpub. LEXIS 435 *; 184 P.3d 993

CARLA DYE, Appellant, v. SHAWNEE MISSION SCHOOL DISTRICT, Appellee.

Notice: NOT DESIGNATED FOR PUBLICATION.

PLEASE CONSULT THE KANSAS RULES FOR CITATION OF UNPUBLISHED OPINIONS.

PUBLISHED IN TABLE FORMAT IN THE PACIFIC REPORTER.

Subsequent History: Review denied by *Dye v. Shawnee Mission Sch. Dist., 2008 Kan. LEXIS 675 (Kan., Nov. 4, 2008)*

Prior History: **[*1]** Appeal from Johnson District Court; JANICE D. RUSSELL, judge.

Disposition: Affirmed.

Core Terms

recreational use, wanton negligence, summary judgment, hole, immunity, recreational, district court, school district, grassy area, government entity, soccer field, employees, football

Counsel: Scott C. Long and Michael L. Hughes, of Long, Luder & Gordon, P.A., of Overland Park, for appellant.

Curtis L. Tideman, Matthew S. Corbin, and David R. Frye, of Lathrop & Gage, L.C., of Overland Park, for appellee.

Judges: Before MARQUARDT, P.J., CAPLINGER and LEBEN, JJ.

Opinion

MEMORANDUM OPINION

Per Curiam: Carla Dye appeals from the district court's order granting summary judgment in favor of the Shawnee Mission School District (District). Because we conclude the district court properly found (1) the District is immune from liability for Dye's injuries under the recreational use exception to the Kansas Tort Claims Act (KTCA), *K.S.A. 75-6101 et seq.*, and (2) Dye has not demonstrated gross and wanton negligence on the part of the District as a matter of law, we affirm the district court's grant of summary judgment.

Factual and procedural background

On the evening she was injured, Dye attended her daughter's soccer game at the Shawnee Mission School District Soccer Complex. Afterward, Dye walked from the fenced-in soccer fields to the area where she regularly met her daughter following soccer games, *i.e.,* a sewer inlet located in a grassy **[*2]** area between the fields and an adjacent parking lot. Though an asphalt trail led from the parking lot to the soccer fields, this grassy area often was used as an alternative route to the parking lot.

As Dye walked through the grassy area near the sewer inlet, she slipped and fell into a hole, injuring her knee and wrist. Before she slipped, Dye did not see the hole, nor did she notice anyone else having difficulty walking through that area. The District's maintenance workers were unaware of the hole before Dye's accident, and the Districts manager of operations and maintenance testified he had difficulty finding the hole after Dye's accident. Neither Dye nor the maintenance crew was aware of any similar accidents occurring at the complex, including the area near the sewer inlet.

Dye filed the instant action alleging the District was negligent in failing to make repairs to dangerous conditions on its property and in failing to warn of such conditions. The District moved for summary judgment, arguing it was immune from liability under the KTCA's recreational use exception, K.S.A. 2007 Supp. 75-6104(o). The district court agreed, finding as a matter of law that the District was entitled **[*3]** to immunity and that Dye had failed to prove gross and wanton negligence.

Dye timely appeals the district court's order granting the District summary judgment.

Application of the recreational use exception

Dye contends the district court erred in applying the recreational use exception to exempt the District from liability under the KTCA. That exception, found in K.S.A. 2007 Supp. 75-6104(o), provides:

> "A governmental entity or an employee acting within the scope of the employee's employment shall not be liable for damages resulting from:
> ….
> (o) any claim 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 proximately causing such injury."

K.S.A. 2007 Supp. 75-6104(o) does not provide absolute immunity; rather, it permits recovery only when a government entity or employee commits gross and wanton negligence.

Whether the exception applies in this case is a question of statutory interpretation over which we exercise unlimited review. Lane v. Atchison Heritage Conf. Center, Inc., 283 Kan. 439, 443, 153 P.3d 541 (2007).

"'Under **[*4]** the KTCA, government liability is the rule and immunity is the exception. [Citation omitted.]'" Lane, 283 Kan. at 444. However, the recreational use exception is broadly applied. 283 Kan. At 445; see Wilson v. Kansas State University, 273 Kan. 584, 592, 44 P.3d 454 (2002) (noting the intent of the legislature to "establish a broad application of recreational use immunity").

The purpose of the recreational use exception, was described in Jackson v. U.S.D. 259, 268 Kan. 319, 995 P.2d 844, Sly. P 10, 268 Kan. 319, 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."

Courts do not segregate parts of the **[*5]** property to determine whether the recreational use exception applies; instead, they examine the collective character of the property in question. *Wilson, 273 Kan. at 587-88*. "In 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.' The injury need not be the result of 'recreation.'" *Jackson, 268 Kan. at 326*; see *Boaldin v. University of Kansas, 242 Kan. 288, 289, 747 P.2d 811 (1987)* (plaintiff injured while sledding on hill at the University of Kansas); *Lane, 283 Kan. at 440* (plaintiff injured after slipping on city conference center's loading dock).

Further, our Supreme Court has broadly construed the exception to apply to property integral to or near a recreational facility. See *Wilson, 273 Kan. at 590* (holding the exception applies to restrooms located in a football stadium); *Nichols v. U.S.D. No. 400, 246 Kan. 93, 785 P.2d 986 (1990)* (applying exception where plaintiff was injured in a grassy area near football field).

Here, the District concedes the grassy area where plaintiff was injured was not specifically designated or intended for recreational activities. Nevertheless, **[*6]** the District argues the exception was properly applied because Dye was injured in an area which surrounded, accommodated, or was an integral part of a recreational facility. Dye, on the other hand, suggests the facts of this case distinguish it from those cases extending the recreational use exception. Further, Dye argues the approach advocated by the District exceeds the plain language of *K.S.A. 2007 Supp. 75-6104(o)* and results in "broad brushed immunity."

We recognize some disagreement in recent case law regarding the breadth of the recreational use exception. See *Poston v. U.S.D. 387, 37 Kan. App. 2d 694, 697-99, 156 P.3d 685 (2007)* (McAnany, J., dissenting) (arguing recreational use exception should not apply when plaintiff was injured in school commons area which incidentally provided direct access to the gym).

However, *Poston* is on review to our Supreme Court and we cannot predict or anticipate the resolution of that case, which was argued January 29, 2008. Moreover, the facts of this case are closely aligned with the facts of *Nichols, 246 Kan. 93, 785 P.2d 986*, and we believe that case controls our decision here.

The plaintiff in *Nichols* was injured following high school football practice when **[*7]** the coach ordered the team to run from the field to the locker rooms. The plaintiff fell as he crossed a "grassy swale" or waterway located between the field and the locker rooms, injuring his back. *246 Kan. at 93-94*. The plaintiff brought a negligence action against the school district alleging the coach was negligent in ordering the players to run to the locker room in darkness and in failing to properly supervise the players.

Nichols appealed the district court's grant of summary judgment to the school district, arguing the district court erred in applying the recreational use immunity exception and in concluding the plaintiff had failed to prove gross or wanton negligence. This court affirmed the application of the immunity exception, and our Supreme Court granted review. *Nichols, 246 Kan. at 94, 98*.

The *Nichols* court found that the recreational use exception, by its plain language, applies to injuries resulting from the *use* of public

property intended for recreational purposes, regardless of whether the activity was supervised by the school district. 246 Kan. at 95. Further, the court noted that the exception is not limited to injuries occurring in areas expressly designated as **[*8]** recreational, or as a result of conditions on the premises. 246 Kan. at 97.

While we recognize that the issue now before the court was not expressly considered in *Nichols,* we need not speculate as to the scope of that opinion, as our Supreme Court has subsequently interpreted *Nichols* broadly. In Jackson, 268 Kan. 319, 995 P.2d 844, the court noted that under *Nichols,* "[s]chool districts are not liable for injuries which are the result of ordinary negligence and which occur on *or near* a football playing field." (Emphasis added.) 268 Kan. at 324; see also Wilson, 273 Kan. at 591 (reaffirming the *Jackson* court's interpretation of *Nichols*).

Here, as in *Nichols,* the plaintiff's injuries occurred *near* the soccer field in a grassy area traversed by soccer players and fans to get from the soccer field to a parking lot which served the soccer field as well as the school. Under these circumstances, we hold the district court properly applied K.S.A. 2007 Supp. 75-6104(o) to find the school district immune from liability for Dye's injuries.

Gross and Wanton Negligence

Alternatively, Dye contends that if the recreational use exception applies, the district court nevertheless erred in granting summary judgment because **[*9]** Dye presented evidence of the District's gross and wanton negligence.

> """Summary judgment is appropriate 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.]'" [Citation omitted.]" Korytkowski v. City of Ottawa, 283 Kan. 122, 128, 152 P.3d 53 (2007).

When, as here, there is no factual dispute, our review of an order regarding summary judgment is de novo. Botkin v. Security State Bank, 281 Kan. 243, 248, 130 P.3d 92 (2006).

"Wanton **[*10]** conduct is established by the mental attitude of the wrongdoer rather than by the particular negligent acts. [Citation omitted.] [It] requires that there be a realization of imminent danger and reckless disregard, indifference, and unconcern for probable consequences. [Citation ommited]" Robison v. State, 30 Kan. App. 2d 476, 479, 43 P.3d 821 (2002).

Citing Gruhin v. City of Overland Park, 17 Kan. App. 2d 388, 392, 836 P.2d 1222 (1992), Dye contends she must show only an act of omission in order to prove wanton negligence. We find Dye's reliance on *Gruhin* to be misplaced.

In *Gruhin,* the plaintiff was injured at a city golf course when he drove a golf cart into a hole several feet deep. The evidence showed that golf club personnel were aware of the hole at the time of Gruhin's injury because another person had been injured at the same location several weeks earlier. While employees had marked the area around the hole with chalk lines, they had failed to take any steps to repair the hole. *17 Kan. App. 2d at 389*.

Gruhin sued the city for negligence, and the district court granted the city's motion for summary judgment, finding the plaintiff had failed to show gross and wanton negligence **[*11]** as required under the recreational use exception. *17 Kan. App. 2d at 391*. Noting that the club employees had prior knowledge of the hole, this court held that the district court erred in granting summary judgment because reasonable minds could differ as to whether "the preventative measure taken [by the club] showed a reckless disregard for the danger posed by the hole." *17 Kan. App. 2d at 393*.

Unlike *Gruhin,* there is simply no evidence in this case that District employees were aware of the hole into which plaintiff stumbled. In fact, employees found the hold difficult to locate even after Dye's injury. While Dye accurately notes the District admitted the hole was dangerous and required repair, this admission occurred *after* her injury and does not demonstrate prior knowledge.

Additionally, Dyes claim that the District should have known about the hole because it was readily observable is, at best, evidence of negligence rather than of gross and wanton negligence. See *Jackson v. City of Norwich, 32 Kan. App. 2d 598, 601, 85 P.3d 1259 (2004)* (holding that plaintiff failed to show gross and wanton negligence because she had failed to present any evidence that the city had knowledge of any **[*12]** dangerous condition); *Robison, 30 Kan. App. 2d at 480* (summary judgment proper when plaintiff failed to present evidence that the "defendant's employees knew about an excess amount of water in the hallway which might cause a fall"); *Boaldin, 242 Kan. at 293-94* (holding that the university's knowledge that students went sledding on a campus hill was not sufficient to establish gross and wanton negligence).

Since Dye failed to present evidence that the District acted with gross and wanton negligence in the maintenance of the property, the district court did not err in finding that, as a matter of law, the District was not liable for gross and wanton negligence.

Affirmed.

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