NO. 2023-126,732-S

IN THE SUPREME COURT OF THE STATE OF KANSAS

BRENDA ZARAGOZA
Appellant

v.

BOARD OF COMMISSIONERS
OF THE COUNTY OF JOHNSON
Appellees

BRIEF *AMICUS CURIAE* OF THE LEAGUE OF KANSAS MUNICIPALITIES

Appeal from the Court of Appeals of the State of Kansas
Opinion Dated June 21, 2024
On Appeal From the District Court of Johnson County, Kansas
Hon. Rhonda K. Mason, District Judge
District Court Case No. 21-CV-03636

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NATURE OF THE CASE

This Court granted the League of Kansas Municipalities' Application to File *Amicus* Brief by Order dated December 20, 2024. This appeal concerns a matter of first impression. Specifically, does the Monticello Branch of the Johnson County Library and its parking lot fall under the recreational use exception of the Kansas Tort Claims Act, K.S.A.75-6104(o) (now K.S.A. 75-6104(a)(15))? While this matter involves one branch of a county library, the Court's decision could broadly affect any municipal library that provides recreational uses. We respectfully ask that the Court affirm the decisions of the district court and Court of Appeals and find that, depending on how a library is intended to be used, municipal libraries and their parking lots may qualify for recreational use immunity under the Kansas Tort Claims Act (KTCA). We will argue that the Court should rely on precedent interpreting the recreational use immunity and other immunities within the Act, and assert that deviating from precedent in decisions determining the scope of these immunities would be harmful to cities.

An additional matter of importance to cities is the constitutionality of the recreational use exception of the Kansas Tort Claims Act. We respectfully request the Court not consider this argument because the issue was not raised before the Court of Appeals and it was not presented in the Appellant's petition for review. Supreme Court Rule 8.03(b)(6)(C)(1). Should the Court decide it is necessary to address the argument, we respectfully ask that the Court adhere to precedent and continue to find that the immunities found in the KTCA do not violate the Kansas Constitution.

STATEMENT OF IDENTITY OF AND INTEREST BY AMICUS CURIAE

The League of Kansas Municipalities is constituted as an instrumentality of its member cities. K.S.A. 12-1610e. Established in 1910, the League is a voluntary, nonpartisan organization of over 530 Kansas cities. The League's mission is to serve as the convener, advocate, and trusted voice for Kansas local governments. The issues in this appeal are subjects of profound interest to Kansas cities, and the decision in this appeal could affect not only the local government that is party to this action, but all cities in Kansas.

INTRODUCTION

The Kansas Legislature enacted the KTCA in 1979. Under the KTCA, a governmental entity is liable for its employees' negligent or wrongful acts or omissions unless an exception exists. K.S.A. 75-6103. K.S.A. 75-6104 contains 24 exceptions in which governmental entities or government employees acting within the scope of their employment are not liable. Among these, is the exception commonly known as the recreational use exception. K.S.A. 75-6104(a)(15). In this brief, we will argue that the recreational use exception applies to libraries that provide recreational uses and that the exception extends to those libraries' parking lots. We will also argue that the recreational use exception is constitutional.

ARGUMENTS AND AUTHORITIES

I. THE RECREATIONAL USE EXCEPTION APPLIES TO LIBRARIES THAT PROVIDE RECREATIONAL USES AND THE EXCEPTION EXTENDS TO THE PARKING LOT

Pursuant to K.S.A. 75-6104(a)(15), governmental entities are immune from "any claim 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." This immunity applies unless the entity, or an employee of the entity, is guilty of gross or wanton negligence. The Court has long recognized the public purpose of the recreational use exception noting that it would encourage governmental entities to build facilities for the benefit of the public without the fear of suit and difficulty funding the facility due to the high costs of litigation. See *Jackson v. U.S.D. 259*, 268 Kan. 319, 331, 995 P.2d 844, 852 (2000). The Court has also recognized the value of this exception, stating, "The benefit to the public is enormous... The public benefits from having a place to meet with others in its community." *Id.* The Court has interpreted the exception broadly, finding that in order to qualify for immunity, a property need only be 1) public, and 2) intended to or permitted to be used for recreational purposes. *Poston v. U.S.D. No. 387*, 286 Kan. 809, 813, 189 P.3d 517 (2008).

The Appellant takes issue with the test as pronounced by the Court, raising a plain language argument that the "open area" referred to in statute does not include enclosed structures. (See Appellant's Supplemental Brief to the Supreme Court at pg. 11-12). It is true that when a statute is plain and unambiguous, a court should not speculate about the legislative intent behind the clear language, and it should refrain from reading something into the statute that is not readily found in its words. *Hoesli v. Triplett Inc.*, 303 Kan. 358, 362, 361 P.3d 504, 508 (2015). However, in making this argument, the Appellant fails to lend credence to the fact that the word "open" could have another common meaning given the context. Open could and does mean, as the courts in this state have found again and

again within the context of the KTCA, that the property is open to the public. See *Jackson*, 268 Kan. At 325; see also *Wright v. U.S.D. No. 379*, 28 Kan. App. 2d 177, 14 P.3d 437 (2000). The Monticello Branch of the Johnson County Library, like all other municipal libraries in the state, is open for the use and enjoyment of the public, so it meets the first prong of the test pronounced in *Poston*.

Further, the Monticello Branch, like many other public libraries in the state, was intended to and permitted to be used for recreational purposes. The immunity granted in the Act by the recreational use exception "depends on the character of the property in question and not the activity performed at any given time." *Barrett v. U.S.S. No. 259*, 272 Kan. 250, 257, 32 P.3d 1156 (2001). Properties are not bound to one use. Recreational use immunity will apply so long as the recreational use is "more than incidental." See *Jackson*, Kan. At 330. The core services of this library, and other libraries throughout the state, facilitate and encourage recreational hobbies like reading, viewing and viewing popular media. Further, municipal libraries throughout the state regularly serve as a recreational hub for their communities by providing the public with other recreational opportunities outside their core functions like housing art installations, hosting story-book hours for children, hosting game nights, teaching yoga or other mindfulness classes, and so much more. It is apparent that libraries satisfy the second prong of the test.

Finally, the recreational use immunity should extend to the library parking lot. The Monticello Branch of the Johnson County Library attracts visitors interested in both its core functions and special offerings. These visitors often drive to the library and need a place to park their car. It is well established that the recreational use immunity "is not

limited to areas expressly designated as recreational." *Nichols v. U.S.D. No. 400*, 246 Kan. 93, 97, 785 P.2d 986 (1990). This Court has found that areas can be immune when they are "necessarily connected" to property having a recreational use. (See *Wilson v. Kansas State University*, 273 Kan. 584, 44 P.3d 454 (2002) applying recreational use immunity to a bathroom at the university football stadium). In *Lane v. Atchison Heritage Conf. Center, Inc.*, the Court of Appeals extended recreational use immunity to a conference center loading dock after a musician performing at the conference center brought suit when he slipped and fell and was injured. 35 Kan. App. 2d 838, 134 P.3d 683 (2006). In rendering the opinion, the Court found that "facilities integral to the functioning of a public and open area used for recreational purposes are also covered by the recreational use exception, despite possessing a nonrecreational character in themselves." *Id.* at 845. Parking lots are integral to the function of the Monticello Branch and other public libraries. In *Lane* this Court extended recreational use immunity to a loading dock that would not typically be traversed by the public. It would be unreasonable to not similarly extend the immunity to a parking lot for a recreational use facility that is regularly used by and traversed by the public as they make use of a recreational facility like a library.

II. THE COURT SHOULD RELY ON PRECEDENT IN INTERPRETING THE RECREATIONAL USE IMMUNITY AND OTHER IMMUNTIES WITHIN THE KTCA.

The decisions of the lower courts in this case are consistent with Supreme Court precedent. The Court of Appeals appropriately relied on *Jackson* and succeeding decisions of this Court to reach their conclusion. Under the doctrine of stare decisis, departure from precedent is disfavored unless the rule is no longer sound or more good than harm will

come from abandoning precedent. *See Rhoten v. Dickson*, 290 Kan 92, 223 P.3d 786 (2010). Lending credence to prior judicial decisions gives consistency to our legal system and ensures that litigants are aware of their rights, remedies, and defenses. Stare decisis "operates to promote system-wide stability and continuity…" *Samsel v. Wheeler Transp. Servs., Inc.*, 246 Kan. 336, 356, 789 P. 2d 541 (1990).

Continuity is especially desirable when dealing with these immunity provisions. Governmental entities know the scope of the exceptions found in the KTCA and rely on them when they take action. Governmental entities exist to provide some level of organization, protection, and service to their constituents. Municipal governments in particular offer services to best serve their citizenry and rely on the protection that these immunities provide. A narrowing of this scope would have a significant impact on cities in this state and may serve to limit the services that they undertake due to the increased potential for litigation and the high costs associated defending these claims. The public is not better served by a government that chooses to do away with recreational activities. On the contrary, 84% of respondents in a 2023 survey conducted by the National Recreation and Park Association indicated that proximity to high-quality parks and other recreational facilities is a determining factor in picking a neighborhood in which to live. See *U.S. Adults Place High Value on Parks and Recreation*. https://www.nrpa.org/parks-recreation-magazine/2023/october/u.s.-adults-place-high-value-on-parks-and-recreation/.

Contrary to the assertions made in the amicus brief prepared by the Trial Lawyers Association that recreational immunity encourages municipalities to be negligent, the

immunity does not extend to gross negligence. A municipality cannot purposely choose to be negligent because then the immunity will not be extended. Municipalities are held accountable by the electors. Lawsuits are not needed to ensure a municipality acts responsibly.

Municipal governments are charged with spending public monies in ways that benefit the public. The services they offer are a product of this public purpose doctrine that binds them and the wants and needs of the community. Many municipal governments are already faced with funding difficulties that force them to postpone crucial projects or eliminate desired services. In *Brown v. Wichita State University*, this Court listed some of the arguments in favor of governmental immunity. First among them was "the necessity to protect the state treasury." 219 Kan. 2, 16, 547 P.2d 1015 (1976). In support of this argument, the Court cited a Missouri Supreme Court decision stating, "…(W)holesale abrogation of the sovereign immunity doctrine could very well deplete the governmental treasury to a point where proper performance of governmental duties would be impaired…" (*Id.* quoting *Payne v. County of Jackson*, 484 S.W. 2d 483 (Mo. 1972)). Cities have limited resources and essentially unlimited need for the services, amenities, and infrastructure that they provide. Eliminating immunities and opening the floodgates to unfettered litigation will drastically limit what services a city can offer and the maintenance projects that they can accomplish.

Further, it is not as if the immunity provisions have had a freezing effect on the amount of claims fielded by governmental entities. Governmental entities respond to

several tort claims throughout the year. In preparing this brief, the League reached out to a number of our largest cities for data regarding the number of claims received this year. Two cities gave us numbers over the last five years, showing an average of 110 claims per year. Two other cities gave us a breakdown of claims by year, showing 246 claims and 216 claims respectively in 2024 as of this week. Even with the immunity provisions that afford cities some protection to operate and provide their essential or desired services, the cost of responding to and defending against these claims is substantial. If the guardrails provided by the recreational use immunity are removed or restricted, these costs will only increase. Contrary to the assertion that municipalities can simply protect with insurance and that there is a limited cost to these actions brought against a city, municipalities are often self-insured as insured premiums are increasingly unattainable.

III. THIS COURT SHOULD NOT TAKE UP THE CONSTITUTIONAL ARGUMENTS RAISED FOR THE FIRST TIME IN THE APPELLANT'S SUPPLEMENTAL BRIEF, BUT IF IT DOES, THIS COURT SHOULD CONTINUE TO UPHOLD THE CONSTITUTIONALITY OF THE IMMUNITIES CODIFIED IN THE KTCA.

Kansas Supreme Court Rule 6.02(a)(5) prevents parties from presenting new arguments in appeals that were not raised in lower courts absent an argument for why the issue is properly before the court. The general rule is that alleged constitutional violations cannot be raised for the first time on appeal. See *State v. Gomez*, 290 Kan. 858, 862, 235 P.3d 1203(2010). There are exceptions when "(1) The newly asserted claim involves only a question of law arising on proved or admitted facts and is determinative of the case; (2) consideration of the claim is necessary to serve the ends of justice or to prevent the denial

of fundamental rights; or (3) the district court is right for the wrong reason." *State v Godfrey*, 301 Kan. 1041, 1043, 350 P.3d 1068 (2015). The Appellant primarily relies on *State v. Robinson*, 314 Kan. 245, 496 P.3d 89 (2021) supporting her assertion that two out of the three exceptions stated in *Robinson* apply to her constitutionality argument. (See Appellant's Supplemental Brief to the Supreme Court at pg. 3). While *Robinson* is similar to the matter presently before the Court because both parties failed to raise the issue with the district court; *Robinson* is distinguishable because unlike Robinson, Appellant failed to initially raise the issue in her Petition for Review of Appellant. *Robinson*, 314 Kan. at 247, 496 P.3d at 895.

In addition to the general prohibition on raising an issue for the first time on appeal, Supreme Court rules state that the 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," unless there was a plain error not presented. Supreme Court Rule 8.03(b)(6)(C)(1). This Court has routinely declined addressing issues not present in the petition for review. See *State v. Johnson*, 297 Kan. 210, 227, 301 P.3d 287, 300 (2013) (The Court declined addressing an unreported issue's merits since it was not included in the petition for review because "[o]ne can only speculate" if the petition for review would have been granted with the issues inclusion, and the omission denied the opposing party the opportunity to "challenge the propriety of our granting review on the issues,") See also *Castleberry v. DeBrot*, 308 Kan. 791, 796, 424 P.3d 495, 501 (2018) (the Court declined to address an issue raised in a supplemental brief, but not in the petition for review.)

The Appellant presents Constitutional arguments for the first time in the case in their Supplemental Brief submitted to the Court on October 24, 2024. Notably, the issue was not raised as the case was considered by lower courts, nor was the argument made in the Appellant's petition for review submitted to the Court on July 22, 2024. Because it was not raised in the petition, Johnson County could not respond to it in their response to the petition for review submitted August 22, 2024. The argument had still not been made when this Court granted the petition for review on September 24, 2024. Because the issue was never raised before the Court of Appeals, nor was it included in the petition for review, it should not be considered now.

That being said, even if the Court saw fit to render a decision on the constitutional issue presented, the Appellant's claim would not be successful. Primarily the Appellant argues that the Section 5 right to a trial by jury is violated by the immunity provisions found in the KTCA. When assessing whether a law violates Section 5 by impermissibly invading the jury's function, courts must analyze two basic questions. *State v. Love*, 305 Kan. 716, 735, 387 P.3d 820 (2017). 1) In what types of cases is a party entitled to a jury trial as a matter of right; and 2) when such right exists, what does the right protect? *Id.* Litigants have a right to a Section 5 jury trial in claims that would have been presented to a jury at the time the Kansas Constitution was ratified. See *Hilburn v. Enerpipe Ltd.*, 309 Kan. 1127,1134, 442 P.3d 509 (2019). Almost fifty years ago, this Court recognized that "governmental immunity was part of the common law at the time the Kansas constitution was adopted." *Brown*, 219 Kan. 2 Syl. 4, 547 P.2d 1015; see also *Ashley Clinic, LLC v. Coates*, 64 Kan. App. 2d 53, 75, 545 P.3d. 1020 (2024), rev. denied. When Section 5 was

ratified, Kansas law did not permit individuals to sue governmental entities. That right would not exist until 1969 when Kansas courts ruled that government units could be sued when performing proprietary functions. See *Carroll v. Kittle*, 203 Kan. 841, 849, 457 P.2d 21 (1969). Shortly after this decision, the legislature enacted a framework to address governmental immunity. See *Brown*, 219 Kan. At 6, 547 P.2d 1015. The KTCA replaced this framework in 1979. The Act affords litigants the ability to assert tort claims against governmental entities, but also provides for immunity in certain circumstances. As such, immunities found in the KTCA do not somehow abrogate a section 5 right to trial by jury because no such right exists.

CONCLUSION

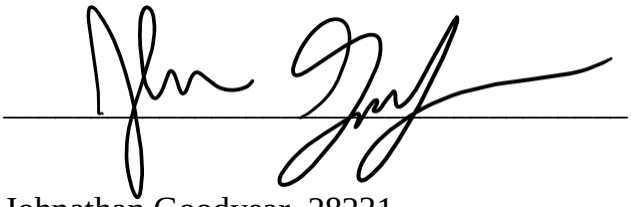
The KTCA provides a framework delineating when governmental entities will be subject to liability and when they are entitled to immunity. The immunities found in the Act allow cities to take action and provide necessary services and improvements without the fear of constant litigation. Without the limited framework of the recreational use immunity, cities will be forced to defend against even more claims than they do now, forcing them to expend their already limited resources on legal defense that would otherwise go toward desired and needed public maintenance and improvement. Departure from precedent will work greater harm to the public as governments scale back their services or increase taxes to fund their legal defense.

We ask that the Court continue to adhere to precedent and find that municipal libraries that provide recreational uses are entitled to recreational use immunity. We further ask that the Court not take up the Constitutional arguments improperly raised by

the Appellant. If the Court does choose to examine these arguments, we ask again that the Court adhere to established precedent and find that the immunities featured in the KTCA do not violate the provisions of the state constitution.

Respectfully submitted,

LEAGUE OF KANSAS MUNICIPALITIES



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CERTIFICATE OF SERVICE

I hereby certify that on December 27, 2024, I electronically filed the foregoing with the Clerk of the Court by using the electronic filing system which will send a notice of electronic filing to the following:

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