Case No. 23-126732-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

BRENDA ZARAGOZA

Plaintiff/Appellant

v.

BOARD OF COMMISSONERS OF THE COUNTY OF JOHNSON

Defendant/Appellee.

BRIEF OF AMICUS CURIAE - KANSAS TRIAL LAWYERS ASSOCIATION

Appeal from the Court of Appeals of the State of Kansas
Case No. 23-126732-A

Jakob J. Provo, KS 28273
Prochaska, Howell & Prochaska, LLC
8415 E. 21st Street North, Suite 230
Wichita, KS 67206
(T): (316) 683-9080
(F): (316) 999-3550
(E): Jprovo@phpattorneys.com
Attorneys for Kansas Trial Lawyers Assoc.

Table of Contents

INTRODUCTION

Kansas Trial Lawyers Association (KTLA) is a nonprofit organization whose membership consists of trial lawyers across Kansas who are committed to ensuring access to the courts, preserving the constitutional right to a jury trial, and advocating for justice in civil matters.

This case clearly involves fundamental constitutional rights and principles of governmental accountability – rights and remedies deeply rooted in Kansas common law and enshrined in Section 18 of the Kansas Constitution. As such, KTLA respectfully submits this Court must carefully consider the historical, constitutional, and public policy implications of broad immunity for municipalities in evaluating whether the recreational use immunity exception under K.S.A. § 75-6104(15) comports with Kansans' historical and constitutional rights, or whether its application has impermissibly expanded to deprive citizens of a remedy by due course of law.

At its core, this case requires this Court to reaffirm that immunity is the exception, not the rule. Case law has unfortunately allowed the recreational use immunity exception to stray far from its intended purpose, undermining long-established common law doctrines of accountability for municipal negligence and infringing upon Section 18's fundamental guarantee of a remedy. This departure must stop. If it does not, governmental immunity in cases involving the scope of immunity will continue to creep beyond the statute's intended purpose impermissibly stripping Kansas citizens of their constitutional rights and allowing the government unbridled immunity.

Kansas Citizens Have a Fundamental Constitutional Right to a Jury Trial For Negligent Acts Committed by A Municipality.

It is undisputed that the legislature may abolish a remedy if there was no common-law right to such a remedy at the time Kansas adopted its constitution in 1861. *See Tillman v. Goodpasture*, 313 Kan. 278, 289 (2021). As pointed out in the Supplemental Brief of Appellant Brenda Zaragoza, Kansas recognized a right to a jury trial to hold municipalities and their agents accountable for

negligent acts prior to the adoption of the Kansas Constitution. *See Leavenworth v. Casey*, McCahon 124 (1860).

The *Casey* decision not only demonstrates that Kansans enjoyed the right to a jury trial prior to ratification, but it highlights the existence of a once-fundamental common-law protection that has since eroded. This erosion has deprived citizens of remedies historically protected under Kansas law. Judge John F. Dillon, in his seminal 1872 treatise on municipal corporations, described the foundational understanding of municipal entities dating back to the foundational principle of the Roman empire that:

> the citizens are members of the whole nation, all possessing the same rights, and *subject to the same burdens*, but retaining the administration of law and government in all local matters which concern not the nation at large," – a description which answers almost perfectly to the modern notion of municipal organizations in England and America. (emphasis added)

John F. Dillon, The Law of Municipal Corporations 3 (James Cockcroft & Co. 1872).

Appellee's position that blanket immunity should shield municipalities, and their agents directly contradict longstanding public policy and common law to the contrary. As Judge Dillon further explained, municipalities are not immune from liability when they neglect duties to the public. In Section 778 of his treatise, Judge Dillon outlined examples of municipal negligence creating liability, including instances where a city neglects its "ministerial duty to cause its sewers to be kept free from obstructions to the injury of a person who has an interest in the performance of that duty." *Id*. at 736.

Likewise, municipalities "for the improper management and use of their property are liable to the same extent and in the same manner as private corporations and natural persons." *Id*. at 737. This principle extends to public walkways and paths, as reflected in well-established common law:

> [A] municipal corporation, with control of a public common, traversed by foot-paths, on which the public may rightfully travel, is liable to a common law action

> for damages caused by a dangerous and unguarded excavation made by the corporation for its own purposes, in the ground adjoining one of the paths, to a person walking thereon, and who was at the time using due care.

Id. at 739.

These passages demonstrate that municipal liability in tort is not a modern concept but one firmly embedded in legal history. This principle was later codified in Kansas jurisprudence. In *Jansen v. Atchison*, 16 Kan. 358, 382 (1876), the Kansas Supreme Court cited Judge Dillon's treatise to reaffirm a municipality's duty to maintain streets, sidewalks, and public infrastructure in a safe condition for public use:

> It may be fairly deduced from the many cases upon the subject, referred to in the notes, that in the absence of an express statute imposing the duty and declaring the liability, municipal corporations proper, having the powers ordinarily conferred upon them respecting bridges, streets and sidewalks within their limits, owe to the public the duty to keep them in a safe condition for use in the usual mode by travelers, and are liable in a civil action for special injuries resulting from neglect to perform this duty.

The Kansas Supreme Court's concern for public safety and accountability is reflected in *Leavenworth v. Casey*, McCahon at 133-34 (1860), wherein the Court held municipalities liable in tort to "best subserve the public interest.". Decisions such as *Topeka v. Tuttle*, 5 Kan. 311 (1870) and *Atchison v. Challiss*, 9 Kan. 603 (1872) further solidified the principle that municipalities were not and should not be immune from tort liability.

Appellee's assertion that Kansas common law never recognized municipal liability is not only incorrect but historically unsupported. As the *Jansen* Court noted, arguments for blanket municipal immunity were "not only novel, but dangerous." *Jansen*, 16 Kan. at 380. Indeed, the dangers of granting municipalities unfettered immunity are made evident by modern injustices under the recreational use immunity exception.

The common law, Kansas territorial law, and early Kansas law make one thing quite clear: citizens have a right to a jury trial against municipalities for tortious acts. Section 18 of the Kansas Constitution's Bill of Rights created a boundary that the government may not cross. That is, Kansas citizens could maintain their causes of actions at common law and that boundary was protected when Kansas adopted its Constitution. In this case, the Court has impermissibly allowed the government to cross that boundary by expanding recreational use immunity exception in K.S.A. § 75-6104(15).

Although much more can be said about the public policy implications of continuing to ignore the historical right to a remedy that has been taken from the Kansas citizens, Judge Dillon summarized this point succinctly, "[h]ow best to govern our cities is yet an unsolved problem in legislation; but it is clear, that for the excesses to which municipal bodies are prone the Courts afford the most effectual, if not the only, remedy." John F. Dillon, The Law of Municipal Corporations 776 (James Cockcroft & Co. 1872) This remedy must be restored to the citizens of Kansas.

The Board of Directors of The Johnson County Library Consented to Suit

The Board of Directors of the Johnson County Library has clearly consented to be sued. Specifically, under K.S.A. § 12-1223(a), the library board is vested with the explicit authority to "sue and be sued." This language is neither accidental nor ambiguous. The Kansas Legislature's choice to include this phrase signifies a clear waiver of sovereign immunity for the Johnson County Library, as established by both state and federal jurisprudence.

The United States Supreme Court has repeatedly recognized that the phrase "sue and be sued" creates a presumption against sovereign immunity. In *Reconstruction Finance Corp. v. J. G. Menihan Corp.* 312 U.S. 81, 85 (1941), the Court explained that "the words 'sue and be sued'

clause normally embraces all civil process incident to the commencement or continuance of legal proceedings. . . there is no presumption that the agent is clothed with sovereign immunity when such language is used."

This principle applies equally here. By incorporating "sue and be sued" into K.S.A. § 12-1223(a), the legislature signaled its intent that library boards, such as the Johnson County Library Board, do not enjoy blanket immunity. Instead, they must answer for their actions or inactions when sued for negligence, just like any other legal entity.

The appellee's argument to the contrary conflicts with the plain meaning of this statutory language. The phrase "sue and be sued" has a settled legal definition and connotation that cannot be ignored. As noted by the United States Supreme Court, "there is no indication that Congress intended the 'sue and be sued' clause to have anything less than its normal scope." *Reconstruction Finance Corp.*, 312 U.S. at 85.

When the legislature grants an entity the capacity to "sue and be sued," it subjects that entity to liability through the courts, including jury trials for tortious conduct. This interpretation aligns with long-standing Kansas jurisprudence that places weight on the plain and unambiguous meaning of statutory language.

Accordingly, when the Johnson County Library Board accepted its statutory authority to operate under K.S.A. § 12-1223(a), it simultaneously accepted the responsibility to appear in court and answer for its negligence. This statutory consent to suit undermines any claim that the recreational use immunity exception under K.S.A. § 75-6104(15) shields the library from accountability.

The dismissal of this action under the recreational use immunity exception must, therefore, be reversed. The Johnson County Library Board, having consented to "sue and be sued," cannot

claim immunity under a statute that plainly contradicts its statutory waiver. The trial court's ruling must be overruled, and this case remanded for further proceedings.

The Kansas Tort Claims Act's Recreational Use Immunity Exception Unequivocally Fails the Quid Pro Quo Test Under Section 18.

As previously established, and recognized in *Casey*, Kansans are vested with a cause of action against municipalities for injuries caused by negligence. That right existed before the adoption of the Kansas Constitution and, therefore, is preserved by Section 18, which ensures that all individuals have a remedy by due course of law.

Since the recreational use immunity exception under K.S.A. § 75-6104(15) is a clear statutory modification of that long-standing common law right, it must satisfy the quid pro quo test (which requires that when a historical remedy is abolished, an adequate substitute remedy or compelling public benefit must be provided in its place). *See Lemuz by & Through Lemuz v. Fieser*, 261 Kan. 936, 944 (1997) *citing Leiker v. Gafford*, 245 Kan. 325, 361 (1989).

Notably, the recreational use immunity exception provides no quid pro quo. There is no adequate substitute remedy for Kansans injured by municipal negligence under circumstances deemed "recreational." Those injured are left entirely without recourse, an outcome that flies in the face of Section 18's fundamental protections.

The Legislature Cannot Abolish a Remedy Without Providing an Adequate Substitute

Under Kansas constitutional jurisprudence, Section 18 guarantees that "for such wrongs that are recognized by the law of the land," the courts shall remain open and provide a remedy. *Tillman v. Goodpasture*, 313 Kan. 278, 301 (2021) (Stegall, J., dissenting). When the legislature abolishes a common law cause of action, as it did here through the recreational use immunity exception, courts must analyze whether the statute satisfies the quid pro quo test.

Appellee claims that the Kansas Tort Claims Act (KTCA) provides sufficient remedies, including remedies for municipal negligence. However, this argument fails because it ignores a critical distinction: while the KTCA may provide a remedy in some circumstances, it offers nothing to individuals whose claims fall under the recreational use immunity exception. For the government, the remedy recognized under common law for injuries it causes has been replaced by complete immunity, with no alternative remedy, recourse or compensating public benefit.

The Kansas Supreme Court has been clear that legislative modifications of common law remedies must not leave injured citizens without a meaningful alternative. As articulated in *Lemuz*, "[t]he right to a remedy by due course of law, guaranteed by Section 18, does not prohibit the legislature from modifying or abolishing common-law remedies *so long as it provides an adequate substitute remedy*." *Lemuz*, 261 Kan. at 944. Here, the recreational use immunity exception does not meet this prerequisite and is thus unconstitutional.

The Purported Public Benefit is Speculative and Inadequate

Appellee and courts relying on *Poston v. Unified Sch. Dist. No. 387*, 286 Kan. 809, 813 (2008), argue the recreational use immunity exception confers a public benefit by promoting access to low-cost recreational facilities. That rationale is an illusion.

First, there is no evidence that absent immunity, municipalities would fail to provide recreational facilities. As Justice Johnson noted in his dissent in *Poston*, the recreational use immunity exception was a "last minute addition" to the KTCA, unsupported by any legislative debate or study on its purported benefits. *Id*. at 821 (Johnson, J., dissenting).

Second, even assuming a public benefit exists, it is insufficient to justify the complete abolition of a historical common law remedy. In *Noel v. Menninger Foundation*, 175 Kan. 751, 762 (1954), this Court rejected a similar argument regarding charitable immunity, holding that

societal benefits provided by charitable organizations could not justify immunity for their negligent acts. The Court emphasized that "[s]ound social policy ought, in fact, require such organizations to make just compensation for harm legally caused by their activities." *Id*.

The same reasoning applies here. Public recreational spaces may provide a benefit to its users, but that benefit does not justify depriving injured Kansans of their constitutional right to a remedy by granting immunity to the government for any harm it may cause due to its negligence. Furthermore, there is no doubt that municipalities can and do mitigate concerns about liability through prudent risk management and insurance, as this Court acknowledged in *Noel*. *Id*. at 758.

The Recreational Use Immunity Exception is a Solution Without a Problem

The recreational use immunity exception purports to solve a nonexistent problem. Municipalities can and have long-provided parks, playgrounds, and recreational spaces. Holding municipalities accountable for negligence does not prevent them from offering that public benefit, rather it ensures that they do so responsibly.

The exception, as currently applied, deprives Kansans of their constitutional right to seek redress while providing municipalities with immunity that is both unnecessary and unjust. It encourages and invites the public to use property without any responsibility for its negligence whatsoever. As the Court stated in *Bair v. Peck*, 248 Kan. 824, 838 (1991), "[t]he primary purpose of the courts is to safeguard the declaration of [a] right and remedy guaranteed by the constitutional provision insuring a remedy for all injuries.". By leaving injured individuals like Brenda Zaragoza without any remedy, the recreational use immunity exception fundamentally undermines Section 18 and the public's confidence in the legal system.

Immunity Under the KTCA Has No Legislative Rationale

The immunity granted under K.S.A. § 75-6104(15) is without clear legislative rationale or justification. Its origin is unexamined, its application arbitrary, and its continued existence unsupported by any compelling reason the grant immunity for any public benefit recreational property may provide. The Kansas Legislature's intent behind immunity in this statute is virtually absent from the historical record, and its broad judicial interpretation has and will continue to cause harm to Kansas citizens.

Immunity for property designated for recreational use was introduced as a last-minute addition to the Kansas Tort Claims Act (KTCA) with minimal, if any, legislative debate. As Justice Johnson aptly observed in his dissent in *Poston*, 286 Kan. at 821, "[the exception was] a last-minute addition to the KTCA, without much, if any, discussion as to its purpose or scope. From that history, I am unable to intuit the public benefits rationale that the majority cites.".

The absence of legislative deliberation leaves immunity from liability devoid of any discernible rationale. Immunity from liability for property used for recreational use lacks any supporting evidence to justify its expansive application. Although courts have postulated that immunity encourages municipalities to provide low-cost recreational opportunities, this is an illusion because there is no basis to grant immunity. Municipalities can provide the same property for recreational use without avoiding liability. In fact, immunity does nothing more than encourage lack of responsibility on its part to prevent injury by making the property safe for its intended use. Interestingly, owners of property – whether private or business – have a duty to act responsibly and prevent injury to those that come on to their property, invited or otherwise, but the government does not. From a public policy standpoint, immunity to the government is non-sensical because it

is contrary to everyone's obligation to act safely in everything they do, including maintaining their property.

Bottom line, there is no evidence that liability for negligence would deter municipalities from offering recreational opportunities. To the contrary, municipalities have long provided parks, playgrounds, and similar facilities for recreational use. As Justice Johnson recognized in *Poston*, the majority's assumption lacks factual basis, "I do not believe that the specter of tort liability would cause municipalities or schools to forgo the provision of recreational facilities, because the risks can be adequately managed with insurance coverage and prudent oversight." *Id.* at 822.

By Interpreting the Recreational Use Immunity Exception to Include Spaces Like Library Parking Lots, Courts Have Converted the Exception into An All-Encompassing Shield of Immunity.

Although intended to cover parks, playgrounds, and open areas used for recreational purposes, the recreational use immunity exception has been applied far beyond its purported scope. Courts have stretched the statutory language to include facilities and areas never contemplated by the Legislature, including gymnasiums, school hallways, grassy fields. The present case, involving Brenda Zaragoza's fall in a library parking lot, presented yet another dangerous overreach of this exception. Ms. Zaragoza was not engaged in recreational activities but was merely returning to her car after checking out library materials.

If a library parking lot qualifies as an "open area for recreational purposes," then so too could virtually any public space, including sidewalks, streets, and buildings. Under such an interpretation, immunity becomes the rule, not the exception, as Kansans are forced to bear the consequences of governmental negligence without recourse. As this Court recognized in *Nichols v. Unified Sch. Dist.*, 246 Kan. 93, 94 (1990), "governmental liability [is] the rule and immunity

[is] the exception.". This principle has been inverted through the unchecked expansion of the recreational use immunity exception.

In fact, this judicial overreach directly contradicts prior Kansas precedent. In *Barrett v. Unified Sch. Dist. No. 259*, 250, 260-261 (2001), the Kansas Supreme Court distinguished between recreational spaces and areas such as parking lots, explicitly recognizing that parking lots were not encompassed by the exception. Similarly, *Poston* reiterated that parking lots were never intended to be included. *Poston,* 286 Kan. at 817. Yet despite these clear holdings, courts have continued to expand the exception's reach to areas surely never contemplated by the Legislature.

In effect, the judiciary's expansive application of the exception has created an all-encompassing shield of immunity that now includes non-recreational areas where Kansans conduct routine activities. If immunity applies to a library parking lot, what would stop the court's expansion of immunity to public sidewalks, streets, or roads leading to a park?

The consequences of this overreach are foreseeable and untenable. Kansas citizens are left without a remedy for injuries caused by municipal negligence, despite clear constitutional guarantees under Section 18. As this Court has noted, "[t]o require an injured individual to forego his cause of action for the wrongful acts of another when he is otherwise entitled thereto because the injury was committed by [the government], is to require him to make an unreasonable contribution to [the government] against his will." *Noel*, 175 Kan. at 762 (replacing "charity" with "government" for emphasis).

The judiciary has an obligation to safeguard constitutional rights, particularly where statutes deprive citizens of remedies protected under Section 18. Courts cannot presume legislative intent where none exists, nor can they expand immunity beyond what is reasonable or necessary. As Justice Johnson astutely warned in *Poston,* 286 Kan. at 820 (Johnson, J., dissenting),

"[l]iberally construing an exception so as to diminish the efficacy of the general rule turns the statutory scheme on its head." Unfortunately for Brenda Zaragoza, this is exactly what happened in her case.

The recreational use immunity exception, as applied, flips the KTCA's statutory scheme on its head. By failing to provide a clear legislative rationale and by depriving Kansans of their constitutional right to a remedy without adequate substitution, immunity is not only contrary to public policy but also in direct violation of Kansas law.

The judiciary's role is to interpret statutes narrowly, consistent with legislative intent and constitutional guarantees. Broad interpretations of K.S.A. § 75-6104(15) raise significant separation of powers concerns, as courts, not the Legislature, are redefining the boundaries of governmental immunity. The expansion of this exception undermines Kansans' constitutional right to a remedy under Section 18 and erodes public trust in the legal system's ability to hold tortfeasors accountable. This Court must restore the proper boundaries of K.S.A. § 75-6104(15) and ensure that immunity truly is the exception, not the rule.

The Expansion of Immunity Has Undermined Not Only Fundamental Constitutional Rights of Kansans, but Also Fundamental Principles of the Legal System Itself.

The unchecked expansion of the recreational use immunity exception under K.S.A. § 75-6104(15) has not only eroded Kansans' constitutional right to a remedy but has also undermined the fundamental purposes of the legal system: accountability, deterrence, and justice.

The foundational principles of tort law—particularly deterrence—are undermined when governmental entities are allowed to act negligently without consequence. As this Court observed in *State v. Harlin*, 260 Kan. 881, 887 (1996), "punishment serves the twin aims of retribution and deterrence. . . . General deterrence is the foremost and overriding goal of all laws, both civil and

criminal." Immunity removes this incentive for governmental entities to ensure their facilities are safe for public use, encouraging complacency rather than responsibility.

This result also contradicts Kansas jurisprudence, which recognizes the constitutional guarantee that "[a]ll persons… shall have remedy by due course of law." *See* Kan. Const. Bill of Rights, § 18. Broad interpretations of K.S.A. § 75-6104(15) have deprived Kansans of their right to a remedy without any compensating benefit, in direct violation of the quid pro quo principle. The Kansas Tort Claims Act was intended to ensure governmental liability is the rule and immunity the exception, but the expansive application of this exception has inverted that principle.

Conclusion

This case is, at its heart, about boundaries; boundaries of constitutional rights, boundaries of governmental accountability, and boundaries of immunity. For over a century, Kansas law has drawn clear lines ensuring that the government is accountable for its negligence, and that Kansans have access to the courts to seek justice. Section 18 of the Kansas Constitution established a firm boundary: Kansans shall have a remedy by due course of law for injuries suffered.

The recreational use immunity exception under K.S.A. § 75-6104(15) has obliterated these boundaries. It has transformed immunity, meant to be the exception, into an all-encompassing rule that shields municipalities from accountability. By expanding the statute's reach to places like library parking lots, the judiciary has blurred the boundaries of legislative intent and constitutional rights, leaving Kansans like Brenda Zaragoza without recourse.

This Court must now redraw the boundaries. If K.S.A. § 75-6104(15) is not found facially unconstitutional, its scope must be limited to align with its original intent and the boundaries established by Kansas law. The judiciary must reaffirm its role as the guardian of constitutional guarantees, ensuring that immunity does not trespass on Kansans' fundamental right to a remedy.

Kansas Trial Lawyers Association urges this Court to restore these boundaries. That is, hold municipalities accountable for negligence, safeguard Section 18's promise of justice, and preserve the principle that governmental liability is the rule, and immunity the exception.

The time has come to restore balance. The time has come to restore justice. The time has come to restore the boundaries.

Respectfully submitted,

/s/ Jakob Provo, KS #28273
Jakob Provo, KS #28273
James R. Howell, KS #13265
Prochaska, Howell & Prochaska LLC
8415 E 21st St N., Suite 230
Wichita, KS. 67206
Telephone: 316-683-9080
Facsimile: 316-683-6508
jprovo@phpattorneys.com
jhowell@phpattorneys.com
Attorneys for Kansas Trial Lawyers Assoc.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 20th day of December, 2024, I filed the above, ***Brief of Amicus Curiae - Kansas Trial Lawyers Association***, using the court's electronic filing system which will send notice to all counsel of record.

Richard W. Morefield, #13128
11814 West 135th St.
Overland Park, Kansas 66213
Ph: (913) 839-2808
Fax: (913) 839-2807
r.morefield@msblawkc.com
Attorneys for Plaintiff/Appellant

Andrew D. Holder, Esq.
Alex S. Gilmore, Esq.
Fisher Patterson Sayler & Smith, LLP
9393 W. 110th St., Ste. 300
Overland Park, KS 66210
Ph: (913) 339-6757
Fax: (913) 339-6187
aholder@fpsslaw.com
agilmore@fpsslaw.com
Attorneys for Defendants/Appellee

Lyndon W. Vix
John William Ralston
Fleeson, Gooing, Coulson, & Kitch LLC
P.O. Box 997
Wichita, KS 67201-0997
lvix@fleeson.com
Attorneys for Kansas Association of Defense Counsel

Johnathan Michael Goodyear
The League of Kansas Municipalities
300 SW 8th Ave, Ste 100
Topeka, KS 66603
jgoodyear@lkm.org
Attorney for The League of Kansas Municipalities

/s/ Jakob J. Provo, #28273
Jakob J. Provo, #28273
James R. Howell, #13265