No. 23-126732-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

BRENDA ZARAGOZA

Plaintiff/Appellant

vs.

BOARD OF COMMISSIONERS OF THE COUNTY OF JOHNSON

Defendant/Appellee

Ark Brief Due
11/27/2023

BRIEF OF APPELLANT BRENDA ZARAGOZA

Appeal from the District Court of Johnson County, Kansas
Honorable Rhonda K. Mason, Judge
District Court Case No. 21CV03636

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ORAL ARGUMENT – 20 MINUTES

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NATURE OF THE CASE

Plaintiff Brenda Zaragoza broke her knee, ankle, and heel when she fell in a public parking lot owned by Defendant Johnson County Board of County Commissioners. The parking lot was adjacent to Defendant's Monticello Branch library. Plaintiff filed a personal injury lawsuit against Defendant alleging that her injuries were caused by the dangerous condition created and maintained by Defendant.

This appeal is from the District Court of Johnson County's entry of summary judgment in favor of the Defendant. The District Court ruled that Defendant's library and parking lot were both entitled to recreational use immunity pursuant to K.S.A. 75-6104(o). The District Court ruled that Plaintiff did not sufficiently plead or offer evidence of gross and wanton negligence. The court denied Plaintiff's motion to amend her Petition to include facts first revealed by Defendant's corporate representative shortly before Plaintiff filed her motion to amend. Plaintiff appeals the District Court's entry of summary judgment and the District Court's denial of Plaintiff's Motion to Amend her Petition.

STATEMENT OF THE ISSUES

Issue I: The District Court erred when it granted summary judgment to Defendant and held that Defendant's public library qualified for recreational use immunity on the date Plaintiff was injured. K.S.A. 75-6104(o).

Issue II: The District Court erred when it granted summary judgment to Defendant and held that recreational use immunity could be extended to

Defendant's public parking lot adjacent to Defendant's public library. K.S.A. 75-6104(o).

Issue III: The District Court erred in granting summary judgment for Defendant even though Plaintiff presented material facts that would have supported a jury finding that Defendant's negligence was gross and wanton.

Issue IV: The District Court erred when it resolved disputed facts and inferences in favor of Defendant, the party seeking summary judgment.

Issue V: The District Court erred when it held that Plaintiff had not sufficiently pled gross and wanton negligence and when it denied Plaintiff's Motion to Amend to plead additional evidence of gross and wanton negligence that Defendant had failed to disclose until shortly before Plaintiff filed her Motion to Amend.

STATEMENT OF FACTS

I. The Parties

Brenda Zaragoza ("Plaintiff") is a resident of Johnson County, Kansas. (R. I, 5; R. III, 7) The Board of County Commissioners of Johnson County ("Defendant"), is a Kansas governmental entity and the governing body for Johnson County, Kansas. (R. III, 7; R. I, 5) The Board of Directors of the Johnson County Library oversees the Johnson County Library's Monticello Branch (hereafter, "Defendant's library" and "the library"), which is public property located at 22435 W. 66th Street, in Shawnee, Kansas. (R. I, 5) Pursuant to K.S.A. 12-1223(b), the Board of Directors of the Johnson County Library may be sued only in the name of "The Board of County Commissioners of the County of Johnson." (R. III, 47)

II. Brief Timeline of Key Events

August 5, 2018: Defendant's library opened to the public. (R. III, 47) The curbs in front of the library and the curbs in the parking lot were unpainted. (R. III, 238) Defendant, through its employee Georgia Sizemore, approved the plan or design for its library. (R. III, 7)

Between August 5, 2018 and July 18, 2020: Pedestrians complained to Defendant that they had trouble distinguishing the stepdown from the sidewalk and curbs to other walking areas. (R. I, 75) Because of that danger, Defendant applied yellow paint to the curbs in front of its library before July 18, 2020. *Id.* (R. III, 381)

July 18, 2020: Plaintiff visited Defendant's library on July 18, 2020. She fractured her knee, ankle, and heel when she fell while stepping from the sidewalk and curb into Defendant's parking lot. (R. III, 44) Defendant had not applied yellow paint to the curbs in the parking lot before Plaintiff fell nor had Defendant otherwise guarded against or warned about the slope and elevation change near the first parking space. (R. III, 41 and 238) Plaintiff could not detect the slope of the parking lot when she stepped down from the sidewalk to the parking lot. (R. III, 41)

August 10, 2021: Plaintiff filed her personal injury lawsuit against Defendant and served discovery on August 10, 2021. (R. I, 5)

September 2, 2021: Defendant filed its answer, which included an affirmative defense that stated, "Plaintiff's claims are barred by the provisions of the Kansas Tort Claims Act, including K.S.A. 75-6104 and limited by the provisions

of K.S.A. 75-6105." (R. I, 12) Defendant did not specifically plead the recreational use immunity found in K.S.A. 75-6104(o). *Id.*

October 4, 2021: Defendant answered Interrogatory 4 (R. I, 222), as follows:

> 4. Identify any warnings whether verbal or written (such as by a sign or otherwise) which were given to the Plaintiff specifically, and/or generally to invitees to the Premises before the incident concerning the condition which caused or contributed to the incident
>
> **ANSWER**: Defendant is unaware of any warning given to Plaintiff or other invitees and explicitly denies the existence of any condition the premises that would require such a warning. (emphasis added).

In response to Request for Admission 16, Defendant denied that the yellow paint on the curb near the library had anything to do with safety. Defendant stated,

> "Admitted, although the yellow paint depicted in Exhibit 1 denotes a no-parking zone, not a warning as to the existence of a curb or as to the slope of the walking space." (R. I, 223; R. II, 36) (emphasis added).

December 14, 2022: The parties were scheduled to take the corporate representative depositions of Defendant and other fact witnesses on December 14 and 16, 2022. (R. II, 44-47) Defendant requested the depositions be rescheduled due to a medical issue with one of its witnesses. (R. II, 47) The parties agreed to reschedule the depositions for January 4 and 5, 2023. (R. II, 45)

December 16, 2022: Discovery was set to close. (R. I, 15)

January 5 and 6, 2023: Defendant's corporate representative Georgia Sizemore testified on January 5, 2023. (R. IV, 1) Defendant's corporate representative Juan Lopez-Tamez testified on January 5, 2023. (R. III, 373) Defendant's corporate representative Christian Madrigal testified on January 6, 2023. (R. IV, 72) Defendant's architect and corporate representative Georgia

Sizemore testified that the reason Defendant decided to apply yellow paint to the curb in front of Defendant's library building was because,

> "there was some folks having trouble in this area here, which is the drop-off area in front of the building. This is a concrete sidewalk here (indicating), and then it's a concrete pull-off as well, and I remember people saying that people were walking off that step, that curb step, without realizing there was a step there because the concrete, there wasn't enough differential. Fresh concrete, it's really hard to tell that curb area, and I'm experiencing that as I get older, so I understand that."

(R. I, 75) *See also,* (R. III, 381) Defendant did not know why the curbs in the parking lot were not painted yellow. (R. I, 77; R. III, 382)

January 17, 2023: Defendant filed its summary judgment motion on January 17, 2023. (R. I, 4) This was the first time Defendant explicitly claimed recreational use immunity under K.S.A. 75-6104(o). (Compare R. III, 6 with R. I, 12)

January 19 and 20, 2023: Plaintiff received the deposition transcripts of the corporate representatives on January 19 and 20, 2023. (R. II, 45)

February 3, 2023: Plaintiff filed her Motion to Amend Petition and her response to the Motion for Summary Judgment on February 3, 2023 – two weeks after receiving the deposition transcripts. (R. I, 23; R. III, 172)

March 7, 2023: Summary judgment oral argument. (R, II, 1-64)

May 16, 2023: The District Court granted summary judgment in favor of Defendant and denied Plaintiff's Motion to Amend Petition. (R. I, 233-248)

June 14, 2023: Plaintiff filed her Notice of Appeal. (R. I, 249)

August 21, 2023: Plaintiff filed her Docketing Statement. (R. I, 251)

III. Facts Relating to Whether Defendant's Library and its Adjacent Parking Lot Were Used or Intended to be Used for Recreational Purposes on or Before the Date of Plaintiff's Injury

There is no dispute that Defendant's library engages in ordinary library functions such as allowing patrons to read and borrow books and media. But, the District Court did not apply recreational use immunity to Defendant's library on the basis of ordinary library functions. (R. I, 244) The District Court thought it was unclear whether typical uses of a public library would qualify as recreational. (R. I, 244) Instead, the District Court granted summary judgment based on Defendant's claim that its library was used or intended for other specific purposes it claimed were recreational. (R. 1, 243)

Defendant relied on the Affidavit of Christian Madrigal (R. III, 47-49) and the deposition of Christian Madrigal (R. IV, 93-94) to support its claim that its library had a recreational use or purpose. Neither the Affidavit nor the deposition identified any recreational use or purpose that occurred or existed on or before July 18, 2020, or at any time before he signed his Affidavit. *Id.* The Madrigal Affidavit uses the present tense to describe library activities that were occurring at the time he executed his Affidavit. (R. III, 47-49) Defendant admits that no recreational use of its parking lot occurred on July 18, 2020. (R. IV, 93-94; R.III, 19)

On its website, Defendant describes library activities, including those listed in the Madrigal Affidavit, in educational terms. (R. I, 53, 97-98) For example, family story time is an activity that is designed to foster a love of reading and to foster pre-reading skills. *Id.* Defendant's Strategic Plan identifies 5 key performance areas: education, operations, community, communication, and convenience.

Recreation is not one of them. *Id.* The 2015 Return on Investment Report evaluated the community impact of the Johnson County library system, but it does not mention recreational uses or purposes of the library. *Id.* at 37, 97-98. Defendant has not offered evidence of a single recreational use or purpose of its library or parking lot that occurred or existed on or before the date of Plaintiff's injury.

IV. Facts Relating to Whether Defendant's Parking Lot is Integral to a Recreational Use.

Defendant admits that its library parking lot has no independent recreational purpose. (R. III, 19) Defendant contends that its parking lot is integral to a recreational use of the library. (R. III, 14-19) For example, Defendant argues, without citation to evidence, that its parking lot "serves as the principal means for the public to park their vehicles while utilizing the Library." (R. III, 22) But, Defendant did not provide any facts to support its claim that the parking lot is necessary to a recreational or other use of the library.

V. Facts Relating to Defendant's Gross and Wanton Negligence

Before Plaintiff fell, Defendant received complaints that pedestrians were having difficulty seeing the drop-off from sidewalks and curbs to parking and driving surfaces due to the lack of differentiation in color of the concrete surfaces. (R. I, 75) Defendant's corporate representative, Georgia Sizemore, admitted she had the same difficulty. (R. I, 75) Because of this danger, Defendant applied yellow paint to the curbs near the library building before Plaintiff suffered her injury in Defendant's parking lot. (R. I, 75) Defendant did not paint the curbs in the parking lot or provide any other type of warning or guarding in the area where Plaintiff

fell and suffered her injury. (R. I, 75, 77, 80) Defendant knew about the slope where Plaintiff fell when the building was completed. (R. II, 381) Defendant admitted that the slope where Ms. Zaragoza fell might not be conspicuous. (R. I, 75) Defendant knew about the slope where Plaintiff fell when the building was completed. (R. III, 381) Defendant does not know why it failed to paint the curb where Plaintiff fell. (R. I, 77) Defendant's expert, Rose Figueroa, testified that when Defendant identifies an unreasonable hazard, it should mitigate it before someone gets hurt. (R. III, 350, 351)

Plaintiff retained Claudia Ziegler Acemyan, Ph.D. as a human factors expert. Dr. Acemyan is a Human Factors and Safety Consultant for Post Hoc, LLC. (R. I, 90) She has consulted with NASA on crew risk reduction and safety. (R. III, 88, 103) She is an Adjunct Assistant Professor in the Psychology Department at Rice University where her focus is on human factors. (R. I, 90; R. III, 87-89) According to Dr. Acemyan, the lack of guarding or warning at the location where Ms. Zaragoza fell was unreasonably dangerous because the change in elevation and slope was not conspicuous. (R. III, 93, 96-102) The library parking lot should have been modified or maintained 1) to prevent patrons from stepping into the parking lot at the area of the sloped pavement where Ms. Zaragoza fell; and/or 2) to provide an effective warning to patrons that would have drawn the patron's attention to the slope of the parking lot. (R. I, 90-93) Further, she opines that the library could and should have erected a barrier or guard rail in front of the sloped area, or used some sort of warning communication, such as striping, messaging,

or signage, to warn users about the slope because the slope would be difficult to perceive by a pedestrian. (R. I, 85, 140-141; R. III, 84, 96-101)

Dr. Acemyan has reviewed the depositions of the Defendant's corporate representatives Georgia Sizemore, Juan Lopez-Tamez, and Christian Madrigal. She agrees with Ms. Sizemore's testimony that the Monticello Library branch plans called for a 24-inch-high plant in the area where Ms. Zaragoza stepped before she stepped into Defendant's parking lot. (R. I, 90-91) She also agrees that such a plant or similarly sized object was not present at the time of Ms. Zaragoza's injury. *Id.* She opines that such a plant or object would have prevented Ms. Zaragoza's injuries. (R. I, 91)

Defendant admits that the library plans called for a two-foot-tall plant in the mulched area where Ms. Zaragoza stepped into the sloped area of the parking lot. (R. I, 77) Defendant admits that no such bush was present on the date of Plaintiff's injury. (R. I, 80; R. III, 385) Defendant admits that a bush would have prevented Plaintiff or others from stepping into the sloped area. (R. I, 78) Defendant admitted that the slope where Ms. Zaragoza fell might not be conspicuous. (R. I, 75) Defendant admits that it has no idea why the plant was not present on the date of Plaintiff's injury. (R. I, 80)

Defendant admitted that architects use yellow paint as shown in Deposition Exhibit 47 for higher contrast (R. I, 76) Defendant admits that yellow paint on the curb would tell a pedestrian that there's an elevation change. (R. I, 76) Defendant admitted that it would have been feasible to put yellow paint on the curb and on the sewer in the area where Ms. Zaragoza fell. (R. I, 76) Defendant does not know

why the curb in the area where Ms. Zaragoza fell had not been painted before she fell (R. I, 77)

Defendant admits that it would expect a patron who parked where Ms. Zaragoza parked to walk across the first parking spot as she did. (R. I, 76) Although Defendant implies that no one else fell where Plaintiff was injured, it admits that it does not know how many people tripped or mis-stepped on Defendant's premises. (R. I, 68) Defendant does not keep any records of incidents if there is no reported injury. *Id.*

VI. Facts Relating to Whether Plaintiff Pled Gross and Wanton Negligence and Regarding Plaintiff's Motion to Amend Petition

In her original Petition, Plaintiff pled that Defendant had actual knowledge that the area where Plaintiff fell was dangerous. (R. I, 7, 8) Plaintiff pled that Defendant had a duty to keep its premises reasonably safe from dangerous conditions and to warn of known dangerous conditions. (R. I, 7, 8) Plaintiff also pled that Defendant failed and/or refused to remedy the known danger or to provide a warning, barrier, or barricade to prevent patrons from falling. (R. I, 8) She also pled that the color of the curb and pavement made it difficult for pedestrians to detect a dangerous slope when stepping into the parking lot.

Plaintiff served written discovery on Defendant with her Petition. In its responses, Defendant denied that there was any condition of the premises that would require a warning. (R. I, 222) Defendant later denied that the yellow paint it applied to curbs near its building was applied as a warning. (R. I, 223)

On January 4 and 5, 2023, Defendant's corporate representatives admitted for the first time that Defendant had received complaints about a lack of contrast in the concrete that made it difficult to see changes in elevation and slope. (R. I, 75) During those depositions, Defendant admitted that it had applied yellow paint to other curbs next to the library building to correct the problem before Plaintiff's injury. *Id.* Defendant admitted that it did not paint the curbs where Plaintiff fell. (R. I, 77, 80) Defendant also admitted that the plans it approved called for a bush in the mulched area near where Plaintiff fell. Defendant admits that this bush would have prevented Plaintiff from stepping in the dangerously sloped area. (R. I, 77, 78)

After Plaintiff discovered this new information she moved to amend her Petition to plead this new evidence of gross and wanton negligence. (R. III, 172) Although Defendant had previously provided discovery responses inconsistent with the testimony of its corporate representatives, the District Court ruled that Plaintiff's motion to amend was filed too late and that Plaintiff's evidence did not support a jury finding of gross and wanton negligence. (R. II, 1-64)

ARGUMENTS AND AUTHORITIES

I. THE DISTRICT COURT ERRED WHEN IT GRANTED SUMMARY JUDGMENT TO DEFENDANT AND HELD THAT DEFENDANT'S PUBLIC LIBRARY QUALIFIED FOR RECREATIONAL USE IMMUNITY ON THE DATE PLAINTIFF WAS INJURED. K.S.A. 75-6104(O).

A. Standard of Review

Defendant's Motion for Summary Judgment claimed that the Kansas Tort Claims Act recreational use immunity, K.S.A. 75-6104(o), shielded it from

responsibility for ordinary negligence. This Court has unlimited de novo review over the interpretation of a statute. *Babe Houser Motor Co. v. Tetreault*, 270 Kan. 502, 506, 14 P.3d 1149 (2000).

Defendant bears the burden to provide undisputed material facts to justify applying recreational use immunity under K.S.A. 75-6104(o) to Plaintiff's claim.

> In order to avoid liability, the governmental entity has the burden of proving that it falls within one of the enumerated exceptions found in K.S.A. 75–6104. *Barber v. Williams*, 244 Kan. 318, 320, 767 P.2d 1284 (1989).

Jackson ex rel. Essien v. Unified Sch. Dist. 259, Sedgwick Cnty., 268 Kan. 319, 322, 995 P.2d 844, 847 (2000); see also, *Williams v. C-U-Out Bail Bonds, LLC*, 310 Kan. 775, 795, 450 P.3d 330, 334 (2019).

Whether Defendant has met its burden to prove immunity under the Kansas Tort Claims Act is a fact issue. Summary judgment is appropriate only "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." *Hammond v. San Lo Leyte VFW Post 7515*, 466 P.3d 886, 889 (Kan. 2020). 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." *Id.* Therefore, factual issues must be resolved in favor of Plaintiff Brenda Zaragoza.

> "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. [Citation omitted.]"

Bracken v. Dixon Industries, Inc., 272 Kan. 1272, 1274–75, 38 P.3d 679 (2002).

B. Preservation of All Issues

Defendant filed its Motion for Summary Judgment on January 17, 2023. (R. III, 4-215) Plaintiff filed its Response to the Motion for Summary Judgment and its Motion to Amend Petition on February 3, 2023. (R. I, 23-172) The issue of recreational use immunity was discussed at length by both parties in their summary judgment briefing (R. I, 23; R. III, 6) in Plaintiff's Motion to Amend Petition (R. III, 172) and the Parties' arguments at the Summary Judgment hearing. (R. II, 1-64). The District Court granted summary judgment. (R. I, 223 and 227)

C. Analysis and Argument

The District Court erred when it granted summary judgment to Defendant. The Court held that Defendant's library was immune from liability for ordinary negligence under the Kansas Tort Claims Act recreational use immunity found at K.S.A. 75-6104(o). (R. I, 233, et seq.) However, under the Kansas Tort Claims Act, liability for government entities is the rule, and immunity is the exception. *Jackson v. U.S.D. 259, Sedgwick Cnty.*, 268 Kan. 319, 322, 995 P.2d 844 (2000). Defendant bears the burden of establishing recreational use immunity. *Soto*, 291 Kan. 73, Syl. ¶ 5, 238 P.3d 278." *Williams v. C-U-Out Bail Bonds; LLC*, 310 Kan. 775, 795, 450 P.3d 330, 344 (2019); See, *Lane v. Atchison Heritage Conf. Ctr., Inc.*, 283 Kan. 439, 444, 153

P.3d 541, 545 (2007)(citing *Jackson v. U.S.D. 259, Sedgwick Cnty.*, 268 Kan. 319, 322, 995 P.2d 844 (2000)).

Defendant did not meet its burden to prove by undisputed material facts that Defendant's library was used or intended for recreational purposes at the time of Plaintiff's injury. The District Court is required to resolve all facts and inferences which may reasonably be drawn from the evidence in favor of Plaintiffs. *Sall v. T's, Inc.*, 281 Kan. 1355, 1360, 136 P.3d 471, 475 (2006). On appeal, when reasonable minds could differ as to the conclusions drawn from the evidence, summary judgment must be denied. *Id.* at 281 Kan. 1362, 136 P.3d 476.

The District Court properly declined to hold that the core functions of a library qualify as a recreational use or purpose. (R. 1, 243 and 244) Instead, the District Court held that applied to Defendant's library because of its other claimed uses and purposes. The District Court stated,

> "The Court holds that this particular library, due to the extent of its recreational activities, qualifies for recreational use immunity. The holding goes no further than that, as there could be libraries that do not provide any of the same recreational activities as the Monticello branch does. This is not intended to provide blanket immunity to all libraries under the recreational use immunity exception to the Kansas Tort Claims Act." (R. 1, 244)

But, Defendant utterly failed to meet its burden of proving a factual basis for recreational use immunity. Defendant did not provide evidence that its library was used or intended for recreational purposes at the time of Plaintiff's injury. To establish immunity under K.S.A. 75-6104(o), Defendant must demonstrate that Plaintiff's claim for injuries resulted from "the use of any public property intended or permitted to be used as a park, playground or open area for recreational

purposes . . . ." K.S.A. 75-6104(o). Although there is no dispute that Plaintiff was injured on public property, Defendant was required to offer undisputed evidence that the library was "intended or permitted to be used as a park, playground or open area for recreational purposes" at the time of Plaintiff's injuries. K.S.A. 75-6104(o).

First, Defendant must offer evidence, not inferences, that its library had recreational uses or purposes on or near the date of Plaintiff's injuries. Otherwise, a governmental entity could manufacture a recreational use or purpose for its property after an injury in an attempt to retroactively create immunity for itself. Similarly, if Defendant stopped permitting further recreational uses or purposes before the date of Plaintiff's injuries, the recreational use immunity would not apply. Timing matters.

The only allegedly recreational uses or purposes claimed by Defendant in its Motion for Summary Judgment are described in the present tense. Defendant's allegations of recreational use are found in paragraphs 6-8 of its Statement of Facts and discussed on pages 10 through 13 of its Memorandum in Support of Motion for Summary Judgment. (R. III, 8, 15-18) (*See also,* Madrigal Affidavit, (R. III, 47-48) Defendant has not offered evidence that a single recreational purpose ~~or use of~~ Defendant's library occurred on or near July 18, 2020 or at any time before the date of the Madrigal Affidavit.

All facts and inferences that may be reasonably drawn from the evidence must be resolved in favor of the non-moving party. *Bracken*, 272 Kan. at 1274-75. The Court cannot infer or assume that recreational activities or purposes were

present at Defendant's library on July 18, 2020 in the absence of admissible evidence regarding that time period. Defendant has failed to carry its burden of proof. Plaintiff does not have the obligation to prove a negative.

Summary judgment is also inappropriate because the activities that Defendant now claims are recreational were publicly described by Defendant as educational, creating a fact issue. For example, Defendant argues that its library currently features art installations and sculptures by local artists, has a story room for children and an outdoor storywalk. (R. III, 47-48) Defendant further claims that the library currently hosts story times, tabletop gaming nights, book clubs and mystery solving events. *Id.* Yet, in Mr. Madrigal's Affidavit, he never suggests that the purpose of these activities is recreational rather than educational. That is because to do so would contradict how Defendant's library describes these activities on its website.

The Defendant's website describes the activities at each library branch as educational. Most activities have a literacy or reading-related purpose. For example, the Defendant's library offered Family Story Time on February 6, 2023. The event is described as,

> The whole family will enjoy this flexible Storytime. Hearing stories is a great way to spend time with your kids and help them foster a love of reading. Stories, songs, fingerplays and movement activities foster pre-reading skills. Fun for the whole family.

Exhibit 8, Family Storytime located at: https://jocolibrary.bibliocommons.com/events/638fb73938ef064200d3f4ea and Affidavit of Lindsay Stamper) (emphasis added) (R. I, 97, 98, 137-139)

Similarly, the Johnson County Library Strategic Plan for 2019-2023 identifies 5 key performance areas: education, operations, community, communication, and convenience. Recreation is not one of them.). (R. I, 97, 98, 99-116) Defendant's 2015 Return on Investment Report evaluated the community impact of the Johnson County library system. There is no mention of recreational uses of the library. The focus is on education. (R. I, 97-98, 117-136)

Recreational use must be more than incidental to trigger the recreational use immunity. The Kansas Supreme Court has held that,

> Under K.S.A. 75–6104(o), if a school gymnasium is encouraged, intended, or permitted to be used for recess, extracurricular events, or other recreational, noncompulsory activities, then K.S.A. 75–6104(o) would apply, provided that the recreational use was more than incidental.

Jackson ex rel. Essien v. Unified School Dist. 259, 995 P.2d 844, 845 (Kan. 2000) (Syllabus ¶ 8) (emphasis added). Of course, the opposite is true. If the school gym is not opened to the public for recreational activities, the gym would not qualify for recreational use immunity. Defendant has failed to demonstrate that the library was an open area intended or permitted to be used for nonincidental recreational purposes at the time of Ms. Zaragoza's injuries. In *Jackson*, the Court noted that public property may have more than one intended use and stated, "[b]ecause those facts were not developed in the circuit court, we would have to speculate to determine the issue. Accordingly, remand is appropriate for the limited purpose of developing facts related to the intended or permitted use of the gymnasium." *Id.* at 995 P.2d at 852, 268 Kan. at 330.

The District Court summarily rejected Plaintiff's concerns that Defendant's attempt to expand recreational use immunity was a slippery slope leading to virtually unlimited recreational use immunity for virtually any government office. If the activities described in the Madrigal Affidavit qualify as a non-incidental recreational use, then any government building that chose to put "art" on its walls, to install sculptures, or to pipe music into its lobby for the enjoyment of its citizens who are waiting in line would be able to claim immunity. The Department of Motor Vehicles could claim its waiting area is recreational if it simply hangs paintings to be viewed by waiting taxpayers. The District Court summarily rejected Plaintiff's concern, but failed to explain how the activities described in the Madrigal Affidavit are fundamentally different or even recreational.

An activity does not become recreational merely because it is enjoyable. The *Jackson* court cited with approval an Illinois case that stated, "compulsory physical education and recreation have different aims: whereas the former seeks to instruct, the latter aspires merely to amuse. Accordingly, although some students may enjoy gym class, it cannot be said to be recreation." *Jackson*, 995. P.2d at 852 (citing *Ozuk v. River Grove Board of Education*, 281 Ill.App.3d 239, 217 Ill.Dec. 18, 666 N.E.2d 687 (1996)). The fact that the library presently hosts activities that may be enjoyable for some of the participants fails to meet Defendant's burden of proving a recreational purpose because the activities are fundamentally educational.

The District Court gave particular weight to an unreported Massachusetts case cited by Defendant. See, *Soto v. City of Worcester*, Not Reported in N.E.2d (2012) (Appendix, p. 51). Reliance on this case by Defendant and the District Court

is misplaced. Indeed, the case demonstrates why the Court of Appeals should reverse the District Court. In *Soto*, the plaintiff filed a personal injury action against the Worcester Public Library. The Worcester library filed a motion for summary judgment based on the Massachusetts recreational use statute. The Superior Court of Massachusetts ruled in favor of defendant basing its ruling on the following statutory definition of recreational use,

> (a) Any person having an interest in land including the **structures, buildings**, and equipment attached to the land, including without limitation, railroad and utility corridors, easements and rights of way, wetlands, rivers, streams, ponds, lakes, and other bodies of water, who lawfully permits the public to use such land for recreational, conservation, **scientific, educational**, environmental, ecological, **research**, religious, or **charitable purposes** without imposing a charge or fee therefor, or who leases such land for said purposes to the commonwealth or any political subdivision thereof or to any nonprofit corporation, trust or association, shall not be liable for personal injuries or property damage sustained by such members of the public, including without limitation a minor, while on said land in the absence of wilful, wanton, or reckless conduct by such person. . . .

Mass. Gen. Laws Ann. ch. 21, § 17C (West) (emphasis added).

Although the District Court described the Massachusetts statute as "similar", to K.S.A. 75-6104 (o), nothing could be further from the truth. The Massachusetts statute explicitly provided recreational use immunity for buildings and structures that are used for scientific, educational, research or charitable purposes. The Kansas statute does not include educational, charitable, and research activities under the recreational use immunity. We must consider that omission to be intentional as the statute is not ambiguous. *Johnson v. U.S. Food Service*, 312 Kan. 597, 600-601, 478 P.3d 776, 779 (2021).

Reasonable minds could and probably would reach different conclusions than the District Court as to whether the evidence supported a finding that Defendant's library qualified as a recreational use. The District Court's Statement of Uncontroverted Facts does not identify a single uncontroverted fact relating to a recreational use or purpose of Defendant's library on or around July 18, 2020. Such a use cannot be assumed or inferred. Because Defendant has not met its burden of proving an immunity under the Kansas Tort Claims Act, summary judgment should be denied.

II. THE DISTRICT COURT ERRED WHEN IT GRANTED SUMMARY JUDGMENT TO DEFENDANT AND HELD THAT RECREATIONAL USE IMMUNITY COULD BE EXTENDED TO DEFENDANT'S PUBLIC PARKING LOT ADJACENT TO DEFENDANT'S PUBLIC LIBRARY. K.S.A. 75-6104(O).

Even if the Court were to hold that Defendant's library meets the standard for recreational use immunity, that immunity cannot be extended to the parking lot where Plaintiff was injured. Defendant admits there is no recreational use of its parking lot. (R. III, 19) The District Court erred when it ruled, without evidentiary support, that Defendant's parking lot was integral to the library and entitled to recreational use immunity.

A. Standard of Review

Plaintiff incorporates by reference the Standard of Review discussed above with respect to Issue I. Supra, p. 12.

B. Preservation of All Issues

Plaintiff incorporates by reference its discussion regarding preservation of the issues with respect to Issue I. Supra, p. 14

C. Analysis and Argument

Defendant offered no evidence that the parking lot where Plaintiff was injured was ever intended or permitted to be used for recreational purposes. Indeed, Defendant denied that such a use exists in its Motion for Summary Judgment. (R. III, 19) Thus, Defendant's parking lot does not independently qualify for recreational use immunity. For recreational use immunity to apply to Defendant's parking lot, Defendant must establish a different basis for the immunity.

Kansas Courts have applied recreational use immunity to non-recreational areas that are adjacent to recreational properties if the non-recreational areas are integral to use of the recreational property. The Kansas Supreme Court has stated that an adjacent area is "integral" to a recreational use when its use is necessary to the recreational use. *Poston v. Unified Sch. Dist. No. 387, Altoona-Midway, Wilson Cnty.*, 286 Kan. 809, 817–18, 189 P.3d 517, 523 (2008). In *Poston*, the plaintiff was the father of a student. The father was injured in the school commons while picking his son up from basketball practice in the school gym. The Court noted, "The incentive to open to the gymnasium to the public (sic) for recreational use necessitates opening those areas integral to the gymnasium's use; in this case that included the commons." *Id.* at 817.

Recreational use immunity only applies to adjacent, non-recreational property if the non-recreational property is necessary to enable the recreational use. In an unpublished opinion, this Court held that the defendant was not entitled to recreational use immunity for an electrical box near the entrance to a park.

Cullison v. City of Salina, Kansas, 371 P.3d 374 (2016) (unpublished, see Appendix, p. 51). In *Cullison*, a young girl died after she slipped and fell onto an ungrounded electrical box that provided electricity to light the park and that also powered an electrical outlet. *Id.* The City failed to establish that the lights or electrical outlets were necessary to use of the park. *Id.* The Court stated that the issue of whether the electrical box was "integral" to use of the park was an issue that had to be left for a full airing of the evidence at trial. *Id.* This case is similar. Defendant offered no evidence that the library could not be used without the parking lot. This is not something the District Court can simply infer on summary judgment as it was required to resolve facts and inferences in favor of Plaintiff. Although the *Cullison* case does not have precedential value because it was unpublished, its persuasive reasoning is based on the *Poston* case.

In another opinion, this Court declined to extend recreational use immunity to a city street. In *Patterson v. Cowley County*, 388 P.2d 923, 53 Kan.App.2d 442 (2017) this Court declined to find 322nd Road to be integral to the use of the Kaw Wildlife Area despite the fact that the road dead ends in the Kaw Wildlife Area. The parties agreed that the Kaw Wildlife Area was recreational. The Court noted that the County had the burden to present undisputed facts establishing its claim for recreational use immunity, but the County failed to do so. *Id.* 388 P.2d at 942, 53 Kan.App.2d at 471. The Court noted, "If we were to adopt the County's position, the government could be immune from liability for any accident that occurred on public roads that eventually lead to a recreational area. The legislature

could not have intended for this provision to abrogate our government's duty to provide safe roads." *Id.*

This case is similar. Defendant has failed to offer undisputed evidence that the parking lot was necessary for use of the library. One need only consider the existence of urban libraries to realize that this is not an inference that can be made in favor of Defendant. Certainly, the legislature did not intend to abrogate Defendant's obligation to provide a safe parking lot. Nor did the legislature intend to extend recreational use immunity to all areas that are adjacent to recreational property. Streets and parking lots that abut recreational properties do not automatically receive immunity.

The *Poston* Court also highlighted a critical factor present in the cases where adjacent property received recreational use immunity. The Court stated,

> U.S.D. No. 387 is immune from liability under the recreational use exception of K.S.A.2007 Supp. 75–6104(o) for Poston's injury that occurred in the middle school's commons *while recreational activities were in progress* in the gymnasium.

Poston, at 819 (emphasis added). In every Kansas appellate case the undersigned has been able to locate where a court has applied recreational use immunity to an adjacent "integral" property, there was a contemporaneous recreational use in progress. There is no rational basis, no statute, nor any Kansas case law that would justify further extending the reach of recreational use immunity to include non-recreational use areas that happen to be adjacent to recreational property that is not being used recreationally at the time of injury.

In *Wilson v. Kansas State University*, 44 P.3d 454 (Kan. 2002), the Kansas Supreme Court applied the recreational use immunity to an injury that occurred in the restroom at a football stadium. The Court acknowledged that the restrooms had a non-recreational purpose but recognized that the restrooms were essential to the use of the football stadium in which they were located. *Id.* at 457. The *Wilson* plaintiff was present in the stadium for a recreational purpose at the time of the injury. Ms. Zaragoza's case is different. There is no evidence of recreational uses of Defendant's library at or near the time when Ms. Zaragoza was injured. Ms. Zaragoza was not engaged in a recreational use of the library.

In *Lane v. Atchison Heritage Conference Center, Inc.*, 283 Kan. 439, 153 P.3d 541 (2007), the Kansas Supreme Court granted immunity to a community center that was used on numerous occasions for recreational purposes and on other occasions for non-recreational purposes. The *Lane* plaintiff was injured on a loading dock of the facility. His injury occurred during a recreational activity and the Court applied recreational use immunity to the loading dock.

In *Nichols v. Unified Sch. Dist. No. 400*, 246 Kan. 93, 785 P.2d 986 (1990), the plaintiff was a football player injured in a grassy area between the practice field and locker room. He was injured while engaging in a recreation. The grassy area was integral to the recreational activity that was taking place. The grassy area did not become protected by immunity simply because it was near the football field. The school had immunity for the injury in the grassy area that was integral to a contemporaneous recreational use. In an unpublished opinion, the Kansas Court of Appeals reached a similar result in a case where a mother was injured walking

in a grassy area between fields while attending her daughter's soccer game. *Dye v. Shawnee Mission School District*, 184 P.3d 993 (2008) (unpublished, see Appendix p. 51).

Limiting recreational use immunity to non-recreational property that is integral and necessary to a concurrent recreational use or purpose makes sense. Liability is the rule; immunity is the exception. *Jackson v. USD 259, Sedgwick Cnty.*, 268 Kan. 322, 995 P.2d 944. To extend the recreational use immunity to the parking lot of a public library without a contemporaneous recreational use would blur boundaries of accountability. To grant immunity for the parking lot in this case would lower safety standards for public structures and would be inconsistent with the expectations of ordinary citizens. Ordinary citizens would not expect a lower safety standard to apply when parking near certain government buildings rather than others.

This Court should reverse the District Court's grant of summary judgment. Defendant offered no evidence of a recreational use of the parking lot where Plaintiff fell. Defendant offered no evidence that its parking lot was essential to a recreational use or purpose of Defendant's library. And Defendant offered no evidence of a recreational use occurring in its library at the time of Plaintiff's injuries. Consequently, there is no basis to apply the recreational use immunity to Defendant's parking lot.

III. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANT EVEN THOUGH PLAINTIFF PRESENTED MATERIAL FACTS THAT WOULD HAVE SUPPORTED A JURY FINDING THAT DEFENDANT'S NEGLIGENCE WAS GROSS AND WANTON.

Summary judgment should have been denied in this case. Even if recreational use immunity applied, Plaintiff offered evidence from which a trier of fact could find that Defendant was guilty of gross and wanton negligence.

A. Standard of Review

Plaintiff incorporates by reference the Standard of Review discussed above with respect to Issue I. Supra, p. 12. Additionally, he Kansas Supreme Court has held that summary judgment should be granted with caution in negligence cases. *Apodaca v. Willmore*, 306 Kan. 529, 533, 392 P.3d 529 (Kan. 2017) (citing *Fettke v. City of Wichita*, 264 Kan. 629, 632, 957 P.2d 409 (1998)). Whether a duty exists in a negligence case is a question of law over which the appellate courts have unlimited review. *Hammond* at 890. Whether a duty has been breached is a question of fact. *Hammond* at 890 (citing *South v. McCarter*, 280 Kan. 85, 94, 119 P.3d 1 (2005). The exception to the general rule against granting summary judgment in a negligence case applies if the only question presented is a question of law. *Hammond* at 890. Defendant has not argued it has no duty of care. Instead, Defendant argues that it was not guilty of gross and wanton negligence.

> Generally, the presence or absence of negligence in any degree is not subject to determination by the court on summary judgment, for such a determination should be left to the trier of fact. Only when reasonable persons could not reach differing conclusions from the same evidence may the issue be decided as a question of law. *Smith v. Union Pacific Railroad Co.*, 222 Kan. 303, 306, 564 P.2d 514 (1977).

Gruhin v. City of Overland Park, 17 Kan. App. 2d 388, 392, 836 P.2d, 1225 (1992)

B. Preservation of All Issues

Plaintiff incorporates by reference its discussion regarding preservation of the issues with respect to Issue I. Supra, p. 15.

C. Analysis and Argument

Even if recreational use immunity applied to Defendant's parking lot, Defendant would not be entitled to summary judgment if reasonable jurors could find that Plaintiff's injuries were caused by Defendant's gross and wanton negligence. As this Court has held, "The recreational use exception to the KTCA will not provide a governmental entity with immunity from liability for damages resulting from gross and wanton negligence." *Gruhin v. City of Overland Park,* 17 Kan. App. 2d 388, 392, 836 P.2d 1222, 1225 (1992).

Plaintiff has offered material evidence that supports a finding that Defendant was guilty of gross and wanton negligence. The *Gruhin* Court explains:

> A wanton act is something more than ordinary negligence but less than a willful act. It indicates a realization of the imminence of danger and a reckless disregard and indifference for the consequences. Acts of omission can be wanton since reckless disregard and indifference are characterized by failure to act when action is necessary to prevent injury. *Cerretti v. Flint Hills Rural Electric Co-op Ass'n,* 251 Kan. 347, Syl. ¶ 8, 837 P.2d 330 (1992). See also *Boaldin v. University of Kansas,* 242 Kan. 288, Syl. ¶ 2, 747 P.2d 811 (1987) (a wanton act indicates a realization of the imminence of danger and a reckless disregard or a complete indifference or an unconcern for the probable consequences of the wrongful act).

Id. (emphasis added).

In *Gruhin,* the plaintiff was injured while playing golf at the City's course. The plaintiff was driving a golf cart and drove into a deep hole that was present in the "rough" area of the golf course. Golf club personnel knew that one other person had been injured in the same location several weeks earlier. With this knowledge, the City marked the area around the hole with chalk. By the time Gruhin suffered his injury, the chalk lines were faint. *Gruhin,* at 1223. The *Gruhin*

Court declined to grant summary judgment for the City because it considered the presence or absence of any degree of negligence to be an issue for the trier of fact. *Gruhin* at 1225. The Court noted that reasonable minds could differ as to whether the preventative measure taken showed a reckless disregard for the danger posed by the hole. The Court declined to grant summary judgment despite evidence that the City had taken some action to warn of the dangerous condition.

In this case, Defendant had received complaints that its curbs and step downs were dangerous because of the uniformity of color. (R. I, 75; R. IV, 17) In response, Defendant applied vivid yellow paint to curbs near the library building to warn patrons of elevation change. *Id.* Defendant did not provide warning paint on the curbs where Ms. Zaragoza fell. (R. I, 77; R. IV, 19) Defendant could not articulate a reason for failing to provide the same protection for users of the parking lot. *Id.*

Defendant argues that the parking lot is integral (essential) to the use of Defendant's library, but it did not provide the same yellow warning paint for users of the lot as it did closer to the library building. Like the City of Overland Park in the *Gruhin* case, Defendant knew that its property contained a hidden danger. After Defendant received complaints about the dangerous condition and before Plaintiff was injured, it painted curbs next to its building with bright yellow paint. Unlike the Defendant in *Gruhin* who at least used chalk as a warning, Defendant did not make any attempt to warn users of the dangerous condition at the location where Plaintiff fell. (R. I, 77 and 80)

A reasonable juror could be expected to find that Defendant had advance knowledge of an imminent danger that harmed Plaintiff and that the Defendant demonstrated indifference or reckless disregard by failing to take any action to paint the curbs in the parking lot before Plaintiff was injured. In the *Gruhin* case, the City of Overland Park marked the dangerous area with chalk. In this case, Defendant did not take any action to correct the danger where Plaintiff fell until after Plaintiff suffered her serious injury. It is baffling that Defendant considers the parking lot integral to the library, but overlooked the very same risk with the parking lot curbs that it corrected closer to the library building.

Defendant admits that its plans for the Monticello Branch building and parking lot called for a 24-inch-high Walkers Low Catmint plant in the location where Plaintiff walked from the sidewalk to the library's parking lot (R. I, 77). Defendant admits that a plant of that type and size would have prevented Plaintiff from stepping into the dangerously and inconspicuously sloped parking lot surface that caused her injury. (R. I, 77; R. III, 385) Defendant did not have a plant in that location on the date of Plaintiff's injury (R. III, 10, 385) Defendant's corporate representatives could not explain why the Defendant either did not follow its building plans or did not replace the plant that would have prevented Plaintiff's injury (R. I, 80).

The evidence of the Defendant's gross and wanton negligence precludes summary judgment. Plaintiff's human factors expert, Dr. Acemyan, has testified in deposition and by affidavit that either a guard or the plant called for by the

plans approved by Ms. Sizemore or yellow paint on the curb or sloped area would have prevented Plaintiff's injuries. (R. I, 86-87, 90-93)

The District Court was required to resolve all facts and inferences in favor of Plaintiff. It did the opposite. The District Court stated in its summary judgment ruling,

> The color of the curb cannot be a basis for gross negligence for two reasons. First, Plaintiff acknowledged that she knew she was stepping off the curb onto the parking lot, even though the curb was unpainted. Second, Defendant painting the curb of the drop-off area, an area that receives inherently more foot traffic, is too factually distinct from a curb much further away from the entrance that was only accessible after cutting through mulch.

Order Granting Summary Judgment and Denying Motion to Amend, (R. I, 233, and 246) Whether Plaintiff knew she was stepping into the parking lot may go to the issue of comparative fault, but it does not bear on the issue of Defendant's gross negligence. Plaintiff testified that she was not aware of the dip of the library's parking lot where she stepped down. (R. III, 233) Defendant is guilty of gross negligence because it knew of the danger, knew the danger was not conspicuous to others, but chose to do nothing.

Defendant increased the risk for Plaintiff and other pedestrians by performing a partial fix of a known problem with its concrete curbs and walking areas. People such as Plaintiff rely on consistency to navigate an environment. (R. III, 98) The vivid yellow paint near the building implied that there was no danger where the paint was not present. The mixture of signals compounded the danger for pedestrians who could assume that the unpainted curbs approaching the

Defendant's library parking lot did not suffer from the same dangerous condition as the painted ones closer to the building. *Id.*

For all the above reasons, the District Court should have denied summary judgment. Defendant knew of a hidden danger, but Defendant failed to address it where the injury occurred. The fact that Defendant provided warning paint in other locations demonstrates its understanding of the danger. Defendant failed to act when action was necessary to prevent an injury. See, *Gruhin,* 17 Kan. App. 2d at 392, 836 P.2d at 1225.

IV. THE DISTRICT COURT ERRED WHEN IT RESOLVED DISPUTED FACTS AND INFERENCES IN FAVOR OF DEFENDANT, THE PARTY SEEKING SUMMARY JUDGMENT.

When it granted summary judgment for Defendant, the District Court made impermissible assumptions and inferences and resolved factual issues in Defendant's favor. Defendant did not provide evidence sufficient for a trier of fact to find recreational use immunity existed on July 18, 2020. Moreover, Plaintiff offered material evidence sufficient for a trier of fact to rule that Defendant was guilty of gross and wanton negligence. On summary judgment, all facts and inferences must be resolved in favor of the non-moving party.

A. Standard of Review

Plaintiff incorporates by reference the Standard of Review discussed above with respect to Issue I. Supra, p. 13.

B. Preservation of All Issues

Plaintiff incorporates by reference its discussion regarding preservation of the issues with respect to Issue I. Supra, p. 15. This issue is one that arose when the

Court granted summary judgment. The parties and the Court discussed the standard for summary judgment in the briefing and oral argument. (R.I, 20, 238-39, R. III, 13)

C. Analysis and Argument

The District 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." *Hammond v. San Lo Leyte VFW Post 7515*, 466 P.3d 886, 889 (Kan. 2020). The District Court failed to follow this standard when it entered summary judgment.

The District Court resolved inferences in favor of Defendant and, in at least two instances, created "facts" to support its summary judgment ruling. The District Court attempts to distinguish the area where Defendant painted the curbs by claiming it was an area with "inherently more foot traffic". There is no evidence in the record regarding comparative foot traffic. Next, the District Court posits that the area where Plaintiff fell was "much further from the entrance", but it doesn't identify any facts that support that assumption or explain its relevance. Then, the District Court ruled that the area where Plaintiff fell was "too factually distinct." The District Court does not explain what facts support this conclusion. In reality, this conclusion is inconsistent with District Court's finding that Defendant's parking lot was integral to Defendant's library. Finally, the District Court suggests that Plaintiff could only reach the parking lot after cutting through mulch. This is inconsistent with the photos in the record. (R. I, 31, 55-73, 100 (taken after post-accident remedial measures), 214, 232, 233, 237) The District Court appears to have

disregarded the testimony from Defendant's corporate representative that if Defendant had planted a 24-inch-high Walkers Low Catmint plant in the mulch as required by the architectural plans, Plaintiff would have been unable to step into the dangerously and inconspicuously sloped area where she fell.

There is no evidence of any recreational use or purpose of Defendant's library or parking lot on the date of Plaintiff's injury and Defendant cannot point to any. Nevertheless, the Court inferred and then held that the undated evidence offered by Defendant proved a recreational use or purpose existed at the time of Plaintiff's injury. Defendant admits that the parking lot does not have a recreational use. Defendant did not provide evidence to support its argument that its parking lot is integral to a recreational use of its library. Despite the lack of evidence, the District Court inferred that there was a factual basis to hold that Defendant's parking lot was integral for a recreational use of Defendant's library.

With respect to the issue of gross and wanton negligence, Defendant admits that individuals had complained that it was difficult to discern the step down from sidewalks and curbs to the walking and driving areas. (R. I, 75, R. IV, 77) Defendant admits that it applied bright yellow paint to the curbs near its library building in response to the complaints, but it did not do so in the parking lot that it claims is integral to the library. (R. I, 75) Defendant admits it doesn't know why it did not paint the curbs in its parking lot. (R. I, 77; R. III, 382) Defendant admits its architectural plans called for a plant at the location where Plaintiff stepped. (R. I, 77) Defendant admits that if it had placed the plant where the architectural plans

designated, Plaintiff could not have stepped into the sloped area that caused her injury. (R. I, 78)

Plaintiff testified that she could not see the slope when she stepped off the curb. The above evidence demonstrates that Defendant knew the curbs near the library and parking lot were in a dangerous condition. Defendant showed complete indifference to correcting that danger where Plaintiff fell. (R. I, 77, 80) There is evidence that the danger is what caused Plaintiff's injuries. (R. III, 41) Yet the District Court ruled that a jury could not find that Defendant's negligence was gross and wanton. The District Court interpreted the facts in the manner most favorable to Defendant and resolved several factual assumptions and inferences in favor of Defendant.

> As a general rule, the presence or absence of negligence in any degree is not subject to determination by the court on summary judgment, for such a determination should be left to the trier of fact. Only when reasonable persons could not reach differing conclusions from the same evidence may the issue be decided as a question of law. *Smith v. Union Pacific Railroad Co.*, 222 Kan. 303, 306, 564 P.2d 514 (1977).

Gruhin v. City of Overland Park, 17 Kan. App. 2d 388, 392, 836 P.2d 1222, 1225 (1992).

A review of the District Court's "Statement of Uncontroverted Facts" demonstrates several places where the court made impermissible inferences and resolved disputed facts in favor of Defendant. (R. I, 234-238) Each example below is quoted from the District Court's order granting summary judgment and is followed by a response with references to the record that show where the court erred or made impermissible inferences:

"6. In addition to allowing patrons to check out books, magazines, movies, music, and other materials for their personal use, the Library features art installations and sculptures by local artists." (R. I, 235) (Court's Statement of Uncontroverted Facts)

Response: Defendant relied on the Affidavit of Christian Madrigal to support its claim that its library features art installations and sculptures by local artists. A jury could conclude that these items are educational, not recreational. Even if these items were deemed recreational, Mr. Madrigal's Affidavit fails to show such a use or purpose existed on the date of Plaintiff's injury, or any other date. (R. III, 47) The District Court cannot merely assume, in the absence of evidence, that these items were offered or available on July 18, 2020. The District Court and Mr. Madrigal both referred to allegedly recreational uses and purposes in the present tense. Neither refer to such uses and purposes in July of 2020.

"7. The Library includes a dedicated story room for children when is open to the public when not in use and an outdoor children's storywalk." (sic) (R. I, 235) (Court's Statement of Uncontroverted Facts)

Response: The Court relied on the Affidavit of Christian Madrigal to support this claim. This statement suffers from the same defect as number 6 above.

"8. The Library also hosts community events like toddler and family story times, tabletop gaming nights, book clubs, events that allow children to read stories to therapy dogs, an after-hours event called "Teen Takeover," in which teenagers work together to solve a mystery using puzzles and riddles, and yoga for preschoolers." (R. I, 235)

Response: Defendant relied on the affidavit of Christian Madrigal to support this claim. This statement suffers from the same defect as numbers 6 and 7 above.

"9. Library branch manager Christian Madrigal reviewed every incident report prepared at the Library from the date it opened to present, and determined the Library has no record of any other person suffering a fall at the specific location where Brenda Zaragoza fell on July 18, 2020, or any record of any other person suffering a fall in the parking lot at or near any other storm drain." (R. I, 235)

Response: Christian Madrigal testified in his deposition that he does not know how many people tripped or fell at the location but were not injured. (R. I, 29, 67, 68; R. IV, 89 (Madrigal deposition, pp. 50, 71-73)) The court's statement of fact fails to acknowledge that no records exist of falls because no such records were kept. The District Court infers a lack of notice even though Defendant's corporate representative Georgia Sizemore testified that Defendant applied vivid yellow paint to curbs near the building because pedestrians complained of a dangerous condition. R. I, 211. The danger was recognized even before Plaintiff's injury had occurred.

The District Court also stated, "Putting aside whether borrowing books and movies can be considered recreation (the Court can see arguments either way, but will refrain from holding one way or the other), other activities that transpired within the walls of the Library more overtly fit the description of recreation. The Library allows for art installations and sculptures by local artists to be displayed for patrons to look at, there is a designated story room for children, there are events

such as toddler and family story times, tabletop gaming nights, book clubs, events that allow children to read stories to registered therapy dogs, an after-hours event called "Teen Takeover," and yoga for preschoolers." (R. I, 243)

Response: Once again, the District Court inferred a recreational use or purpose existed at Defendant's library on July 18, 2020. Yet, Defendant offered no evidence of any activity or purpose that existed at the time of Plaintiff's injury. Furthermore, on its website Defendant described the activities in educational terms creating a fact issue. As stated above, Mr. Madrigal's testimony and his affidavit only related to activities and purposes that he claims were occurring at the time of his testimony and affidavit. There is no evidence by affidavit or deposition of a recreational use or purpose at Defendant's library or parking lot on or around July 18, 2020.

The District Court further stated that there was insufficient evidence of gross and wanton negligence,

> The color of the curb cannot be a basis for gross negligence for two reasons. First, Plaintiff acknowledged that she knew she was stepping off the curb onto the parking lot, even though the curb was unpainted. Second, Defendant painting the curb of the drop-off area, an area that receives inherently more foot traffic, is too factually distinct from a curb much further away from the entrance that was only accessible after cutting through mulch. Importantly, painting a nearby curb is not evidence that Defendant knew that the slope of the parking lot in the location where Plaintiff fell was a dangerous condition. Painting the nearby curb also does not suggest that Defendant ignored any known dangers. There is no evidence that any other patron fell in the area Plaintiff fell in, or fell in any other area that was sloped to facilitate drainage.

(R. I, 246)

Response: The District Court is correct that Plaintiff knew she was stepping into Defendant's parking lot. But, Plaintiff pled that she did not perceive the slope of the parking lot. (R. I, 7, 8) She testified that there was an unexpected dip in the parking lot and no warning of the condition. (R. III, 41) Defendant's corporate representative admitted the slope might not be conspicuous. (R. I, 161) There is no evidence or reference in the record to the amount of foot traffic where the curb was painted or the amount of foot traffic where Plaintiff fell. The District Court inconsistently concludes that the curb where plaintiff fell was too factually distinct from the curbs that were painted while also finding that the parking lot is integral to the library.

The District Court suggested that there was no evidence that the Defendant knew about the slope in the parking lot. Defendant's corporate representative Juan Lopez-Tamez was aware of the slope when the building was being completed. R. III, 381. Regardless, the slope is a condition that Defendant created, and knowledge is attributed to Defendant for conditions it created. As a matter of law, when a property owner creates a condition, it is presumed that they have knowledge of the condition. See, PIK 126.04 and *Magness v. Sidmans Restaurants, Inc.*, 195 Kan. 30, 402 P.2d 767 (Kan. 1965).

The District Court's comment about the slope of the parking lot is a focus on the wrong issue. There is no dispute that Defendant knew that pedestrians had trouble discerning the elevation changes between sidewalks, curbs, and parking/walking areas due to the uniformity of color. Whether or not Defendant considered the slope of the parking lot where Plaintiff fell, Defendant knew about

the dangers of the curbs and Defendant elected to do nothing to correct that issue. Even if Defendant was unaware of the additional danger caused by the sloped parking lot, it needed to address the dangers it admits it knew about.

Reasonable jurors could conclude that Defendant's inaction rose to the level of gross and wanton negligence and that this negligence caused Plaintiff's injuries.

V. THE DISTRICT COURT ERRED WHEN IT HELD THAT PLAINTIFF HAD NOT SUFFICIENTLY PLED GROSS AND WANTON NEGLIGENCE AND WHEN IT DENIED PLAINTIFF'S MOTION TO AMEND TO PLEAD ADDITIONAL EVIDENCE OF GROSS AND WANTON NEGLIGENCE THAT DEFENDANT HAD FAILED TO DISCOSE UNTIL SHORTLY BEFORE PLAINTIFF FILED HER MOTION TO AMEND.

Plaintiff's original Petition was sufficient under notice pleading principles to support Plaintiff's claim that Defendant was guilty of gross and wanton negligence. If this Court disagrees, the District Court still erred by not permitting Plaintiff to amend her Petition. In its responses to written discovery, Defendant concealed its active knowledge of the dangerous condition that injured Plaintiff. After Defendant's corporate representative testified in a manner that contradicted Defendant's written discovery responses, Plaintiff promptly moved to amend her Petition to add specific allegations of gross and wanton negligence. Defendant is not prejudiced by the addition of new allegations based on information previously concealed by Defendant.

A. Standard of Review

Plaintiff incorporates by reference the Standard of Review discussed above with respect to Issue I. Supra, p. 13.

B. Preservation of All Issues

Plaintiff incorporates by reference its discussion regarding preservation of the issues with respect to Issue I. Supra, p. 15. Additionally, Plaintiff filed a Motion to Amend setting forth the legal and factual basis for the Motion to Amend as well as argument that the original Petition was sufficient to support a claim of gross and wanton negligence. (R. I, 172) Plaintiff also filed a Response in Opposition to Defendant's Motion to Strike Fourth Supplemental Interrogatory Answer that discussed Defendant's prior concealment of its knowledge of the danger that caused Plaintiff's injury. (R. I, 219)

C. Analysis and Argument

The District Court denied Plaintiff's motion to amend on the basis that it was untimely and that her allegations were insufficient for a jury to find that Defendant was guilty of gross and wanton negligence. The District Court erred on both points.

1. Timeliness of the Motion to Amend

Plaintiff's motion to amend should have been granted based on the procedural history and context of the case. Both Kansas and federal law favor allowing amendments to pleadings so that cases can be resolved on their merits. Plaintiff moved to amend her Petition after she discovered new evidence that had previously been concealed or withheld by Defendant.

"As a general rule, amendments to pleadings are favored in law and should be allowed liberally in the furtherance of justice to the end that every case may be presented on its real facts and determined on its merits." *Walker v. Fleming Motor Co.*, 195 Kan. 328, 330 (1965). "This principle has been followed in Kansas under

both the old and the new codes of civil procedure." *Id.* The Kansas Supreme Court reiterated, in the context of a motion to amend, that "[i]f the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits." *Johnson v. Board of Pratt County Comm'rs*, 259 Kan. 305, 328 (1996) (quoting *Foman v. Davis*, 371 U.S. 178,182 (1962)).

"The court should freely give leave to amend when justice so requires." *Tubbesing v. Kansas Republican Party*, No. 21CV1577, 2022 WL 1093494, at *4 (Kan. Dist. Ct. Mar. 03, 2022). "Amendments are permitted before during and after trial" under K.S.A. 60-215. *Commercial Credit Corporation v. Harris*, 212 Kan. 310, 312 (1973). "The Court should freely permit amendments when doing so will aid in presenting the merits." *Kansas Fire and Safety Equipment v. City of Topeka*, No. 2014-CV-156, 2019 WL 8168205, at *1 (Kan. Dist. Ct. Feb. 13, 2019) (citation omitted). Because the gross and wanton nature of Defendant's conduct is a key issue in this case, Plaintiff should be given an opportunity to present evidence on that topic. *Johnson v. Board of Pratt County Comm'rs*, 259 Kan. 305, 328 (1996).

The District Court contended that Plaintiff's Motion to Amend was untimely. Plaintiff filed her original Petition on August 10, 2021 and she served written discovery with her Petition. On April 15, 2022, the District Court entered a scheduling order setting a deadline for motions to amend of May 20, 2022 and a discovery deadline of December 16, 2022. (R. I, 15, 19) Plaintiff filed her Motion to Amend on February 3, 2023, two weeks after obtaining deposition transcripts that contained the newly discovered evidence. (R. III, 172)

Plaintiff was not dilatory in filing her Motion to Amend. Plaintiff served written discovery on Defendant with her Petition. Defendant's discovery responses were inaccurate and misleading considering the later testimony of its corporate representatives on January 4 and 5, 2023. Whether it was inadvertent or intentional, Defendant concealed information from Plaintiff that would have enabled her to amend her Petition within the deadline set by the District Court. Although it is important to note that Defendant did not explicitly plead the recreational use immunity in its answer. (R. I, 12)

In Interrogatory 4, Plaintiff asked, and Defendant answered, as follows:

> 4. Identify any warnings, whether verbal or written (such as by a sign or otherwise) which were given to the Plaintiff specifically, and/or generally to invitees to the Premises before the incident concerning the condition which caused or contributed to the incident.
>
> **ANSWER: Defendant is unaware of any warning given to Plaintiff or other invitees, and explicitly denies the existence of any condition the premises that would require such a warning.**

See, (R. I, 222)

On January 5, 2023, Defendant's corporate representative, Georgia Sizemore, admitted it had painted the curbs closer to the building with yellow warning paint because pedestrians could not clearly discern the step down from the sidewalk to the street. (R. I, 75) And, Defendant did not provide a similar warning for the curbs that were located just a few yards away in the parking lot used by library patrons. (R. I, 75, 77 and 80)

Defendant admitted in discovery that Georgia Sizemore was one of their employees involved in the design and/or construction of the sidewalks, parking lot, curbs, and surrounding areas of the premises. (R. I, 222) Presumably, Defendant discussed the case with Ms. Sizemore before identifying her.

> 26. Please identify each of your employees and/or agents who were involved in the design and or construction of the sidewalks, parking lot, curbs, and surrounding areas of the premises.
>
> **ANSWER: Georgia Sizemore, Strategic Facilities Manager.**

Later, the Defendant was asked to "Admit that on July 18, 2020, the Premises had yellow paint on the curbs in the locations represented in Exhibit 1." Defendant's response was misleading and inaccurate. (R. I, 223 and 232)

> 16. Admit that on July 18, 2020, the Premises had yellow paint on the curbs in the locations represented in **Exhibit 1.**
>
> **ANSWER: Admitted, although the yellow paint depicted in Exhibit 1 denotes a no-parking zone, not that a warning as to the existence of a curb or as to the slope of the walking space.**

In her deposition, Ms. Sizemore testified that, before the date Ms. Zaragoza fell, yellow paint was applied to curbs near the building due to a safety concern about the visibility of the step down from the curb. (R. I, 75) Defendant's response to Request for Admission 16 is contradicted by the testimony of the Defendant's corporate representative.

Defendant's discovery responses painted the picture that it was unaware of any dangerous condition of the curbs and sidewalks before Ms. Zaragoza's injury. Plaintiff reasonably believed Defendant had provided all information requested

in discovery. To the contrary, Defendant knew of the dangerous condition at the library and had painted a warning on some of the dangerous curbing, but not the curbing where Ms. Zaragoza fell. (R. I, 67 and 75)

It was not until January 5, 2023 that Defendant's corporate representative, Georgia Sizemore, admitted that Defendant had applied yellow paint to curbs near the building due to the same lack of conspicuity that was also present in the area where Ms. Zaragoza fell and suffered her injuries. (R. I, 75) The next day, corporate representative, Christian Madrigal, gave similar testimony. (R. IV, 77)

Defendant characterizes Plaintiff's supplemental interrogatory response as a "late disclosure." Yet, Plaintiff's supplemental interrogatory response merely repeats what Defendant's corporate representative disclosed for the first time on January 5, 2023. Plaintiff did not receive the deposition transcript of the corporate representative Georgia Sizemore until January 19, 2023. Frankly, Defendant should have supplemented its discovery responses following the depositions of Ms. Sizemore and the other corporate representatives, but it did not do so. While it is entirely possible that Defendant's employees did not communicate this important information to their counsel earlier in the discovery process, that doesn't prejudice Defendant, but Plaintiff. This was discussed in depth at the oral argument on the summary judgment motion and motion to amend. (R. II, 35-37)

In essence, Defendant is asking the Court to prevent Plaintiff from using evidence Plaintiff obtained through a deposition of Defendant's own corporate representative. The Library wants to be rewarded for not disclosing what it knew earlier in the discovery process.

The error in the Defendant's logic is apparent by reviewing *Olathe Mfg., Inc. v. Browning Mfg.*, 259 Kan. 735, 915 P.2d 86 (1996). In *Olathe Mfg.*, The Kansas Supreme Court pointed out that the plaintiff had changed its lost profits theory based on new information the plaintiff had developed. The plaintiff in *Olathe Mfg.* did not disclose its new information or new theory to defendant until shortly before trial thereby prejudicing the defendant. The Court distinguished that situation from *New Dimensions Products, Inc. v. Flambeau Corp.*, 17 Kan.App.2d 852, 859, 844 P.2d 768 (1993). In the *New Dimensions* case, the Court liberally allowed plaintiff to use the evidence and inferences used to prove lost profits because "the defendant controlled most of the documentation needed to prove lost profits." *Olathe Mfg., Inc.*, 259 Kan. at 767, 915 P.2d at 105 (emphasis added). The *New Dimensions Products* court stated,

> After the trial court had an opportunity to review the newly reported discovery documents finally disclosed by appellant it ruled: "[A]ny and all materials that have been discovered due to the court's order after the plaintiff rested in this case only evidence that supports the plaintiff's position will be allowed to be presented. All other will be denied."

New Dimensions Prod., Inc. v. Flambeau Corp., 17 Kan. App. 2d 852, 861, 844 P.2d 768, 775 (1993). The *New Dimensions* court affirmed the trial court's decision to allow only the plaintiff to use information produced late by the defendant. That is precisely the situation here. The Defendant's corporate representative Georgia Sizemore had the information at issue, the Defendant controlled the information, and the Defendant denied that information existed until January 5, 2023. Plaintiff does not have a new theory about how she was injured. Defendant cannot claim

surprise or prejudice when Plaintiff seeks to use information Defendant failed to disclose in written discovery, but its corporate representative revealed under cross examination.

2. Sufficiency of the Allegations of Defendant's Gross and Wanton Negligence

In her Petition for Damages, Plaintiff pled that Defendant created a dangerous condition that caused Plaintiff's injuries. Specifically, Plaintiff pled that the difficult to detect elevation of the curb and slope of the parking lot caused her injuries. (R. I, 7-9) (Petition, ¶¶ 11, 12, 19, 21). Plaintiff pled that Defendant knew of the dangerous condition. (R. I, 8 (Petition, ¶ 17). When she filed suit, Plaintiff did not know that Defendant had received complaints about the dangerous condition. Plaintiff pled that, Defendant failed and/or refused to remedy the condition, or provide a notice, warning, barrier or barricade to prevent patrons from tripping, falling, or losing their balance on the dangerous curb and adjacent parking lot surface. (R. I, 8 (Petition, ¶ 18, 20).

The District Court ruled that Plaintiff's Petition was insufficient to support a claim of gross and wanton negligence at trial and denied Plaintiff leave to amend on the basis that the facts Plaintiff added would not support a finding of gross and wanton negligence at trial. (R. I, 245-47) The District Court erred on both points.

As the Kansas Court of Appeals noted,

> A wanton act is something more than ordinary negligence but less than a willful act. It indicates a realization of the imminence of danger and a reckless disregard and indifference for the consequences. Acts of omission can be wanton since reckless disregard and indifference are characterized by failure to act when action is necessary to prevent injury. *Cerretti v. Flint Hills Rural Electric Co-op Ass'n*, 251 Kan. 347,

> Syl. ¶ 8, 837 P.2d 330 (1992). See also *Boaldin v. University of Kansas*, 242 Kan. 288, Syl. ¶ 2, 747 P.2d 811 (1987) (a wanton act indicates a realization of the imminence of danger and a reckless disregard or a complete indifference or an unconcern for the probable consequences of the wrongful act).

Gruhin v. City of Overland Park, 17 Kan. App. 2d 388, 392, 836 P.2d 1222, 1225 (1992) (emphasis added). In the motion to amend, Plaintiff offered admissions from the deposition testimony of Defendant's corporate representative. Ms. Sizemore is an architect employed by Defendant. She testified that Defendant painted the curbs near the library building because,

> "there was some folks having trouble in this area here, which is the drop-off area in front of the building. This is a concrete sidewalk here (indicating), and then it's a concrete pull-off as well, and I remember people saying that people were walking off that step, that curb step, without realizing there was a step there because the concrete, there wasn't enough differential. Fresh concrete, it's really hard to tell that curb area, and I'm experiencing that as I get older, so I understand that."

(R. I, 75). She also admitted that Defendant did not paint the curb in the area where Ms. Zaragoza fell before the date of her fall (R. I, 77; R. IV, 19) Defendant failed to act to protect individuals using in the parking lot from precisely the same danger on a sidewalk that runs from the library building to the parking lot. (R. I, 232) Defendant could not articulate a reason for failing to provide this visible warning. *Id.*

Defendant also failed to plant a 24-inch-high bush that would have prevented Plaintiff from stepping in the area where the parking lot was deceptively sloped. (R. I, 77; R. III, 385) Defendant does not know why the plant was not present on the date of Plaintiff's injury. (R. I, 80) Defendant does not have

any checklist or other method of regularly verifying the safety of its parking lot. (R. I, 147, 168-171)

Taken together, these admissions by Defendant are sufficient for a jury to find that Defendant knew about a danger and recklessly disregarded it or was indifferent to it. The question is not whether this court would lean that way, but whether a reasonable jury could find reckless disregard or indifference.

The *Gruhin* case provides a helpful example. The Court held that reasonable minds could differ as to whether Overland Park employees displayed reckless disregard of a known danger when they only applied a chalk warning on a hole. *Gruhin*, 17 Kan. App. 2d at 392-394, 836 P.2d at 1225, 1226. Similar to the *Gruhin* case, Plaintiff offered evidence of Defendant's knowledge of the dangerous condition, evidence that Defendant failed to warn, guard, or repair the condition for the safety of pedestrians, and evidence that Defendant has no idea why it failed to provide the painted warning, or the bush called for by the plans. Unlike the *Gruhin* defendant, the Defendant in this case made no effort to alleviate the danger where Plaintiff fell.

Plaintiff's evidence is sufficient for a jury to find gross and wanton negligence. Considering Defendant's concealment of its knowledge of the dangerousness of the sidewalks and curbs, Plaintiff's motion to amend should be granted. Defendant should not be permitted to gain a litigation advantage by failing to disclose information from Plaintiff in discovery regardless of whether that failure was intentional or inadvertent. To rule otherwise would be to send a

message that if parties can conceal information until after the deadline passes for a motion to amend, they are in the clear.

CONCLUSION

For the above reasons, Plaintiff requests the Court reverse the District Courts grant of summary judgment and remand the case for additional discovery.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies the above document was filed via facsimile to (785) 296-1028 on October 25, 2023, with the Appellate Clerk for the Kansas Court of Appeals. A copy was also emailed as follows:

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APPENDIX (Unpublished)

Cullison v. City of Salina, Kansas, 371 P.3d 374 (2016)

Dye v. Shawnee Mission School District, 184 P.3d 993 (2008)

Soto v. City of Worcester, Not Reported in N.E.2d (2012)

371 P.3d 374 (Table)
Unpublished Disposition
This decision without published opinion is referenced in the Pacific Reporter. See Kan. Sup. Ct. Rules, Rule 7.04.
Court of Appeals of Kansas.

Jonni CULLISON, et al., Appellants,

v.

CITY OF SALINA, KANSAS, Appellee.

No. 114,571.

May 27, 2016.

Review Denied June 2, 2017.

Appeal from Saline District Court; William B. Elliott, Judge.

Attorneys and Law Firms

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James P. Nordstrom and Andrew D. Holder, of Fisher, Patterson, Sayler & Smith, L.L.P., of Topeka, for appellee.

Before HILL, P.J., STANDRIDGE and ATCHESON, JJ.

MEMORANDUM OPINION

PER CURIAM.

*1 This is a tort action arising out of the death of 12–year–old Jayden Hicks, who suffered catastrophic injuries when she slipped and fell on an electrical junction box on a main street in Salina. Wires in the box had shorted out, and the absence of a ground wire caused the metal housing to become electrified. The Saline County District Court granted summary judgment to Defendant City of Salina based on the recreational use exception to the Kansas Tort Claims Act, K.S.A. 75–6101 *et seq.*, because the junction box is located at the mouth of a small downtown park and provides electricity for lights in the park and along the street. We find disputed issues of material fact as to the applicability of the exception and, therefore, reverse and remand for further proceedings.

Factual Background and Procedural History

Given the narrowness of the issue on appeal, we may briefly state the pertinent facts. We do so favorably to Plaintiffs Jonni Cullison and Jaymie Hicks, Jayden's parents, who have sued on behalf of their daughter's estate and her heirs. Looking at the evidentiary record that way conforms to our standard of review for summary judgments. *See Bouton v. Byers*, 50 Kan.App.2d 35, 36–37, 321 P.3d 780 (2014).

During the early evening of May 29, 2013, Jayden was playing with her two siblings and two of their friends in and around Campbell Plaza in downtown Salina. Campbell Plaza is described as a "pocket park" adjacent to Santa Fe Avenue and includes a stage and an open area for people to mingle. Jayden apparently slipped in a puddle that had formed after a rainstorm. She fell on a junction box that is flush with the sidewalk at an entrance to Campbell Plaza. The metal cover of the junction box had become electrically charged with a high voltage. Jayden's body absorbed the charge, and several people trying to rescue the child were severely jolted when they touched her. Firefighters called to the scene were able to pry Jayden from the junction box. Although Jayden then received immediate medical care, her injuries were fatal. She died on December 31, 2013.

The junction box had been installed in the 1980s by a company the City hired to do electrical work in the downtown area. The record evidence indicates the City did not inspect the wiring inside the box then and had not done so until just after Jayden was hurt. An inspection at that time showed that two live wires within the box had come into contact with each other, causing the electrical current to flow into the metal housing of the box. The inspection also revealed no ground wire had been installed. The evidence on summary judgment indicates that use of a ground wire would have conformed to accepted standards for electrical work at the time the junction box was placed and that had a ground wire been included, the charge created when the live wires came into contact would have tripped a breaker cutting off power to the junction box.

The junction box is located on a strip of concrete forming part of the sidewalk on Santa Fe. The concrete strip runs along the entrance to Campbell Plaza and the storefronts on Santa Fe. Closer to the street, the sidewalk consists of decorative bricks. Campbell Plaza also appears to be surfaced with the same type of decorative brick. A photograph showing the junction box, the entrance to Campbell Plaza, and the sidewalk and

storefronts on Santa Fe was submitted to the district court as part of the evidentiary record on summary judgment. The junction box provides electricity for decorative lights in the Plaza and along Santa Fe. One or more electrical outlets on a concrete planter and bench framing part of Campbell Plaza are powered through the junction box.

*2 Plaintiffs filed their tort action on February 19, 2014, and they amended the petition twice. They sued the City of Salina, the manufacturer of the junction box, and the company that installed it. Plaintiffs and the private defendants reached a confidential out-of-court disposition, so those companies have been dismissed from the case. The City has asserted various grounds that would limit or defeat liability, including the recreational use immunity under the KTCA, K.S.A. 75–6104(o). Following extensive discovery, Plaintiffs filed a motion and supporting memorandum for partial summary judgment asking the district court to find the City was not entitled to recreational use immunity as a matter of law. The City filed a memorandum in opposition and a cross-motion requesting that it be granted immunity as a matter of law. The district court later issued a written decision granting the City's cross-motion and entering judgment in its favor. Plaintiffs have timely appealed the judgment in favor of the City.

Legal Analysis

Standard of Review on Summary Judgment

A party seeking summary judgment has the obligation to show, based on appropriate evidentiary materials, there are no disputed issues of material fact and judgment may, therefore, be entered in its favor as a matter of law. *Shamberg, Johnson & Bergman, Chtd. v. Oliver,* 289 Kan. 891, 900, 220 P.3d 333 (2009); *Korytkowski v. City of Ottawa,* 283 Kan. 122, Syl. ¶ 1, 152 P.3d 53 (2007). In essence, the movant argues there is nothing for a jury or a trial judge sitting as factfinder to decide that would make any difference. The party opposing summary judgment must then point to evidence calling into question a material factual representation made in support of the motion. *Shamberg,* 289 Kan. at 900; *Korytkowski,* 283 Kan. 122, Syl. ¶ 1. If the opposing party does so, the motion should be denied so a factfinder may resolve that dispute. In addressing a request for summary judgment, the district court must view the evidence in the light most favorable to the party opposing the motion and give that party the benefit of every reasonable inference that might be drawn from the evidentiary record. *Shamberg,* 289 Kan. at 900; *Korytkowski,* 283 Kan. 122, Syl. ¶ 1. An appellate court applies the same standards in reviewing the entry of a summary judgment. The Kansas Supreme Court has reiterated those principles in *Thoroughbred Assocs. v. Kansas City Royalty Co.,* 297 Kan. 1193, 1204, 308 P.3d 1238 (2013).

Because entry of summary judgment amounts to a question of law—it entails the application of legal principles to uncontroverted facts—an appellate court owes no deference to the trial court's decision to grant the motion and review is unlimited. See *Adams v. Board of Sedgwick County Comm'rs,* 289 Kan. 577, 584, 214 P.3d 1173 (2009); *Golden v. Den–Mat Corporation.,* 47 Kan.App.2d 450, 460, 276 P.3d 773 (2012). Likewise, merely because each party in a case has filed a motion for summary judgment, the district court has no broader authority to grant one of the motions. Each motion must be separately and independently reviewed using the standards we have outlined. *Wheeler v. Rolling Door Co.,* 33 Kan.App.2d 787, 790–91, 109 P.3d 1255 (2005); *Jones v. Noblit,* No. 100,924, 2011 WL 4716337, at *1 (Kan.App.2011) (unpublished opinion). In short, the filing of cross-motions does not afford the district court a license to decide a case on summary judgment.

*3 At trial, a government entity asserting immunity under one of the KTCA exceptions has to prove its entitlement to that protection. *Soto v. City of Bonner Springs,* 291 Kan. 73, 78, 238 P.3d 278 (2010); *Jackson v. U.S.D. 259,* 268 Kan. 319, Syl. ¶ 3, 995 P.2d 844 (2000). A party seeking summary judgment on an issue on which it bears the burden of proof must present uncontroverted facts establishing its right to a judgment as a matter of law. *Golden,* 47 Kan.App.2d at 497 (A party asserting an affirmative defense "has an obligation to come forward with evidence on summary judgment that would allow a jury to find those facts necessary to show" the defense applies.); *Mickelson v. New York Life Ins. Co.,* 460 F.3d 1304, 1311 (10th Cir.2006) (if defendant bears ultimate burden of persuasion on issue, defendant must come forward with facts on summary judgment that would allow a jury finding in its favor). The moving party, then, must do more than argue the opposing party cannot disprove the issue. See *Celotex Corp. v. Catrett,* 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Fitzpatrick v. City of Atlanta,* 2 F.3d 1112, 1115–16 (11th Cir.1993) (explaining difference in required showing for summary judgment depending on whether moving party bears burden of proof at trial).

KTCA Legal Principles

As we have indicated, what's before us turns on the proper interpretation and application of the recreational use

exception to governmental liability under the KTCA. The exception provides:

> "A government entity ... 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. 75–6104(o).

Before discussing the district court's ruling in this case, we mention several legal principles guiding judicial consideration of the KTCA.

Under the KTCA, municipal liability is the rule and immunity the exception. *Thomas v. Board of Shawnee County Comm'rs,* 293 Kan. 208, 233, 262 P.3d 336 (2011); *Soto,* 291 Kan. at 78; see K.S.A. 75–6103. As a general proposition, the KTCA exceptions are to be narrowly construed, since they curtail the rule of liability. *Keiswetter v. State,* No. 110,610, 2016 WL 1612922, at *6–7 (Kan .2016); *Jackson v. City of Kansas City,* 235 Kan. 278, 286, 680 P.2d 877 (1984); *Estate of Belden v. Brown County,* 46 Kan.App.2d 247, 290, 261 P.3d 943 (2011). An accepted tenet of statutory construction calls for the narrow application of exceptions. See *Telegram Publishing Co. v. Kansas Dept. of Transportation,* 275 Kan. 779, 785, 69 P.3d 578 (2003); *Broadhurst Foundation v. New Hope Baptist Society,* 194 Kan. 40, 44, 397 P.2d 360 (1964). But the recreational use exception to the KTCA has been afforded a broad reading for reasons that seem mysterious. See *Poston v. U.S.D. No. 387,* 286 Kan. 809, 812–13, 189 P.3d 517 (2008) (recognizing recreational use exception "to be broadly applied" in reliance on *Jackson,* 268 Kan. at 331); 286 Kan. at 820–21 (Johnson, J., dissenting) (noting lack of statutory basis and legislative history supporting broad construction of exception); *Jackson,* 268 Kan. at 331 (exception given generous reading because doing so encourages government entities to develop parks and other recreational areas resulting in public benefit). The *Jackson* court, perhaps in light of that approach, recognized the recreational use exception to be highly fact specific and held its application should be determined on a case-by-case basis. 268 Kan. 319, Syl. ¶ 7.

*4 The Kansas Supreme Court has extended coverage under K.S.A. 75–6104(o) to places outside a park or other recreational area if they are "integral" to its use. *Poston,* 286 Kan. at 817. The court indicated, however, an outside place merely "incidental" to a park's function will not enjoy recreational use immunity. 286 Kan. at 818–19; see *Wilson v. Kansas State University,* 273 Kan. 584, 590, 44 P.3d 454 (2002) (court draws distinction between incidental and integral purposes to find restrooms at football stadium subject to recreational use immunity); *Jackson,* 268 Kan. at 330 (quoting with favor *Ozuk v. River Grove Board of Education,* 281 Ill.App.3d 239, 243–44, 666 N.E.2d 687 [1996] to effect that comparable Illinois statute applicable only if " 'the recreational use was more than incidental' "). Just how the integral-incidental determination is to be made or applied isn't entirely clear. If the classification is binary, then a given outside place must be either incidental or integral to an associated recreational area. There is no middle ground. If, however, a place may fall somewhere in between, the applicability of the recreational use immunity appears unsettled. Is more than incidental use enough for immunity to attach to the place? Or must the use reach or exceed integral to warrant immunizing the place?

On appeal, Plaintiffs submit there are disputed facts as to whether the junction box is within Campbell Plaza and, thus, subject to the recreational use exception. They also say there are disputed facts indicating that if the junction box is outside the park, it should not be considered integral to the use of the park, so no immunity applies. Finally, they say there are disputed facts that would support a finding that the City acted with gross and wanton negligence in failing to retrofit the junction box with a ground wire, thereby nullifying any available immunity.

Location of Junction Box

At least on summary judgment, the parties do not dispute that Campbell Plaza is a park covered by the recreational use exception to the KTCA. The location of the junction box is a known and undisputed fact. But that is not necessarily determinative of the applicability of the recreational use exception because the borders of Campbell Plaza are not clear as a matter of law from this record. *Cf. Burton v. City of Belle Glade,* 178 F.3d 1175, 1187 (11th Cir.1999) (summary judgment may be inappropriate when parties agree on facts but dispute inferences to be drawn). As we have indicated, the junction box is at the mouth of an entrance to Campbell Plaza but in an area that corresponds to part of the sidewalk that extends down Santa Fe in front of the stores. Campbell Plaza has no gate or fence clearly separating it from the street. Nor is there even a sign at the entrance that at least arguably might indicate where the park begins. The City, of course, owns both Campbell Plaza and the sidewalk. We, therefore, suppose there are no deeds or formal surveys establishing a

genuine property line between the two, as there would be for parcels with different owners. The summary judgment record contains no documents of that type.

*5 In its ruling, the district court described the junction box as "located in an indistinct divide between Campbell Plaza and the adjoining South Santa Fe sidewalk." The district court's characterization fosters an impression that there is some sort of area between the sidewalk on Santa Fe and Campbell Plaza. At the very least, that appears to be an inference rather than an unequivocal fact. And it is an impermissible summary judgment inference playing to the City's advantage and Plaintiffs' detriment. We think it considerably more precise to say, based on the summary judgment record, that the divide between Campbell Plaza and the Santa Fe sidewalk is indistinct. The sidewalk abuts Campbell Plaza—what's unclear is where one ends and the other begins.

Those circumstances add up to ambiguities that on summary judgment preclude a finding as a matter of law that the junction box is within Campbell Plaza and subject to recreational use immunity for that reason. Such a conclusion would require drawing inferences adverse to Plaintiffs, contrary to the rules governing the disposition of summary judgment motions. Moreover, since the City would have to prove its entitlement to recreational use immunity at trial, it has to present undisputed facts on summary judgment establishing that entitlement as a matter of law.

On summary judgment, the City submitted evidence that it *treated* the junction box and the concrete strip as part of Campbell Plaza. For example, work crews from the parks department apparently performed routine maintenance on Campbell Plaza and its entrances. But some intragovernmental labeling of a place can't change its physical character or actual use. Otherwise, a municipality could immunize its city hall under the recreational use exception by calling it a park and having employees of the parks department mow the lawn. That would be an ineffective legal fiction.

Incidental or Integral

As the Kansas Supreme Court has held, however, a place integral to a park or other recreational area may be covered under K.S.A. 75-6104(o) even though it is physically outside that area. In arguing for that protection, the City emphasized the junction box carries electrical current used for lighting in Campbell Plaza and on the street. The City has described the lighting in Campbell Plaza as "decorative," a description we accept for purposes of summary judgment. The City also mentioned, more or less in passing, electrical outlets on a concrete bench or planter at the edge of the park. In its decision granting summary judgment, the district court pointed to both the lights and the outlets in explaining why recreational use immunity applies as a matter of law.

The evidence fails to establish the City's entitlement to judgment as a matter of law on the theory the junction box was essential to the use of Campbell Plaza as a recreational area. First, decorative lights are, by definition, just that—decoration. By common meaning, a "decorative" object is "purely ornamental," Merriam–Webster's Collegiate Dictionary 324 (11th ed.2003), or serves to "embellish," The American Heritage Dictionary of the English Language 472 (5th ed.2011). We doubt something ornamental and only ornamental could be integral to the functionality of a park or any other place. Even if the City's decorative lights are more than just pretty, it doesn't follow that they must be "integral" to Campbell Plaza. Obviously, the area can be used during daylight and twilight hours without the lights. The record likewise fails to show as a matter of law that Campbell Plaza would be unusable after dark without those lights or that the street lights along Santa Fe would provide inadequate illumination. Again, on summary judgment, the City is obligated to present undisputed facts establishing its claim for recreational use immunity on this basis. The evidentiary record, however, falls short.

*6 We don't see the electrical outlets on the outskirts of Campbell Plaza as adding much to the City's position. They could be used for all sorts of things from recharging cell phones to plugging in devices for playing recorded music or recording music being played. Most of those kinds of devices, however, also operate with batteries. The outlets may be a convenience for visitors to Campbell Plaza and the Salina downtown generally, but we cannot say as a matter of law they are integral to either. The district court could not have granted judgment to the City because the junction box, though outside Campbell Plaza, was integral to the Plaza's use. The issue must be left for a full airing of the evidence at trial.

Gross and Wanton Negligence

Even if we were mistaken on those points, the City would not be entitled to summary judgment if reasonable jurors could find Jayden Hicks' death resulted from gross and wanton negligence attributable to the City. As we have outlined, a municipality's gross and wanton negligence negates the

recreational use immunity extended in K.S.A. 75–6104(o). That heightened culpability takes away the protection afforded by the exception, restoring the KTCA's general rule of governmental liability. At trial, Plaintiffs would bear the burden of proving gross and wanton negligence. But they may defeat the City's motion for summary judgment by pointing to facts, disputed or otherwise, that would support a jury finding in their favor on the issue. They need not show such a finding to be likely—only that it would be permissible in light of the evidence. *Estate of Belden*, 46 Kan.App.2d at 276 (In reviewing summary judgment granted a defendant, the appellate court asks whether "a reasonable jury *might* render a verdict for" plaintiff and "do[es] not consider the probability of such a verdict, only its possibility.").

Typically, whether a party has been negligent, even grossly and wantonly so, presents a question of fact for the jurors. *Vaughn v. Murray*, 214 Kan. 456, 459, 521 P.2d 262 (1974); *Gruhin v. City of Overland Park*, 17 Kan.App.2d 388, Syl. ¶ 3, 836 P.2d 1222 (1992). A court should presume to decide the issue as a matter of law only in the absence of any evidence favoring the negligence claim. *Vaughn*, 214 Kan. at 459 (gross negligence); *Estate of Belden*, 46 Kan.App.2d at 276 (determination of negligence generally should be for jurors).

Gross and wanton negligence requires more than the mere carelessness or inadvertence of ordinary negligence but does not entail a willful intent to injure. See *Soto*, 291 Kan. at 82. There must be " 'a realization of the imminence of danger and a reckless disregard and complete indifference and unconcern for the probable consequences[.]' " 291 Kan. at 82 (quoting *Saunders v. Shaver*, 190 Kan. 699, 701, 378 P.2d 70 [1963]); see *Reeves v. Carlson*, 266 Kan. 310, 313–14, 969 P.2d 252 (1998). Culpability depends upon action or inaction " 'indicating indifference to known circumstances.' " *Adamson v. Bicknell*, 295 Kan. 879, 890, 287 P.3d 274 (2012) (quoting *Elliott v. Peters*, 163 Kan. 631, 634, 185 P.2d 139 [1947]); *Gould v. Taco Bell*, 239 Kan. 564, 572, 722 P.2d 511 (1986) (failure to act may constitute gross and wanton negligence).

*7 Plaintiffs highlight two strands of evidence in support of their position that the record permits a reasoned conclusion favoring gross and wanton negligence. First, they offer internal municipal reports from 2007, 2009, and 2011 laying out the declining condition of the City's electrical wiring in downtown Salina and the need for repair. The most recent report described the wiring as poor and noted problems with the decorative lighting working only intermittently. As the City points out, however, none of the reports suggested the deteriorating wiring posed a safety risk.

Based on the summary judgment record, however, the reports would permit a reasonable inference that wires associated with the decorative lighting, including those in the junction boxes, might be prone to coming loose. An errant wire electrified the junction box that Jayden Hicks fell on.

The second strand of evidence comes from Steven Adams, who was the City's master electrician leading up to and at the time of Jayden Hicks' fatal injury. Adams went to Campbell Plaza to inspect the junction box shortly after Jayden Hicks had been taken to the hospital. A police officer overheard Adams telling a firefighter that he knew there was no ground wire in the junction box because if there had been, it would have tripped the breaker every time there was a power surge. During his deposition, Adams testified that he told the firefighter if the junction box had been properly grounded, the breaker would have tripped. Asked about what the police officer recounted, Adams testified he did not recall whether he had said something to that effect. But he disclaimed any knowledge of the municipal reports on the downtown electrical system. Adams agreed that had the junction box been properly grounded, it should not have become electrified. According to Adams, a ground wire would have tripped the breaker, cutting off power to the junction box.

From the police officer's account, jurors could infer that the City, through its trained employees, knew the junction box had no ground wire before Jayden Hicks was electrocuted. Nobody from the City had looked inside the junction box before then. So no one had direct knowledge that a ground wire had not been included when the junction box had been installed. But Adams, who was familiar with electrical circuitry, had already deduced the absence of a ground wire because the junction box had never tripped the breaker—something he would have expected to happen periodically had the box been grounded. A conclusion inferred from telling circumstances is no less knowledge than a conclusion based on direct visual observation. See *State v. McClelland*, 301 Kan. 815, 820, 347 P.3d 211 (2015) ("[T]here is no distinction between direct and circumstantial evidence in terms of probative value.").

Despite his knowledge that the junction box lacked a functional ground, Adams took no action. Jurors could find he, thus, knew or based on his training had reason to

know that the junction box could become electrified if the wires dislodged, causing a short circuit. And jurors could find he also understood an electrified junction box posed a substantial danger capable of causing severe or lethal injuries. Those circumstances could support a finding of gross and wanton negligence in failing to take corrective action by retrofitting the junction box with a ground wire. See *Wagner v. Live Nation Motor Sports, Inc.*, 586 F.3d 1237, 1244–45 (10th Cir.2009) (applying Kansas law and recognizing conduct of defendant may support gross and wanton negligence if circumstances show disregard of " 'high and excessive degree of danger ... apparent to a reasonable person' in the defendant's position") (quoting *Lanning v. Anderson*, 22 Kan.App.2d 474, 921 P.2d 813, *rev. denied* 260 Kan. 994 [1996]); *Deaver v. Board of Lyon County Commissioners*, No. 110,547, 2015 WL 715909, at *9 (Kan.App.) (unpublished opinion) *rev. denied* 302 Kan. —— (Sept. 14, 2015). Whether the circumstances depicted in the summary judgment record portray a sufficiently imminent danger amounts to an unresolved question of fact. To turn back a motion for summary judgment, Plaintiffs did not have to show Adams or some other City employee knew the housing of the junction box had actually become electrified. The district court mistakenly confined the dangerous condition to the actual electrification of the housing and failed to consider the absence of a ground wire as a sufficiently dangerous condition.

*8 The district court, therefore, erred in granting summary judgment in favor of the City, effectively finding no gross and wanton negligence as a matter of law. We, of course, say simply that the threads woven in the summary judgment record do not warrant that conclusion. The threads need not be particularly long or strong to do so. Whether they would be sufficiently durable to withstand a full trial is another matter —one on which we express no opinion.

In coming to our conclusion, we have relied only on what we have identified as Plaintiffs' second strand of evidence resting on Adams' knowledge. Our consideration of the record effectively discounts the information in the municipal reports, since Adams testified he didn't know about them. We suppose, however, the two strands really ought to be combined to measure the full knowledge of the City, as a municipal corporation. See *City of Arkansas City v. Anderson*, 243 Kan. 627, 635, 762 P.2d 183 (1988) (knowledge of agents of corporate entity imputed to entity, giving it a collective "identical knowledge"). That would fortify Plaintiffs' position and our conclusion as to the potential risk and danger.

The City failed to demonstrate entitlement to summary judgment based on the recreational use immunity outlined in K.S.A. 75–6104(o) and the factual record compiled on the parties' cross-motions. The district court erred in granting the City's motion. We reverse and remand for further proceedings consistent with this decision.

All Citations

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184 P.3d 993 (Table)
Unpublished Disposition
(Pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions are not precedential and are not favored for citation. They may be cited for persuasive authority on a material issue not addressed by a published Kansas appellate court opinion.)
Court of Appeals of Kansas.

Carla DYE, Appellant,

v.

SHAWNEE MISSION SCHOOL DISTRICT, Appellee.

No. 98,379.

June 6, 2008.

Review Denied Nov. 4, 2008.

Appeal from Johnson District Court; Janice D. Russell, Judge.

Attorneys and Law Firms

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.

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

MEMORANDUM OPINION

PER CURIAM.

*1 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 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 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.

*2 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 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, Sly. ¶ 10, 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 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, 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."

*3 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, and we believe that case controls our decision here.

The plaintiff in *Nichols* was injured following high school football practice when 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 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, 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

*4 Alternatively, Dye contends that if the recreational use exception applies, the district court nevertheless erred in granting summary judgment because 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 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 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.

*5 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 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.

All Citations

184 P.3d 993 (Table), 2008 WL 2369847

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30 Mass.L.Rptr. 73
Superior Court of Massachusetts,
Worcester County.

Juanita SOTO

v.

CITY OF WORCESTER et al.[1]

No. WOCV200902946C.

June 5, 2012.

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

FERRARA, JOHN S., Justice.

*1 The plaintiff, Juanita Soto ("Soto"), filed this action in Superior Court seeking damages against the defendants, the City of Worcester (the "City") and the Worcester Public Library (the "Library"). Soto alleges that, while she was on the second floor of the Library premises, a ceiling block fell and struck her head and body, causing injury. She brings a claim of negligence against the defendants. This action is now before the court on the motion of the defendants for summary judgment. Defendants argue that they are entitled to immunity under the Recreational Use Statute, G.L.c. 21, § 17C, and therefore can only be liable if plaintiff was injured as a result of conduct on their part that was willful, wanton, or reckless. For the reasons set forth below, the defendants' motion for summary judgment is *ALLOWED*.

Background

The following facts are taken from the parties' Statement of Undisputed Material Facts and the summary judgment record. Unless otherwise noted, these facts are undisputed.

The Library is located at 3 Salem Square in Worcester, Massachusetts. It is owned and operated by the City, and is organized as a division within the Executive Office of the City Manager of the City of Worcester. It is a free public library and does not charge a fee for admission or for the use of its resources.

Soto visited the Library on June 13, 2008. She planned to check her email, search for a job, and perform research. At the library, Soto accessed a computer terminal located on the second floor. While she was there, she alleges that a tile fell from the ceiling and struck her on the head. She informed a librarian of the incident, and continued to work at the computer.

The defendants allege that Senior Custodian Robert Fanion ("Fanion") responded to the incident and spoke with Soto. An affidavit of Fanion indicates that he retrieved the fallen ceiling tile that measured two feet by two feet and weighed approximately two pounds. The defendants claim that Soto told Fanion that she was not hurt, that she did not want to file an accident report, and that she wished to continue using the computer. The plaintiff disagrees with defendants' version of that conversation.

Soto claims that she sustained multiple injuries and suffered neck pain and headaches as a result of the tile striking her. She visited the Emergency Department at St. Vincent's Hospital and later received physical therapy at New England Chiropractic.

Discussion

A. Standard of Review

Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Kourouvacilis v. General Motors Corp.*, 410 Mass. 706, 716 (1991); *Cassesso v. Commissioner of Corr.*, 390 Mass. 419, 422 (1983). The moving party bears the burden of affirmatively demonstrating the absence of a triable issue, and that the summary judgment record entitles the moving party to "judgment as a matter of law." *Pederson v. Time, Inc.*, 404 Mass. 14, 16–17 (1989). A party moving for summary judgment who does not bear the burden of proof at trial must demonstrate the absence of a triable issue either by submitting affirmative evidence negating an essential element of the nonmoving party's case, or by showing that the nonmoving party is unlikely to submit proof of that element at trial. *Kourouvacilis*, 410 Mass. at 716. *Flesner v. Technical Communications Corp.*, 410 Mass. 805, 809 (1991). The nonmoving party cannot defeat the motion for summary judgment simply by resting on its pleadings and "mere assertions of disputed facts." *LaLonde v. Eissner*, 405 Mass. 207, 209 (1989). Instead, the nonmoving party

must respond with evidence of specific facts establishing the existence of a genuine dispute. *Pederson,* 404 Mass. at 17. When deciding a motion for summary judgment, the court views the evidence in the light most favorable to the nonmoving party, but does not weigh evidence, assess credibility, or find facts. *Attorney Gen. v. Bailey,* 386 Mass. 367, 370–71 (1982).

B. The City is Entitled to Qualified Immunity

*2 The Recreational Use Statute, G.L.c. 21, § 17C, provides qualified immunity to landowners who allow their land to be used by the public for recreational purposes without charging a fee. It provides, in pertinent part:

> Any person having an interest in land including the structures, buildings, and equipment attached to the land, ... who lawfully permits the public to use such land for recreational, conservation, scientific, educational, environmental, ecological, research, religious, or charitable purposes without imposing a charge or fee therefore, or who leases such land for said purposes to the commonwealth or any political subdivision thereof or to any nonprofit corporation, trust or association, shall not be liable for personal injuries or property damage sustained by such members of the public, including without limitation a minor, while on said land in the absence of wilful, wanton, or reckless conduct by such person. Such permission shall not confer upon any member of the public using said land, including without limitation a minor, the status of an invitee or licensee to whom any duty would be owed by said person.

G.L.c. 21, § 17C.

The statute was amended in 1998 to broaden the scope of activities covered to include passive, indoor activities as well as active, outdoor ones. Educational or research activities are included as recreational uses. G.L.c. 21, § 17C. The statute applies to municipalities as well as to private persons. *Id.;* see *Ali v. City of Boston,* 58 Mass.App.Ct. 439, 442 (2003); *Anderson v. Springfield,* 406 Mass. 632, 633–34, 549 N.E.2d 1127 (1990).

The statute changes the duty owed by landowners who make their land available for recreational use without a fee to the recreational users. Such landowners owe only the standard of care applicable to trespassers: that is, landowners must refrain from wilful, wanton, or reckless conduct as to their safety. G.L.c. 21, § 17C.

In the present case, the City owned and operated the Library and allowed the public to make use of its facilities for recreational purposes without charging a fee. Thus, to survive the defendants' motion for summary judgment, Soto must demonstrate that the City behaved in a "wilful, wanton, or reckless" manner.

There is no issue of willful conduct here; it is not alleged that the defendants intended any harm occur to plaintiff. Thus, the issue is whether or not the defendant engaged in conduct that was wanton or reckless. "Wilful, wanton, or reckless conduct," within the meaning of the recreational use statute, involves an intentional or unreasonable disregard of a risk that presents a high degree of probability that substantial harm will result to another. The risk of death or grave bodily injury must be known by the landowner, or reasonably apparent to a reasonable person. *Ali,* 441 Mass. at 239.

Cases in which courts have found defendants' actions amounted to wanton or reckless conduct involve specific knowledge of a dangerous condition that poses an obvious risk of death or serious bodily injury. See, e.g., *Sheehan v. Foriansky,* 317 Mass. 10, 15 (1944) (driver knew that a trespasser was on the running board, increased his speed, and ran into a pole, killing him); *Freeman v. United Fruit Co.,* 223 Mass. 300, 302 (1916) (defendant deliberately threw, from a great height, a large, heavy roll of canvas stiffened with ice); *Romana v. Boston Elevated Ry.,* 218 Mass. 76, 78 (1914) (defendant had been warned of the danger of an electrically charged pole on a path commonly used by children, but did nothing).

*3 Cases in which courts have not found "wilful, wanton, or reckless" behavior, on the other hand, involve a lower level of risk, or defendants who had no knowledge of the condition. See, e.g ., *Sandler,* 419 Mass. at 338–39 (defendant's failure to remedy defects in a tunnel on a bikeway was neither wanton nor reckless because there was no high degree of risk of death or serious bodily injury); *Carroll v. Hemenway,* 315 Mass. 45, 46–47 (1943) (no evidence of wilful, wanton, or reckless conduct when a police officer investigating a building fell into an unlit and unguarded elevator well); *Dunn v. Boston,* 75 Mass.App.Ct. 556, 562 (2009) (failure to repair crumbling steps due to budgetary concerns not wilful, wanton, or reckless).

In the present case, there is no evidence of wanton or reckless conduct on the part of the City. Nothing suggests that the City was aware of the condition that caused Soto's alleged injury. Moreover, as with the defendant's failure to repair the defects in *Sandler,* there is no evidence that the condition created a high risk of death or serious bodily injury. The City did not "intentionally or unreasonably ignore[°] a 'high degree of probability that substantial harm [would] result to another.' " *Dunn,* 75 Mass.App.Ct. at 556, quoting *Sandler,* 419 Mass. at 336. Indeed, on the present state of the evidence, there is nothing to suggest that the City knew or reasonably should have known of a risk that a tile would fall from the Library ceiling, and thus the plaintiff could not sustain a burden of proof of mere negligence. See *Sheehan v. Roche Bros. Supermarkets,* 448 Mass. 780, 782–84 (2007). As a result, Soto cannot maintain her action against the City.

C. Whether the Library Is Subject to Suit

Soto has named the Worcester Public Library as a separate defendant in this action. The defendant argues that the Library is a department of the City and may not independently sue or be sued and that the City, therefore, is the correct party. The undisputed facts are that the Library is owned and operated by the City. It is organized as a division within the Executive Office of the City Manager. It is not clear from the record whether or not the Library determines its own budget, possesses the authority to contract in its own name, or has sources of funding independent of appropriations from the City. See *Middleborough v. Middleborough Gas & Electric Dept.,* 422 Mass. 583, 586–87 (1996). On the present record, construing the evidence in the light most favorable to the nonmoving party, it cannot be ascertained whether or not the Library has the capacity to sue or be sued.

However, even if the library is an independent department, it is entitled to the same recreational use immunity as the City. Thus, it is of little consequence to either party whether or not it can be sued separately.

ORDER

For the foregoing reasons, it is hereby *ORDERED* that the defendants' Motion for Summary Judgment is *ALLOWED.*

All Citations

Not Reported in N.E.2d, 30 Mass.L.Rptr. 73, 2012 WL 3005061

Footnotes

1 Worcester Public Library.

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