OFFICIALLY SELECTED
CASES ARGUED AND DETERMINED

IN THE

COURT OF APPEALS

OF THE

STATE OF KANSAS

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SARA R. STRATTON

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For the use and benefit of the State of Kansas

JUDGES AND OFFICERS OF THE KANSAS
COURT OF APPEALS

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HON. KAREN ARNOLD-BURGER …… Overland Park

JUDGES:

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HON. THOMAS E. MALONE ..... Wichita
HON. STEPHEN D. HILL ..... Paola
HON. G. GORDON ATCHESON ..... Westwood
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HON. AMY FELLOWS CLINE……..……...Valley Center
HON. LESLEY ANN ISHERWOOD……..…….....Hutchinson
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Amir v. Kansas Dept. of Revenue	126,162	Johnson	08/23/2024	Affirmed
Andrews v. State	126,787	Sedgwick	08/23/2024	Affirmed
Barnett v. State	126,267	Sedgwick	08/09/2024	Affirmed
Bartlett Family Real Estate Fund v. Robben	126,815	Johnson	08/09/2024	Reversed; remanded with directions
Bartlett Family Real Estate Fund v. Robben	126,895	Johnson	08/09/2024	Appeal dismissed
Bloom v. State	126,357	Shawnee	07/19/2024	Affirmed
C.A. v. A.S.	126,269	Marion	07/19/2024	Affirmed
Community Health Center of Southeast of Kansas, Inc. v. Kansas Dept. of Labor	126,251	Crawford	08/02/2024	Affirmed
Cox v. State	126,048	Johnson	08/02/2024	Affirmed
CVR Energy, Inc. v. National Union Fire Insurance Co. of Pittsburgh, PA	126,271	Montgomery	07/19/2024	Affirmed
Dartez v. State	126,183	Riley	08/09/2024	Affirmed
Denney v. Inmate Review Board	127,099	Labette	08/16/2024	Affirmed
Denney v. State	126,784	Sedgwick	08/09/2024	Affirmed
Dick v. ReWell	126,809	Butler	07/12/2024	Affirmed
Hamwi v. First Student Services	126,272	Workers Comp. Bd	08/30/2024	Affirmed
Hernandez v. Pistotnik	126,255	Sedgwick	08/16/2024	Affirmed in part; vacated in part; remanded with directions
Higginbotham v. State	126,764	Workers Comp. Bd	07/19/2024	Affirmed
Hill City Housing Authority v. Nevins	126,274	Graham	07/19/2024	Reversed
In re Adoption of S.L. and J.L.	127,101 127,102	Sheridan	07/26/2024	Affirmed
In re Care and Treatment of Delimont	126,768	Morris	08/02/2024	Affirmed
In re J.R.	127,113	Lyon	08/30/2024	Affirmed
In re Marriage of Rrapaj	126,386	Johnson	08/09/2024	Affirmed
In re Marriage of S.P. and R.P.	126,858	Ford	08/16/2024	Affirmed
In re Marriage of S.W. and M.W.	126,234	Johnson	08/16/2024	Appeal dismissed
Knisley v. Equity Bank	126,277	Sedgwick	08/09/2024	Affirmed

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Mattice v. City of Stafford	126,397	Stafford	08/02/2024	Reversed; remanded with directions
Ohlsen v. City of Seneca	126,618	Nemaha	08/16/2024	Affirmed
Overbey v. Hembree	126,687	Pottawatomie	08/02/2024	Reversed; remanded wih directions
Requena v. Kansas Prisoner Review Board	126,876	Reno	07/26/2024	Affirmed
Richardson v. State	126,772	Wyandotte	07/26/2024	Affirmed
Romero v. Hornung	126,331	Workers Comp.	08/30/2024	Affirmed
Ross v. State	126,792	Saline	07/12/2024	Affirmed
Schutt v. Foster	126,555	Johnson	07/26/2024	Reversed in part; remanded with directions
Shears v. State	126,779	Shawnee	07/26/2024	Affirmed
State v. Alford	126,299	Sedgwick	07/12/2024	Affirmed
State v. Arnold	125,443	Wyandotte	08/30/2024	Affirmed
State v. Beadle	126,451	Geary	08/30/2024	Affirmed
State v. Beeson	126,887	Lyon	08/23/2024	Sentence vacated; case remanded with directions
State v. Bybee	125,912	Labette	08/23/2024	Affirmed
State v. Carter	126,276	Saline	07/26/2024	Affirmed
State v. Chester	126,535	Douglas	07/19/2024	Affirmed
State v. Colley	125,596	Geary	08/09/2024	Affirmed
State v. Contreras-Avila	125,485	McPherson	08/30/2024	Reversed; remanded
State v. Courtney	126,109	Leavenworth	08/02/2024	Affirmed
State v. Crandall	126,791	Harvey	08/30/2024	Sentence vacated; case remanded with directions
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State v. Dunerway	125,680	Sedgwick	08/16/2024	Affirmed
State v. Epps	125,646	Sedgwick	07/19/2024	Appeal dismissed
State v. Evans	126,630	Sedgwick	07/19/2024	Affirmed
State v. Feikert	126,504	Cheyenne	08/30/2024	Affirmed
State v. Fox	126,580 126,581	Lyon	08/23/2024	Affirmed in part; reversed in part; remanded with directions
State v. Garcia-Gomez	126,461	Sedgwick	07/26/2024	Affirmed
State v. George	126,875	Leavenworth	07/12/2024	Affirmed
State v. Godat	125,619	Butler	08/16/2024	Reversed; remanded with directions

TITLE	DOCKET NUMBER	DISTRICT COURT	DATE OF DECISION	DECISION
State v. Godat	125,619	Butler	07/19/2024	Reversed; remanded with directions
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	126,260	Saline	07/12/2024	Affirmed
State v. Jarvis	126,813	Sedgwick	08/30/2024	Affirmed in part; dismissed in part
State v. Jernigan	126,467	Riley	07/26/2024	Affirmed
State v. Jones	126,361	Barton	07/12/2024	Affirmed in part; reversed in part; sentence vacated in part
State v. Labroi	126,495			
	126,496	Sedgwick	08/02/2024	Affirmed
State v. Leach	125,398	Sedgwick	08/16/2024	Affirmed
State v. Lehl	126,070	Sedgwick	07/19/2024	Affirmed
State v. Martins	125,611	Douglas	08/02/2024	Affirmed
State v. Mason	125,523	Kiowa	07/19/2024	Affirmed
State v. Matney	126,619			
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	126,622	Johnson	08/30/2024	Affirmed
State v. Miller	126,018	Reno	08/09/2024	Affirmed
State v. Mills	126,237	Douglas	07/12/2024	Affirmed
State v. Morgan	126,036	Riley	08/30/2024	Affirmed
State v. Morgan	125,882	Douglas	08/30/2024	Sentence vacated; case remanded with directions
State v. Nauman	126,911	Leavenworth	08/23/2024	Reversed; remanded with directions
State v. Neave	126,799	Ford	08/23/2024	Appeal dismissed
State v. Nesbitt	126,683	Sedgwick	07/12/2024	Affirmed
State v. Penn	126,525	Reno	08/30/2024	Sentence vacated; case remanded with directions
State v. Phillips	125,079	Leavenworth	08/16/2024	Affirmed
State v. Robinson	127,079	Sedgwick	07/26/2024	Affirmed
State v. Seepersad	126,457	Douglas	07/19/2024	Affirmed
State v. Seymour	125,961	Sedgwick	07/31/2024	Reversed; remanded
State v. Sosebee	125,737	Dickinson	07/19/2024	Remanded with directions
State v. Stoddard	126,050	Geary	08/02/2024	Affirmed

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State v. Vaught	127,015 127,016	Dickinson	08/30/2024	Appeal dismissed
State v. Walls	126,632	Wyandotte	08/23/2024	Affirmed
State v. West	126,104	Nemaha	08/23/2024	Affirmed
State v. Wilkinson	126,645	Sedgwick	08/02/2024	Reversed; remanded with directions
State v. Wright	126,601	Shawnee	08/30/2024	Affirmed
State v. Yeargin-Charles	125,754	Jackson	07/26/2024	Affirmed
Stewart v. State	126,095	Lyon	07/12/2024	Affirmed
Strategic Energy Income Fund III v. Stephens Energy Group	126,026	Sedgwick	08/02/2024	Affirmed
Valentine v. State	125,527	Sedgwick	08/16/2024	Affirmed

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APPEAL AND ERROR:

Appeal of Trial Verdict as Contrary to Evidence—Appellate Review. When a verdict is attacked on the ground it is contrary to the evidence, appellate courts do not reweigh the evidence or reassess the credibility of the witnesses. Appellate courts will not disturb the jury's verdict if the evidence and all reasonable inferences drawn from the evidence, considered in the light most favorable to the successful party, support the jury's findings.
Ashley Clinic v. Coates 53

No Interlocutory Appeal from Order Suppressing Evidence—Exception. The State may not take an interlocutory appeal from an order suppressing evidence unless the exclusion of such evidence substantially impairs the State's ability to prosecute its case. *State v. Harris* 432

Preserving Claim for Appeal Requires Objection or Motion to Alter or Amend Judgment under K.S.A. 60-252 and Rule 165. Under K.S.A. 2023 Supp. 60-252 and Supreme Court Rule 165 (2024 Kan. S. Ct. R. at 232), a party seeking to preserve a claim for appeal that a district court's judgment lacks sufficient factual findings or conclusions of law must object to such or move to alter or amend the judgment based on such inadequacy. However, when a district court sufficiently states its factual findings and conclusions of law, a party need not file a motion under K.S.A. 2023 Supp. 60-252 to preserve a claim that the trial court erroneously applied the stated legal theory to the specifically stated factual findings.
In re Marriage of Meek..... 270

Trespass Claim—Remedy to Make Injured Party Whole—Appellate Review. When a district court fashions a remedy designed to make an injured party whole, an appellate court does not determine whether the remedy is the best remedy but considers whether the remedy fails to follow the applicable law or otherwise breaches judicial discretion.
Drouhard v. City of Argonia 246

CIVIL PROCEDURE:

District Courts Are Courts of General Jurisdiction—Lawsuits May Proceed if Facts State Any Claim upon Which Relief Can Be Granted. Kansas district courts are courts of general jurisdiction. This means, among other things, that Kansas courts presume that they may hear whatever claims a plaintiff pursues. A lawsuit filed in Kansas may proceed as long as the facts included in the petition and the reasonable inferences that can be drawn from those facts state any claim upon which relief can be granted.
Rogers v. Wells Fargo Bank, N.A. 290

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Lawsuits Filed in Kansas Governed by Kansas Law—Burden on Party to Persuade Court Other Law Applies. Courts presume that lawsuits filed in Kansas are governed by Kansas law. The party seeking the application of a different state's law bears the burden of persuading the courts that the other law should apply. *Rogers v. Wells Fargo Bank, N.A.* 290

Motion for Dismissal under K.S.A. 60-212(b)(6)—Court Considers Plaintiff's Petition and Attached Documents—Exception. A district court faced with a motion to dismiss under K.S.A. 60-212(b)(6) ordinarily may only consider the plaintiff's petition and any documents attached to it. A rare exception arises when a plaintiff asserts a claim based on a written instrument; courts may consider an undisputedly authentic copy of that written instrument attached to a motion to dismiss without converting the motion to a request for summary judgment. But courts will not resolve factual questions surrounding those instruments as part of a K.S.A. 60-212(b) motion. Nor will courts consider documents attached to a motion to dismiss that are not central to the plaintiff's claim or when there is a reasonable question about their applicability or authenticity.
Rogers v. Wells Fargo Bank, N.A. 290

---Determination by Court Whether Plaintiff Has Stated Claim. When a defendant moves for dismissal under K.S.A. 60-212(b)(6), the district court must resolve every factual dispute in the plaintiff's favor. The court must assume all the factual allegations in the petition—along with any reasonable inferences from those allegations—are true. The court then determines whether the plaintiff has stated a claim based on the plaintiff's theory or any other possible theory.
Rogers v. Wells Fargo Bank, N.A. 290

Motion for Relief under K.S.A. 60-260(b). On motion and just terms, the court may relieve a party from a final judgment for any of the reasons set forth in K.S.A. 60-260(b)(1)-(6). *Stout v. KanEquip, Inc*. 405

—District Court's Considerations. When ruling on a motion to set aside an order under K.S.A. 60-260(b), the district court should consider all the facts, including (1) whether the motion was filed within a reasonable time, (2) whether the motion will prejudice the other party, and (3) whether the moving party has good cause to move to set aside an order.
Stout v. KanEquip, Inc. 405

---Discretion of District Court—Appellate Review. A ruling on a motion for relief from judgment under K.S.A. 60-260(b) rests within the sound discretion of the district court. Abuse of discretion occurs when the district court's decision is based on a legal or factual error or if no reasonable person would agree with it. *Stout v. KanEquip, Inc*. 405

Motion for Relief under K.S.A. 60-260(b)(1)—Limits. K.S.A. 60-260(b)(1) permits relief by a party because of mistake, inadvertence, surprise, or excusable neglect. The motion must be filed within a reasonable time not more than one year from the date of judgment. *Stout v. KanEquip, Inc.* 405

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Motion for Relief under K.S.A. 60-260(b)(6)—Catchall Provision—Liberal Construction. K.S.A. 60-260(b)(6) is a catchall provision providing relief from final judgment for any other reason justifying it. This provision is to be liberally construed to preserve the delicate balance between the conflicting principles that litigation be brought to an end and that justice be done in light of all the facts. *Stout v. KanEquip, Inc.* 405

Notice Pleading in Kansas Initiates a Lawsuit. To initiate a lawsuit in Kansas, a petition need only include a short and plain statement that gives the defendant fair notice of the plaintiff's claim and the ground upon which it rests. Courts commonly refer to this practice as notice pleading.
Rogers v. Wells Fargo Bank, N.A. 290

Petition May Be Dismissed under K.S.A. 60-212(b)(6)--Dismissal Is the Exception Not the Rule—Federal Plausibility Standard Not Used in Kansas Courts. K.S.A. 60-212(b)(6) allows a petition to be dismissed if it fails to state a claim upon which relief may be granted. Dismissal under K.S.A. 60-212(b)(6) is the exception, not the rule. Kansas courts do not use the plausibility standard for pleadings employed by federal courts under Rule 12(b)(6) of the Federal Rules of Civil Procedure.
Rogers v. Wells Fargo Bank, N.A. 290

CONSTITUTIONAL LAW:

Privilege against Self-incrimination—District Court Properly Permitted Witness not to Testify at Criminal Trial under These Facts. In the circumstances of this case, the district court properly permitted a witness to assert her constitutional privilege against self-incrimination to avoid testifying at the defendant's criminal trial after the State charged her with perjury based on her preliminary hearing testimony. The State's offer of statutory immunity under K.S.A. 22-3415 was insufficient to shield the witness from the real risk she would face an additional perjury charge if she were compelled to testify. *State v. Adams* 132

Review of Equal Protection Claim—Three-Step Process. A court engages in a three-step process when reviewing an equal protection claim. First, it considers whether the legislation creates a classification resulting in different treatment of similarly situated individuals. If the statute treats "arguably indistinguishable" individuals differently, the court determines next the appropriate level of scrutiny to assess the classification by examining its nature or the right at issue. Then, the court applies that level of scrutiny to the statute. *State v. Wooldridge* 314

Warrantless Searches and Seizures are Invalid—Exception. Under both the Fourth Amendment to the United States Constitution and section 15 of the Kansas Constitution Bill of Rights, warrantless searches and seizures by law enforcement officers are deemed unreasonable and invalid unless a recognized exception to the warrant requirement applies.
State v. Dixon 1

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CONTRACTS:

Claim of Tortious Interference with Contract—Knowledge of Existing Contract and Intentional Inducement to Breach Agreement—Damages Caused to Claimant. A party claiming tortious interference with a contract must show that the offending party knew of an existing contractual relationship and nevertheless intentionally induced one of the contracting parties to breach that agreement, causing damages to the claimant. A person intentionally induces a breach when they act with actual or legal malice.
Ashley Clinic v. Coates 53

Employment Contract—Continued Employment Is Sufficient Consideration to Support Employment Contract. Continued employment can be sufficient consideration to support an employment contract, including one that adds a covenant not to compete. *Ashley Clinic v. Coates* 53

Interference with Contract—Establishing Damages—Reasonable Basis for Computation Must Be Shown with Reasonable Certainty. Damages need not be established with absolute certainty. Instead, a party claiming that it has been injured as a result of another's wrongful acts must show the extent of its injury—that is, the amount of damages it suffered—with reasonable certainty. This requires some reasonable basis for computation that will enable the jury to arrive at an approximate estimate of the damages.
Ashley Clinic v. Coates 53

— Whether Justified Depends on Factual Questions. Interference with a contract may be justified—and thus not tortious—in certain instances, including if the interference occurs for a legitimate business purpose. Whether such a justification exists turns on several factual questions, including the defendant's motives, the proximity of the defendant's conduct to the interference, and the means employed. *Ashley Clinic v. Coates* 53

Presumption that Written Contracts are Valid and Supported by Adequate Consideration. Kansas courts presume that written contracts are valid and supported by adequate consideration. The jury is entitled to presume that a written contract is valid unless the party contesting its validity proves it is not. *Ashley Clinic v. Coates* 53

COURTS:

Court of Appeals Must Follow Supreme Court Precedent—Exception. This court is duty-bound to follow Kansas Supreme Court precedent absent some indication our Supreme Court is departing from its previous position.
State v. Harris 432

Jurisdiction of Appellate Courts Provided by Statute. Appellate courts only have jurisdiction as provided by statute. Where an appeal is not taken consistent with this statutory authority, it must be dismissed for lack of jurisdiction. *State v. Harris* 432

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CRIMINAL LAW:

Alternative-Means Crime—Crime That can Be Committed in More than One Way – Jury Instructions. When the State charges a person with a crime that can be committed in more than one way, it may present evidence of alternative means of committing that offense. A district court presents an alternative-means crime to a jury when its instructions incorporate multiple means for a single statutory element of an offense. *State v. Arreola* 562*

Consecutive Sentences—No Entitlement to Duplicative Jail Credit for Consecutive Prison Sentences in Multiple Cases. When consecutive sentences are imposed in separate cases, the defendant is entitled to a single day of jail credit for each day spent in jail while those cases were pending. A defendant is not entitled to duplicative jail credit toward consecutive prison sentences imposed in multiple cases. *State v. Feikert* 503*

Criminal Use of Weapons Violation—Proof That Defendant Knowingly Possessed Firearm and Was Convicted of Domestic Violence Offense within Five Years. In a prosecution for criminal use of weapons in violation of K.S.A. 2019 Supp. 21-6301(a)(18), the State must prove beyond a reasonable doubt not only that the defendant knowingly possessed a firearm, but also that the defendant did so while knowingly convicted of a domestic violence offense within the preceding five years. The "knowingly" culpable mental state applies to each element of the crime.
State v. Beasley 203

Culpable Mental State Discussed in K.S.A. 21-5202(g). "If the definition of a crime prescribes a culpable mental state with regard to a particular element or elements of that crime, the prescribed culpable mental state shall be required only as to specified element or elements, and a culpable mental state shall not be required as to any other element of the crime unless otherwise provided." K.S.A. 21-5202(g).
Johnson v. Bass Pro Outdoor World 217

Culpable Mental State of at Least Recklessness an Essential Element of Every Crime under Statute. Generally, a culpable mental state of at least recklessness is an essential element of every crime. K.S.A. 21-5202(a). Where the statute defining the crime does not prescribe a culpable mental state, one is nevertheless required unless the definition of the crime "plainly dispenses with any mental element."
Johnson v. Bass Pro Outdoor World 217

DNA Testing under K.S.A. 21-2512—Limits of Application to Certain Crimes. The plain language of K.S.A. 21-2512 limits its application solely to those convicted of first-degree murder or rape. Because individuals who are convicted of attempted rape are not similarly situated to those convicted of rape, the application of K.S.A. 21-2512 should not be extended on equal protection grounds to include DNA testing for individuals convicted of attempted rape. *State v. Wooldridge* 314

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Kansas RICO Act—Compulsory Joinder Rule Not Required When Predicate Cases Used to Establish Pattern of Racketeering Activity. Under the Kansas RICO Act, the compulsory joinder rule does not require the State to bring the RICO charge when it brings the predicate cases used to establish the pattern of racketeering activity in the RICO charge. *State v. Dixon* 82

— Double Jeopardy Clause Does Not Prohibit Using Prior Adjudications and Convictions to Prove Charge. The Double Jeopardy Clauses of the United States Constitution and section 10 of the Kansas Constitution Bill of Rights do not prohibit the use of the defendant's prior adjudications and convictions to prove a charge under the Kansas RICO Act. *State v. Dixon* 82

— Juvenile Adjudications Included in Racketeering Activity. The Kansas RICO Act's definition of racketeering activity includes juvenile adjudications. *State v. Dixon* 82

— — A Kansas RICO offense is a continuing offense. Under the Kansas RICO Act, the State can charge the defendant as an adult when some of the alleged predicate racketeering activity occurred when the defendant was a juvenile provided that the final alleged predicate racketeering activity occurred when the defendant was an adult. *State v. Dixon* 82

— Predicate Offenses Not Lesser Included Crimes of RICO Offense. Under the Kansas RICO Act, the defendant's predicate offenses used to establish a pattern of racketeering activity are not lesser included crimes of the RICO offense. *State v. Dixon* 82

RICO Act K.S.A. 21-6327 et seq.—Similar to Federal RICO Act 18 U.S.C. § 1961. The Kansas Racketeer Influenced and Corrupt Organization (RICO) Act, K.S.A. 21-6327 et seq., is substantially similar to the federal Racketeer Influenced and Corrupt Organization (RICO) Act, 18 U.S.C. § 1961 et seq., both in its purpose and the specific conduct it proscribes. *State v. Dixon* 82

Sentencing—Jail Credit Allowed by Statute for all Time Defendant Is Incarcerated. K.S.A. 21-6615(a) entitles a defendant to an allowance for jail credit against their controlling sentence for all time spent incarcerated while the defendant's cases were pending disposition. *State v. Feikert* 503*

Sexual Exploitation of a Child for Possession of Child Pornography—Requirements. To convict a defendant of sexual exploitation of a child for possession of child pornography under K.S.A. 2018 Supp. 21-5510(a)(2), the State must prove that a defendant had knowledge of the nature of the visual depiction—meaning, that defendant either knew the essential character or the identity of the visual depiction and that defendant had joint or exclusive control over the visual depiction with knowledge of or intent to have such control or that the defendant knowingly kept the visual depiction in a place where the defendant had some measure of access and right of control. See K.S.A. 2018 Supp. 21-5202(i). *State v. Ballantyne* 14

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Statute of Limitations Begins to Run When Victim Determines Criminal Conduct. Under K.S.A. 1998 Supp. 21-3106(8)(f)(ii), the statute of limitations begins to run when the victim becomes able to determine the criminal nature of the conduct. *State v. Bolinger* 115

Statute of Limitations for Prosecution—Tolling Provisions in Statute Provide Certain Time Periods Excluded from Count. The tolling provisions listed in K.S.A. 1998 Supp. 21-3106(8)(f) do not indefinitely extend the statute of limitations for prosecution. Rather, they provide that certain time periods are excluded from the count. When the statute of limitations contains an exception or condition that tolls its operation, courts deduct a specified period of time when there is substantial competent evidence that two or more of the statutory factors are present. *State v. Bolinger* 115

Statutory Definition of Possession under K.S.A. 2018 Supp. 21-5111(v). Possession, as that term is used in K.S.A. 2018 Supp. 21-5510(a)(2), includes knowingly accessing and viewing child pornography when a defendant has joint or exclusive control over a visual depiction with knowledge of or intent to have such control or knowingly keeps the visual depiction in a place where the defendant has some measure of access and right of control over it on the internet. See K.S.A. 2018 Supp. 21-5111(v).
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DIVORCE:

Determination of Marital Property—Appellate Review. In an action for divorce, annulment, or separate maintenance, the district court's determination about which property is defined as marital property pursuant to K.S.A. 23-2801(a) is a question of law subject to de novo review.
In re Marriage of Meek 270

Division of Property—All Property Becomes Marital Property under K.S.A. 23-2801(a) Once Action Is Commenced--Exception. In Kansas when the parties' property is not subject to division under some other agreement, upon commencement of divorce, annulment, or separate maintenance actions all property owned by married persons—whether maintained or defined as separate property under K.S.A. 23-2601 or not—becomes marital property pursuant to K.S.A. 23-2801(a).
In re Marriage of Meek 270

— Broad Discretion of District Court to Make Equitable Division unless Other Agreement—Appellate Review. In actions for divorce, annulment, and separate maintenance when the parties' property is not subject to division under some other agreement, the district court has broad discretion to equitably divide all property owned by married persons pursuant to K.S.A. 23-2802(c). This court reviews the district court's division of property pursuant to K.S.A. 23-2802 for an abuse of discretion.
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Marital Property Includes Personal Injury Awards or Settlements under K.S.A. 23-2801(a). When no other agreement dictates otherwise, personal injury awards or settlements received during marriage are marital property under K.S.A. 23-2801(a). *In re Marriage of Meek* 270

DAMAGES:

No Duplicative Damages Recoverable Where Damages Arise from Same Injury or Loss. Kansas law does not prohibit a district court from awarding duplicative damages against separate defendants based on different conduct and different theories of recovery. But Kansas law prohibits a party from recovering duplicative damages from separate defendants where the damages arise from the same injury or loss. *Ashley Clinic v. Coates* 53

EQUITY:

Claim for Unjust Enrichment— Requirements. To succeed on a claim for unjust enrichment, a person must show that they have conferred a benefit upon another party; that the other party knew of or appreciated that benefit; and that the circumstances surrounding the benefit make it inequitable for the other party to retain it without payment for its value.
Ashley Clinic v. Coates 53

GARNISHMENT:

Garnishment Proceeding—Judgment Creditor Can Only Enforce What Debtor Could Enforce. In a garnishment proceeding, the judgment creditor stands in the shoes of the judgment debtor to enforce only what the debtor could enforce. *B.H. v. P.B.* 551*

— Judgment Creditor Not In More Favorable Position against Garnishee Than the Judgment Debtor. Garnishment proceedings do not place the judgment creditor in a more favorable position to enforce a claim—including an insurance claim—against the garnishee than the judgment debtor for the same cause of action. *B.H. v. P.B.* 551*

— No Contractual Privity between Judgment Creditor and Garnishee. A garnishment proceeding does not create contractual privity between a judgment creditor and the garnishee. A judgment creditor seeking to garnish a judgment debtor's insurance provider—when the judgment creditor is not in privity of contract with the insurer and is not an intended third-party beneficiary of the insurance policy—may only recover from the insurer to the extent the insured judgment debtor could recover. *B.H. v. P.B.* 551*

Review of Garnishment Orders—Appellate Review. Appellate courts apply a bifurcated standard of review to garnishment orders to determine whether the district court's findings of fact are supported by substantial competent evidence and whether those findings are sufficient to support the district court's conclusions of law. An appellate court exercises unlimited review over the district court's conclusions of law and, when the facts are undisputed, need not review the district court's factual findings. *B.H. v. P.B.* 551*

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INSURANCE:

Interpretation of Terms of Insurance Policy—Unlimited Appellate Review. Like appellate review of any other contract or written instrument, appellate courts exercise unlimited review to interpret the terms of an insurance policy which must, when possible, be construed to give effect to the parties' intentions. If an insurance policy's language is clear and unambiguous, it must be taken in its plain, ordinary, and popular sense. *B.H. v. P.B.* 551*

JURISDICTION:

Territorial Jurisdiction—Broad Interpretation of Statute. The territorial jurisdiction statute is to be interpreted broadly in determining whether a crime may be prosecuted in Kansas. *State v. Merrill* 322

— Governed by Statute. Whether territorial jurisdiction exists is a question of law governed by the provisions of K.S.A. 21-5106.
State v. Merrill 322

— Requirements for Criminal Prosecution. If one or more material elements of a crime occurs wholly or partly within this state, then Kansas has territorial jurisdiction to prosecute a criminal defendant.
State v. Merrill 322

KANSAS CORPORATION COMMISSION:

Authority Vested in KCC Through Electric Public Utilities Act. The Electric Public Utilities Act, K.S.A. 66-101 et seq., vests the Kansas Corporation Commission with jurisdiction and the authority necessary to control those electric public utilities doing business in Kansas.
Heritage Tractor, Inc. v. Evergy Kansas Central, Inc. 511*

Right of KCC to Adopt Tariff—Governs Relationship between Utility Provider and Customers. The Kansas Corporation Commission has the right to adopt tariffs which outline the terms and conditions governing the relationship between a utility provider and its customers.
Heritage Tractor, Inc. v. Evergy Kansas Central, Inc. 511*

MOTOR VEHICLES:

Implied Consent Notice Requirements—Substantial Compliance Is Generally Sufficient. Substantial compliance with the implied consent notice requirements set forth in K.S.A. 8-1001 et seq. is generally sufficient provided that the notice conveys the essentials of the statute and does not mislead the driver. *State v. Merrill* 322

Reasonable Grounds Required of Law Enforcement to Request Breath Test—Proof Shown by Using DC-27 Form or Through Competent Testimony. Law enforcement officers must have reasonable grounds to request a breath test. In later administrative driving license proceedings considering the reasonableness of making this request, or in subsequent judicial review of such requests, the State can prove reasonable grounds by using a completed DC-27 form, or

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through competent testimony, or both. Technical errors like checking or not checking a particular box on the form do not bar the form's use as evidence.
Davis v. Kansas Dept. of Revenue 107

Sentencing Enhancement Statute—Not Violation of Ex Post Facto Clause. K.S.A. 21-6811(c)(3) does not violate the Ex Post Facto Clause of the United States Constitution. *State v. Merrill* 322

PARENT AND CHILD:

Children's Right to Permanency within Reasonable Time Frame—Difference between Adult Time and Child Time. Children have a right to permanency within a time frame reasonable to them. The Legislature recognized the difference between adult and child time because a child perceives time differently than adults. Consequently, the Kansas Code for Care of Children, K.S.A. 38-2201 et seq., specifically sets out an essential objective: CINC proceedings should be disposed of without any unnecessary delay. *In re B.H.* 480

Due Process Clause---Parent's Relationship with Child Is Protected Liberty Interest---Fundamental Right Continues Throughout CINC Case. The Due Process Clause of the Fourteenth Amendment to the United States Constitution recognizes a parent's relationship with his or her child is a protected liberty interest. This liberty interest acknowledges a parent's right to make decisions regarding the child's care, custody, and control. This fundamental right remains intact during a child in need of care (CINC) case. Even if a parent has his or her child removed from the parent's custody during a CINC case, the parent's liberty interest is upheld unless a court terminates parental rights. Consequently, throughout a CINC case, a parent's fundamental liberty interest requires procedural due process.
In re B.H. 480

Due Process Requirements—Notice and Opportunity to Be Heard. The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. This is particularly important in an adversarial setting such as a parental rights termination hearing. These two facets of due process—notice and an opportunity to be heard—ensure that a parent's fundamental rights are not terminated without procedural due process. *In re B.H.* 480

Parent's Motion for New Counsel or Motion to Withdraw by Attorney—Heightened Scrutiny by Court to Ensure Unnecessary Delay. Courts should thoroughly inquire about a parent's motion for new counsel or an attorney's motion to withdraw from representing a parent to ensure that the case proceeds toward a timely resolution for the child. This heightened scrutiny works in harmony with the Kansas Code for Care of Children's expressed policy of disposing of proceedings without unnecessary delay. *In re B.H.* 480

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Right of Indigent Parent to Appointed Counsel—Focus of Justifiable Dissatisfaction Inquiry with Attorney—Factors for Court to Review. In determining whether a court should appoint new counsel in a CINC proceeding, an indigent parent must show justifiable dissatisfaction with his or her appointed counsel. The focus of a justifiable dissatisfaction inquiry is the adequacy of counsel in the adversarial process, not the parent's perception or view of his or her attorney. As such, a party demonstrates justifiable dissatisfaction by showing a conflict of interest, an irreconcilable disagreement, or a complete breakdown in communications between client and counsel. In making this determination, the district court must conduct some sort of investigation. *In re B.H.* 480

Statutory Right to Counsel of Indigent Parents—Courts Required to Appoint Lawyers for Indigent Parents in CINC Cases. Indigent parents have a statutory right to counsel. As such, courts are statutorily required to appoint lawyers for indigent parents in a child in need of care case. This statutory right to counsel remains with the parent facing the termination of their parental rights. *In re B.H.* 480

POLICE AND SHERIFFS:

Traffic Stop Must Not Be Extended Beyond Reason. Officers must be careful to ensure that any inquiries of matters beyond the reason for the traffic stop occur concurrently with the tasks permitted for such stops so they will not measurably extend the time it would otherwise take. This is called multitasking. If an officer is not effectively multitasking, these unrelated inquiries—without reasonable suspicion, probable cause, or consent—impermissibly expand the stop beyond what the United States Constitution permits. *City of Overland Park v. LaGuardia* 465

PRODUCTS LIABILITY:

Protection of Lawful Commerce in Arms Act—Precludes Civil Actions against Manufacturers and Sellers of Firearms—Qualified Civil Liability Action. The Protection of Lawful Commerce in Arms Act precludes civil actions for damages against manufacturers and sellers of firearms "resulting from the criminal or unlawful misuse of" a firearm. That type of action is known as a "qualified civil liability action" in the Act. 15 U.S.C. § 7902(a); 15 U.S.C. § 7903(4), (5)(A).
Johnson v. Bass Pro Outdoor World 217

Qualified Civil Liability Actions May Not Be Brought in Federal or State Court under Federal Arms Act. The Protection of Lawful Commerce in Arms Act provides that qualified civil liability actions "may not be brought in any Federal or State court." 15 U.S.C. § 7902(a). This provision expressly preempts state tort actions that are included in the definition of "qualified civil liability actions." The scope of the preemption is determined by the plain language of that definition and the exceptions listed in 15 U.S.C. § 7903(5). *Johnson v. Bass Pro Outdoor World* 217

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PUBLIC UTILITIES:

Jury Question Whether Inspection Program Encompasses Due Care Required. Whether a public utility's inspection program comprehensively encompasses the due care demanded by the extreme risk inherent to the services it provides is a question on which reasonable minds could differ, and therefore, it should be submitted to a jury for resolution.
Heritage Tractor, Inc. v. Evergy Kansas Central, Inc. 511*

Legal Tariffs Construed in Same Manner as Statutes—Interpretation of Tariffs. Legally established tariffs are construed in the same manner as statutes. When a court sets out to determine the plain meaning of a tariff it looks not only to the language used, but also the specific context in which it appears, as well as the broader context of the tariff provision in its entirety.
Heritage Tractor, Inc. v. Evergy Kansas Central, Inc. 511*

Tariff Provision Drafted Broadly to Insulate Public Utility from Liability—Unreasonable and Unenforceable Provision. A tariff provision drafted so broadly as to insulate a public utility from liability for every conceivable act of misfeasance, including ordinary negligence which results in catastrophic property damage, is unreasonable and unenforceable.
Heritage Tractor, Inc. v. Evergy Kansas Central, Inc. 511*

Tariff Structure of Public Utility—May Limit Utility's Liability to Customers. A public utility's tariff structure may contain provisions which are intended to limit the utility's liability to its customers provided such tariffs are neither unreasonable nor unjust.
Heritage Tractor, Inc. v. Evergy Kansas Central, Inc. 511*

REAL PROPERTY:

Proof of Trespass— Recovery of Damages. A plaintiff who proves trespass can recover for any loss sustained. *Drouhard v. City of Argonia* 246

Rights under Easement—Injunction May Be Granted by District Court. When an aggrieved landowner has clearly defined rights under an easement that are recognized and protected by law, the district court may grant an injunction without applying the traditional four-part balancing of equities test.
Drouhard v. City of Argonia 246

Rights of Easement Holder—Trespass Committed if Exceeds Rights. An easement holder commits a trespass by exceeding the rights provided under the easement. *Drouhard v. City of Argonia* 246

Trespass Claim—Calculation of Damages. No set measure of damages is required for a trespass claim. *Drouhard v. City of Argonia* 246

---- No Recovery for Both Actual and Nominal Damages for Same Claim. A plaintiff who fails to prove actual loss may recover nominal damages, but a plaintiff cannot recover both actual and nominal damages for the same claim. Nominal damages are to be assessed in a trivial amount.
Drouhard v. City of Argonia 246

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SEARCH AND SEIZURE:

Emergency Aid Exception—Circumstances When Warrantless Search of Personal Property Allowed. The emergency aid exception allows the warrantless search of personal property, such as a purse, when a person is found unconscious or in a semi-conscious condition and the intent of law enforcement's reasonably limited search is to discover the person's identity or other information that may provide medical assistance. *State v. Dixon* 1

Emergency Aid Exception to Warrant Requirement—Application. The emergency aid exception to the warrant requirement applies when (1) law enforcement officers have an objectively reasonable basis to believe someone is seriously injured or imminently threatened with serious injury, and (2) the manner and scope of any ensuing search is reasonable. *State v. Dixon* 1

Justification of Delay of Stop---Focus on Specific Facts That Criminal Activity Taking Place. The prosecution does not meet its burden by simply proving that the officer believed the circumstances could have formed a reasonable suspicion. Rather, something more than an unparticularized suspicion or hunch must be articulated by the officer. Consistent with this long-standing caselaw, we find that the prosecution does not meet its burden by pointing to factors not articulated by the officer that could have formed a reasonable suspicion in an effort to justify the delay after the fact. The focus must be on the factors, if any, articulated by the officer.
City of Overland Park v. LaGuardia 465

Officer's Authority to Provide Assistance—Ends When no Longer Reasonable. A law enforcement officer's limited authority to reasonably determine whether a person needs assistance and to provide such assistance ends when it is no longer reasonable to believe the person needs assistance. *State v. Dixon* 1

Traffic Stops—No Extension of Time unless Reasonable Suspicion or Probable Cause. Traffic stops cannot be measurably extended beyond the time necessary to process the infraction that prompted the stop unless there is a reasonable suspicion of or probable cause to believe the detainee is involved in other criminal activity.
City of Overland Park v. LaGuardia 465

TORTS:

Willful and Wanton Conduct—Two-Pronged Burden on Party to Establish Wanton Conduct. A party seeking to establish wanton conduct bears a two-pronged burden: (1) demonstrate that the act complained of was conducted with a realization of the imminence of danger; and (2) that the act was performed with a reckless disregard for or complete indifference

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to its probable consequences. The conduct at issue may be either broad or specific but each component of the inquiry must address the same conduct. *Heritage Tractor, Inc. v. Evergy Kansas Central, Inc.* 511*

TRIAL:

Alternative-Means Crimes—Appellate Review. Kansas courts no longer distinguish between alternative means for committing an offense and options within a means of committing a crime. Instead, appellate courts review district courts' instructions on alternative-means crimes under the same framework as other challenges to jury instructions. *State v. Arreola* 562*

Jury Instruction on Voluntary Intoxication—Appropriate under These Facts if Evidence Supports Findings—Specific Intent Necessary to Commit Crime. A jury instruction on voluntary intoxication is factually appropriate in aggravated-burglary cases when there is evidence presented at trial that could support a finding that the defendant was intoxicated and their mental faculties were so impaired that they could not form the specific intent necessary to commit that crime. Evidence that a person may have lacked this level of intent due to intoxication tends to show the loss of the ability to reason, to plan, to recall, or to exercise motor skills. *State v. Arreola* 562*

Prosecutors May Not Misstate Law or Attempt to Shift Burden of Proof to Defendant—Limits. Prosecutors may not misstate the law or attempt to shift the burden of proof to the defendant. But prosecutors may argue that some evidence is more credible than other evidence and may use the art of rhetoric—within the confines of reason and the governing law—to convey the strength of the State's case to the jury. *State v. Arreola* 562*

STATUTES:

Application of Rule of Lenity if Reasonable Doubt of Meaning of Statute. The rule of lenity arises only when there is any reasonable doubt of the statute's meaning. *State v. Bolinger* 115

Construction of Statutes—Determination of Legislative Intent—Appellate Review. When construing statutes to determine legislative intent, appellate courts must consider various provisions of an act *in pari materia* with a view of reconciling and bringing the provisions into workable harmony if possible. *State v. Bolinger* 115

Express Preemption Provision in Federal Protection of Lawful Commerce in Arms Act—Determination of Scope of Preemption. When a federal statute contains an express preemption provision like the one used in the Protection of Lawful Commerce in Arms Act, we look to the plain language of that provision to determine the scope of the preemption. That is the best evidence of congressional intent. *Johnson v. Bass Pro Outdoor World* 217

Scope of Express Preemption Provision in Federal Statute—Interpretation of Language—Two Principles. An analysis of the scope of any express preemption provision in a federal statute must begin with the text. The

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interpretation of that language is guided by two principles about the nature of that preemption: (1) the presumption against preemption of the historic police powers of the states and (2) Congress' purpose in enacting the legislation. *Johnson v. Bass Pro Outdoor World* 217

Strict Construction of Criminal Statutes in Favor of Accused. Criminal statutes are strictly construed in favor of the accused. This rule is subordinate to the rule that the interpretation of a statute must be reasonable and sensible to effect the legislative design and intent of the law.
State v. Bolinger 115

To Resolve Text of Ambiguous Federal Statute—Courts Rely on Principles of Federalism. When a federal statute's text is ambiguous, courts can rely on the basic principles of federalism to resolve any ambiguity in a way that does not broadly intrude on the police power of the states.
Johnson v. Bass Pro Outdoor World 217

SUMMARY JUDGMENT:

Motion for Summary Judgment. A party cannot avoid summary judgment based on speculation or the hope that something may develop later during discovery or at trial. *Conge v. City of Olathe* 383

— Burden on Opposing Party. The party opposing a motion for summary judgment must come forward with evidence that establishes a genuine dispute regarding a material fact. A factual dispute is not material unless it has legal force as to a controlling issue. *Conge v. City of Olathe* 383

— District Court's Consideration. In ruling on a motion for summary judgment, a district court must resolve all facts and reasonable inferences from the evidence in favor of the party against whom judgment is sought.
Conge v. City of Olathe 383

-- Granted When No Genuine Issue of Material Fact Remains. Summary judgment is appropriate in the district court when all the available evidence demonstrates that no genuine issue of material fact remains, entitling the moving party to judgment as a matter of law.
Conge v. City of Olathe 383

Review of Trial Court's Ruling of Summary Judgment De Novo—Appellate Review. Appellate courts review a trial court's ruling on a motion for summary judgment de novo, meaning we are unconstrained by the lower court's ruling because we are in the same position as the lower court. We must view the facts in the light most favorable to the party opposing summary judgment. If reasonable minds could disagree about the conclusions to be drawn from the evidence—if there is a genuine issue about a material fact—summary judgment is inappropriate.
Johnson v. Bass Pro Outdoor World 217

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TORTS:

Claim of Retaliatory Discharge for Whistleblowing—Burden of Claimant. A person claiming retaliatory discharge for whistleblowing has the burden of establishing every element of the claim by clear and convincing evidence. *Conge v. City of Olathe* 383

—Burden of Proof Shifts Between Parties. If an employee can demonstrate a prima facie case of retaliatory discharge based on whistleblowing, the burden of proof shifts to the employer to come forward with evidence establishing that the employee was terminated for a legitimate nonretaliatory reason. If the employer is able to come forward with such evidence, the burden shifts back to the employee to come forward with evidence to show that the reason given by the employer for the termination of employment was pretextual. *Conge v. City of Olathe* 383

— Elements for Proof. To establish a prima facie case of unlawful retaliatory discharge for whistleblowing, one must prove the following elements: (1) a reasonable person would conclude that the employer or the employee's coworker was engaged in activity that violated rules, regulations, or the law pertaining to public health, safety, and welfare; (2) the employer knew about the reporting of the violation before discharging the employee; (3) the employer discharged the employee in retaliation for reporting the violation; and (4) the employee acted in good faith based on a legitimate concern about the wrongful activity. *Conge v. City of Olathe* 383

— Summary Judgment Appropriate if Plaintiff Fails to Establish Case. Summary judgment is appropriate in a retaliatory discharge case when an employee fails to establish a prima facie case. It is also appropriate when the employer has come forward with evidence of a legitimate nonretaliatory reason for the termination and the employee fails to come forward with evidence establishing that the reason given was pretextual.
Conge v. City of Olathe 383

Kansas Tort Claims Act—Application. The Kansas Tort Claims Act, K.S.A. 75-6101 et seq., distinguishes between traditional governmental functions—such as legislative, judicial, and executive enforcement actions—and other circumstances when a governmental entity is carrying out actions that could also be performed by private individuals. *Ashley Clinic v. Coates* 53

— Applicable to Claim of Tortious Interference under these Facts. The Kansas Tort Claims Act, K.S.A. 75-6101 et seq., applies to a claim of tortious interference with a contract against a county hospital.
Ashley Clinic v. Coates 53

— Definition of Wantonness under the Act. To constitute wantonness the act must indicate 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.
Zaragoza v. Board of Johnson County Comm'rs 358

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— Exception Depends on Character of Property and Not Activity Performed. The recreational use exception to the Kansas Tort Claims Act depends on the character of the property in question and not the activity performed at any given time; the plain wording of the statute only requires that the property be intended or permitted to be used for recreational purposes, not that the injury occur as the result of recreational activity.
Zaragoza v. Board of Johnson County Comm'rs 358

— Immunity under Statute Extends to Parking Lots. Immunity under K.S.A. 75-6104(o) extends to a parking lot integral to public property intended or permitted to be used as a park, playground, or open area for recreational purposes, including a library.
Zaragoza v. Board of Johnson County Comm'rs 358

— Recreational Use Exception Not Limited to Outdoor Areas. The recreational use exception to the Kansas Tort Claims Act, K.S.A. 75-6101 et seq., is not limited to outdoor areas or to areas intended for physical activity.
Zaragoza v. Board of Johnson County Comm'rs 358

Kansas Tort Claims Act's Damages Limitations—No Violation of Right to Jury Trial. The Kansas Tort Claims Act's damages limitations, including K.S.A. 75-6105(a)'s cap on total damages and K.S.A. 75-6105(c)'s prohibition of punitive damages, do not violate the right to a jury trial enshrined in section 5 of the Kansas Constitution Bill of Rights. *Ashley Clinic v. Coates* 53

Legal Malice—Definition. Legal malice is the intent to do harm without any reasonable justification or excuse. *Ashley Clinic v. Coates* 53

TRIAL:

Jury Instructions—No Meaningful Distinction between Using "No Reasonable Doubt" or "Beyond a Reasonable Doubt" Terminology. A district court's jury instruction that states: "If you have no reasonable doubt as to the truth of each of the claims required to be proved by the State, you should find the defendant guilty," is legally appropriate. Using the terminology "no reasonable doubt" does not lower the State's burden of proof to a lesser standard than "beyond a reasonable doubt" as there is no meaningful distinction between the terms. *State v. Beasley*..... 203

VENUE:

Venue Required to Establish Jurisdiction. Venue is a question of fact that must be proved to establish jurisdiction. *State v. Merrill* 322

WORKERS COMPENSATION ACT:

Motion to Modify Award—Determining if Good Cause Exists to Review. Determining whether good cause exists to review a workers compensation award under K.S.A. 44-528(a) is different from the discretionary decision to modify the award or reinstate an award. As part of this threshold inquiry, the ALJ should consider the entire record and what is reasonable under the totality of the circumstances. *Jackson v. Johnson County* …….....…….345

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— --- ALJ's Considerations. In determining whether a motion to modify a workers compensation award will be granted under K.S.A. 44-528(a), the Administrative Law Judge (ALJ) must make a threshold discretionary determination of whether good cause exists to review the award. It is only if the ALJ finds that good cause supports review that the matter will proceed to a final determination on modification of the award or reinstatement of a prior award. *Jackson v. Johnson County* 345

ZONING:

Applications for Multi-family Residential Developments May Be Treated as Zoning Amendments. State zoning statutes do not prohibit zoning authorities from treating applications for multi-family residential planned unit developments as zoning amendments governed by K.S.A. 12-757. *Austin Properties v. City of Shawnee, Kansas* 166

Broad Zoning Ordinances May Be Enacted by Cities and Counties. Cities and counties may enact broad zoning ordinances and procedures so long as they do not violate state zoning statutes.
Austin Properties v. City of Shawnee, Kansas 166

Factors in *Golden v. City of Overland Park* May Be Considered When Zoning Authorities Evaluating Zoning Amendments. Zoning authorities are strongly encouraged, although not required, to consider and document the factors enumerated in *Golden v. City of Overland Park*, 224 Kan. 591, 584 P.2d 130 (1978), when evaluating zoning amendments. Zoning authorities may consider some *Golden* factors more important than others and are not limited to the factors enumerated in *Golden* for their zoning decisions.
Austin Properties v. City of Shawnee, Kansas 166

Protest Provisions of Statute Apply to Multi-family Residential Development Applications. Zoning authorities are not prohibited from applying the protest provisions of K.S.A. 12-757(f)(1) to multi-family residential planned unit development applications. *Austin Properties v. City of Shawnee, Kansas* 166

Resubmission of Failed Zoning Amendments Inapplicable if Protested Zoning Amendment Not Approved by 3/4 Majority Vote. If a zoning authority fails to approve a protested zoning amendment by 3/4 majority vote, the protested zoning amendment is denied, and the processes for resubmission of failed zoning amendments in K.S.A. 12-757(d) are inapplicable. *Austin Properties v. City of Shawnee, Kansas* 166

Valid Protest Petition Filed against Zoning Amendment—3/4 Majority Vote Required for Zoning Authority to Approve. When neighbors file a valid protest petition against a zoning amendment pursuant to K.S.A. 12-757(f), the zoning authority can only approve the amendment by a 3/4 majority vote. *Austin Properties v. City of Shawnee, Kansas* 166

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Zoning Decisions May Not Be Based on Unsupported Generalities. Zoning authorities cannot rely on unsupported generalities or a plebiscite of neighbors when making zoning decisions.
Austin Properties v. City of Shawnee, Kansas 166

(553 P.3d 344)

No. 126,505

STATE OF KANSAS, *Appellee*, v. BLAKE WAYNE FEIKERT, *Appellant*.

SYLLABUS BY THE COURT

1. CRIMINAL LAW—*Sentencing—Jail Credit Allowed by Statute for all Time Defendant Is Incarcerated.* K.S.A. 21-6615(a) entitles a defendant to an allowance for jail credit against their controlling sentence for all time spent incarcerated while the defendant's cases were pending disposition.

2. SAME—*Consecutive Sentences—No Entitlement to Duplicative Jail Credit for Consecutive Prison Sentences in Multiple Cases*. When consecutive sentences are imposed in separate cases, the defendant is entitled to a single day of jail credit for each day spent in jail while those cases were pending. A defendant is not entitled to duplicative jail credit toward consecutive prison sentences imposed in multiple cases.

Appeal from Cheyenne District Court; PRESTON PRATT, judge. Submitted without oral argument. Opinion filed July 12, 2024. Affirmed.

Darby VanHoutan, of Kansas Appellate Defender Office, for appellant.

Ryan J. Ott, assistant solicitor general, and *Kris W. Kobach*, attorney general, for appellee.

Before PICKERING, P.J., MALONE and WARNER, JJ.

WARNER, J.: In *State v. Hopkins*, 317 Kan. 652, Syl., 537 P.3d 845 (2023), the Kansas Supreme Court held that K.S.A. 2022 Supp. 21-6615(a) entitles a defendant "to jail time credit against his or her sentence for all time spent incarcerated while the defendant's case was pending disposition." On its face, this seems like a simple rule. But nuances of Kansas sentencing law allow courts to tailor sentences to the facts of each case. And the *Hopkins* decision has given rise to questions about how it should be applied in some of those more complex cases.

In particular, since *Hopkins* was decided, courts have diverged on to how jail time should be credited when a defendant receives consecutive prison sentences in separate cases. (*Hopkins* involved a situation where the defendant was sentenced in only one case and thus did not shed light on this question.) Some courts

have concluded, as the district court did here, that a defendant receives one day of credit toward their total controlling prison sentence for each day spent in jail while the cases were pending. See *State v. Gutierrez*, No. 125,073, 2024 WL 1338948, at *3 (Kan. App. 2024) (unpublished opinion) (Malone, J., concurring). Other courts have found, at least implicitly, that defendants should receive jail credit toward each consecutive sentence—a practice that can lead to two or more days of jail credit for each day spent in jail. See *State v. Ward*, No. 125,421, 2023 WL 7404186, at *5 (Kan. App. 2023) (unpublished opinion).

Today, we clarify that a defendant is not entitled to duplicative jail credit toward consecutive prison sentences imposed in multiple cases. Based on this clarification, we affirm the district court's ruling in the case before us.

FACTUAL AND PROCEDURAL BACKGROUND

Blake Feikert was charged in July 2022 with criminal threat against a law enforcement officer. He was arrested on July 27, 2022, and was held in jail until he posted a release bond on December 13, 2022. While in custody for those 139 days, Feikert was also awaiting the disposition of two other criminal cases—one involving a separate charge of criminal threat against a law enforcement officer (in a different incident from the July 2022 case) and another alleging Feikert had violated the terms of an earlier probation and felony diversion agreement.

On January 24, 2023, Feikert entered into a plea agreement covering the three pending cases. Feikert agreed to plead guilty to criminal threat against a law enforcement officer in this case, stemming from the July 2022 arrest. He also stipulated that he had violated his probation conditions and diversion agreement, and he agreed to plead guilty to the felony charges underlying the earlier diversion. In exchange, the State dismissed the separate charge of criminal threat against a law enforcement officer. The district court accepted Feikert's pleas in both cases, and he was taken into custody to await sentencing.

Feikert's sentencing hearing took place 92 days later on April 26, 2023. The district court imposed a controlling 29-month prison sentence in the earlier case that had involved probation and

diversion and a 21-month prison sentence in this case, to be served consecutively. The court then applied credit for the 231 days Feikert had spent in custody—139 days from July 27 to December 13, 2022, and 92 days from January 24 to April 26, 2023—toward his 29-month sentence in the earlier case. Because this credit accounted for all the time Feikert had spent in jail, the court did not apply any jail credit to his sentence in this case. Feikert appeals.

DISCUSSION

Feikert argues that the district court's application of jail credit was inconsistent with the jail-credit statute and the Kansas Supreme Court's holding in *Hopkins*. Feikert acknowledges that he did not raise this claim before the district court. But this omission is understandable, as *Hopkins* was decided while Feikert's appeal was pending. He argues—and we agree—that there is no dispute about the controlling facts, and thus the record permits us to meaningfully consider that claim for the first time on appeal. Indeed, even if the district court had considered Feikert's current claim at sentencing, we would not be constrained by the district court's interpretation of the controlling Kansas statute. *State v. Harris*, 311 Kan. 816, 821, 467 P.3d 504 (2020).

Jail credit in Kansas is governed by K.S.A. 21-6615(a). Feikert's jail credit was controlled by the same version of that statute that the Kansas Supreme Court considered in *Hopkins*. K.S.A. 2022 Supp. 21-6615(a) states:

> "In any criminal action in which the defendant is convicted, the judge, if the judge sentences the defendant to confinement, shall direct that for the purpose of computing defendant's sentence and parole eligibility and conditional release dates thereunder, that such sentence is to be computed from a date, to be specifically designated by the court in the sentencing order of the journal entry of judgment. *Such date shall be established to reflect and shall be computed as an allowance for the time which the defendant has spent incarcerated pending the disposition of the defendant's case.*" (Emphasis added.)

Feikert asserts that *Hopkins* established a rule that a defendant must receive credit against their sentence "for all time spent incarcerated while the defendant's case was pending disposition." *Hopkins*, 317 Kan. 652, Syl. He points out that the *Hopkins* court did not announce a different rule for consecutive, concurrent, or single sentence cases. Because Feikert spent 231 days in jail while he

was waiting the disposition in this case, he argues that he should be given credit toward his sentence for that time—regardless of whether he was also being held for other cases or has received credit for that jail time in other cases. We do not read *Hopkins* so broadly.

For roughly 45 years, the Kansas Supreme Court interpreted K.S.A. 21-6615(a)'s statement that a defendant should be given an "allowance" for the time they spent incarcerated "pending the disposition of the defendant's case" to mean that a person would only receive jail credit when they were being held *solely* on the crime charged. See *State v. Smith*, 309 Kan. 977, 981, 441 P.3d 1041 (2019); *Campbell v. State*, 223 Kan. 528, 528-31, 575 P.2d 524 (1978). But the Supreme Court overruled this caselaw in *Hopkins*, noting that while this precedent originated from a need to prevent duplicative credit, it had evolved to create inequitable situations unmoored to the language of K.S.A. 21-6615(a), where criminal defendants being held in jail for multiple cases received *no* credit for any of those cases. *Hopkins*, 317 Kan. at 657-58. The *Hopkins* court thus cast away its previous requirement that a defendant only receive credit for when they were held solely on the crime charged for a simplified rule that a defendant receive one day of credit for each day spent in jail:

"Under our former interpretation of K.S.A. 2022 Supp. 21-6615(a), we would have had to closely evaluate each of the other charges against Hopkins to figure out how much credit, if any, could be awarded. However, applying our updated rule is a much easier endeavor; we simply conclude that because Hopkins spent 572 days in jail while his case was pending, Hopkins must be awarded 572 days in jail time credit." 317 Kan. at 659.

Beyond this statement, the Supreme Court's decision in *Hopkins* provides scant guidance as to how this simplified rule should be applied in more complicated instances, like when a defendant is sentenced in multiple cases. But the facts underlying *Hopkins*—and the backdrop of cases against which it was decided—illuminate our path.

The defendant in *Hopkins* was arrested and jailed pending trial on murder charges. The State also moved to revoke Hopkins' probation in an earlier theft case, and he was held in jail awaiting disposition on that case. New charges were added after Hopkins

unsuccessfully attempted to escape jail and flee. Hopkins spent 572 days in jail while these cases were pending. Eventually, Hopkins negotiated a plea deal with the State. Hopkins agreed to plead guilty to two counts of premeditated first-degree murder; the State dismissed the probation revocation on the theft case and other pending charges. The district court ordered him to serve two concurrent sentences of lifetime imprisonment without the possibility of parole for 50 years.

At sentencing, Hopkins requested credit for the jail time he spent incarcerated awaiting resolution of these various cases. The district court denied Hopkins' request based on Kansas Supreme Court caselaw, as Hopkins had not been held *solely* on the murder charges. The result was that Hopkins would receive no credit toward his sentence for the year and a half he had spent in jail.

On appeal, the Kansas Supreme Court held that Hopkins was entitled to credit against his murder sentences for all the time Hopkins spent in jail before sentencing. In so holding, the court specifically overruled the precedent established by *Campbell* and its progeny. After conducting a cursory statutory analysis, the *Hopkins* court concluded that Hopkins was entitled to 572 days of jail time credit—which corresponded to the entire time Hopkins spent in jail before sentencing—even though Hopkins was being held for other charges besides the murder charges. 317 Kan. at 659. The court held that "[u]nder the obvious and plain meaning of the words chosen by the Legislature, a defendant shall be awarded jail time credit for *all* time spent in custody pending the disposition of his or her case." 317 Kan. at 657.

While this rule was simple to apply in a case like *Hopkins*—where there was a sentence imposed in only one case and that sentence involved concurrent prison terms—it is less straightforward in situations like the one now before us. Feikert was being held in jail while multiple criminal cases were pending. He was convicted and received prison sentences in two of those cases. And the district court ordered him to serve those two prison sentences consecutively. *Hopkins* does not articulate a clear method for determining jail credit in multiple cases where consecutive sentences are imposed.

But other caselaw helps fill this gap. For example, in *State v. Lofton*, 272 Kan. 216, 32 P.3d 711 (2001), the court held that a defendant who receives consecutive prison sentences is only entitled to credit toward one of those sentences—not both. There, the district court imposed two consecutive life sentences and another consecutive 6-month sentence. Lofton argued on appeal that his jail credits had been improperly computed because "the 7 months and 2 days he spent in jail awaiting trial on these charges should have been credited to the sentence imposed on *each* of the two felonies, for a total of 14 months and 4 days credit on his aggregate prison sentences." 272 Kan. at 216. The Supreme Court rejected this argument, finding that the previous codification of the jail-credit statute did not support the defendant's contention that he was "entitled to jail time credit on his aggregate sentence for twice the number of days he was actually incarcerated." 272 Kan. at 218. *Lofton* was a single sentence case, but it nevertheless illustrates a common-sense rule that a defendant should receive one day of credit—not multiple days—toward a controlling prison sentence for every day spent in jail.

The Kansas Supreme Court recently reaffirmed its prohibition against duplicative credit in *State v. Davis*, 312 Kan. 259, 288, 474 P.3d 722 (2020), which involved consecutive sentences in multiple cases—analogous to Feikert's situation. In *Davis*, the district court ordered Davis to serve a hard 25 life sentence and other consecutive sentences totaling 86 months in prison. These sentences ran consecutive to sentences imposed in two other cases.

Davis argued on appeal that he should be given credit for 599 days he spent in jail awaiting sentencing. The district court denied Davis' request because "the 599 days were awarded as jail credit against another case's sentence, to which the sentence in this case would run consecutive." 312 Kan. at 288. And the Supreme Court affirmed that decision, explaining that "if consecutive sentences are imposed in separate cases, the defendant is still only entitled to a single day of jail time credit for each day spent in jail." 312 Kan. at 287. In other words, "'[j]ail credit awarded in two cases for the same dates can only be counted once when sentences are run consecutively.'" 312 Kan. at 287. Thus, once jail credit "has

already been 'used up'" by one sentence, it cannot be applied to another consecutive sentence. 312 Kan. at 288.

Nothing in *Hopkins* suggests that the Kansas Supreme Court intended that decision to modify *Davis*' rule that prohibits duplicative credit in instances where a defendant receives consecutive sentences in multiple cases.

Nor do Kansas statutes demand otherwise. K.S.A. 2022 Supp. 21-6615(a) requires courts to calculate sentences with an "allowance for the time which the defendant has spent incarcerated." Accord Black's Law Dictionary 96 (11th ed. 2019) (defining an "allowance" as a "share or portion . . . that is assigned or granted"). As the Supreme Court explained in *Hopkins*, this allowance statutorily entitles a defendant in a criminal case to reduce the amount of time they spend in prison by an equivalent amount of time they spent in jail before the prison sentence was imposed. It does not mean that a defendant is entitled to a duplicative credit for time spent in jail awaiting disposition of criminal charges against multiple cases. Such a rule would defy common sense, as it would grant a windfall to defendants who commit multiple offenses in separate cases. Accord *State v. Keel*, 302 Kan. 560, 574, 357 P.3d 251 (2015) (courts construe statutes to avoid unreasonable or absurd results).

Before closing, we pause to note that today's holding is consistent with the legislature's recent amendment to K.S.A. 21-6615, which took effect upon publication in the Kansas Register on May 23, 2024. See K.S.A. 21-6615, as amended by L. 2024, ch. 96, §§ 7, 13. The amended statute states that a person's release date must be determined based on "an allowance for the time that the defendant has spent incarcerated pending of the disposition of the defendant's case," and—consistent with *Hopkins*—a defendant is "entitled to have credit applied for each day spent incarcerated." K.S.A. 21-6615(a)(1) (amended 2024). The statute further clarifies—consistent with our holding here—that courts should not include in that calculation "[a]ny time awarded as credit in another case when consecutive sentences are imposed on a defendant." K.S.A. 21-6615(a)(2)(A) (amended 2024).

No one argues that these statutory amendments apply here. But the amendments are consistent with our ruling under K.S.A.

2022 Supp. 21-6615(a) and Kansas Supreme Court caselaw that a defendant is not entitled to duplicative jail credit toward consecutive prison sentences imposed in multiple cases. Thus, Feikert is not entitled to a duplicative allowance for the jail credit already applied in a separate case. We affirm the district court's judgment.

Affirmed.

(552 P.3d 1266)

No. 126,005

HERITAGE TRACTOR, INC., *Appellant*, v. EVERGY KANSAS CENTRAL, INC., *Appellee*.

SYLLABUS BY THE COURT

1. KANSAS CORPORATION COMMISSION—*Authority Vested in KCC Through Electric Public Utilities Act*. The Electric Public Utilities Act, K.S.A. 66-101 et seq., vests the Kansas Corporation Commission with jurisdiction and the authority necessary to control those electric public utilities doing business in Kansas.

2. SAME—*Right of KCC to Adopt Tariff—Governs Relationship between Utility Provider and Customers.* The Kansas Corporation Commission has the right to adopt tariffs which outline the terms and conditions governing the relationship between a utility provider and its customers.

3. PUBLIC UTILITIES—*Tariff Structure of Public Utility—May Limit Utility's Liability to Customers.* A public utility's tariff structure may contain provisions which are intended to limit the utility's liability to its customers provided such tariffs are neither unreasonable nor unjust.

4. SAME—*Legal Tariffs Construed in Same Manner as Statutes—Interpretation of Tariffs.* Legally established tariffs are construed in the same manner as statutes. When a court sets out to determine the plain meaning of a tariff it looks not only to the language used, but also the specific context in which it appears, as well as the broader context of the tariff provision in its entirety.

5. SAME—*Tariff Provision Drafted Broadly to Insulate Public Utility from Liability—Unreasonable and Unenforceable Provision.* A tariff provision drafted so broadly as to insulate a public utility from liability for every conceivable act of misfeasance, including ordinary negligence which results in catastrophic property damage, is unreasonable and unenforceable.

6. TORTS—*Willful and Wanton Conduct—Two-Pronged Burden on Party to Establish Wanton Conduct.* A party seeking to establish wanton conduct bears a two-pronged burden: (1) demonstrate that the act complained of was conducted with a realization of the imminence of danger; and (2) that the act was performed with a reckless disregard for or complete indifference to its probable consequences. The conduct at issue may be either broad or specific but each component of the inquiry must address the same conduct.

7. PUBLIC UTILITIES—*Jury Question Whether Inspection Program Encompasses Due Care Required.* Whether a public utility's inspection program comprehensively encompasses the due care demanded by the extreme risk inherent to the services it provides is a question on which reasonable minds could differ, and therefore, it should be submitted to a jury for resolution.

Appeal from Douglas District Court; JAMES R. MCCABRIA, judge. Oral argument held November 14, 2023. Opinion filed July 19, 2024. Reversed and remanded.

Court T. Kennedy, of Gates Shields Ferguson Swall Hammond, P.A., of Overland Park, and *Michelle D. Hurley*, pro hac vice, of Yost & Baill, LLP, of Minneapolis, Minnesota, for appellant.

John T. Bullock, J. Eric Weslander, and *Whitney L. Casement*, of Stevens & Brand, LLP, of Lawrence, for appellee.

Before HILL, P.J., MALONE and ISHERWOOD, JJ.

ISHERWOOD, J.: Heritage Tractor, Inc. (Heritage), a tractor dealership, suffered over $3 million in catastrophic damage when a utility pole owned by Evergy Kansas Central, Inc. (Evergy), collapsed onto the business and started a fire. Heritage sued Evergy to recover its losses, but the district court granted Evergy's motion for summary judgment.

In a written ruling, the district court explained that Evergy was insulated from liability by virtue of its tariff structure, specifically, section 7.02(B) of its limited liability provisions. That subsection purports to limit Evergy's liability in a vast array of contexts unless Heritage makes an affirmative showing of willful or wanton conduct. The district court also found that Heritage failed to bring forth any evidence which demonstrated that Evergy acted with wanton disregard in that it was aware of the precise impending risk posed by the pole at issue and chose to disregard the same.

Heritage brings this appeal and requests our analysis of whether the district court's grant of summary judgment was erroneous. Following a careful review of the record, scrutiny of Evergy's tariff, and a thorough analysis of the governing law, we agree with the district court's implicit finding that subsections (A) and (C) of tariff 7.02 are inapplicable to this case. However, we disagree with its conclusion that subsection (B) of the tariff provides

Evergy with an avenue for the immunity from liability it seeks and instead find that this subsection is overly broad and unreasonable. Finally, contrary to the district court, we are satisfied there was ample evidence from which reasonable minds could differ regarding whether Evergy's preventative measures were sufficient to materially lessen the risk of a catastrophic pole failure and conclude that the proper course of action is to submit that evidentiary dispute to a jury for resolution. Accordingly, the district court's decision granting Evergy's request for summary judgment is reversed, and this case is remanded for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

The Pole Falls

In early May 2018, a utility pole owned by Evergy fell onto the roof of the Heritage tractor dealership and caused a fire. The subsequent investigation determined that the cause was accidental.

Two years later, Heritage filed suit against Evergy and alleged that Evergy was negligent in its maintenance of the pole by failing to inspect, repair, or replace it. Heritage further asserted that Evergy breached both express and implied warranties and committed trespass.

The Pole and its History

At the time of the incident, the wooden utility pole at issue was approximately 50 years into its estimated 53-year lifespan. We recognize that age should not be relied on, in isolation, as an accurate measure of pole integrity. The equipment attached to the pole accounted for 41% of the pole's strength capacity, as designated under the National Electrical Safety Code (NESC).

Evergy never experienced any problems with the pole prior to the incident, and Tim Deneke, Heritage's on-site manager who was charged with the task of managing any significant problems that arose with the business, never personally observed or fielded any concerns about the pole. In the week leading up to the fire, Deneke walked or drove past the pole almost every day and it "'[l]ooked like every other pole that was around there.'" That is, it

never swayed, wobbled, or otherwise exhibited unusual movement. To Deneke's knowledge, there was never a time when Evergy failed to address issues reported by the business.

About six weeks prior to the pole's collapse, Heritage notified Evergy that the building's electrical service line appeared to be touching its roof. David Shockley, a journeyman lineman for Evergy, responded to the call and despite finding the service line was not actually in contact with the roof, he still removed some slack from the line. Nothing indicated to Shockley that the pole was unstable.

Evergy's Inspection Procedures

The Kansas Corporation Commission's (KCC) Electric Reliability Requirements did not include a specific inspection process or cycle for these poles. The NESC directs that inspection of utility equipment may be performed "'as experience has shown to be necessary.'" The record reveals that Evergy limited regular patrol-type inspections to only that equipment located within what it considered to be critical points in the community infrastructure and those installed in higher traffic areas such as parks, schools, or fairgrounds. Heritage did not meet either of those classifications. There is also evidence that Evergy limited its inspections to poles within circuits that were lesser performing. The subject pole was associated with a high performing circuit; thus, it was not scheduled for inspection.

During discovery, Nelson Bingel was deposed. He is the current NESC chairman and former Vice President of Product Strategy for Osmose Utilities, the company that performed inspections for Evergy. He testified that the recommendation was for Evergy to inspect its wooden utility poles, such as the one that failed here, every 10 years and the company was previously notified that its inspections did not meet expectations. Further, there was evidence to indicate that the pole was never subjected to an inspection by Evergy during its 50-year lifetime and, at the time of the collapse, there was significant advanced decay though its cross-section.

Beyond scheduled inspections, Evergy relied on its employees' judgment, experience, and training to notice whether equipment was damaged. For example, its linemen were instructed to

insert an awl or screwdriver into a pole's base to gauge its soundness before scaling it for service. In the event that endeavor yielded any sign of instability they had the authority to order a pole changed immediately. Again, lineman Shockley allegedly performed the soundness test when responding to the service call six weeks before the pole fell and did not uncover any issues with the pole.

The District Court's Summary Judgment Decision

Evergy moved for summary judgment and argued that the terms of its tariff with the KCC, specifically under sections 7.02(A), (B), and (C), insulated it from liability for mere negligence, and therefore, to obtain relief Heritage had the burden to affirmatively show that its damages were the result of Evergy's wanton conduct. According to Evergy, Heritage could not sustain this burden because its claims amounted to "garden-variety negligence," and no facts "even remotely" suggested that Evergy allowed the pole to remain in place despite knowledge of its dangerous condition. Evergy also asserted that Heritage's two other causes of action did not offer a work-around from the tariff.

Heritage responded that the tariff provisions Evergy relied on to shield it from liability were only applicable within the contexts addressed by each subsection, none of which materialized here, and, to the extent the district court disagreed with that position, the tariffs also could not offer a foundation to avoid liability because the scope of their purported limitations on liability abrogated Kansas common law, which rendered them unenforceable and unreasonable. Finally, Heritage argued there was sufficient evidence for a jury to conclude that the pole eventually gave way because of Evergy's wanton conduct, a claim permitted under the tariff, so summary judgment was not appropriate.

After a hearing, the district court granted Evergy's motion for summary judgment. It determined that whether Evergy could have followed a better utility pole inspection protocol was a question grounded in negligence, and section 7.02(B) of the KCC tariff protected Evergy from liability for ordinary negligence under the circumstances presented. Thus, Heritage's sole avenue of relief lied

with its ability to prove that Evergy's practices amounted to wanton conduct, but it failed to controvert any material fact or make any affirmative showing that Evergy acted with wanton disregard. The court elaborated that Heritage neglected to establish that Evergy's failure to inspect the pole on a 10-year cycle was somehow material to the case or offer any evidence which proved that Evergy was put on notice that there was an impending risk that this specific pole could cause harm or damage, but nevertheless opted to act with a concurrent disregard of that risk. The court concluded there were no facts upon which a reasonable juror could rely to conclude that Evergy engaged in wanton conduct. Therefore, it would be improper to allow the case to proceed to a jury.

The district court then summarized what it believed were the uncontroverted facts: no Heritage employee observed anything out of the ordinary with the pole prior to the fire; Evergy directs its linemen to gauge poles for soundness prior to climbing them; an Evergy lineman responded to a service call at Heritage approximately six weeks before the incident and reported no irregularities with the pole; and finally, the KCC's Electric Reliability Requirements do not mandate a specific inspection cycle for poles.

Finally, the district court rejected Heritage's claim that the tariff was unenforceable or unreasonable as an abrogation of common law, citing the Kansas Supreme Court's holding in *Danisco Ingredients USA, Inc. v. Kansas City Power & Light Co.*, 267 Kan. 760, 774, 986 P.2d 377 (1999), for support. The district court opined that *Danisco* stood for the proposition that tariffs which limit the liability of utility providers such as Evergy to only acts of wanton conduct are enforceable and in alignment with Kansas' public policy.

Heritage now appeals the case to us and requests that we analyze the propriety of the district court's summary judgment decision.

LEGAL ANALYSIS

Overview of Tariffs

Heritage has presented four questions for us to review in this case, nearly all of which arise out of the tariffs drafted by Evergy. Before embarking on the respective analyses required to resolve

each of those claims, we believe it is appropriate, and helpful, to offer an overview of how tariffs manifest and the role they are designed to serve.

In Kansas, the regulation of public utilities is legislative—not judicial. *Grindsted Products, Inc. v. Kansas Corporation Comm'n*, 262 Kan. 294, 309, 937 P.2d 1 (1997). As a utility provider, Evergy is regulated by the KCC. The Electric Public Utilities Act, K.S.A. 66-101 et seq. (EPUA), in turn gives the KCC "full power, authority and jurisdiction to supervise and control the electric public utilities, as defined in K.S.A. 66-101a, doing business in Kansas," and empowers the KCC to "do all things necessary and convenient for the exercise of such power, authority and jurisdiction." See K.S.A. 66-101 et seq.; K.A.R. 82-1-201 et seq. Every public utility doing business in Kansas is controlled by the KCC and is required to publish and file with the KCC copies of all schedules, rates, rules, regulations, and contracts. See K.S.A. 66-101c.

In the interest of the public and the utility's customers, the Kansas Legislature granted the KCC the authority to adopt tariffs, or rules, effective against public utilities. See K.S.A. 66-101 et seq. Those tariffs also outline the terms and conditions which govern the relationship between a utility provider and its customers. *Danisco*, 267 Kan. at 765; *Southwestern Bell Tel. Co. v. Kansas Corporation Commission*, 233 Kan. 375, 377, 664 P.2d 798 (1983). While these tariffs are frequently crafted by the regulated utility, they are not permitted to be unjustly or unreasonably discriminatory nor unduly preferential. Tariffs must comport with any conditions, schedules, and provisions authorized by the regulatory agency, and amended tariffs and schedules of rates are not effective unless approved by the KCC. *Grindsted*, 262 Kan. at 309.

Certain tariff provisions are referred to as liability limitations and are justified by the theory that because a public utility is subject to strict regulations, its liability should be expressly defined and limited so as not to undermine its ability to offer its service at reasonable rates. That is, a reasonable rate is dependent, in part, on rules which limit a provider's liability. *Danisco*, 267 Kan. at 769. Once those tariffs are duly filed with the KCC, they generally bind both the utility and the customer. *Farmland Industries, Inc.*

v. Kansas Corporation Comm'n, 29 Kan. App. 2d 1031, 1043, 37 P.3d 640 (2001). However, neither the Electric Public Utilities Act, nor prior caselaw interpreting the same, explicitly vests either the utility or the KCC with the authority to craft tariffs which place unreasonable limitations on a public utility's liability to its customers. See *Danisco*, 267 Kan. at 767-68; *McNally Pittsburg Mfg. Corp. v. Western Union Telegraph Co.*, 186 Kan. 709, 714-15, 353 P.2d 199 (1960); *Milling Co. v. Postal Telegraph Co.*, 101 Kan. 307, 310, 166 P. 493 (1917).

With this background in mind, we turn to the substantive questions Heritage brought to us for review.

Did the district court err in granting Evergy's motion for summary judgment?

The primary issue driving Heritage's appeal is whether error occurred when the district court granted Evergy's request for summary judgment. The summary judgment standard is well known:

"Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, admissions on file, and supporting affidavits show that no genuine issue exists as to any material fact and the moving party is entitled to judgment as a matter of law. The district court must resolve all facts and reasonable inferences drawn from the evidence in favor of the party against whom the ruling is sought. When opposing summary judgment, a party must produce evidence to establish a dispute as to a material fact. In order to preclude summary judgment, the facts subject to the dispute must be material to the conclusive issue in the case. Appellate courts apply the same rules and, where they find reasonable minds could differ as to the conclusions drawn from the evidence, summary judgment is inappropriate. Appellate review of the legal effect of undisputed facts is de novo." *GFTLenexa, LLC v. City of Lenexa*, 310 Kan. 976, 981-82, 453 P.3d 304 (2019).

Within this issue, Heritage advances a two-fold contention of error. First, it asserts that the district court missed the mark in finding that section 7.02(B) of Evergy's limited liability tariffs specifically justified constraints on the utility's liability under the facts presented here. It then claims the court compounded its error when it concluded that Heritage also failed to come forward with sufficient facts to justify submitting the matter to a jury to determine whether Evergy engaged in "wanton" conduct. We will address each aspect of its argument in turn.

A. Whether limited liability provisions are enforceable

Section 7.02 in Evergy's tariff structure embodies the utility's limitations of liability and was relied on by both Evergy and the district court as a foundation for the assertion that summary judgment was appropriate given that the terms of the KCC tariff insulated the utility from liability for the property damage that occurred here.

Heritage first contends that the Legislature did not grant the KCC the latitude to insulate utilities from liability for their negligent conduct, and therefore, section 7.02 of Evergy's tariffs suffers from an unenforceability problem. Evergy counters that the Legislature specifically vested the KCC with broad authority to regulate utility providers in whatever manner it deemed necessary to best serve the public interest, a latitude which necessarily includes eliminating common negligence claims against a utility.

Whether the KCC had authority to adopt the tariff's limitation of liability is a question of law over which this court exercises unlimited review. *Danisco*, 267 Kan. at 765. For their part, utilities have an obligation to only establish rates, regulations, and rules that are "just and reasonable." K.S.A. 66-101b. To the extent a utility strays from that requirement, a provision which is analyzed and determined to be "unjust or unreasonably discriminatory or unduly preferential" will be deemed void. K.S.A. 66-101b. The KCC enjoys investigatory powers through the operation of K.S.A. 66-101d, K.S.A. 66-101e, and K.S.A. 66-101f. If it acts under that authority and finds that a utility's rates violate the EPUA in any way, it has the legislatively established power to substitute the offending provision in a manner it determines to be "just, reasonable and necessary." K.S.A. 66-101f(a). Finally, through K.S.A. 66-101g, the Legislature specifically dictated that the provisions of the EPUA are to be liberally construed, and under K.S.A. 66-115, a tariff is assumed to be prima facie reasonable.

To determine whether the Legislature gave the KCC the authority to approve a liability limiting tariff which encompasses the extensive property damage Heritage suffered in this case, we can derive some guidance from our Supreme Court's opinion in *Danisco*, 267 Kan. at 767-68. Danisco Ingredients USA, Inc. (Danisco) was a Kansas based manufacturer of food additives and a

customer of Kansas City Power & Light Company (KCP&L), which operated in both Missouri and Kansas. Danisco's production of food additives utilized a high vacuum process that could not tolerate "'even the briefest interruption of power.'" 267 Kan. at 762. Yet, it experienced three power outages in 1993 that caused disruptions to its production and resulted in economic damages. Danisco sued KCP&L in the hope of recovering its losses. The district court was called upon to interpret the following two liability limiting tariff provisions:

Rule 7.06, which addressed KCP&L's duty to supply continuous electrical energy to customers, and provided:

"'The Company will use reasonable diligence to supply continuous electric service to the customer but does not guarantee the supply of electric service against irregularities or interruptions. The Company shall not be considered in default of its service agreement with the customer and shall not otherwise be liable for any damages occasioned by any irregularity or interruption of electric service.'" 267 Kan. at 763.

Rule 7.12 purported to cover KCP&L's liability to its customers generally, and provided:

"'The Company shall not be considered in default of its service agreement and shall not be liable on account of any failure by the Company to perform any obligation if prevented from fulfilling such obligation by reason of any delivery delay, breakdown, or failure of or damage to facilities, an electric disturbance originating on or transmitted through electric systems with which the Company's system is interconnected, act of God or public enemy, strike or other labor disturbance involving the Company or the Customer, civil, military, or governmental authority, or any cause beyond the control of the Company.'" 267 Kan. at 763.

The district court concluded the provisions were unreasonable and unenforceable, prompting an appeal by KCP&L. In analyzing whether the Legislature granted the KCC the ability to limit a public utility's liability the *Danisco* court relied, in part, on *Milling Co.*, 101 Kan. 307. In that case, the court was tasked with determining whether a telegraph company could limit its liability for negligence. In so doing, it conducted an examination of the provisions governing public utilities and determined they did not explicitly authorize a limitation on liability. 101 Kan. at 310-11. However, the *Milling Co.* court did recognize that language contained within the public utilities act, which required that rules and

regulations be reasonable and that rates be filed with the Commission, seemingly indicated a *narrow* right to such a limitation would be tolerated.

The court elaborated:

"It has been held in this state that a common carrier (without a permissive statute) cannot impose a condition exempting him from liability for his own negligence, and a telegraph company is so much like a carrier that its liability for negligence should be governed by similar principles, yet reasonable limitations of liability other than those which do not seek to excuse its gross negligence have been upheld; while stipulations restricting liability to an insignificant sum where the negligence was gross have been disregarded. [Citations omitted.]" 101 Kan. at 311.

The *Milling Co.* court went on to hold that "[a] telegraph company may make reasonable stipulations limiting its liability, but in the absence of positive or permissive statutes governing the subject, the reasonableness of any such stipulation is a question for judicial determination." 101 Kan. 307, Syl. ¶ 2. It ultimately found that the limitation at issue was unreasonable because it sought to constrain liability for negligence to an insignificant sum in all circumstances. 101 Kan. at 311.

Relying on the EPUA, *Milling Co.*, and other prior caselaw, the *Danisco* court concluded that while the EPUA does not explicitly confer power on either the public utility or the KCC to limit liability, Kansas nevertheless allows reasonable limitations as an integral part of the rate-making process. While the KCC is responsible for ensuring reasonable rates and assesses the propriety of liability limitations within the utility's filed tariff, it is the courts that will serve as the final arbiter over any questions concerning reasonability. 267 Kan. at 767-68.

But we note that *Danisco* is highly contextualized, and those details provide a critical distinction. Notably, it held that "[i]t was reasonable for the KCC to allow a tariff to become effective which relieved [KCP&L] of liability for damages resulting from its own ordinary negligence *in regard to the supply of electric service*." (Emphasis added.) 267 Kan. 760, Syl. ¶ 5. But the court went on to find that the approved limits on liability at issue in KCP&L's tariff 7.12 went too far and, as a result, were inconsistent with Kansas law and public policy. 267 Kan. at 769, 773.

The consistent undercurrent in these analyses is that while liability limitations are enforceable in the abstract, a comprehensive assessment must be made with an eye toward what is "just and reasonable." See K.S.A. 66-101b. That reasonability touchstone leads us to the next aspect of Heritage's argument which is whether it can be said the particulars of the liability limitations set out under Evergy's tariff 7.02 are so unreasonable as to render them unenforceable. To resolve that inquiry, we must focus on the precise language of 7.02(A), (B), and (C).

B. Interpretation of tariff 7.02, subsections (A), (B), and (C)

It is Heritage's position that the tariff was inapplicable under the facts of this case because subsection (A) of that provision is intended to solely address Evergy's duty to provide steady and continuous service, subsection (B) relates only to that harm or damage sustained by a customer during the course of Evergy's installation, maintenance, or replacement of equipment, and subsection (C) is limited to that harm or damage a non-customer suffered as a result of Evergy's installation, maintenance, or replacement of equipment on a customer's property.

Evergy counters that the language set forth under subsection (A) specifically encompasses *any* loss, damage, or injury *whatsoever* that is "'caused by or arising from Company's operations.'" It then proposes a rather broad interpretation of subsection (B) and argues it should be construed to cover not only operations, but also the provision of electric service, as well as the installation, maintenance, or replacement of lines or other facilities. Finally, Evergy refutes that subsection (C) has any application to non-customers, and instead argues that it simply contemplates the ordinary operations of the company and limits any liability for trespass, personal injury, and property damage that may be caused by or related to such ordinary operations. In short, according to Evergy, all three subsections operate to shield it from liability for any property damage Heritage sustained by the collapse of its pole.

A determination of whether any of the three subsections may properly be construed to limit Evergy's liability to Heritage requires us to engage in an interpretation of the terms used in each.

"Legally established tariffs are construed in the same manner as statutes." *Farmland Indus., Inc.*, 29 Kan. App. 2d at 1043. Interpretation of a statute is a question of law and is reviewed de novo. *Roe v. Phillips County Hospital*, 317 Kan. 1, 5, 522 P.3d 277 (2023). "The fundamental rule regarding statutory construction is that the intent of the legislature governs, where it can be ascertained. In construing statutes, the legislative intention is to be determined from a general consideration of the entire act. [Citation omitted.]" *Danisco*, 267 Kan. at 772.

As in *Danisco*, the tariffs filed and approved here are the product of input from the utility company (Evergy) and the approval process of the KCC. "Thus, in construing the tariffs in question, consideration must be given to both the role and intent of the KCC in the process of approval and the intent of all participants, including the customers of [the utility]." 267 Kan. at 772-73. When construing tariffs to determine intent, appellate courts must consider the various provisions *in pari materia* with a view of reconciling and bringing the provisions into workable harmony if possible. *Roe*, 317 Kan. at 5-6. Tariff schedules are to be construed as a whole, including footnotes, from the ordinary meaning of the words used. *Grindsted*, 262 Kan. at 310.

While it is the KCC's responsibility to ensure reasonable rates and determine the propriety of liability limitations within approved tariffs, it is ultimately our responsibility to decide whether a duly filed and approved tariff purporting to limit a public utility's liability is reasonable. *Danisco*, 267 Kan. at 768. The interpretation that emerges should also be consistent with the purpose of the tariff so as to avoid absurd results. *City of Wichita v. Trotter*, 316 Kan. 310, 318, 514 P.3d 1050 (2022); *Grindsted*, 262 Kan. at 310. Finally, in our endeavor to exact clarity from each of the individual subsections, we must remain mindful of the rule that "the plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341, 117 S. Ct. 843, 136 L. Ed. 2d 808 (1997); see also *State v. Strong*, 317 Kan. 197, 203, 527 P.3d 548 (2023); *O'Donoghue v. Farm Bureau Mut. Ins. Co.*, 275 Kan. 430, 433, 66 P.3d 822 (2003) (in construing

statutes, courts should construe words and phrases according to context and approved use of language).

All three of the subsections at issue make up the entirety of tariff 7.02 which is entitled "Limitation of Liability." But a careful reading reveals that, as Heritage correctly notes, the limitations allowed under each are triggered by three decidedly different circumstances. That is, they are tailored to their individual contexts as a result of the language specifically chosen by Evergy during the drafting phase. While Evergy has consistently taken the stance that all three are applicable in this case and each one exempts it from liability, we find such an interpretation would result in unreasonable and inexplicable redundancy and thereby cannot abide their view. Rather, our analysis of those provisions, with an eye toward the principles governing interpretation set out above, and the obligations attendant to those principles in this context, leads us to conclude that sections 7.02(A) and (C), when read individually and in harmony with one another, do not serve to limit Evergy's liability to Heritage. Those two subsections are only applicable in wholly distinguishable contexts than what we are faced with here. We agree that subsection (B) can be read to embrace the property damage arising out of the fire because the language of that provision is so broad and sweeping it essentially encompasses all conceivable facts under which harm or damage may arise. For reasons explained below, tariffs of that nature are unreasonable and rejected as void. Accordingly, the district court's contrary finding and grant of summary judgment to Evergy were erroneous. The path we took to arrive at this conclusion is illustrated by the following meticulous analysis.

Subsection 7.02(A) of the tariff states:

"Company shall use commercially reasonable efforts to supply steady and continuous Electric Service at the Point of Delivery. Company shall not be liable to customer for any loss, damage or injury whatsoever caused by or arising from Company's operations including loss, damage or injury occasioned by irregularities of or interruptions in Electric Service, leakage, escape or loss of electric energy after same has passed the Point of Delivery or for any other cause unless it shall affirmatively appear that the injury to persons or damage to property complained of has been caused by Company's willful or wanton conduct. In no event shall Company be liable for any loss, damage or injury caused by any defects in customer's wiring or appliances."

Section 1 for Evergy's full complement of tariffs is devoted to definitions for a portion of the various terms used throughout the document. That section is beneficial given that, again, the tariffs are drafted by Evergy and not every reader attempting to decipher the provisions is fluent in the vernacular from which those terms of art arise.

The first phrase in subsection (A) states that Evergy shall "supply steady and continuous Electric Service at the Point of Delivery." Tariffs 1.03 and 1.08 clarify that "Electric Service" and "Point of Delivery" should, respectively, be understood to mean the following:

"'Electric Service' means the availability of electric power and energy supplied by Company at a point of delivery within Company's Service Territory on or near the customer's premises, at approximately the standard voltage and frequency for a class of service made available by Company in that area, which source is adequate to meet customer's requirements, irrespective of whether or not the customer makes use of such Electric Service."

"'Point of Delivery' means the place where Company's wires are joined to customer's wires or apparatus unless some other Point of Delivery is specified in the Service Agreement."

Tariff 7.01(A) sheds additional light and explains that for purposes of "Supplying Electric Service" the "Company shall supply Electric Service . . . at Points of Delivery, which are adjacent to facilities of Company adequate to and suitable for the Electric Service desired by Customer."

When performing exercises in statutory interpretation, ordinary terms should be assigned ordinary meanings. See *Greer v. Eby*, 309 Kan. 182, 192-93, 432 P.3d 1001 (2019). In that respect, a dictionary is useful in teasing out the underlying meaning of this first phrase in 7.02(A). According to Webster's, "steady" means "constant, regular, uniform, or continuous; not changing, wavering, or faltering." Webster's New World College Dictionary 1420 (5th ed. 2018). Similarly, "continuous" is defined as "going on or extending without interruption or break." Webster's New World College Dictionary 322 (5th ed. 2018). From this collective terminology, we can deduce that this subsection was drafted to address Evergy's obligation to provide stable, uninterrupted electrical power and energy to its customers at their electrical inlets.

Turning to the second sentence, we note that the focus shifts from the act Evergy is obligated to perform to the protections it is afforded when injury or harm occurs *during* its provision of that electrical service. Heritage contends that the plain language communicates that the limitations of liability in subsection (A) "all logically relate to the corresponding duty imposed on [Evergy] to provide steady and continuous service." We agree. This single sentence is a tad unwieldly, but we have isolated the language below and will endeavor to break it down to explain the reasoning behind our decision.

"Company shall not be liable to customer for any loss, damage, or injury whatsoever caused by or arising from Company's operations, including loss, damage or injury, occasioned by irregularities of or interruptions in Electric Service, leakage, escape or loss of electric energy after same has passed the Point of Delivery or for any other cause unless it shall affirmatively appear that the injury to persons or damage to property complained of has been caused by Company's willful or wanton conduct."

First, we note that this sentence immediately follows the identification of the specific service Evergy is obligated to provide—"to supply steady and continuous Electric Service at the Point of Delivery." Accordingly, we are satisfied that references to any damage or harm arising out of the "Company's operations" pertain to the conduct addressed by the sentence which immediately precedes it. That is, it intends to encompass, and is thereby limited to, any harm emanating from the Company's supply of electric service.

This conclusion is then buttressed by the choice of terms that follow the reference to those "operations," all of which describe a different manner of disruption to electric service. For example, "irregular" is defined as: "not conforming to established rule, method, usage, standard, etc.; out of the ordinary; anomalous." Webster's New World College Dictionary 769 (5th ed. 2018). "Interruption" is understood to mean "an interrupting or being interrupted"; interrupt is defined as "to make a break in the continuity of; cut off; obstruct." Webster's New World College Dictionary 761 (5th ed. 2018). "Leakage" means "an act or instance of leaking; leak" and "leak" is defined as "a loss of electrical current

though faulty insulation." Webster's New World College Dictionary 828 (5th ed. 2018). Finally, "escape" is "an outward flow or leakage." Webster's New World College Dictionary 495 (5th ed. 2018).

Evergy argues that an analysis of this nature breaks down in the face of the phrase "or for any other cause," and cites *Sierra Club v. Moser*, 298 Kan. 22, 53, 310 P.3d 360 (2013), for the proposition that the word "any" must receive an "expansive reading." But Evergy's position cannot overcome the hurdles erected by principles of statutory construction. Most notably, that "'[t]o determine a statute's plain meaning, we not only look to the language itself, but also the specific context in which that language is used, and the broader context of the statute as a whole.'" *Bruce v. Kelly*, 316 Kan. 218, 224, 514 P.3d 1007 (2022) (citing *Othi v. Holder*, 734 F.3d 259, 265 [4th Cir. 2013]). In addition, "[w]ords are to be given the meaning that proper grammar and usage would assign them." Scalia & Garner, *Reading Law: The Interpretation of Legal Texts*, at 140 (2012).

It is without question that the immediate context here is the supply of electric service, which we know from Evergy's own table of definitions to mean its obligation to provide stable, uninterrupted electrical power and energy to its customers at their electrical inlets. Accordingly, the global insulation from liability Evergy attempts to attach to the phrase "or for any other cause" is inconsistent not only with the language surrounding it in the same sentence, but also with the subsection as a whole. Its position also falters in the face of the *ejusdem generis* rule. That rule is frequently triggered when statutes provide a list of specific items followed by a general catch-all phrase which is often introduced by the words "or other." Generally, the phrase may be construed to be limited to things "of the same kind" (*ejusdem generis*) as the specific items which it follows. 1 Subst. Crim. L. § 2.2(h) (3d ed.); see also *Rockers v. Kansas Turnpike Authority*, 268 Kan. 110, 115, 991 P.2d 889 (1999) (where a more general word or phrase follows the enumeration of specific things, the general word or phrase is typically understood to refer to things of the same kind or within the same classification as the specific terms).

In *McBoyle v. United States*, 283 U.S. 25, 51 S. Ct. 340, 75 L. Ed. 816 (1931), McBoyle flew an airplane, he knew to be stolen, from one state to another and was later convicted under a federal statute that made it a felony to transport in interstate commerce an "automobile, automobile truck, automobile wagon, motor cycle, or any other self-propelled vehicle not designed for running on rails" which the driver or operator knows to be stolen. The United States Supreme Court ultimately held that an airplane was not covered by the quoted phrase finding that "other self-propelled vehicles" was limited to land vehicles, consistent with the theme of the other specific objects listed. 283 U.S. at 26-27. Similarly, in *Yates v. United States*, 574 U.S. 528, 135 S. Ct. 1074, 191 L. Ed. 2d 64 (2015) (plurality opinion), Yates was convicted of knowingly disposing of undersized fish in order to prevent the government from taking lawful custody and control of them, and violating the Sarbanes-Oxley Act by destroying or concealing a tangible object with the intent to impede, obstruct, or influence the government's investigation into harvesting undersized grouper. The United States Supreme Court later held that Yates could not be convicted under the statute which prescribed the concealing or falsifying of "any record, document, or tangible object," because if Congress had truly intended "tangible object" to be interpreted so broadly as to encompass objects as dissimilar as documents and fish, it would have had no reason to refer specifically to "record" or "document." 574 U.S. at 546.

As a final example, in *R.P. v. First Student Inc.*, 62 Kan. App. 2d 371, 515 P.3d 283 (2022), a panel of this court undertook an analysis of the definition of "municipality" found at K.S.A. 75-6102(b). It observed that the definition includes two specific enumerations followed by more general phrases, similar to what we face here. The first of the more precise lists included "any county, township, city, school district," and was followed by the more general phrase "or other political or taxing subdivision of the state." The second specific enumeration read, "or any agency, authority, institution," which was then followed by the more general phrase "or other instrumentality thereof." Applying the *ejusdem generis* rule, the panel interpreted the general phrase "any agency, authority, institution or other instrumentality thereof" to fall

within the same classification as "any county, township, city, school district or other political or taxing subdivision of the state." It then concluded the more general phrase "other instrumentality thereof" meant something within the same classification as "any agency, authority, [or] institution," and noted that each specifically enumerated entity in K.S.A. 75-6102(b) was reflective of either a larger governmental entity or a body organized by a governmental entity to perform a government function. 62 Kan. App. 2d at 376-77.

The same principle influences our decision here. The enumeration of specific types of electrical supply failure indicates that the phrase "or for any other cause" is meant to cover only that harm or damage which occurs specifically during the course of supplying electrical energy to a customer's inlets, rather than any possible harm which may manifest as a result of any conceivable malfeasance Evergy may commit as a utility provider. See *Commissioner of Internal Rev. National Carbide Corp.*, 167 F.2d 304, 306 (2d Cir. 1948) ("words are chameleons, which reflect the color of their environment"). If it were otherwise, there would be no need to include the list "irregularities of or interruptions in Electric Service, leakage, escape or loss of electric energy after the same has passed the Point of Delivery." Our interpretation gives voice to the fundamental rule of statutory construction that the purpose and intent of the drafting body govern the outcome. As explained in *Adamson v. WorldCom Communications, Inc.*, 190 Or. App. 215, 222, 78 P.3d 577 (2003):

"[T]he effect of a tariff on a particular claim depends on the nature of the claim and the specific terms of the tariff. If the claim is one that implicates the provisions of a tariff, then the tariff controls according to its terms, which may either limit relief available or bar a claim entirely. But if the claim is unrelated to the tariff, then the claim is not limited or barred. In other words, merely because a tariff exists does not necessarily mean that a claim is barred."

The collapse of a 50-year-old deteriorated pole which in turn triggered a fire resulting in several million dollars in damage to a business is well outside the scope of the harm or damage contemplated under subsection (A) of section 7.02. Accordingly, that provision does not insulate Evergy from liability for the significant loss Heritage suffered.

Subsection 7.02(B) of the tariff states:

"Customer shall save Company harmless from all claims for trespass, injury to persons and damage to lawns, trees, shrubs, buildings or other property that may be caused by reason of or related to Company's operations, the provision of Electric Service hereunder and the installation, maintenance or replacement of Company's service lines or other facilities necessary to serve customer, unless it shall affirmatively appear that the injury to persons or damage to property complained of has been caused by Company's willful or wanton conduct."

Within this subsection, the tariff outlines that Evergy is not liable for "*all claims* for trespass, injury to persons and damage to lawns, trees, shrubs, buildings or other property that may be caused by reason of or related to [Evergy's] operations" unless "the injury to persons or damage to property complained of has been caused by [Evergy's] willful or wanton conduct." (Emphasis added.) Here, the property damage was caused by "reason of or related to" Evergy's operations—its pole, which was a component in delivering electrical services to customers, fell on Heritage's building which caused the fire. Under subsection 7.02(B), unless the harm complained of was the result of Evergy's willful or wanton conduct, Evergy is not liable for the damage to the property. Candidly, it is difficult to envision an instance that would not be swept up within the vast scope of this provision. Its language is exceedingly broad and all-encompassing. Thus, facially it applies to the situation before us.

Finally, 7.02 subsection (C) of the tariff states:

"In accordance with its normal work procedures, Company shall exercise reasonable care when installing, maintaining and replacing Company's facilities located on customer's premises. However, beyond such normal procedures, Company assumes no responsibility for trespass, injury to persons or damage to lawns, trees, shrubs, buildings or other property that may be caused by reason of or related to Company's operations, the provision of Electric Service hereunder or the installation, maintenance or replacement of Company's facilities to serve customer, unless it shall be shown affirmatively that the injury to persons or damage to property complained of has been caused by Company's willful or wanton conduct."

At the hearing on its summary judgment motion, Evergy took the position that this subsection was the most on point here. As an initial matter, the tariff indicates that Evergy vows to exercise "reasonable care" while performing specifically enumerated tasks,

i.e., "installing, maintaining and replacing Company's facilities," during the course of "normal" work procedures. Or stated another way, to exercise reasonable care when undertaking efforts related to the utility which conform to a standard or regular pattern: characterized by that which is considered usual, typical, or routine. Normal: "conforming with or constituting an accepted standard, model, or pattern . . . natural; usual; standard; regular." Webster's New World College Dictionary 998 (5th ed. 2018). In the second sentence of the subsection there is a pivot in the subject matter to now address limitations on liability. There is an associated shift in the language away from the aforementioned "normal procedures" to focus on that which is "beyond such normal procedures." That is, the language used indicates that Evergy is insulated from liability from any harm occurring outside the scope of "such normal procedures." In our view, that alteration in the language signals that the utility will not be liable for any damage resulting from the performance of those same specifically enumerated tasks—"installing, maintaining and replacing Company's facilities," or provision of its electric service under "unusual," "extraordinary" or "exceptional" circumstances. Merriam-Webster Online Dictionary, http://www.merriam-webster.com/thesauraus/normal.

The review of a statute to ascertain its intent begins with the plain language used therein, giving common words their ordinary meaning, and when that plain language is clear and unambiguous a court refrains from reading something into the provision that is not readily found in its words. *Austin Properties v. City of Shawnee, Kansas*, 64 Kan. App. 2d 166, 174, 547 P.3d 531 (2024). We also have a responsibility to give reasonable, rational, sensible, and intelligent constructions to tariffs whenever possible. See *Mendenhall v. Roberts*, 17 Kan. App. 2d 34, 42, 831 P.2d 568 (1992). Where this subsection contemplates damage arising out of *affirmative acts* undertaken by the company, i.e., "installing, maintaining and replacing Company's facilities" and "the provision of Electric Service" when addressing the circumstances in which the company's liability is limited, it is neither sensible nor reasonable to construe the language of this provision to also encompass the *failure to act*, or Evergy's refusal to inspect and main-

tain its poles, as falling within that limitation on its liability. Moreover, Evergy consistently turned a blind eye to the pole for decades, not simply during circumstances that were "beyond such normal [work] procedures" as required to fall within the parameters of the limited liability portion of this provision. Thus, we decline to find that subsection (C) of tariff 7.02 insulates Evergy from liability for the extensive damage that Heritage endured when the rotted pole finally gave way and collapsed. See *Adamson*, 190 Or. App. at 222.

C. Whether the limitation of liability articulated under subsection (B) must be rejected as a violation of fundamental notions of reasonability

While we have determined that subsection (B) of tariff 7.02, on its face, is seemingly applicable here, our inquiry does not end there. Rather, Heritage requests that we take our analysis one step further and resolve whether the limitation on liability set out in the subsection is unenforceable because the extent of its reach is unreasonable as a matter of law and violates public policy. It asserts that we can use *Danisco* as a guide to arrive at a finding that the limitation is too extreme because it essentially serves to indemnify Evergy against all conceivable negligence claims unless their conduct is wanton; a limitation that is neither inherent to nor justified by the rate-making process.

Evergy counters that the conclusion Heritage advocates for arises out of a significantly more conservative reading of *Danisco* than what was intended by the Kansas Supreme Court when drafting the opinion and, when that authority is afforded the court's intended interpretation, it reflects that the reach of subsection (B) is reasonable. According to Evergy, a contrary finding will result in future damage awards that threaten to jeopardize the financial stability of the utility or be absorbed by the rate payers.

We reiterate our awareness of the fact that "reasonable rates are dependent in no small measure on rules limiting liability, for the broader the liability exposure, the greater the cost of electric service." *Danisco*, 267 Kan. at 773 (citing *Waters v. Pacific Telephone Co.*, 12 Cal. 3d 1, 7, 114 Cal. Rptr. 753, 523 P.2d 1161 [1974]). Whether that reasonability requirement is satisfied,

which in turn allows for the enforceability of the tariff, is a question left for the courts to decide and is one over which we exercise unlimited review. See *McNally Pittsburg Mfg. Corp.*, 186 Kan. at 715 (The courts are the final arbiter of the reasonableness of a limitation of liability within a duly approved tariff.).

In one of the earliest relevant cases in our state, *Russell v. Telegraph Co.*, 57 Kan. 230, 45 P. 598 (1896), Russell brought an action against Western Union to recover various damages he sustained as a result of the telegraph company's failure to promptly deliver a message to him. Our Supreme Court found that it is unreasonable for a common carrier to attempt to limit its own liability but could nevertheless reasonably demand that such claims for negligence be brought within 60 days. 57 Kan. at 233-34.

That theme carried over to 1917 and *Milling Co.* In that case, the Kansas Supreme Court recognized that a utility's ability to limit its liability was "a proper element of consideration in rate making" because "[i]f a higher degree of responsibility attaches to the service, a greater rate must be exacted." 101 Kan. at 311. There, the court found the tariff that constrained the telegraph's liability for ordinary negligence limited recovery to the fee of the missent telegraph. But according to the court, such a limitation of the utility's liability was unreasonable given the magnitude of "the annoyance, delay, business inconvenience, and financial damage" borne of "a telegraph company's failure to perform its self-assumed public service." 101 Kan. at 311. The returned fee was roughly 25 or 40 cents whereas the actual damage arising from the missent telegraph was approximately $265. Thus, the court determined it is unreasonable for a company to limit its liability for negligence to an insignificant sum in virtually all circumstances. 101 Kan. at 311.

We must now return to *Danisco* as it is a key authority in guiding the analysis of this case. The provisions at issue in that case limited KCP&L's liability relating to the continuous supply of electric services, and the court was tasked with determining whether those provisions were "reasonable and enforceable as a matter of law and public policy." *Danisco*, 267 Kan. at 765. When determining if those limitations were reasonable, the court reiterated that the "[t]he theory underlying the enforcement of liability

limitations is that because a public utility is strictly regulated its liability should be defined and limited so that it may be able to provide service at reasonable rates." 267 Kan. at 769. This theory is supported by the notion that "'[a] broadened liability exposure must inevitably raise the cost and thereby the rates, of electric service.'" 267 Kan. at 769 (quoting *Landrum v. Florida Power & Light Co.*, 505 So. 2d 552, 554 [Fla. Dist. App. 1987]). The *Danisco* court observed that other jurisdictions addressing a similar question have found that it is reasonable to allow some limitation on liability for ordinary negligence in connection with the delivery of electric services. 267 Kan. at 769, 771; see *Landrum*, 505 So. 2d at 554 (delivery of electric services); *Computer Tool & Engineering v. NSP*, 453 N.W.2d 569, 573 (Minn. App. 1990) (delivery of electric services); *Lee v. Consolidated Edison*, 98 Misc. 2d 304, 306, 413 N.Y.S.2d 826 (1978) (delivery of electric services).

Ultimately, the *Danisco* court determined it was reasonable for KCP&L to enjoy a measure of insulation from liability for those damages resulting from its own simple negligence "*in regard to the supply of electrical service*," but tariffs which attempt to relieve a utility of liability for damages from its wanton or willful conduct are unreasonable. (Emphasis added.) 267 Kan. at 772. However, that is a distinctly different question than the one we have been asked to resolve—whether it is reasonable for a utility to enjoy a limitation of its liability when property damage occurs due to an avoidable failure of the utility company's equipment. Stated in broader terms, is a utility's limitation of liability for property damage flowing from the company's ordinary negligence reasonable?

In *Szeto v. Arizona Public Service Company*, 252 Ariz. 378, 503 P.3d 829 (Ariz. Ct. App. 2021), a fire destroyed two homes, one of which was owned by the Szetos. A fire investigator subsequently determined that arcing in the overhead electrical wires on the utility pole between the two homes caused the fire. The Szetos pursued a cause of action against the Arizona Public Service Company (APS) and asserted that the negligent manner in which the company maintained the power lines gave rise to the fire. APS

moved for summary judgment on the grounds that it was exempted from liability for ordinary negligence by its public utility tariff, which stated, in relevant part:

> "'5.3 Service Interruptions: Limitations on Liability of Company
>
> "'5.3.1 Company shall not be liable to the customer for any damages occasioned by Load Serving ESP's equipment or failure to perform, fluctuations, interruptions or curtailment of electric service, except where due to Company's willful misconduct or gross negligence. Company may, without incurring any liability therefore, suspend the customer's electric service for periods reasonably required to permit Company to accomplish repairs to or changes in any of Company's facilities. The customer needs to protect their own sensitive equipment from harm caused by variations or interruptions in power supply.'" 252 Ariz. at 381.

The trial court granted APS's motion upon finding that the phrase "failure to perform" indicated that the utility company could only be held liable for the commission of willful misconduct or gross negligence. *Szeto*, 252 Ariz. at 381.

The Szetos sought review from the Arizona Court of Appeals and obtained a reversal back to the lower court. The appellate court rationalized that while limitations on a utility's liability for economic damages resulting from service interruptions are appropriately considered in rate-making decisions because of their contractual nature and far-reaching effects, no such policy consideration supports eliminating liability when a public utility's negligence causes property damage or a personal injury arising out of a fire caused by a utility's negligence in maintaining its electrical service lines. Thus, where the latter do not meet the justification to fall within the protected sphere, limiting a utility's liability for such incidents is not appropriate. 252 Ariz. at 382-83.

We likewise find *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32, 809 N.E.2d 1248 (2004), beneficial to our analysis. In that case, Janice Adams' house exploded and caused her death shortly after she returned home and stepped inside. An investigation revealed that the cause of the explosion and corresponding fire was the failure of the flexible connector between Adams' kitchen range and the gas supply which allowed a significant amount of natural gas to escape and accumulate in the home. When Adams entered the house and flipped on an electric light it generated a small spark that in turn ignited the gas.

Janice's daughter, Christy Adams, brought a wrongful-death action against NI-Gas. She alleged that the utility company was aware that Cobra brand natural gas appliance connectors were defective and prone to failure resulting in natural gas leaks and explosions. She asserted that NI-Gas had a duty to warn its customers about the dangers associated with those particular connectors and that it breached this duty. NI-Gas moved for summary judgment and its motion was granted.

The Illinois Court of Appeals ultimately reversed the summary judgment order upon finding that, as a matter of law, "'a utility company that has actual knowledge of a dangerous condition associated with the use of its product has a responsibility to its customers to warn them of that danger.'" 211 Ill. 2d at 42 (quoting *Adams v. Northern Illinois Gas Co.*, 333 Ill. App. 3d 215, 224, 774 N.E.2d 850 [2002]). NI-Gas petitioned for and was granted review by the Illinois Supreme Court.

At the outset, the Illinois Supreme Court observed that a tariff provision such as the one at issue "provides the source for, and determines the nature and extent of, a public utility's service obligations to its customers." *Adams*, 211 Ill. 2d at 57 (citing *Illinois Bell Switching Station*, 161 Ill. 2d 233, 248, 641 N.E.2d 440 [1994] [Miller, J. concurring]). Thus, to the extent the claim implicates the provisions of a tariff, then the tariff controls according to its terms, which may either limit relief or bar a claim entirely. But if the claim is unrelated to the tariff, then the claim will not be either limited or precluded. Stated another way, the mere existence of a tariff will not serve to bar a claim. 211 Ill. 2d at 58 (quoting *Adamson*, 190 Or. App. at 222). Nor is the tariff "'a shield against all actions based in state law.'" 211 Ill. 2d at 58 (quoting *American Telephone and Telegraph Co. v. Central Office Telephone, Inc.*, 524 U.S. 214, 230-31, 118 S. Ct. 1956, 141 L. Ed. 2d 222 [1998] [Rehnquist, C.J., concurring]).

The court went on to note that Illinois courts have long applied common-law principles to defendant utilities subsequent to the 1921 enactment of the Public Utilities Act, despite the existence of tariffs filed with the Illinois Commerce Commission, because where the tariff does not address a particular situation, the common law is triggered, and its corresponding duty analysis must be

applied. *Adams*, 211 Ill. 2d at 61-62 (citing *Metz v. Central Illinois Electric and Gas Co.*, 32 Ill. 2d 446, 207 N.E.2d 305 [1965]); *Clare v. Bond County Gas Co.*, 356 Ill. 241, 190 N.E. 278 [1934]). The *Adams* court concluded that NI-Gas owed a duty to Adams and rejected NI-Gas' contention that its tariff provision absolved it from any duty associated with a customer's equipment even in those instances where it is aware of a leak or some other factor that renders the transportation of gas unsafe. 211 Ill. 2d at 63. In so doing, the court hearkened back to its obligation to adhere to principles of statutory construction. Specifically, its duty to presume that the legislature did not intend absurdity or injustice, and that a statute or ordinance must receive a sensible construction. 211 Ill. 2d at 64-65.

Applying those principles to the tariff provision, in conjunction with the rule that exculpatory language contained within a tariff is to be strictly construed against the public utility and in favor of the customer, the court concluded that the Commission did not intend to completely immunize NI-Gas with respect to a gas leak of which it had notice. *Adams*, 211 Ill. 2d at 64-65. Rather, it is "entirely appropriate" that a public utility bear responsibility for personal injury or property damage which arises out of its own negligence and there is no general policy that allows a commission to grant limitations for such damages. 211 Ill. 2d at 68; see also *State Farm Fire & Cas. Co. v. Southern Bell Tel. & Tel. Co.*, 245 Ga. 5, 7, 262 S.E.2d 895 (1980) (holding tariff limiting a general claim for failure to provide telephone service does not preclude a state claim arising out of the utility's alleged negligence); *Computer Tool & Engineering, Inc. v. Northern States Power Co.*, 453 N.W.2d 569, 573 (Minn. App. 1990) (holding tariff is narrow and only applies to exonerate the utility from liability occasioned by interruptions in electric service; liability remains for all injuries not attributable to power disruptions); *Public Service Com'n v. Mo. Gas Energy*, 388 S.W.3d 221, 231-32 (Mo. App. 2012) (holding limitations of liability involving economic damages are the types involved when establishing a utility's rates, but the same cannot be said of limitations of liability in a negligence action involving property damage); *Olson v. Pacific Northwest Bell Telephone Co.*, 65 Or. App. 422, 426, 671 P.2d 1185

(1983) ("Assuming, arguendo, that the extent of defendant's liability may be limited reasonably by tariffs or regulations, we do not agree that this tariff insulates defendant from all liability under other theories."); *Kroger Co. v. Appalachian Power Co.*, 244 Va. 560, 563, 422 S.E.2d 757 (1992) (interpreting utility tariff and noting it would not shield company from "all liability in providing power to a customer beyond the delivery point"); *O'Neill v. Connecticut Light & Power Co*., No. HHDCV186089044S, 2020 WL 1889124, at *11 (Conn. Super. 2020) (unpublished opinion) (holding tariff unenforceable against claims of ordinary negligence because no authority set out in statute to limit liability in tariffs).

Returning to the matter at hand, again, the occurrence under scrutiny involves the collapse of a 50-year-old wooden pole with only three years remaining on its average lifespan at the time it buckled, which sparked a fire and caused several millions of dollars in damage to Heritage's business. Testimony regarding industry inspection standards provided evidence that poles of this nature should be inspected on a 10-year cycle. But there was no evidence to indicate the pole was ever inspected at any point during its entire existence. Investigation of the pole that was undertaken after the fire revealed evidence of advanced wood decay throughout the entire cross-section of the pole.

The trial court granted Evergy's request for summary judgment upon finding that the nature of the facts presented here were of the type contemplated when the tariff addressing limitations on liability, specifically subsection 7.02(B), was drafted. To reiterate, that section states the following:

"Customer shall save Company harmless from all claims for trespass, injury to persons and damage to lawns, trees, shrubs, buildings or other property that may be caused by reason of or related to Company's operations, the provision of Electric Service hereunder and the installation, maintenance or replacement of Company's service lines or other facilities necessary to serve customer, unless it shall affirmatively appear that the injury to persons or damage to property complained of has been caused by Company's willful or wanton conduct."

We recognize that a limitation on liability reflected in tariffs enables utilities to offer lower rates to their customers. And admittedly, the tariff environment boasts some rather unforgiving

terrain. For example, a carrier must charge the filed tariff rate even if it has quoted its customer a lower rate upon which the customer relied in entering into the contract. See *Marco Supply Co. v. AT & T Communications*, 875 F.2d 434, 436 (4th Cir. 1989). Thus, "[n]either the customer's ignorance nor the utility's misquotation of the applicable tariff provides refuge from the tariff or alters the tariff's terms." *Southwestern Bell Telephone Co. v. Metro-Link Telecom, Inc.*, 919 S.W.2d 687, 693 (Tex. App. 1996). But a common thread is detectable in the aforementioned cases that prompted a finding in favor of liability: while notions of public policy favor limitations on liability for damages arising out of service interruptions due to their far-reaching effects, those policy considerations do not equally align with eliminating liability when the negligent acts of a public utility result in isolated incidents of property damage. This is the same mindset exhibited by the Supreme Court of the United States in *Central Office Telephone* when it stated that "[i]n order for the filed rate doctrine to serve its purpose, therefore, it need pre-empt only those suits that seek to alter the terms and conditions provided for in the tariff." 524 U.S. at 229. Inherent in these rulings is the lack of an intention to award public utilities complete immunity such as what Evergy seeks here.

Even in those states where the limitation of liability is more broadly permitted, the boundary for reasonableness stops short of a complete absolution of liability. For example, the Texas Supreme Court has rationalized that liability for ordinary negligence can be limited to some degree in a utility company's tariff because "a limitation on liability is an inherent part of the rate the utility charges for its services." *Southern Elec. Power Co. v. Grant*, 73 S.W.3d 211, 217 (Tex. 2002). There, an electric utility customer sued the utility provider for negligence, seeking damages for personal injuries and property damage, due to an electrical power fluctuation in her home. The district court entered summary judgment in favor of the utility, holding that the tariff absolved the company from liability, and the customer appealed. There, the tariff read:

"'The Company shall not be liable for damages occasioned by interruption, failure to commence delivery, or voltage, wave form, or frequency fluctuation

caused by interruption or failure of service or delay in commencing service due to accident to or breakdown of plant, lines, or equipment, strike, riot, act of God, order of any court or judge granted in any bonafide adverse legal proceedings or action or any order of any commission or tribunal having jurisdiction; *or, without limitation by the preceding enumeration, any other act or things due to causes beyond its control, to the negligence of the Company, its employees, or contractors, except to the extent that the damages are occasioned by the gross negligence or willful misconduct of the Company*.'" 73 S.W.3d at 214-15.

The Texas Supreme Court determined that the utility's "tariff provision limiting its personal-injury liability is reasonable" because "it does not purport to relieve [the company] from liability under all conceivable circumstances." 73 S.W.3d at 220. That is, it specifically conditioned its approval of the tariff on the basis that it did not attempt to shield the utility from the consequences of its negligent conduct in all situations.

It is difficult to capture the point more clearly, or eloquently, than our Supreme Court did in *Wilson* several decades ago:

"'In accordance with the general doctrines as to the duties and liabilities of persons making use of instrumentalities apt to injure others, it has been held that where one accumulates and gets possession of a quantity of electricity and attempts to use it, he must take care of it and see that it does not do damage to persons or property. . . . According to a number of American authorities, while those engaged in generating and distributing electricity may be held to a high degree of care for the protection of those liable to come in contact with this dangerous and subtle force, nevertheless the liability of electric companies, telephone companies, and others transmitting or using electricity for damage or injury, is governed, not by the principles of insurance of safety, or of contracts, but, as in the case of unintended damage or injury generally, by the simple rules of the law of negligence. Such companies or persons are not commonly regarded as insurers against injury. *The obligation of electric companies to exercise proper care is not determined by their right to construct and maintain their lines, but rests upon their duty to protect others while in the lawful exercise of their rights.* With the advance of civilization, electricity has become a necessity, and in order to make it useful to man it must be carried from place to place. The restrictions governing the handling of this commodity by public or private corporations or by individuals must, in view of its commercial and domestic importance, be reasonable, although the expense of what may be necessary to prevent injury to others is not an absolute defense to actions for injury for failure to take the necessary precautions.'" (Emphasis added.) *Wilson v. Kansas Power & Light Co.*, 232 Kan. 506, 511-12, 657 P.2d 546 (1983) (quoting 26 Am. Jur. 2d, Electricity, Gas, and Steam § 39, pp. 245-47).

Electricity is an extraordinarily dangerous commodity, as evidenced by the catastrophic facts of this case. Thus, where the touchstone for this matter must be reasonableness, we are persuaded that the limits of liability expressed in 7.02(B) are a clear reflection of Evergy's desire to insulate itself from liability under any conceivable circumstance, a stance which goes too far and runs contrary to Kansas law and public policy. See K.S.A. 66-101b (granting the KCC the authority "to make just and reasonable rules, classifications and regulations"). In construing the provision, we must presume that neither absurdity nor injustice were intended; nevertheless, that is the outcome the plain language demands. A tariff provision drafted so broadly as to insulate a public utility from liability for every conceivable act of misfeasance, including ordinary negligence which results in catastrophic property damage, is unreasonable and unenforceable.

At a very fundamental level, what is evident from the tariff structure is that under provision 7.07, Evergy purports to assure its customers that it will provide the necessary "[m]aintenance, Replacement, and Emergency Repairs of Company's Facilities" as required, yet under 7.02(B) it eliminates any recourse a customer might have for Evergy's failure to adhere to that express obligation. Thus, what the tariff giveth, it also taketh away. If we were analyzing this through the lens of a contract, such an internal inconsistency as it exists in the tariff structure would be tantamount to an illusory promise. Again, consideration must be given to both the role and intent of the KCC in the process of approval and the intent of *all* participants, including the utility's customers. *Danisco*, 267 Kan. at 772-73. Here, Evergy seeks to surreptitiously excise the interests of its customers through the operation of its tariff structure. Accordingly, the district court erred in applying the limitations of liability found under 7.02(B) in Evergy's tariff as a shield from liability for the utility's allegedly negligent conduct when granting summary judgment. That subsection is unlawful and unreasonable and sets forth a grant of immunity that was well beyond the KCC's delegated authority. Therefore, that portion of the tariff is void.

The removal of that subsection from the tariff eliminates the foundation underlying the district court's award of summary judgment to Evergy. Accordingly, we reverse the decision of the district court and remand the case with directions to begin litigation anew to afford Heritage a full and fair opportunity to establish whether the calamitous damage it suffered was the product of Evergy's ordinary negligence.

D. Is the authority of the KCC to limit liability of public utilities an unlawful abrogation of common law?

Our next step toward resolution of this case is to address Heritage's claim that interpreting the tariff in such a way that liability for acts of common negligence is excluded also gives rise to constitutional implications.

It is Evergy's position that this issue never arose as part of the parties' briefing exchange on the motion for summary judgment and Heritage likewise failed to address the matter at the hearing on the motion. According to Evergy, the issue was resolved by the district court on the only grounds that Heritage put forth—that the KCC did not have the statutory authority to abrogate the common-law cause of action of negligence in the tariff.

"Preservation is a question of law subject to plenary review." *State v. Campbell*, 308 Kan. 763, 770, 423 P.3d 539 (2018). The preservation rule dictates that if an issue was not raised before the district court it generally cannot be raised on appeal. *In re Adoption of Baby Girl G.*, 311 Kan. 798, 801, 466 P.3d 1207 (2020).

Our review of Heritage's response to the summary judgment motion reveals that it did argue that the Legislature never granted the KCC the right to abrogate common law with its tariffs. While we note the absence of the word "constitutional," we acknowledge its entire argument is grounded in the Legislature's ability, or inability, to delegate a measure of authority to the KCC which paves the way for an abrogation of a common-law remedy. Heritage briefly argued that to the extent that was the Legislature's intention, it failed to provide a substitute remedy for its removal of a cause of action for negligence. Although the district court only

addressed this argument in passing, we find the point was sufficiently raised by Heritage and is properly before us for consideration.

Heritage has not successfully cleared all the procedural hurdles necessary to secure review, however. Their filings with our court do not contain a comprehensive analysis of any constitutional concern they might harbor. Rather, the issue received merely a passing mention and was never fully fleshed out or litigated. While Heritage employs constitutional verbiage in its brief before this panel, it fails to clarify precisely which right is at issue aside from a general reference to the "removal of an ordinary negligence cause of action." They likewise do not propose which particular statute should be subjected to constitutional scrutiny and put forth a corresponding analysis. For us to make assumptions in that regard would essentially be developing Heritage's constitutional claim on its behalf and well outside the bounds of our neutral role. A party's failure to support their argument with pertinent authority or to show why it is sound despite a lack of supporting authority or in the face of contrary authority is akin to failing to brief the issue. Therefore, an argument that is not supported with pertinent authority is deemed waived and abandoned. *Friedman v. Kansas State Bd. of Healing Arts*, 296 Kan. 636, 645, 294 P.3d 287 (2013). Further, an argument raised incidentally in a brief and not argued therein is also deemed abandoned. *Manhattan Ice & Cold Storage v. City of Manhattan*, 294 Kan. 60, 71, 274 P.3d 609 (2012).

Heritage has failed to advance their constitutional claim in a manner that enables us to meaningfully review its particulars and, as a result, has effectively abandoned this argument on appeal. Consequently, the issue will not receive further consideration.

E. Did the district court err in holding there were insufficient facts to submit the issue of willful or wanton conduct to a jury?

We previously noted that the district court granted Evergy's motion on two independent legal bases—that the utility was insulated from liability for ordinary negligence through operation of its tariff and that Heritage failed to demonstrate that the damage it

suffered was the product of Evergy's wanton conduct. Both parties graced us with extensive analyses of each aspect of the district court's ruling in their written briefs as well as during oral argument to our court. Thus, even though we are reversing this matter for a trial to litigate Heritage's claim against Evergy for ordinary negligence, we nevertheless believe it is prudent to address and analyze each issue the parties so comprehensively presented to us for resolution.

Heritage argues that the district court erred in finding there were not sufficient facts to submit the issue of willful or wanton conduct to a jury. Specifically, it contends that Evergy was aware of the broad risk of dangerous conditions associated with aging utility poles, yet it failed to adhere to an inspection program that complied with industry standards. It elaborates that although Evergy may have undertaken some actions to incidentally lessen the risk of a catastrophic pole failure, none of those actions were designed to identify aging and decaying poles or avoid catastrophic pole failure. Finally, it asserts that reasonable minds could differ with respect to whether Evergy's inspection and preventative measures materially lessened the risk of catastrophic pole failure and, therefore, the district court erred in ruling as a matter of law that Evergy's conduct fell short of wanton.

Evergy responds that the tariff imposes a burden on Heritage to establish that such wanton conduct affirmatively appeared, which it failed to do before the district court. Additionally, Evergy argues that Heritage does not demonstrate the existence of a genuine issue of material fact. Finally, it asserts that there was insufficient evidence to support a finding of wanton conduct.

Returning briefly to our standard of review. When this case was before the district court, Evergy, as the party seeking summary judgment, had the burden to show that, based on the evidence, there were no material facts for either a jury or the judge sitting as fact-finder to decide that would have any bearing on the outcome of the case. *GFTLenexa*, 310 Kan. at 981-82. The district court found that Evergy successfully satisfied its burden and granted summary judgment. To uphold that decision on appeal, we must review the facts in the light most favorable to Heritage, as the party opposing summary judgment, and determine whether

there truly are no issues of material fact. If that review leads us to conclude that reasonable minds could disagree about the conclusion to be drawn from the evidence, that will indicate a genuine issue does exist with respect to a material fact and require us to reverse the district court's grant of summary judgment to Evergy. See *Edwards v. Anderson Engineering, Inc.*, 284 Kan. 892, 904, 166 P.3d 1047 (2007).

In Kansas, wanton conduct "is distinct from negligence and differs in kind." *Bowman v. Doherty*, 235 Kan. 870, 876, 686 P.3d 112 (1984). The *Bowman* court elaborated that "[w]anton conduct is distinguished from a mere lack of due care by the fact that the actor realized the imminence of injury to others from his acts and refrained from taking steps to prevent the injury. This reckless disregard or complete indifference rises substantially beyond mere negligence." 235 Kan. at 876. Unlike negligence, "[w]anton conduct is established by the mental attitude of the wrongdoer rather than by the particular negligent acts." *Robison v. State*, 30 Kan. App. 2d 476, 479, 43 P.3d 821 (2002) (citing *Friesen v. Chicago, Rock Island & Pacific Rld.*, 215 Kan. 316, 322, 524 P.2d 1141 [1974]). Because wantonness derives from that mental attitude, acts of omissions as well as acts of commission can be wanton. *Gould v. Taco Bell*, 239 Kan. 564, 572, 722 P.2d 511 (1986).

To successfully establish wanton conduct, a plaintiff must make a two-pronged showing: (1) that the act was performed with a realization of the imminence of danger; and (2) that it was carried out with a reckless disregard of or complete indifference to the probable consequences of the act. *Reeves v. Carlson*, 266 Kan. 310, 314, 969 P.2d 252 (1998); *Gould*, 239 Kan. at 572. Stated another way, the keys to demonstrating wantonness are the knowledge of a dangerous condition and an indifference to its consequences. *Reeves*, 266 Kan. at 314. The plaintiff is not required to prove any degree of intent or willingness to injure on the part of the actor. *Lanning v. Anderson*, 22 Kan. App. 2d 474, 479, 921 P.2d 813 (1996) (citing *Boaldin v. University of Kansas*, 242 Kan. 288, 293, 747 P.2d 811 [1987]).

The first prong may be established in two ways. First, the plaintiff may put on direct evidence of the defendant's actual knowledge of a dangerous condition. Second, they may establish,

through circumstantial evidence, a defendant's reason to believe that his act might result in injury to another because it was taken with express disregard of a high and excessive degree of danger, which was either known to the defendant or readily apparent to a reasonable person in the defendant's position. See 22 Kan. App. 2d at 481-82.

Turning to the second prong, the Kansas Supreme Court has explained that definite acts undertaken by a defendant which materially lessen the chances of the likely consequences can potentially insulate an actor from liability, but the acts must constitute more than mere token efforts. *Friesen*, 215 Kan. at 323. Critical to the analysis of such precautionary measures is whether they actually materially lessen the chances of the consequences associated with the particular "dangerous condition" analyzed under the first prong of the test. *Wagner v. Live Nation Motor Sports, Inc.*, 586 F.3d 1237, 1244-45 (10th Cir. 2009).

Therefore, when assessing if wanton conduct is established, a reviewing court must carefully apply both prongs of the test to the same alleged risk. See *Reeves*, 266 Kan. at 314.

"In other words, if the first part of Kansas's two-part inquiry asks whether the defendant had knowledge of a broadly described dangerous condition, the second part of that inquiry must ask whether the defendant recklessly disregarded or was indifferent to the same broadly described risk; conversely, if the first part of the test targets the narrow, specific risk that caused the particular accident at issue and asks if the defendant was aware or should have been aware of that particular specific risk, then the second part of the analysis to be consistent must ask if the defendant was indifferent to that specific risk." *Wagner*, 586 F.3d at 1245.

After conducting its analysis, the district court concluded that Heritage failed to "demonstrate awareness of any imminent risk by Evergy" and "[i]n the absence of any basis to believe that Evergy knew of or had reason to know the pole at issue had soundness issues, it is hard to make the argument that Evergy was even negligent with respect to the maintenance of this pole." That conclusion is fundamentally flawed. Heritage's position before the district court, as it is here, was that there is a broad risk associated with wooden utility poles generally because they age and can fail. But the district court's focus was on the Heritage pole in isolation. That runs in contravention of the test which requires that the same risk be contemplated under both steps of the test. See *Wagner*, 586

F.3d at 1245; *Reeves*, 266 Kan. at 314. Stated differently, it held Heritage to a standard it was not required to satisfy.

Viewing the risk broadly under the first prong, as Heritage advocates for, Evergy had knowledge of the broad risk that aging utility poles create. In *Cope v. Kansas Power & Light Co.*, 192 Kan. 755, 761, 391 P.2d 107 (1964), the court found that utility companies have a duty to exercise the highest degree of care when maintaining electric power lines in order to protect the public and stated:

> "From the beginning, it has been the rule that a high-voltage line is one of the most dangerous things known to man; that not only is the current deadly, but the ordinary person has no means of knowing whether any particular wire is carrying a deadly current or is harmless, and that distributors of electricity which erect and maintain electric power lines are under a duty to exercise the highest degree of care to protect the public from danger." 192 Kan. at 761.

With respect to the first prong, Evergy, as a deliverer of electricity, had knowledge of the broadly described dangerous condition. Electricity is inherently dangerous, and when wooden poles subject to aging are the means relied upon to assist with the transport of that commodity, a risk to the general public is created. Evidence adduced at the hearing established that there is an industry standard which requires that poles be inspected every 10 years and that Evergy had knowledge of that standard. That is circumstantial evidence of the importance of maintaining the poles that Evergy relied upon to transport its electricity.

Under the second prong, Heritage has the burden to show that Evergy recklessly disregarded or was indifferent to the same broadly described risk—that improper maintenance of inherently dangerous electrical poles can lead to catastrophic failure and subsequent damages. See *Wagner*, 586 F.3d at 1245.

Evergy contends that it responsibly took steps to materially lessen any risk of pole failure by tracking and reporting work performed on the portions of the system most in need of immediate attention, conducting circuit walkdowns, as well as rolling targeted excavation and inspection of specific poles under a contractor-based program. It also highlighted its workplace policies which directed employees to repair and report any safety issues, and that journeymen had the authority to immediately order pole

replacement when the need arose. Evergy also cited its alleged compliance with the NESC code and the KCC's inspection program. While that final factor may be true, as Heritage points out, under Kansas law, compliance with a governing code does not automatically negate liability. In *Cerretti v. Flint Hills Rural Electric Co-op Ass'n*, 251 Kan. 347, 356-57, 837 P.2d 330 (1992), the Kansas Supreme Court held:

> "Conformity with the NESC or an industry-wide standard is not an absolute defense to negligence. While it may be evidence of due care, compliance with industry standards, or standards legislatively or administratively imposed, does not preclude a finding of negligence where a reasonable person engaged in the industry would have taken additional precautions under the circumstances. Whether the company is negligent, even though it complied with the code, is usually a question to be determined by the jury under proper instructions by the court."

Whether Evergy exercised all due care in its inspection program, given its awareness of the extreme risk inherent to providing electrical services, is a question on which reasonable minds could differ, and as such, it should be submitted to a jury.

The record contains some evidence that, when viewed in favor of Heritage, indicates Evergy was on notice that its inspection protocol did not meet the recommended 10-year inspection cycle. Specifically, Bingel, who, again, currently held the role of NESC chairman and served as the former Vice President of Product Strategy for Osmose Utilities, the company with whom Evergy contracted to conduct its inspections, provided testimony addressing those points. To be clear, this was not merely a matter where Evergy had knowledge of a dangerous condition. There is also evidence before us which bears out that Evergy limited its inspections to only those poles delivering electricity within circuits that were lesser performing and those in higher performing circuits, such as the one at issue here, were generally not scheduled for inspections. That is, it took affirmative steps to avoid performing inspections of and, by association, the corresponding maintenance required for, a portion of its wooden poles. Viewing this evidence in the light most favorable to Heritage, reasonable minds could certainly differ on whether Evergy's preventative measures were sufficient to materially lessen the risk of catastrophic pole failure. Thus, the district court erred in ruling that Evergy's conduct was

not wanton as a matter of law. This is a question that must be submitted to a jury. See *Cerretti*, 251 Kan. at 357 ("Whether the company is negligent, even though it complied with the code, is usually a question to be determined by the jury under proper instructions by the court.").

Evergy contends that the tariff provisions demand a higher standard from Heritage in that any allegations of wanton conduct must be "affirmatively shown." It notes that while the term is not expressly defined in the tariff, it "is regularly used to signify a heightened factual burden that does not rely merely on inferences, specification, argument or bare allegations." To refresh, the relevant language from subsection 7.02(B), the subsection which provided the foundation for the district court's ruling, states:

"Customer shall save Company harmless from all claims for trespass, injury to persons and damage to lawns, trees, shrubs, buildings or other property that may be caused by reason of or related to Company's operations, the provision of Electric Service hereunder and the installation, maintenance or replacement of Company's service lines or other facilities necessary to serve customer, *unless it shall affirmatively appear that the injury to persons or damage to property complained of has been caused by Company's willful or wanton conduct*." (Emphasis added.)

However, Kansas law does not support the interpretation that Evergy implores us to assign this phrase. While reasonable limitations of simple negligence are permitted, the *Danisco* court expressly held that it is "not reasonable for the KCC to allow a tariff to become effective which would relieve [a utility] of liability for damages resulting from its wanton or willful misconduct." *Danisco*, 267 Kan. at 772. Evergy's proposed reading contravenes this directive by raising the bar of the wanton standard to increase its chances it will be spared liability.

To preclude summary judgment, the facts subject to the dispute must be material to the conclusive issue in the case. When reasonable minds could differ as to the legal conclusions drawn from the evidence and the motion has been granted by the district court, it is incumbent upon this court to reverse the ruling granting summary judgment. We find a legitimate, material question exists whether Evergy's practices rise to the level of wanton disregard of the public's safety. A question of that nature is most appropriately

resolved by a jury. Accordingly, the district court's decision granting summary judgment to Evergy was erroneous and must be reversed.

CONCLUSION

The use of the summary judgment procedure is to be encouraged as an aid in the expeditious disposition of a lawsuit. However, it is a drastic means of disposing of litigation and, therefore, should be allowed only when the right of the moving party is clear and free from doubt. That is not this case. Rather, in finding that 7.02(B) of Evergy's tariff structure insulated it from liability, the district court opted to enforce a provision that is unreasonable and inconsistent with both Kansas law and public policy. Additionally, a district court errs in entering an award for summary judgment when a very real question exists concerning the nature of a public utility's conduct. Rather, such matters are best resolved through submission to a jury.

Reversed and remanded.

(554 P.3d 676)

No. 126,874

B.H., Special Administrator of the Estate of C.W.H., a Minor, And B.H., Individually and for and on Behalf of All the Surviving Heirs-at-Law of C.W.H., a Minor, *Appellees*, v. P.B. and L.B., *Defendants*, and UPLAND MUTUAL INSURANCE, *Appellant*.

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SYLLABUS BY THE COURT

1. GARNISHMENT—*Review of Garnishment Orders—Appellate Review*. Appellate courts apply a bifurcated standard of review to garnishment orders to determine whether the district court's findings of fact are supported by substantial competent evidence and whether those findings are sufficient to support the district court's conclusions of law. An appellate court exercises unlimited review over the district court's conclusions of law and, when the facts are undisputed, need not review the district court's factual findings.

2. INSURANCE—*Interpretation of Terms of Insurance Policy—Unlimited Appellate Review*. Like appellate review of any other contract or written instrument, appellate courts exercise unlimited review to interpret the terms of an insurance policy which must, when possible, be construed to give effect to the parties' intentions. If an insurance policy's language is clear and unambiguous, it must be taken in its plain, ordinary, and popular sense.

3. GARNISHMENT—*Garnishment Proceeding—Judgment Creditor Can Only Enforce What Debtor Could Enforce*. In a garnishment proceeding, the judgment creditor stands in the shoes of the judgment debtor to enforce only what the debtor could enforce.

4. SAME—*Garnishment Proceeding—Judgment Creditor Not In More Favorable Position against Garnishee Than the Judgment Debtor*. Garnishment proceedings do not place the judgment creditor in a more favorable position to enforce a claim—including an insurance claim—against the garnishee than the judgment debtor for the same cause of action.

5 SAME—*Garnishment Proceeding—No Contractual Privity between Judgment Creditor and Garnishee*. A garnishment proceeding does not create contractual privity between a judgment creditor and the garnishee. A judgment creditor seeking to garnish a judgment debtor's insurance provider—when the judgment creditor is not in privity of contract with the insurer and is not an intended third-party beneficiary of the insurance policy—may only recover from the insurer to the extent the insured judgment debtor could recover.

Appeal from Bourbon District Court; ANDREA PURVIS, judge. Submitted without oral argument. Opinion filed August 16, 2024. Reversed and remanded with directions.

Samuel A. Green, of Fisher, Patterson, Sayler & Smith, L.L.P., of Topeka, for appellant.

Gregory S. Diehl, of Ralston, Pope & Diehl, L.L.C., of Topeka, for appellee.

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

HURST, J.: Mother's toddler tragically died from drowning in a pond at the child's foster parents' home. Mother sought damages from the foster parents, alleging they negligently caused her child's death. The district court found one of the foster parents—P.B.—80% at fault for her child's death and awarded Mother damages of $320,000, comprised of $120,000 for the mother's survivor claim and $200,000 for her wrongful death claim. Mother filed this garnishment proceeding against the foster parents and their homeowners insurer, Upland Mutual Insurance, seeking an order that Upland Mutual pay the judgment. Upland Mutual disclaimed coverage, arguing the foster parents' homeowners insurance policy excluded coverage for her child's death. The district court agreed in part, finding no coverage for Mother's survivor claim but finding the homeowners insurance policy covered Mother's wrongful death claim because Mother was not an insured under the policy.

Upland Mutual appeals the district court's garnishment order for Mother's wrongful death claim. This court agrees the district court erred in finding the insurance policy covers Mother's wrongful death claim. The district court's garnishment order against the insurer is therefore reversed, and the case is remanded for further proceedings consistent with this opinion.

FACTUAL AND PROCEDURAL BACKGROUND

P.B. and L.B. were licensed foster parents who received Mother's child, C.W.H., as a foster placement in December 2015 when C.W.H. was about one month old. In August 2017, when C.W.H. was about 23 months old, he drowned in a tragic accident in a fishpond on the foster parents' property when only P.B. was home. At the time of C.W.H.'s death, Mother had been working

on her reintegration plan and C.W.H. was spending five nights a week with Mother.

The foster parents were insured under a homeowners insurance policy issued by Upland Mutual. Their policy contained the following provisions relevant to this appeal:

"**DEFINITIONS**

"1. The words 'you' and 'your' mean the person or persons named as the insured on the 'declarations'. This includes 'your' spouse if a resident of 'your' household.

. . . .

"3. 'Bodily injury' means bodily harm to a person and includes sickness, disease, or death. This also includes required care and loss of services.

. . . .

"7. 'Insured' means:

a 'you';

b. 'your' relatives if residents of 'your' household;

c. persons under the age of 21 residing in 'your' household and in 'your' care or in the care of 'your' resident relatives . . . .

. . . .

"12. 'Occurrence' means an accident, including repeated exposures to similar conditions, that results in 'bodily injury' or 'property damage' during the policy period. . . . .

"**LIABILITY COVERAGES**

"**PRINCIPAL COVERAGES—LIABILITY AND MEDICAL PAYMENTS TO OTHERS**

"**Coverage L—Personal Liability—**'We' pay, up to 'our' 'limit', all sums for which an 'insured' is liable by law because of 'bodily injury' or 'property damage' caused by an 'occurrence' to which this coverage applies. 'We' will defend a suit seeking damages if the suit resulted from 'bodily injury' or 'property damage' not excluded under this coverage. 'We' may make investigations and settle claims or suits that 'we' decide are appropriate. 'We' do not have to provide a defense after 'we' have paid an amount equal to 'our' 'limit' as a result of a judgment or written settlement.

. . . .

"**EXCLUSIONS THAT APPLY TO LIABILITY COVERAGES**

"'We' do not pay for 'bodily injury' or 'property damage' resulting from one or more of the following excluded 'occurrences', regardless of other causes or 'occurrences' that contribute to or aggravate the 'bodily injury' or 'property damage' whether such causes or 'occurrences' act to produce the 'bodily

injury' or 'property damage' before, at the same time as, or after the excluded 'occurrence'.

. . . .

"2. **Additional Exclusions That Apply Only to Coverage L**—Coverage L does not apply to:

a. 'bodily injury' to 'you', and if residents of 'your' household, 'your' relatives and persons under the age of 21 in 'your' care or in the care of 'your' resident relatives."

Upland Mutual disclaimed liability for the accident and notified P.B. and L.B. of this refusal to provide coverage and defense, explaining in part:

"The investigation undertaken and completed by Upland Mutual confirmed that [C.W.H.] was under the age of 21 (he was approximately age 22 months old at the date of this incident), was residing in your household and was in your care. Both of you are insureds under this policy. [C.W.H.] was also an insured under the policy. Pursuant to the exclusions outlined above, there isn't any liability coverage available for a bodily injury/wrongful death claim of one insured resident of your household against another insured resident of your household."

Mother sued numerous defendants—including P.B. and L.B.—alleging damages from C.W.H.'s death. After a bench trial, the district court found that P.B.'s negligence in failing to adequately supervise C.W.H. caused his death and apportioned P.B. 80% of the fault. The district court awarded Mother $150,000 in noneconomic damages on her survivor claim under K.S.A. 60-1801 et seq. and $250,000 in damages on her wrongful death claim under K.S.A. 60-1901 et seq. The district court determined that because it assigned P.B. 80% of the fault in C.W.H.'s death, he was liable for $320,000 of the total judgment—$120,000 for Mother's survivor claim and $200,000 for her wrongful death claim.

After winning that judgment, Mother filed this action for garnishment against Upland Mutual, P.B.'s homeowners insurer, in the amount of the judgment against P.B. Upland Mutual denied liability, claiming P.B.'s homeowners insurance policy did not provide coverage for the judgment. The district court partially agreed with both parties. The district court found "the resident exclusion of the Policy precludes any coverage for the survivor claim asserted by plaintiff" because C.W.H. "was a resident of the [foster parents'] household as defined under the policy." However,

the district court also concluded "there should be coverage for [P.B.]'s proportional share of fault on the wrongful death claim under the Policy because the claim benefits C.W.H.'s heir-at-law," who "was not a resident of the [foster parents'] home." The district court therefore ordered Upland Mutual to pay Mother $200,000, which represents P.B.'s proportional share of fault on her wrongful death claim.

Upland Mutual appealed the district court's garnishment order.

DISCUSSION

The only issue on appeal is whether the district court erred in entering a garnishment order against Upland Mutual for Mother's wrongful death judgment against P.B. "Garnishment is a procedure whereby the wages, money or intangible property of a person can be seized or attached pursuant to an order of garnishment issued by the court under the conditions set forth in the order." K.S.A. 2023 Supp. 60-729(a).

Generally, this court applies a bifurcated standard of review to garnishment orders to determine whether the district court's findings of fact are supported by substantial competent evidence and then whether those findings are sufficient to support the court's conclusions of law. *Geer v. Eby*, 309 Kan. 182, 190, 432 P.3d 1001 (2019). But when the facts are undisputed, as they are here, this court need not review the district court's factual findings and can proceed to the second step to review the district court's conclusions of law de novo. 309 Kan. at 190-91. This court exercises unlimited review to interpret and determine the legal effect of a contract, and its review is "'unaffected by the lower courts' interpretations or rulings.'" *Trear v. Chamberlain*, 308 Kan. 932, 936, 425 P.3d 297 (2018) (quoting *Born v. Born*, 304 Kan. 542, 554, 374 P.3d 624 [2016]).

The District Court Erred in Finding the Foster Parents' Homeowners Insurance Policy Provided Coverage for the Judgment on Mother's Wrongful Death Claim

After receiving a judgment against P.B. for the wrongful death of her child, Mother became a creditor with P.B. owing Mother

the debt. Mother sought to enforce payment of the judgment debt by garnishing P.B.'s homeowners insurer, Upland Mutual. In a garnishment proceeding, a creditor such as Mother can "stand[ ] in the shoes of the debtor" to enforce judgments owed to the debtor but only to the extent the debtor could enforce the same judgment. *Geer*, 309 Kan. at 191. This means that if the Upland Mutual homeowners insurance policy provides coverage for the judgment that P.B. could enforce, then Mother can stand in P.B.'s shoes and demand that Upland Mutual pay her instead of P.B. See *Granados v. Wilson*, 317 Kan. 34, 53, 523 P.3d 501 (2023) (creditor stands in the shoes of the debtor); *LSF Franchise REO I v. Emporia Restaurants, Inc.*, 283 Kan. 13, 22, 152 P.3d 34 (2007) (". . . a judgment creditor may not attach property that does not legally belong to the judgment debtor"). The district court found the Upland Mutual policy provided coverage for Mother's wrongful death judgment and therefore issued its garnishment order. This court must review the policy anew—without deference to the district court's interpretation—to determine whether the policy provides coverage for Mother's judgment against P.B.

This court interprets the terms of an insurance policy just as it would any other contract and, when possible, construes insurance policies "'to give effect to the intention of the parties.'" *Geer*, 309 Kan. at 192. However, because the insurer typically prepares its own contracts, "'it has a duty to make the meaning clear,'" and "'[i]f the insurer intends to restrict or limit coverage under the policy, it must use clear and unambiguous language; otherwise, the policy will be liberally construed in favor of the insured.'" 309 Kan. at 192. If there is no ambiguity in the policy terms—including any limitation or restrictions—the language will be "taken in its plain, ordinary, and popular sense." 309 Kan. at 192.

The Upland Mutual policy covers personal liability as follows:

"'We' pay, up to 'our' 'limit,' all sums for which an 'insured' is liable by law because of 'bodily injury' or 'property damage' caused by an 'occurrence' to which this coverage applies. 'We' will defend a suit seeking damages if the suit resulted from 'bodily injury' or 'property damage' not excluded under this coverage."

This fairly broad coverage provision is limited by a separate provision that states personal liability coverage "does not apply to: a.

'bodily injury' to 'you', and if residents of 'your' household, 'your' relatives and persons under the age of 21 in 'your' care . . . ." The policy defines bodily injury as "bodily harm to a person and includes sickness, disease, or death," and "[t]his also includes required care and loss of services." The plain and unambiguous policy language excludes from coverage bodily injuries, including death, to persons under the age of 21 that occurred while the injured was in the care of the insured and a resident of their household.

Although the parties do not dispute that C.W.H. was under the age of 21, in the insureds' care, and a resident of the insureds' home at the time of his death, Upland Mutual appears to have read the disputed exclusion provision two different ways. In its letter disclaiming coverage, Upland Mutual based its denial on C.W.H.'s status as a person under age 21 in the care of the insureds who was also a resident of the home and thus himself an insured. Upland Mutual explained that because C.W.H. "was also an insured under the policy," the exclusion prohibited a "claim of one insured resident of your household against another insured resident of your household." However, in its appellate brief, Upland Mutual states the exclusion at issue "applies regardless" of whether C.W.H. resided with the insureds "because he was under the care of the [insureds] at the time of the accident." Upland Mutual argues "[t]he resident exclusion excludes from coverage claims for 'bodily injury' to a resident of the insured household *and* to persons under the ages of 21 in the insureds' care." (Emphasis added.) The district court based its determination on C.W.H.'s status as an insured—adopting Upland Mutual's interpretation in its coverage letter. On appeal, this court need not agonize over the correct interpretation of the provision because the parties do not dispute that C.W.H. resided with the insureds and thus met this definition under either interpretation.

Mother argues her wrongful death claim is not excluded from coverage—despite the clear, unambiguous policy language to the contrary—because Mother "was not an insured, she was not a resident, she was not a relative, and she was not in P.B. or L.B.'s care." Essentially, Mother argues the policy exclusion applies to wrongful death judgments only if *the person seeking to collect the*

judgment (in this case Mother) satisfies the elements of the exclusion provision. The district court agreed with this argument, explaining:

"The wrongful death claim benefits C.W.H.'s heir-at-law, who was not a resident of the [Defendant's] home. The Court concludes that this distinguishes the cases cited by Garnishee from the present case. The Court concludes that there should be coverage for [P.B.'s] proportional share of fault on the wrongful death claim under the Policy because the claim benefits C.W.H.'s heir-at-law."

The district court correctly notes that the cases Upland Mutual relied on share a factual distinction from this case. In those cases, the persons seeking benefits under the insurance policy satisfied the elements of the respective exclusion provision in that they were insureds or related to the insureds. See *Patrons Mut. Ins. Ass'n. v. Harmon*, 240 Kan. 707, 732 P.2d 741 (1987) (minor seeking damages under a wrongful death action against his father for the death of the minor's mother); *Thornburg v. Schweitzer*, 44 Kan. App. 2d 611, 240 P.3d 969 (2010) (deceased minor's mother sought damages against her husband, the deceased minor's father, for their son's death); *Mauch v. Mauch*, No. 92,842, 2005 WL 1805200 (Kan. App. 2005) (unpublished opinion) (deceased minor's parents sought damages against the deceased minor's paternal grandparents, with whom they were living at the time of the minor's accidental death). For example, in *Thornburg*, a panel of this court interpreted a similar homeowners insurance policy exclusion when a mother sought recovery from her own homeowners policy in a wrongful death action against her husband for negligently causing their son's death. 44 Kan. App. 2d at 613. The couple's homeowners insurance policy stated that coverage did "'not apply to . . . bodily injury to you or residents of your household.'" 44 Kan. App. 2d at 617. Their policy further provided that "'[i]nsured means you and the following residents of your household: . . . your relatives; and . . . persons under 21 in the care of those named above.'" 44 Kan. App. 2d at 617. The panel agreed with the insurer that there was no coverage for the wrongful death action under the couple's policy:

"The exclusion language in the present case . . . is not ambiguous. It is undisputed that [the deceased minor] was the [couple's] son and was a person under the age of 21 in the [couple's] care; therefore, pursuant to the clear policy terms, he was

a resident of the [couple's] household. Under these terms, there was clearly no coverage available to [the father] under the policy . . . ." 44 Kan. App. 2d at 621.

Similarly, in *Patrons*, a minor son filed a wrongful death action against his father for causing the death of his mother. 240 Kan. at 707. The father requested that his homeowners insurer defend him against the wrongful death action, but the policy excluded from coverage bodily injury "'which is expected or intended by the insured'" and "'bodily injury to you and any insured within the meaning'" of the definition of insured. 240 Kan. at 713-14. The court found the exclusion unambiguous and determined that coverage did not apply to "bodily injury or death which is expected or intended by the insured" or "bodily injury or death to any insured," and did not compensate "any *insured* for bodily injury or death to an insured." (Emphasis added.) 240 Kan. at 714.

Mother argues that because she is not an insured under the Upland Mutual policy, the holdings in cases like *Thornburg* and *Patrons* are distinguishable and inapplicable. While this case is indeed distinguishable from those cases, that factual distinction does not alter the legal principles or analysis. First, Mother has not argued that she is entitled to coverage of her claim as a party to, or intended third-party beneficiary of, the Upland Mutual policy, and she only seeks payment through garnishment. Mother's garnishment action does not create contractual privity between her and Upland Mutual. See *GFTLenexa, LLC v. City of Lenexa*, 310 Kan. 976, Syl. ¶ 8, 453 P.3d 304 (2019) ("Privity of contract is that connection or relationship existing between two or more contracting parties. Privity between the plaintiff and the defendant with respect to the subject of the lawsuit is essential to the maintenance of any action on a contract."); *M & I Marshall & Ilsley v. Higdon*, 63 Kan. App. 2d 668, 677, 536 P.3d 898 (2023) ("A garnishment action alone does not create privity of contract between a garnishee and a garnisher."). Mother, as judgment creditor and garnisher, may only seek payment from Upland Mutual to the extent such payment is owed to P.B. as the judgment debtor and insured. *Ray v. Caudill*, 266 Kan. 921, 924, 974 P.2d 560 (1999) ("In a garnishment proceeding, the creditor . . . takes the place and stands in the shoes of its debtor . . . taking only what [the debtor] could enforce against the third-party garnishee.").

When the policy does not provide coverage for P.B.'s claim, Mother, as P.B.'s judgment creditor, likewise cannot recover.

"'Proceedings in garnishment do not change the legal relations and rights existing between the defendant and the garnishee, nor place the plaintiff in a more favorable position for the enforcement of a claim against the garnishee than would be the defendant in an action brought by him for the same cause; nor can anyone be held in such proceedings to the payment of a liability which the defendant could not himself enforce because of existing equities and set-offs.'" *LSF Franchise REO I*, 283 Kan. at 22.

So, even if this court agreed with Mother that the bodily injury exclusion for insureds or residents of the insureds' household applies to wrongful death judgments only when an insured seeks recovery, as a judgment creditor standing in the shoes of the insured, Mother's judgment would still be excluded under the policy.

Second, the clear, unambiguous policy language excludes coverage for bodily injury to the insureds and resident minors in their care, regardless of who seeks recovery. The policy excludes coverage for bodily injury based on the person injured—not the person seeking benefits under the policy. Here, C.W.H. was the person injured, and as a minor residing with and in the care of the insureds, damages arising from C.W.H.'s death are excluded from coverage under the policy. When the terms of an insurance policy are clear and unambiguous, the court must give effect to the parties' clear intentions and enforce the contract as made and may not "strain to create an ambiguity where, in common sense, there is not one." *O'Bryan v. Columbia Ins. Group*, 274 Kan. 572, 576, 56 P.3d 789 (2002).

The argument advanced by Mother and accepted by the district court is inconsistent with the plain and unambiguous policy language. The applicable policy exclusion turns not on who claims the benefit but rather on who suffered the bodily injury. While Mother's argument may carry some logical basis by preventing insureds from recovering for their own negligence but allowing third parties to recover from an insured's negligence, that result is inconsistent with the policy language. Regardless of who seeks the policy benefit, the policy clearly excludes from coverage damages resulting from C.W.H.'s death because C.W.H. was residing in the insureds' home, under the insureds' care, and under the age of 21.

CONCLUSION

The Upland Mutual insurance policy plainly and unambiguously excludes Mother's wrongful death judgment from coverage, regardless of the beneficiary, and the district court therefore erred in interpreting the policy to permit coverage. While this court recognizes that P.B. has been found to have negligently caused C.W.H.'s death and sympathizes with Mother's unimaginable loss, the Upland Mutual policy simply does not provide coverage for her judgment. Accordingly, the district court's garnishment order for Mother's wrongful death judgment is reversed. On remand, the district court is directed to enter judgment for Upland Mutual on Mother's garnishment claim for her wrongful death judgment against P.B.

Reversed and remanded with directions.

(554 P.3d 684)

No. 124,612

STATE OF KANSAS, *Appellee*, v. DANIEL A. ARREOLA, *Appellant*.

SYLLABUS BY THE COURT

1. CRIMINAL LAW—*Alternative-Means Crime—Crime That can Be Committed in More than One Way – Jury Instructions.* When the State charges a person with a crime that can be committed in more than one way, it may present evidence of alternative means of committing that offense. A district court presents an alternative-means crime to a jury when its instructions incorporate multiple means for a single statutory element of an offense.

2. TRIAL—*Alternative-Means Crimes—Appellate Review.* Kansas courts no longer distinguish between alternative means for committing an offense and options within a means of committing a crime. Instead, appellate courts review district courts' instructions on alternative-means crimes under the same framework as other challenges to jury instructions.

3. SAME—*Jury Instruction on Voluntary Intoxication—Appropriate under These Facts if Evidence Supports Findings—Specific Intent Necessary to Commit Crime.* A jury instruction on voluntary intoxication is factually appropriate in aggravated-burglary cases when there is evidence presented at trial that could support a finding that the defendant was intoxicated and their mental faculties were so impaired that they could not form the specific intent necessary to commit that crime. Evidence that a person may have lacked this level of intent due to intoxication tends to show the loss of the ability to reason, to plan, to recall, or to exercise motor skills.

4. TRIAL—*Prosecutors May Not Misstate Law or Attempt to Shift Burden of Proof to Defendant—Limits.* Prosecutors may not misstate the law or attempt to shift the burden of proof to the defendant. But prosecutors may argue that some evidence is more credible than other evidence and may use the art of rhetoric—within the confines of reason and the governing law—to convey the strength of the State's case to the jury.

Appeal from Shawnee District Court; DAVID B. DEBENHAM, judge. Submitted without oral argument. Opinion filed August 23, 2024. Affirmed.

Corrine E. Gunning, of Kansas Appellate Defender Office, for appellant.

Carolyn A. Smith, assistant district attorney, *Michael F. Kagay*, district attorney, and *Kris W. Kobach*, attorney general, for appellee.

Before ARNOLD-BURGER, C.J., MALONE and WARNER, JJ.

WARNER, J.: Daniel Arreola was convicted of several crimes after he broke into an apartment and attacked people inside. He appeals, challenging various aspects of the evidence presented at trial, the district court's instructions to the jury, and the prosecutor's closing argument, as well as the constitutionality of the statutory definitions of rape and aggravated criminal sodomy. We are unpersuaded by Arreola's constitutional claim. And after carefully reviewing the record and the parties' arguments, we conclude that Arreola's trial, though not perfect in all respects, was fair. We thus affirm his convictions.

FACTUAL AND PROCEDURAL BACKGROUND

On a July evening in 2015, three women hosted a party at their first-floor apartment in Topeka. The party lasted well into the night, with partygoers drinking alcohol and mingling inside the apartment and outside on a back patio, which was connected to the apartment's kitchen by a sliding glass door.

Sometime during the party, one of the hosts and a guest were talking on the patio. Arreola approached them and asked if he could join the party. They told him he could if he stayed on the patio outside. Several times throughout the night, Arreola made his way into the apartment and was told to leave. After the hosts were forced to ask Arreola to go back outside a third time, one of them locked the sliding glass door so he could not reenter. A guest recalled that Arreola "didn't put up much confrontation" and was disagreeable but not forcefully so—he acted in a way that "you would expect from a drunk person."

Around 4 a.m., Arreola started yelling from outside the glass door that he was going to break in. A guest tried to calm him down, but Arreola pulled out a gun and pressed it against the glass, pointing it at the people inside and repeating that he was going to break in. The guest immediately told everyone that Arreola was armed and to move away from the door and out of the kitchen.

Arreola kicked the door and made his way inside the apartment. He then started yelling that he "was FBI" and that if anyone moved, he would shoot them. Arreola approached the guest he had spoken with on the patio earlier—now lying on the floor behind a couch in the living room—and pressed the gun to the back of the

guest's neck, telling him not to move or he would be shot. Another person who had been hiding in the living room started running down the hallway toward one of the bedrooms, and Arreola began chasing him. The guest in the living room then ran out the sliding back door and into the parking lot. Arreola initially chased him outside but quickly gave up and went back into the apartment. The escaped guest called 911.

Back inside the apartment, Arreola approached the bedroom of one of the hosts (L.M.) where she and a guest (C.T.) were hiding. Arreola forced his way inside and told the two women to lie on the ground. Arreola climbed on top of C.T., put his gun to her chest, and told her that "he was FBI, and this was just protocol." He started going through C.T.'s pockets, and L.M. told Arreola to leave her alone. Arreola then went over to L.M., put his gun to the back of her head, pulled down her sweatpants and underwear, and forcibly penetrated her vagina and anus with his penis. While on top of L.M., Arreola pointed his gun at C.T. and said, "Don't fucking look at me."

In the meantime, Topeka police officers arrived at the scene. Hearing the officers, Arreola got off L.M. and flashed his gun outside the bedroom door at the officers. The officers withdrew from the apartment to establish a strategic position. Amid the turmoil, Arreola fled. Officers found him banging on another apartment door—three apartments down from where the incident occurred—and arrested him.

The officers took Arreola to the police station. He was interviewed by a detective, who testified at trial that Arreola appeared drunk and that much of what he said during the interview did not make sense. For example, when asked if he raped anyone, Arreola answered that he "was not raped by an officer." The detective also testified that Arreola said that he did not know what he had done that night.

Arreola was charged with several crimes. The case proceeded to trial, where the jury found Arreola guilty of aggravated burglary, three counts of aggravated assault with a deadly weapon, aggravated criminal sodomy, rape, and unlawful tampering with an electronic monitoring device—a crime Arreola was charged

with after he removed his GPS monitor and fled Kansas while released on bond. Arreola was sentenced to 257 months' imprisonment.

DISCUSSION

Arreola raises several arguments on appeal. He asserts that the jury instruction on aggravated burglary was faulty because it listed alternative means of committing that offense. He also claims that the district court should have instructed the jury on the potential effect that his voluntary intoxication had on his ability to form the specific intent required to commit aggravated burglary. And he asserts the prosecutor erred during closing arguments; that the statutes criminalizing rape and aggravated criminal sodomy are unconstitutional; and that the aggregation of these errors denied him a fair trial. We agree that an instruction on voluntary intoxication was legally and factually appropriate in this case. But the absence of that instruction was not a clear error that affected the outcome of the trial. And we are not persuaded by Arreola's remaining arguments. We therefore affirm his convictions.

1. *Arreola has not shown reversible error in the district court's jury instructions.*

Arreola challenges two aspects of the district court's instructions to the jury. He asserts that the court's instruction on aggravated burglary included alternative means of committing that offense that were not proved by the State beyond a reasonable doubt. And he claims that the court should have instructed the jury on voluntary intoxication to help the jury assess whether he could have formed the specific intent necessary to commit that crime. Arreola acknowledges that he neither objected to the aggravated-burglary instruction nor requested a voluntary-intoxication instruction. But he asserts that these alleged errors so clearly affected the outcome of his trial that they require a new trial for the aggravated-burglary charge.

When faced with a claim that an instruction should have been altered or that an unrequested instruction should have been given at trial, we must determine whether the instruction was appropriate under the law and whether it fit the evidence presented. *State*

v. Holley, 313 Kan. 249, 254, 485 P.3d 614 (2021). If so, we consider whether the district court's instructions require reversal. *State v. Gentry*, 310 Kan. 715, 720, 449 P.3d 429 (2019). A person raising an instructional deficiency for the first time on appeal, as Arreola is here, did not allow the district court the opportunity to assess whether the instruction should have been given in the first instance. Thus, they must demonstrate that the absence of the instruction was clearly erroneous—that is, they must firmly convince the appellate court that the jury would have reached a different verdict if the instruction had been given. K.S.A. 22-3414(3); *State v. Craig*, 311 Kan. 456, 464, 462 P.3d 173 (2020); *Gentry*, 310 Kan. at 720-21.

1.1. *The district court's instruction on aggravated burglary was legally and factually appropriate.*

Arreola argues that the district court's instruction on aggravated burglary listed alternative means of committing that offense, triggering a higher evidentiary standard that the State had to meet for him to be convicted of that crime. Arreola notes that the district court did not instruct the jury to this effect; he asserts that the evidence presented did not otherwise meet the State's burden of proof.

The district court instructed the jury that, for the crime of aggravated burglary, the State was required to prove:

"1. The defendant entered a dwelling.
"2. The defendant did so without authority.
"3. The defendant did so with the intent to commit rape, aggravated assault, theft, or aggravated criminal sodomy therein."

Arreola did not object to this instruction. But on appeal, he claims that the specific criminal intents the court listed in its instruction—that Arreola entered *with the intent to commit rape, aggravated assault, theft, or aggravated criminal sodomy*—provided alternative means of committing aggravated burglary. He asserts the State was required to prove each of these possible intents beyond a reasonable doubt to avoid reversal. See *State v. Wright*, 290 Kan. 194, 224 P.3d 1159 (2010) (super sufficiency test), *overruled by State v. Reynolds*, 319 Kan. 1, 552 P.3d 1 (2024).

When the State charges a person with a crime that can be committed in more than one way, it may present evidence of alternative means of committing that offense. *Reynolds*, 319 Kan. at 4-5. A district court presents an alternative-means crime to a jury when its instructions "incorporate multiple means for a single statutory element" of an offense. 319 Kan. at 4-5.

Arreola's case involves such a crime. To prove aggravated burglary under K.S.A. 2015 Supp. 21-5807(b), the State was required to demonstrate that Arreola entered the apartment "without authority . . . with intent to commit a felony, theft or sexually motivated crime therein." The district court narrowed this definition somewhat at trial after the parties submitted their proposed jury instructions, informing the jury that the State must prove that Arreola entered "with the intent to commit rape, aggravated assault, theft, or aggravated criminal sodomy." This instruction presented an alternative-means crime because it listed four possible criminal intents for committing the offense.

Until recently, Kansas courts used a different framework for analyzing jury instructions that contained alternative means of committing an offense. This previous framework distinguished between instances where an instruction listed "distinct alternatives for a material element of the crime," *State v. Garcia-Martinez*, 318 Kan. 681, 686, 546 P.3d 750 (2024), or merely described "'the factual circumstances in which a material element may be proven'" (or "options within a means"), *State v. Jordan*, 317 Kan. 628, 636, 537 P.3d 443 (2023). When a court's instructions included alternative means of a material element of the crime, our Supreme Court required the State to prove each alternative beyond a reasonable doubt (a requirement courts previously described as a "super-sufficiency" of the evidence). *Wright*, 290 Kan. at 203.

As this case was pending, however, the Kansas Supreme Court decided *Reynolds*, which altered this legal landscape by overruling *Wright* and its progeny and focusing on the language of K.S.A. 22-3414(3). After *Reynolds*, our analysis no longer distinguishes between alternative means and the often-perplexing "options within a means." 319 Kan. at 19-20. Instead, we review challenges to district courts' instructions on alternative-means

crimes under the same framework as other challenges to jury instructions. See K.S.A. 22-3414(3). Thus, "[i]f a defendant claims a jury instruction contained an alternative means error, the reviewing court must consider whether the instruction was both legally and factually appropriate." 319 Kan. 1, Syl. ¶ 4, 552 P.3d 1. If an instructional error has occurred—for example, if an instruction includes a means for which there was no evidence and was thus not factually appropriate—we evaluate whether that error was harmless or reversible under the standards articulated in *State v. Plummer*, 295 Kan. 156, 283 P.3d 202 (2012), and *State v. Ward*, 292 Kan. 541, 256 P.3d 801 (2011). 319 Kan. 1, Syl. ¶ 4, 552 P.3d 1. An alternative-means instruction that was not challenged before the district court only necessitates a new trial if the instruction was clearly erroneous. 319 Kan. at 18-19; see K.S.A. 22-3414(3).

Since *Reynolds* was decided after the parties had already submitted their appellate briefs, we requested supplemental briefing from Arreola and the State on how we should analyze the aggravated-burglary instruction under the *Reynolds* framework. Having now reviewed the parties' responses—along with their original appellate briefs—we find that the jury was properly instructed on aggravated burglary.

The parties acknowledge that the aggravated-burglary instruction was legally appropriate. We agree—the district court's instruction on aggravated burglary was consistent with the language of K.S.A. 2015 Supp. 21-5807(b).

The parties' positions diverge, however, on whether the aggravated-burglary instruction was factually appropriate. To prove Arreola committed the crime of aggravated burglary, the State was required to show that Arreola entered the apartment while intending to commit at least one of the offenses listed in K.S.A. 2015 Supp. 21-5807(b). See K.S.A. 21-5202(h) ("A person acts 'intentionally,' or 'with intent,' with respect to the nature of such person's conduct or to a result of such person's conduct when it is such person's conscious objective or desire to engage in the conduct or cause the result."); *State v. Gutierrez*, 285 Kan. 332, Syl. ¶ 4, 172 P.3d 18 (2007). A person's intentions upon entry for purposes of aggravated burglary are rarely proven by direct evidence; instead, they "must be discerned from the circumstances" surrounding the

person's actions. *State v. Larsen*, 317 Kan. 552, 560, 533 P.3d 302 (2023).

For a jury instruction to be factually appropriate, there must be some evidence—viewed "in the light most favorable to the requesting party"—that makes the instruction relevant to the facts of the case. *Reynolds*, 319 Kan. at 17; *State v. Carter*, 316 Kan. 427, 430, 516 P.3d 608 (2022). Arreola concedes that there was evidence from which a jury could find that he entered the apartment with the intent to commit aggravated assault, which the court included in the instruction as an intent that could support an aggravated-burglary conviction. But he asserts that the instruction was factually overbroad and thus inappropriate because the evidence did not show that he had not entered the apartment with the specific intent to commit the other three crimes listed in the court's aggravated-burglary instruction—theft, rape, and aggravated criminal sodomy. We do not find this argument persuasive.

First, there was evidence presented at trial from which a jury could find that Arreola entered the apartment with the intent to commit theft. Arreola does not contest the fact that he stole several pairs of underwear and a scarf. See *State v. Colson*, 312 Kan. 739, 756, 480 P.3d 167 (2021) (noting that "the jury could have inferred an *initial* intent to break in to commit a theft" from "the intruder's ultimate post-break-in conduct").

Similarly, there was evidence submitted at trial from which a jury could find that Arreola entered the apartment with an intent to commit rape or an intent to commit aggravated criminal sodomy. Shortly after entering the apartment, Arreola forced his way into a bedroom, pulled down a woman's sweatpants, and raped and sodomized her. It is true that Arreola confronted a few people in different areas of the apartment before reaching this victim. But while Arreola was free to argue that these actions showed he did not have a specific intent to rape or sodomize when he broke into the apartment, the jury could also discern this intent from the circumstances of his entry.

Viewing the evidence in the light most favorable to the State, there was evidence presented at trial to show that Arreola entered the apartment "with the intent to commit rape, aggravated assault,

theft, or aggravated criminal sodomy." Thus, the court's instruction to the jury on aggravated burglary was legally and factually appropriate. Arreola has not shown any error in the district court's aggravated-burglary instruction.

1.2. *The absence of an instruction on voluntary intoxication was not clearly erroneous.*

Arreola next asserts that the district court should have instructed the jury on the effect that his voluntary intoxication had on his ability to form the specific intent to commit aggravated burglary. Arreola did not request this instruction at trial. But he claims on appeal that the instruction was appropriate, and the absence of that instruction impaired the jury's assessment of the evidence.

The parties agree that an instruction on voluntary intoxication was legally appropriate as to the aggravated-burglary charge because this crime requires a specific criminal intent—in Arreola's case, to enter a dwelling without authority to commit rape, aggravated assault, theft, or aggravated criminal sodomy. See *State v. Murrin*, 309 Kan. 385, 393, 435 P.3d 1126 (2019) (voluntary-intoxication instruction is legally appropriate for specific-intent crimes). They disagree, however, as to whether this instruction was factually appropriate.

A jury instruction on voluntary intoxication is factually appropriate in aggravated-burglary cases when there is evidence presented at trial that could support a finding that the defendant was intoxicated to the point that their mental faculties were so impaired that they could not form the specific intent necessary to commit that crime. *State v. Crawford*, 253 Kan. 629, 642, 861 P.2d 791 (1993); see *State v. Makthepharak*, 276 Kan. 563, 572, 78 P.3d 412 (2003). Evidence that a person may have lacked this level of intent due to intoxication tends to show the "loss of the ability to reason, to plan, to recall, or to exercise motor skills." *State v. Gallegos*, 313 Kan. 262, 271, 485 P.3d 622 (2021); see also *State v. Betancourt*, 299 Kan. 131, 141, 322 P.3d 353 (2014) ("Loss of memory or inability to remember events before or during the offense may show an inability to form intent.").

Arreola argues there was evidence at trial showing he was so intoxicated that he could not form the necessary intent to commit

aggravated burglary. He notes that there was ample evidence that he had been drinking alcohol that night. While he admits there was no evidence to prove how much alcohol he drank or what his blood alcohol content was, he argues that his actions and the statements he made after entering the apartment showed that he was highly intoxicated. He points out that

- one guest testified that Arreola's behavior earlier in the night was "what you would expect from a drunk person";
- Arreola acted bizarrely, giving statements that he "was FBI" and what he was doing "was just protocol"; and
- the detective testified that Arreola appeared drunk and gave nonsensical answers during his interview.

The State counters that this evidence does not show that Arreola was too intoxicated to form the necessary intent to commit aggravated burglary, asserting that Kansas courts will not infer that a defendant was so impaired that they were unable to form the necessary intent simply because they drank alcohol or were drunk. See *State v. Kidd*, 293 Kan. 591, 595, 265 P.3d 1165 (2011); see also *State v. Brown*, 291 Kan. 646, 656, 244 P.3d 267 (2011). But these cases are distinguishable from the facts here, as both cases were devoid of evidence that would call the respective defendants' intent into question. In *Kidd*, there was evidence that the defendant was only "'buzzed,'" not drunk, and that he was talking and playing video games with the victim just before the criminal events took place. 293 Kan. at 596. In *Brown*, there was evidence that although the defendant smelled of alcohol and was mumbling, his mental faculties were intact. 291 Kan. at 657.

Here, there was some evidence—albeit perhaps tenuous—supporting the instruction. While we do not find that the guests' testimony about Arreola's actions earlier in the evening or the strangeness of Arreola's "FBI" statements, in and of themselves, warrant a voluntary-intoxication instruction, the detective's testimony is another matter. The detective explained that Arreola appeared drunk during the police interview and said that Arreola claimed he did not recall anything about his actions that night. The jury could assess the credibility of Arreola's assertions based on the evidence presented. But the detective's statements show that the instruction was relevant

under the facts. In other words, the voluntary-intoxication instruction was factually appropriate.

But our analysis does not end here. Because Arreola did not request a voluntary-intoxication instruction at trial, he must demonstrate that the absence of that instruction was a clear error that infected the fairness of the trial. That is, he must firmly convince this court that the jury would have reached a different verdict even if the district court had given that instruction. Arreola has not made this showing.

The jury heard evidence regarding Arreola's drinking, including the guests' and detective's testimony. But the jury also heard evidence showing that Arreola entered the apartment with a specific criminal intent and was aware of his actions. For example, after Arreola broke into the apartment, he had the wherewithal to try to control the movement of the partygoers by putting his gun to the back of a guest's neck and threatening to shoot him if he moved and by chasing several people who were running away from him. Arreola was also able to navigate his way back into the apartment after he had chased a guest into the parking lot. After Arreola had forced his way into a bedroom and was assaulting L.M., there was evidence that he remained aware of his actions—he pointed his gun at C.T. and said, "Don't fucking look at me." And when officers arrived at the apartment, Arreola stopped what he was doing, flashed his gun outside the bedroom door, and fled the scene.

We are not firmly convinced that the jury would have reached a different verdict even if the district court had given a voluntary-intoxication instruction.

2. *The prosecutor did not misstate the law when discussing the reasonable-doubt standard.*

Arreola also challenges the fairness of his trial based on the prosecutor's closing argument. He asserts that the prosecutor misled the jury by inaccurately describing the State's burden to prove the elements of all offenses beyond a reasonable doubt. Again, we are not persuaded by Arreola's argument.

Appellate courts use a two-step process to review claims of prosecutorial error. *State v. Sherman*, 305 Kan. 88, 109, 378 P.3d 1060 (2016). We first determine whether the prosecutor erred by making ar-

guments that fell "outside the wide latitude afforded" to attorneys arguing their cases. 305 Kan. at 109. In doing so, we consider the context in which the challenged statement was made, rather than analyzing the statement in isolation. *State v. Bodine*, 313 Kan. 378, 406-07, 486 P.3d 551 (2021). If we find the prosecutor erred, then the State must convince us beyond a reasonable doubt that the erroneous argument did not affect the jury's verdict. *Sherman*, 305 Kan. at 98, 109.

Our discussion of Arreola's claim requires additional background. Arreola's closing argument at trial focused on what he perceived as holes in the State's evidence and why the absence of some evidence created doubt as to his guilt. For example, Arreola noted that an officer had apprehended a different person within blocks of the apartment the night of the incident, but that officer did not testify at trial. Arreola also pointed to the absence of seminal DNA evidence, arguing that the State should have conducted a more thorough investigation.

The prosecutor's rebuttal addressed these arguments, explaining that the absence of some evidence did not necessarily mean that the State had not met its burden of proof. For context, we provide a lengthy passage from that discussion here:

"[A]t the end of the day, when you're back there deliberating, you might want more. It's natural to want that. . . . And you might want to see that, but that doesn't mean you don't have enough, because the last thing I need to talk to you guys about today is the idea of reasonable doubt.

"Now, in a criminal case, it is the State's burden of proof. The defendant is not required to prove that he is innocent. The State must prove that he's guilty. Well, we have done that in this case. And one thing to keep in mind about the burden of proof is, although it is a heavy burden, it is not an impossible burden. We do not have a criminal justice system that has created for itself a burden of proof that is like a mountain so high that it can never be climbed.

"If you had any reasonable doubt as to the defendant's guilt, that's one thing, but you should ask yourself this question about whether any of the doubts that [defense counsel] has presented to you are, in fact, reasonable, because the bottom line is, although the defendant does not have to prove that he is not guilty, he also doesn't have to just sit here and watch the State present its case. He can present his own case, as he has done. He can present his own evidence. He can cross-examine the State's witnesses.

"And it is an entirely fair question to ask at the end of the trial if the defendant's arguments are weak, if his claims don't consent or they don't seem to be credible or believable, then there should not be any reasonable doubt as to the defendant's guilt."

Arreola argues that this line of argument attempted to shift the State's burden of proof to him by insinuating that he must present evidence of his innocence. We disagree.

In a criminal case, the State must prove each element of the charged crimes beyond a reasonable doubt. *Miller v. State*, 298 Kan. 921, Syl. ¶ 5, 318 P.3d 155 (2014). Prosecutors may not misstate the law or attempt to shift the burden of proof to the defendant. *State v. Pribble*, 304 Kan. 824, 837, 375 P.3d 966 (2016). But this does not mean that prosecutors are animatrons. They are attorneys advocating for the State's position. They may argue that some evidence is more credible than other evidence and may use the art of rhetoric—within the confines of reason and the governing law—to convey the strength of the State's case to the jury.

To this end, prosecutors are granted "'considerable latitude to address the weaknesses of the defense.'" 304 Kan. at 837. They may point out a lack of evidence supporting a defendant's argument. *State v. Hachmeister*, 311 Kan. 504, 516, 464 P.3d 947 (2020). And, relevant here, when a defendant argues that the State's evidence is not credible because the State failed to present some piece of evidence, the prosecutor may respond by "'informing the jury that the defense has the power to introduce evidence'" and subpoena witnesses. 311 Kan. at 516.

The prosecutor's arguments, when viewed in context, discuss the contours of the reasonable-doubt standard in a manner consistent with Kansas law. The prosecutor emphasized that the State bore the burden to prove Arreola's guilt. The prosecutor's remark that "although the defendant does not have to prove he is not guilty, he also doesn't have to just sit here and watch the State present its case" did not shift the burden of proof to Arreola. A prosecutor can properly point out a lack of evidence supporting a defendant's argument. *Pribble*, 304 Kan. at 837 ("[A] prosecutor does not shift the burden of proof by pointing out the absence of evidence to support the defense argument that there are holes in the State's case.").

We are similarly unconvinced by Arreola's claim that a later statement by the prosecutor regarding Arreola's subpoena power also attempted to shirk the State's burden. When addressing the defense's assertions during closing argument about the absence of

certain types of evidence, the prosecutor observed that "the defendant has the same power of subpoena that the State has." The prosecutor continued: "[I]f the defendant thought that there was a witness or a piece of evidence that would show a reasonable doubt to you as jurors, he could have subpoenaed the witness to come in and testify, or he could have admitted the evidence himself." This argument was a permissible effort to rebut the defense's assertion.

Arreola has not shown that the prosecutor's closing argument went beyond the permissible latitude allowed to an advocate arguing their case. We are unpersuaded by his claims of prosecutorial error.

3. *Arreola has not shown a constitutional infirmity in the intent elements of the statutes defining rape and aggravated criminal sodomy.*

Arreola also challenges the constitutionality of the statutes defining rape and aggravated criminal sodomy. Arreola argues that these statutes violate his right to due process of law because the 2010 recodification of the Kansas criminal code added language that "it shall not be a defense that the offender did not know or have reason to know that the victim did not consent to the [sexual act], that the victim was overcome by force or fear, or that the victim was unconscious or physically powerless," essentially making rape and aggravated criminal sodomy strict-liability offenses. See K.S.A. 2015 Supp. 21-5503(e) (rape); K.S.A. 2015 Supp. 21-5504(f) (aggravated criminal sodomy).

Arreola concedes that he did not raise this challenge before the district court. But he argues—and we agree—that the record permits us to meaningfully consider his constitutional claim because it is a purely legal question that turns solely on the language of K.S.A. 2015 Supp. 21-5503(e) and K.S.A. 2015 Supp. 21-5504(f). And even if the district court had considered this question before or after trial, we would not be constrained by the district court's statutory interpretation. *State v. Harris*, 311 Kan. 816, 821, 467 P.3d 504 (2020).

As Arreola acknowledges, the Kansas Supreme Court recently rejected this same constitutional challenge to the rape statute in *State v. Thomas*, 313 Kan. 660, 488 P.3d 517 (2021). In

Thomas, the court found that even if rape and aggravated criminal sodomy lacked an intent requirement, "nothing in our law suggest[s] due process prohibits the Legislature from adopting strict liability criminal offenses." 313 Kan. at 663.

Arreola asserts that *Thomas* was wrongly decided. But as an intermediate appellate court, we have a duty to follow the controlling precedent of the Kansas Supreme Court absent some indication the court is departing from its previous position. *Snider v. American Family Mut. Ins. Co.*, 297 Kan. 157, 168, 298 P.3d 1120 (2013). Our Supreme Court has not signaled an intention to depart from its relatively recent analysis in *Thomas*. Nor has Arreola articulated why *Thomas*' reasoning, which was based on the statutory definition of rape, is not equally applicable to aggravated criminal sodomy.

Arreola has not shown that K.S.A. 2015 Supp. 21-5503(e) or K.S.A. 2015 Supp. 21-5504(f) are facially unconstitutional.

4. *No errors accumulated to deny Arreola a fair trial.*

In his remaining argument, Arreola asserts that even if his claimed errors did not individually require reversal of his convictions, their combination deprived him of a fair trial. But beyond the absence of a voluntary-intoxication instruction—which is subject to a clear-error review and not included in a cumulative-error analysis—Arreola has not apprised us of any error, let alone multiple errors that compound to undermine the fairness of his trial. See *State v. Waldschmidt*, 318 Kan. 633, Syl. ¶ 9, 546 P.3d 716 (2024); *State v. Cofield*, 288 Kan. 367, 378, 203 P.3d 1261 (2009).

No trial is perfect. But a defendant is entitled to a fair trial, not a perfect one. *State v. Cruz*, 297 Kan. 1048, 1075, 307 P.3d 199 (2013). After carefully reviewing the record, we find that Arreola received a fair trial under the law, and we affirm his convictions.

Affirmed.