OFFICIALLY SELECTED
CASES ARGUED AND DETERMINED

IN THE

COURT OF APPEALS

OF THE

STATE OF KANSAS

Reporter:
SARA R. STRATTON

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JUDGES AND OFFICERS OF THE KANSAS
COURT OF APPEALS

CHIEF JUDGE:

HON. KAREN ARNOLD-BURGER …… Overland Park

JUDGES:

HON. HENRY W. GREEN JR. ..... Leavenworth
HON. THOMAS E. MALONE ..... Wichita
HON. STEPHEN D. HILL ..... Paola
VACANT .....
HON. G. GORDON ATCHESON ..... Westwood
HON. DAVID E. BRUNS ..... Topeka
HON. ANTHONY J. POWELL ..... Wichita
HON. KIM R. SCHROEDER ..... Hugoton
HON. KATHRYN A. GARDNER ..... Topeka
HON. SARAH E. WARNER ..... Lenexa
HON. AMY FELLOWS CLINE……..……...Valley Center
HON. LESLEY ANN ISHERWOOD……..…….....Hutchinson
HON. JACY J. HURST..……..... Lawrence

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Bohanon v. Stone	124,167	Reno	04/08/2022	Reversed; remanded with directions
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Carner v. Ogg-Daugharthy	124,444	Franklin	04/29/2022	Affirmed
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City of Salina v. Dahl	124,122	Saline	05/06/2022	Affirmed
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Goering v. Huestis	124,293	Brown	04/29/2022	Affirmed
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Prince v. Kansas Dept. of Labor	124,175	Shawnee	05/13/2022	Affirmed in part; reversed in part; remanded with directions
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State v. Elliott	123,609	Clay	04/15/2022	Affirmed
State v. Foster	123,276	Wyandotte	05/06/2022	Affirmed
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State v. Griffin	123,661	Sedgwick	04/15/2022	Affirmed
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State v. Revell	123,913	Sedgwick	05/06/2022	Affirmed
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Tran v. State	124,072	Sedgwick	05/13/2022	Affirmed
White v. State	123,792	Butler	04/15/2022	Affirmed
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ADMINISTRATIVE LAW:

Final Order Required to Identify Agency Officer Who Receives Service of Petition for Judicial Review—Thirty-Day Period for Filing Petition for Judicial Review. K.S.A. 77-613(e) requires an administrative agency's final order to identify the agency officer who will receive service of a petition for judicial review on behalf of the agency. The 30-day jurisdictional period for filing a petition for judicial review begins to run after service of an order that complies with K.S.A. 77-613(e).
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Interpretation of Written Documents by Court—Interpret Written Language in Reasonable Fashion. It is not the function of a court to read sections of a written document in isolation or highlight awkward phrasing. Instead, courts must endeavor to interpret written language in a reasonable fashion that does not vitiate the purpose of the writing or reach an absurd result. *Gilliam v. Kansas State Fair Bd.* ……..…. 236*

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Interpretation of Workers Compensation Statutes—Appellate Review. Because the interpretation of workers compensation statutes involves a question of law, appellate review is unlimited. In interpreting a statute, appellate courts are not to give deference to the Board's legal analysis or determination. *Turner v. Pleasant Acres* ……..…….. 122

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CIVIL PROCEDURE:

Comparative Fault Procedure in Kansas—Policy of Judicial Economy. Kansas law requires defendants seeking to minimize their liability in comparative fault

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situations not involving a chain of distribution or similar commercial relationship to do so by comparing the fault of other defendants to reduce their own share of liability and damages. If a defendant chooses to settle and obtain release of common liabilities involving other parties whom the plaintiff did not sue, the defendant does not have an action for comparative implied indemnity or postsettlement contribution. Under Kansas comparative fault procedure, such a remedy is not necessary, and such an action defeats the policy of judicial economy, multiplying the proceedings from a single accident or injury.
Great Plains Roofing and Sheet Metal, Inc. v. K Building Specialties, Inc. 204*

Doctrine of Comparative Fault—Parties to Occurrence to Have Determination of Fault in One Action. The doctrine of comparative fault requires all the parties to the occurrence to have their fault determined in one action.
Great Plains Roofing and Sheet Metal, Inc. v. K Building Specialties, Inc. 204*

Exception to One-Action Rule—Separate Actions by Plaintiffs Against Tortfeasors if No Determination of Comparative Fault. An exception to the one-action rule allows plaintiffs to pursue separate actions against tortfeasors where there has been no judicial determination of comparative fault, but this exception does not allow defendants to bring separate actions.
Great Plains Roofing and Sheet Metal, Inc. v. K Building Specialties, Inc. 204*

Joinder of Additional Parties—Determination of Percentage of Negligence Attributable to Each Party. The requirement to join additional parties under K.S.A. 2020 Supp. 60-258a(c) does not distinguish between tort and contract claims, but instead focuses on the need for a fact-finder to determine the percentage of negligence attributable to each party.
Great Plains Roofing and Sheet Metal, Inc. v. K Building Specialties, Inc. 204*

One-Action Rule—In Negligence Claim All Parties Must Be Joined in Original Action. When an injured party asserts a claim for negligence, all parties whose causal negligence contributed to the injury must be joined to the original action, with no distinction between tort claims and contract claims. This is called the one-action rule.
Great Plains Roofing and Sheet Metal, Inc. v. K Building Specialties, Inc. 204*

Purpose of K.S.A. 60-258a—Impose Individual Liability for Damages on Proportionate Fault of All Parties to Occurrence. The intent and purpose of the Legislature in adopting K.S.A. 60-258a was to impose individual liability for damages based on the proportionate fault of all parties to the occurrence which gave rise to the injuries and damages even though one or more parties cannot be joined formally as a litigant or be held legally responsible for his or her proportionate fault. It was the intent of the Legislature to fully and finally litigate in a single action all causes of action and claims for damages arising out of any act of negligence.
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Due Process Protection--Parents Have Fundamental Right to Decisions Regarding Their Children. The Due Process Clause of the United States Constitution provides heightened protection against government interference with the fundamental right of parents to make decisions concerning the care, custody, and control of their children. *Schwarz v. Schwarz* …….. 103

Speedy Trial Assessment—Burden on Defendant to Show Actual Prejudice. To meet the burden to show actual prejudice, the defendant cannot rely on generalities or the passage of time but must show how the delay thwarts his or her ability to defend oneself. *State v. McDonald* ……..……. 59

— Consideration of Totality of Circumstances—Factors. The speedy trial assessment considers the totality of the circumstances with special emphasis on four factors: length of the delay, reason for the delay, defendant's assertion of his or her right, and prejudice to the defendant. *State v. McDonald* ……..……. 59

— Evaluation of Actual Prejudice—Three Factors. Courts consider three factors when evaluating actual prejudice: oppressive pretrial incarceration, the defendant's anxiety and concern, and most importantly, the impairment of one's defense. *State v. McDonald* ……. 59

— First Factor—Length of Delay between Charge and Arrest—Presumptively Prejudicial under These Facts. Under the facts of this case, the State's delay of over six years and three months between charging the defendant with child rape and arresting the defendant is presumptively prejudicial. *State v. McDonald* ……..…. 59

— Fourth Factor—Actual and Presumed Prejudice from Excessive Delay. When assessing the fourth factor—prejudice—for a constitutional speedy trial analysis, we consider both actual prejudice and, in a proper case, presumed prejudice flowing from excessive delay. *State v. McDonald* ……. 59

— Presumed Prejudice if Excessive Delay. When the State has been negligent, prejudice can be presumed if the delay has been excessive. A delay of over six years attributable to the State is long enough to give rise to a presumption that the defendant's trial would be compromised, and the defendant would be prejudiced. *State v. McDonald* ……..……. 59

— Second Factor—Reason for Delay. When considering the second factor—the reason for the delay—the court assesses responsibility for the delay as between the State and the defendant. The State's inability to arrest a defendant because of the defendant's own evasive tactics is a valid reason for delay. But in that event, the State bears the burden to show that it took reasonably diligent efforts to pursue an evasive defendant. *State v. McDonald* ……. 59

— State May Mitigate Presumption of Prejudice. When a defendant relies on a presumption of prejudice to establish the fourth factor and identifies a delay of sufficient duration to be considered presumptively prejudicial, this presumption of prejudice can be mitigated by a showing that the defendant acquiesced in the delay

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Claim for Partial Indemnity or Contribution against Third-Party Defendant—Settlor Must Show Paid Damages on Behalf of Third-Party. To prevail on a claim for partial indemnity or contribution against a third-party defendant, the settlor must show that it actually paid damages on behalf of that third party. If the third party was never at risk of having to pay for its own damages, the settlor cannot show it benefited the third-party defendant, and the value of its contribution claim is zero.
Great Plains Roofing and Sheet Metal, Inc. v. K Building Specialties, Inc. ….. 204*

Indemnification Provision—Determination of Fault Required to Determine Contractual Liability. When a contract requires a promisor to indemnify another for the promisor's share of negligence, the underlying negligence tort controls the promisor's liability, and it becomes impossible to determine contractual liability without a determination of fault.
Great Plains Roofing and Sheet Metal, Inc. v. K Building Specialties, Inc. ….. 204*

Indemnification Provision Permitting Indemnity to Maximum Extent Allowed by Applicable Law Is Valid with Limits. When an indemnification provision permits indemnity "to the maximum extent allowed by applicable law," the provision is valid, but it limits the promisor's indemnification liability so that the promisor is not responsible for the promisee's negligence.
Great Plains Roofing and Sheet Metal, Inc. v. K Building Specialties, Inc. ….. 204*

Kansas Anti-Indemnity Statute—Indemnification Provision in Construction Contract Void and Unenforceable if Requires Promisor to Indemnify for Negligence or Intentional Acts. Under K.S.A. 2020 Supp. 16-121(b), the Kansas anti-indemnity statute, an indemnification provision in a construction contract is void and unenforceable if it requires the promisor to indemnify the promisee for the promisee's negligence or intentional acts or omissions.
Great Plains Roofing and Sheet Metal, Inc. v. K Building Specialties, Inc. ….. 204*

CRIMINAL LAW:

Booking Photo of Defendant at Trial—Relevancy Determination—In This Case Found to Be Material for Identity Purposes. A booking photo from the current case that illustrated defendant's appearance had changed considerably between the time of his arrest and the time of his trial was material, as required for relevancy determination, for identity purposes, because it explained the confusion by the child witnesses who had difficulty or no longer recognized the defendant due to the changes in his physical appearance. *State v. Vazquez* ……..…… 86

Booking Photo of Defendant from Prior Case May Be Unduly Prejudicial. A booking photo for the current crime does not carry the same potential

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for an unduly prejudicial impact as a mugshot from a prior case where the latter may suggest the defendant has a history of criminality.
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Booking Photo of Defendant Is Relevant—Admissible as Evidence at Trial. A criminal defendant's booking photo, taken at the time of arrest for the offenses for which he or she is currently on trial is relevant and generally admissible as evidence if it has a reasonable tendency to prove a material fact. *State v. Vazquez* 86

Sentencing—Burden of Proof on State to Prove Criminal History of Defendant at Sentencing—Requirements. Under K.S.A. 2020 Supp. 21-6814, the State bears the burden to prove criminal history at sentencing. The State can satisfy its burden to establish criminal history by preparing for the court and providing to the offender a summary of the offender's criminal history. If the defendant provides written notice of any error in the summary criminal history report and describes the exact nature of that error, then the State must go on to prove the disputed portion of the criminal history. In the event the offender does not provide the required notice of alleged criminal history errors, then the previously established criminal history in the summary satisfies the State's burden, and the burden of proof shifts to the offender to prove the alleged criminal history error by a preponderance of the evidence. *State v. Hasbrouck* 50

— Classification of Out-of-State Conviction as Nonperson Crime. Under K.S.A. 2019 Supp. 21-6811(e)(3)(B)(iii), if the elements of the offense do not require proof of any of the circumstances listed in K.S.A. 2019 Supp. 21-6811(e)(3)(B)(i) or (ii), then it must be classified as a nonperson crime.
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— Classification of Out-of-State Conviction as Person Crime. Under K.S.A. 2019 Supp. 21-6811(e)(3)(B)(ii), an out-of-state conviction is a person crime if the elements of that felony necessarily prove that a person was present during the commission of the crime. *State v. Hasbrouck* 50

— Classification of Person Crime under K.S.A. 2019 Supp. 21-6811(e)(3)(B)(i)—Elements of Out-of-State Felony Offense—Eight Circumstances. Under K.S.A. 2019 Supp. 21-6811(e)(3)(B)(i), classification of a person crime is determined by looking at the elements of the out-of-state felony offense. The statute then lists eight "circumstances" that if any are found in the elements of the out-of-state crime, then the crime will be classified as a person crime in Kansas when a court establishes a criminal history score. The eight circumstances are found in K.S.A. 2019 Supp. 21-6811(e)(3)(B)(i)(a)-(h). All eight circumstances depict dangerous situations in which innocent people may be harmed. The statute exempts a charged accomplice or another person with whom the defendant is engaged in the sale of a controlled substance or a noncontrolled substance. *State v. Hasbrouck* 50

Sentencing for Out-of-State Felony Convictions under K.S.A. 2019 Supp. 21-6811(e)(3)(B). With the enactment of K.S.A. 2019 Supp. 21-6811(e)(3)(B), the Legislature replaced all the prior rules concerning how out-of-state criminal felony

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convictions are to be treated as person or nonperson crimes when a sentencing court is setting the offender's criminal history score. *State v. Hasbrouck* ….....…. 50

ESTATES:

Decedent's Will Required to be Delivered to District Court in County Where Resided. After the decedent's death, the person having custody of the decedent's will shall deliver the will to the district court in the county where the decedent resided. *In re Estate of Lessley* …….. 75

Petition for Probate and Will Required to be Filed Within Six Months of Decedent's Death. A petition for probate of a will and the will itself must be filed with the district court within six months of the decedent's death. *In re Estate of Lessley* ……...……..….. 75

Probate Process Requires Timely Filing of Will. In order to probate a will, the district court must have the will. Timely filing of the will is a required step in the probate process. *In re Estate of Lessley* ……..…….. 75

Requirement of Filing of Petition for Probate of Will Within Six Months of Death of Testator. No will of a testator who died while a resident of this state shall be effectual to pass property unless a petition is filed for the probate of such will within six months after the death of the testator, except as provided by statute. *In re Estate of Lessley* ……..….. 75

Will Ineffective and Not Admissible if Not Timely Filed. The untimely filing of a will causes the will to become ineffective and not subject to admission to probate. *In re Estate of Lessley* ……..…….. 75

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Admission of Probative Evidence—Appellate Review. Evidence is probative if it has any tendency to prove any material fact and its admission will be examined on appeal for an abuse of discretion by the district court judge. *State v. Vazquez* ……..… 86

Material Fact Has Bearing on Decision in Case—Appellate Review. A material fact is one that has some real bearing on the decision in the case and presents a question of law over which an appellate court exercises unlimited review. *State v. Vazquez* …… 86

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Liability of Insurer for Judgment in Excess of Policy Limit—Requirement of Causal Connection. Kansas law is clear that for an insurer to be liable for a judgment in excess of the policy limit, there must be a causal connection between the insurer's conduct and the excess judgment. *Granados v. Wilson* ……...…… 10

No Affirmative Duty of Insurer to Initiate Settlement Negotiations before Third Party Makes Claim. Although an insurer must exercise diligence and good faith in its efforts to settle a claim within the policy limits,

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an insurer owes no affirmative duty to initiate settlement negotiations with a third party before the third party makes a claim for damages.
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JUDGES:

Abuse of Judicial Discretion—Determination. A district court judge commits an abuse of discretion by (1) adopting a ruling no reasonable person would make, (2) making a legal error or reaching an erroneous legal conclusion, or (3) reaching a factual finding not supported by substantial competent evidence. *State v. Vazquez* 86

JUVENILE JUSTICE CODE:

Review of Presumptive Sentence by Appellate Court if Lack of Specific Finding as Required by Statute. An appellate court has jurisdiction to review a presumptive sentence under K.S.A. 2019 Supp. 38-2380(b)(5), when a trial judge imposes a sentence under K.S.A. 2019 Supp. 38-2369(a)(1)(B), that lacks a specific finding in a written order stating that the juvenile offender poses a significant risk of harm to another or damage to property.
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Sentencing of Juvenile Offender—Requirement of Specific Finding in Written Order by Trial Judge. Before a trial judge under K.S.A. 2019 Supp. 38-2369(a)(1)(B) directly commits a juvenile offender to a juvenile correctional facility, the trial judge must make a specific finding in a written order stating that the juvenile offender poses a significant risk of harm to another or damage to property. *In re S.L.* 1

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Amendment of Statute by Legislature—Presumption of Intent to Change Prior Law. When the Legislature amends a statute, Kansas courts presume that it intended to change the law that existed prior to the amendment. *State v. Hasbrouck* 50

PARENT AND CHILD:

Request for Grandparent Visitation under Statute—Factors for Consideration by Court. When considering a request for grandparent visitation, in addition to considering under K.S.A. 2018 Supp. 23-3301(b), the best interests of the child and whether a substantial relationship exists between grandparent and child, the court must presume that a fit parent is acting in the child's best interests and must give special weight to a fit parent's proposed grandparent visitation plan. The court cannot adopt a grandparent's conflicting plan without first finding that the parent's proposed plan is unreasonable. The burden is on the grandparent to rebut the presumption that a fit parent's proposed visitation plan is reasonable. Reasonableness is assessed in light of the totality of the circumstances.
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Statutory Authorization for Service of Notice of Hearing—Individual Not Required to Personally Sign for Delivery. K.S.A. 2020 Supp. 38-2267(b) authorizes service of the notice of a hearing concerning the termination of parental rights by return receipt delivery, which includes service by certified mail. The law does not restrict the delivery of the notice to the person served or otherwise require that individual to personally sign for its delivery. *In re A.P.* ……..……...……. 141

Statutory Grandparent Visitation Rights—Findings of Best Interests and Substantial Relationship. K.S.A. 2018 Supp. 23-3301(b) allows for grandparent visitation when "visitation rights would be in the child's best interests and when a substantial relationship between the child and the grandparent has been established." *Schwarz v. Schwarz* ……...…….. 103

— No Statutory Exclusion of Visitation Rights Following Death of Parent. K.S.A. 2018 Supp. 23-3301(a), which permits a provision for grandparent visitation rights in a pending divorce action, does not preclude a separate and independent action for grandparent visitation rights following the death of a parent. *Schwarz v. Schwarz* ……...…….. 103

REAL PROPERTY:

Improvement to Real Property Is Valuable Addition to Property or Amelioration in Condition. An improvement is a valuable addition made to real property or an amelioration in its condition, amounting to more than mere repairs or replacement, costing labor or capital, and intended to enhance its value, beauty, or utility or to adapt it for new or further purposes. An improvement need not involve structural additions and need not necessarily be visible as long as it enhances the value of the property.
Claeys v. Claeys ……...……. 196*

Partition Proceedings—Broad Discretion of District Courts for Determining Division of Interests. Partition proceedings, which seek to fairly divide ownership interests in real property, are equitable in origin. District courts have broad discretion to determine how best to fairly divide those interests. When a cotenant has made improvements to the property, the court may adjust the division to apply a credit to that cotenant for his or her efforts, measured by the extent the improvement enhances the value of the land. *Claeys v. Claeys* ……...……...……. 196*

STATUTES:

Construction—Determination of Legislative Intent—Appellate Review. The fundamental rule of statutory construction is to determine the Kansas Legislature's intent. If a statute is plain and unambiguous, appellate courts are not to speculate about the legislative intent behind the language used and must refrain from reading something into the statute that is not readily found in its words. *Turner v. Pleasant Acres* ……..…….. 122

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TAXATION:

Equipment Rental Expenses Necessary to Perform Taxable Services Are Not Tax Exempt. Equipment rental expenses which are necessary to perform taxable services are materially different from hotel and meal expenses incurred by employees who perform the taxable services. As such, equipment rental expenses are not tax exempt under *In re Tax Appeal of Cessna Employees Credit Union*, 47 Kan. App. 2d 275, 277 P.3d 1157 (2012).
In re Tax Appeal of Capital Electric Line Builders, Inc. ….…… 251*

No Exemption under Retailers' Sales Tax Act for Equipment Rental Expenses. The Kansas Retailers' Sales Tax Act, K.S.A. 79-3601 et seq., does not exempt equipment rental expenses incurred to perform taxable services from taxation.
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Property Tax Exemptions Effective January 1 of Tax Year in Which Mineral Lease Produced at Exempt Levels. Since property tax exemptions are effective from the date of the first exempt use (K.S.A. 79-213[j]), and mineral leases are appraised as of January 1 each year (K.S.A. 79-301), a property tax exemption under K.S.A. 79-201t is effective January 1 of the tax year in which the mineral lease produced at exempt levels.
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Refund of Property Tax Paid on Mineral Lease When Lease Produced at Exempt Levels. A taxpayer is entitled to a refund of property taxes paid on a mineral lease for the tax year in which the mineral lease produced at exempt levels under K.S.A. 79-201t. K.S.A. 79-213(k).
John O. Farmer, Inc. v. Board of Ellis County Comm'rs ……...… 262*

TORTS:

Comparative Implied Indemnity—Cause of Action by Tortfeasor for Recovery of Damages Proportional to Joint Tortfeasor's Fault. Comparative implied indemnity, or as it is more accurately termed postsettlement contribution, describes the cause of action initiated by a tortfeasor in a negligence lawsuit to recover from a joint tortfeasor the share of the damages proportional to the joint tortfeasor's fault.
Great Plains Roofing and Sheet Metal, Inc. v. K Building Specialties, Inc. ….. 204*

Comparative Implied Indemnity or Claim of Contribution against Joint Tortfeasor as Third Party—Must Assert Timely Claim. For a tortfeasor to pursue a claim of contribution or comparative implied indemnity against a joint tortfeasor who was not sued by the plaintiff, the tortfeasor must join the joint tortfeasor as a third party under K.S.A. 2020 Supp. 60-258a(c) and assert a timely claim against the joint tortfeasor.
Great Plains Roofing and Sheet Metal, Inc. v. K Building Specialties, Inc. ….. 204*

Determination of Percentage of Fault in One Lawsuit--Submission to Jury of Causal Fault or Negligence of All Parties to Occurrence. The causal fault or negligence of all parties to the occurrence, including the negligence of the injured

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plaintiff and any third parties, should be submitted to the jury and the percentage of fault of each determined in one lawsuit.
Great Plains Roofing and Sheet Metal, Inc. v. K Building Specialties, Inc. 204*

TRIAL:

Booking Photo of Defendant—Preventative Measures Required to Minimize Prejudicial Effect. The district court should take preventive measures to minimize any potentially prejudicial effect the photograph might have. *State v. Vazquez* 86

Consolidation of Criminal Cases for Trial—Applying Base Sentence Rules Separately to Convictions Violates Equal Protection Clause. When two or more criminal cases are consolidated for trial because all the charges could have been brought in one charging document, then applying the base sentence rules under K.S.A. 2020 Supp. 21-6819(b) separately to the defendant's convictions in each case violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. *State v. Myers* 149*

Consolidation of Criminal Cases for Trial—Conviction of Multiple Charges—Compliance with Equal Protection Clause. For K.S.A. 2020 Supp. 21-6819(b) to comply with the Equal Protection Clause of the Fourteenth Amendment, when two or more cases are consolidated for trial because all the charges could have been brought in one charging document, and the defendant is convicted of multiple charges at trial, the defendant shall be sentenced using only one primary crime of conviction and one base sentence, as though all the charges had been brought in one complaint.
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WORKERS COMPENSATION:

Decisions of Workers Compensation Appeals Board--Appellate Review under KJRA. Appellate courts review decisions from the Kansas Workers Compensation Appeals Board under the Kansas Judicial Review Act (KJRA), K.S.A. 77-601 et seq. In doing so, appellate courts must review the record to determine whether the decision of the Board is supported by evidence that is substantial when viewed in light of the record as a whole. It is not the role of the appellate courts to reweigh the evidence or to make credibility determinations. *Turner v. Pleasant Acres* 122

Dual Purpose of K.S.A. 44-504. The Kansas Legislature enacted the provisions of K.S.A. 44-504 to serve a dual purpose. First, K.S.A. 44-504(a) preserves an injured worker's right to assert a claim to recover damages caused by third parties. Second, K.S.A. 44-504(b) prevents an injured worker from receiving a double recovery for the same injuries.
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Employer's Subrogation Rights—Legislative Determination. The nature and extent of an employer's subrogation rights under the Kansas Workers Compensation Act are matters for legislative determination.
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Injured Worker's Recovery under K.S.A. 44-504(b)—Subrogation Rights of Employer against Duplicative Recovery. Under K.S.A. 44-504(b), if an injured worker receives a judgment, settlement, or other recovery in a claim asserted against any person or entity—other than the employer or a co-employee—who caused the injury for which compensation is payable under the Kansas Workers Compensation Act, the employer is subrogated to the extent of the compensation and medical benefits provided and has a lien against any duplicative recovery. The subrogation lien does not include any amount paid by a third party for loss of consortium or loss of services to an injured worker's spouse.
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No Distinction between Types of Recovery in K.S.A. 44-504(b). K.S.A. 44-504(b) does not distinguish between the types of recovery to which the workers compensation subrogation lien attaches.
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No. 123,439

STATE OF KANSAS, *Appellee*, v. ANTHONY D. A. MYERS, *Appellant*.

SYLLABUS BY THE COURT

1. TRIAL—*Consolidation of Criminal Cases for Trial—Applying Base Sentence Rules Separately to Convictions Violates Equal Protection Clause.* When two or more criminal cases are consolidated for trial because all the charges could have been brought in one charging document, then applying the base sentence rules under K.S.A. 2020 Supp. 21-6819(b) separately to the defendant's convictions in each case violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

2. SAME—*Consolidation of Criminal Cases for Trial—Conviction of Multiple Charges—Compliance with Equal Protection Clause.* For K.S.A. 2020 Supp. 21-6819(b) to comply with the Equal Protection Clause of the Fourteenth Amendment, when two or more cases are consolidated for trial because all the charges could have been brought in one charging document, and the defendant is convicted of multiple charges at trial, the defendant shall be sentenced using only one primary crime of conviction and one base sentence, as though all the charges had been brought in one complaint.

Appeal from Sedgwick District Court; KEVIN J. O'CONNOR, judge. Opinion filed April 8, 2022. Convictions affirmed, sentences vacated, and case remanded with directions.

Peter Maharry of Kansas Appellate Defender Office, for appellant.

Lance J. Gillett, assistant district attorney, *Marc Bennett*, district attorney, and *Derek Schmidt*, attorney general, for appellee.

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

MALONE, J.: After a consolidated trial of two criminal cases, a jury convicted Anthony D. A. Myers of attempted first-degree murder, two counts of aggravated battery, two counts of criminal discharge of a firearm, and two counts of criminal possession of a weapon by a convicted felon. The district court sentenced Myers separately in each case, imposing a controlling sentence of 855 months' imprisonment.

Myers appeals, arguing (1) the district court erred in consolidating his two cases for trial; (2) the district court erred in denying

his motion for new counsel; (3) he received ineffective assistance of counsel at trial; (4) his convictions for first-degree murder and aggravated battery were multiplicitous, as were his convictions for criminal discharge of a firearm and aggravated battery; (5) cumulative error denied him a fair trial; (6) K.S.A. 2020 Supp. 21-6819(b), as applied, violates his rights under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution; and (7) the district court erred in calculating his criminal history score because the State failed to provide evidence that his prior misdemeanor convictions were counseled. After thorough review of the record, we affirm Myers' convictions but remand for resentencing.

FACTUAL AND PROCEDURAL BACKGROUND

On February 15, 2017, Dawnisha Johnson rented a 2005 gray Pontiac G6 from Kwik Kars. Johnson knew Myers for four or five years through close acquaintances. Johnson rented the Pontiac for Myers because Myers did not have a license. Johnson continued to extend the rental for Myers, who would give her cash to pay Kwik Kars.

Carla Carter lived at her home in Wichita with her husband, her daughters, and her four grandchildren, including J.W., who was 13, and J.C., who was 16. On February 23, 2017, Carter was standing outside watching two of her grandchildren play basketball when a car came down the street "pretty fast." Carter yelled, "'Slow down. The kids are playing.'" The car then stopped and backed up to the front of Carter's driveway. Carter again told the driver to slow down. The driver then told her, "'Stuff like that will get a person shot up, and [he was] the type . . . who could do this.'" Carter got the tag number from the car and noticed the driver was a black male with dreadlocks. J.C. was standing near Carter when this occurred, and she told Carter after the car drove away that she got a good look at the driver. Carter called 911 to report the incident because she was scared.

Wichita Police Officer Ryan Oliphant was dispatched. Oliphant spoke to Carter who reported that a silver Pontiac G6, with tag number 757FBB, sped down her street so she yelled at the driver to slow down. Carter stated that the driver then told her, "You don't know if I'm the one to come back and shoot the

house—or shoot the place up later." Carter described the driver as a black male with shoulder-length dreadlocks.

Oliphant ran the tag and discovered the car was registered to a car rental company called Kwik Kars. He spoke to the company and learned that the car was rented to Johnson. Kwik Kars called Johnson and said the police were interested in the car. After hearing that the police were calling about the car, Johnson contacted Myers to try to get the car back. When Johnson told Myers about the police, Myers told her it was just about some argument he had with some women who yelled at him in the car. Johnson told Myers to get the car back to her before the police found him. Johnson exchanged text messages with Myers about getting the car back, but he never returned it to her.

February 25, 2017 shooting

On February 25, 2017, at around 5 a.m., J.W. was asleep in his bed, in the den by the front window of Carter's house. J.W.'s bed was positioned against the wall near the window. Meanwhile, Carter was sitting up in her chair watching the security cameras when she noticed car lights and then saw brake lights. She said this caught her attention because the houses around her were empty. Carter then saw a shadow on her camera that went up the driveway and between two parked cars. Carter started to walk to the door to see what was happening when she heard "pop, pop, pop, pop, pop" and glass breaking. Carter yelled, "'We've been shot'" and she saw the car leaving.

Carter was concerned about her husband and J.W. because they occupied the bedroom or den facing the front of the house. Carter ran to J.W., who was screaming and bleeding from his leg. Carter helped J.W. to the living room and called 911. The bullet had gone all the way through J.W.'s ankle, cracking the bone.

Wichita Police Officer Tyler Richards was dispatched to Carter's home. Richards asked J.W. if he had been in any arguments with anybody who would have targeted him because Richards noticed all the gunshots focused on his room. J.W. told Richards that a few days earlier someone threatened to shoot up the house. After speaking to police, Carter went with J.W. to the hospital.

Wichita Police Department Crime Scene Investigator Karie Railing responded to Carter's house. She photographed the scene, and her photos were admitted at trial. Railing documented damage to the front window. Railing saw three bullet holes on the right pane of the window and saw the center pane was broken. Railing also noticed bullet holes in the siding of the home and the entry door. Based on the bullet holes, the shooter stood in front of the house, shooting into the house. Railing found a bullet on J.W.'s bed that she collected. Railing found other bullet holes in the mattress but was unable to recover any other bullets from the scene. Outside the house, Railing recovered casings. Railing did not find any fingerprints on the casings.

Wichita Police Detective Brian Mock was assigned the case. On February 27, 2017, Mock obtained the Kwik Kars rental form and found Johnson rented the car. Mock talked to the owner of Kwik Kars, Brady Dody, who helped Mock locate the car by activating its GPS locator. The GPS did not allow officers to track the car but pinged its location when requested. Mock directed Wichita Police Officer Jared Henry and his partner, Detective Christopher Hornberger, to locate the Pontiac.

Mock called Johnson, and Johnson informed him that Myers drove the rental car on February 23, 2017, and she did not see it until after 5:30 p.m. Johnson asked why the police were interested in the car, and Johnson said that Myers had told her that he had been in some sort of argument with a lady he did not know. Johnson told Mock that she knew Myers had a gun in the past.

Henry located the car, which was unoccupied, and called an undercover officer to watch the Pontiac. Wichita Police Officer Michael Russell responded in an undercover car. Russell observed a male access the Pontiac from the passenger side and then the driver's side. The male then got into the passenger seat of a white Cadillac driven by a female. Russell observed the Cadillac start to drive away before coming to a stop. The male then exited the Cadillac and walked back to the Pontiac. Russell thought the man was carrying something small in his hands. The man then got into the Pontiac's driver's side for a moment before returning to the Cadillac. The Cadillac then started to leave the area. Russell told Henry and Hornberger to follow the Cadillac. Russell returned to watching the Pontiac.

Henry and Hornberger saw the driver of the Cadillac fail to signal, so they initiated a traffic stop. Henry contacted the driver, later identified as Elizabeth Alverado. Hornberger approached the passenger's side and the passenger identified himself as "Derek Myers." Hornberger thought the passenger was giving him a false name and asked if he had any tattoos because he could visibly see one on the passenger's chest. The tattoo said, "'Loyalty.'"

Hornberger had just confirmed the passenger was Myers, when he saw him open his door and run off. Henry chased Myers through a neighborhood. Hornberger detained Alverado. Henry eventually found Myers hiding in a backyard. Henry searched Myers and found a rental car key and some money. Russell searched the Pontiac and found a .9-millimeter handgun under the driver's seat. Mock had the casings recovered from Carter's house and the gun from the Pontiac submitted for testing.

Mock met with J.C. and Carter on March 2, 2017. Mock did not tell them that anyone had been arrested but showed J.C. a photo array. J.C. identified Myers as the driver who threatened them on February 23, 2017, two days before the shooting. Mock did not get the results back from the casings and gun comparison until May 2018. In the meantime, in April 2018, Myers' name surfaced in another shooting investigation.

April 11, 2018 shooting

J.S., a 15-year-old, lived with his father and his sister, C.S., a 17-year-old. J.S. liked to play basketball at the McAdams Park rec center. The rec center had an indoor basketball court, which players had to sign in to use, and surveillance cameras.

In the early morning of April 11, 2018, C.S. and J.S. were at home alone. J.S. was sleeping when he heard banging on the door, so he got up and saw a man through the peephole standing on the porch. J.S. opened the door and recognized the man as someone he had played basketball with at the rec center. J.S. saw the man pull a gun out of his hoodie pocket with his left hand, so J.S. started to shut the door. The man then shot through the front door. J.S. got hit in the left thigh and right foot. The man continued to fire through the door while J.S. tried to get away from the door.

C.S. woke up to banging on the door and the gunshots and then she heard J.S. scream. C.S. went into the living room and saw J.S. standing in a puddle of blood. J.S. told her that he had been shot and showed her his leg and his foot. C.S. called 911. J.S. told C.S. that the guy who shot him was a guy he played basketball with who had dreads.

Wichita Police Officer Cort DePeugh was dispatched to the house around 6:30 a.m. When he arrived, he saw bullet strikes on the doorway and a trail of blood. DePeugh followed the blood trail into a bedroom and found a young male laying on the bed complaining of pain in his leg. DePeugh looked at the male's leg and noticed he was bleeding from his ankle and his upper left leg. The male identified himself as J.S. and told DePeugh he was sleeping when he heard someone banging on the door repeatedly, so he went to answer it. J.S. said that when he opened the door someone stepped off the porch, pulled out a gun, and shot him so he closed the door and ran to the bedroom. J.S. said he recognized the shooter as a guy he played basketball with at the rec center, but he did not know the guy's name. EMS took J.S. to the hospital.

Wichita Police Crime Scene Investigator Lori Scott processed the scene. Scott took pictures of the house and the evidence, which were admitted at trial. Scott collected eight .9-millimeter casings from the front yard of the house. Scott found eight bullet holes going through the front door of the house. Scott also found bullet fragments in the house.

Wichita Police Officer Donielle Watson went to the hospital to talk to J.S. J.S. gave Watson a description of the shooter and stated that the shooter was left-handed. J.S. also told him that he played basketball with the shooter on either March 14 or March 21. Henry took the description and went to the rec center. Henry found J.S.'s signature on the sign in sheet from March 21 and then watched the surveillance footage from around that time. While watching the footage, Henry recognized Myers from the prior investigation.

Henry relayed the information to the violent crime task force. Watson returned to the hospital to show J.S. a photo array. J.S. identified a photo of the shooter, Myers.

Wichita Police Officer Bryan Knowles and his partner Brock Kampling found Myers and took him into custody. Matthew Balthazor, a detective with the Wichita Violent Crime Unit, completed a personal history form on Myers and had him review and sign the forms. Balthazor observed that Myers signed the forms with his left hand.

Charges and criminal proceedings

On May 25, 2018, the State charged Myers with attempted first-degree murder, aggravated battery, criminal discharge of a firearm, and criminal possession of a weapon by a convicted felon under case number 18CR941 for the shooting of J.S. On June 26, 2018, the State then charged Myers with criminal discharge of a firearm, aggravated battery, criminal possession of a weapon by a convicted felon, and possession of cocaine under case number 18CR1664 for the shooting in February 2017 injuring J.W.

On June 29, 2018, Myers requested an attorney and the district court appointed Casey Cotton to represent him. On July 13, 2018, Cotton moved to withdraw after Myers filed an ethics complaint against him. The district court granted Cotton's motion. The district court then appointed Steven Wagle to represent Myers.

On October 22, 2018, Myers filed a pro se motion to remove Wagle. At a hearing on the motion, Wagle asserted that he was physically assaulted by Myers, Myers had called him by a racial slur multiple times, and there was a complete lack of communication between the two. The district court granted the motion, finding counsel had been physically assaulted by Myers and there was a complete breakdown of communication. The district court then appointed Steven Mank to represent Myers.

Mank moved to withdraw as counsel on December 18, 2018. The district court granted the motion and appointed Kenneth Clark.

On April 29, 2019, the State moved to consolidate 18CR941 and 18CR1664 for trial. Myers opposed the consolidation. The district court granted the State's motion to consolidate over Myers' objection, finding the cases were of the same general character.

On July 3, 2019, less than three weeks before the scheduled jury trial, Myers moved to remove Clark as counsel. At the hearing, Myers complained to the district court about his lack of communication with Clark. Clark acknowledged some lack of communication and stated Myers "might be better served with different counsel." The district court denied the motion, finding Myers had failed to show a complete breakdown in communication, an irreconcilable disagreement, or a conflict of interest.

The district court held a four-day jury trial beginning July 22, 2019. The State dismissed count four, possession of cocaine, in 18CR1664 at trial. The State called various law enforcement officers and other witnesses who testified to the above facts. Some testimony relevant to the issues on appeal will be mentioned.

J.C. identified Myers as the person driving the car on February 23, 2017. J.C. testified that she had never seen Myers before the day he threatened them. Forensic Scientist Justin Rankin testified as an expert that the casings recovered from Carter's house were fired from the gun found in the Pontiac. When asked about the more than a year delay in testing the weapon, Rankin explained that he was the only person responsible for every firearm comparison case in Sedgwick County and he had to prioritize testing based on upcoming trial dates. He also explained that because he is the only examiner, he had to get an outside source to verify his results, meaning he would have to submit his cases to another agency to verify his results. J.S. also identified Myers as the person he played basketball with and who shot him. The State rested and Myers moved for a judgment of acquittal, which the district court denied.

Myers testified on his own behalf. Myers testified that he let at least two other people use the Pontiac, including someone named Orlando. Myers testified that he did not argue with Carter on February 23, 2017, and that he never told Johnson that he did. He also claimed he had never seen Carter before. He claimed he did not own a gun and did not put a gun in the Pontiac. Myers testified that he recognized J.S. from playing basketball but he never saw him anywhere else, and he never went to J.S.'s house.

Myers also called D.D., who testified that he was friends with J.S. and often played basketball at the rec center. D.D. stated that a lot of people who played basketball at the rec center had dreads.

D.D. testified that he did not recognize Myers. On cross-examination, D.D. maintained he did not tell any police officer he knew the shooter had "'Loyalty'" tattooed on his chest even though the report stated he did. The defense rested.

The State called rebuttal witnesses. The State called K.W., J.S.'s friend, who testified that he and J.S. played basketball with Myers about half of the time they were at the rec center. K.W. testified that sometimes the basketball games would become "testy," but he could not think of any fight or incident that would have led to the shooting. K.W. said he heard the police sirens and went over to J.S.'s house and talked to his sister who described the shooter. K.W. thought the description sounded like someone he and J.S. had played basketball with at the rec center. K.W. told Watson that the shooter sounded like a guy they played basketball with who had a "'Loyalty'" tattoo on his chest. The State also recalled Balthazor, who testified that he could not locate any record for a person named "Orlando Stantin" and that the closest he could find was an "Orlando Stanford," but Stanford was in prison during the time of both crimes.

The district court instructed the jury. The jury found Myers guilty of attempted first-degree murder, aggravated battery, criminal discharge of a firearm, and criminal possession of a weapon by a convicted felon in case 18CR941. The jury found Myers guilty of criminal discharge of a firearm, aggravated battery, and criminal possession of a weapon by a convicted felon in 18CR1664.

Posttrial proceedings

On August 7, 2019, Myers filed a pro se motion for new trial based on ineffective assistance of counsel. Clark also filed a motion for judgment of acquittal, based on multiplicity. The presentence investigation (PSI) report revealed that Myers had a criminal history score of B. Myers filed a pro se objection to the PSI report.

On October 16, 2019, Myers filed a pro se motion to remove Clark as counsel, alleging he was ineffective. The district court appointed Mark Sevart to represent Myers.

On June 17, 2020, Sevart objected to the PSI report asserting that it incorrectly scored Myers' previous misdemeanors. Sevart

also filed a motion for new trial asserting Myers had received ineffective assistance of counsel during his trial.

On July 9, 2020, the district court held a sentencing hearing and heard Myers' motion for new trial. Sevart stated that "as far as the evidence goes" for his motion for new trial, he would ask the court to take judicial notice of the court file. He then presented his arguments on the motion for new trial, including whether Myers received ineffective assistance of counsel. The district court denied the motion.

The district court proceeded to sentencing, where Sevart withdrew his objection to the criminal history. Myers then personally affirmed that he was not objecting to his criminal history score of B. In 18CR941, the district court set the base sentence for attempted first-degree murder at 618 months' imprisonment. The district court ran the remaining three charges in that case concurrent to the base offense for a controlling sentence of 618 months' imprisonment with 36 months' postrelease supervision. In 18CR1664, the district court set the base sentence for criminal discharge of a firearm at 228 months' imprisonment. The district court ran the criminal possession of a firearm conviction consecutive to the criminal discharge of a firearm conviction and ran the aggravated battery conviction concurrent for a controlling sentence of 237 months' imprisonment with 36 months' postrelease supervision. The district court ordered the sentences in the two cases to run consecutive for a total term of 855 months' imprisonment. Myers timely appealed the district court's judgment.

DID THE DISTRICT COURT ERR BY CONSOLIDATING THE CASES FOR TRIAL?

Myers first claims the district court erred in consolidating his two cases for trial. The district court can order two charging documents charged against a single defendant to be tried together "if the crimes could have been joined in a single complaint, information or indictment." K.S.A. 22-3203. Crimes can be joined in a single charging document when the crimes charged "are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan." K.S.A. 22-3202(1).

Myers argued against consolidation before trial, but the district court granted the State's motion to consolidate, finding the two cases of the same general character. The district court found that although some of the charges were different, the two cases occurred at the same time of day and involved individuals Myers had prior contact with. The district court also noted that both cases involved Myers allegedly shooting at homes, using a .9-millimeter firearm, and had a victim identify Myers as the shooter. The district court also rejected Myers' prejudice argument, stating that it believed jurors follow the instructions given and make the State prove every element of every offense.

Myers argues that the two cases were not of the same character because the incidents occurred at different locations, involved different people, and occurred over a year apart. Myers argues that the district court's reliance on the fact that both cases involved shooting into an occupied home cannot support consolidation because that fact is "a product of the charge, not of some unique similarity between the two cases." Myers also argues that at trial, the evidence in both cases was separate; the State first called 14 witness to testify to the February 2017 shooting, then called 9 witnesses to testify to the April 2018 shooting, and only one witness—Officer Henry—overlapped both cases. Finally, Myers argues that even if consolidation were legally appropriate, the district court abused its discretion because consolidation prejudiced Myers by bolstering the evidence in each case and leading the jury to believe Myers was a "'general wrongdoer.'"

The State argues that the district court properly granted consolidation. The State argues that the cases need only be similar not identical and that the differences Myers focuses on do not refute the district court's finding. The State asserts that the crimes in each case were similar because the facts supporting the charges were similar. The State argues that the district court did not abuse its discretion in consolidating the cases because the district court properly considered that juries follow instructions and there was no sign that consolidation would prejudice Myers. Finally, the State asserts that any error in consolidating the cases was harmless.

This court uses a three-step analysis when reviewing challenges to a district court's decision to consolidate cases for trial:

"First, we determine whether K.S.A. 22-3203 permits consolidation. Under that statute, multiple complaints against a defendant can be tried together if the State could have brought the charges in a single complaint. K.S.A. 22-3202(1) sets out the conditions under which multiple crimes may be joined in a single complaint. Whether one of these conditions is satisfied is a fact-specific inquiry, and we review the district court's factual findings for substantial competent evidence and the legal conclusion that one of the conditions is met de novo.

"Second, because K.S.A. 22-3202 provides that the district court 'may' order charges joined together, the court retains discretion to deny a consolidation request even if a statutory condition is met. . . . We review this decision for an abuse of discretion.

"Finally, if an error occurred in the preceding steps, we determine whether the error resulted in prejudice—that is, whether the error affected a party's substantial rights. [Citations omitted.]" *State v. Carter*, 311 Kan. 783, 793, 466 P.3d 1180 (2020).

We first determine whether the statutes permit consolidation. The district court allowed consolidation on the statutory ground that the charges in the two cases were of "the same or similar character." K.S.A. 22-3202(1). Here, neither party challenges the district court's factual findings. Instead, Myers argues that the findings did not satisfy the condition that the cases be of the same or similar character. We have unlimited review of the district court's legal conclusion that the statutory test is satisfied. *Carter*, 311 Kan. at 793.

Myers argues that the crimes in the two cases were not of the same or similar character because they occurred over one year apart, they involved different people, and they occurred at different locations. But as the district court noted in its ruling, the Kansas Supreme Court has upheld consolidation even when the crimes occurred after a passage of time, occurred at different locations, and involved different people. For instance, in *State v. Cruz*, 297 Kan. 1048, 307 P.3d 199 (2013), Cruz shot and killed a man in the early morning hours in a nightclub parking lot. Investigation revealed that Cruz had been involved in a murder a year earlier in the early morning in a strip club parking lot. The State charged Cruz in two separate cases and the district court consolidated the two cases against Cruz for trial, finding them to be of the same or similar character. On appeal, the Kansas Supreme Court upheld

the consolidation and summarized the facts and similarities of the two crimes:

"Both crimes involved patrons leaving a nightclub at closing time; both victims were accosted and challenged in the establishment's parking lot before the patrons could reach their respective vehicles; both victims had scant warning before being shot repeatedly and killed with a handgun; the same weapon was used in both shootings and contained a small amount of DNA that did not exclude Cruz as a contributor; a fellow gang member identified Cruz as the shooter in both incidents; and both cases charged first-degree murder and criminal possession of a firearm. If that scenario does not establish two crimes of the same or similar nature, one would need a novelist's imagination to conjure up one that would." 297 Kan. at 1055.

We observe that there were more similarities in *Cruz* than we have here: the same weapon was used in both shootings and the same fellow gang member identified Cruz as the shooter in both cases. But the State is correct that *Cruz* supports consolidation here and establishes that the mere passage of time does not render two cases dissimilar in character. 297 Kan. at 1057; see also *State v. Crosby*, 312 Kan. 630, 634, 479 P.3d 167 (2021) (finding argument that 1-year time difference prevented crimes from being of similar character unpersuasive and citing cases rejecting similar arguments for time periods of 17 months and 4 years). Thus, Myers' claim that the crimes could not be of similar character because of the one-year period between the two is unpersuasive.

Similarly, Myers' argument that the cases are not similar in character because they involve different people and occurred at different locations is unpersuasive. While the two cases each involved a group of people that did not know the other, the character of the groups was the same: both victims interacted with Myers before the shootings. And again, while the precise address of the crimes was different, the character of the location was the same: the residence of the victim. See *Crosby*, 312 Kan. at 634-35 (finding cases similar despite differing locations and differing people because both crimes involved a drug dealer as the victim and Crosby threatened the victim with a firearm while trying to take drugs without payment).

Myers also argues that the motive in each case was not the same because the State did not establish a motive in J.S.'s shoot-

ing. But the State at least offered a possible reason for J.S.'s shooting when K.W. testified that the basketball games at the rec center would become "testy." While the State did not establish a definite motive for J.S.'s shooting, it did establish that both cases were similar in that the victims did not know Myers well and he still shot up their houses within a brief time of interacting with them. The seemingly inexplainable overreaction by Myers is another similarity between the two cases, not a fact undermining consolidation.

To best illustrate how different two cases must be to not satisfy the same or similar character test, we look to *State v. Thomas*, 206 Kan. 603, 481 P.2d 964 (1971), where our Supreme Court reversed a district court's decision to consolidate a murder case and an unrelated forgery case. The murder case stemmed from a body found in a car containing Thomas' fingerprint and witness accounts that Thomas and the victim were seen together earlier in the evening at a club. In contrast, the forgery case stemmed from checks and cards stolen from various victims over a few weeks. Our Supreme Court reasoned that the forgery and murder cases were in no way similar, and the district court's decision to consolidate the cases for trial amounted to prejudicial error. 206 Kan. at 608.

There are many more similarities here than existed in *Thomas*. Both cases filed against Myers involved early morning shootings at residences; a .9-millimeter weapon was used in both shootings; Myers had contact with the victims a brief time before the shootings in each case; both shootings involved Myers overreacting to minor incidents with the victims; and the charges filed in each case were identical except that 18CR941 included a count of attempted first-degree murder. The Kansas Legislature has said that a court can consolidate two cases for trial when the charges are of the same or similar character. This is a broad test that is relatively easy to satisfy. We are satisfied that the State could have initially filed all the charges against Myers in a single complaint because the cases were of the same or similar character. Thus, we find the district court did not err in finding that the statutory test for consolidation was met.

Finding a statutory condition for consolidation is met—that the charges in the cases are of the same or similar character—we

must next examine whether the district court abused its discretion in ordering consolidation. A district court abuses its discretion if its action is (1) arbitrary, fanciful, or unreasonable; (2) based on an error of law; or (3) based on an error of fact. *Crosby*, 312 Kan. at 635. Myers bears the burden of showing an abuse of discretion. 312 Kan. at 635.

Myers argues the district court abused its discretion because consolidation prejudiced him in that a jury would be less likely to believe that two individuals who did not know each other were both mistaken in identifying Myers as the shooter. Myers likened this prejudice to admitting prior crimes evidence under K.S.A. 60-455. He asserts that consolidation bolstered the State's evidence in each case, leading the jury to believe that Myers was a "general wrongdoer." The State counters that the district court did not abuse its discretion because it considered the prejudice but found that jurors would follow the instructions. The State asserts that Myers identifies no real prejudice, just speculation.

Myers cannot meet his burden of establishing the district court abused its discretion in consolidating his two cases for trial. First, Kansas appellate courts have consistently rejected the argument that consolidation is equivalent to the prejudicial admission of other-crimes evidence under K.S.A. 60-455. See, e.g., *State v. Smith-Parker*, 301 Kan. 132, 161, 340 P.3d 485 (2014) ("'Kansas case law and the provisions of K.S.A. 22-3202(1) make it clear that joinder is not dependent upon the other crimes being joined meeting the admissibility test set forth in K.S.A. 60-455.'").

Second, the jury was instructed: "Each crime charged against the defendant is [a] separate and distinct offense. You must decide each separately on the evidence and law applicable to it, uninfluenced by your decision as to any other charge." Kansas appellate courts have found this instruction "negates the inherently prejudicial effect of trying a person on multiple counts." *Cruz*, 297 Kan. at 1058. And jurors are presumed to follow the district court's instructions. *State v. Llamas*, 298 Kan. 246, 261, 311 P.3d 399 (2013).

We have little doubt that consolidation of the cases against Myers for trial may have bolstered the State's evidence against him. Almost any defendant can make this complaint when cases

are consolidated for trial. But without Myers pointing to something more specific as to how consolidation of the cases for trial prejudiced him in his situation, we are unable to find that no reasonable person would have agreed with the district court's decision to consolidate the cases against Myers for trial. Thus, we conclude the statutory test for consolidation was met, and Myers has failed to meet his burden of showing that the district court abused its discretion in consolidating the cases for trial.

DID THE DISTRICT COURT ERR IN REFUSING TO APPOINT NEW COUNSEL BEFORE THE START OF TRIAL?

Myers next claims the district court abused its discretion in denying his motion for new counsel before trial. The state and federal Constitutions guarantee criminal defendants a right to effective assistance of counsel, but they do not guarantee the defendant the right to choose which attorney will represent him or her. *State v. Breitenbach*, 313 Kan. 73, 90-91, 483 P.3d 448, *cert. denied* 142 S. Ct. 255 (2021). The rules surrounding a motion for substitute counsel are well established:

> "'[T]o warrant substitute counsel, a defendant must show "justifiable dissatisfaction" with appointed counsel. Justifiable dissatisfaction includes a showing of a conflict of interest, an irreconcilable conflict, or a complete breakdown in communications between counsel and the defendant. But ultimately, "'[a]s long as the trial court has a reasonable basis for believing the attorney-client relation has not deteriorated to a point where appointed counsel can no longer give effective aid in the fair presentation of a defense, the court is justified in refusing to appoint new counsel.'"
>
> "Further, when the defendant's dissatisfaction emanates from a complaint that cannot be remedied or resolved by the appointment of new counsel—such that replacement counsel would encounter the same conflict or dilemma—the defendant has not shown the requisite justifiable dissatisfaction. [Citations omitted.]" 313 Kan. at 90-91.

Myers filed a pro se motion to remove Clark as counsel less than three weeks before trial, alleging "a major communication issue," that Clark had stated he is too busy to properly provide counsel to Myers, and that Myers had filed several pro se motions that Clark did not adopt. The district court held a hearing on Myers' pro se motion on July 10, 2019. At the hearing, Myers stated that he and Clark had not had a chance to go over his defense, that he asked Clark to send some subpoenas out for him, and that Clark

had not contacted witnesses Myers told him to contact. Myers stated that he needed to be "communicating with [his] counsel, which [wa]s not happening."

The district court inquired of Clark. Clark said:

" . . . I can't disagree with what Mr. Myers is saying about a lack of communication frankly. My workload right now has been a struggle for me, and I have not had as much time as I would like to have communicated with him about this case. I did meet with him recently.

"And just to address comments that he made, I do have an investigator who is in the process of trying to contact the witnesses he gave me. And I had talked briefly with his sister just to let these folks know that someone would be contacting them.

"Judge, I think that, unfortunately, the circumstances have been such that we've—Mr. Myers and I have kind of come to a situation where we're not able to communicate; and when we do communicate, it's not as effectively as we should, to be able to work together to prepare a defense in this case. He is facing significant charges. The cases, as the Court noted, have now been consolidated. But I'm concerned about my ability going forward to effectively represent him. And frankly, I think he might be better served with different counsel."

The district court asked Clark if he had met with Myers and whether Myers had told him what he wants done on the case, to which Clark responded, "We have had meetings to that effect, yes, Your Honor." The district court pointed out that Myers has had several lawyers appointed and that if a new attorney was appointed it was unlikely that trial would occur as scheduled. The district court then asked Myers what he thought a new attorney could do that Clark did not, with the explanation that lawyers need not file a motion that is frivolous. Myers responded, "Well, communication [wa]s key," and that he could not establish his defense if he could not speak with an attorney.

The State then argued that Myers' motion seemed to follow a pattern where he waited until close to the jury trial date then moved to get new counsel appointed. Myers responded to the State's assertion, conceding that he has been through many attorneys, but asserted if he called his attorney and the attorney did not return his call or come talk to him, there was nothing he could do to communicate with them.

The district court responded that lawyers can prepare a case without necessarily contacting the defendant regularly and that there were 12 days until trial in which he and Clark could discuss

strategy. The district court reiterated that he heard Clark state he had a lot of work to do, but the court stated every attorney has a lot of work and the test was whether there was a conflict of interest or breakdown in communication. The district court found no conflict of interest was alleged. The district court then addressed whether Myers showed an irreconcilable disagreement or complete breakdown in communication. The district court found that a lawyer need not visit a defendant a certain number of times and although Clark stated he felt Myers may be better off with another attorney, that statement did not rise to the level of justifiable dissatisfaction. The district judge also stated that Myers' request for new counsel seemed to be a pattern for him:

> "This is a pattern, and I'm taking that into account. This is a pattern of Mr. Myers. [The prosecutor] laid out how many attorneys there have been; some very good attorneys that Mr. Myers has had, or found complaints about. And I'm considering and thinking about the easy thing for me to do is to appoint another lawyer.
>
> "But a decision has to be made upon whether or not, like I have stated, whether there is a conflict of interest, which there is none that I have been told about. An irreconcilable disagreement—there is disagreement. Nobody has told me that it's irreconcilable; nobody has told me that these witnesses won't be subpoenaed; nobody has told me that motions won't necessarily be filed. And I haven't heard about a complete breakdown in communication."

On appeal, Myers argues that he established a breakdown in communication and that counsel had a conflict of interest because counsel did not have time to prepare adequately. The State counters that the district court did not abuse its discretion in finding no breakdown of communication and Myers' previous actions showed a pattern of creating conflicts to obtain new counsel.

This court reviews a district court's decision on whether to substitute counsel for an abuse of discretion. *State v. Pfannenstiel*, 302 Kan. 747, 762, 357 P.3d 877 (2015). A district court abuses its discretion if its action is (1) arbitrary, fanciful, or unreasonable; (2) based on an error of law; or (3) based on an error of fact. *Crosby*, 312 Kan. at 635. Myers bears the burden of establishing an abuse of discretion. 312 Kan. at 635.

Myers briefly argues that he established a conflict of interest for Clark to continue to represent him. But Myers did not argue there was a conflict of interest before the district court. The district

court even noted as much stating it had not been told of any conflict of interest. An issue not raised before the district court cannot be raised on appeal. *State v. Gonzalez*, 311 Kan. 281, 295, 460 P.3d 348 (2020).

Myers mainly argues on appeal that the facts showed a complete breakdown of communication and that the district court committed an error of fact by finding there was no breakdown of communication. Myers points to his assertions to the district court that he had only met with Clark to discuss the motion to consolidate and there had been no discussion about trial or his defense. Myers also points to his assertion that he repeatedly tried to call Clark, but they had not talked at all. Myers also asserts that Clark agreed with Myers, by telling the district court that because of his workload he had not spent as much time as was necessary on Myers' case.

The State counters that the record does not establish a complete breakdown of communication. The State asserts that the hearing established that Clark had met with Myers and that Myers had said what he wanted done in the case. The State also points out that Clark admitted that the two do communicate, with the caveat that they may not communicate as effectively as they should. The State also points out that there was no other evidence to support a complete breakdown of communication.

Myers fails to acknowledge that after he raised his concerns to the district court about a lack of communication with Clark, the court conducted further inquiry, explaining that there was still time before trial for Clark to discuss a defense with Myers, that Clark stated he was investigating the witnesses Myers identified, and that simply because Clark had not spoken to him as much as Myers would desire did not mean Clark was not working on the case. The district court did not disregard Myers' assertions but merely considered them along with the other information presented and found that Myers' complaints did not rise to the level of a complete breakdown of communication.

The district court's finding that Myers did not establish a justifiable dissatisfaction supporting new counsel based on a lack of communication is supported by the record. Myers' main complaint he kept reiterating at the hearing was that he could not get a hold

of Clark when he called his office, and he felt Clark had not visited him enough to discuss the case. But disagreements or a lack of communication between a defendant and counsel will not always rise to the level of justifiable dissatisfaction. *State v. Brown*, 305 Kan. 413, 425, 382 P.3d 852 (2016). "'The focus of the justifiable dissatisfaction inquiry is the adequacy of counsel in the adversarial process, not the accused's relationship with his attorney.'" *State v. Staten*, 304 Kan. 957, 972, 377 P.3d 427 (2016).

As the district court pointed out, just because counsel is not visiting with the defendant does not mean that counsel is not working on the case. Clark acknowledged that he had an investigator working on the leads Myers gave him, and Myers himself acknowledged that Clark had recently seen him to go over the motion to consolidate. And as the district court pointed out, there was still time for Clark to talk to Myers about the strategy he planned to present at trial, including the defense. See *Edgar v. State*, 294 Kan. 828, 839, 283 P.3d 152 (2012) (acknowledging that counsel has a duty to consult with defendant's questions of overarching defense strategy); *State v. Rivera*, 277 Kan. 109, 117, 83 P.3d 169 (2004) ("Strategical and tactical decisions like preparation, scheduling, and the type of defense, however, lie with the defense counsel . . . .").

Myers could not provide a specific answer about what new counsel could do for him beyond what Clark had been doing, stating merely that "communication was key" and that he had to communicate with his attorney. But this vague assertion identifies nothing that the appointment of new counsel would address. See *Breitenbach*, 313 Kan. at 90-91 ("[W]hen the defendant's dissatisfaction emanates from a complaint that cannot be remedied or resolved by the appointment of new counsel—such that replacement counsel would encounter the same conflict or dilemma—the defendant has not shown the requisite justifiable dissatisfaction.").

Myers also argues that the district court's finding that he was trying to delay trial by requesting new counsel was contrary to the facts. But Myers reads too much into the district court's statement. Although the district court did acknowledge a pattern of substituting counsel, the court noted that it needed to determine whether there was an irreconcilable disagreement or a complete breakdown in communication. The district court did not explicitly state it found that Myers was trying to delay the trial by moving for new counsel. In any event, the district

court's consideration of the potential delay of appointing new counsel was not necessarily inappropriate. See *Pfannenstiel*, 302 Kan. at 764 (noting federal courts addressing potential conflict of interest have routinely included timeliness or potential delay as one of the factors considered when determining whether a trial court abused its discretion in denying a motion for new counsel).

The district court never directly asked Clark if he would be prepared to represent Myers at the upcoming trial. But the district court indirectly gathered information relevant to this inquiry when Clark explained that he had been meeting with Myers about what Myers wanted him to do on the case and that an investigator was trying to contact witnesses. We observe that Clark did not file any motion requesting a trial continuance because he was not ready to proceed. Perhaps more significantly, we also observe that after the trial, the district court found that Clark's representation of Myers at trial was not ineffective based on any of the grounds Myers asserted in his motion for new trial.

In sum, Myers did not establish a complete breakdown in communication with Clark to warrant the appointment of new counsel on the eve of the trial. The fact that Myers was asking the district court for a fifth court-appointed attorney was a factor for the court to consider in deciding whether Myers showed justifiable dissatisfaction. The district court asked about Myers' concerns about his communication with Clark, and the court's finding that Myers failed to show a complete breakdown in communication is supported by the record. The district court is justified in refusing to appoint new counsel "'[a]s long as the trial court has a reasonable basis for believing the attorney-client relation has not deteriorated to a point where appointed counsel can no longer give effective aid in the fair presentation of a defense.'" *Breitenbach*, 313 Kan. at 90. The district court made that call here and Myers has failed to show the decision was an abuse of discretion.

DID THE DISTRICT COURT ERR IN DENYING MYERS' MOTION FOR NEW TRIAL BASED ON INEFFECTIVE ASSISTANCE OF COUNSEL?

Myers next claims the district court erred in denying his motion for new trial based on ineffective assistance of counsel. The State asserts that the district court correctly denied Myers' motion for new trial.

On August 7, 2019, Myers filed a pro se motion for new trial on the grounds of ineffective assistance of counsel. Myers asserted that Clark: failed to investigate his case, failed to produce photographs "that were cru[c]ial for defendant's rebuttal evidence," failed to submit video surveillance from the rec center to rebut preliminary hearing evidence that Myers was the only person who wore his hair in dreadlocks, failed to communicate with Myers, failed to object to any of the State's evidence or testimony, failed to contact alibi witnesses provided by Myers, failed to cross-examine the State's expert witness on firearms, failed to raise at trial that Myers was never subjected to gunshot residue testing, and failed to object to prosecutorial misconduct.

Clark also moved for a new trial on Myers' behalf, arguing that there was insufficient evidence to support the verdicts and that his jury trial rights were violated because the jury was all white while Myers is African American. Myers' new counsel, Sevart, later moved for a new trial alleging that Myers received ineffective assistance of counsel based on a conflict of interest between him and Clark, Clark's lack of preparation, Clark's failure to call witnesses to testify to Myers' lack of gold tipped hair, and Clark's failure to call alibi witnesses.

The district court addressed these motions at sentencing. Sevart argued the motions and stated that "as far as the evidence goes" on the motions for new trial, he would ask the court to take judicial notice of the court file. Sevart did not ask to call any witnesses to support the motions. After hearing arguments, including whether Myers received ineffective assistance of counsel, the district court denied the motions for new trial, finding Myers failed to establish either prong of the ineffective assistance of counsel test. The district court noted that it had observed the trial and saw Clark cross-examine witnesses, that he showed an understanding of the case, and found that nothing in the record suggested that Clark's performance fell below an objective standard of reasonableness. The district court also noted that there was no information before the court about Clark's thought process in relation to the alibi defense.

On appeal, Myers asserts that his convictions should be reversed because Clark was deficient in several areas, "which cumulatively had a direct impact on the verdict rendered by the

jury." The State responds that Myers failed to show in district court that Clark provided ineffective representation. Both parties agree that in a motion for new trial based on ineffective assistance of trial, we generally must review the district court's findings of fact for substantial competent evidence and review its conclusions of law de novo. See *State v. Coones*, 301 Kan. 64, 69-70, 339 P.3d 375 (2014).

The Sixth Amendment to the United States Constitution, as applied to the states under the Fourteenth Amendment, guarantees that in criminal prosecutions the accused has the right to effective assistance of counsel. *Sola-Morales v. State*, 300 Kan. 875, 882, 335 P.3d 1162 (2014). An ineffective assistance of counsel claim based on deficient performance is subject to the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

> """The first prong of the test for ineffective assistance of counsel requires a defendant to show that counsel's representation fell below an objective standard of reasonableness, considering all the circumstances. Judicial scrutiny of counsel's performance must be highly deferential, and a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. We must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.
>
> """[Under the second prong of the test for ineffective assistance of counsel], the defendant also must establish prejudice by showing that there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. A court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. [Citations omitted.]""" *State v. Butler*, 307 Kan. 831, 852-53, 416 P.3d 116 (2018).

Appellate courts generally will not consider an allegation of ineffective assistance of counsel raised for the first time on appeal. *State v. Salary*, 309 Kan. 479, 483, 437 P.3d 953 (2019). Myers' ineffective assistance of counsel claims were raised and ruled on in district court. But as we will discuss, our review of some of Myers' claims is hampered by the lack of an adequate evidentiary record in the district court. Myers' claims on appeal of ineffective assistance of trial counsel fall generally into five categories. Some

of the claims Myers raised in district court are not argued on appeal. An issue not briefed is deemed waived or abandoned. *State v. Davis*, 313 Kan. 244, 248, 485 P.3d 174 (2021).

(1) Clark failed to admit evidence that would undermine J.S.'s and J.C.'s identification.

First, Myers asserts Clark erred in not procuring the surveillance video from the rec center because it would have showed multiple individuals playing basketball with dreadlocks which would have undermined J.S.'s identification. Myers asserts that Clark also erred in not producing multiple photographs of Myers before and after the alleged shootings to show that he never had blonde hair, which would undermine J.C.'s identification. Myers asserts Clark also called no witnesses to testify that Myers never had blonde hair or gold tips.

But Myers cannot prevail on these claims. While Clark may not have admitted surveillance video, he still elicited this information when questioning D.D.:

"[CLARK:] In your experience with playing basketball up there, were there typically guys there who were playing basketball that wore their hair in dreads?
"A. Yes.
"Q. Was that a fairly frequent occurrence?
"A. I mean, it's like a lot of people come up there with dreads, dreaded hair, like people with different hairstyles."

And Clark did admit a photo of Myers, taken February 3, 2017, that showed he had no color in his hair. Myers himself testified that he had never dyed his hair. Johnson also testified that she did not remember Myers' hair being blonde or gold in color at the time of the 2017 shooting. Thus, Myers has not established that Clark was deficient on this point.

(2) Clark failed to challenge J.S.'s photo array identification.

Myers asserts that Clark should have highlighted or followed up on J.S.'s answer of "yes" to the prosecutor's question about whether the detective who showed him the photo array suggested who he should pick out. Myers asserts that Clark also never sought to suppress the suggestive photo array.

Myers fails to recognize that the entire exchange and other evidence in the record established that detectives did not tell J.S. who to choose. The relevant exchange between the J.S. and the prosecutor stated:

"Q. All right. You said, you didn't know his name, but you recognized his face as soon as you saw him?
"A. Yes.
"Q. When the officer came, did he show you some photos?
"A. Yes.
"Q. Did he indicate anybody's name, or anything at that point, or just showed you the photos?
"A. He just showed me the photos.
"Q. *Did he indicate who you should pick out or anything?*
"A. *Yeah. Yes, he did.*
"Q. *Say that again.*
"A. *Yes, he did. Yes.*
"Q. I guess my question is, did he show you the photos and let you look at them yourself—
"A. Yes.
"Q. —so you could see if you could pick somebody out?
"A. Yes." (Emphasis added.)

Both before and after the complained of statement, the prosecutor reiterated that the detectives simply gave J.S. the photos and let him look at them. And Watson testified that he did not know who was in the photo array because department policy required another detective prepare it. Watson also testified that he never told J.S. who to pick out and he read J.S. an admonition that stated that the suspect may not even be in the photos. Myers has not established that the photo array was tainted requiring action from Clark.

(3) Clark failed to call witnesses to present an alibi defense.

Myers argues that he gave Clark "multiple names of alibi witnesses" and that Clark was deficient for only contacting one and deciding not to pursue an alibi defense. He argues Clark's actions constituted a failure to conduct a reasonable investigation.

Clark filed an alibi notice for the April 11, 2018 shooting. The notice listed two witnesses, "exact address unknown." The notice stated that Myers was at the residence shared by the two witnesses

at the time of the shooting but did not otherwise specify the substance of the testimony of the two witnesses. The record does not reflect why the witnesses were not called to testify at trial.

Our review of the merits of this claim is hampered by the lack of an adequate evidentiary record in the district court. Myers did not testify at the hearing on his motion for new trial to elaborate on his claim that Clark was ineffective for not calling the alibi witnesses. Myers also did not call either witness to develop what his alibi defense would have been at trial and to establish that the alibi witnesses were, in fact, willing and able to testify at trial. Most importantly, Myers did not call Clark as a witness in district court to establish whether Clark's failure to call the witnesses resulted from a strategic decision made by Clark after investigating the witnesses.

Generally, the decision whether to call a witness at trial is a strategic decision left to counsel's discretion. *Sola-Morales*, 300 Kan. at 887. Strategic choices made by counsel after a thorough investigation of the law and the facts are virtually unchallengeable. *State v. Cheatham*, 296 Kan. 417, 437, 292 P.3d 318 (2013). To prove a claim of ineffective assistance of counsel, the defendant bears the burden of demonstrating that trial counsel's alleged deficiencies were *not* the result of trial strategy. *State v. Gleason*, 277 Kan. 624, 644, 88 P.3d 218 (2004). There is a strong presumption that trial counsel's conduct falls within the wide range of reasonable professional assistance. *Butler*, 307 Kan. at 853.

Myers could have called Clark as a witness to support his motion for new trial but did not do so. Without Clark's testimony to explain why he did not pursue the alibi defense and to establish the decision did not result from reasonable trial strategy, Myers fails to overcome the strong presumption that Clark provided reasonable professional assistance. We give full play to that presumption precisely because Myers had the chance to call Clark as a witness but did not do so. Based on the record before us, Myers fails to show that Clark's performance was deficient on the failure to present an alibi defense.

(4) Clark failed to challenge the State's lack of physical evidence.

Myers argues that Clark failed to properly challenge the State's lack of evidence about fingerprints and the State's failure to subject Myers to gunshot residue testing. Myers concedes that the State's witnesses testified that fingerprints were not obtained from the casings, but he asserts that Clark "ignored" the lack of evidence.

This argument is confusing because during closing Clark used the witnesses' testimony that they recovered no fingerprints to argue that there was no evidence directly linking Myers to the shootings. Thus, it is unclear how Myers wanted Clark to further "challenge" the witnesses' testimony that there were no fingerprints found in the case. Myers failed to show that Clark's performance was deficient on this point.

(5) Clark failed to object to the makeup of the jury pool.

Myers argues that Clark failed to object to the jury pool which had only one African American member. Myers argues that because Clark failed to object, the district court refused to consider his jury pool argument in his motion for new trial.

While Clark and Sevart both asserted the jury pool issue in their motions for new trial, neither raised the claim as an ineffective assistance of counsel issue. Instead, it was raised as a separate constitutional basis for a new trial. Thus, Myers is raising this ineffective assistance of counsel claim for the first time on appeal, although he does not acknowledge it. Generally, an appellate court does not review issues raised for the first time on appeal. *State v. Johnson*, 309 Kan. 992, 995, 441 P.3d 1036 (2019).

In any event, Myers' argument fails because he incorrectly asserts that the district court failed to consider his argument because Clark failed to object. The district court pointed out that this issue should have been raised when the jury was selected. But the district court then addressed the merits of the argument, stating the general rules and finding no evidence that jury members had been purposely and systemically excluded from jury service. The district court then denied the motion for new trial based on the makeup of the jury panel. Thus, Clark's failure to object did not bar Myers' motion for new trial based on the makeup of the jury panel.

In sum, Myers fails to establish that Clark's performance was deficient on each of the claims he argues on appeal. Without a showing by Myers that Clark's performance was deficient, we need not reach the prejudice prong of the ineffective assistance of

counsel claim. Myers fails to show the district court erred in denying his motion for new trial based on ineffective assistance of counsel.

WERE MYERS' CONVICTIONS MULTIPLICITOUS?

Myers next argues that his convictions of aggravated battery and attempted first-degree murder in 18CR941 were multiplicitous and that his convictions of aggravated battery and criminal discharge of a firearm in 18CR1664 were multiplicitous. The State argues that none of the convictions were multiplicitous under the proper test.

Myers raised the multiplicity issue in case 18CR941 below but did not raise the issue for the charges in 18CR1664. Generally, this court does not hear issues raised for the first time on appeal. *Gonzalez*, 311 Kan. at 295. But Myers correctly asserts that the Kansas Supreme Court has heard a multiplicity issue for the first time on appeal to prevent the denial of fundamental rights. 311 Kan. at 295. Thus, we will address Myers' claim. This court applies unlimited review to multiplicity challenges. 311 Kan. at 295.

"The Double Jeopardy Clause prevents a defendant from being punished more than once for the same crime." 311 Kan. at 296. Multiplicity occurs when a single offense is charged as several offenses in a charging document. Multiplicity involves a two-part test, determining first whether the convictions arise from the same conduct, and second whether by statutory definition there is only one offense. 311 Kan. at 296. Under the first prong, the court determines if "the conduct is discrete," meaning the convictions do not arise from the same conduct. 311 Kan. at 296. But if the convictions arise from the same act or transaction then the conduct is unitary, and the court must consider the second prong. Under the second prong, if the convictions are for violating different statutes, the court applies "the same-elements" test: determining "'whether each offense contains an element not contained in the other; if not, they are the 'same offen[s]e' and double jeopardy bars additional punishment and successive prosecution.'" 311 Kan. at 296.

Neither party contests that the first prong of the multiplicity test is met in either case: both challenged convictions arise from the same transaction. Thus, Myers' challenges hinge on the second

prong: whether the offenses each contain an element the other does not.

Myers' convictions of aggravated battery and attempted first-degree murder in 18CR941 are not multiplicitous.

In 18CR941, the State charged Myers with attempted first-degree murder. An attempt is "any overt act toward the perpetration of a crime done by a person who intends to commit such crime but fails in the perpetration thereof or is prevented or intercepted in executing such crime." K.S.A. 2020 Supp. 21-5301(a). First-degree murder is defined as "the killing of a human being committed: (1) [i]ntentionally, and with premeditation." K.S.A. 2020 Supp. 21-5402(a)(1). Thus, the State had to prove that Myers performed an overt act toward the perpetration of first-degree murder, that he intended to commit first-degree murder, and that he failed to complete the crime of first-degree murder. The State also charged Myers with aggravated battery in that case, which is "[k]nowingly causing great bodily harm to another person or disfigurement of another person." K.S.A. 2020 Supp. 21-5413(b)(1)(A).

Myers concedes that "[a]t first blush" the two crimes have different elements, but he argues that the linchpin of this analysis depends on the overt act for the attempted murder charge. Myers asserts that because the overt act for the attempted murder was the aggravated battery—Myers shooting J.S. in the leg and continuing to fire—the aggravated battery elements were identical to some of the elements of attempted first-degree murder and thus the two convictions were multiplicitous. Myers cites *State v. Appleby*, 289 Kan. 1017, 221 P.3d 525 (2009), in support of his argument.

But *Appleby* is distinguishable. There, the defendant was convicted of capital murder under K.S.A. 21-3439(a)(4) defined as the intentional and premeditated killing of the victim in the commission of attempted rape. Our Supreme Court addressed whether the defendant's capital murder conviction and the defendant's attempted rape conviction were multiplicitous. 289 Kan. at 1025-26. The court reasoned:

"To prove the elements of capital murder, the State had to prove beyond a reasonable doubt that Appleby intentionally, and with premeditation, killed A.K. in the commission of, or subsequent to, the crime of attempted rape. Hence, all of the elements of attempted rape were identical to *some* of the elements of the capital murder, meaning the attempted rape was a lesser included offense." 289 Kan. at 1029-30.

In *Appleby*, the capital murder conviction was statutorily based on killing the victim during the commission of attempted rape. Here, the attempted first-degree murder charge is not statutorily based the commission of aggravated battery. This distinction renders *Appleby* unhelpful to the issue at hand.

The State asserts that under the "same-elements" test, Myers' convictions of attempted first-degree murder and aggravated battery each contain a distinct element the other does not. Attempted first-degree murder requires an intent to commit first-degree murder—or an intent to kill a human being—which aggravated battery does not. See *Gonzalez*, 311 Kan. at 297 ("When the crime at issue is an attempt, the mental culpability required is intent to commit that crime."). Similarly, aggravated battery contains an element—the infliction of great bodily harm—which attempted first-degree murder does not. Thus, the two convictions were not multiplicitous under the "same-elements" test.

As Myers acknowledges, this court addressed a similar multiplicity argument in *State v. Walker*, No. 122,222, 2021 WL 2603087 (Kan. App. 2021) (unpublished opinion), *rev. denied* 314 Kan. 859 (2021). The panel addressed whether attempted second-degree murder and aggravated battery were multiplicitous. 2021 WL 2603087, at *6. The panel compared the elements of the two offenses, concluding that:

> "By following the [*State v.*] *Schoonover*[, 281 Kan. 453, 133 P.3d 48 (2006),] elements test, we see the statutes for attempted second-degree murder and aggravated battery define different crimes because each offense contains a distinct element. Attempted intentional second-degree murder requires an intent to kill, while aggravated battery does not. Aggravated battery requires a knowing infliction of great bodily harm, which attempted murder does not—after all, a person could be guilty of attempted second-degree murder for shooting at a person and missing." 2021 WL 2603087, at *8.

Myers asserts that the *Walker* panel's reasoning is erroneous because it failed to consider "what the State had to prove to establish the overt act" and it "only looked at the generic elements of aggravated battery and attempted second-degree murder." But as the State asserts, the "same-elements" test only requires the court to determine "'whether each offense contains an element not contained in the other.'" *Gonzalez*, 311 Kan. at 296. Our Supreme Court has clarified, "[T]he same-elements test . . . '"has nothing to

do with the evidence presented at trial."'" 311 Kan. at 298. Thus, Myers' argument that this court must consider what the State had to prove at trial is contrary to the law.

Finally, Myers argues that aggravated battery is a lesser included offense of attempted first-degree murder under K.S.A. 2020 Supp. 21-5109(b)(2) and thus he cannot be convicted of both. But this argument is different from a multiplicity argument and Myers does not assert whether this argument is preserved. In any event, assuming it is properly before this court, his argument also fails.

The lesser included offense statute states: "Upon prosecution for a crime, the defendant may be convicted of either the crime charged or a lesser included crime, but not both." K.S.A. 2020 Supp. 21-5109(b). The statute then defines a lesser included crime as "a crime where all elements of the lesser crime are identical to some of the elements of the crime charged." K.S.A. 2020 Supp. 21-5109(b)(2). The lesser included offense statute, like the multiplicity analysis, requires the elements of the two convictions to be examined to determine whether they contain identical elements. As analyzed above, both offenses contain a distinct element the other does not. See *State v. Gaither*, 283 Kan. 671, Syl. ¶ 12, 156 P.3d 602 (2007) ("aggravated battery does not qualify as a lesser-included crime of attempted first-degree murder"). In sum, Myers' convictions of aggravated battery and attempted first-degree murder are not multiplicitous.

Myers' convictions of aggravated battery and criminal discharge of a firearm in 18CR1664 are not multiplicitous.

In 18CR1664, the State charged Myers with criminal discharge of a firearm, which is the "[r]eckless and unauthorized discharge of any firearm: (A) At a dwelling, building or structure in which there is a human being whether the person discharging the firearm knows or has reason to know that there is a human being present" and the "criminal discharge results in great bodily harm to a person." K.S.A. 2020 Supp. 21-6308(a)(1)(A) and (b)(1)(B). In that case the State also charged Myers with aggravated battery, which is "[k]nowingly causing great bodily harm to another person or disfigurement of another person." K.S.A. 2020 Supp. 21-

5413(b)(1)(A). Myers again concedes that criminal discharge of a firearm has "some additional elements," but argues that the two crimes are identical in that both require the State to prove great bodily harm. The State counters that the offenses each contain a distinct element.

The State's analysis is persuasive. Under the same elements test, criminal discharge of a firearm has distinct elements that aggravated battery does not, including reckless discharge of a firearm, at an occupied building, and the criminal discharge resulted in great bodily harm. Similarly, aggravated battery contains a distinct element that criminal discharge of a firearm does not: knowingly causing great bodily harm. While Myers is correct that the State had to establish that he caused bodily harm for both offenses, he fails to recognize that for criminal discharge of a firearm the bodily harm is merely a result of his reckless discharge of the firearm. Whereas for aggravated battery, the defendant's causing the great bodily harm is the actus reus: the defendant must *knowingly* cause great bodily harm. Thus, each offense contains a distinct element the other does not, meaning the two convictions are not multiplicitous.

Myers also again argues that aggravated battery is a lesser included offense of criminal discharge of a firearm under K.S.A. 2020 Supp. 21-5109(b)(2). But because aggravated battery contains an element that criminal discharge of a firearm does not, it is not a lesser included offense of criminal discharge of a firearm. In sum, Myers' convictions of aggravated battery and criminal discharge of a firearm are not multiplicitous.

DID CUMULATIVE ERROR DEPRIVE MYERS OF A FAIR TRIAL?

Myers argues that cumulative error denied him a fair trial. A cumulative error analysis aggregates all errors and determines whether the combined effect of the errors violated the defendant's right to a fair trial. *State v. Tully*, 293 Kan. 176, 205, 262 P.3d 314 (2011). But the cumulative error analysis does not apply when multiple errors have not been found. *State v. Gonzalez*, 307 Kan. 575, 598, 412 P.3d 968 (2018). Myers did not establish any errors. As a result, a cumulative error analysis does not apply.

DOES K.S.A. 2020 SUPP. 21-6819(b), AS APPLIED, VIOLATE MYERS' RIGHTS UNDER THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

Under the revised Kansas Sentencing Guidelines Act (KSGA), when a defendant is convicted in a "multiple conviction case," the district court may impose concurrent or consecutive sentences subject to certain rules. K.S.A. 2020 Supp. 21-6819(b). In determining the sentence in a multiple conviction case, the district court must establish a "base sentence" for the primary crime—which is the crime with the highest severity level. K.S.A. 2020 Supp. 21-6819(b)(2). The base sentence is then calculated by applying the defendant's full criminal history to the primary crime. K.S.A. 2020 Supp. 21-6819(b)(3). The rest of the defendant's sentences for convictions in the multiple conviction case are calculated using a criminal history score of I. K.S.A. 2020 Supp. 21-6819(b)(5). "The total prison sentence imposed in a case involving multiple convictions arising from multiple counts within an information, complaint or indictment cannot exceed twice the base sentence." K.S.A. 2020 Supp. 21-6819(b)(4).

Although Myers' two cases were consolidated for trial, the district court sentenced him separately in each case. In 18CR941, the base sentence for attempted murder in the first degree was 618 months' imprisonment. The district court ran the remaining three charges in that case concurrent to the base offense for a controlling sentence of 618 months' imprisonment with 36 months' postrelease supervision. In 18CR1664, the base sentence for criminal discharge of a firearm was 228 months' imprisonment. The district court ran count three, criminal possession of a weapon by a convicted felon, consecutive to the criminal discharge of a firearm and ran count two, aggravated battery, concurrent for a controlling sentence in 18CR1664 of 237 months' imprisonment with 36 months' postrelease supervision. The district court ordered 18CR1664 to run consecutive to 18CR941, for a total term of 855 months' imprisonment.

Myers argues that K.S.A. 2020 Supp. 21-6819(b)—which directs the district court to designate a base sentence for the primary crime in a multiple conviction case and apply an offender's full

criminal history to the base sentence—as applied, violated his equal protection rights. He asserts that allowing the district court to apply a base sentence for each case treats one class of defendants—those that have multiple convictions after one trial based on charges raised in a single charging document—differently from another class of defendants—those that have multiple cases consolidated for one trial because the charges could have been brought in one charging document—even though the only difference between the two classes is the number of case numbers attached to the charges.

A statute's constitutionality is a question of law subject to unlimited review. *Gonzalez*, 307 Kan. at 579. Generally, appellate courts presume statutes are constitutional and must resolve all doubts in favor of a statute's validity. 307 Kan. at 579. Likewise, courts must interpret a statute in a way that makes it constitutional if there is any reasonable construction that would maintain the Legislature's intent. 307 Kan. at 579. But when a statute implicates "'fundamental interests,'" the presumption of constitutionality does not apply. *Hilburn v. Enerpipe Ltd.*, 309 Kan. 1127, 1132, 442 P.3d 509 (2019).

Preservation

Myers concedes that he raises this issue for the first time on appeal. Generally, this court will not hear an issue raised for the first time on appeal, even a constitutional one. *State v. Phillips*, 299 Kan. 479, 493, 325 P.3d 1095 (2014). There are three exceptions, including when the "theory involves only a question of law arising on proved or admitted facts and is determinative of the case" or when "consideration of the theory is necessary to serve the ends of justice or to prevent the denial of fundamental rights." 299 Kan. at 493. Myers argues that this issue can be raised under these two exceptions.

The State argues that this case is not a pure legal question because this issue requires determining whether Myers is similarly situated to "other offenders whose crimes were all charged in a single complaint" which the State claims is "inherently factual." The State also argues that the issue does not fall under the second exception because Myers cannot meet his burden of establishing an equal protection violation.

The State's arguments are not persuasive. Contrary to the State's assertion, this court need not consider the facts of Myers' case compared to the facts of other hypothetical cases in addressing an equal protection claim. The similarly situated inquiry only involves comparing Myers' sentencing limitations to those that would have applied had he been charged in one charging document; it does not require comparison to other specific cases. While the State is correct that determining whether consolidation of charges for trial is warranted is a factual inquiry, that question is not the issue here.

Instead, this court looks only to the classes as defined by Myers and determines whether the law as applied to those classes violates equal protection. See *State v. Denney*, 278 Kan. 643, 650-51, 101 P.3d 1257 (2004) (addressing whether the classes presented by the appellant were indistinguishable even though the issue was raised for the first time on appeal, finding it presented a question of law on proven or admitted facts); see also *State v. Dixon*, 60 Kan. App. 2d 100, 131-32, 492 P.3d 455 (finding equal protection challenge to "double rule" properly before the court for the first time on appeal because the court need only consider whether the statute created two classes and if the classes were similarly situated, a question of law requiring no factual findings), *rev. denied* 314 Kan. 856 (2021). There is no question of fact that this court needs to decide in addressing Myers' claim. As a result, this challenge can be heard under the first exception. We also agree with Myers that consideration of the issue is necessary to serve the ends of justice or to prevent the denial of fundamental rights.

Analysis

The Equal Protection Clause of the Fourteenth Amendment states: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Under the Equal Protection Clause "similarly situated individuals should be treated alike." *State v. Gaudina*, 284 Kan. 354, 372, 160 P.3d 854 (2007). Stated another way, the clause "does not require that all persons receive identical treatment, but only that persons

similarly situated with respect to the legitimate purpose of the law receive like treatment." 284 Kan. at 372.

This court engages in a three-step process in 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. [Citations omitted.]" *State v. LaPointe*, 309 Kan. 299, 316, 434 P.3d 850 (2019).

Before addressing the parties' arguments, it helps to summarize a recent case from this court that both parties discuss, *State v. Dixon*, 60 Kan. App. 2d 100. Dixon, like Myers, had two criminal cases that were consolidated for trial based on the State's motion that the two cases could have been charged in one charging document. A jury convicted Dixon of all charges across both cases. The district court sentenced Dixon separately in both cases, designating a base sentence in each case and imposing consecutive sentences on the remaining counts. On appeal, Dixon raised an equal protection challenge to K.S.A. 2020 Supp. 21-6819(b)(4), the provision known as the "double rule," arguing that the double rule, which applied to multiple convictions brought in one charging document, treated one class of defendants—those with multiple counts charged in one charging document—differently than another class—those with multiple cases consolidated for trial because the charges could have been brought in one charging document. 60 Kan. App. 2d at 130.

This court found merit in Dixon's argument that the double rule treated arguably indistinguishable classes of individuals differently. 60 Kan. App. 2d at 134. The court explained that both classes proceeded to one trial on multiple charges that were "'of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.'" 60 Kan. App. 2d at 134 (quoting K.S.A. 22-3202[1]). But only those defendants who had their charges brought in one charging document benefited from the double rule. The panel found the only difference between the two classes of defendants was the number of case numbers attached to the charges. 60 Kan. App. 2d at 134.

The panel then proceeded to the next step of the equal protection analysis—determining whether the double rule passed rational basis scrutiny. Dixon acknowledged that the double rule had a legitimate goal when applied to separate charging documents containing unrelated charges but argued the rule had no legitimate purpose "when there was one trial because the charges could have been brought in one charging document, but the State declined to do so." 60 Kan. App. 2d at 136. The panel acknowledged that the decision to proceed to a consolidated trial was a discretionary decision for the prosecutor but found that if the prosecutor elected to proceed to a consolidated trial because the prosecutor could have brought the charges in one charging document, then Dixon should receive the same sentencing benefit he would have a right to receive had the charges been brought in one charging document. 60 Kan. App. 2d at 136-37. The panel concluded that it was the State's arbitrary decision to charge the crimes in separate criminal cases that led to the sentencing disparity in Dixon's case. 60 Kan. App. 2d at 137.

The panel found that had the double rule been applied to Dixon as though he had been charged in one charging document, he would have received a maximum sentence of 1,306 months' imprisonment, which was more than 700 months, or about 61 years, less than the sentence he received because the district court applied a base sentence—and the double rule—in each case. 60 Kan. App. 2d at 139. Thus, the panel found that the double rule, as applied to Dixon's case, violated his equal protection rights:

> "We are mindful that the rational basis test is a very lenient standard and a statute must be enforced as written 'if any state of facts reasonably may be conceived to justify it.' [Citation omitted.] But we are unable to find that the strict application of K.S.A. 2020 Supp. 21-6819(b)(4) to Dixon's case implicates any legitimate sentencing goal. As a result, we find that the statute, as applied to Dixon's cases, does not pass rational basis scrutiny." 60 Kan. App. 2d at 139.

The panel concluded that the proper remedy was to extend the double rule to cases that are consolidated for trial because they could have been charged in one charging document. 60 Kan. App. 2d at 139-40. The panel stated:

"We note that our decision does not stand for the proposition that the State must always consolidate cases for trial when they are related. Instead, our decision stands for the proposition that when the State chooses to consolidate cases for trial because the charges could have been brought in one charging document, then the State must be held to the sentencing limitations applicable to a trial based on one charging document." 60 Kan. App. 2d at 140.

In *Dixon*, the double rule under K.S.A. 2020 Supp. 21-6819(b)(4) was violated. Myers' sentences in his two cases did not violate the double rule. But the issue here is whether a sentencing court should sentence a defendant in separate cases designating a primary crime and a base sentence in each case when the cases were consolidated for trial because the charges could have been brought in a single complaint. As we will see in Myers' cases, using this sentencing procedure results in a longer controlling sentence than he would have received had all the charges been brought in one charging document.

Do the base sentence rules treat arguably indistinguishable classes of individuals differently?

Myers argues that the base sentence rules in K.S.A. 2020 Supp. 21-6819(b) distinguish between two similarly situated defendants: (1) defendants who had one trial on multiple counts charged in one case and (2) defendants who had one trial on multiple counts charged in separate cases consolidated for trial based on a finding that the charges *could have* been brought in one charging document. He asserts the first group benefits from the base sentence rules by having only one base sentence while the second class has a base sentence for each case. He argues the only distinction between these two classes of defendants is that the latter class has multiple case numbers attached to the charges.

The State argues that Myers' argument is really a challenge to prosecutorial discretion. The State argues that there is a distinction between Myers and defendants who have one trial on counts in a single document: his cases could have been tried separately because the cases were not subject to compulsory joinder.

Myers bears the burden of establishing that he is similarly situated to members of a class receiving different treatment. *State v. Cheeks*, 298 Kan. 1, 5, 310 P.3d 346 (2013), *overruled on other grounds by State v. LaPointe*, 309 Kan. 299, 316, 434 P.3d 850

(2019). In conducting review, this court is "limited 'by the distinctions argued by the complaining party.'" *Cheeks*, 298 Kan. at 5. Our Supreme Court has recognized that "[d]etermining whether individuals are similarly situated is 'not always susceptible to ease of application.'" 298 Kan. at 5.

The State is correct that Myers' cases were not consolidated under compulsory joinder and his cases could have been tried separately. But that does not undermine Myers' argument that when the State *chooses* to consolidate the cases because it could have brought the charges in one charging document, he should be treated similarly—sentenced with only one base sentence—to those defendants who were charged in one charging document. His argument, like Dixon's, is persuasive.

The State moved, and the district court granted, consolidation under K.S.A. 22-3203, which states: "The court may order two or more complaints, informations or indictments against a single defendant to be tried together if the crimes could have been joined in a single complaint, information or indictment." Crimes can be charged in the same charging document "if the crimes charged . . . are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan." K.S.A. 22-3202(1). Thus, both classes of defendants identified by Myers had multiple convictions after one trial because the crimes charged were of the same or similar character or stemmed from the same act or transaction or two or more acts or transactions constituting parts of a common scheme or plan.

But only defendants who have their charges brought in a single case, or in one charging document, get the benefit of a single base sentence for multiple convictions. When a defendant is charged in two separate cases, even though the charges are later consolidated for one trial because they *could have* been brought in a single complaint, the defendant is sentenced separately in each case and receives a base sentence in each case, leading to a longer controlling sentence. As in *Dixon*, the only difference between the two classes of defendants is the number of case numbers attached to the charges.

We find the base sentence rules in K.S.A. 2020 Supp. 21-6819(b) treat arguably indistinguishable classes of defendants differently. We must now proceed to the next step in the analysis to determine the appropriate level of scrutiny to assess to the classification and decide whether K.S.A. 2020 Supp. 21-6819(b) passes that level of scrutiny.

Do the base sentence rules in K.S.A. 2020 Supp. 21-6819(b) pass rational basis scrutiny?

Both parties agree that because the statute does not involve suspect or quasi-suspect classes, rational basis scrutiny applies. The rational basis test is "'a very lenient standard.'" *Denney*, 278 Kan. at 651. "'For a statute to pass constitutional muster under the rational basis standard, it therefore must meet a two-part test: (1) It must implicate legitimate goals, and (2) the means chosen by the legislature must bear a rational relationship to those goals. '" 278 Kan. at 651. The test is only violated when the classification "'rests on grounds wholly irrelevant to the achievement of the State's legitimate objective'" and the statute will not "'be set aside if any state of facts reasonably may be conceived to justify it.'" 278 Kan. at 651-52. Myers bears the burden of "negating "'every conceivable [reasonable] basis which might support'" the differing treatment. [Citation omitted.]" See *Cheeks*, 298 Kan. at 8.

Myers cites *Dixon* and argues that applying the base sentence rules in K.S.A. 2020 Supp. 21-6819(b) to each case despite the cases being consolidated for trial because the charges could have been brought in one charging document is an arbitrary distinction. He argues that the distinction allows the State to secure harsher sentences by charging defendants in multiple cases but proceeding to only one trial.

Myers' cases show the sentencing disparity he is talking about. Myers received a base sentence of 618 months' imprisonment for attempted first-degree murder in 18CR941. Myers received a base sentence of 228 months' imprisonment for criminal discharge of a firearm in 18CR1664. He also received a consecutive term of 9 months' imprisonment for criminal possession of a weapon by a convicted felon for a controlling sentence in 18CR1664 of 237 months' imprisonment. The district court ordered the sentences in the two cases to run consecutive for a total term of 855 months'

imprisonment. Had the charges been filed in one complaint, Myers' presumptive sentence range for criminal discharge of a firearm would have been 61-59-55 months' imprisonment, calculated using a criminal history score of I. See K.S.A. 2020 Supp. 21-6819(b)(5). In other words, even assuming the high range on the sentencing grid, Myers' sentence for that count would have been at least 167 months less than the 228-month base sentence he received (228-61=167). Even if the district court ran the same counts in the two cases consecutive, Myers' total term would have been 688 months' imprisonment instead of the 855-month sentence he received (618+61+9=688).

The State filed the complaint in case 18CR941 on May 25, 2018, for the crimes arising from the April 2018 shooting. The State filed the complaint in case 18CR1664 on June 26, 2018, for the crimes arising from the February 2017 shooting. Interestingly, the report on the shell casings recovered from Carter's house was completed on May 21, 2018. It was within the State's discretion to file the two cases separately. But the State later consolidated the cases for trial because all the charges *could have* been brought in a single complaint under K.S.A. 22-3202(1). As a result of the State's decision to file the complaints separately, Myers ultimately received a sentence that was 167 months longer than the sentence he would have received for the same convictions had all the charges originally been filed in a single complaint. As reasoned in *Dixon*, this sentencing disparity based solely on the number of cases attached to the charges at a consolidated trial seems to defeat the KSGA's purpose of uniform sentencing. See *State v. Fowler*, 311 Kan. 136, 152, 457 P.3d 927 (2020) ("[T]he Legislature's stated policy goal[] in enacting the KSGA [is] uniformity in sentencing.").

The State argues there are rational reasons for the different treatment. The State asserts that "[i]t is perfectly logical and reasonable to allow for harsher sentences for offenders, such as defendant, who victimize multiple people on different occasions." The State asserts the consolidation promotes judicial economy and that such economy should not result in a "windfall" at sentencing for defendants. The State also argues that Myers' arguments will require "the State to make a choice it should not be forced to make

which will lead to alternative Equal Protection claims from defendants." The State asserts that defendants will now have an incentive to have their cases consolidated for trial and if the cases are not consolidated, defendants will argue they should have been, creating a "Catch 22" for the State. The State argues that the KSGA already provides defendants with a "significant benefit" under K.S.A. 2020 Supp. 21-6810(a), which provides that counts joined for trial under K.S.A. 22-3203 and amendments thereto do not count as prior convictions in determining the defendant's criminal history.

The State's arguments are unpersuasive. To begin, we agree with the State that prosecutors have wide discretion in charging decisions. As this court stated in *Dixon*:

"[W]e recognize that a prosecutor is the representative of the State in criminal prosecutions and has broad discretion in controlling those prosecutions. The scope of this discretion extends to the power to investigate and to determine who shall be prosecuted and what crimes shall be charged. [Citations omitted.] The discretion to decide what charges to file in any situation is an important tool reserved to the prosecutor, and courts should not try to interfere with such discretion, nor do we have the power to do so." 60 Kan. App. 2d at 136-37.

Although we agree the prosecutor has charging discretion, the State's argument that a defendant who victimizes multiple people on different occasions deserves a harsher sentence misses the point. While the crimes Myers committed victimized different people on different occasions, the State ultimately consolidated the cases for trial because they were of the same or similar character and could have been charged in one charging document. Thus, it was the State's discretionary but arbitrary decision to originally file similar charges—that could have been brought in one charging document—in separate charging documents that led to the sentencing disparity in this case.

The State's judicial economy argument is also problematic. Judicial economy supports consolidating cases for trial, but it does not support the disparate sentencing treatment that results from consolidation, especially considering that the goal of the KSGA is uniformity in sentencing. See *Fowler*, 311 Kan. at 152. Again, Myers is not asserting that the State cannot consolidate cases for trial. He is merely asserting that if the State chooses to consolidate cases for trial because the State could have charged the crimes in

one charging document, then the cases should be sentenced as if they were in fact brought in one charging document. Disparate sentencing based solely on the number of cases attached to charges bears no rational relationship to promoting judicial economy.

We also disagree that sentencing Myers as though all the charges for which he was convicted had been filed in one complaint results in a "windfall" for him. Myers only received one trial and the consolidation of the cases provided the State with a significant procedural and strategic advantage at trial. The jury found Myers guilty of all the charges. As it stands, Myers received a sentence that was 167 months longer than the sentence he would have received for the same convictions had all the charges originally been filed in a single complaint. Myers simply argues that if he is to be tried as though all the charges against him had been filed in one complaint, he should be sentenced as though all the charges were filed in one complaint. There is no windfall here.

The State's arguments about forcing it to make a choice that may lead to different equal protection claims in the future is also not persuasive. First, it seems that speculating on the possibility of future equal protection claims if there is a ruling in Myers' favor is hypothetical. And as for defendants now having an incentive to ask for consolidated trials, if all the charges against a defendant are of the same or similar character, then a consolidated trial is appropriate and should be considered whether the request is made by the defendant or by the State. Second, a ruling in Myers' favor will not force the State to make a decision it should not have to make. The only choice the State will need to make is whether it should try two cases separately and receive the full benefit of the base sentence rules or consolidate the cases for trial with the understanding that the defendant will be sentenced as though the charges had been brought in one case.

Finally, the State points to the "significant benefit" the defendant already receives under K.S.A. 2020 Supp. 21-6810(a), which provides that counts joined for trial under K.S.A. 22-3203 and amendments thereto do not count as prior convictions in determining criminal history. But we see this argument as working against the State and not in its favor. The Kansas Legislature seems to

recognize that when a defendant is convicted of charges in separate complaints that were consolidated for trial because the charges could have been brought in one charging document, it is inappropriate to count the convictions against each other in determining criminal history. This KSGA provision shows some acknowledgment by the Legislature that at least in terms of determining criminal history, a defendant who is tried as though all the charges could have been brought in one complaint should be sentenced as though all the charges were brought in one complaint.

As we observed in *Dixon*, 60 Kan. App. 2d at 139, "[w]e are mindful that the rational basis test is a very lenient standard, and a statute must be enforced as written 'if any state of facts reasonably may be conceived to justify it.'" (quoting *Denney*, 278 Kan. at 652). But we are unable to find that the strict application of K.S.A. 2020 Supp. 21-6819(b) to Myers' cases implicates any legitimate sentencing goal. As a result, we find that the statute, as applied to Myers' cases, does not pass rational basis scrutiny. Thus, we conclude that the base sentence rules found in K.S.A. 2020 Supp. 21-6819(b), as applied to Myers' cases, violates his equal protection rights under the Fourteenth Amendment. Our final step is to determine the remedy for this violation.

What is the remedy for this violation?

There are two remedies when a statute is under-inclusive: (1) either declare the statute void or (2) order that its benefits include the aggrieved class. *Denney*, 278 Kan. at 656. To decide between the two remedies, the court should look at the importance of the statute and the effects of striking it down. 278 Kan. at 656.

Given the two remedies, it would be more consistent with the purpose of the KSGA to extend the coverage of the statute as opposed to striking it down. Such a remedy has been taken in other cases. See, e.g., *Denney*, 278 Kan. at 660 (extending coverage of statute to aggrieved class finding the remedy better than nullifying the statute); *Dixon*, 60 Kan. App. 2d at 140 (expanding coverage of double rule found in K.S.A. 2020 Supp. 21-6819[b][4] to defendants who had a consolidated trial based on a finding that the charges could have been brought in one charging document); *State*

v. Kelsey, 51 Kan. App. 2d 819, 829, 356 P.3d 414 (2015) (expanding coverage of statute to cover narrow class at issue after equal protection challenge).

In sum, we vacate Myers' sentences and remand for resentencing with the court designating one primary crime of conviction—attempted first-degree murder—and only one base sentence for both cases. Contrary to the State's argument, our decision does not stand for the proposition that the State must always consolidate cases for trial when they are related. Instead, we merely hold that when the State chooses to consolidate cases for trial because the charges could have been brought in one charging document, then the State must be held to the sentencing limitations—applying only one base sentence—applicable to a trial based on one charging document. See *Dixon*, 60 Kan. App. 2d at 140 (reasoning same in relation to double rule).

DID THE DISTRICT COURT ERR IN CALCULATING MYERS' CRIMINAL HISTORY SCORE?

Myers argues, for the first time on appeal, that the district court erred in finding his criminal history score was B because the State did not present evidence that he had counsel or waived counsel for his prior misdemeanor convictions. See K.S.A. 2020 Supp. 21-6811(a) (allowing three prior misdemeanor convictions to be aggregated to one person felony conviction). Myers concedes that he withdrew any objection to the PSI report and personally affirmed that he did not object to a criminal history score of B. But Myers argues that the State had the burden to prove his criminal history score, including whether his misdemeanor convictions were counseled or that he waived counsel and because the State did not meet this burden, his case must be remanded.

The State correctly asserts that the Kansas Supreme Court recently rejected the same claim in *State v. Roberts*, 314 Kan. 316, 498 P.3d 725 (2021). In *Roberts*, the defendant claimed for the first time on appeal that the State failed to prove that his three prior municipal convictions were counseled or that he waived counsel and thus his sentence was illegal. Roberts admitted his criminal history in the PSI report and never notified the court of any alleged error. Our Supreme Court reaffirmed that "'[a] person accused of

a misdemeanor has a Sixth Amendment right to counsel if the sentence to be imposed upon conviction includes a term of imprisonment, even if the jail time is suspended or conditioned upon a term of probation,'" and that uncounseled misdemeanor convictions cannot be used in subsequent criminal proceedings. 314 Kan. at 320.

The *Roberts* court stated that resolution of the issue depended on who had the burden of proving the validity of prior convictions: the State or the defendant. 314 Kan. at 321. The court found that under K.S.A. 2020 Supp. 21-6814, the State satisfies its initial burden of proving an offender's criminal history by providing the PSI report. If the offender provides written notice of any error in the PSI report, then the State must prove the disputed portion of the criminal history. But if the offender does not object to any errors in the PSI report, the report satisfies the State's burden of proving criminal history, and the burden shifts to the offender to prove any error in the alleged criminal history by a preponderance of the evidence. 314 Kan. at 322. The court then held:

"[A] defendant who fails to object under K.S.A. 2020 Supp. 21-6814(c) at sentencing to the constitutional validity of a prior conviction used to enhance a current sentence, based on a claim of the absence of counsel without a valid waiver, has the burden to show the prior conviction is invalid, regardless of whether the defendant's constitutional challenge to the allegedly uncounseled conviction in criminal history is brought on direct appeal of the current sentence or in a proceeding collaterally attacking that sentence." 314 Kan. at 334-35.

The court elaborated that without an objection at sentencing, "a presumption of regularity attaches to a final judgment entered in a prior case and the defendant bears the burden of producing evidence to rebut that presumption." 314 Kan. at 335. The court found that because Roberts admitted his criminal history at sentencing and did not object, the PSI report satisfied the State's burden to prove the constitutional validity of his prior misdemeanor convictions and Roberts had the burden to show in his direct appeal that the prior convictions were constitutionally invalid. 314 Kan. at 336; see also *State v. Corby*, 314 Kan. 794, 502 P.3d 111 (2022) (applying same analysis to defendant's criminal history challenge in direct appeal).

Identical to *Roberts*, Myers personally admitted his criminal history at sentencing after withdrawing his objection to his criminal history. Because Myers admitted his criminal history, the PSI report met the State's burden of proving the validity of his prior convictions, including the three misdemeanor convictions. Thus, Myers bears the burden in this, his direct appeal, to show the prior convictions were invalid. But Myers does not claim, let alone point to evidence to establish, that his prior misdemeanor convictions were uncounseled. As a result, Myers is entitled to no relief on this claim in his direct appeal. But we observe that Myers may still move to correct his alleged illegal sentence, and in such a motion he will have the burden of proving his misdemeanor convictions were uncounseled, resulting in a different criminal history score and an illegal sentence.

Convictions affirmed, sentences vacated, and case remanded with directions.

No. 124,032

JUDITH CLAEYS, TRUSTEE OF THE CLAEYS REVOCABLE LIVING TRUST, *Appellee*, v. DAVID CLAEYS and KENNETH CLAEYS, *Appellants*.

SYLLABUS BY THE COURT

1. REAL PROPERTY—*Partition Proceedings—Broad Discretion of District Courts for Determining Division of Interests*. Partition proceedings, which seek to fairly divide ownership interests in real property, are equitable in origin. District courts have broad discretion to determine how best to fairly divide those interests. When a cotenant has made improvements to the property, the court may adjust the division to apply a credit to that cotenant for his or her efforts, measured by the extent the improvement enhances the value of the land.

2. SAME—*Improvement to Real Property Is Valuable Addition to Property or Amelioration in Condition.* An improvement is a valuable addition made to real property or an amelioration in its condition, amounting to more than mere repairs or replacement, costing labor or capital, and intended to enhance its value, beauty, or utility or to adapt it for new or further purposes. An improvement need not involve structural additions and need not necessarily be visible as long as it enhances the value of the property.

Appeal from Marshall District Court; JOHN L. WEINGART, judge. Opinion filed April 29, 2022. Reversed and remanded with directions.

Robert W. Coykendall and *Sabrina K. Standifer*, of Morris, Laing, Evans, Brock & Kennedy, Chartered, of Wichita, for appellants.

Andrew J. Lohmann and *Jason E. Brinegar*, of Galloway, Wiegers & Brinegar, P.A., of Marysville, for appellee.

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

WARNER, J.: Kenneth and David Claeys appeal the district court's decision denying their counterclaim in a real-property partition case against a trust administered by their sister-in-law, Judith Claeys. Kenneth and David assert the district court should have adjusted the equitable division of the property due to improvements they made to the property—namely, converting it from dry land to irrigated farmland—that increased its value. After reviewing the record and the parties' arguments, we agree that

the evidence showed that Kenneth and David improved the land, and the district court erred when it found otherwise. We remand the case for a determination whether Kenneth and David should be granted an equitable offset for that improvement.

FACTUAL AND PROCEDURAL BACKGROUND

In 2012, three brothers—Kenneth, David, and Richard Claeys—inherited undivided one-third interests in two tracts of land after their father's death. The land consisted of a tract in Marshall County and a tract in Washington County. Since 1987, Kenneth rented and farmed the Marshall County property under a sharecropping arrangement with his father and, after his father died, his brothers. Under this arrangement, Kenneth farmed the property and received 60% of the crop yield; the remaining 40% was split among the landowners.

Not long after inheriting the land, Kenneth decided to irrigate part of the Marshall County property. Sixty-six acres were already flood-irrigated, but he decided to expand the irrigated acreage by installing a large pivot system to irrigate another 126.55 acres. Kenneth had discussed the expansion with his father before his father died, and Kenneth knew that irrigating more of the land would result in a higher crop yield and a more profitable farm. He also knew that irrigated land was more valuable than dry land.

Kenneth bought a Reinke 10-tower pivot irrigation system for $83,200. He also spent over $10,000 on piping and a water meter necessary to operate the pivot system. And he secured a water permit to reroute water from a nearby river to the pivot system; without the permit, he could not use the new system to irrigate the extra acreage. David helped Kenneth install the system by helping dig and pay for the underground piping. The third brother, Richard, was aware of the new irrigation system but not involved in its acquisition or installation. Neither Richard nor his wife Judith ever contributed to the cost or installation of the pivot system, and Kenneth and David never asked for their permission or help.

Richard died at some point after Kenneth installed the irrigation system, and his undivided one-third interest in the land passed to a family trust under Judith's control. Judith subsequently filed a partition action against Kenneth and David, seeking to sever their

joint ownership of the properties in Marshall and Washington counties. Kenneth and David counterclaimed, asserting that their improvements to the Marshall County tract unjustly enriched Judith and thus they were entitled to an offset in any partition to account for those improvements.

The district court appointed three commissioners to appraise the land so it could be divided. The commissioners valued the Washington County tract at $390,000 and the Marshall County tract—where Kenneth and David installed the irrigation system—at $2,065,000. The appraised value of the Marshall County tract did not include the Reinke irrigation equipment, but it did value the 126.55 acres as irrigated (not dry) land.

Judith elected to buy the Washington County tract, while Kenneth and David elected to buy the Marshall County tract—effectively resolving the initial partition action. But Kenneth and David's counterclaim remained. Because Judith's tract was smaller and less valuable than the Marshall County tract, Kenneth and David owed her $428,333 to account for her one-third interest in that property. The district court ordered $50,000 of that sum to be placed in escrow pending the counterclaim; Kenneth and David believed that the $50,000, which they felt represented Judith's one-third interest in the increased value from irrigation, should be credited against what they owed her.

The counterclaim proceeded to a one-day bench trial. The pretrial order framed the issues around the Reinke pivot-system equipment—whether the added irrigation system increased the value of the Marshall County tract and, if so, whether credit should be applied against Judith's portion to account for the increase. The evidence at trial was mostly uncontroverted. Kenneth and David explained the work they devoted to converting the tract to irrigable land, including securing the water permit and diverting the water to irrigate the land through the newly purchased irrigation equipment. Witnesses testified that irrigating the Marshall County tract increased its value—even excluding the value of the pivot system itself—between $500 and $2,800 per acre.

It was also undisputed that the pivot system was Kenneth's personal property that he could remove at any time. But as the court-appointed commissioners explained in their testimony, the pivot system was not what made the land more valuable. Rather,

it was the fact that the land was now irrigated. In other words, irrigated land is worth more than dry land, and the continued preservation of those acres as irrigable land—through obtaining the water permit and taking steps to use that permit by irrigating the land in some way, regardless of the specific irrigation equipment used—is what makes the land more valuable for appraisal purposes.

The district court ruled for Judith on the counterclaim, finding that Kenneth and David had not shown they should receive a credit for the irrigation-driven value increase. The court recognized that Kansas law allows a cotenant credit for improvements a person makes to the land—measured by the amount the improvements increase the land's value when they happen without the other owners' permission. But instead of considering whether irrigating the land improved its value, the district court limited its consideration to the specific pivot system Kenneth had purchased. According to the district court, this system—the Reinke pivot equipment—was Kenneth's personal property and thus not an "improvement." The district court therefore denied Kenneth and David's counterclaim and awarded the $50,000 in escrow to Judith. Kenneth and David appeal.

DISCUSSION

Partition proceedings, which seek to fairly divide ownership interests in property, are equitable in origin. As such, district courts have broad discretion to determine how best to fairly divide those interests. See K.S.A. 60-1003(d); *Einsel v. Einsel*, 304 Kan. 567, 577, 374 P.3d 612 (2016). And appellate courts review district courts' exercise of these broad powers for an abuse of discretion. 304 Kan. 567, Syl. ¶ 1. A court abuses its discretion when it acts in a way that no reasonable court would under the circumstances or bases its decision on a factual or legal error. 304 Kan. 567, Syl. ¶ 1. Legal conclusions are subject to unlimited review. 304 Kan. at 579.

When partitioning real property, a district court has "full power to make any order not inconsistent with the provisions of this article that may be necessary to make a just and equitable partition between the parties, and to secure their respective interests."

K.S.A. 60-1003(d). To that end, the Kansas Supreme Court has recognized that "[i]mprovements added to a property by one of several cotenants may be the subject of a credit to that cotenant," measured by the extent the improvement enhances the property value. *Miller v. Miller*, 222 Kan. 317, Syl. ¶ 5, 564 P.2d 524 (1977).

Kansas law recognizes that improvements may take many forms. At its base, an improvement is "'[a] valuable addition made to . . . property (usually real estate) or an amelioration in its condition, amounting to more than mere repairs or replacement, costing labor or capital, and intended to enhance its value, beauty or utility or to adapt it for new or further purposes.'" *Haz-Mat Response, Inc. v. Certified Waste Services Ltd.*, 259 Kan. 166, Syl. ¶ 4, 910 P.2d 839 (1996) (quoting Black's Law Dictionary 757 [6th ed. 1990]). The determination as to whether some circumstance improves the land must be rooted in the facts of each case. 259 Kan. 166, Syl. ¶ 3. While many cases discuss improvements as structural additions (such as adding a barn or an addition to a residence), there is no requirement that an improvement take this form. In fact, "the improvement of real property need not necessarily be visible, although in most instances it is." 259 Kan. 166, Syl. ¶ 3. Ultimately, the improvement must be some circumstance that "enhance[s] the value of the property." 259 Kan. 166, Syl. ¶ 3.

Applying these principles here, the district court erred when it found that Kenneth and David did not improve the land when they installed an irrigation system, changing the land's status from dry to irrigated. The district court focused solely on one aspect of the irrigation system—the physical, above-ground equipment—but Kansas law requires a broader inquiry, looking beyond just physical structures and equipment.

Contrary to the district court's findings and Judith's assertions on appeal, improvements are not limited to physical additions. Nor does it matter that obtaining a water right and changing a property's status from dry land to irrigated land are not physical or visible improvements. The district court thus committed an error of law when it focused exclusively on the physical equipment and its status as personal property. Indeed, Kenneth and David acknowledged that the equipment was personal property, and the court-

appointed appraisers did not include the equipment in their land valuation. There was no basis for the court to conclude that the equipment's status as personal property meant the land had not been improved.

Instead, the undisputed evidence presented at the bench trial showed that Kenneth and David improved the property by converting over 126 acres from dry land to irrigated land. This conversion enhanced the property's condition by increasing the farmland's productivity and was not a mere repair or replacement. Kenneth and David expended significant labor and capital, securing the water permit, purchasing an irrigation system and related equipment, and connecting the system to the water source. Kenneth explained that he intended to enhance the land's utility and adapt it for further purposes because the new irrigation system—which supplemented preexisting flood irrigation—allowed for a more productive farm and an increased crop yield. And the witnesses at the trial unanimously agreed that irrigated land is more valuable than unirrigated property, even though their opinions varied as to how much more valuable the land now was.

Judith points to the evidence that the increased land value is attributable to the water permit, suggesting that simply securing a water permit cannot constitute an improvement that results in such a difference in land value. But this argument is unpersuasive for a number of reasons. Most notably, the evidence at trial was uncontroverted that irrigated land was more valuable than unirrigated property, and all appraisers agreed that the difference in value was only possible through obtaining a water permit. Moreover, under Kansas law, the continued right to use the water permit is closely tied to the efforts to actively irrigate the land. A proposed diversion works—here, a pivot irrigation system—is key to the permitting process. See K.S.A. 82a-712. When the State grants a permit application, it is allowing the applicant "to proceed with the construction of the proposed diversion works and to proceed with all steps necessary for the application of the water to the approved and proposed beneficial use." K.S.A. 82a-712. And to keep a permit or water right, a person must use it. K.S.A. 82a-718(a). Here, the water permit was one key aspect of the improvement—converting dry land to irrigated land—and the value increase associated

with the permit is just one consideration when determining whether there is an improvement.

In sum, Kenneth and David improved the Marshall County tract when they converted the 126.55 acres to irrigated land. They obtained a water permit and actively used that permit by irrigating the land—buying and installing the Reinke system, installing underground piping to connect to the water source, and using that water to increase the property's crop yield. Their efforts boosted the value and utility of the land. Under these circumstances, the district court erred when it found there was no improvement and denied Kenneth and David's counterclaim on that basis. We thus remand the case to the district court to determine whether to award credit for this improvement based on its assessment of the evidence previously presented at trial.

Before concluding, we pause to address the parties' arguments regarding the Kansas Supreme Court's decision in *Miller* and the scope of the district court's discretion on remand. See 222 Kan. 317, Syl. ¶ 5. Kansas law allows the district court "to make any order . . . necessary to make a just and equitable partition between the parties." K.S.A. 60-1003(d). The district court abused its discretion in its original ruling because it failed to consider whether efforts other than the purchasing of the specific pivot system here improved the value of the property. In other words, the court did not apply the correct legal standard defining improvements in this state.

Kansas courts have long recognized that they can adjust the equities in a partition case to account for improvements to the property. See, e.g., *Ames v. Ames*, 170 Kan. 227, 230-31, 225 P.2d 85 (1950); *Sarbach v. Newell*, 28 Kan. 642, 645-47 (1882). This power reflects the broad equitable discretion district courts have in partition proceedings. See K.S.A. 60-1003(d). When partitioning property, district courts have "the same powers as were exercised by chancery courts under equity practice, including full power to settle all questions involved on just and equitable principles." *Knutson v. Clark*, 169 Kan. 205, Syl. ¶ 2, 217 P.2d 1067 (1950).

But awarding credit for improvements is not required when some other circumstance would render an adjustment unfair. The *Miller* decision is one of many showing that courts "may" adjust the presumed division of property to account for the various equities in a case. 222 Kan. 317, Syl. ¶ 5. That language is permissive; it reflects courts' broad equitable powers in this area. Indeed, the most recent Kansas Supreme

Court decision addressing equitable adjustments in partition cases confirms that *Miller* does not *require* that credit be given, but simply recognizes that district courts *may* award it. See *Denton v. Lazenby*, 255 Kan. 860, 863-64, 879 P.2d 607 (1994). There, the court recognized that the right to credit for improvements "is not a legal right but arises from principles of equity." 255 Kan. 860, Syl. ¶ 2. The Kansas Supreme Court continued to refer to *Miller*'s articulation as the "general rule," but the court did not adjust the equitable distribution in that case because both parties had agreed and contributed to the improvement. 255 Kan. at 862. In other words, the court confirmed that equitable considerations drive the decision whether to award credit when a cotenant makes an improvement to the property. 255 Kan. at 863-64.

We read *Miller* not as a bright-line rule requiring credit when there is an improvement, but as simply recognizing that a district court can adjust the equities as it sees fit during a partition proceeding. When one party has improved the land, the court can certainly consider those efforts and improvements as it determines how to equitably partition the real property. Thus, the district court's decision on remand should take into account whether to adjust the amount Kenneth and David owe Judith, based on the partition of the property, in light of Kenneth and David's improvement, as well as any other equitable considerations appropriate to the fair division of the land.

Reversed and remanded with directions.

No. 124,170

GREAT PLAINS ROOFING AND SHEET METAL, INC., *Appellant*, v. K BUILDING SPECIALTIES, INC., et al., *Appellees*.

SYLLABUS BY THE COURT

1. CONTRACTS—*Kansas Anti-Indemnity Statute—Indemnification Provision in Construction Contract Void and Unenforceable if Requires Promisor to Indemnify for Negligence or Intentional Acts.* Under K.S.A. 2020 Supp. 16-121(b), the Kansas anti-indemnity statute, an indemnification provision in a construction contract is void and unenforceable if it requires the promisor to indemnify the promisee for the promisee's negligence or intentional acts or omissions.

2. SAME—*Indemnification Provision Permitting Indemnity to Maximum Extent Allowed by Applicable Law Is Valid with Limits.* When an indemnification provision permits indemnity "to the maximum extent allowed by applicable law," the provision is valid, but it limits the promisor's indemnification liability so that the promisor is not responsible for the promisee's negligence.

3. CIVIL PROCEDURE—*One-Action Rule—In Negligence Claim All Parties Must Be Joined in Original Action.* When an injured party asserts a claim for negligence, all parties whose causal negligence contributed to the injury must be joined to the original action, with no distinction between tort claims and contract claims. This is called the one-action rule.

4. SAME—*Purpose of K.S.A. 60-258a—Impose Individual Liability for Damages on Proportionate Fault of All Parties to Occurrence.* The intent and purpose of the Legislature in adopting K.S.A. 60-258a was to impose individual liability for damages based on the proportionate fault of all parties to the occurrence which gave rise to the injuries and damages even though one or more parties cannot be joined formally as a litigant or be held legally responsible for his or her proportionate fault. It was the intent of the Legislature to fully and finally litigate in a single action all causes of action and claims for damages arising out of any act of negligence.

5. SAME—*Comparative Fault Procedure in Kansas—Policy of Judicial Economy.* Kansas law requires defendants seeking to minimize their liability in comparative fault situations not involving a chain of distribution or similar commercial relationship to do so by comparing the fault of other defendants to reduce their own share of liability and damages. If a defendant chooses to settle and obtain release of common liabilities involving other parties whom the plaintiff did not sue, the defendant does not have an action

for comparative implied indemnity or postsettlement contribution. Under Kansas comparative fault procedure, such a remedy is not necessary, and such an action defeats the policy of judicial economy, multiplying the proceedings from a single accident or injury.

6. SAME—*Doctrine of Comparative Fault—Parties to Occurrence to Have Determination of Fault in One Action.* The doctrine of comparative fault requires all the parties to the occurrence to have their fault determined in one action.

7. TORTS—*Determination of Percentage of Fault in One Lawsuit--Submission to Jury of Causal Fault or Negligence of All Parties to Occurrence.* The causal fault or negligence of all parties to the occurrence, including the negligence of the injured plaintiff and any third parties, should be submitted to the jury and the percentage of fault of each determined in one lawsuit.

8. CONTRACTS—*Indemnification Provision—Determination of Fault Required to Determine Contractual Liability.* When a contract requires a promisor to indemnify another for the promisor's share of negligence, the underlying negligence tort controls the promisor's liability, and it becomes impossible to determine contractual liability without a determination of fault.

9. SAME—*Claim for Partial Indemnity or Contribution against Third-Party Defendant—Settlor Must Show Paid Damages on Behalf of Third-Party.* To prevail on a claim for partial indemnity or contribution against a third-party defendant, the settlor must show that it actually paid damages on behalf of that third party. If the third party was never at risk of having to pay for its own damages, the settlor cannot show it benefited the third-party defendant, and the value of its contribution claim is zero.

10. TORTS—*Comparative Implied Indemnity—Cause of Action by Tortfeasor for Recovery of Damages Proportional to Joint Tortfeasor's Fault.* Comparative implied indemnity, or as it is more accurately termed postsettlement contribution, describes the cause of action initiated by a tortfeasor in a negligence lawsuit to recover from a joint tortfeasor the share of the damages proportional to the joint tortfeasor's fault.

11. SAME—*Comparative Implied Indemnity or Claim of Contribution against Joint Tortfeasor as Third Party—Must Assert Timely Claim*. For a tortfeasor to pursue a claim of contribution or comparative implied indemnity against a joint tortfeasor who was not sued by the plaintiff, the tortfeasor must join the joint tortfeasor as a third party under K.S.A. 2020 Supp. 60-258a(c) and assert a timely claim against the joint tortfeasor.

12. CIVIL PROCEDURE—*Joinder of Additional Parties—Determination of Percentage of Negligence Attributable to Each Party*. The requirement to

join additional parties under K.S.A. 2020 Supp. 60-258a(c) does not distinguish between tort and contract claims, but instead focuses on the need for a fact-finder to determine the percentage of negligence attributable to each party.

13. SAME—*Exception to One-Action Rule—Separate Actions by Plaintiffs Against Tortfeasors if No Determination of Comparative Fault.* An exception to the one-action rule allows plaintiffs to pursue separate actions against tortfeasors where there has been no judicial determination of comparative fault, but this exception does not allow defendants to bring separate actions.

Appeal from Johnson District Court; PAUL C. GURNEY, judge. Opinion filed April 29, 2022. Affirmed.

Jenifer W. Svancara, *Jeffrey C. Baker*, and *Christopher R. Staley*, of Sanders Warren Russell & Scheer LLP, of Overland Park, for appellant.

David J. Welder and *Michael G. Norris*, of Norris Keplinger Hicks & Welder, LLC, of Leawood, for appellees.

Before ISHERWOOD, P.J., GREEN and BRUNS, JJ.

GREEN, J.: An on-the-job accident injured Philip Andrew Trokey, and he sued Great Plains Roofing and Sheet Metal, Inc. (Great Plains) in Jackson County, Missouri. Great Plains settled with Trokey. Then, Great Plains filed an indemnification suit against K Building Specialties, Inc. and Installtec, Inc. (K Building) in Johnson County, Kansas. K Building and Great Plains both moved for summary judgment. The Johnson County District Court granted summary judgment for K Building. Great Plains appeals. Because Kansas' one-action rule bars Great Plains from postsettlement contribution, we affirm.

FACTS

In July 2014, Great Plains and K Building were subcontractors working on a construction project at the John Deere Regional Facility in Olathe, Kansas. Great Plains and K Building had separate contracts with The Weitz Company (Weitz), the general contractor. K Building's employee, Spencer Plumb, operated an aerial lift despite not having an aerial lift certification and not fully inspecting the lift before operating it. While Plumb operated the lift, it tipped over. The K Building employee in the lift bucket, Philip Andrew Trokey, suffered injuries including a fractured femur, hip,

ribs, multiple fractures to vertebrae, and a traumatic brain injury. Trokey sued the aerial lift's owner, Great Plains, in Jackson County, Missouri. His claims against Great Plains were: (1) supplying a dangerous chattel or product, (2) failure to warn, and (3) general negligence.

K Building's contract with Weitz instructed K Building to use the aerial lift owned by Great Plains. K Building agreed that it would be responsible for the safe operation of the aerial lift as follows: "Man lifts and scaffold will be provided by others for use by [K Building]. [K Building] is responsible for the safe operation of equipment and also responsible for repair costs for damages caused while operating the equipment." Under the contract, K Building also "agrees and acknowledges that it has assumed full responsibility and liability for safety precautions in connection with the construction means, methods, techniques, sequences, supervision and procedures pertaining to [K Building's] Work." K Building also agreed to the following: "No [K Building] employee shall operate any equipment unless specifically authorized and trained to do so." And K Building "shall take reasonable precautions (including, without limitation, providing any and all necessary training) for the safety of and should provide reasonable protection to prevent damage, injury, or loss to persons or property arising out of, relating to or in connection with its use of the Equipment."

During depositions, Weitz asserted that if K Building "broke it, caused damages, they were fully responsible for everything related to those damages, whether it be equipment or people or anything." After the incident which injured Trokey, K Building paid for the property damage to the aerial lift.

K Building's contract with Weitz also contained an indemnification provision, which read as follows:

"The undersigned Subcontractor or Supplier ('Subcontractor'), and for its officers, directors, members, employees, agents and assigns, in consideration for its use of equipment (including, but not limited to, scaffolding) ('Equipment') provided by Contractor or others, hereby releases, waives and discharges Contractor and the Project Owner, and each of their respective affiliates, agents, officers, employees, insurers, sureties and other subcontractors and suppliers (collec-

tively, the 'Released Parties') from any and all claims, losses, costs including attorneys' fees, damages, injury, death, expenses, and liability arising out of, relating to or in connection with the Subcontractor's use of the Equipment. Subcontractor further agrees, to the maximum extent allowed by applicable law, to defend, indemnify, and hold harmless the Released Parties from any and all claims by whomsoever made, losses, costs including attorneys' fees, damages, injury, death, expenses, and liability arising out of, relating to or in connection with any acts or omissions of, or use of the Equipment by, the Subcontractor or the Subcontractor's Agents, servants or employees, and regardless of the active or passive negligence or contribution by the Released Parties. The Subcontractor represents and affirms that it has or has caused the Equipment to be fully inspected and acknowledges that the Equipment is in good and safe operating condition and repair and accepts the Equipment in its present condition and repair including latent or hidden defects, if any. . . . In the event any portion of this release and indemnity is held to be invalid, it shall be interpreted so as to allow the fullest release and indemnity permitted by law."

Trokey filed his petition for damages in Jackson County, Missouri. In the Missouri lawsuit, Trokey alleged that Great Plains was negligent for providing a lift with a flat tire because the lift tilted toward the flat tire, causing it to tip over. Specifically, Trokey alleged that Great Plains was negligent in the following ways:

"a. In failing to fix the underinflated tire on the Lift;
"b. In failing to warn [Trokey] that the Lift was dangerous and defective in its current condition;
"c. In failing to properly maintain the Lift;
"d. In failing to properly repair the Lift despite knowing of a dangerous condition;
"e. In representing that the Lift was safe for use;
"f. In failing to properly inspect the Lift;
"g. In failing to properly supply the Lift in a safe condition;
"h. In affirmatively claiming that the Lift was safe for use;
"i. In supplying the Lift to an operator that was unqualified to operate the Lift."

Trokey's Missouri lawsuit also included claims against Plumb for negligently operating the lift without training, but Trokey dismissed those claims with prejudice.

Great Plains filed a third-party petition against K Building and Weitz in the Missouri lawsuit, asserting claims of indemnification and contribution. But then Great Plains voluntarily dismissed its claims against K Building and Weitz without prejudice. Nothing

in the record explains why Great Plains dismissed its claims against K Building and Weitz.

Great Plains settled with Trokey in October 2019.

While the Missouri lawsuit was ongoing, Great Plains filed a petition against K Building in Johnson County, Kansas, alleging breach of contract and seeking a declaratory judgment. Great Plains' second amended petition added claims for contractual indemnity, comparative implied indemnity, and contribution. Great Plains and K Building filed cross-motions for summary judgment, and the trial court granted summary judgment to K Building.

Great Plains timely appeals.

ANALYSIS

Did the contract's indemnity clause violate Kansas' anti-indemnity statute?

Great Plains argues that the trial court erred in holding that the indemnification provision violated the Kansas anti-indemnity statute. Although Great Plains is correct and the provision is valid, it is largely irrelevant. The one-action rule, not the Kansas anti-indemnity statute, prevents Great Plains from prevailing here.

An appellate court exercises unlimited review over the interpretation and legal effect of written instruments and is not bound by the lower court's interpretations or rulings. Whether a written instrument is ambiguous is a question of law subject to de novo review. *Trear v. Chamberlain*, 308 Kan. 932, 936, 425 P.3d 297 (2018).

If the relevant facts before the trial court were undisputed, fact questions may be resolved by the appellate court de novo. *Simpson v. City of Topeka*, 53 Kan. App. 2d 61, 68, 383 P.3d 165 (2016) (whether a party has defaulted on a contractual obligation is reviewed de novo if the relevant facts are undisputed); *First Nat'l Bank of Omaha v. Centennial Park*, 48 Kan. App. 2d 714, 725, 729-30, 303 P.3d 705 (2013) (whether a party has substantially performed under the contract or whether the implied duty of good faith and fair dealing was violated are reviewed de novo if underlying facts are undisputed); *Inter-Americas Ins. Corp. v. Imaging Solutions Co.*, 39 Kan. App. 2d 875, 885-86, 185 P.3d 963

(2008) (interpreting reasonable time provisions of UCC contract is a question of fact but becomes a question of law when facts are not in dispute).

Contracts are presumed legal. The burden lies on the party challenging the contract to prove it is illegal. *Frazier v. Goudschaal*, 296 Kan. 730, 749, 295 P.3d 542 (2013) (co-parenting agreement); *National Bank of Andover v. Kansas Bankers Surety Co.*, 290 Kan. 247, 257, 225 P.3d 707 (2010) (bankers surety bond).

The primary rule for interpreting written contracts is to ascertain the parties' intent. If the terms of the contract are clear, the parties' intent should be determined from the language of the contract without applying rules of construction. *Trear*, 308 Kan. at 936; see *Schmitendorf v. Taylor*, 58 Kan. App. 2d 292, 302, 468 P.3d 796 (2020).

Additionally,

"'"[a]n interpretation of a contractual provision should not be reached merely by isolating one particular sentence or provision, but by construing and considering the entire instrument from its four corners. The law favors reasonable interpretations, and results which vitiate the purpose of the terms of the agreement to an absurdity should be avoided."' [Citations omitted.]" *Waste Connections of Kansas, Inc. v. Ritchie Corp.*, 296 Kan. 943, 963, 298 P.3d 250 (2013).

"'It is the duty of courts to sustain the legality of contracts in whole or in part when fairly entered into, if reasonably possible to do so, rather than to seek loopholes and technical legal grounds for defeating their intended purpose. . . . [T]he paramount public policy is that freedom to contract is not to be interfered with lightly.' [Citations omitted.]" *Idbeis v. Wichita Surgical Specialists, P.A.*, 279 Kan. 755, 770, 112 P.3d 81 (2005).

See *Wasinger v. Roman Catholic Diocese of Salina*, 55 Kan. App. 2d 77, 80, 407 P.3d 665 (2017).

"'In placing a construction on a written instrument, reasonable rather than unreasonable interpretations are favored by the law. Results which vitiate the purpose or reduce the terms of the contract to an absurdity should be avoided. The meaning of a contract should always be ascertained by a consideration of all pertinent provisions and never be determined by critical analysis of a single or isolated provision.' [Citations omitted.]" *Einsel v. Einsel*, 304 Kan. 567, 581, 374 P.3d 612 (2016).

See *In re Marriage of Gerleman*, 56 Kan. App. 2d 578, 588-89, 435 P.3d 552 (2018).

Under K.S.A. 2020 Supp. 16-121(b), "[a]n indemnification provision in a contract which requires the promisor to indemnify the promisee for the promisee's negligence or intentional acts or omissions is against public policy and is void and unenforceable."

Great Plains argues that the trial court erred by holding that the contract's indemnification provision was void and unenforceable. The trial court held that Great Plains was a third-party beneficiary to the contract between K Building and Weitz. K Building does not appeal this decision. The trial court also held that the contract was a "construction contract" so that K.S.A. 2020 Supp. 16-121 applies, and both parties agree. Thus, the sole disputed issue is whether the promisor, K Building, agreed to indemnify the promisee, Great Plains, for Great Plains' own negligence.

K Building claims that the indemnification provision promises too much, making it unenforceable. Again, section 0.5.21 of K Building's contract with Weitz states as follows:

"The undersigned Subcontractor or Supplier ('Subcontractor'), and for its officers, directors, members, employees, agents and assigns, in consideration for its use of equipment (including, but not limited to, scaffolding) ('Equipment') provided by Contractor or others, hereby releases, waives and discharges Contractor and the Project Owner, and each of their respective affiliates, agents, officers, employees, insurers, sureties *and other subcontractors and suppliers* (collectively, the 'Released Parties') from any and all claims, losses, costs including attorneys' fees, damages, injury, death, expenses, and liability arising out of, relating to or in connection with the Subcontractor's use of the Equipment. Subcontractor further agrees, *to the maximum extent allowed by applicable law*, to defend, indemnify, and hold harmless the Released Parties from any and all claims by whomsoever made, losses, costs including attorneys' fees, damages, injury, death, expenses, and liability arising out of, relating to or *in connection with any acts or omissions of, or use of the Equipment by, the Subcontractor or the Subcontractor's Agents, servants or employees, and regardless of the active or passive negligence or contribution by the Released Parties*. The Subcontractor represents and affirms that it has or has caused the Equipment to be fully inspected and acknowledges that the Equipment is in good and safe operating condition and repair and accepts the Equipment in its present condition and repair including latent or hidden defects, if any. . . . *In the event any portion of this release and indemnity is held to be invalid, it shall be interpreted so as to allow the fullest release and indemnity permitted by law*." (Emphases added.)

K Building argues that Weitz, the general contractor, was trying to obtain the broadest indemnity possible from K Building,

which ultimately violated the Kansas anti-indemnity statute, K.S.A. 2020 Supp.16-121(b). It asserts that K Building would have to indemnify all released parties from any claims arising from use of the equipment, no matter who was at fault. K Building contends that the contract would require it to indemnify Great Plains even if an accident occurred with the lift and K Building operated the lift perfectly. For example, Great Plains could be entirely at fault by failing to maintain the lift and parking it in a dangerous location, causing the accident. In that event, K Building argues that it would still be liable because the accident arose out of its "use of the Equipment" and the indemnification provision applies "regardless of the active or passive negligence or contribution by" Great Plains.

While K Building's reading of the contract language is correct, Great Plains counters with two arguments. One has merit and the other does not. Great Plains' meritless argument is that the phrase "arising out of, relating to or in connection with any acts or omissions of [K Building]" has a causative meaning. Great Plains asserts that the phrase signals that the indemnification provision is only triggered if K Building's actions or inactions cause injury. This argument is unpersuasive. The phrase is *not* causative in meaning and, furthermore, this reading is belied by the later expression "regardless of the active or passive negligence" of other parties. The language makes clear that K Building is responsible, no matter who is at fault. If the analysis stopped there, the provision would violate K.S.A. 2020 Supp. 16-121(b).

But, as Great Plains correctly points out, the provision contains two clauses which Great Plains calls "safe harbor" clauses. First, K Building "further agrees, *to the maximum extent allowed by applicable law*, to defend, indemnify, and hold harmless" Great Plains. Second, the provision ends by stating that if it is invalid, then the indemnification provision "shall be interpreted so as to allow the fullest release and indemnity permitted by law." Thus, this contract provision, when read in conjunction with K.S.A. 2020 Supp. 16-121(b), limits K Building's indemnity obligations.

The contract is clearly a multi-state contract. For example, section 8.4.1 specifies that it applies to projects located in the State of Arizona. Section 8.4.1(b) states that it, and not subsections

8.4.1(a), (c)-(f), applies to projects in the State of California. Section 8.4.1(f) applies in several jurisdictions, including Kansas. With this in mind, other provisions such as the one at issue here, section 0.5.21, were drafted with the knowledge that they will apply to different projects across different jurisdictions. In jurisdictions with no anti-indemnity statutes, K Building's liability may be larger, requiring it to indemnify released parties even when K Building was not negligent. But the safe harbor provisions allow K Building's liability to shrink to fit applicable law. Because Kansas law does not allow K Building to indemnify Great Plains for Great Plains' negligence, K Building's obligation is limited to indemnifying its own negligence. See *St. Paul Surplus Lines Insurance Co. v. International Playtex, Inc.*, 245 Kan. 258, 274, 777 P.2d 1259 (1989) (holding that the express terms of an insurance contract did not cover punitive damages because it insured punitive damages "to the maximum extent allowed by law" and Kansas law prohibited insurance on punitive damages).

Thus, K.S.A. 2020 Supp. 16-121(b) does not render the indemnification provision void and unenforceable. Instead, the language of the contract caps K Building's liability at the statutory limit. K Building's liability can only extend as far as its own share of negligence in the underlying tort.

At oral argument, Great Plains took care to note that it had a tort claim and a contract claim. Great Plains argued that K Building, as a joint tortfeasor, had an obligation to pay for its share of negligence under comparative implied indemnity. And Great Plains further argued that K Building, as a contracting party, had an obligation to pay beneficiaries for its share of negligence under the contract's indemnification provision. But this is a distinction without a difference. Whether K Building would owe because of a negligence tort or because of a contractual obligation, a fact-finder must still determine K Building's share of negligence.

The difficulty Great Plains has with its contractual indemnification claim is that it cannot show the extent of negligence which K Building has indemnity liability for. No determination of liability exists, so Great Plains is asking for a remand to determine each

tortfeasor's share of liability. But the one-action rule bars this court from granting the requested relief.

Is Great Plains barred from recovery under the one-action rule?

Great Plains and K Building miss the trees for the forest. That is, they argue a mass of unresolved and overlapping issues. But focusing on each issue individually shows that one is both dispositive and simple. Great Plains cannot prevail on indemnification in this suit because the one-action rule bars its recovery. Because the trial court was right for the wrong reasons, we affirm its grant of summary judgment to K Building.

The principles of the summary judgment rule have been outlined as follows:

> "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. [Citation omitted.]" *GFTLenexa, LLC v. City of Lenexa*, 310 Kan. 976, 981-82, 453 P.3d 304 (2019).

If a trial court reaches the correct result, its decision will be upheld even though it relied on the wrong ground or assigned erroneous reasons for its decision. See *Gannon v. State*, 302 Kan. 739, 744, 357 P.3d 873 (2015).

Great Plains argues in its brief that it has properly asserted a tort claim of comparative implied indemnity. But Great Plains cannot recover on its claim. It comes down to this:

> "'[D]efendants seeking to minimize their liability in comparative fault situations not involving a chain of distribution or similar commercial relationship [must] do so by comparing the fault of other defendants in order to reduce their own share of liability and damages. If a defendant chooses to settle and obtain release of common liabilities involving other parties whom the plaintiff did not sue, the defendant does not have an action for comparative implied indemnity or post-settlement contribution. This holding recognizes that under Kansas comparative

fault procedure such a remedy is not necessary, and further recognizes that such an action defeats the policy of judicial economy, multiplying the proceedings from a single accident or injury.'" *Dodge City Implement, Inc. v. Board of Barber County Comm'rs*, 288 Kan. 619, 637, 205 P.3d 1265 (2009) (quoting and endorsing *Dodge City Implement, Inc. v. Board of Barber County Comm'rs*, 38 Kan. App. 2d 348, 363, 165 P.3d 1060 [2007]).

This requirement, called the "one-action rule," traces its origin to Kansas' adoption of comparative negligence. See *Dodge City Implement, Inc.*, 288 Kan. at 625, 629. In 1974, the Kansas Legislature implemented K.S.A. 60-258a, abolishing joint and several liability and replacing it with comparative liability, in which each tortfeasor bears a loss in proportion to its share of the total fault. K.S.A. 2020 Supp. 60-258a(d); *Brown v. Keill*, 224 Kan. 195, 203-04, 580 P.2d 867 (1978).

The joinder provision at K.S.A. 2020 Supp. 60-258a(c) reads as follows:

"*Joining additional parties.* On motion of any party against whom a claim is asserted for negligence resulting in death, personal injury, property damage or economic loss, any other person whose causal negligence is claimed to have contributed to the death, personal injury, property damage or economic loss, must be joined as an additional party."

The Legislature intended "to impose individual liability for damages based on the proportionate fault of all parties to the occurrence." *Brown*, 224 Kan. at 207.

To give effect to this legislative intent, our Supreme Court interpreted K.S.A. 60-258a(c) to require accounting for the liability of all tortfeasors, even those who might be immune, unknown, or unavailable. See *Dodge City Implement, Inc.*, 288 Kan. at 625. Our Supreme Court distinguishes between parties to the occurrence and parties to the litigation as follows:

"[W]e conclude the intent and purpose of the legislature in adopting K.S.A. 60-258a was to impose individual liability for damages based on the proportionate fault of all parties to the occurrence which gave rise to the injuries and damages even though one or more parties cannot be joined formally as a litigant or be held legally responsible for his or her proportionate fault." *Brown*, 224 Kan. at 207.

And when the parties are joined, tortfeasors must assert claims against each other in that action rather than file a separate action.

"[A]ll persons who are named as parties and who are properly served with summonses are bound by the percentage determination of causal negligence. Because the statute contemplates that each party has a right to cross-claim against any or all other parties to a lawsuit, . . . any party who fails to assert a claim against any other party in a comparative negligence action is forever barred. A corollary rule naturally follows that a person who has not been made a party to a comparative negligence case should not be bound by a judgment therein, even though his causal negligence may have been determined." *Eurich v. Alkire*, 224 Kan. 236, 238, 579 P.2d 1207 (1978).

In *Kennedy v. City of Sawyer*, 228 Kan. 439, 618 P.2d 788 (1980), cattle died from an herbicide which contained arsenic. The cattle owners sued the City of Sawyer and a city councilman for spraying the herbicide at the border of the city's land and the cattle pasture. The city and the councilman filed a third-party complaint against the herbicide's distributor who, in turn, sued the manufacturer. The trial court granted motions to dismiss the distributor and manufacturer.

The city and the councilman appealed the third-party dismissals. During the appeal process, the city settled with the cattle owners. The *Kennedy* court held that the city could recover from the distributor and manufacturer a portion of the settlement that the city had paid out. So the *Kennedy* court reversed the order dismissing the third parties, stating the following:

"Of course, to satisfy the legislative intent of encouraging resolution of all issues in a single action, the comparison of fault of all wrongdoers should be effected in the original action. *Eurich v. Alkire*, 224 Kan. 236, 579 P.2d 1207 (1978). It must be recognized that the procedural mechanism of K.S.A. 60-258a(c) exists to facilitate joinder (and hence comparison) of all potential wrongdoers and may supersede the third-party mechanism which formerly provided the only means for securing a consideration of the fault of a wrongdoer who plaintiff chose not to sue." 228 Kan. at 460.

The *Kennedy* court determined that the defendant/third-party plaintiff's claims against the joined tortfeasors could exist independently of the original claims. "The maintenance of a claim by plaintiff against a joined party is not a prerequisite to securing comparison." 228 Kan. at 460. But the *Kennedy* court maintained that a defendant had an obligation to assert its claims against third parties. The court held: "In the present case where the amount of

the damages were not fixed by judicial proceedings, but by compromise and settlement between plaintiff and defendants, it will be the duty of the defendants to bring into the action all tortfeasors against whom comparative liability through indemnity is sought." 228 Kan. at 460-61. By holding that the trial court erred in dismissing the third parties, the *Kennedy* court established that issues of liability and indemnity should all be decided in one action comparing fault.

But *Kennedy* suffered from an idiosyncrasy which makes it unique. See *Dodge City Implement, Inc.*, 288 Kan. at 628 (calling *Kennedy* "awkward" because it straddled across a statutory change). The comparative negligence statute, K.S.A. 60-258a, became effective in 1974. Even though the cattle in *Kennedy* died of arsenic poisoning in 1975, the change in the law was still relatively new. None of the parties mentioned comparative negligence in any pleading or during later arguments on motions. And the trial court dismissed the city's third-party indemnification claims based on principles set forth in *Russell v. Community Hospital Association, Inc.*, 199 Kan. 251, 428 P.2d 783 (1967). The trial court erred in applying *Russell* because it predated the statutory change. Thus, defendant City of Sawyer tried to join all tortfeasors but failed because the trial court (wrongly) dismissed the third parties. The *Kennedy* court had to remand for the third parties to be joined again.

Similarly, the parties here did not argue the one-action rule to the trial court. K Building's summary judgment motion argued that Great Plains did not state a valid claim for comparative implied indemnity. K Building even cited *Kennedy*. But the focus of K Building's argument was that Great Plains failed to show that the settlement paid by Great Plains had benefited K Building. Great Plains responded that it had a claim of comparative implied indemnity, also citing *Kennedy*. But the parties did not discuss whether such a claim must be brought in the original action or whether it can be asserted in a separate, second action. The trial court can hardly be faulted for failing to weigh an argument never presented to it. Nevertheless, the trial court would have been correct to grant summary judgment based on the one-action rule.

The one-action rule arose again a year after *Kennedy*, but without the question of third-party defendants. Instead, a plaintiff tried to bring an action twice. Glynn Albertson won a lawsuit against another driver for injuries that Albertson suffered in a car accident. After the judgment was satisfied, Albertson filed a second suit against Volkswagenwerk Aktiengesellschaft (Volkswagen) in federal court, alleging injuries and damages caused by a defective product but arising from the same collision. In *Albertson v. Volkswagenwerk Aktiengesellschaft*, 230 Kan. 368, 369, 634 P.2d 1127 (1981), our Supreme Court answered the following certified question from the federal court:

"'Having once obtained a satisfied judgment for a portion of his injuries in a comparative negligence action, may a plaintiff bring an action to recover damages for the remaining portion of his injuries against a defendant not a party to the first action, such second action being based on strict liability in tort?'"

The *Albertson* court answered with a firm "no" when it stated the following:

"The action is over. Volkswagen could have been sued in state court but plaintiff chose not to join the corporation for strategic reasons. Albertson is bound by that decision. Under the doctrine of comparative fault all parties to an occurrence must have their fault determined in one action, even though some parties cannot be formally joined or held legally responsible. Those not joined as parties or for determination of fault escape liability." 230 Kan. at 374.

This court and our Supreme Court have cited the one-action rule as originating with *Albertson*. See *Mick v. Mani*, 244 Kan. 81, 90, 766 P.2d 147 (1988); *Tersiner v. Gretencord*, 17 Kan. App. 2d 551, 553, 840 P.2d 544 (1992). But *Albertson* itself is of limited value here because it is procedurally different. Albertson, as the injured party, was the plaintiff in the first suit against the other driver. Then, Albertson was again the plaintiff in his suit against defendant Volkswagen.

Trokey, the injured party, is not part of this suit. Instead, the defendant in the original negligence suit, Great Plains, now asserts a claim against another tortfeasor. Therefore, one-action rule cases which are most helpful for review here are the cases involving liable tortfeasors filing claims against other tortfeasors.

Union Pacific Railroad Company (Union Pacific) filed third-party claims in *Ellis v. Union Pacific R.R. Co.*, 231 Kan. 182, 643

P.2d 158 (1982). An automobile-train collision killed three occupants of the automobile and injured the driver. In the ensuing action for damages, defendant Union Pacific joined the City of Onaga, Mill Creek Township, and Pottawatomie County, asserting that expert conclusions showed possible liability from these government entities. The plaintiffs did not assert any claims against these governmental third-party defendants. These defendants argued that they were joined solely for determination of fault. The trial court agreed, finding that no one in the lawsuit sought recovery of monetary damages from the government entities. This lack of monetary damages is key to understanding the *Ellis* court's ruling.

After Union Pacific settled with the plaintiffs, it sought comparative implied indemnity or contribution against the government defendants. The *Ellis* court clarified that the correct term for the action is postsettlement contribution. 231 Kan. at 184. The *Ellis* court ruled that the government entities would not have settled or contributed to a settlement because they had no liability in the suit. Neither the plaintiff nor the defendant/third-party plaintiff had sought monetary damages against these third-party defendants. "The settling defendant cannot, however, create liability where there is none." 231 Kan. at 192. Union Pacific could not seek contribution for settling a claim on behalf of the government entities because no one in the suit could have recovered from those entities.

Similarly, the defendant railroad in *Gaulden v. Burlington Northern, Inc.*, 232 Kan. 205, 654 P.2d 383 (1982), asserted a claim against another tortfeasor. Sylvester Gaulden injured his right knee in a crossing accident when he jumped clear to avoid being struck by a pickup truck. Gaulden brought an action in damages against the railroad and the pickup truck driver. The railroad asserted a cross-claim against the driver. Gaulden settled his claim with the driver, but the railroad did not settle its cross-claim with the driver.

The *Gaulden* court held that the trial court erred in dismissing the railroad's cross-claim. Instead, it should have submitted the driver's fault to the jury. The *Gaulden* court held as follows:

"[T]he causal fault or negligence of all parties, including the contributory negligence of the plaintiff and the negligence of the carrier and any third parties, should be submitted to the jury and the percentage fault of each determined in one lawsuit." 232 Kan. at 214. The right to seek contribution or comparative implied indemnity "does not depend upon whether a claim is asserted against the third party by the injured employee." 232 Kan. at 214. That is, one tortfeasor is not at the mercy of the plaintiff's choice of defendants. Instead, K.S.A. 2020 Supp. 60-258a allows defendants to join additional tortfeasors. In fact, the *Gaulden* court phrased it as a requirement:

"In order to assert its right against a third party, a carrier must bring the third party into the lawsuit, by means of K.S.A. 60-258a(c) or otherwise (if the third party is not already in the lawsuit), and must assert a claim for contribution or 'comparative implied indemnity' against the third party before the running of the statute of limitations, so that the third party will be aware that he or she may be subjected to monetary liability and can appear and defend against such claim. Mere joinder of a third party under K.S.A. 60-258a(c) is not enough, as pointed out in *Ellis*; in addition to joinder, a claim must be asserted against the third party." 232 Kan. at 214.

And defendant Teepak, Inc. sought postsettlement contribution when a sausage casing made by Teepak obstructed Carl Baise's small intestine. *Teepak, Inc. v. Learned*, 237 Kan. 320, 699 P.2d 35 (1985). Baise sought medical treatment and Dr. George Learned performed surgery, removing two-thirds of Baise's small intestine. Baise sued Teepak for its faulty sausage in the United States District Court for the Western District of Missouri and Teepak settled. Teepak sought indemnity against Dr. Learned in Kansas, alleging medical malpractice.

Teepak encountered the same problem that Union Pacific had in *Ellis*. It could not create liability where there was none. Baise had never asserted a medical malpractice claim against Dr. Learned, so Dr. Learned had no liability to the original plaintiff. And Teepak served a third-party complaint against Dr. Learned but settled before he filed an answer. The *Teepak* court stated the legal issue before it twice, back-to-back. Although a bit redundant, the court's precise wording is useful for analyzing Great Plains' claim here:

"The basic question before us may be stated in general terms as follows: Whether or not, under the principles of comparative negligence, a defendant tortfeasor causing the initial injury to the plaintiff may settle with the injured plaintiff *and then* seek indemnification, or contribution, *in a separate action*, from another person whom the tortfeasor contends is a 'subsequent' tortfeasor causing part of the injured party's damages even though the injured party never asserted a claim against the 'subsequent' tortfeasor.

"In specific terms the question may be stated as follows: Whether or not the Kansas law of comparative negligence permits a tortfeasor causing physical injury to a person to settle with the injured person *and then* proceed against a physician whom the tortfeasor (but not the injured party) claims added to the injured party's damages through negligent treatment of the injured party." (Emphases added.) 237 Kan. at 322.

The *Teepak* court held that Teepak's procedural choices barred it from recovery. "Teepak could have brought Dr. Learned into the action as a party whose negligence should be compared with that of Teepak . . . ." 237 Kan. at 325. But Dr. Learned's liability was not at issue in the underlying case when Teepak settled with Baise. The *Teepak* court held that this put Dr. Learned in the same position as the government entities in *Ellis*—no judgment for monetary damages was possible so postsettlement contribution was not possible either.

The *Teepak* court noted a difference between Teepak's claim and the original 1980 case to coin the term comparative implied indemnity, *Kennedy*. The sausage manufacturer had no relationship with the doctor who removed the sausage casing from the patient. But in *Kennedy*, the herbicide manufacturer and the distributor did have a relationship. "Indemnification among those in the chain of distribution arises out of their contractual relationship with each other and *Kennedy* must be read in the context of its factual situation." 237 Kan. at 328. The *Teepak* court felt that the term of "joint tortfeasors" in *Kennedy* did not adequately capture this relationship because it omitted any concept of contractual obligations.

Read in isolation, the *Teepak* court's statement might imply that contracting parties need not follow the one-action rule. Instead, they could maintain indemnification as a separate action. But it is not so. "[K.S.A. 60-258a] comprehensively provides machinery for drawing *all* possible parties into a lawsuit to fully and

finally litigate *all* issues and liability arising out of a single collision or occurrence . . . . " (Emphases added.) *Eurich*, 224 Kan. at 237. "It was the intent of the legislature to fully and finally litigate in a single action *all* causes of actions and claims for damages arising out of any act of negligence." (Emphasis added.) *Mathis v. TG & Y*, 242 Kan. 789, Syl. ¶ 2, 751 P.2d 136 (1988).

The *Kennedy* court remanded for a determination of comparative negligence in a single action, whether the parties were merely joint tortfeasors or owed each other contractual indemnification duties. When a contract requires one party to indemnify another for its share of negligence, the underlying tort controls the party's liability. It becomes impossible to determine the extent of the breaching party's contractual liability without also determining its liability in the negligence action. For this reason, the one-action rule applies to all cases comparing fault, whether the action is in tort or in contract, as in *Kennedy*.

The defendant's responsibility to join third-party tortfeasors came up again in *Mathis*. A loose door closure hit the plaintiff on the head as he was leaving a TG & Y store in Wichita. TG & Y stated that it intended to compare its negligence with the negligence of its landlord and a door repair company. But there was some confusion about who the landlord was and who was responsible for the door. Initially, the plaintiff added claims against Jacobs Construction Co., Inc. and G. & J. Investments, Inc. as landlords and Hopper's Mirror and Glass, Inc. for its repair work on the door. When the plaintiff discovered that the actual landlord, Vernon Jacobs, had hired Cheney Door Company, Inc. to maintain the doors, he filed a new suit against Jacobs and Cheney Door Company.

After dismissals in the original suit, TG & Y remained the only defendant. But TG & Y did not join the new defendants of the new suit to compare their fault. Instead, after the second case settled, TG & Y moved to dismiss the original case. TG & Y argued that the plaintiff had split his cause of action by suing the store in one case and the store's landlord and door repairer in a second case. TG & Y claimed that the plaintiff violated the one-action rule. The *Mathis* court ruled that it was in fact TG & Y's

responsibility to join tortfeasors to the action. The *Mathis* court stated the one-action rule as follows:

"K.S.A. 60-258a allows all possible parties to be brought into a single lawsuit, to fully and finally litigate all issues and liability arising out of a single occurrence, and to apportion the amount of total damages among those parties against whom negligence is attributable in proportion to each party's degree of fault. All who are named as parties and who are properly served with summonses are bound by the adjudication of the percentage of causal negligence. Because each party has a right to cross-claim against any or all other parties to the lawsuit, any party who fails to assert a claim against any other party in a comparative negligence action is forever barred." 242 Kan. at 791.

The *Mathis* court explained that because the plaintiff settled with or dismissed the defendants in the second suit, those defendants were no longer responsible to the plaintiff. But their percentage of fault could still be determined in the original suit. The *Mathis* court remanded so that the plaintiff could pursue his claim against TG & Y. In doing so, the *Mathis* court reminded TG & Y that it could join other defendants for the purpose of comparing negligence at trial. 242 Kan. at 794.

This court succinctly summarized the central premise of the one-action rule in *Schaefer v. Horizon Building Corp.*, 26 Kan. App. 2d 401, 985 P.2d 723 (1999):

"In order to prevail on a claim for partial indemnity or contribution against a third-party defendant, the settlor must show it actually paid damages on behalf of that third party. If the third party was never at risk of having to pay for its own damages, the settlor cannot show it benefited the third-party defendant, and the value of its contribution claim is zero." 26 Kan. App. 2d 401, Syl. ¶ 2.

Thomas R. and Lisa Ann Schaefer sued housing development Horizon Building Corporation (Horizon) after noticing problems with settling in the structure of their house. Horizon sought comparative implied indemnity against building contractor The Holland Corporation, Inc. (Holland). The *Schaefer* court held that Horizon had no claim because Holland was not a named party or at risk of suit when Horizon settled with the homeowners:

"As a result, Holland was not exposed to liability, and Horizon has not shown that any portion of its settlement expense is attributable to Holland. Further, Horizon has refused to explain why joinder under K.S.A. 60-258a was not available, which would have protected Horizon without exposing Holland to more liability than it faced in the original action. [Citation omitted.]" 26 Kan. App. 2d at 403-04.

The case most like Great Plains' claim here is *Dodge City Implement, Inc*. A collision between a Burlington Northern and Santa Fe Freight (BNSF) train and a truck owned by Dodge City Implement, Inc. (DCI) led BNSF to sue DCI in the United States District Court for the District of Kansas. DCI settled with BNSF and the federal case was dismissed. DCI then filed a second action in Kansas against defendants Barber County and Moore Township under negligence and implied indemnity theories because of an alleged failure to construct and maintain a safe grade crossing.

Our Supreme Court held that under the one-action rule, DCI could not bring a comparative implied indemnity claim against the township and county after settling the railroad's lawsuit when the township and county were not parties to the lawsuit. Such actions would defeat the policy of judicial economy, multiplying the proceedings from a single accident or injury. Our Supreme Court summarized its holding as follows:

"The fact that DCI and [its employee] chose to settle BNSF's claim did not entitle them to status as a clearing house for comparison of fault among potential tortfeasors. They were not entitled to bring a second action against the County and the Township, when the County and the Township had no involvement in the federal case." 288 Kan. at 637.

Finally, Great Plains cites the explanation of comparative implied indemnity from *Watco Companies, Inc. v. Campbell*, 52 Kan. App. 2d 602, 371 P.3d 360 (2016). Great Plains incorrectly claims that if settlement occurs before a timely comparative fault determination is made, then "'the settling tortfeasor may then and in that event file an action in court to have the degrees of responsibility among joint tortfeasors determined, damages assessed and apportionment decreed among them.'" 52 Kan. App. 2d at 611. But Great Plains misreads the *Watco* court's statement of the one-action rule. The *Watco* court held that if a tortfeasor settled before a "comparative negligence action *has been filed*," then the settling tortfeasor may file an action. (Emphasis added.) 52 Kan. App. 2d at 610-11. That is, if an injured party settles with a tortfeasor rather than filing a claim, then that tortfeasor may file a claim against other tortfeasors. Under this rule, either the injured party files an action or the settling tortfeasor files an action. Both scenarios preserve the one-action rule.

Significantly, the missing element in *Dodge City Implement, Inc.* was present in *Watco Companies, Inc*. The *Watco* court held that Watco Companies, Inc. (Watco) had preserved its claim for comparative implied indemnity. The *Watco* court would allow Watco to proceed precisely because it made a timely claim against the third-party defendants in the original negligence action. 52 Kan. App. 2d at 610-11, 614-16 (citing the one-action rule and holding that Watco complied with it, but ultimately ruling that Watco could not recover for separate reasons). The comparative fault of Watco and the third-party defendants was not determined in the original action because the federal court, in its discretion, declined to exercise supplemental jurisdiction over the claims. So, the difference between *Dodge City Implement, Inc.* and *Watco Companies, Inc.* is that DCI did not assert third-party claims in the original action, but Watco did assert its claims in the original action.

Before the trial court, K Building cited *Dodge City Implement, Inc.*, *Schaefer*, *Ellis*, and *Kennedy*. But its citations were in service of its argument that Great Plains had no valid claim of comparative implied indemnity, which would be a question appropriately answered in the original suit. Conversely, Great Plains cited *Kennedy*, *Ellis*, *Schaefer*, and *Watco Companies Inc*. But Great Plains did not anticipate the one-action rule and present arguments to the trial court for why it should not be applied. The parties had all the relevant precedents before them, but seemingly missed the issue. Again, the trial court can hardly be faulted for failing to consider an argument that the parties never raised.

In sum, Great Plains cannot settle a comparative negligence claim and then file a new action to litigate comparative negligence with entities not part of the original suit. Instead, the one-action rule required Great Plains to join tortfeasors to the original suit. This is true regardless of the reason for comparing negligence. In *Kennedy*, some parties had contractual relationships requiring indemnification. In more recent cases, parties had no relationship other than they each contributed to the same tort. But the relevant question is not whether an action derives from tort law or contract

law. The relevant question is whether the fact-finder must compare fault. If so, fault must be compared in one action. Because the one-action rule bars recovery here, we affirm the trial court as right for the wrong reasons.

Before turning to the next issue, it is important to discuss why the one-action rule applies here despite complications. Great Plains' weakest argument comes in its reply brief when it asserts that K Building could not have been a party to the underlying suit. In fact, Great Plains claims that K Building told the trial court that it could not have been a party because of workers compensation exclusivity. The record shows that this statement is imprecise. Trokey was K Building's employee, and Trokey could not assert a claim against K Building, which is what K Building told the trial court. But K Building could be part of the suit as a third-party defendant, even if Trokey could not make a claim directly against his employer. Great Plains' suggestion that K Building could not be a party to the original suit is counter to the law.

Great Plains itself provides the citations necessary to refute its argument. Great Plains argues that, when employees are barred from suing their employers for on-the-job injuries, employees can seek damages from a third party and the third party can seek indemnification damages from the employer. Kansas law enforces contractual indemnity obligations between employers and third parties. Great Plains gives the example of *Estate of Bryant v. All Temperature Insulation, Inc.*, 22 Kan. App. 2d 387, 916 P.2d 1294 (1996).

John R. Bryant was injured in a construction accident while employed by Foley Company (Foley). Bryant did not sue his employer Foley, but instead sued APAC-Kansas, Inc. (APAC), alleging negligent operation of a crane. APAC joined Foley as a third-party defendant, alleging that Foley was contractually bound to hold APAC harmless. The *Bryant* court held that Bryant, as a Foley employee, could not have recovered from Foley, but APAC could. The *Bryant* court held that workers compensation exclusive remedy provisions did not bar third-party claims against an employer when those claims were based on an express indemnification agreement. 22 Kan. App. 2d at 395-96.

In short, *Bryant* shows that Great Plains could have brought a claim against K Building in the original action, even if Trokey could not sue K Building. Great Plains also cites *McCleskey v. Noble Corp.*, 2 Kan. App. 2d 240, 244, 577 P.2d 830 (1978), for the holding that an employer can be liable to a third party if it has an independent contractual duty to that party. But Great Plains only succeeds in arguing against itself. The one-action rule bars Great Plains from bringing a second action to litigate comparative negligence against a tortfeasor not a party to the original action.

In *Bryant*, the liable tortfeasor brought its contractual indemnity claim against the employer in the original action. In *McCleskey*, the liable tortfeasor brought its indemnity claim against the employer in the original action. In neither case did the liable tortfeasor file a new action to assert its claim against the employer. *Bryant*, 22 Kan. App. 2d at 388; *McCleskey*, 2 Kan. App. 2d at 246 (affirming the trial court's decision to dismiss the employer "'except that [it] is to remain a party to this action in accordance with the provisions of K.S.A. 60-258a for the purpose of assessment, determination and comparison of the negligence attributable to the respective parties'"). As a result, the one-action rule did not arise in *Bryant* or *McCleskey* because there was only one action. If Great Plains was liable to Trokey, and K Building had to indemnify Great Plains for K Building's share of negligence, then all such claims should have been determined in one action through adjudication or settlement. In its briefs, Great Plains provided no legal reason it could not bring its claims against K Building in the original action.

But at oral argument, Great Plains stated without citation that Missouri cases have reached a different outcome from the Kansas cases *Bryant* and *McCleskey*. Great Plains told the court that it dismissed the claims against K Building because Missouri courts have interpreted workers compensation exclusivity as barring a suit from the injured employee, like Trokey, and also third parties, like Great Plains. Thus, any claims that Great Plains took to trial against K Building would be defeated by workers compensation exclusivity. Assuming that this uncited difference between Kansas and Missouri law is correct, then Great Plains' recourse is to the

Missouri Court of Appeals and potentially the Missouri Supreme Court. Instead, Great Plains, a Missouri corporation sued in its home state, predicted an unfavorable outcome and sought refuge under the more favorable law of a neighboring state.

But Kansas' one-action rule discourages multiplying proceedings from a single occurrence even across jurisdictions. In *Mick*, our Supreme Court explained that the one-action rule is statutory at its heart. "The one-action rule is not an extension of the doctrine of res judicata but the result of legislation. In *Eurich*, we held that by the enactment of [K.S.A.] 60-258a the legislature intended that henceforth all negligence claims arising out of one occurrence must be determined in one action." 244 Kan. at 95. Despite the rule arising from a Kansas statute, application of the rule is not limited to Kansas cases. That is, the rule bars filing a second action in Kansas even when the first action was in another jurisdiction. In *Dodge City Implement, Inc.*, the original action was in the United States District Court for the District of Kansas. 288 Kan. at 621. In *Teepak*, the original action was in the United States District Court for the Western District of Missouri. 237 Kan. at 321. In both cases, the settling defendant could not file a new claim in Kansas against a tortfeasor not subject to liability in the original case.

But the one-action rule does not demand the impossible. If a plaintiff cannot bring all tortfeasors into the original action, then a new claim can be filed in Kansas. In *Anderson v. Scheffler*, 242 Kan. 857, 752 P.2d 667 (1988), our Supreme Court allowed a plaintiff to maintain a second suit. Jacob Anderson, age 19, was pouring poultry meal into an auger pit at Badger By-Products (Badger), a division of Beatrice Companies, Inc. (Beatrice). Anderson's leg slipped through the grate into the pit, where the auger severed his leg above the knee. Anderson sued Badger for his amputated leg. Because Anderson was a Missouri resident, Badger successfully removed the case to federal court on diversity jurisdiction. Anderson moved to amend his petition to join additional defendants including Beatrice and the Missouri company that sold the auger to Badger, Industrial Bearing and Transmission Company, Inc. (IBT). Anderson also moved to remand the case to state court. The federal trial court denied Anderson's motion to add IBT

as a defendant because to do so would destroy diversity jurisdiction. The federal court allowed Anderson to add the other defendants and proceed with the case, which eventually settled. Our Supreme Court allowed Anderson to bring a second suit against IBT in Kansas because he "did everything he could to preserve his lawsuit against IBT and [its employee]." 242 Kan. at 865; see also *Rodina v. Castaneda*, 60 Kan. App. 2d 384, 391-92, 494 P.3d 172 (2021) (holding that a plaintiff who was unable to recover on a default judgment could bring a second suit against an additional tortfeasor because no judicial determination of fault was made in the original suit). But Great Plains has not shown that it was barred from joining K Building to the original suit legally.

Factually, Great Plains did join K Building to the original suit. Then Great Plains voluntarily dismissed its claims against K Building. After K Building was no longer part of the original action, Great Plains settled that original action with Trokey. Because Great Plains could have compared the fault of all tortfeasors in one action but chose not to, the one-action rule bars Great Plains from seeking to litigate comparative fault in a separate action, whether fault must be compared under tort law or to determine the extent of K Building's contractual indemnity liability.

Does public policy encourage this type of settlement?

Great Plains shows how important the one-action rule is when it argues that public policy encourages settlements. But Great Plains cites *Ellis*, among other cases, for this proposition. And the relevant language from *Ellis* is the following: "Settlements are favored in the law. The settling defendant cannot, however, create liability where there is none. [Citations omitted.]" 231 Kan. at 192. K Building could not have been liable in the original suit because Great Plains dismissed its claims against K Building.

Great Plains argues that summary judgment here will have a chilling effect on settlements. It asserts that parties will hesitate to settle any claims if they are barred from seeking indemnification from a party separately at fault for causing injury. But this discussion comes back to the trial court decision affirmed by the *Dodge*

City Implement, Inc. court. In that case, the trial court stated the following:

"'[T]he defendants herein were not named defendants or joined pursuant to K.S.A. 60-258a(c) in the previous federal lawsuit brought by Burlington Northern and Santa Fe Railway Co. and . . . it would be unfair to defendants herein to subject them to allegations of fault now that were not asserted in the federal case.'" 288 Kan. at 623.

The *Dodge City Implement, Inc.* court agreed with the trial court, saying that such an action would defeat the policy of judicial economy, multiplying the proceedings from a single accident or injury. 288 Kan. at 637. Great Plains could have brought, and did bring, all claims into a single proceeding. By dismissing its claims against K Building and filing the current action after it settled with Trokey, Great Plains multiplied the proceedings from a single accident or injury. And Great Plains does not explain why it did so in either its initial brief or its reply brief.

In sum, Great Plains negotiated a settlement at a time when K Building would have had no liability if the case had gone to trial. No action was pending against K Building, and it did not participate in settlement negotiations. Now Great Plains seeks postsettlement contribution from K Building based on K Building's share of liability. Great Plains also asserts that a genuine issue of fact exists on the relative negligence of Great Plains and K Building and seeks a remand to determine comparative negligence. Throughout its brief, Great Plains intimates that K Building's share of negligence could be as high as 100%, making K Building liable for the entire settlement amount. If Great Plains is correct, then Great Plains negotiated a settlement with K Building's money. Public policy does not encourage such settlements.

Did Great Plains seek indemnification for its own negligence?

Great Plains argues that the trial court was incorrect in saying that Great Plains seeks indemnification for its own negligence. Great Plains states that the settlement agreement did not contain an admission of liability and the trial court did not find that Great Plains was negligent or liable. K Building contends that a finding

of negligence is irrelevant because Great Plains was the only defendant when it settled with Trokey. Thus, according to K Building, the only issue resolved by the settlement was Great Plains' potential liability on Trokey's negligence claim.

Great Plains cannot evade a judicial determination of fault by settling in the original action, only to request a judicial determination of fault by filing a new action. The *Dodge City Implement, Inc.* court rejected a similar move from DCI, stating the following:

"'[A]s the one-action rule has evolved, the courts have seemingly developed a preference for permitting *plaintiffs* to pursue a second suit against defendants not party to the original action. . . . "[A] *plaintiff* may pursue separate actions against tortfeasors where there has been no judicial determination of comparative fault. Thus, the exceptions to the one-action rule arise when there has been no prior judicial determination of fault.'" (Emphasis added.)

"'. . . DCI cites no authority for its suggestion that this exception to the one-action rule may be extended to defendants.' [Citations omitted.]" 288 Kan. at 635-36 (quoting *Mick*, 244 Kan. at 93).

Great Plains similarly cites no authority for extending the one-action rule to defendants. Instead, Great Plains faults K Building for not pointing to any rule requiring Great Plains to bring all claims into Trokey's original negligence suit in Missouri. But the one-action rule, with its self-explanatory name, is the rule requiring Great Plains to bring all claims into the original action. By failing to bring its claims in the first suit, Great Plains triggered the one-action rule which bars it from bringing a second suit in Kansas. When 19-year-old Jacob Anderson could not join all potential tortfeasors for the loss of his leg, the *Anderson* court allowed him to bring a second suit against tortfeasors not in the original action. 242 Kan. at 865. When Curtis Rodina learned the identity of the dentist who had caused $85,000 in economic damages and $200,000 in noneconomic damages, the *Rodina* court allowed him to bring a second suit. 60 Kan. App. 2d at 391-92. In both cases, the plaintiffs were entitled to a judicial determination of comparative fault where there was no such determination in the original action. It is readily apparent that those plaintiffs would have suffered an injustice if the courts had barred them from seeking adequate recovery. But Great Plains fails to show that this exception should allow it to bring a second suit, particularly when it

brought and then voluntarily dismissed the same claims in the original suit. Simply put, Great Plains is not a good candidate for applying any exceptions to the one-action rule.

Also, Great Plains asserts that its right to indemnification would not begin to run until it became obligated by judgment or settlement to pay the original plaintiff. Great Plains cites *Barbara Oil Co. v. Kansas Gas Supply Corp.*, 250 Kan. 438, 456, 827 P.2d 24 (1992). But *Barbara Oil* involved the purchase and sale of natural gas, with plaintiffs claiming that the defendant breached "take or pay" contracts by not buying a minimum amount of gas. Comparative negligence was not at issue, which is the crux of the one-action rule. A fact-finder would need to determine K Building's comparative fault in Trokey's accident to determine its indemnity liability, making this case unlike *Barbara Oil*. Further, the *Barbara Oil* court stated when the statute of limitations would bar an indemnity claim, not when the right to indemnity would begin. Finally, Great Plains in fact did bring claims of indemnification and contribution against K Building in the original Missouri suit. Great Plains' brief fails to expand on its statement and does not explain how its indemnification claim would not have been ripe. Great Plains' argument is inadequately briefed. Issues not adequately briefed are deemed waived or abandoned. *In re Marriage of Williams*, 307 Kan. 960, 977, 417 P.3d 1033 (2018).

Great Plains claims that the effect of going to trial in Missouri as the only defendant was that it could be obliged to pay a judgment which included its own negligence, if any, and K Building's negligence, if any. Great Plains provides a long discussion of the difference between Kansas comparative fault and Missouri comparative fault. Great Plains includes select Missouri jury instructions in its brief and cites *Teeter v. Missouri Highway & Transp. Comm'n*, 891 S.W.2d 817, 821 (1995). Great Plains asserts that, in Missouri, fault is only apportioned between the parties at trial. Nonparties are excluded.

Great Plains is incorrect that the defendant in *Teeter* bore the burden of the full judgment because settlement credits reduced the judgment. In *Teeter*, parents brought a wrongful death suit after a car accident killed their daughter. Two defendants settled, leaving the Missouri Highway and Transportation Commission (MHTC)

as the only defendant. The jury returned a verdict of $500,000 and found MHTC to be 10% at fault. As described by Great Plains, this would mean that MHTC should be liable for $500,000.

But Great Plains omits an important point. MHTC received a credit for the settlement agreements of the other tortfeasors. Because they settled for $48,000, the judgment was reduced to $452,000. The *Teeter* court also noted that MHTC failed to protect its right to contribution from the tortfeasor who was 90% at fault. Missouri maintains contribution actions between jointly and severally liable tortfeasors, whereas Kansas claims of postsettlement contribution depend on comparative fault. The Missouri-style contribution claim died out in Kansas in 1974, with the shift to comparative fault. See *Kennedy*, 228 Kan. at 451 (holding that "contribution among *joint judgment debtors* is no longer needed . . . because separate individual judgments are to be entered"). MHTC went to trial as the only defendant because Missouri law allows "'alleged tort-feasors to buy their peace by good faith settlements with the claimant.'" 891 S.W.2d at 820 (quoting *Lowe v. Norfolk & Western Ry. Co.*, 753 S.W.2d 891, 892 [Mo. Banc 1988]). By settling, the tortfeasor 90% at fault had essentially removed the question of her fault from the suit. Thus, the *Teeter* court held that MHTC, as the lone defendant, was solely liable for the remaining judgment, after deducting the $48,000 from settlements. 891 S.W.2d at 821 (holding that MHTC would pay the full $452,000 if it was an ordinary defendant, but a statutory cap on damages limited the judgment to $100,000).

The distinction between settling and nonsettling tortfeasors was key to the *Teeter* court's reasoning. The United States District Court for the Western District of Missouri explained the distinction in *Millentree v. Tent Restaurant Operations, Inc.*, 618 F. Supp. 2d 1072 (W.D. Mo. 2009). William Travis Stoner left a bar in Independence, Missouri, and hit Leon Millentree with his pickup truck in the bar's parking lot. Millentree sued Stoner for his injuries and sued the bar for serving a visibly intoxicated Stoner in violation of Missouri's dram shop laws. Stoner settled and Millentree proceeded with his claim against the bar.

The bar sought to have Stoner joined as a third-party defendant, arguing that the most efficient way to allocate fault to Stoner would be to permit the jury to find his percentage of fault without adding him as a liable party. The *Millentree* court reviewed *Teeter* and concluded that Missouri law prohibits Stoner from being joined as a defendant, even if only to compare his fault. 618 F. Supp. 2d at 1074-75; see also *Beverly v. Hudak*, 545 S.W.3d 864, 876 (Mo. App. 2018) (holding that fault is only apportioned among those at trial). Stoner had "bought his peace" and was dismissed from the action for all purposes, including allocation of fault, because he had settled with Millentree.

The rule that Great Plains points to is that Missouri juries will not compare the fault of tortfeasors who are not defendants *because they settled*. In Missouri, settling defendants are shielded from any further action by statute. Here, K Building was not a defendant or third-party defendant. But K Building's absence was because the claims were dismissed, not because K Building settled. Great Plains fails to provide caselaw which addresses tortfeasors who are not parties for reasons other than settlement, such as unknown or unavailable tortfeasors. Great Plains' argument simply fails to address the question.

Instead, Great Plains provides two Missouri cases favoring indemnity claims. In *Howe v. Lever Brothers Co.*, 851 S.W.2d 769 (Mo. App. 1993), a worker injured in a fall sued the general contractor and the property owner. The general contractor sued the worker's employer, its subcontractor. The Missouri Court of Appeals held that the indemnity claims were proper. 851 S.W.2d at 773. In *Lone Star Indus., Inc. v. Howell Trucking, Inc.*, 199 S.W.3d 900 (Mo. App. 2006), after a worker was killed in Lone Star's quarry, Lone Star settled with his widow. Lone Star sought indemnification damages from Howell Trucking as a joint tortfeasor. The Missouri Court of Appeals allowed Lone Star's indemnity suit to proceed, holding that an indemnity claim is separate and distinct from the tort claim and may be brought as either a third-party claim or a separate suit. 199 S.W.3d at 907. But Great Plains' citations do little to support its arguments. *Howe* reinforces the one-action rule since all actions were brought in the original suit.

The *Lone Star* court's statement that an indemnity suit for negligence may be brought separately represents a difference between Kansas and Missouri law on comparative negligence. And, as a statement from the Missouri Court of Appeals, does not bind Kansas appellate courts.

But if Great Plains would have been liable at trial for Trokey's full damages as the sole defendant, then there is more reason to keep K Building as a third-party defendant. As K Building correctly argues: "[Great Plains] simply could have maintained its claims against K Building in the Missouri lawsuit instead of voluntarily dismissing them. Had [Great Plains] chosen this path, the Missouri jury would have been able to make a determination as to whether K Building was negligent." To the extent that Great Plains could have been liable to pay a judgment including K Building's negligence, this wound was self-inflicted. Because the one-action rule bars Great Plains' attempt to litigate negligence in a second action, we affirm the trial court's summary judgment.

Great Plains brought and then dismissed an indemnification claim against K Building in the original action in Missouri. The one-action rule prevents Great Plains from bringing a second action. Because the trial court properly granted summary judgment for K Building, we affirm summary judgment as right for the wrong reasons.

Affirmed.

No. 122,254

GABRYELLE GILLIAM, *Appellee*, v. KANSAS STATE FAIR BOARD, *Appellant*.

SYLLABUS BY THE COURT

1. ADMINISTRATIVE LAW—*Final Order Required to Identify Agency Officer Who Receives Service of Petition for Judicial Review—Thirty-Day Period for Filing Petition for Judicial Review.* K.S.A. 77-613(e) requires an administrative agency's final order to identify the agency officer who will receive service of a petition for judicial review on behalf of the agency. The 30-day jurisdictional period for filing a petition for judicial review begins to run after service of an order that complies with K.S.A. 77-613(e).

2. SAME—*Interpretation of Written Documents by Court—Interpret Written Language in Reasonable Fashion*. It is not the function of a court to read sections of a written document in isolation or highlight awkward phrasing. Instead, courts must endeavor to interpret written language in a reasonable fashion that does not vitiate the purpose of the writing or reach an absurd result.

Appeal from Reno District Court; TRISH ROSE, judge. Opinion filed May 6, 2022. Reversed.

M.J. Willoughby, assistant attorney general, and *Derek Schmidt*, attorney general, for appellant.

Christopher A. McElgunn, of Klenda Austerman LLC, of Wichita, for appellee.

Before WARNER, P.J., CLINE, J., and RICHARD B. WALKER, S.J.

WARNER, J.: Gabryelle Gilliam's lamb was crowned grand champion of the market-lamb competition at the 2016 Kansas State Fair. Winning this competition is a boon to the animal's owner but less gratifying for the animal itself: The owner receives the recognition of the title, a championship belt buckle, and a cash prize, while the animal is slaughtered within days and its meat sold to market.

After the animal is processed, its carcass is examined by a veterinarian to ensure compliance with the State Fair rules. When Gilliam's lamb was slaughtered in September 2016, a veterinarian

observed multiple injections marks on the back of both its hind legs. A joint committee of the Kansas State Fair Board determined that these injection sites were evidence of "unethical fitting"—unfairly changing the animal's natural appearance for the competition. The committee recommended disqualifying Gilliam's entry and canceling her award. The Board accepted that recommendation and informed Gilliam and her father of its decision.

Because the Board is a state agency, Gilliam was able to appeal the Board's decision to the Reno County District Court under the Kansas Judicial Review Act, K.S.A. 77-601 et seq. The district court reviewed the administrative record and reversed the Board's decision, interpreting the State Fair rules to require a veterinarian—and not the Board or some other entity—to determine that an animal has been unethically fitted before the animal (and the animal's owner) can be disqualified from the fair.

The Board now appeals, raising several jurisdictional and legal challenges to the district court's decision. After carefully considering the parties' arguments and the record before us, we find that the district court erroneously interpreted the 2016 State Fair rules and employed an incorrect standard when it reviewed Gilliam's case. We therefore reverse the district court's ruling and affirm the Board's decision to disqualify Gilliam and her lamb from the 2016 competition.

FACTUAL AND PROCEDURAL BACKGROUND

Gilliam registered multiple lambs in the 2016 Kansas State Fair's market-lamb competition. Gilliam, who was 18 years old and in college at Kansas State University, had taken part in fairs for several years; the 2016 State Fair was the last year she would be eligible to compete. When she registered her lambs, she agreed to abide by the Kansas State Fair rules and the International Association of Fairs and Expositions National Code of Show Ring Ethics. Both sets of rules prohibit exhibitors from altering a show animal's natural contours or conformation—a practice the fair rules label "unethical fitting." A determination of unethical fitting results in disqualification of the competitor and animal, as well as forfeiture of any titles and prizes.

Gilliam checked in her lambs at the fair on September 9, 2016, and showed them the next day. During the fair's Grand Drive, one of Gilliam's lambs—Lamb 11824—was crowned grand champion. This victory does not merely confer the "grand champion" title; the owner of the lamb also receives a belt buckle and $4,000 in prize money.

After the market-lamb competition, the fair immediately acquires ownership of the grand champion animal. Grand champions are generally kept on display throughout the fair before being slaughtered. But for some undisclosed reason, Lamb 11824 was processed while the 2016 State Fair was still taking place.

Dr. Paul Grosdidier, a veterinarian with the Kansas Department of Agriculture, was present during the slaughter. While inspecting the carcass of Gilliam's lamb, the veterinarian discovered areas of discoloration and swelling in the muscle and fat on the back of both hind legs and abnormal reddening of the skin over those areas. He concluded that multiple recent injections had likely caused these abnormalities. Curiously, however, lab tests did not identify any drugs in the lamb's system. The veterinarian summarized his observations in a written report to the fair's general manager.

In November 2016, the fair's general manager informed Gilliam that her lamb had been disqualified due to unethical fitting. Gilliam initiated a protest to challenge this decision, and two committees of the Kansas State Fair Board—the Committee on Competitive Rules and the Committee on Youth—held a joint hearing to consider her appeal the following month. Both Gilliam and her father were present at the hearing. Gilliam spoke little, but her father addressed the committee members and denied the Gilliams had injected the lamb. He suggested that a competitor who had access to the lamb after it had been crowned might have been involved in nefarious conduct. And he pointed out that the veterinarian's report only identified injections and discoloration; it did not specifically conclude that the injections constituted unethical fitting or otherwise violated the fair rules.

Dr. Grosdidier also appeared at the hearing, explaining that his "big concern was the . . . obvious injection sites in the back legs." The veterinarian described his observations and explained the abnormalities and discoloration were reactions caused by a

muscular injection, not simply a puncture. Although he would not speculate about what had been injected, he believed the injections had occurred within a week of his inspection—and given the redness and degree of swelling, the injections likely occurred only a few days before.

The members of the joint committee discussed these observations, as well as the fact that no drugs were detected in the lamb's drug test, and the various inferences that could be drawn from these circumstances. The Gilliams also participated in these discussions. One committee member—Jackie McClaskey, who was then the Secretary of the Kansas Department of Agriculture—noted that testing could only identify the presence of drug residue, not naturally occurring substances. She also explained that, based on her discussions with Dr. Grosdidier, the absence of drug residue suggested the purpose of the injection was to alter the lamb's appearance, rather than treat an illness. Another committee member observed that the only purpose he could infer from the multiple injection sites was to "enhance the animal . . . in some way, shape, or form" for "showing the animal."

Once the committee members had discussed the evidence presented, they voted on the appropriate action to be taken. The committee ultimately recommended that the Board should uphold the decision to disqualify Gilliam's lamb for unethical fitting. Secretary McClaskey abstained from the committee's vote since the veterinarian was an employee of the Department of Agriculture.

The Board considered Gilliam's protest at its meeting in January 2017. Gilliam, now represented by an attorney, attended the meeting and addressed the Board. The record does not include a transcript of what precisely occurred, but the meeting minutes show—contrary to her father's earlier statements to the joint committee—that Gilliam told the Board she had given Lamb 11824 a vitamin B-12 injection before the competition.

The Board adopted the joint committee's recommendation and disqualified Gilliam's entry of Lamb 11824, informing Gilliam and her attorney of its decision by letter on January 17, 2017. This letter did not identify the person who should be served if Gilliam decided to petition the district court for judicial review. The fair's

general manager sent Gilliam an additional letter with this information on March 17, 2017, informing Gilliam that its previous letter was a final agency action.

On April 17, 2017, Gilliam filed a petition seeking judicial review of the Board's decision disqualifying her lamb and forfeiting her belt buckle and prize money. After a nonevidentiary hearing, the district court reversed the Board's decision. The court concluded the veterinarian's findings provided "some evidence" to support the Board's decision but did not constitute "substantial evidence." More specifically, the district court interpreted the State Fair rules to require the veterinarian—not the general manager, joint committee, or Board—to make a declaration that an act constitutes unethical fitting before an entry can be disqualified. The Board appeals.

DISCUSSION

The Kansas State Fair Board, established by Kansas statutes, is the administrative agency that oversees the Kansas State Fair. See K.S.A. 2020 Supp. 74-520a; see also *Brown v. Board of State Fair Managers*, 6 Kan. App. 2d 40, 41, 626 P.2d 812 (1981) (holding the Board's predecessor was a Kansas agency subject to the Kansas Tort Claims Act). The Board consists of leaders of the Kansas agriculture and business communities—including the Secretary of Agriculture, the Secretary of Commerce, the Director for Extension of Kansas State University, and a representative nominated by the Kansas Fairs Association, among others. See K.S.A. 2020 Supp. 74-520a(a).

Kansas law empowers the Board to "adopt rules and regulations regarding the holding of the [S]tate [F]air and the control and government thereof." K.S.A. 74-523. This case turns primarily on the rules the Board adopted for the 2016 State Fair that prohibit the showing of animals that have been "unethically fitted"—essentially, using unethical practices to "fit" the animal for show. While the parties describe the rules' treatment of this prohibition in various ways, their dispute centers on *who* must make that determination:

- The Board asserts that unethical fitting is a legal determination to be made by the Board based on the evidence submitted at the administrative hearings.

- Gilliam contends that the Board's rules require a finding of unethical fitting to be made (and attested to) by a veterinarian.

The district court agreed with Gilliam, reversing the Board's disqualification decision because the fair's veterinarian had not specifically found that Lamb 11824 had been unethically fitted. The Board now challenges the district court's reversal, raising a plethora of jurisdictional and legal arguments.

Having reviewed the administrative record and the parties' numerous arguments, we agree with the Board and conclude that the rules empower the Board to make the ultimate determination as to whether a contestant has unethically fitted an animal at the competition. And we find that substantial competent evidence supports the Board's decision that Lamb 11824 had been unethically fitted during the 2016 State Fair. We thus reverse the district court's judgment and reinstate the Board's decision.

1. *The courts have jurisdiction to consider Gilliam's administrative appeal.*

Before turning to the Board's substantive arguments, we must first consider whether courts have the authority to consider Gilliam's administrative appeal at all, given the manner by which her appeal was initiated. The Board contends that Gilliam did not file her petition for judicial review within the time required by Kansas law, so the district court—and, by extension, this court—never acquired jurisdiction to hear her challenge to the Board's decision. We disagree and conclude the case is properly before us.

The Kansas Judicial Review Act provides the exclusive means of judicial review of most agency actions. K.S.A. 77-603; K.S.A. 77-606. As such, it governs our review here. Under the Act, a court may review an agency decision when a person files a petition challenging a final agency action within 30 days after service of a final order. K.S.A. 77-607(a); K.S.A. 77-610; K.S.A. 77-613(b). If a petition is not filed within this 30-day period, a court

does not have jurisdiction to consider the appeal. See *Pieren-Abbott v. Kansas Dept. of Revenue*, 279 Kan. 83, Syl. ¶ 6, 106 P.3d 492 (2005). A party has three extra days to file his or her petition—or 33 days total—if the final order is served by mail. See K.S.A. 77-613(e).

In most contexts, a final order is "self-defining," as it "definitely terminates a right or liability involved in an action or . . . grants or refuses a remedy as a terminal act in the case." *Kaelter v. Sokol*, 301 Kan. 247, 250, 340 P.3d 1210 (2015). In administrative actions, we have similarly explained that a final order "determines the legal rights and duties of the parties." *Guss v. Fort Hays State University*, 38 Kan. App. 2d 912, 916, 173 P.3d 1159 (2008). The parties agree that the Board's January 17, 2017, decision letter was a final order—or final agency action—under this definition, as it resolved the question of Gilliam's lamb's eligibility. The parties also agree that Gilliam did not file her petition for judicial review within 30 days after service of that letter.

Our jurisdictional analysis does not end with these facts, however. Kansas courts have long recognized that an agency's final order must comply with the provisions of K.S.A. 77-613(e) to trigger the 30-day appeal window for petitions for judicial review. *Heiland v. Dunnick*, 270 Kan. 663, 670-71, 19 P.3d 103 (2001). And K.S.A. 77-613(e) requires a final order in an administrative action to "state the agency officer to receive service of a petition for judicial review on behalf of the agency." This requirement preserves a person's appellate rights by informing him or her how to serve process for an administrative appeal. 270 Kan. at 671; *Reifschneider v. State*, 266 Kan. 338, 342-43, 969 P.2d 875 (1998). "The 30-day period for filing a petition for judicial review . . . *begins to run* '*after* service of the order'" that complies with K.S.A. 77-613(e). (Emphasis added.) 266 Kan. at 343.

Applying these principles to the case before us, the district court had jurisdiction to consider Gilliam's administrative appeal. Although the Board's January letter was a final order, it did not trigger the appeal period because it failed to specify who should receive a petition for judicial review. The Board cured this omission by identifying an agent in its March letter. The record shows that the Board mailed its letter on March 17, so Gilliam had 33 days—until April 19—to file her petition. She did so on April 17.

Thus, her appeal was timely, and the district court had jurisdiction to consider her claim.

2. *The district court erred when it reversed the Board's decision.*

Having confirmed that Kansas courts have jurisdiction to hear Gilliam's administrative appeal, we now turn to the substance of the Board's decision and the district court's ruling. As we have noted, the Board concluded—based on Dr. Grosdidier's report and the committee members' experience and inferences—that Lamb 11824 had been unethically fitted in violation of the 2016 State Fair rules. The Board therefore disqualified Gilliam's lamb and forfeited her award and monetary prize.

In her petition for judicial review, Gilliam raised several broad legal challenges to the Board's decision. She claimed the Board had exceeded its jurisdiction when it disqualified Lamb 11824's entry and revoked Gilliam's prize. She also claimed the Board misinterpreted or failed to follow its own rules and asserted that the Board's findings were not supported by substantial evidence in the record. The thrust of each of these arguments was that the fair rules required *the veterinarian* (or testing agency), as opposed to the Board, to make a determination of unethical fitting. Gilliam argued that because Dr. Grosdidier's report and affidavit never made this determination, the Board could not disqualify her.

The district court found this argument persuasive and reversed the Board's decision. The court observed that "Dr. Grosdidier's report arguably provided some evidence of the rule violation," but it concluded that the veterinarian's findings "do not rise to the level of substantial evidence." In reaching this decision, the court acknowledged that the veterinarian "found evidence of injections that likely occurred within a week of his examination." But it noted that he "found no prohibited substances or irritants in the lamb" and "did not find the animal's appearance had been altered." And it emphasized that the veterinarian never used the phrase "unethical fitting" in his report or affidavit.

The Board challenges the district court's decision, claiming it misapplied the standard for reviewing administrative appeals and

disregarded or downplayed the evidence that supported the Board's decision. We agree.

When someone appeals an agency's decision under the Kansas Judicial Review Act, the reviewing court—whether a district court, the Court of Appeals, or Supreme Court—may grant relief only if it determines that one or more of the situations in K.S.A. 77-621(c) applies. Because we exercise the same statutorily limited review, appellate courts give no deference to the district court's assessment of the agency action and instead treat the appeal as though it had been made directly to this court. See *In re Tax Appeal of Fleet*, 293 Kan. 768, 776, 272 P.3d 583 (2012); *Carlson Auction Service, Inc. v. Kansas Corporation Comm'n*, 55 Kan. App. 2d 345, 349, 413 P.3d 448 (2018).

Gilliam originally claimed that the Board's disqualification decision fell within four of the situations listed in K.S.A. 77-621(c), ranging from jurisdictional defects to interpretive errors to factual deficiencies. But each challenge was based on the same underlying allegation: that the Board misinterpreted and misapplied its rules regarding unethical fitting. According to Gilliam, the determination of unethical fitting rested with the veterinarian—not the Board—so the Board violated its rules when it made that finding. It exceeded the scope of its authority when it made the determination and disqualified her. And its decision lacked factual support, as everyone acknowledges that Dr. Grosdidier never explicitly found that Gilliam's lamb had been unethically fitted. See K.S.A. 77-621(c)(2), (4), (5), (7).

The district court limited its decision to Gilliam's last point, finding the Board's decision was not supported by substantial evidence in the record. On appeal, however, the Board addresses each of Gilliam's previous assertions. Gilliam, in turn, adds additional challenges—claiming that the Board's decision was arbitrary and capricious (essentially reiterating her previous arguments that the decision lacked a factual foundation) and asserting that later attempts by the Board to introduce new evidence to the district court during the administrative appeal violated her right to due process of law.

But though the parties present myriad arguments, they all turn on one question: *Who makes a determination of unethical fitting?*

Answering this question requires a more thorough examination of the 2016 State Fair rules.

To begin, we observe that in most administrative appeals, courts examine rules that have been promulgated as administrative regulations. In those cases, the regulations have the force and effect of law, and we give no deference to the agency's (or district court's) interpretation. See K.S.A. 77-425; *Romkes v. University of Kansas*, 49 Kan. App. 2d 871, 880, 317 P.3d 124 (2014).

The 2016 State Fair rules are a different animal, as they are not regulations that have been published in the *Kansas Register* and do not appear to have been adopted through formal rulemaking. See K.S.A. 74-523 (authorizing the Board to "adopt rules and regulations" to govern the State Fair). Instead, these rules derive their authority in part through *agreement*. In other words, when Gilliam decided to compete in the 2016 State Fair, she agreed that she would comply with—and be bound by—the rules we now consider.

But regardless of the rules' origin, our standard of review remains unchanged. When considering statutes, regulations, or some other written document, appellate courts do not defer to previous tribunals' interpretations. See *Trear v. Chamberlain*, 308 Kan. 932, 936, 425 P.3d 297 (2018) (written contracts); *Douglas v. Ad Astra Information Systems*, 296 Kan. 552, 559, 293 P.3d 723 (2013) (statutes). Instead, courts review and apply the governing language as written. And when language is conflicting or unclear, courts seek to ascertain and give effect to the drafters' intent. See *Waste Connections of Kansas, Inc. v. Ritchie Corp.*, 296 Kan. 943, 963-64, 298 P.3d 250 (2013).

Admittedly, the 2016 State Fair rules are not a model of drafting clarity. They did not undergo the review process associated with statutes or formal regulations, but rather were written to govern the fair and its youth livestock competitions. We note that the rules contain numerous statements that could be confusing if taken out of context. The rules also contain some unfortunate (and likely inadvertent) language, such as a statement that Board management may "arbitrarily"—not *unilaterally*—determine all matters. But as in any case when we are called on to interpret the language of a written document, it is not the function of this court to read sections in isolation or highlight awkward phrasing. Accord

Trear, 308 Kan. at 936 (written language should not be read in isolation but rather should be read in the context of the entire instrument). Instead, in the case of any ambiguity, we must endeavor to interpret the rules in a "'reasonable'" fashion that does not "'vitiate the purpose'" of the rules or reach an absurd result. 308 Kan. at 936.

With these principles in mind, we turn to the 2016 State Fair rules themselves. While some language in those rules is duplicative or even conflicting, there are at least two matters relevant to this case that are sufficiently unambiguous to inform our conclusion.

First, the rules unequivocally prohibit the "showing of unethically fitted livestock." Unethical fitting is defined as "changing the normal conformation of any part of an animal's body or using drugs, including over the counter and/or extra-label, or mechanical devices to alter the physical make-up and/or performance of the animal." The rules provide several examples of unethical fitting, including (as the Board found applicable to this case):

- "Treating or massaging any part of the animal's body, internally or externally, with an irritant, counterirritant, or other substance to alter conformation";
- "Surgery or other practices performed to change the natural contour or appearance of an animal's body, hide, or hair";
- "Insertion of foreign material under the skin."

Gilliam attempts to construe these examples as an exclusive list of the circumstances that may constitute unethical fitting. But the plain language of the rules belies this assertion, noting that unethical fitting "includes but is not limited to" the examples provided. The rules state that "[a]ny exhibitor not complying with Kansas State Fair rules, regulations, and requirements"—including the prohibition on unethical fitting—"may be denied entry, participation[,] and facility usage."

Second, the rules reiterate in multiple sections that the Board is the fair's governing body and ultimate decision-maker. For ex-

ample, the rules state that the Board "makes all rules and regulations and reserves the final and absolute right to interpret these rules and regulations." This includes the responsibility to "settle and determine all matters, questions and differences in regard there to, or otherwise arising out of, any connection with or incident pertaining to the Fair." When a situation arises that "no rule appears to cover," the fair's general manager will ask the Board "to make a rule and define its application to the situation." And when a participant of the fair wishes to protest or otherwise contest a fair official's preliminary finding of a rule violation—such as the determination that an animal has been unethically fitted—the protest is submitted to the Board for its consideration.

Gilliam attempts to sidestep these two clear directives by isolating one paragraph in the rules entitled "Consequences." That paragraph states:

"In the event any animal is declared by the veterinarian or testing agency to be unethically fitted, the animal will immediately be disqualified and the exhibitor of that animal may be barred from participation in future Kansas State Fair competitions. The exhibitor will forfeit all titles, awards, premiums and prizes. The Kansas State Fair Board, through its management, makes all rules and regulations, and reserves the final and absolute right to interpret these rules and regulations."

Gilliam argues that the first sentence in this paragraph indicates that only a veterinarian or testing agency—not the Board—can find that an animal has been unethically fitted. We do not find this reading persuasive. The first sentence merely indicates that "in the event" a veterinarian has determined an animal was unethically fitted, immediate disqualification occurs. The language does not state that *only* a veterinarian can make that finding. Indeed, such a restriction would effectively shear off the rules' multiple statements that the Board holds ultimate decision-making authority, including its ability to review a contestant's protest. And it would defy common sense to rely on a veterinarian or testing agency to make a nonmedical or nonscientific assessment as to whether certain facts violated the rules.

Undoubtedly, this provision could have been phrased more artfully. But we do not find that it was intended to undermine the Board's authority—either under the 2016 fair rules and under Kansas law generally—to decide matters relating to the fair and its

competitions. Instead, the language merely allocates different responsibilities to different entities. The veterinarian or testing agency is charged with making factual findings and conclusions based on testing or observation of the animal. But the final determinations—what constitutes unethical fitting and whether a specific factual finding meets that definition—is for the Board to decide, consistent with its duty to interpret the rules and regulations.

Thus, the Board correctly interpreted the rules to vest it with ultimate decision-making authority. Contrary to Gilliam's assertions in her petition, the Board did not misinterpret or misapply the rules, nor did it exceed its jurisdiction by making a finding that Lamb 11824 had been unethically fitted. Gilliam has not demonstrated any error under K.S.A. 77-621(c)(2), (c)(4), or (c)(5).

And though the evidence before the Board was subject to multiple potential interpretations, the Board's decision regarding unethical fitting was supported by substantial evidence in light of the record as a whole. Dr. Grosdidier observed discoloration and swelling in the fat and muscle of both back legs, along with abnormal reddening of the skin over those areas, but a lab test did not reveal any drugs in the lamb's system. Given those facts, the veterinarian opined that the lamb had received injections up to a week, but more likely a few days, before slaughter, though he did not know what had been injected.

The Board drew various inferences from this information. Based on the negative lab results, the Board inferred that whatever had been injected was likely a naturally occurring substance. The multiple injections suggested their purpose was to alter the lamb's appearance. And though the Board could not conclude precisely when the injections occurred, it did not find Gilliam's jealous-competitor theory to be persuasive. In short, in light of the record as a whole, the Board's decision was supported by substantial evidence. Gilliam's challenges under K.S.A. 77-621(c)(7) and (c)(8) (which were based on the same factual arguments) are unavailing.

In its ruling, the district court acknowledged that there was "some" evidence of unethical fitting, but it did not find that evidence to be "substantial." In reaching this conclusion, the district court incorrectly applied the standard for reviewing an administrative appeal. It is not the role of a reviewing court to reweigh the evidence or reevaluate the agency's credibility determinations.

K.S.A. 77-621(d). Instead, the district court was charged with determining whether the Board's decision was supported by "evidence that is substantial when viewed in light of the record as a whole." K.S.A. 77-621(c)(7). Substantial evidence—or substantial competent evidence—is merely evidence that possesses "'relevance and substance'" and furnishes "'a substantial basis in fact from which the issues can be reasonably resolved.'" *Harsay v. University of Kansas*, 308 Kan. 1371, 1382, 430 P.3d 30 (2018). This standard does not require—as the district court apparently believed—a reweighing of the administrative record to determine whether the evidence was, in the court's view, substantial *enough*. See *Sunflower Racing, Inc. v. Board of Wyandotte County Comm'rs*, 256 Kan. 426, Syl. ¶ 2, 885 P.2d 1233 (1994) (an agency finding supported by substantial evidence must be affirmed, even if the reviewing court would have reached a different conclusion had it been the trier of fact).

Finally, we note that Gilliam's remaining procedural challenges are similarly unpersuasive. Gilliam presents two new arguments in her appeal to this court relating to the Board's actions—challenging Secretary McClaskey's ability to participate in the joint committee discussions and the Board's efforts to submit additional evidence to the district court regarding observations of Lamb 11824 during the fair. We ordinarily do not consider arguments raised for the first time on appeal because, among other reasons, we lack the benefit of a developed record for our review. See *Gannon v. State*, 303 Kan. 682, 733, 368 P.3d 1024 (2016). And Gilliam has not shown that we should apply an exception to this preservation requirement.

The importance of presenting these arguments to the agency (or the district court) is particularly evident here. For example, because Gilliam did not raise her claim regarding Secretary McClaskey's participation to the Board, the Board never had the opportunity to consider whether Secretary McClaskey should have taken part in its discussion. Nor are there facts in the record to support Gilliam's challenge. Gilliam and her father participated in the joint committee's hearing and had the opportunity to hear all the deliberations and present evidence regarding what they be-

lieved occurred. Similarly, with regard to Gilliam's other procedural claim, there is no indication in the record that the district court ever considered the additional evidence the Board submitted in its appeal; in fact, the court ultimately (though erroneously) ruled in Gilliam's favor.

In summary, the 2016 State Fair rules entrusted the Board with the power to resolve all matters relating to the fair. Under this authority, the Board determined—based on the evidence and inferences from Lamb 11824's veterinary examination—that Gilliam's lamb had been unethically fitted. The Board's action regarding Gilliam's lamb was consistent with the 2016 State Fair rules and supported by substantial evidence in the record. The district court thus erred when it reversed the Board's decision.

We reverse the district court's ruling reversing the Board's decision, and we affirm the Board's decision disqualifying Gilliam's lamb and canceling her award and monetary prize.

No. 122,804

In the Matter of the Appeal of CAPITAL ELECTRIC LINE BUILDERS, INC., from an order of the Division of Taxation on Assessment of Retailers' Sales Tax.

SYLLABUS BY THE COURT

1. TAXATION—*No Exemption under Retailers' Sales Tax Act for Equipment Rental Expenses*. The Kansas Retailers' Sales Tax Act, K.S.A. 79-3601 et seq., does not exempt equipment rental expenses incurred to perform taxable services from taxation.

2. SAME—*Equipment Rental Expenses Necessary to Perform Taxable Services Are Not Tax Exempt*. Equipment rental expenses which are necessary to perform taxable services are materially different from hotel and meal expenses incurred by employees who perform the taxable services. As such, equipment rental expenses are not tax exempt under *In re Tax Appeal of Cessna Employees Credit Union*, 47 Kan. App. 2d 275, 277 P.3d 1157 (2012).

Appeal from Kansas Board of Tax Appeals. Opinion filed May 6, 2022. Affirmed.

S. Lucky DeFries and *Jeffrey A. Wietharn*, of Morris, Laing, Evans, Brock & Kennedy, Chtd., of Topeka, for appellant.

Jay D. Befort, general counsel, of Legal Services Bureau, Kansas Department of Revenue, for appellee.

Before WARNER, P.J., CLINE, J., and RACHEL L. PICKERING, District Judge, assigned.

CLINE, J.: After an audit, the Kansas Department of Revenue (Department) assessed Capital Electric Line Builders, Inc. for unpaid retailers' sales tax along with associated penalties and interest. The Department claimed Capital Electric should have charged its customers sales tax on rental equipment charges Capital Electric passed through to those customers. Capital Electric appealed to the Board of Tax Appeals (BOTA), who upheld the assessment.

Capital Electric asks us to expand this court's ruling in *In re Tax Appeal of Cessna Employees Credit Union*, 47 Kan. App. 2d 275, 277 P.3d 1157 (2012), and find such rental equipment

charges are not subject to sales tax. We decline to do so because the Kansas Retailers' Sales Tax Act, K.S.A. 79-3601 et seq., does not exempt such charges from taxation. Further, the rental equipment charges are materially different from the travel expenses in *Cessna*. BOTA correctly found the rental equipment charges were taxable, so we affirm its decision to uphold the assessment.

Capital Electric's assessment for unpaid sales tax

Capital Electric contracts with various customers to perform construction, maintenance, and emergency repairs on those customers' powerlines, which are taxable services under the Kansas Retailers' Sales Tax Act, K.S.A. 79-3601 et seq. Specifically, K.S.A. 2020 Supp. 79-3603 imposes a retailers' sales tax on the gross receipts from enumerated taxable services. The tax is imposed on the consumer (here, Capital Electric's customers) but collected by the seller (Capital Electric). See K.S.A. 79-3604. The tax is calculated on the "gross receipts" the seller received for a taxable sale or service. K.S.A. 2020 Supp. 79-3603. The Act defines "gross receipts" as "the total selling price or the amount received as defined in this act, in money, credits, property or other consideration valued in money from sales at retail within this state." K.S.A. 79-3602(o). And it defines "selling price" as:

> "(ll)(1) 'Sales or selling price' applies to the measure subject to sales tax and means the total amount of consideration, including cash, credit, property and services, for which personal property or services are sold, leased or rented, valued in money, whether received in money or otherwise, without any deduction for the following:
>
> . . . .
>
> (B) [T]he cost of materials used, labor or service cost, interest, losses, all costs of transportation to the seller, all taxes imposed on the seller and any other expense of the seller;
>
> (C) charges by the seller for any services necessary to complete the sale, other than delivery and installation charges . . . ." K.S.A. 79-3602(ll)(1)(B)-(C).

Capital Electric billed its customers per scheduled hourly labor rates for work its employees performed under the contracts at issue. Presumably, these labor rates (which included rates for straight time, time-and-a-half, and double time for various categories of workers) included Capital Electric's labor burden (i.e., payroll taxes and employee benefit costs associated with employees

within each category). Capital Electric also billed its customers for equipment it owned and used in performing the work per scheduled rates incorporated into these contracts. As for equipment necessary to perform the contract services which Capital Electric did not own, Capital Electric passed associated rental charges (including taxes it paid on those rental charges) through to its customers. Capital Electric also passed through hotel and meal expenses for its employees to its customers. Under Capital Electric's contract, it billed the hotel and meal expenses at cost but billed charges for rental equipment at cost plus 10%.

Capital Electric included both its hourly owned equipment charges and hourly labor rates in its gross receipts when calculating sales tax owed by its customers. But it only included its 10% mark-up charge on equipment rentals in those gross receipts and thus only collected and remitted sales tax on that 10% markup. It did not collect sales tax on the hotel and meal expenses. Capital Electric separately itemized the equipment rental charges and hotel and meal expenses. Its contracts did not discuss special tax treatment for any of these charges.

The Department audited Capital Electric's transactions between March 1, 2011, and August 31, 2013. The Department assessed Capital Electric for uncollected retailers' sales tax on the rental equipment charges, a penalty, and interest on the uncollected sales tax. The Department also assessed Capital Electric for uncollected retailers' sales tax on its employees' hotel and meal expenses. After Capital Electric reminded the Department that under *In re Tax Appeal of Cessna Employees Credit Union*, 47 Kan. App. 2d 275, such travel expenses are not subject to retailers' sales tax, the Department removed those expenses. Once the Department removed the travel expenses, the adjusted assessment totaled $106,606.

Capital Electric appealed the assessment to BOTA and both parties moved for summary judgment. BOTA granted the Department's motion, upholding the Department's assessment, and denied Capital Electric's motion. BOTA found Capital Electric incurred the rental expenses to perform taxable services to its customers, so the rental expenses should have been included in Cap-

ital Electric's gross receipts and taxed. Indeed, BOTA noted Capital Electric "could not have performed the taxable services if it did not rent the equipment necessary to perform the services." BOTA explained its decision as follows (calling Capital Electric "CELB"):

"Nothing in the [Kansas Retailers' Sales Tax] Act allows a seller to invoice its purchasers for the seller's expenses (including sales tax imposed on the seller) incurred to perform necessary services and then itemize the expenses upon which the seller paid taxes and claim the expenses are 'reimbursed:' therefore, removable from the seller's taxable gross receipts. There is no use of the word 'reimbursement' in the Act.

"These expenses, whether incurred by sellers of tangible personal property or sellers of taxable services, that are passed through to the sellers' purchasers are included in the seller's taxable gross receipts. The gross receipts sales tax is a tax on overhead and all other expenses passed through to the purchaser.

"Taxable service contracts may or may not include the sale of tangible personal property upon which title passes. The service contracts pass services to the purchaser; however, in both types of taxable sales the taxable gross receipts include all expenses of the seller and all taxes imposed on the seller if the seller includes in its invoice to its purchaser these expenses and taxes.

"In the instant action, the sales tax was legally and directly imposed only once on CELB when CELB rented equipment; then, in a separate and distinct taxable services sale, CELB passed through the Equipment Rental Expenses, and increased the Expenses by 10% as part of the expenses CELB incurred to perform the taxable services CELB agreed to perform for its service purchasers.

"No double taxation occurred. 'Where there are two separate taxpayers and two separate sales transactions, even though a single subject matter is involved, any taint of double taxation is removed.' *Boise Bowling Center v. State*, 93 Idaho 367, 370, 461 P.2d 262 (1969); *Lakewood Lanes, Inc. v. State*, 61 Wash. 2d 751, 380 P.2d 466 (1963); *Gandy v. State*, 57 Wash. 2d 690, 359 P.2d 302 (1961); *Waterbury Motor Lease, Inc. v. Tax Commissioner*, 174 Conn. 51, 381 A.2d 552 (1977).

"Additionally, in [*In re Tax Appeal of*]*Atchison Cablevision*, 262 Kan. []223, [936 P.2d 721 (1997),] the court, quoting the Board of Tax Appeals, stated: 'Under the plain language of the statute, sales tax is to be levied upon the gross receipts from . . . services. Gross receipts is defined as the total selling price which means the total cost to the consumer. . . .'

"CELB admits it was required in its Contracts with its purchasers to provide CELB owned equipment and rented equipment, both necessary and used to perform services for its purchasers. The retailers' sales taxes CELB paid its seller to rent the equipment were taxes imposed legally and directly on CELB.

"The question is not whether CELB was double taxed. The question is whether the Equipment Rental Expenses, including the taxes, passed through to CELB's purchasers were 'consideration' paid by the purchasers to CELB to perform the taxable services and includable in CELB's taxable gross receipts pursuant to the Act's sales tax provisions.

"K.S.A. 79-3602(o) defines CELB's taxable 'gross receipts' as the total selling price or the amount received by the seller from its consumers minus an amount equal to returns and trade-ins:

". . . **the total selling price or the amount received as defined in this act**, in money, credits, property or other consideration valued in money from sales at retail within this state; and embraced within the provisions of the act. The taxpayer, may take credit in the report of gross receipts for: (1) An amount equal to the selling price of property returned by the purchaser when the full sale price thereof, including the tax collected, is refunded in cash or by credit; and (2) an amount equal to the allowance given for the trade-in of property. (Emphasis added)

"The Act does not authorize any exclusion from CELB's taxable gross receipts for 'reimbursements' of the seller's out of pocket equipment rental expenses necessary to perform taxable services and taxes imposed thereon. The Act mandates that sales tax be collected by the CELB from its purchaser if CELB's expenses and taxes are passed through to its purchasers.

"K.S.A. 79-3602(ll)(1) states:

"Sales or selling price' applies to the measure subject to sales tax and means the total amount of consideration, including cash, credit, property and services, for which . . . services are sold, leased or rented, valued in money . . . without any deduction for the following:

. . . .

(B) the cost of materials used, labor or service cost, interest, losses, all costs of transportation to the seller, all taxes imposed on the seller and any other expense of the seller;

(C) charges by the seller for any services necessary to complete the sale . . . .

"K.S.A. 79-3602(ll) does not authorize any deduction for 'reimbursements' of taxes imposed on the seller or any other expenses of the seller.

. . . .

"This provision clearly applies to the purchaser/consumer in each sales transaction. The taxes imposed on CELB as purchaser of the rented equipment were separately stated on the invoices the rental companies gave to CELB as purchaser; therefore, the sales taxes legally and directly imposed on CELB were excluded from the rental companies' taxable gross receipts. Likewise, the taxes legally and directly imposed on CELB's purchasers of the taxable services were separately stated on the invoices CELB gave to its purchasers; therefore, the sales taxes legally and directly imposed on the CELB purchasers were excluded from CELB's taxable gross receipts.

"K.S.A. 79-3602(ll)(3)(C) removes from a seller's taxable gross receipts only the taxes legally and directly imposed on the seller's purchasers/consumers if the taxes are separately stated on the invoice, bill of lading, etc. given to the consumer/purchaser. Furthermore, the [Department]'s publication KS-1525, entitled '*Sales & Use Tax for Contractors, Subcontractors, and Repairmen*,' on page 18, provides:

"[Y]our profit (including the markup of materials) and overhead costs are figured into the total charged the customer and are therefore subject to sales tax.

A contractor may not deduct overhead expenses when figuring the taxable amount of the labor services portion of any contract. Nondeductible overhead items include . . . rental or lease payments . . . for equipment . . . .

"In the instant action, CELB admits the equipment was rented because it did not own the equipment necessary to perform the taxable services. The Act does not provide that the expenses of the seller, including taxes imposed on the seller, can be 'reimbursed' and removed from the taxable gross receipts. If this were the interpretation of the statute, then all expense of the seller, if reimbursed by the purchaser of the taxable services, could be removed from the taxable gross receipts and only the seller's profits would be taxable.

"To interpret the Act to allow sellers to exclude from taxable gross receipts all expenses upon which the seller has paid sales tax such as, heating, cooling, lighting, owned trucks and equipment expenses, and only include in taxable gross receipts the increase to such expenses would require the Board to 'disregard manifest legislative intent appearing in the plain and unambiguous language of the statute' and to 'add what is not easily found therein or to remove what ordinary language would include. *J.G. Masonry*[, *Inc. v. Department of Revenue*], 235 Kan. [497,] 500[, 680 P.2d 291 (1984),] and *National Cooperative Refinery* [*Ass'n v. Board of McPherson County Comm'rs*], 228 Kan. [595,] 597[, 618 P.2d 1176 (1980)]. See also, [*In re Tax Appeal of*]*Atchison Cablevision*[, 262 Kan.] at 228. This interpretation would result in an 'unreasonable construction' and render meaningless the definition of taxable gross receipts specifically included in K.S.A. 79-3602(ll)(1). See [*In re Tax Appeals of*]*Genesis Health Clubs*, 42 Kan. App. 2d [239,] 242[, 210 P.3d 663 (2009)].

"CELB's contractual obligation to rent and operate the equipment to perform necessary services for its purchasers was 'consideration' as defined in K.S.A. 79-3602(ll)(1) and the rental equipment expenses, including the taxes imposed on CELB, are includable in CELB's taxable gross receipts."

Capital Electric's appeal

Capital Electric petitioned us for judicial review of BOTA's order under the Kansas Judicial Review Act (KJRA). Although it seeks relief under three subsections of the KJRA—K.S.A. 77-621(c)(3) ("the agency has not decided an issue requiring resolution"), K.S.A. 77-621(c)(4) ("the agency has erroneously interpreted or applied the law"), and K.S.A. 77-621(c)(8) ("the agency action is otherwise unreasonable, arbitrary or capricious")—all its arguments relate to BOTA's failure to apply *In re Tax Appeal of Cessna Employees Credit Union.* In *Cessna*, another panel of this court found travel expenses incurred by a seller's employees and passed through to the customer were not taxable. Capital Electric claims *Cessna* is dispositive and BOTA should have expanded its ruling to include the equipment rental charges at issue. By failing

to expand *Cessna*, Capital Electric asserts BOTA erroneously interpreted or applied the law and "avoided the central question presented to it for resolution," so "Capital Electric is entitled to relief from BOTA's final order under K.S.A. 77-621(c)(3) and/or [(c)](4)." It also claims BOTA acted unreasonably when it treated the rental equipment charges differently than the travel expenses in *Cessna*. We disagree for reasons explained below.

In re Tax Appeal of Cessna Employees Credit Union *decision*

In *In re Tax Appeal of Cessna Employees Credit Union*, Cessna Employees Credit Union (CECU) appealed from a Kansas Court of Tax Appeals' (COTA) order denying its claim to refund some of the retailers' sales tax it paid to Jack Henry and Associates (JHA). 47 Kan. App. 2d at 276-78. JHA sold computer upgrade goods and services to CECU. JHA invoiced CECU for the services, hardware, and software. And JHA separately invoiced CECU for JHA's travel purchases—which were for "JHA employees' transportation, meals, and lodging." 47 Kan. App. 2d at 276. JHA's travel purchases were necessary for JHA to complete its contractual obligations to CECU.

JHA's invoices to CECU for JHA's travel expense reimbursement included: (1) JHA's employees' travel expenses, (2) the sales tax JHA originally paid on those travel expenses, and (3) another tax on the total of JHA's travel expenses and the tax JHA paid, imposed under the Kansas retailers' sales tax. JHA separately stated the cost of each travel purchase. After CECU paid the invoices, it requested a refund of the retailers' sales tax it paid to JHA on JHA's travel expenses. The Department denied CECU's refund claim, and CECU appealed to the Secretary of Revenue. The Secretary upheld the denial, and CECU appealed to COTA.

COTA denied CECU's claim, concluding JHA's travel expense reimbursement was subject to Kansas retailers' sales tax as part of JHA's "gross receipts" in the transaction. It found the expense reimbursement was "'part of the total amount of consideration given by CECU in the transaction for which the taxable goods and services were sold by JHA.'" 47 Kan. App. 2d at 277-78.

On appeal, a panel of this court reversed COTA's decision. 47 Kan. App. 2d at 284. To reach this conclusion, the panel focused on the Act's definitions of "gross receipts" and "total selling

price." Based on these definitions, the panel concluded the real question was whether JHA's travel expense reimbursement was either: (1) "part of the consideration 'from [JHA's] sale at retail' of computer upgrade goods and services"; or (2) "part of the consideration 'for which [such] property or services [were] sold.'" 47 Kan. App. 2d at 281. Answering this question, the panel held:

"We conclude they were not [part of the consideration] because they were not in any way sold at retail, nor were they a part of the sale of goods and services, nor were they part of the selling price of the goods and services. They were, in fact, merely a reimbursement of an associated cost incurred by the seller. The Division [of Taxation] stipulated that these costs were 'reimbursed' rather than sold, were invoiced separately, and were consumed by JHA, *not* by CECU." 47 Kan. App. 2d at 281.

The panel specifically limited its holding "to those circumstances where a goods or services contract makes provision for reimbursement of travel expenses consumed by, taxable to, and taxes paid by the seller, with those expenses separately invoiced to the party reimbursing same." 47 Kan. App. 2d at 283-84.

In re Tax Appeal of Cessna Employees Credit Union *is distinguishable.*

Capital Electric argues that, like in *In re Tax Appeal of Cessna Employees Credit Union*, "the third-party rentals at issue were for use and consumption by the vendor, Capital Electric, not for resale to the vendor's service customers," and the equipment rental companies collected the sales tax on those rentals from Capital Electric, as the ultimate consumer. According to Capital Electric, it did not have to collect that tax a second time from its service customers. But even though the equipment rentals were not for "resale," they were used to perform the very services for which Capital Electric charged its customers. It is that service transaction—between Capital Electric and its customers—which the Act treats as a separate taxable transaction from the transaction between Capital Electric and the equipment rental companies. On the other hand, JHA's employees' meals and lodging were not used to perform their computer upgrade services, so they did not add value to the service transaction in *Cessna*.

Capital Electric claims taxing the equipment charges constitutes unfair "double taxation," because it paid taxes on the rental

equipment charges. But K.S.A. 79-3602(ll)(1) specifically prohibits deducting "all taxes imposed on the seller and any other expense of the seller" as well as "charges by the seller for any services necessary to complete the sale . . . ." from the sales or selling price. K.S.A. 79-3602(ll)(1)(B), (ll)(1)(C). By the Act's plain language, Capital Electric cannot deduct its equipment rental charges (or any taxes imposed on it in those rental transactions) from the price of the services it provided its customers.

In focusing its appeal solely on expanding *Cessna*, Capital Electric gets tunnel vision. It not only loses sight of the statutory language at issue, but it fails to consider how it treated other charges in the transactions. For example, Capital Electric presumably included its employees' payroll taxes in its labor charges, which are then taxed as part of the gross receipts. It offers no reason why those payroll taxes should be treated differently than the taxes it paid on the equipment rental charges. And, presumably, its hourly equipment charges consider personal property taxes and other costs associated with owning that equipment, yet it also fails to explain why its owned equipment charges should be treated differently from its rental equipment charges.

Capital Electric also argues that "[l]ike in *Cessna*, the reimbursed rental expenses here were not 'in any way sold at retail, nor were they part of the sale of goods and services, nor were they part of the selling price of the goods and services. They were, in fact, merely a reimbursement of an associated cost incurred by the seller.'" While Capital Electric structured its invoices to treat the rental expenses as a reimbursement, that treatment doesn't change the character of the charge. Unlike *Cessna*, where the travel expenses were not a part of the ultimate sale of computer goods and services, the rental equipment here was very much a part of the ultimate sale of Capital Electric's construction, maintenance, and repair services to its customers' utility lines. See K.A.R. 92-19-55b(g)(1).

Just like the equipment it owned, Capital Electric could not have performed its contracted services without renting the equipment for its employees to use in performing the services. Cf. *In re Tax Appeal of Cessna Employees Credit Union*, 47 Kan. App. 2d at 281 (concluding travel expenses were not part of the sale of

goods and services). Capital Electric charged sales tax on its hourly charges for use of its own equipment. It offers no persuasive reason why rental equipment charges for equipment that was just as necessary to perform the contracted services should be treated any differently.

Publication KS-1525—"Sales & Use Tax for Contractors, Subcontractors & Repairmen"

In support of its final argument that the Department's assessment and BOTA's decision arbitrarily disregard the law, Capital Electric points to a Department-promulgated Publication—KS-1525, *Sales & Use Tax for Contractors, Subcontractors & Repairmen*, revised January 2014. Capital Electric string cites four passages from different sections of this publication, asserting they support its argument that the Department's assessment and BOTA's decision constitute unfair "double taxation." But the main problem with Capital Electric's position is it quotes the publication out of context, and it ignores the very section that addresses the situation here—rental of equipment used by an operator to perform contract services.

First, Capital Electric quotes two passages from the "Tools" section of the publication, which specifies that contractors pay the sales tax on the tools and materials used on the project, including rented tools. But rental equipment is at issue, not tools or materials. And directly following the "Tools" section is a section entitled "Machinery and Equipment." This section specifically addresses the situation here:

> "The lease or rental of equipment with an operator is not considered to be a lease/rental of tangible personal property (taxable), but providing a service. Whether or not the service is taxable depends on the rules for labor services . . . . The rental would be taxable if the service being performed by the equipment/operator is a taxable service."

Capital Electric never mentions this section in its brief.

This language from the pertinent section of the publication also answers Capital Electric's next argument, in which it quotes another section of the publication that states: "'Sales tax is to be paid on an item or taxable service only ONCE—by the final user or consumer.'" Once again, the Act treats Capital Electric's transaction

with the equipment renter (in which it rented equipment) separately from its transactions with its customers (in which it used rental equipment to perform contracted services). Under the Act, Capital Electric is the consumer in the equipment rental transaction, and its customers are the consumers in the service contract transaction.

Finally, Capital Electric references a quote from the billing section of the publication: "As a contractor you do not charge your customers sales tax on the total amount of the contract. It is not lawful to charge tax on the tax you have already paid." But this section discusses the billing method in which contractors charge sales tax on their taxable labor services contracts by billing the customer for the contract price on the taxable labor services and separately stating the sales tax. The quoted language means that when using this billing method, the tax is charged only on the labor services portion of the contract, not the total contract amount, because tax-paid materials (not "equipment") and subcontractor costs should not be taxed—as these costs are not included in the gross receipts for construction contracts. This section does not address the question before BOTA or this court.

Conclusion

BOTA's conclusion that the rental charges and tax Capital Electric paid on those charges are includable in Capital Electric's gross receipts is supported by the plain language of the Act. See K.S.A. 79-3602(o); K.S.A. 79-3602(ll)(1)(B)-(C). Capital Electric raises tax policy concerns that only the Legislature is qualified to address.

BOTA correctly found the Act requires that any cost of doing business a seller recovers from its customers must be part of the tax base of its retail charges, unless specifically exempt. There is no exemption for rental equipment charges or associated taxes in the Act. While the Department correctly reversed course in removing the travel expenses from its assessment under *Cessna*, *Cessna* does not cover rental equipment charges. And the *Cessna* court expressly limited its holding to travel expenses. We see no reason to disobey that directive.

Affirmed.

Nos. 123,488
123,489

JOHN O. FARMER, INC. and DAMAR RESOURCES, INC., *Appellees*, v. BOARD OF ELLIS COUNTY COMMISSIONERS, *Appellant*.

SYLLABUS BY THE COURT

1. TAXATION—*Property Tax Exemptions Effective January 1 of Tax Year in Which Mineral Lease Produced at Exempt Levels*. Since property tax exemptions are effective from the date of the first exempt use (K.S.A. 79-213[j]), and mineral leases are appraised as of January 1 each year (K.S.A. 79-301), a property tax exemption under K.S.A. 79-201t is effective January 1 of the tax year in which the mineral lease produced at exempt levels.

2. SAME—*Refund of Property Tax Paid on Mineral Lease When Lease Produced at Exempt Levels.* A taxpayer is entitled to a refund of property taxes paid on a mineral lease for the tax year in which the mineral lease produced at exempt levels under K.S.A. 79-201t. K.S.A. 79-213(k).

Appeal from Ellis District Court; EDWARD E. BOUKER, judge. Opinion filed May 6, 2022. Affirmed.

Michael A. Montoya, of Michael A. Montoya, P.A., of Salina, for appellant.

Bradley A. Stout, of Adams Jones Law Firm, P.A., of Wichita, for appellees.

Before HILL, P.J., POWELL and CLINE, JJ.

CLINE, J.: John O. Farmer, Inc. and Damar Resources, Inc. (Taxpayers) sought property tax exemptions under K.S.A. 79-201t for tax year 2018 on several oil and gas leases in Ellis County. The Board of Tax Appeals (BOTA) granted the exemptions "commencing with the ad valorem personal property taxes assessed on the 2018 oil production," which effectively made the exemptions applicable to Taxpayers' 2019 taxes but not their 2018 taxes on the leases. Taxpayers appealed to the district court, seeking a determination that their exemptions were effective January 1, 2018. They also sought a refund of their 2018 taxes. The district court found BOTA misinterpreted the law when determining the effective date of the exemptions and ordered the refund. The County appeals, arguing the exemptions should instead be effective January 1, 2019.

Because we find the district court correctly determined BOTA misinterpreted the statutes governing Taxpayers' exemptions, we affirm the district court's ruling which modified BOTA's decision and ordered a refund of Taxpayers' 2018 taxes.

Proceedings before BOTA

Taxpayers own mineral leasehold interests in Ellis County, Kansas (the Leases). Kansas taxes oil and gas leases and wells that are producing or capable of producing oil or gas in paying quantities as personal property. K.S.A. 79-329. To that end, mineral leasehold interests in the state must be appraised annually with their fair market value determined as of January 1, for the determination of property taxes owed each year. K.S.A. 79-301; K.S.A. 79-329.

Taxpayers paid property taxes on the Leases in 2018. In March 2019, they timely applied to exempt the Leases from property taxes under K.S.A. 79-201t, which exempts certain low-producing leases from taxation. Taxpayers requested the exemptions be effective January 1, 2018, based on the Leases' 2018 production. The county appraiser reviewed Taxpayers' exemption applications, confirmed their factual accuracy, and recommended the exemptions be granted without a hearing.

BOTA found the Leases qualified under K.S.A. 79-201t and granted the exemptions "commencing with the ad valorem personal property taxes assessed on the 2018 oil production, and each succeeding year, so long as the property continues to be used for exempt purposes." Taxpayers petitioned for reconsideration, requesting that BOTA clarify they were entitled to a refund of the 2018 property taxes paid on the Leases. BOTA denied the petitions, finding no reason to modify its orders.

The district court finds Taxpayers' 2018 taxes should be refunded.

Taxpayers petitioned for judicial review of BOTA's decision in Ellis County District Court. They requested the district court either modify BOTA's order to state that they were entitled to a refund of the 2018 taxes or remand the matter to BOTA with instructions to address whether the 2018 taxes could be assessed against an exempt lease. The district court consolidated the cases

involving each lease, and the parties stipulated to the facts. The parties agreed Taxpayers paid ad valorem property taxes on the Leases in 2018. The parties also agreed the Leases produced less than five barrels per day in 2018 and therefore qualified for an exemption from property taxes under K.S.A. 79-201t.

The parties agreed that BOTA used different language when granting prior exemption requests under K.S.A. 79-201t. In the past, BOTA's standard language granted the exemptions "from January 1" of the tax year at issue (here, 2018). This time, BOTA ordered the exemptions "commencing with the ad valorem personal property taxes assessed on the 2018 oil production." According to the parties, this phrasing change is meaningful because Taxpayers would receive a refund of their 2018 property taxes paid on the Leases under the prior language, but not under the new language.

Taxpayers argued that in failing to refund their 2018 taxes, BOTA's orders were unconstitutional, erroneously interpreted or applied the law, were arbitrary and capricious, and failed to decide an issue requiring resolution. The County, for its part, argued BOTA correctly granted exemptions to begin in the 2019 tax year, based on the method used to appraise oil and gas leases in Kansas. Under this method, the prior year's production is generally used to determine a lease's fair market value as of January 1 (with some exceptions not applicable here). Because the 2017 production (which was used to determine the Leases' fair market value as of January 1, 2018) was not at exempt levels, the County argues the Leases should not be exempt from 2018 taxes.

At trial, the district court heard testimony from long-time Ellis County Appraiser Lisa Ree. Ree explained how county appraisers value mineral leasehold interests for ad valorem property tax purposes and how they determine whether a lease qualifies for an exemption under K.S.A. 79-201t. Using a formula supplied by the Department of Property Valuation's annual Oil and Gas Appraisal Guide (the Guide), lease production from the past two years is used to estimate the value of oil remaining in the ground for future production (also called the gross reserve value of a lease). The gross reserve value is then apportioned between the royalty (or landowner) interest and the working (or operator) interest. Under

this formula, the first time 2018 production from a lease would be used in calculating the lease's gross reserve value is tax year 2019.

Ree explained that ad valorem property taxes are assessed annually as of January 1 against the gross reserve value. While property taxes are assessed against the gross reserve value, not annual production, the past two years of production are used to estimate the decline rate in the production of the lease and forecast the productive capability of the lease for the next seven years. The forecasted future production, discounted back to present worth, is used as an estimate of the gross reserve value as of January 1 of the given tax year.

Ree also testified that county appraisers across the state disagree about how to interpret BOTA's standard language when granting exemptions under K.S.A. 79-201t. She said some county appraisers interpreted the prior language, which granted the exemption as of January 1 of the year in which production fell below the exempt level, to entitle the taxpayer to a refund for property taxes paid on the gross reserve value for the year in which production fell to exempt levels. Other appraisers took the opposite position and would not grant such refunds. Ree, a board member of the Kansas County Appraiser's Association, said the issue had been a frequent topic of conversation over the years.

Ree interpreted the new wording used in BOTA's order—granting the exemptions on the property taxes "'assessed on the 2018 oil production"'—to mean Taxpayers were not entitled to a refund of their 2018 property taxes. This was because the first time the 2018 oil production would be included in calculating the gross reserve value of the Leases would be for tax year 2019.

The district court also heard testimony from Kevin Hupp II, an oil and gas consultant specializing in ad valorem taxation. Hupp confirmed Ree's description of the assessment process and confusion among county appraisers as to how to interpret the language used in BOTA's previous exemption orders. He testified the appraisal of a mineral lease as of January 1 is an estimate of what the lease will produce for that tax year. And the taxes are assessed based on that projection of future production.

The district court found that BOTA incorrectly interpreted and applied the law in granting an exemption from "property taxes

assessed on the 2018 oil production," since property taxes are not assessed on lease production. The court observed that BOTA's language change granted an exemption from a form of taxation which does not exist. The district court found BOTA's new phrasing misinterpreted K.S.A. 79-201t, K.S.A. 79-301 (requiring appraisal of personal property as of the first day of January of each year), and K.S.A. 79-501 (requiring tangible personal property to be appraised at its fair market value).

The district court found the Leases were exempt from property taxes since average daily production on the Leases fell below five barrels per day in 2018, and, under K.S.A. 79-213(j), the exemption applied from the first day of exempt use, which was January 1, 2018. The court also found that BOTA, in failing to order a refund of the taxes for 2018, left a matter unresolved which requires resolution. The court rejected Taxpayers' claim that BOTA's orders were unconstitutional and ordered the County to refund the 2018 property taxes paid on the Leases.

The County asks us to reverse the district court and affirm BOTA.

The County claims Taxpayers are not entitled to a refund of their 2018 taxes paid on the Leases since the 2017 production was not at exempt levels. It asks us to reverse the district court and find the exemptions on the Leases should be granted with an effective date of January 1, 2019.

The Kansas Judicial Review Act (KJRA) controls judicial review of BOTA decisions. See K.S.A. 74-2426(c). The district court found that BOTA's orders violated K.S.A. 77-621(c)(3) and (4). Taxpayers, as the parties seeking to invalidate BOTA's action, have the burden to prove BOTA was wrong. K.S.A. 77-621(a)(1). Our review of BOTA's interpretation and application of the law is unlimited and without deference to the agency's view. *May v. Cline*, 304 Kan. 671, 675, 372 P.3d 1242 (2016).

The standards governing judicial interpretation of statutes—including tax statutes—are well known:

"Under the Kansas Constitution and statutes, taxation is the rule and exemption is the exception. One claiming exemption from taxation has the burden of showing that the use of the property comes clearly within the exemption claimed. Ordinarily, tax exemption statutes are to be construed strictly in favor of imposing the tax and against allowing the exemption for one who does not clearly

qualify. However, the strict construction rule is subordinate to the fundamental rule of statutory construction that the intent and purpose of the legislature govern if that intent can be ascertained. [Citations omitted.]" *In re Tax Appeal of Hutchinson's Historic Fox Theatre, Inc.*, No. 90,145, 2003 WL 22119343, at *2 (Kan. App. 2003) (unpublished opinion).

See *In re Tax Appeal of LaFarge Midwest*, 293 Kan. 1039, 1045, 271 P.3d 732 (2012).

If the statute is plain and unambiguous, a court must give effect to its express language, rather than determine what the law should or should not be. *In re Paternity of S.M.J. v. Ogle*, 310 Kan. 211, 212, 444 P.3d 997 (2019). Additionally, courts must consider the various provisions of an act in pari materia to reconcile and bring them into harmony if possible. 310 Kan. at 213.

Article 11, § 1(a) of the Kansas Constitution requires the Legislature to "provide for a uniform and equal basis of valuation and rate of taxation of all property subject to taxation." K.S.A. 79-329 requires oil and gas leases and wells that are producing or capable of producing oil or gas in paying quantities to be assessed and taxed as personal property. Personal property must be appraised uniformly and equally at its fair market value as of the first day of January each year. See K.S.A. 79-501; K.S.A. 79-1439(a); K.S.A. 79-301. "'Fair market value'" is defined as "the amount in terms of money that a well informed buyer is justified in paying and a well informed seller is justified in accepting for property in an open and competitive market" as of January 1 of a given year. K.S.A. 79-503a.

The Legislature has given the Director of the Division of Property Valuation, a division of the Kansas Department of Revenue, the authority to prescribe guides to help county appraisers establish fair market value for personal property. K.S.A. 75-5105a(b). The annual Oil and Gas Appraisal Guide is one of those guides. This Guide provides a uniform methodology for determining the fair market value of oil and gas leases as of January 1 of the given tax year. The Guide's formula determines the fair market value of any given lease by estimating the lease's "gross reserve value," which is the present value, as of January 1, of all reserves to be recovered in the future over the life of the lease. Thus, property taxes are assessed not against annual production but against

the fair market value of the mineral interest itself as of a specific date.

The Legislature has also exempted certain low-producing leases from taxation. K.S.A. 79-201t provides:

"The following described property, to the extent herein specified, shall be and is hereby exempt from all property or ad valorem taxes levied under the laws of the state of Kansas:

"(a) All oil leases, other than royalty interests therein, the average daily production from which is three barrels or less per producing well, or five barrels or less per producing well which has a completion depth of 2,000 feet or more."

Any taxpayer seeking an exemption under this statute, like any exemption from property taxes, must file a request with the county appraiser. After examining the request, the appraiser submits it to BOTA along with the appraiser's recommendation on whether the exemption should be granted and whether a hearing is necessary. BOTA then examines the request and appraiser's recommendation. BOTA may hold a hearing but need not do so. K.S.A. 79-213. If BOTA grants a taxpayer's request for exemption, the exemption is effective "beginning with the date of first exempt use." K.S.A. 79-213(j). "In the event that taxes have been paid during the period where the subject property has been determined to be exempt, the board shall have the authority to order a refund of taxes for the year immediately preceding the year in which the exemption application is filed." K.S.A. 79-213(k).

Although K.S.A. 79-201t exempts oil wells, the "average daily production from which" is equal or below a certain level, it does not state how "average daily production" should be calculated. Under K.S.A. 75-5105a and K.S.A. 79-506, the Director of Property Valuation has provided guidelines for this calculation:

"Average daily production per well is defined as annual production divided by 365 days divided by the number of producing wells; or, in the case of new leases, actual production divided by the number of actual days produced divided by the number of producing wells. Normal downtime is expected and included in the 365 days. Abandoned or shut-in wells are not included in the calculation as producing wells.

"The statute is specific as to production and no consideration may be given to well shut down, pumping unit, or transportation problems. In these cases, the annual production divided by the actual producing days is to be used to determine the exemption; normal downtime does not qualify as one of these cases. Lease production that began during the year should not be annualized, but should be

calculated from the date the lease went into production. The royalty interest and the production equipment do not qualify for the exemption."

BOTA's new interpretation ignores the Legislature's directive.

The County, in asking us to affirm BOTA's order, contends that a change in average daily production after January 1 should not have retroactive effect. Since the methodology used to tax oil and gas properties includes any change in production after the January 1 appraisal date in calculating the gross reserve value for the next tax year, the County argues Taxpayers' exemptions should be granted only for that next tax year (here, 2019).

On the other hand, Taxpayers argue (and the district court found) that K.S.A. 79-201t grants an exemption from property taxes for any tax year in which annual production is equal or below a certain number of barrels. Because average daily production from each of the Leases fell below five barrels in 2018, the district court found Taxpayers were entitled to an exemption from ad valorem taxes on the Leases for that year. See K.S.A. 79-201t.

As noted by the parties, BOTA previously interpreted the law just like the district court, and another panel of this court has also approved this interpretation. See *In re Tax Exemption Application of Graham-Michaelis Corp.*, 27 Kan. App. 2d 467, 470, 2 P.3d 795 (2000). In *In re Graham-Michaelis Corp.*, Barton County sought review from several BOTA orders granting exemptions under K.S.A. 79-201t for the 1997 tax year. The taxpayers applied for the exemptions in 1998 based on actual production for the 1997 calendar year. BOTA granted the exemptions beginning January 1, 1997, explaining that K.S.A. 79-213(j) required it to grant the tax exemption beginning in the year in which actual production met the statutory standards found at K.S.A. 79-201t.

On appeal, Barton County argued that the taxpayers were only entitled to exemptions for 1998. The panel agreed with BOTA, noting the taxpayers met the requirements under K.S.A. 79-201t and that, under K.S.A. 79-213(j), the exemption was effective as of the date of first exempt use. The panel recognized an ambiguity in K.S.A. 79-201t about how to apply the exemption but explained that the authority to resolve this question had largely been delegated to BOTA. 27 Kan. App. 2d at 470. The panel noted BOTA was a specialized agency whose "decisions should be given great

credence and deference when it is acting in its area of expertise." 27 Kan. App. 2d at 469.

The County asserts that we must defer to BOTA's new interpretation of the law, as this court deferred to BOTA's previous interpretation in *In re Graham-Michaelis Corp.* While the County acknowledges that K.S.A. 79-213(j) provides an exemption "shall be effective beginning with the date of first exempt use," it argues that "BOTA retains the right to determine in which tax year the exemption should commence."

Since the decision in *In re Graham-Michaelis Corp.*, Kansas courts have been freed from the deferential yoke previously required when reviewing an agency's interpretation of the statutes it is tasked with administering. See, e.g., *Douglas v. Ad Astra Information Systems*, 296 Kan. 552, 559, 293 P.3d 723 (2013) (explaining that the doctrine of operative construction "has been abandoned, abrogated, disallowed, disapproved, ousted, overruled, and permanently relegated to the history books where it will never again affect the outcome of an appeal"). So we need not defer to BOTA's revised interpretation of K.S.A. 79-213(j). And it is the Legislature, not BOTA, who retains the right to determine when tax exemptions should begin.

That said, just because the panel in *In re Graham-Michaelis Corp.* applied a now disfavored deferential standard of review in approving BOTA's previous interpretation does not mean its ultimate decision is invalid. That panel correctly noted BOTA's prior interpretation of K.S.A. 79-213(j) accurately reflected the statutory language, which provides the exemption "shall be effective beginning with the date of first exempt use." On the other hand, BOTA's new interpretation ignores that language.

Since the Leases began producing at exempt levels in 2018, their date of first exempt use was in tax year 2018. And in harmonizing the various statutory provisions, the district court found the specific date of first exempt use was the first day of 2018 since oil and gas leases are appraised as of January 1. See K.S.A. 79-301. As the district court noted, the Guide addresses how fair market value of a lease is determined; it does not address how exemptions are determined. And even if it did, the statutory language would control.

The Legislature clearly intended the exemption to be retroactively applied by allowing Taxpayers to claim it on the first date their Leases qualified. K.S.A. 79-213(j). And, to further underscore this intent, it provided BOTA the authority to refund taxes already paid on property later found to be exempt. K.S.A. 79-213(k). Since a lease is taxed based on a projection of its future production, it only makes sense that those taxes be refunded if the lease produces at exempt levels instead of the projected production levels.

The district court correctly found BOTA misinterpreted the law in its order. Taxpayers are entitled to exemptions with an effective date of January 1, 2018.

The district court also relied on K.S.A. 77-621(c)(3) in granting Taxpayers relief. It found that BOTA, in failing to order a refund of the taxes for 2018, left a matter unresolved which requires resolution. Since we agree the effective date of Taxpayers' exemptions is January 1, 2018, they are entitled to a refund of property taxes they paid for tax year 2018. See K.S.A. 79-213(k). We also affirm the district court's order that the County refund those taxes to the appropriate Taxpayer in each case.

While the County also argues BOTA's orders were not unconstitutional, the district court did not find they were, nor did Taxpayers make this argument on appeal. Therefore, we need not address this issue.

Affirmed.