OFFICIALLY SELECTED
CASES ARGUED AND DETERMINED

IN THE

COURT OF APPEALS

OF THE

STATE OF KANSAS

Reporter:
SARA R. STRATTON

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

(545 P.3d 1020)

No. 125,528

ASHLEY CLINIC, LLC, *Appellee/Cross-Appellant*, v. SCOTT COATES, M.D., and LABETTE COUNTY MEDICAL CENTER d/b/a LABETTE HEALTH, *Appellants/Cross-Appellees*.

SYLLABUS BY THE COURT

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

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

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

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

5. TORTS—*Legal Malice—Definition.* Legal malice is the intent to do harm without any reasonable justification or excuse.

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

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

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

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

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

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

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

Appeal from Neosho District Court; ROBERT J. FLEMING, judge. Oral argument held September 19, 2023. Opinion filed March 15, 2024. Affirmed.

Mark A. Cole, *Barry L. Pickens*, and *Anna G. Schuler*, of Spencer Fane LLP, of Overland Park, for appellants/cross-appellees.

Frankie J. Forbes and *Quentin M. Templeton*, of Forbes Law Group, LLC, of Overland Park, and *Brandon J.B. Boulware*, of Boulware Law LLC, of Kansas City, Missouri, for appellee/cross-appellant.

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

WARNER, J.: This case concerns the application and effect of a noncompete clause in an employment agreement between Dr. Scott Coates and his former workplace, Ashley Clinic, LLC. After a six-day trial, a jury found that Coates had breached that employment agreement when he went to work for Labette County Medical Center and that Labette tortiously interfered with Coates' employment agreement with Ashley Clinic. Labette and Coates now challenge many aspects of that trial. In a cross-appeal, Ashley Clinic challenges the district court's enforcement of the damage cap in the Kansas Tort Claims Act as well as the district court's denial of an equitable claim for unjust enrichment. After carefully reviewing the record and the parties' arguments, we affirm the district court's judgment.

FACTUAL AND PROCEDURAL BACKGROUND

The dispute at the heart of this case involves Coates' decision to end his relationship with Ashley Clinic and to work for Labette. Labette is a county hospital organized under K.S.A. 19-4601 et seq. It is based in Parsons but operates a healthcare center in Montgomery County and a clinic in Neosho County (in Chanute).

Coates' professional relationship with Ashley Clinic

After finishing his medical training in general surgery, Coates moved to southeast Kansas to work for Ashley Clinic in 2001. Although Ashley Clinic's principal office is in Chanute, the clinic requested that Coates establish his practice in Iola. After a few years, Coates transitioned much of his practice from Iola to Chanute.

Ashley Clinic initially hired Coates as a salaried employee for its surgery practice. A couple of years later, Coates became a member of Ashley Clinic. In doing so, he became a party to the clinic's operating agreement, which set forth the rules and regulations about management and business of the clinic, the rights and privileges of the members, and various other mutual covenants.

In 2006, Coates—along with the other members of the clinic—signed an amended employment agreement. This agreement, which was motivated in part by a physician's decision to leave the clinic and open a competing practice, stated that Coates

agreed he would not provide "medical services, especially the practice of General Surgery, within Neosho, Allen, Woodson, Wilson, Montgomery or Labette Counties" for two years after leaving the clinic. (These six counties are where the clinic's patients are generally located.) Because the extent of injuries stemming from the violation of this provision would be difficult to ascertain, the agreement provided that any breach of the restriction would lead to liquidated damages "in an amount equal to [200%] of the salary and bonus that was paid to [Coates], prior to any breach."

In 2016, Ashley Clinic and its members executed an amended operating agreement. Unlike the previous operating agreement, which did not contain any specific limitations on competition, the 2016 operating agreement stated that no member would engage in any business that could "jeopardize any business relationship the [clinic] has with any customer, client, patient, vendor or supplier of the [clinic]." Coates signed this agreement.

Coates' departure from Ashley Clinic

After working at Ashley Clinic for several years, Coates started looking for a different position. Since his family was in Chanute, he hoped to find a job in the area so he could raise his own family nearby. He sent letters to multiple local hospitals explaining his situation, including a letter to Brian Williams, the CEO at Labette. Coates narrowed his search to three hospitals: Neosho Memorial, Coffey Health, and Labette.

Eventually, Labette extended an offer to Coates. During conversations leading up to this offer, Williams and Coates discussed the noncompete provision in Coates' 2006 employment agreement with Ashley Clinic. Labette's attorney analyzed this provision and concluded that it prevented Coates from practicing within the six-county region, which included Labette's medical offices in Neosho County, Labette County, and Montgomery County.

Coates signed an employment contract with Labette in June 2019. This contract included a $125,000 "Legal Allowance" to pay legal expenses arising from his decision to leave Ashley Clinic and work at Labette. It also included an indemnity clause, stating:

"[Labette] Medical Center acknowledges that at the time of signing of this Agreement that [Coates] is subject to covenants against competition and non-solicitation covenants pursuant to his current Employment Agreement with the Ashley Clinic, LLC, and other agreements with the Ashley Clinic, LLC and its affiliates that restrict [Coates] from entry into and full performance of Physician's obligations pursuant to this Agreement. Accordingly, [Labette] assumes the full risk to it of any and all losses, damages, costs expenses and attorneys' fees it may incur that arise from any claim, action, or proceeding of any kind or nature that may be brought against [Labette] by the Ashley Clinic."

Later that month, Coates notified Ashley Clinic that he would be leaving the clinic in August.

Ashley Clinic's lawsuit against Coates and Labette

Ashley Clinic filed suit against Coates and Labette. It sought an injunction preventing Coates from practicing medicine in the area and damages relating to breach of the noncompete provision in Coates' employment agreement. Ultimately, Ashley Clinic raised 12 claims against Coates and Labette. Relevant here, Ashley Clinic argued:

- Coates breached the noncompete provision in the 2006 employment agreement by practicing general surgery at Labette's clinics in Chanute and Independence, as well as at its hospital in Parsons.
- Coates breached a 2003 confidentiality agreement by disclosing confidential information to multiple third parties.
- Labette tortiously interfered with the 2006 employment agreement between Coates and Ashley Clinic by intentionally inducing Coates to breach the noncompete clause in that agreement.
- Labette was unjustly enriched by the compensation it received for the medical services that Coates performed.

As the case progressed, Ashley Clinic sought permission to add a claim for punitive damages against Labette. The district court invited the parties to file supplemental briefing on several legal issues about the application of the Kansas Tort Claims Act (KTCA), including whether the KTCA's cap on compensatory

damages was constitutional and applicable, whether punitive damages were available, and whether the KTCA would apply to Labette if it conducted business outside of Labette County.

In response, Coates and Labette argued that the KTCA prohibited Ashley Clinic from asserting punitive damages against Labette because Labette is a governmental entity. And Coates and Labette argued that the Act's damage cap—contained in K.S.A. 75-6105(a)—limited Ashley Clinic's recovery of compensatory damages to a maximum amount of $500,000. Ashley Clinic disagreed and urged the district court to defer its rulings until after trial.

The district court ultimately denied Ashley Clinic's request to add a claim for punitive damages. The case then proceeded to a jury trial. The jury found that Coates had breached the confidentiality agreement and the 2006 employment agreement, causing a total of $472,913.50 in damages. The jury also found that Labette had tortiously interfered with the 2006 employment agreement between the clinic and Coates, causing $739,523.06 in damages. The district court ruled in Labette's favor on the clinic's equitable claim for unjust enrichment, finding the clinic had conferred no benefit on Labette that required further compensation.

Following the trial, the district court found that the KTCA applied to Ashley Clinic's tortious-interference claim against Labette and thus reduced the damages on that claim from $739,523.06 to $500,000. The court then entered judgment in favor of Ashley Clinic against Coates for $472,913.50 ($9,437.50 for breaching the confidentiality agreement and $463,476 for breaching the employment agreement) and against Labette for $500,000.

DISCUSSION

Coates and Labette now appeal the respective judgments against them, challenging numerous evidentiary bases for the jury's verdict and raising arguments regarding the legality of the district court's ultimate damage awards. Ashley Clinic cross-appeals the district court's decisions under the KTCA—capping the damages against Labette and denying the clinic's claim for punitive damages—and the court's adverse ruling on its unjust-enrichment claim.

Given the intertwining and sometimes overlapping nature of these arguments, we examine them in the order they were presented at trial. We thus begin our discussion with evidentiary challenges to the verdict.

1. *Coates' and Labette's challenges to the jury verdict*

After hearing several days of testimony, the jury found that Coates had breached his confidentiality agreement and the noncompete clause of the 2006 employment agreement. It also found that Labette wrongfully induced Coates to breach the noncompete clause with Ashley Clinic, causing the clinic to suffer $739,523.06 in damages.

Coates and Labette now challenge that verdict from several angles. They argue that the evidence presented at trial did not show that Coates was bound by the noncompete clause in the employment agreement, assailing the proof that the agreement was a valid contract supported by consideration and that Coates was an employee, subject to the agreement's provisions. Labette further asserts that Ashley Clinic did not present evidence of its lost profits to support its tortious-interference claim. And it asserts that Ashley Clinic did not demonstrate that Labette acted with malice, a necessary element of tortious interference with a contract.

The jury is central to our system of justice. Courts rely on jurors to observe witnesses' demeanor, listen to their testimony, and weigh the evidence presented in the context of each party's arguments to determine what versions of events are credible. And once jurors have been instructed on the law, we empower them to apply that law to the facts and render a verdict.

These are not duties appellate courts take lightly. Thus, when a verdict "is attacked on the ground it is contrary to the evidence," we do not "weigh the evidence or pass on the credibility of the witnesses." *Timsah v. General Motors Corp.*, 225 Kan. 305, Syl. ¶ 1, 591 P.2d 154 (1979). We will not disturb the jury's verdict "[i]f the evidence with all reasonable inferences to be drawn therefrom, when considered in a light most favorable to the successful party below, will support the verdict." 225 Kan. 305, Syl. ¶ 1. With these principles in mind, we turn to the parties' arguments.

1.1. *Evidence that the 2006 employment agreement was valid and enforceable against Coates*

Coates and Labette first argue that the jury erred when it awarded damages based on the 2006 employment agreement between Coates and Ashley Clinic—the agreement containing the noncompete clause at the heart of this case. Coates and Labette attack two aspects of the jury's reliance on that agreement: They assert the 2006 employment agreement was void, claiming the facts at trial showed the agreement was not supported by consideration. And they assert that even if the agreement were valid in the abstract, its provisions do not apply to Coates since he was not an employee but a member of the limited liability company running the clinic. After reviewing the evidence submitted at trial, we find neither argument persuasive.

"Every contract, to be legally enforceable, must be supported by a consideration." *Dugan v. First Nat'l Bank in Wichita*, 227 Kan. 201, Syl. ¶ 8, 606 P.2d 1009 (1980). Consideration in this context is something that is given or given up in exchange for the promises in the contract. It might include "'some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other.'" *Varney Business Services, Inc. v. Pottroff*, 275 Kan. 20, 32, 59 P.3d 1003 (2002) (quoting 17A Am. Jur. 2d, Contracts § 113). Whether an agreement is supported by consideration is ordinarily a factual question for the jury. *Evco Distributing, Inc. v. Brandau*, 6 Kan. App. 2d 53, 59, 626 P.2d 1192, *rev. denied* 230 Kan. 817 (1981).

Kansas courts presume that written contracts are valid and supported by adequate consideration. *State ex rel. Ludwick v. Bryant*, 237 Kan. 47, 50, 697 P.2d 858 (1985). The jury here was properly instructed on this principle and thus was entitled to presume that the 2006 employment agreement, which Coates signed, was valid unless Coates or Labette proved it was not.

Coates and Labette argue that the noncompete provision in the 2006 employment agreement was unenforceable because that agreement added nothing to what Coates was already entitled to receive under the 1999 operating agreement. They point out that

the 2006 employment agreement did not change Coates' compensation or alter the fees and expenses the clinic agreed to cover on his behalf.

As a general rule, a person does not make a new promise when they merely agree to do what they were already bound to do. *Cron v. Zimmerman*, 160 Kan. 78, Syl. ¶ 1, 159 P.2d 400 (1945). But Kansas courts have long recognized that continued employment can be sufficient consideration to support a new employment contract, including one that adds "a covenant not to compete." *Puritan-Bennett Corp. v. Richter*, 8 Kan. App. 2d 311, 315, 657 P.2d 589, *rev. denied* 233 Kan. 1092 (1983); see *Wichita Clinic v. Louis*, 39 Kan. App. 2d 848, 853-54, 185 P.3d 946, *rev. denied* 287 Kan. 769 (2008) ("Dr. Louis' continued employment by the Clinic during a 13-year period constitutes sufficient consideration to support the restrictive covenant.").

The jury heard evidence that signing the 2006 employment agreement allowed Coates to continue his medical practice at the clinic. Another physician at the clinic testified that "all members [were] required to sign [an] amended employment agreement" and that signing the employment agreement was a requirement of "maintaining [their] employment at the Ashley Clinic." The physician explained that "unless you signed it, you weren't going to be able to continue practicing." Thus, there was evidence presented at trial to support the jury's reliance on the 2006 employment agreement because that agreement was based on consideration and thus a valid contract.

Coates and Labette also argue that even if the 2006 employment agreement was enforceable in the abstract, it had no effect on Coates since he was a member of the limited liability company, not merely an employee. Broadly speaking, Coates and Labette argue that Coates' actions at the clinic should not be considered those of an employee under various legal tests and statutory frameworks. They devote significant briefing to the question of whether Coates would be an employee under the common-law test Kansas uses for assessing whether an employee-employer relationship exists under the Kansas Wage Payment Act, Kansas Workers Compensation laws, the Kansas Employment Security Act, and tort actions based on vicarious liability. See *Craig v.*

FedEx Ground Package System, Inc., 300 Kan. 788, 793-98, 335 P.3d 66 (2014) (discussing the origins and application of the 20-factor common-law test). They also question whether Coates would be classified as an employee under federal laws governing taxes and family leave.

The statutory frameworks and categories of liability discussed by the defendants impose rights and responsibilities on people based on their legal status as employees, regardless of how they have been classified by their employer. For example, Kansas courts have used the 20-factor test to ascertain whether a person is entitled to wage protection and for compensation for injuries suffered while working, even when the company has denied an employment relationship. See 300 Kan. at 805-28; *Knoble v. National Carriers, Inc.*, 212 Kan. 331, 332-33, 510 P.2d 1274 (1973).

Coates' responsibilities under the 2006 employment agreement arose not from his legal status as an employee, but from the fact that he agreed to those terms by signing the contract. So it is unnecessary to determine whether Coates would have been deemed an employee for other purposes under different legal frameworks.

The language of the 2006 employment agreement demonstrates that the parties to that contract fully recognized that Coates both served as a member of the company and worked in its medical practice. The agreement acknowledged that Coates was "also . . . a Member" of the clinic but nevertheless defined Coates as an "Employee" for its purposes. It set forth licensing requirements and detailed restrictions on Coates' practice not delineated in the earlier operating agreements, including the days and hours to be worked, as well as other clinic and on-call responsibilities. And most important for purposes of this discussion, it included an agreement that Coates would not practice medicine in Neosho, Allen, Woodson, Wilson, Montgomery, and Labette Counties for two years after his work at the clinic. Coates signed the agreement on the line designated "EMPLOYEE."

Coates has never argued that he entered this agreement under duress. Nor has he contested the general enforceability of any aspect of the agreement, including the noncompete clause. Instead, Coates merely asserts that its provisions should not apply to him

since he might not be considered an employee in other contexts. But the Kansas Supreme Court has cautioned that courts have a duty "'to sustain the legality of contracts'" when they are "'fairly entered into, if reasonably possible to do so, rather than to seek loopholes and technical legal grounds for defeating their intended purpose.'" *Weber v. Tillman*, 259 Kan. 457, 463, 913 P.2d 84 (1996).

The jury found that Coates should be bound by the agreement he signed. There was evidence presented to support this conclusion. Neither the jury nor the district court erred in finding the 2006 employment agreement was valid and enforceable against Coates.

1.2. *Evidence that Labette tortiously interfered with the contract between Coates and Ashley Clinic*

Labette next challenges the jury's finding that it tortiously interfered with the 2006 employment agreement by knowingly inducing and assisting Coates in violating the noncompete clause. On appeal, Labette does not dispute that there was evidence from which the jury could conclude that it interfered with that agreement. But it argues there was no evidence to show it acted with malice when it did so.

A party claiming tortious interference with a contract must show that the offending party knew of an existing contractual relationship and nevertheless intentionally induced one of the contracting parties to breach that agreement, causing damages to the claimant. *Turner v. Halliburton Co.*, 240 Kan. 1, 12, 722 P.2d 1106 (1986). The Kansas Supreme Court has held that a person intentionally induces a breach when they act maliciously—that is, with "'actual or legal malice.'" *Burcham v. Unison Bancorp, Inc.*, 276 Kan. 393, 426, 77 P.3d 130 (2003). Whether the offending party has acted maliciously is typically a question of fact for the jury. *Smith v. Farha*, 266 Kan. 991, Syl. ¶ 4, 974 P.2d 563 (1999).

The jury found that Labette tortiously interfered with the 2006 employment agreement between Coates and Ashley Clinic when it negotiated with and eventually hired Coates, knowing Coates' position with Labette would violate his noncompete clause.

Labette acknowledges these facts but argues they did not demonstrate that it acted maliciously. It claims that malice requires a level of evil-mindedness and an intent to injure—neither of which were present here. Rather, it asserts, the evidence merely showed that Labette acted as any business competitor would—motivated by profits, but not evil intent.

As Ashley Clinic notes in its response brief, Labette's argument conflates *actual malice*, which is required for defamation, with *legal malice*, which is all that must be shown in a claim for tortious interference with a contract or business expectancy. To show legal malice, Ashley Clinic was merely required to present evidence that Labette intended to interfere with the contract without any reasonable justification or excuse. See *Linden Place v. Stanley Bank*, 38 Kan. App. 2d 504, 513, 167 P.3d 374 (2007); see also PIK Civ. 4th 103.05 (legal malice is "the intent to do harm without any reasonable justification or excuse"); PIK Civ. 4th 124.91, Notes on Use ("[L]egal malice, and not actual malice, is still the required element for claims of tortious interference that do not involve defamation, a qualified privilege or other claims or defenses having constitutional underpinnings.").

The jury heard evidence that Labette knew of the noncompete clause in its negotiations with Coates and concluded that he would likely be bound by that provision. It nevertheless hired him for a medical practice less than three miles from Ashley Clinic. In anticipation of his breaching that agreement, Labette included in its contract with Coates a legal allowance to pay $125,000 in legal fees and costs associated with any breach-of-contract action. And it further assessed that hiring Coates would be worth defending its actions, agreeing that Coates would not be required to indemnify Labette should it be sued by Ashley Clinic. The jury could find from this evidence that Labette proceeded with its decision to hire Coates even though it knew its actions would lead to the breach of his contract with Ashley Clinic.

Even so, Labette argues that the jury should have instead found that Labette was justified as a competitor to hire Coates from another medical provider. Labette points to the Restatement (Second) of Torts § 768 (1979), which discusses a privilege for

business competitors to interfere with contracts for business purposes as long as they do not employ wrongful means. Though this section has not been adopted in Kansas, our caselaw—reflected in the pattern jury instruction provided to the jury here—recognizes that interference with a contract may be justified in certain instances, including if it occurs for a "legitimate business purpose." See *Burcham*, 276 Kan. at 425.

The Kansas Supreme Court has explained that this justification "'denote[s] the presence of exceptional circumstances which show that no tort has been in fact committed.'" *Turner*, 240 Kan. at 12-13 (quoting 45 Am. Jur. 2d, Interference § 27). Whether such a justification exists turns on several factual questions, including the defendant's motives, the proximity of the defendant's conduct to the interference, and the means employed. See *Burcham*, 276 Kan. at 425.

The jury in this case was instructed on the factors that Kansas courts have found relevant to whether a competitor's interference may be justified. The jury was also informed, consistent with Kansas law, that such a justification may exist when the defendant "used fair means and good faith for some lawful interest or purposes." Accord 276 Kan. at 425 (discussing justification in such circumstances); Restatement (Second) of Torts § 767 (discussing when interference with a contract may be improper). The jury concluded that Labette's conduct—knowingly interfering with Coates' agreement not to compete with Ashley Clinic—was not justified under these facts.

This finding is supported by the evidence and consistent with Kansas law and the Restatement. Indeed, Restatement (Second) of Torts § 768, comment i, illustrates that the very privilege or justification that Labette seeks to benefit from is not intended to apply when a competitor knowingly induces another company's employee to breach a valid covenant not to compete:

> "An employment contract, however, may be only partially terminable at will. Thus it may leave the employment at the employee's option but provide that he is under a continuing obligation not to engage in competition with his former employer. Under these circumstances a defendant engaged in the same business might induce the employee to quit his job, but *he would not be justified in engaging the employee to work for him in an activity that would mean violation of the contract not to compete*." (Emphasis added.)

In short, the jury's finding that Labette tortiously interfered with the 2006 employment contract between Coates and Ashley Clinic is supported by evidence presented at trial. We will not reweigh that evidence on appeal.

1.3. *Evidence of Ashley Clinic's damages*

In its remaining challenge to the verdict, Labette argues that the evidence presented at trial was not sufficient to support the damages assessed by the jury for its tortious interference. Labette challenges the jury's damage award in two ways. It asserts that the damages awarded by the jury reflected only Ashley Clinic's lost revenue after Coates left the practice and did not reflect the expenses and overhead; in other words, the damages awarded by the jury were based on lost revenue, not lost profits. And it asserts that there was no evidence presented to show that Coates' departure caused the damages the clinic claimed. Again, we are unpersuaded.

Damages need not be established with absolute certainty. *Kendrick v. Manda*, 38 Kan. App. 2d 864, 871, 174 P.3d 432 (2008). Instead, a party claiming that it has been injured as a result of another's wrongful acts must show the extent of its injury—that is, the amount of damages it suffered—with *reasonable* certainty. *Wolfe Electric, Inc. v. Duckworth*, 293 Kan. 375, 392, 266 P.3d 516 (2011). This requires ""some reasonable basis for computation which will enable the jury to arrive at an approximate estimate"' of the damages." 293 Kan. at 395 (quoting *Puckett v. Mt. Carmel Regional Med. Center*, 290 Kan. 406, Syl. ¶ 3, 228 P.3d 1048 [2010]).

At trial, Ashley Clinic presented testimony of an accountant it had retained to assess its damages. The accountant compared two 16-month periods—from August 2017 to the end of 2018 (when Coates was still a member of the clinic) and from August 2019 to the end of 2020 (after Coates had left)—to show the difference in income before and after Coates left the practice. The accountant testified that, based on this data, the clinic brought in $739,523.06 less income after Coates departed. The jury eventually awarded this amount as the damages caused by Labette's tortious interference with Coates' agreement with Ashley Clinic.

On appeal, Labette acknowledges that the accountant retained by Ashley Clinic testified about the amount of *revenue* the clinic lost in the period after Coates left the practice. But Labette argues that lost revenue, or the difference in the gross income the clinic received, is not an accurate reflection of the clinic's damages. Labette asserts that the correct measure of the clinic's losses is its lost *profit*—the amount left after deducting any changes in expenses from that income.

Ashley Clinic counters that while the distinction between revenue and profit (or between gross revenue and net revenue) might be meaningful in other cases, it is a distinction without a difference here. The clinic notes that its finance director testified at trial that the clinic's expenses and overhead remained the same after Coates left in August 2019. Thus, it asserts, the lost revenue in this case was equal to its lost profit. Accord 22 Am. Jur. 2d, Damages § 57 ("Gross revenue is generally not an appropriate measure of damages because revenue is calculated without regard to the costs the plaintiff incurred in the course of making that revenue. However, when operating expenses or overhead are fixed, gross profits may be awarded as representing net profits.").

Labette argues that the finance director's statement could not have been accurate. It points to other testimony that at least one other employee left Ashley Clinic when Coates did, which should have altered the clinic's overhead. Labette notes that the clinic's witnesses had limited information about the direct costs saved from Coates' departure and were not asked to consider the clinic's variable costs and expenses. And Labette asserts that none of the clinic's witnesses persuasively demonstrated that the clinic's loss in revenue was attributable to Coates' departure, rather than some other factor.

These arguments admittedly have some common-sense appeal. But they go to the strength of the clinic's evidence and the credibility of its witnesses, not to whether there was evidence presented to support the damage award. It was incumbent upon Labette to point out these perceived weaknesses to the jury. Viewing the evidence in the light most favorable to Ashley Clinic, the clinic showed that it lost $739,523.06 in net income following Coates' departure. That evidence was sufficient to show the

amount of damages suffered and the cause of those damages. The jury's damage award against Labette was supported by evidence presented at trial.

2. *Ashley Clinic's unjust-enrichment claim*

Turning from the jury verdict to the district court's rulings, Ashley Clinic argues that the court erred when it ruled in Labette's favor on the clinic's unjust-enrichment claim. Ashley Clinic argues that its affiliation with Coates over the course of almost two decades allowed him to develop skills as a surgeon and a name for himself and to establish deep ties to the Chanute community. It asserts that by hiring Coates—who the clinic describes as a "turn-key physician"—Labette inequitably gained the benefit of the clinic's investment.

The district court was unpersuaded by these arguments. It found that Coates' training and reputation were naturally developed during the course of his work at Ashley Clinic, and the clinic always faced the prospect of losing him to a different medical practice. The court stated that the risk of the clinic's patients following Coates to Labette was not a benefit that the clinic conferred upon its competitor, but rather a potential injury to the clinic that was accounted for in its damage claim for Labette's tortious interference with Coates' noncompete agreement.

Claims for unjust enrichment arise in equity. *Haz-Mat Response, Inc. v. Certified Waste Services Ltd.*, 259 Kan. 166, 176, 910 P.2d 839 (1996). They seek to enforce contracts implied by law by compensating one party with what should fairly and in good conscience be due from another. 259 Kan. at 176. To succeed on a claim for unjust enrichment, a person must show that they have conferred a benefit upon another party; that the other party knew of or appreciated that benefit; and that the circumstances surrounding the benefit make it inequitable for the other party to retain it without payment for its value. 259 Kan. 166, Syl. ¶ 6.

The district court found that Ashley Clinic had not sustained its burden to prove this claim because the clinic had not shown it conferred any benefit on Labette. We agree. Many benefits that the clinic claims to have bestowed on Labette are merely advancements in Coates' own career development. And while the evidence

showed that Labette profited from hiring Coates, that profit was not a benefit provided by Ashley Clinic. If anything, its profits were made as a result of Coates' breach of his noncompete agreement—for which Ashley Clinic had already been compensated by way of its claim that Labette had tortiously interfered with that contract.

It appears that the motivation behind Ashley Clinic's unjust-enrichment claim is not so much its belief that it had conferred a benefit on Labette, but rather its conviction that Labette should not be permitted to profit from its tortious conduct. In other words, Ashley Clinic appears to be asserting that Labette should be forced to disgorge any income that resulted from its wrongful actions. In essence, Ashley Clinic is using its unjust-enrichment claim as an avenue to recover punitive or exemplary damages when, as we discuss later in this opinion, those damages are not available under the KTCA. See K.S.A. 75-6105(c). But a claim for unjust enrichment is not an appropriate vehicle when Ashley Clinic did not bestow a benefit on Labette that required compensation.

The district court did not err when it found that Ashley Clinic had not shown that its actions had unjustly enriched Labette.

3. *Questions regarding the damage awards*

The parties' remaining arguments relate to the appropriateness of the damages awarded against Coates and Labette. Most of these questions center on the applicability of the KTCA to Labette and the constitutionality and application of the limitations on damages within that Act. Labette and Coates also assert that the damages levied against them are duplicative, as they both derive from the same injury to Ashley Clinic—losses flowing from Coates' breach of the noncompete agreement.

As we explain more fully below, we agree with the district court that the tort claim against Labette is governed by the KTCA, while the contract claims against Coates are not. As such, the district court did not err in applying the Act here—reducing the recoverable damages against Labette to $500,000 and denying Ashley Clinic's claim for punitive damages. We also find that these provisions do not violate the right to a jury trial in section 5 of the Kansas Constitution Bill of Rights because Kansas law did not

recognize tort claims against governmental entities at the time our constitution was ratified.

Finally, the district court did not err in entering the respective damage judgments against each defendant because those damages were supported by the evidence at trial. But we agree with Labette and Coates that Ashley Clinic may not recover damages beyond its total claimed losses.

3.1. *The KTCA's limitations on damages and Ashley Clinic's tortious-interference claim against Labette*

The KTCA, K.S.A. 75-6101 et seq., is a comprehensive act adopted in 1979 to define when government actors are immune from civil actions and when they may be held liable for tortious acts. It applies broadly to governmental entities—to state agencies and officials, as well as to counties, townships, cities, school districts, and other municipal actors. K.S.A. 75-6101; K.S.A. 75-6102(a), (b).

The Kansas Supreme Court has described the KTCA as "an 'open ended' act, meaning that liability is the rule and immunity is the exception." *Soto v. City of Bonner Springs*, 291 Kan. 73, 78, 238 P.3d 278 (2010). The Act distinguishes between traditional governmental functions—such as legislative, judicial, and executive enforcement actions—and other circumstances when a governmental entity is carrying out actions that could also be performed by private individuals. See K.S.A. 75-6103; K.S.A. 75-6104(a)(1)-(3). With very few exceptions, the KTCA continues the longstanding rule in this state that governmental entities are absolutely immune from liability for traditional governmental functions (and, though not applicable here, for discretionary acts). See K.S.A. 75-6104. In virtually all other instances, the Act states that a governmental entity is "liable for damages caused by the negligent or wrongful act or omission of any of its employees while acting within the scope of their employment under circumstances where the governmental entity, if a private person, would be liable under the laws of this state." K.S.A. 75-6103(a).

The extent of this liability is tempered, however, by other provisions of the KTCA. For example, the Act caps the amount of damages for all claims within its scope "arising out of a single occurrence or accident" at $500,000. K.S.A. 75-6105(a). And the

Act states that governmental entities and their employees, to the extent they are covered by the Act, are not "liable for punitive or exemplary damages" or for prejudgment interest. K.S.A. 75-6105(c).

Labette is a county hospital organized under the Hospital and Related Facilities Act, K.S.A. 19-4601 et seq. (Hospital Act). Tort claims against county hospitals are generally subject to the KTCA. See K.S.A. 75-6102(b) (county entities are subject to the KTCA); see also K.S.A. 75-6115(a)(2) (KTCA covers claims for professional malpractice against employees of county hospitals). The district court found that Labette is subject to the KTCA and thus reduced the jury's tortious-interference damages from $739,523.06 to $500,000. It also denied Ashley Clinic's request to add a claim for punitive damages.

Ashley Clinic challenges both damages rulings, arguing the KTCA's damages limitations should not apply here. Although the clinic acknowledges that Labette is a county hospital whose actions would ordinarily be covered by the KTCA, it asserts that the Act does not cover Labette's actions in this case because Labette acted beyond its statutory authority by operating a clinic in Neosho County.

The Hospital Act sets forth the circumstances under which a county commission may establish a county hospital. See K.S.A. 19-4603. Once the county has established a hospital, a county commission or hospital board may authorize the construction, purchase, lease, and equipping of an additional hospital or clinic. K.S.A. 19-4606(b). Ashley Clinic asserts that nothing in this provision allowed the Labette County Commission to authorize Labette's medical practice in *Neosho* County where Coates primarily works.

For support, Ashley Clinic points to an opinion of the Kansas Attorney General that analyzed whether a county hospital board may purchase or lease property outside the originating county to run a hospital or clinic. The attorney general opined there that although the Hospital Act did not directly address this question, several provisions of Kansas law, read together, led him to believe that such an action was not permissible. See Att'y Gen. Op. No. 2015-13. But opinions of the attorney general are merely advisory.

They are not law and do not bind courts, though we may in some instances find their reasoning persuasive. *Data Tree v. Meek,* 279 Kan. 445, 455, 109 P.3d 1226 (2005).

While this question is interesting in an academic sense, we need not discuss the point further here for two reasons.

First, as Labette correctly notes in its brief, questions about the extent of a governmental entity's authority are addressed through quo warranto actions. See, e.g., *State, ex rel. Fatzer v. Minneola Hospital District*, 177 Kan. 238, 277 P.2d 607 (1954) (quo warranto action brought by the attorney general to determine the legality of a hospital district); accord *Neiman v. Common School District*, 171 Kan. 237, 246, 232 P.2d 422 (1951) ("If an inquiry is to be made as to whether the school board exceeded its legal authority it should be made in an action by the state on the relation of the attorney general or the county attorney."). Ashley Clinic has not pointed to any statute permitting it to challenge the legality of Labette's authority through its private tort claim.

Second, nothing in the KTCA suggests that its damages limitations or other provisions would no longer govern if a governmental entity somehow acted outside its statutory authority. Accord *State v. Spencer Gifts*, 304 Kan. 755, Syl. ¶ 3, 374 P.3d 680 (2016) ("An appellate court merely interprets statutory language as it appears; it is not free to speculate and cannot read into the statute language not readily found there."). Grafting such a restriction into the KTCA would severely limit its effectiveness and complicate its application. For example, would the Act apply if a sheriff's deputy negligently caused an injury just over the county line? What if a state actor misread its authority in other ways? Indeed, aren't governmental actors stepping outside their permitted authority to some extent whenever they engage in tortious conduct? And, on top of that, if we were to accept Ashley Clinic's construction, would the governmental entity lose the benefit of the KTCA entirely, or only in the proportion it exceeds its statutory bounds?

It is not the role of an appellate court to read complications into a statute or to change the scope of legislative policy. Instead, "where the legislature declares a policy, and there is no constitu-

tional impediment, the question of the wisdom, justice, or expediency of the legislation is for that body and not for the courts." *Spencer Gifts*, 304 Kan. 755, Syl. ¶ 4. In the KTCA, the legislature adopted a comprehensive act defining the scope of tort liability for virtually all governmental entities. County actors may not exempt themselves from that liability. See K.S.A. 75-6101(c).

In short, we are not persuaded by Ashley Clinic's reading of the KTCA. And we are similarly unconvinced by the clinic's argument that the proprietary nature of Labette's actions changes the application of the Act. The legislature explicitly stated that the Act's tort liability, including the limitations on that liability, was adopted to apply to proprietary acts—"circumstances where the governmental entity, if a private person, would be liable under the laws of this state." K.S.A. 75-6103(a).

The district court correctly ruled the KTCA and its damages limitations apply to Ashley Clinic's tortious-interference claim against Labette. The court did not err when, consistent with that Act, it reduced the damages for that claim to $500,000 and denied the clinic's claim for punitive damages. See K.S.A. 75-6105(a), (c).

3.2. *The KTCA's damages limitations and the right to a jury trial under section 5 of the Kansas Constitution Bill of Rights*

Ashley Clinic also claims that the two damages limitations under the KTCA that the district court applied in this case—the damage cap of $500,000 and the disallowance of punitive damages—violated the right to a jury trial under the Kansas Constitution. Again, we do not find this argument persuasive.

Section 5 of the Kansas Constitution Bill of Rights states that "[t]he right of trial by jury shall be inviolate." This provision "'preserves the jury trial right as it historically existed at common law when our state's constitution came into existence.'" *Hilburn v. Enerpipe Ltd.*, 309 Kan. 1127, 1133, 442 P.3d 509 (2019).

The Kansas Supreme Court has explained that there are "two basic questions in any Section 5 analysis." *State v. Love*, 305 Kan. 716, 735, 387 P.3d 820 (2017).

"In what types of cases is a party entitled to a jury trial as a matter of right? See, *e.g.*, *Hasty v. Pierpont*, 146 Kan. 517, 72 P.2d 69 (1937) (distinguishing causes at law from causes in equity); see also *City of Fort Scott v. Arbuckle*, 165 Kan. 374, 388-89, 196 P.2d 217 (1948) (distinguishing prosecutions for violation of municipal ordinances and state statutes). And when such a right exists, what does the right protect? See, *e.g.*, *Miller* [*v. Johnson*], 295 Kan. [636,] 647-48, [289 P.3d 1098 (2012)] (analyzing jury's role in determining damages); *Kimball v. Connor*, 3 Kan. 414, 432 (1866) ('[Section 5] . . . does [not] contemplate that every issue, which, by the laws in force at the adoption of the constitution of the State, was triable by jury . . . should remain irrevocably triable by that tribunal.')." *Love*, 305 Kan. at 735.

When assessing whether a law violates section 5 by impermissibly invading the jury's function, courts engage in a two-step analysis. We first must determine whether the law implicates the jury-trial right—for example, by involving a claim that would have been presented to the jury at the time the Kansas Constitution was ratified. If the jury-trial right is implicated, courts must then assess whether the law in question "impairs that right by interfering with the jury's fundamental function." *Hilburn*, 309 Kan. at 1134.

In *Hilburn*, the Kansas Supreme Court found that the cap on noneconomic damages under K.S.A. 60-19a02 violated section 5 of the Kansas Constitution Bill of Rights. 309 Kan. at 1135. A plurality of the court reasoned that the noneconomic damages cap was impermissible because it "intrude[d] upon the jury's determination of the compensation owed personal injury plaintiffs to redress their injuries." 309 Kan. 1127, Syl.

Ashley Clinic asserts that "the exact same criticism" that was noted in *Hilburn* about the noneconomic damage cap in K.S.A. 60-19a02 is present with the KTCA's damage cap in K.S.A. 75-6105(a). We disagree.

Unraveling this issue requires a careful look at history. As Labette points out, *Hilburn* is distinguishable because there, the noneconomic damage statute *limited* the jury's determination on damages that were otherwise available at common law—here, the KTCA *adds* to what was recoverable at common law. 309 Kan. at 1134 ("We have consistently held that the determination of noneconomic damages was a fundamental part of a jury trial at common law and protected by section 5."). For Ashley Clinic's constitutional argument to succeed, there must have been a common-

law right to have a jury determine damages against a governmental entity when the Kansas Constitution was ratified. But no such right existed.

Nearly 50 years ago, the Kansas Supreme Court recognized that "governmental immunity was part of the common law at the time the Kansas Constitution was adopted." *Brown v. Wichita State University*, 219 Kan. 2, Syl. ¶ 4, 547 P.2d 1015, *appeal dismissed* 429 U.S. 806 (1976). Originally, this governmental immunity was absolute—immunizing governmental actors for both traditional governmental functions and proprietary actions. It was not until 1969, more than a century after the Kansas Constitution was ratified, that Kansas courts allowed governmental entities to be sued when performing proprietary functions. See *Carroll v. Kittle*, 203 Kan. 841, 849, 457 P.2d 21 (1969). Shortly after the court's decision in *Carroll*, the legislature enacted a comprehensive statutory framework to address the issue of governmental immunity—the predecessor of the KTCA. See *Brown*, 219 Kan. at 6. Then the legislature adopted the KTCA in 1979.

When section 5 was ratified, Kansas law did not permit people to sue government entities. As such, Ashley Clinic would have had no common-law right at that time to sue Labette and have a jury determine damages. The ability to assert that claim arose in 1969 and now only exists in the tort context under the KTCA. That statutory right—including the limitations on damages that define the scope of that right (including the damages cap and the disallowance of punitive damages)—does not violate the right to trial by jury under section 5 of the Kansas Constitution Bill of Rights.

3.3. *Duplicative damages versus duplicative recovery*

The final questions in this case concern the damages assessed against both Coates and Labette. The defendants argue that the respective damage assessments against each defendant—for $472,913.50 against Coates and for $500,000 against Labette—cannot stand for two reasons: They assert that allowing the two damage assessments to stand violates the KTCA's judgment bar, which prevents judgments against a governmental employer and employee for the same conduct. And they claim that the two dam-

age assessments are duplicative in that they both compensate Ashley Clinic for the same losses and allowing them to stand would grant the clinic a windfall. We address each argument in turn.

Our analysis begins with the KTCA's judgment bar. K.S.A. 75-6107 reads:

> "(a) The judgment in an action subject to the provisions of this act against a governmental entity shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee whose act or omission gave rise to the claim.
>
> "(b) Any judgment against an employee whose act or omission gave rise to the claim shall constitute a complete bar to any action for injury by the claimant, by reason of the same subject matter, against a governmental entity."

Subsection (a) bars certain actions against an employee when a party recovers against the governmental entity that employs the employee. Subsection (b) does the opposite, barring certain actions against a governmental entity when a person recovers against its employee.

Coates and Labette argue that under this statute, Ashley Clinic could only recover against either Coates *or* Labette in the underlying lawsuit. More specifically, because Ashley Clinic recovered against Labette—a governmental entity—on the tortious-interference claim to which the KTCA applied, the Act's judgment bar prohibited entry of judgment against Coates—now Labette's employee—on the contract claims. This argument fails for three significant and related reasons.

First, Ashley Clinic's contract claims against Coates are not subject to the KTCA. Kansas courts have long recognized that the Act covers *tort* claims, not contract claims. See *Ritchie Paving, Inc. v. City of Deerfield*, 275 Kan. 631, 643, 67 P.3d 843 (2003) (rejecting that an action based on reasonable detrimental reliance on a promise was barred by the KTCA because it was not based on tort principles); *In re One 1993 Chevrolet Corsica*, 268 Kan. 759, 763, 999 P.2d 927 (2000) ("[T]he Kansas Tort Claims Act is not applicable to the issues herein. There is no claim . . . against the City for negligence or tort."); *Jackson Trak Group, Inc. v. Mid States Port Authority*, 242 Kan. 683, 695, 751 P.2d 122 (1988) (refusing to entertain arguments about immunity under the KTCA because "while theoretically interesting, are not relevant [because]

we are not dealing with a "'tort'"). Thus, the limitations contained in the KTCA do not apply to Ashley Clinic's claim that Coates breached his contracts with the clinic.

Second, we disagree with Labette that the damages assessed against each defendant concern "the same subject matter" within the meaning of the KTCA's judgment bar. K.S.A. 75-6107(a), (b). While the defendants' actions were related and often intertwined, they were not the same.

- Coates' liability arose because he breached two contracts with Ashley Clinic—the confidentiality agreement and the 2006 employment agreement. His obligations and liability did not result from a tortious act committed while he was employed at Labette. Instead, they stemmed from a failure to honor his previous, binding agreements. The damages for violating the noncompete clause were not tort damages but liquidated damages defined in his 2006 employment contract.

- Labette's liability arose because it tortiously induced Coates to violate the noncompete agreement, knowing its actions would injure Ashley Clinic. While this conduct is related to Coates' actions, Labette's wrongful acts—including its offer to pay Coates' litigation expenses stemming from his change in employment—differ from Coates' breach of his contract.

Third, while Coates is now an employee of Labette, the relationship between the two defendants does not fit comfortably within the scope of K.S.A. 75-6107. That statute prevents a governmental employer from being held liable for the same tortious acts for which its employee has been found liable (or vice versa). In other words, the statute prevents governmental entities and actors—and the taxpayers who fund their positions—from being subject to multiple judgments arising from the same tortious conduct. Not only are Coates' and Labette's actions different here, but Coates was not an employee of Labette at the time most of Labette's tortious conduct occurred. The fact that Coates eventually became employed by Labette does not mean that Ashley Clinic's distinct claims against each defendant merged under the KTCA.

Before turning to Labette's second argument on the appropriateness and collectability of the two damage awards, we note that Ashley Clinic has offered another reason why it believes the KTCA's judgment bar does not apply: It asserts that K.S.A. 75-6107 only bars *subsequent* actions against a governmental entity or its employer, not concurrent claims. We question the clinic's reasoning in that assertion, as K.S.A. 75-6107 only states that a judgment against a governmental employer (or employee) acts as a bar against its employee (or employer) for the same conduct. But because we have concluded that KTCA's judgment bar does not apply for other reasons, we need not discuss this assertion further.

In the defendants' final argument, Coates and Labette assert that even if the KTCA's judgment bar does not apply, the damage awards against them are impermissibly duplicative and cannot stand. They argue that Ashley Clinic's damages for both Coates' breach of the 2006 employment agreement and Labette's tortious interference with that contract were the same—the losses suffered from the violation of the noncompete clause. Thus, they argue, the district court should not have entered damage judgments on both of those claims.

Kansas has long adhered to the principle that a plaintiff may present multiple claims of relief to the jury, and judgments on each of those claims—including damage awards—will be upheld on appeal if they are legally sound and supported by the evidence. See *Jacobsen v. Woerner*, 149 Kan. 598, 603, 89 P.2d 24 (1939) (where a plaintiff is injured and several persons are responsible, the injured person has a claim against each tortfeasor). Ashley Clinic presented evidence at trial supporting its claims against each defendant and the damages flowing from those acts.

- The parties recognize that the 2006 employment agreement included a liquidated-damages calculation for Coates' violation of the noncompete agreement and this amount was consistent with the damages the jury found for that breach.

- The jury's damage award against Labette for its tortious interference with Coates' employment agreement was supported by evidence presented at trial. And the KTCA

> required the district court to reduce the damages against Labette to $500,000.

Thus, we disagree with Coates' and Labette's assertions that the district court erred when it entered damage awards against the defendants for these amounts. We affirm the district court's damage judgments.

We pause before closing to address the parties' related arguments concerning the *recoverability* of these separate damage judgments. In doing so, we recognize that Ashley Clinic has not yet sought satisfaction for the judgments against Labette and Coates. The contrasting assertions in the parties' briefs nevertheless warrant some discussion.

While Kansas law does not prevent the respective damage judgments from being entered against each defendant in this case, it does not follow that Ashley Clinic is automatically entitled to recover the full combined amount of all the damages awarded. Kansas law does not prohibit the district court from *awarding* duplicative damages against separate defendants based on different conduct and different theories of recovery. But Kansas law prohibits a party from *recovering* duplicative damages from separate defendants where the damages arise from the same injury or loss. See *York v. InTrust Bank, N.A.*, 265 Kan. 271, 311-12, 962 P.2d 405 (1998).

Kansas courts have often referred to this principle as the one-satisfaction (or one-recovery) rule. See *Jacobsen*, 149 Kan. at 603. This rule recognizes that a plaintiff may receive "only one recovery for a wrong." *York*, 265 Kan. at 311.

While the nature of tort claims and contract claims differ, the general aim of compensatory damages in tort and of damages in contract is the same—to make the injured party whole. See *Burnette v. Eubanks*, 308 Kan. 838, 857, 425 P.3d 343 (2018) (compensatory damages for an injury caused by a tort are meant to restore the plaintiff to a pre-injury position); *Peterson v. Ferrell*, 302 Kan. 99, 106, 349 P.3d 1269 (2015) (contract damages aim "to put the nonbreaching party in the position he or she would have been in had the breach never occurred"). When damage awards are entered against multiple parties for the same injury, a plaintiff is not entitled to a windfall. Rather, they can only recover up to the

amount of compensatory or contract damages that would make them whole. *York*, 265 Kan. at 312.

Ashley Clinic's witnesses testified at trial that the clinic had suffered $739,523.06 in losses as a result of Labette's tortious interference with the 2006 employment contract. Although the damage award against Coates for breach of that agreement was determined by a liquidated-damages provision, not based on the witnesses' testimony, that award sought to compensate the clinic for the same injury—losses arising from Coates' breach of the agreement's noncompete clause. Accord *Horizon Memorial Group, L.L.C. v. Bailey*, 280 S.W.3d 657, 667 (Mo. Ct. App. 2009) (finding damage awards for a tortious-interference claim and for breach of contract based on a liquid-damages provision were "coextensive because they arose from Bailey's breach of contract and were awarded solely to compensate Horizon and Bailey & Cox for the lost benefits of their contract"). The damages from Coates' breach of the confidentiality agreement ($9,437.50) were a separate and independent loss.

While it is true that the damage judgments against Coates and Labette were each based on the evidence presented at trial, the one-satisfaction rule dictates that Ashley Clinic may only *recover* combined damages from the defendants up to its total claimed loss. Thus, while Ashley Clinic may seek to recover damages from each defendant up to each respective judgment, the clinic may not recover more than $739,523.06 combined from the tortious-interference claim and Coates' breach of the 2006 employment agreement. Any issue that may arise in applying the one-satisfaction rule to Ashley Clinic's separate judgments against Labette and Coates must be addressed and resolved by the district court in a post-judgment proceeding.

CONCLUSIONS

There was evidence at trial to support the reliance on the 2006 employment agreement between Coates and Ashley Clinic as a valid and enforceable contract. The jury's finding that Labette tortiously induced Coates to breach that agreement, causing $739,523.06 in damages, was also supported by the evidence presented.

The district court did not err when it ruled in Labette's favor on Ashley Clinic's unjust-enrichment claim, as the clinic had not demonstrated that it conferred any benefit on Labette that warranted further compensation.

Labette is a county hospital, and the scope of any tort claim against Labette is defined by the KTCA. Consistent with the KTCA, the district court properly reduced Ashley Clinic's damages claim against Labette to $500,000 and properly denied the clinic's claim for punitive damages. See K.S.A. 75-6105(a), (c).

The KTCA's limitations on damages, including the Act's cap on total damages and its bar against punitive damages, do not violate the right to a jury trial in section 5 of the Kansas Constitution Bill of Rights.

The KTCA's judgment bar in K.S.A. 75-6107 does not prevent damage awards from being entered against both Coates and Labette.

The district court did not err when it entered the respective damage judgments against Coates and Labette, as those damages were supported by evidence at trial. But Ashley Clinic may not recover more than its total claimed damages at trial when it seeks to satisfy those judgments.

Affirmed.

(545 P.3d 1040)

No. 125,992

STATE OF KANSAS, *Appellee*, v. ERIK NAHSHON DIXON, *Appellant*.

SYLLABUS BY THE COURT

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

2. SAME—*Kansas RICO Act—Juvenile Adjudications Included in Racketeering Activity.* The Kansas RICO Act's definition of racketeering activity includes juvenile adjudications.

3. SAME—*Kansas RICO Act—Juvenile Adjudications Included in Racketeering Activity.* A Kansas RICO offense is a continuing offense. Under the Kansas RICO Act, the State can charge the defendant as an adult when some of the alleged predicate racketeering activity occurred when the defendant was a juvenile provided that the final alleged predicate racketeering activity occurred when the defendant was an adult.

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

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

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

Appeal from Sedgwick District Court; JEFFREY E. GOERING, judge. Oral argument held March 5, 2024. Opinion filed March 29, 2024. Affirmed.

James M. Latta, of Kansas Appellate Defender Office, for appellant.

Matt J. Maloney, assistant district attorney, *Marc Bennett*, district attorney, and *Kris W. Kobach*, attorney general, for appellee.

Before GARDNER, P.J., MALONE, J., and TIMOTHY G. LAHEY, S.J.

MALONE, J.: Erik Nahshon Dixon began committing crimes with his street gang, the Insane Crips, as a juvenile, and he continued as he grew into adulthood. Eventually, the State charged Dixon with violating the Kansas Racketeer Influenced and Corrupt Organization (RICO) Act, K.S.A. 21-6327 et seq., due to his pattern of criminal activity, some of which was committed as a juvenile and some as an adult. A jury convicted Dixon as charged, and the district court sentenced him to 138 months' imprisonment.

On appeal, Dixon raises statutory and constitutional arguments, including: (1) juvenile adjudications do not qualify as racketeering activities under the Kansas RICO statutes; (2) the State needed to charge him in juvenile court because his pattern of racketeering activities began when he was a juvenile; (3) the Double Jeopardy Clause prohibits the use of prior adjudications and convictions to prove a RICO offense, (4) the predicate offenses that established his pattern of racketeering activity were lesser included crimes of the RICO offense, and (5) the compulsory joinder rule required the State to bring the Kansas RICO charge when it brought the predicate charges. Dixon also challenges the sufficiency of the evidence to support his conviction. This case raises issues of first impression in Kansas as no prior appellate court decision has addressed a defendant's conviction under the Kansas RICO Act. For the reasons explained below, we reject Dixon's claims and affirm the district court's judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Dixon, born in 1996, became a documented member of the Insane Crips in 2012 after he was arrested with other gang members six times and then self-identified as a member of the gang. Dixon continued to be involved in criminal activity associated with the gang over the next several years. Dixon turned 18 in 2014.

By 2016, the Wichita Police Department's gang unit began investigating Dixon and several others in connection with a series

of gang related shootings that had occurred in the city. The investigation disclosed that Dixon's house had been the target of two shootings earlier that year. In between those two shootings, Dixon and several of his fellow gang members were suspected of being involved in a retaliatory shooting of a rival gang member's house. As part of the investigation, law enforcement obtained search warrants for Dixon's Facebook account and phones. These searches provided law enforcement with information suggesting that Dixon was looking to find and retaliate against those responsible for the shootings at his house.

Within the Insane Crips organization, Dixon was considered by police to be at the top of the pecking order when it came to the business side of the enterprise, specifically, selling drugs. In November 2016, law enforcement executed a search warrant at Dixon's apartment, finding many drugs, a ledger, firearms, and cash. Another search warrant, executed in April 2017, yielded more drugs, firearms, and cash. These discoveries led to a federal case against Dixon, in which he pled guilty to possession of a firearm in furtherance of a drug trafficking crime and was sentenced to 120 months' incarceration.

In July 2019, the State charged Dixon and eight others with violating the Kansas RICO Act. The State alleged that Dixon, while a member of a criminal street gang, the Insane Crips, conducted or participated directly or indirectly in a pattern of racketeering activity. The State alleged that the pattern of activity included:

"Racketeering Activity A: Use of Guns

"1. Criminal Use of Weapons Pursuant to K.S.A. 21-6301(a)(14)(b)(5)(A), adjudicated in the 18th Judicial District Court in 13JV1062 on 12/13/13;

"2. Criminal Use of Weapons Pursuant to K.S.A. 21-6301(a)(14)(b)(5)(A), adjudicated in the 18th Judicial District Court in 14JV248 on 5/22/14;

"Racketeering Activity B: Distribution of Drugs

"1. Possession of Marijuana pursuant to K.S.A. 21-5706, convicted in the 18th Judicial District Court in 14CR3189 on 1/7/15;

"2. Carrying a Concealed Weapon pursuant to K.S.A. 21-6302, convicted in the 18th Judicial District Court in 14CR3189 on 1/7/15; (left in distribution of drugs since same case and had 9 individual bags of marijuana, scale and money and the gun[.]"

Relevant to this appeal, two of the predicate offenses included in "Racketeering Activity A: Use of Guns" were juvenile adjudications. In 2013, Dixon pled guilty to one count of criminal use of a weapon in violation of K.S.A. 21-6301(a)(14). In 2014, Dixon pled guilty to another count of criminal use of a weapon under the same statute.

Before trial, Dixon moved to dismiss the State's case on several grounds. First, he claimed that the Double Jeopardy Clause required dismissal because he had already been prosecuted for the predicate offenses listed in the charging document. Second, he asserted that the case should be dismissed under the compulsory joinder rule, as he alleged that the State "had to bring the RICO charge" when it prosecuted the predicate offenses. Finally, Dixon claimed that the State should not be allowed to use the two juvenile adjudications as predicate offenses, noting that the State had not moved to prosecute him as an adult in the juvenile cases. The State filed a detailed response addressing each claim.

The district court denied the motion to dismiss in a ruling announced from the bench. As to double jeopardy, the district court ruled that there was no unitary conduct because the "pattern offenses all stem from events that occurred at different dates in different locations" and that there was no "same offense" at issue because there are different elements in the Kansas RICO crime when compared to the prior adjudications and convictions. As to the compulsory joinder claim, the district court found that the State could not have presented evidence of any Kansas RICO violation at the prior proceedings. And lastly, the district court found that the State properly brought the Kansas RICO charge in adult court because the RICO charge was a continuing crime and at least one of Dixon's predicate offenses occurred when he was an adult.

Dixon's case proceeded to a jury trial and he was tried alone. The State offered into evidence, without objection from Dixon, the journal entries from Dixon's prior adjudications and convictions. The parties agreed that Dixon's two adult convictions in 14CR3189 would count as one predicate offense and for that predicate offense the State would need to prove that Dixon carried a concealed weapon *or* possessed marijuana. The State presented

testimony from many Kansas and federal law enforcement officers who had helped investigate Dixon and his gang as well as an informant from a rival gang. The State's witnesses also testified to Dixon's alleged involvement in several gang related shootings in Wichita and his arrests while in possession of guns and narcotics with fellow gang members. The crux of the State's case centered on Dixon's involvement as a member of the Insane Crips and his participation in both drug dealing and violent crimes for the gang. Dixon did not testify at trial and did not contest his membership in the Insane Crips. The theme of defense counsel's closing argument was that the predicate offenses were isolated incidents unrelated to gang membership and did not meet the statutory definition of a pattern of racketeering activity.

The jury found Dixon guilty as charged. The district court sentenced him to 138 months' imprisonment. Dixon timely appealed the district court's judgment.

OVERVIEW OF THE KANSAS RICO ACT AND COMPARISON TO FEDERAL LAW

The Kansas RICO Act is substantially similar to the federal Racketeer Influenced and Corrupt Organization (RICO) Act, 18 U.S.C. § 1961 et seq., both in its purpose and the specific conduct it proscribes. Anti-racketeering statutes target organized crime and the individuals who participate in criminal enterprises in a broad spectrum of illegal activities. They present tools for law enforcement to combat the negative effects of patterns of criminal activities conducted by criminal groups. In enacting the federal RICO Act, Congress stated: "It is the purpose of this Act to seek the eradication of organized crime . . . by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime." Organized Crime Control Act of 1970, Statement of Findings and Purpose, 84 Stat. 922, reprinted in 1970 U.S. Code Cong. & Ad. News at 1073.

In 2013, the Kansas Legislature passed a similar antiracketeering statute, providing similar tools for Kansas law enforcement to combat organized crime. As explained in testimony presented

to the Legislature when it considered enacting the Kansas RICO Act, the successful use of the federal RICO Act by the federal government was a motivating factor for the Kansas Act's passage:

"[R]acketeering laws are based on the notion that with some criminal enterprises, the whole is greater than the sum of the parts—and, therefore, should be subject to greater penalties. A criminal street gang, for example, may commit numerous low-level crimes, but the *pattern* of criminal activity has a much greater negative effect on the community and on innocent residents than does any individual crime taken by itself. The federal government has successfully used the federal RICO statute to combat criminal street gangs, including those in Kansas. Giving Kansas law enforcement officials access to this tool at the state level would be a powerful step forward in our anti-gang efforts." Testimony of Attorney General Derek Schmidt, Senate Judiciary Committee, January 29, 2013.

Beyond the fact that both the federal and Kansas RICO Acts were enacted for the same purpose, their elements are nearly identical, at least as to the charge against Dixon. The federal RICO Act provides:

"It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." 18 U.S.C. § 1962(c).

The Kansas RICO Act states: "[I]t is unlawful for any covered person: . . . employed by, or associated with, any enterprise to recklessly conduct or participate, directly or indirectly, in such enterprise through a pattern of racketeering activity or the collection of an unlawful debt." K.S.A. 21-6329(a)(3). The Kansas RICO Act defines "covered person" to include "a criminal street gang member." K.S.A. 21-6328(b)(1).

Although the Kansas RICO Act is not identical to its federal counterpart, the definition of a "pattern of racketeering activity" closely mirrors the federal act—both define the term as engaging in at least two predicate incidents or acts of racketeering activity. Compare K.S.A. 21-6328(e) with 18 U.S.C. § 1961(5). But the Kansas statute goes a step further in specifying that the activities must have "the same or similar intents, results, accomplices, victims or methods of commission or that otherwise are interrelated by distinguishing characteristics and are not isolated incidents."

K.S.A. 21-6328(e). That said, this additional language in the Kansas RICO Act generally tracks how the language in the federal act is construed. See *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 240, 109 S. Ct. 2893, 106 L. Ed. 2d 195 (1989) (noting that in the RICO context "'[c]riminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events'").

The similarities in purpose and structure between the Kansas RICO Act and the federal RICO Act on which it is based makes federal caselaw addressing similar challenges to those raised by Dixon particularly persuasive.

ARE JUVENILE ADJUDICATIONS INCLUDED IN THE DEFINITION OF "RACKETEERING ACTIVITY" UNDER THE KANSAS RICO ACT?

Dixon contends that juvenile offenses, such as the two predicate adjudications the State included in the RICO offense he was charged with committing, are not included in the definition of "racketeering activity" under the Kansas RICO Act. Thus, he argues that he was convicted of a nonexistent crime and either the district court lacked subject matter jurisdiction or the State presented insufficient evidence to support his conviction. Dixon argues that the applicable statutes are unambiguous, but if there is any ambiguity he prevails under the rule of lenity. He urges this court to reverse his conviction, vacate his sentence, and dismiss the charge. The State maintains that Dixon's argument is contrary to the plain language of the Kansas RICO Act—that is, that the definition of "racketeering activity" in K.S.A. 21-6328(f)(1) encompasses juvenile adjudications.

Whether subject matter jurisdiction exists is a question of law subject to unlimited review. *State v. Dunn*, 304 Kan. 773, 784, 375 P.3d 332 (2016). To the extent this court must interpret the statutory language of the Kansas RICO Act to address Dixon's claim, it will exercise unlimited review. *State v. Betts*, 316 Kan. 191, 197, 514 P.3d 341 (2022). The principles of statutory interpretation are well-established:

"The most fundamental rule of statutory construction is that the intent of the Legislature governs if that intent can be ascertained. In ascertaining this intent, a court begins with the plain language of the statute, giving common words their ordinary meaning. When a statute is plain and unambiguous, a court should not speculate about the legislative intent behind that clear language, and it should refrain from reading something into the statute that is not readily found in its words. But if a statute's language is ambiguous, a court may consult canons of construction to resolve the ambiguity." *State v. Eckert*, 317 Kan. 21, Syl. ¶ 6, 522 P.3d 796 (2023).

Dixon's argument requires examination of several statutory provisions. First, the State charged Dixon under K.S.A. 21-6329(a)(3), which states that "it is unlawful for any covered person . . . employed by, or associated with, any enterprise to recklessly conduct or participate, directly or indirectly, in such enterprise through a *pattern of racketeering activity* or the collection of an unlawful debt." (Emphasis added.) The definitional statute, K.S.A. 21-6328(e), provides that a

"'[p]attern of racketeering activity' means engaging in at least two incidents of racketeering activity that have the same or similar intents, results, accomplices, victims or methods of commission or that otherwise are interrelated by distinguishing characteristics and are not isolated incidents, provided at least one of such incidents occurred after the effective date of this act and that the last of such incidents occurred within five years, excluding any period of imprisonment, after a prior incident of racketeering activity."

In turn, K.S.A. 21-6328(f)(1) states:

"'Racketeering activity' means to commit, attempt to commit, conspire to commit or to solicit, coerce or intimidate another person to commit any:

"(1) *Felony or misdemeanor violation* of [one of a number of listed Kansas criminal offenses]." (Emphasis added.)

Both parties agree that the language of the relevant statutes is unambiguous; they disagree on the meaning of the term "violation." Dixon argues that juveniles "cannot commit felony or misdemeanor violations as a matter of law," and therefore juvenile adjudications cannot be considered racketeering activities. He points out that the Kansas Supreme Court has explained that "'a juvenile adjudication is not a "criminal conviction."'" *In re M.M.*, 312 Kan. 872, 875, 482 P.3d 583 (2021). Dixon is correct that a criminal conviction and a juvenile adjudication are distinct entities, a point well established in Kansas caselaw. See, e.g., *State v.*

LaMunyon, 259 Kan. 54, 57, 911 P.2d 151 (1996) ("[A] juvenile proceeding is considered a civil proceeding of a protective nature totally divorced from any criminal implication."); *State v. Crawford*, 39 Kan. App. 2d 897, 901, 185 P.3d 315 (2008). But juvenile adjudications, while not convictions, are still classified as felonies or misdemeanors in determining an offender's criminal history. See K.S.A. 21-6811; K.S.A. 21-6810(a).

While an adjudication is not a conviction, the premise of Dixon's argument that a juvenile cannot commit a felony or misdemeanor violation is based on his conflation of the terms "conviction" and "violation." The Kansas RICO Act does not utilize the word "conviction" in its definition of racketeering activity—the statute uses the phrase: any "[f]elony or misdemeanor *violation*." (Emphasis added.) K.S.A. 21-6328(f)(1). Thus, resolution of this issue turns on whether the term "violation" in K.S.A. 21-6328(f)(1) encompasses both criminal convictions and juvenile adjudications or, as Dixon contends, only includes criminal convictions.

As a starting point, we note that the terms "violation" and "conviction"—while related—are not interchangeable. A "violation" is defined as "[a]n infraction or breach of the law; a transgression" or "[t]he act of breaking or dishonoring the law." Black's Law Dictionary 1881 (11th ed. 2019). On the other hand, a "conviction" is defined as "[t]he act or process of judicially finding someone guilty of a crime; the state of having been proved guilty" or "[t]he judgment (as by a jury verdict) that a person is guilty of a crime." Black's Law Dictionary 422 (11th ed. 2019). These definitions show that the term "violation" as used in the Kansas RICO Act encompasses a broader meaning than "conviction." Whereas a conviction specifically signifies the legal process of having been found guilty, a violation simply means the contravention of some law.

Dixon points out that the Kansas RICO Act's definition of racketeering activity does not explicitly reference juvenile offenses or adjudications and asserts that this omission signifies that adjudications were purposefully not included in the definition. But the Act also omits the term "conviction." Had the Legislature re-

ferred to convictions in defining an instance of racketeering activity, a fair reading would be that it had intended to exclude juvenile adjudications. Accord *State v. Boyer*, 289 Kan. 108, 116, 209 P.3d 705 (2009) (holding that a reference to convictions under a statute did not encompass juvenile adjudications). Instead, in drafting the Kansas RICO Act, the Legislature used the broader phrase: "Felony or misdemeanor *violation*." (Emphasis added.) K.S.A. 21-6328(f)(1). The fact that the statute does not distinguish between adult convictions or juvenile adjudications suggests that racketeering activity is not limited to adult convictions but encompasses any violations of the listed offenses. Significantly, the State routinely charges juvenile offenders with violating many of the listed criminal offenses in K.S.A. 21-6328(f)(1).

In a final attempt to support this claim, Dixon points to K.S.A. 38-2302(s), which defines "juvenile offender" in relevant part as

> "a person who commits an offense while 10 or more years of age but less than 18 years of age which if committed by an adult would constitute the commission of a felony or misdemeanor . . . or who violates the provisions of K.S.A. 41-727, K.S.A. 74-8810(j) or K.S.A. 21-6301(a)(14), and amendments thereto."

Dixon asserts that the phrase "which if committed by an adult would constitute the commission of a felony or misdemeanor" indicates that only adults can commit felonies and misdemeanors, as he claims such language would be unnecessary if juveniles can commit such offenses. But when K.S.A. 38-2302(s) is read in its entirety, the statute is communicating a simple point: the term "juvenile offender" includes not only juveniles who commit any act that would be a felony or misdemeanor if committed by an adult, but also juveniles who commit certain acts (e.g., consumption of an alcoholic beverage under K.S.A. 41-727) that would not be illegal for adults.

The federal RICO Act's definition of "racketeering activity" does not use the language "felony or misdemeanor violation," but it defines the term to mean, in part, "*any act* . . . which is chargeable under State law and punishable by imprisonment for more than one year." (Emphasis added.) 18 U.S.C. § 1961(1). Similar to the Kansas RICO Act, the federal act's definition of racketeering activity does not use the term conviction. As we will discuss

more in the next section of this opinion, federal courts allow juvenile offenses to be included in the definition of racketeering activity. See, e.g., *United States v. Wong*, 40 F.3d 1347, 1364 (2d Cir. 1994) (upholding defendant's RICO conviction when the pattern of racketeering activity included five acts, only one of which was committed when defendant was an adult).

A defendant's commission of, attempt to commit, conspiracy to commit, or coercion of another person to commit any of the listed felony and misdemeanor offenses constitutes an instance of racketeering activity. K.S.A. 21-6328(f). As such, proof that a defendant breached any one of the listed felony or misdemeanor offenses, whether as an adult or a juvenile, qualifies as racketeering activity. The plain language of K.S.A. 21-6328(f)(1), specifically its use of the broad term "violation," demonstrates that the Legislature did not intend to limit the definition of "racketeering activity" to mean only adult convictions. We find that the Kansas RICO Act's definition of racketeering activity includes juvenile adjudications. Thus, we conclude the State did not charge Dixon with a nonexistent crime, and the district court had subject matter jurisdiction over Dixon's case.

Alternatively, Dixon briefly argues that because juvenile adjudications are not included in the definition of "racketeering activity" under the Kansas RICO Act, the State presented insufficient evidence to support his conviction. This argument depends on his statutory argument that the State cannot prove racketeering activity through a juvenile offense—an argument we have just found unavailing. As a result, the sufficiency of the evidence claim fails as well. We observe that Dixon also makes a broader argument that there was insufficient evidence to support his conviction if his predicate offenses are not considered unitary conduct under a double jeopardy analysis. We will address that argument later in this opinion.

DID THE STATE NEED TO CHARGE DIXON IN JUVENILE COURT BECAUSE HIS PATTERN OF RACKETEERING ACTIVITY BEGAN WHEN HE WAS A JUVENILE?

Dixon next argues that assuming that juvenile adjudications may be used to establish a pattern of racketeering activity under

the Kansas RICO Act, then the district court lacked subject matter jurisdiction because "the State failed to commence a juvenile case before seeking an adult criminal prosecution." He contends that because the State alleged that his two juvenile adjudications for criminal use of a weapon constituted "racketeering activities" in its RICO charge, the State needed to bring the RICO charge in juvenile court and then move to prosecute Dixon as an adult.

The State counters that the RICO case against Dixon was properly brought because it was a continuing offense and at least one of the predicate racketeering activities occurred when he was an adult, not a juvenile. The State urges this court to follow federal caselaw analyzing and rejecting similar jurisdictional challenges under the federal RICO statute.

Dixon was 23 years old when the State filed its RICO case. The question this court must answer is whether the State must charge an adult defendant with a RICO offense in juvenile court when the alleged pattern of racketeering activity includes acts committed both as a juvenile and as an adult. Whether subject matter jurisdiction exists is a question of law subject to unlimited review. *Dunn*, 304 Kan. at 784. Likewise, statutory interpretation is a question of law subject to unlimited review. *Betts*, 316 Kan. at 197.

In making his argument, Dixon mainly relies on caselaw and statutory authority for when the State may charge a *juvenile* as an adult. He emphasizes K.S.A. 38-2347, which contains the procedure the State must follow to prosecute a juvenile as an adult. Dixon does not contest that he was an adult when he committed some of the alleged acts of racketeering activity and when the State charged him with the RICO offense. He argues that because the RICO charge contained an element that included his prior juvenile offenses, the entire RICO charge should have been considered a juvenile offense.

The State asserts Dixon's argument is misplaced because a RICO offense is a continuing offense—that is, a crime committed over an extended time. The State urges this court to follow federal caselaw analyzing analogous challenges where a defendant was alleged to have committed a pattern of racketeering activity that

encompassed both juvenile and adult offenses. Although the Kansas RICO Act does not directly mirror its federal counterpart, the definition a "pattern of racketeering activity" in the federal offense is instructive in considering whether the Kansas version of the crime is a continuing offense. Compare K.S.A. 21-6328(e) with 18 U.S.C. § 1961(5). Both the Kansas RICO Act and the federal RICO Act define a "pattern of racketeering activity" as engaging in at least two incidents or acts of racketeering activity. The fact that the government must prove a "pattern" in at least two acts of racketeering activity to prove a RICO charge supports the State's claim that a RICO offense is a continuing offense.

Each of the federal cases the State cites found that a defendant may be held liable for committing a RICO offense as an adult if the pattern of racketeering activity includes some predicate offenses committed when the defendant was a juvenile and at least one offense was committed when the defendant was an adult. See *United States v. Delatorre*, 157 F.3d 1205, 1209 (10th Cir. 1998); *Wong*, 40 F.3d at 1364-66. In *Wong*, the defendant was convicted of substantive RICO and RICO conspiracy violations—the pattern of racketeering activity included five acts, only one of which was committed when he was an adult. After he was convicted, Wong moved to dismiss, arguing the definition of "pattern of racketeering activity" would not support his convictions absent proof that he had committed two or more predicate acts *as an adult* because any juvenile acts were "outside the jurisdiction of the federal courts and could not constitute RICO predicate acts." 40 F.3d at 1364. The district court denied Wong's motion to dismiss, finding "that substantive RICO and RICO conspiracy were 'continuing crimes,' and that Wong's commission of a single predicate act as an adult was sufficient to establish federal jurisdiction over Wong to be tried as an adult." 40 F.3d at 1364.

On appeal, the Second Circuit affirmed. The *Wong* court noted that under the Juvenile Delinquency Act (JDA), 18 U.S.C. § 5031 et seq., the relevant act for determining jurisdiction is the crime charged in the indictment—i.e., Wong's age *at the time of the RICO offenses charged in the indictment*, not his age when he committed some of the predicate acts contained within the RICO charge. 40 F.3d at 1365. To bolster its conclusion, the *Wong* court

analogized Wong's situation with that of a defendant charged with conspiracy—another continuing offense—that began when a defendant was a minor but was completed as an adult. 40 F.3d at 1365-66. In the conspiracy context, federal courts have held that a defendant may be tried as an adult even if the conspiracy began as a minor, so long as they continued to participate in the conspiracy after reaching adulthood. See *United States v. Thomas*, 114 F.3d 228, 238-39 (D.C. Cir. 1997); see also *United States v. Moscony*, 927 F.2d 742, 754 (3d Cir. 1991) (noting that substantive RICO offense is a continuing offense analogous to conspiracy).

In another case reaching the same result, *Delatorre*, 157 F.3d at 1209, the Tenth Circuit held that the government could bring a RICO case against the adult defendant without complying with the JDA even though one of the predicate acts supporting the RICO charges occurred before the defendant became an adult. Because of the continuing nature of the offense, the court found that as long as the government could show *some* participation in racketeering activity as an adult, it did not need to bring a juvenile case under the JDA. 157 F.3d at 1209. The court noted: "No circuit has applied the JDA to an adult conspiracy or racketeering prosecution simply because defendant's participation in the crimes began prior to his eighteenth birthday." 157 F.3d at 1209-10.

We agree with the federal caselaw that a RICO offense is a continuing offense. A continuing offense is defined as "[a] crime (such as a conspiracy) that is committed over a period of time, so that the last act of the crime controls when the statute of limitations begins to run." Black's Law Dictionary 1300 (11th ed. 2019). The Kansas RICO statute that Dixon was convicted under, K.S.A. 21-6329(a)(3), supports a finding that it should be treated as a continuing offense. The statutory language of the offense requires the State to prove a pattern of racketeering activity—two or more acts that occurred over time. Because the criminal conduct the State must prove to secure a conviction under the RICO Act must occur over time, the offense is continuing.

Dixon began committing the RICO offense he was charged with committing as a juvenile, but he continued to participate in racketeering activities after he became an adult. By the time the State charged Dixon with the RICO offense, he had participated

in racketeering activities both as a juvenile and an adult. Because he was an adult at the time he was charged and when he committed the final racketeering activity, the State could charge Dixon as an adult—even though the charge contained two alleged predicate racketeering activities he committed as a juvenile. As a result, the State was not required to bring its case in juvenile court. We conclude that the district court did not lack subject matter jurisdiction and that Dixon was properly charged as an adult.

DOES THE DOUBLE JEOPARDY CLAUSE PROHIBIT THE USE OF PRIOR ADJUDICATIONS AND CONVICTIONS TO PROVE A RICO OFFENSE?

Dixon contends that the Double Jeopardy Clauses of the United States Constitution and section 10 of the Kansas Constitution Bill of Rights prohibit the use of his prior adjudications and convictions to prove a RICO offense. He claims the State cannot use prior convictions or adjudications to prove a pattern of racketeering activity because doing so effectively forced him to face successive prosecutions for the same conduct. The State asserts that because Dixon's RICO offense constitutes a separate, distinct act from his predicate offenses, his double jeopardy argument fails.

The Double Jeopardy Clauses of the Fifth Amendment to the United States Constitution and section 10 of the Kansas Constitution Bill of Rights prohibit the State from securing multiple convictions on multiplicitous charges. *State v. Sprung*, 294 Kan. 300, 306, 277 P.3d 1100 (2012). The Double Jeopardy Clause "protects against: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense." *State v. Schoonover*, 281 Kan. 453, 463, 133 P.3d 48 (2006). Appellate courts exercise unlimited review when determining whether convictions are multiplicitous. *State v. Davis*, 306 Kan. 400, 419, 394 P.3d 817 (2017).

In *Schoonover*, the Kansas Supreme Court provided a framework to determine whether convictions subject a defendant to double jeopardy. "[T]he overarching inquiry is whether the convictions are for the same offense." 281 Kan. at 496. This inquiry is

broken into two components, both of which must be met for there to be a double jeopardy violation: (1) Do the convictions arise from the same conduct and, if so, (2) by statutory definition, are there two offenses or only one? 281 Kan. at 496.

As for the first prong of the analysis, if the convictions are not based on the same conduct, the analysis ends. 281 Kan. at 496-97. To determine whether the convictions are based on the same conduct, courts look to:

"(1) whether the acts occur at or near the same time; (2) whether the acts occur at the same location; (3) whether there is a causal relationship between the acts, in particular whether there was an intervening event; and (4) whether there is a fresh impulse motivating some of the conduct." 281 Kan. 453, Syl. ¶ 16.

Only if this court determines that Dixon's actions constituted unitary conduct should it proceed to consider whether, by statutory definition, his conduct constituted one offense or two. See *Sprung*, 294 Kan. at 306-08. Under the second prong of the analysis the test to be applied depends on whether the convictions arise from a single statute or from multiple statutes. *Schoonover*, 281 Kan. at 497-98. If, as here, the convictions are based on different statutes, the convictions are multiplicitous only when the statutes on which the convictions are based contain an identity of elements.

Dixon argues that he faced successive prosecutions because the predicate adjudications and convictions and the RICO charge itself constitute unitary conduct. He asserts that the "Kansas RICO charge completely subsumes all alleged racketeering activities in this case." At trial, the State introduced evidence of Dixon's prior adjudications and convictions as evidence of the requisite predicate acts constituting a pattern of racketeering activity. Dixon objected to the use of these prior violations before, during, and after trial to no avail. The district court explained that the State's use of the adjudications and convictions as predicate offenses in the RICO charge did not implicate double jeopardy concerns because there was no unitary conduct and the elements of the RICO charge and the prior adjudications and convictions were different.

We agree with the district court that Dixon's RICO offense and the predicate adjudications and convictions do not constitute

unitary conduct. Granted, the RICO offense requires that the predicate acts amounting to a pattern of racketeering activity are "interrelated by distinguishing characteristics and are not isolated incidents." K.S.A. 21-6328(e). But this does not mean that the activities are a singular course of conduct. The acts underlying Dixon's adjudications and convictions occurred on different dates and at different locations. The first predicate act occurred in 2013 and the final one occurred in 2015. The common characteristic of these predicate acts was Dixon's gang membership, but the individual crimes were separate acts, motivated by fresh impulses, over an extended period of time. The commonality between these acts—their intents, results, Dixon's accomplices, etc.—shows a pattern of racketeering activity, but it does not establish that Dixon's actions were unitary conduct for double jeopardy purposes.

Our analysis could end here. But even if we were to find that the predicate acts and the RICO offense constituted unitary conduct, Dixon is entitled to no relief because the offenses arose from different statutes and there is no identity of elements. The RICO offense requires the State to prove that Dixon committed multiple acts of racketeering. Whereas the RICO statute criminalizes racketeering activities, the predicate offenses the State used to establish the pattern of activity are intended to deter weapons and narcotics violations. As explained in more detail below in the discussion of Dixon's lesser included offense-based argument, there is no identity of elements between the offenses.

Federal courts have rejected identical double jeopardy-based challenges to the federal RICO statutes on which the Kansas RICO Act is based. For example, in *United States v. Grayson*, 795 F.2d 278, 282-83 (3d Cir. 1986), the court found that successive prosecutions for a RICO offense and its underlying predicate offenses did not violate the Double Jeopardy Clause. The court observed that federal courts had "uniformly" held that "Congress intended separate convictions or consecutive sentences for a RICO offense and the underlying predicate offense." 795 F.2d at 283. The *Grayson* court noted:

"'There is nothing in the RICO statutory scheme which would suggest that Congress intended to preclude separate convictions or consecutive sentences for

a RICO offense and the underlying or predicate crimes which make up the racketeering pattern. The racketeering statutes were designed primarily as an additional tool for the prevention of racketeering activity, which consists in part of the commission of a number of other crimes. The Government is not required to make an election between seeking a conviction under RICO, or prosecuting the predicate offenses only. Such a requirement would nullify the intent and effect of the RICO prohibitions.'" 795 F.2d at 283 (quoting *United States v. Rone*, 598 F.2d 564, 571 [9th Cir. 1979]).

The Kansas RICO Act was crafted with the intent to provide Kansas law enforcement with tools much like those provided under the federal act. See Testimony of Eric B. Smith, Legal Counsel, League of Kansas Municipalities, Senate Judiciary Committee, January 29, 2013. Additional testimony in support of the Kansas RICO Act presented to the Kansas Legislature by the Attorney General and the Kansas Association of Chiefs of Police underscores that an express purpose of the Act was to provide enhanced penalties for members of enterprises that engage in patterns of criminal activity. See Testimony of Attorney General Derek Schmidt and Ed Klumpp, Kansas Association of Chiefs of Police Legislative Committee Chair, Senate Judiciary Committee, January 29, 2013. As with the federal RICO Act, the legislative history of the Kansas RICO Act demonstrates a legislative intent to permit prosecution for both predicate offenses and the RICO offense to deter criminal enterprises.

In sum, the RICO offense Dixon was charged with committing and the predicate offenses used to establish a pattern of racketeering activity are not the "same" offense; they are all based on different statutes and are intended to deter different kinds of activity. Dixon cannot establish (1) that his RICO conviction and his predicate adjudications and convictions were based on the same conduct or (2) that these offenses contained an identity of elements. As a result, Dixon's double jeopardy-based argument under the federal and Kansas Constitutions must fail.

WERE THE PREDICATE OFFENSES THAT ESTABLISHED DIXON'S PATTERN OF RACKETEERING ACTIVITY LESSER INCLUDED CRIMES OF THE RICO OFFENSE?

Along with Dixon's double jeopardy argument, he separately brings a statutory claim that the predicate offenses constituted the

"'same offense' as the Kansas RICO conviction because the prior adjudications and convictions are lesser included crimes of the Kansas RICO conviction under K.S.A. 21-5109(b)(2)." Dixon argues: "Because Kansas RICO law requires proof of other crimes (racketeering activity) to prove a Kansas RICO crime, the other crimes (racketeering activity) are necessarily lesser included crimes by definition. . . . [E]very element of the other crimes (racketeering activity) are identical to some of the elements of the Kansas RICO conviction."

A lesser included crime is defined, in relevant part, as "a crime where all elements of the lesser crime are identical to some of the elements of the crime charged." K.S.A. 21-5109(b)(2). Whether a crime is a lesser included offense is a question of law subject to unlimited appellate review. *State v. Alderete*, 285 Kan. 359, 361-62, 172 P.3d 27 (2007).

> "The proper analysis to determine whether a crime is a lesser included offense of another crime applies a strict elements test and is limited to a comparison of the abstract elements of the offenses charged. The test no longer takes into account the factual nuances of a specific case as they may bear on satisfaction of the statutory elements of both crimes under examination." 285 Kan. 359, Syl. ¶ 2.

Dixon's assertion that the predicate offenses were lesser included offenses of the RICO offense is misplaced. The State presented four violations to establish Dixon's pattern of racketeering activity: two adjudications for criminal use of a weapon in violation of K.S.A. 2018 Supp. 21-6301(a)(14), one conviction for criminal carrying of a weapon under K.S.A. 2018 Supp. 21-6302(a)(4), and one conviction for possession of marijuana under K.S.A. 2018 Supp. 21-5706(b)(3). Each of these offenses contains elements that are not present in the RICO offense, which states that it is unlawful for any covered person "employed by, or associated with, any enterprise to recklessly conduct or participate, directly or indirectly, in such enterprise through a pattern of racketeering activity." K.S.A. 21-6329(a)(3).

In applying the statutory test for lesser included offenses, we examine *strictly* the statutory elements of the crimes. Although each of the predicate offenses have different elements, they all require proof that a defendant possessed or carried weapons or

drugs—the RICO offense has no such element. While Dixon is correct that there is some intersection between the predicate offenses and the RICO charge because the predicate offenses must show a pattern of activity, this does not make those offenses lesser included crimes of the RICO charge. The definition of racketeering activity encompasses committing, attempting to commit, conspiring to commit, or soliciting, coercing, or intimidating another person to commit *any of the listed felony or misdemeanor violations*. K.S.A. 21-6328(f). As a result, the State could secure a conviction for the overarching RICO offense without proving that Dixon was in actual or constructive possession of weapons or drugs—an element necessary to establish each of his prior adjudications and convictions. Thus, not all the elements of the lesser crime are identical to some elements of the crime charged, as contemplated under K.S.A. 21-5109(b)(2).

Dixon makes three separate claims related to his argument that his predicate offenses were lesser included crimes of the RICO charge, so we will address them here. First Dixon claims that K.S.A. 21-5109(c), part of the statute addressing lesser included crimes, prevented the State from offering as evidence at trial the journal entries showing his pleas to his predicate offenses. K.S.A. 21-5109(c) states in full:

> "Whenever charges are filed against a person, accusing the person of a crime which includes another crime of which the person has been convicted, the conviction of the lesser included crime shall not bar prosecution or conviction of the crime charged if the crime charged was not consummated at the time of conviction of the lesser included crime, but the conviction of the lesser included crime shall be annulled upon the filing of such charges. *Evidence of the person's plea or any admission or statement made by the person in connection therewith in any of the proceedings which resulted in the person's conviction of the lesser included crime shall not be admissible at the trial of the crime charged.* If the person is convicted of the crime charged, or of a lesser included crime, the person so convicted shall receive credit against any prison sentence imposed or fine to be paid for the period of confinement actually served or the amount of any fine actually paid under the sentence imposed for the annulled conviction." (Emphasis added.)

The State asserts that this court should not reach this issue because Dixon did not object to the evidence when the journal entries were offered at trial. Dixon readily admits that he failed to

object to the admission of the journal entries when they were offered at trial, but he asserts this court should address this issue because it involves only a question of law arising on admitted facts and is finally determinative of the case. See, e.g., *State v. Phillips*, 299 Kan. 479, 493, 325 P.3d 1095 (2014) (listing commonly recognized exceptions courts apply to consider unpreserved claims).

K.S.A. 60-404 provides: "A verdict or finding shall not be set aside . . . by reason of the erroneous admission of evidence unless there appears of record objection to the evidence timely interposed and so stated as to make clear the specific ground of objection." As the State notes, Kansas courts have long stressed the importance of the legislative mandate contained in K.S.A. 60-404, which, under its plain language, requires a contemporaneous objection for an evidentiary claim to be reviewed on appeal. *State v. King*, 288 Kan. 333, 349, 204 P.3d 585 (2009). In *State v. Carter*, 312 Kan. 526, 535, 477 P.3d 1004 (2020), the Kansas Supreme Court explicitly stated: "Exceptions exist for raising issues on appellate review without expressing an objection to the trial court, but K.S.A. 60-404 does not allow those exceptions to come into play in the context of the admissibility of evidence." Because Dixon did not make a timely and specific objection to the admission of the evidence as required by K.S.A. 60-404, and there are no exceptions to this rule, we cannot address Dixon's evidentiary claim on appeal.

Second, Dixon claims that this court must "annul" the prior adjudications and convictions that were lesser included offenses of the RICO charge. Dixon again points to K.S.A. 21-5109(c) which mandates that "the conviction of the lesser included crime shall be annulled upon the filing of such charges." Dixon's argument on this point depends on his assertion that his prior adjudications and convictions that established his pattern of racketeering activity were lesser included crimes of the RICO offense. But because Dixon's prior adjudications and convictions were not lesser included crimes of the RICO offense, Dixon's annulment argument under K.S.A. 21-5109(c) fails.

Third, Dixon claims that he is entitled to jail credit for any time he spent incarcerated for his prior adjudications and convictions that established his pattern of racketeering activity. He again

refers to K.S.A. 21-5109(c) which states: "If the person is convicted of the crime charged, or of a lesser included crime, the person so convicted shall receive credit against any prison sentence imposed . . . for the annulled conviction." This argument once again depends on Dixon's assertion that his prior adjudications and convictions were lesser included crimes of the RICO offense—they were not. Moreover, Dixon's claim is speculative because he merely asserts that it is *likely* that he served a period of confinement for his prior adjudications and convictions—but there is no settled record to determine the amount of jail credit he would theoretically receive.

WAS THE STATE REQUIRED UNDER THE COMPULSORY JOINDER RULE TO BRING THE KANSAS RICO CHARGE WHEN IT BROUGHT THE PREDICATE CHARGES?

Dixon contends, under the compulsory joinder rule, that the State was required to bring its RICO charge against him when it brought the cases used to establish the pattern of racketeering activity in the RICO charge. Dixon acknowledges that his claim must fail under *State v. Wilkins*, 269 Kan. 256, 7 P.3d 252 (2000), but he contends that case was wrongly decided and should be overturned. This court exercises unlimited review when analyzing compulsory joinder issues and interpretation of the statute where the rule is set forth, K.S.A. 21-5110. *State v. Jordan*, 303 Kan. 1017, 1018, 370 P.3d 417 (2016).

"'Under the compulsory joinder rule, if evidence is admitted of an offense not contained in the charge, later prosecution of that offense is barred if it could have been included as an additional count in the first prosecution.'" 303 Kan. at 1019. The rule seeks to prevent the State from proving a crime that it did not charge in a first trial and then prosecuting the defendant again in a later trial using the same evidence that was presented in the earlier trial. *Wilkins*, 269 Kan. 256, Syl. ¶ 2. Three elements must be established for a prosecution to be barred under the compulsory joinder rule: "(1) The prior prosecution must have resulted in either a conviction or an acquittal; (2) evidence of the present crime must have been introduced in the prior prosecution; and (3) the present crime

must be one which could have been charged as an additional count in the prior case." 269 Kan. at 260; *Jordan*, 303 Kan. at 1020.

Relevant here, the second element requires the defendant to "show that the evidence presented at the first trial, when viewed in a light most favorable to the defendant, *would* lead a rational factfinder to find the defendant guilty beyond a reasonable doubt of the crimes in the second trial." (Emphasis added.) *Wilkins*, 269 Kan. at 263. The Kansas Supreme Court later modified this test in *Jordan*, 303 Kan. at 1021-22, requiring the defendant to simply show that the evidence at the first trial *could* lead a rational fact-finder to find guilt beyond a reasonable doubt of the crimes in the second trial. Dixon admits he cannot satisfy this element. Dixon argues that *Jordan* and *Wilkins* are "clearly erroneous based on the plain language of [K.S.A. 21-5110(b)(1)]," but acknowledges that this court is duty bound to follow Kansas Supreme Court precedent absent some indication that the court is departing from its previous position. See *State v. Rodriguez*, 305 Kan. 1139, 1144, 390 P.3d 903 (2017). Dixon has not provided any specific argument to establish any such departure.

Dixon cannot show that a rational fact-finder could find him guilty beyond a reasonable doubt of the RICO charge based on the evidence presented at the trials for his predicate offenses. Under Kansas Supreme Court precedent that this court is duty bound to follow, Dixon's claim under the compulsory joinder rule fails.

SUFFICIENCY OF THE EVIDENCE

Dixon argues that if this court finds that his "pattern of racketeering activity" did not constitute unitary conduct—as addressed in his double jeopardy-based argument above—the State must have presented insufficient evidence to support his RICO conviction because his predicate offenses were necessarily isolated, and not a pattern of activity. The State asserts that Dixon's sufficiency of the evidence claim fails because it is based on the incorrect premise that separate criminal acts under a double jeopardy analysis cannot be part of a pattern of racketeering activity.

When a defendant challenges the sufficiency of the evidence to support their conviction(s), an appellate court examines the evidence in a light most favorable to the State and determines

whether a trier of fact could have found the essential elements of the charge beyond a reasonable doubt. *State v. Sieg*, 315 Kan. 526, 530-31, 509 P.3d 535 (2022). In conducting this review, the appellate court will not reweigh evidence, resolve evidentiary conflicts, or make witness credibility determinations. *State v. Zeiner*, 316 Kan. 346, 350, 515 P.3d 736 (2022). To the extent this court must engage in statutory interpretation, its review is unlimited. *Betts*, 316 Kan. at 197.

Dixon argues that "[w]e either have a double jeopardy problem . . . or we have a sufficiency [of the evidence] problem." He asserts that "a finding of non-unitary conduct means, automatically, that Dixon's racketeering activities were isolated incidents, which isn't a Kansas RICO crime." In other words, Dixon argues the evidence was insufficient because separate criminal acts cannot be part of a pattern of racketeering activity. This argument misses the mark. A determination that a defendant committed separate criminal acts under a double jeopardy analysis does not necessarily mean that those acts were not part of a pattern of racketeering activity.

The definitions of pattern of racketeering activity under the Kansas RICO Act and unitary conduct for double jeopardy purposes are not interchangeable. As noted above, under K.S.A. 21-6328(e), a "'[p]attern of racketeering activity' means engaging in at least two incidents of racketeering activity that have the same or similar intents, results, accomplices, victims or methods of commission or that otherwise are interrelated by distinguishing characteristics and are not isolated incidents." On the other hand, conduct maybe considered unitary for double jeopardy purposes when actions arise from the same act or transaction or from a single course of conduct. To show unitary conduct courts look to whether the acts occur at or near the same time or location, whether there was a causal relationship or an intervening event between or a fresh impulse motiving the acts. *Schoonover*, 281 Kan. 453, Syl. ¶ 16. Contrary to Dixon's assertions, a determination that a defendant committed separate acts for double jeopardy purposes does not mean that the State presented insufficient evidence to support the RICO conviction.

The requisite nexus between individual acts of racketeering activity forming a pattern is that the acts share similar intents, results, accomplices, victims, or methods of commission. The State provides an excellent example of the distinction: If a defendant committed a murder of a rival gang member in retaliation for a prior shooting and then, at some later time, assaulted a different person who had stolen drugs from the gang, those two acts would constitute a pattern of racketeering activity because both acts had a similar intent—to protect or defend the criminal enterprise. This pattern would exist even though the two criminal acts would not constitute unitary conduct for double jeopardy purposes. In other words, whether a defendant's predicate offenses were unitary under a double jeopardy analysis is irrelevant to whether the State can prove a pattern of racketeering activity to sustain a RICO conviction.

Dixon does not challenge the evidence the State presented at his trial. His argument is more of a legal one: that the instances of racketeering activity cannot be considered a pattern if this court concludes that those instances were not unitary under a double jeopardy analysis. We reject that claim. The State presented evidence that Dixon committed four instances of racketeering activity that, when considered together, could be found to collectively constitute a pattern because each was committed with a similar intent and with similar accomplices in furtherance of his gang activity. Therefore, the State presented sufficient evidence to support Dixon's RICO conviction.

Affirmed.