Appellate Update

Hon. Amy Fellows Cline, Kansas Court of Appeals
Hon. Lesley Isherwood, Kansas Court of Appeals

Thursday, April 28th
12:00 – 12:50 p.m.

RECENT DECISIONS AND HOT ISSUES: CIVIL CASES

Cases: April 1, 2021-April 1, 2022

The following are summaries of case highlights from opinions filed in the last 12 months by the Kansas Supreme Court or the Kansas Court of Appeals. They have been prepared by staff attorneys for the two courts and are not to be used as an authoritative reference regarding the cases described. Only the portion of each case related to the topic noted is discussed. You are encouraged to read the entire case before relying upon it.

The effect of a petition for review: Pending determination of the Supreme Court on a petition for review and during the time in which a petition for review may be filed, an opinion of the Court of Appeals is not binding on the parties or on the district courts. If a petition for review is granted, the decision or opinion of the Court of Appeals has no force or effect, and the mandate will not issue until disposition of the appeal on review. If review is denied, the decision of the Court of Appeals is final as of the date of the denial. A denial of a petition for review expresses no opinion of the Supreme Court on the merits of the case. See Kan. Sup. Ct. R. 8.03

ADMINISTRATIVE LAW

PRESUMPTION OF VALIDITY. The Kansas Board of Healing Arts sanctioned Seyed Sajadi, MD, because Sajadi had been sanctioned in Missouri. Sajadi argued that the Board could only sanction him for being sanctioned in another jurisdiction, not for the underlying sanctionable conduct that occurred in another jurisdiction. Sajadi also contended that the

Kansas sanction could not be more punitive than the Missouri sanction. The Court of Appeals affirmed, concluding that Sajadi had not overcome the presumption of validity attached to agency actions to show that the Board erred in limiting his practice.

> *Sajadi v. Kansas Bd. of Healing Arts*, 61 Kan. App. 2d 114, 500 P.3d 542 (Sept. 24, 2021).

UTILITIES. A natural gas utility that bills customers on the basis of the energy content of gas consumed engages in in an unjust, unreasonable, or unfair practice when it manipulates measurement data to charge customers for more energy than was actually consumed.

> *Hanson v. Kansas Corporation Commission*, 313 Kan. 752, 490 P.3d 1216, (Jul. 16, 2021).

APPELLATE PRACTICE

PRO SE LITIGANTS. Catherine A. Joritz appealed the trial court's denial of her petition for judicial review of the termination of her tenure-track employment with the University of Kansas. The Court of Appeals rejected her request that the court adopt a more lenient standard when reviewing her arguments because she is pro se.

> *Catherine A. Joritz v. University of Kansas*, 61 Kan. App. 2d 482, P.3d __, 2022 WL 187435 (Jan. 21, 2022), *petition for rev. filed* (Feb. 22, 2022).

SCOPE OF REMAND. After the Court of Appeals remanded the district court's order, Harold Johnson moved for trial attorney fees. The district court denied the motion, finding that the Court of Appeals had fully addressed the merits of Johnson's right to attorney fees by denying his appellate attorney fees motion as untimely. On appeal, the Court of Appeals held that its mandate's silence as to Johnson's right to attorney fees upon remand did not mean that Johnson could not move for attorney fees upon remand; it just meant that it had fully decided Johnson's right to appellate attorney fees in his initial appeal.

> *Harold Johnson v. Board of Directors of Forest Lakes Master Association*, __ Kan. App. 2d__, P.3d __, 2021 WL _____ (Dec. 10, 2021).

ATTORNEY SANCTIONS

FEES RELATED TO MOTIONS TO ENFORCE PROTECTIVE ORDERS. Yudi Hernandez hired Brad and Brian Pistotnik's law firm to pursue a bodily injury claim. Yudi later replaced the firm with Stephen Brave. Brave sued Brad, Brian, and the firm on Yudi and other clients' behalf, alleging false advertising. The district court entered a protective order in Yudi's case, precluding use of confidential material obtained during Brave's deposition of Brad. Brave continued to litigate the issue and Brad successfully moved to

enforce the order. The district court assessed expenses incurred by Brad in filing those motions against Brave. The Kansas Court of Appeals upheld the sanctions, holding the district court has leeway in sanctioning discovery abuses.

Hernandez v. Pistotnik, 60 Kan. App. 2d 393, 494 P.3d 203 (July 23, 2021).

CHILD IN NEED OF CARE

VIDEOCONFERENCE—DUE PROCESS. After the district court terminated Mother's rights, she appealed arguing that her due process rights were violated because the court proceedings, including a hearing on the motion to terminate her rights, were held by videoconference. The Court of Appeals affirmed, holding that videoconferencing does not violate due process rights as long as adequate safeguards ensure meaningful participation.

In the Interest of C.T., 61 Kan. App. 2d 218, 501 P.3d 899 (Oct. 29, 2021).

UCCJEA. Mother of A.W., a child suffering from diabetic ketoacidosis, transferred A.W. from Missouri to a hospital in Kansas to avoid Missouri child services. Kansas filed a CINC petition after Missouri social services declined. The district court adjudicated A.W. a child in need of care. On appeal, the Court of Appeals reversed, holding that, under the UCCJEA, Missouri was A.W.'s home state and Missouri did not waive jurisdiction because a court of Missouri, not an administrative agency, must decline jurisdiction. The "unjustifiable conduct" provision was also inapplicable because the unjustifiable conduct must be from the party seeking to invoke the state's jurisdiction. The district court had the authority under emergency jurisdiction to enter temporary orders, but it could not enter permanent orders.

In the Interest of A.W., 60 Kan. App. 2d 296, 493 P.3d 298 (June 18, 2021).

CIVIL PROCEDURE

ORIGINAL ACTIONS. The Kansas Secretary of State filed an original action seeking writs of mandamus and quo warranto for the dismissal of pending district court cases challenging the congressional districts drawn by the 2022 legislature. Relief in mandamus and quo warranto did not lie, as the district judges did not have a mandatory duty to dismiss the cases, and the district judges were not exercising unlawfully asserted authority.

Schwab v. Klapper, No. 124,849, 2022 WL 627748, __ Kan. __, __ P.3d __ (Mar. 4, 2022).

CLAIM PRECLUSION—FEDRAL SUPPLEMENTAL JURISDICTION. A litigant may reassert state-law claims in state court that previously were dismissed without prejudice by a federal court that declined to exercise its discretionary, supplemental jurisdiction over them after resolving any federal law claims. The state law claims are not res

judicata since the decision to decline jurisdiction is not a final judgment on the claims. Overruling *Stanfield v. Osborne Industries*, 263 Kan. 388 (1997) and *Rhoten v. Dickson*, 290 Kan. 92 (2010).

Herrington v. City of Wichita, 314 Kan. 447, 500 P.3d 1168 (Dec. 17, 2021).

APPEALS TO DISTRICT COURT. Scott Brown won a judgment against Casey Zimmerman in small claims court. Zimmerman appealed to the district court. The district court affirmed the judgment after a review of the record. Zimmerman appealed, arguing that he was entitled to a trial de novo, not merely a review of the record. The Court of Appeals reversed, finding that the appeal should have been tried and determined de novo by a district judge.

Scott Brown v. Casey Zimmerman, 61 Kan. App. 2d 537, __ P.3d __, 2022 WL 333411 (Feb. 4, 2022).

MOTION TO STRIKE—PUBLIC SPEECH PROTECTION ACT. A former student, proceeding as John Doe, sued Kansas State University and its Administrator, Heather Reed, alleging Reed communicated false and defamatory information to another university. KSU and Reed filed motions to strike under Kansas' Public Speech Protection Act, asserting Reed's communication was an exercise of rights protected under the Act. The district court granted the motions and dismissed Doe's case. The court of appeals affirmed, finding Doe failed to meet his burden of producing substantial competent evidence to support his claims and to overcome the university's prima facie showing that the claims involved the exercise of a protected right. Thus, the district court did not err in granting the motions to strike.

John Doe v. Kansas State University and Heather Reed, 61 Kan. App. 2d 128, 499 P.3d 1136 (Oct. 1, 2021).

PLEADING REQUIREMENTS. Stevie Kucharski-Berger sued Hill's Pet Nutrition, alleging violations of Kansas' restraint of trade and consumer protection laws, after learning that Hill's prescription pet food contains no medicine or drug, and that no prescription is legally required to purchase it. Kucharski-Berger also raised an unjust enrichment claim on the same grounds. The district court dismissed the suit, holding that Kucharski-Berger failed to state a claim upon which relief could be granted. The Court of Appeals reversed holding, in part, that Kucharski-Berger's pleadings sufficiently apprised Hill's of the claims against the company. The court also held that Kucharski-Berger could bring her statutory

claims and her unjust enrichment claim even if she would ultimately be unable to recover on both theories.

> *Kucharski-Berger v. Hill's Pet Nutrition, Inc*., 60 Kan. App. 2d 510, 494 P.3d 283, (Aug. 20, 2021), *petition for rev. filed* (Sept. 17, 2021), *petition for rev. denied* (Dec. 9, 2021).

ONE-ACTION RULE. Curtis Rodina sued a dental practice and some dentists for malpractice and other claims. Because the defendants did not respond, the district court entered a default judgment against them. The district court ruled it was unnecessary to apportion fault in the default judgment. Rodina subsequently learned that Dr. Alberto Castanedo performed the allegedly negligent dental procedures. Rodina brought another suit against Castanedo. The district court dismissed the second suit under the one-action rule. The Court of Appeals reversed, holding that Rodina was entitled by law to an apportionment of fault. Since the default judgment did not apportion fault, Rodina's suit against Castaneda was not barred by the one-action rule.

> *Curtis Rodina v. Alberto R. Castaneda, D.D.S.*, 60 Kan. App. 2d 384, 494 P.3d 172, (July 16, 2021), *petition for rev. filed* (Aug. 12, 2021), *petition for rev. denied* (Dec. 6, 2021).

APPEAL OF ORDER MADE BY JUDGE PRO TEM. The district court entered a protection from abuse order against J.L.B. The presiding judge was appointed under K.S.A. 2020 Supp. 20-310a(d), as a judge pro tem. J.L.B. first filed her appeal from the order in the district court. The district court dismissed the appeal and directed it be filed in the Court of Appeals. Acknowledging conflicting language within the statute, the Court of Appeals found the judge pro tem acted within the authority of a district magistrate judge, requiring J.L.B. to take her appeal to the Court of Appeals.

> *J.B.B. v. J.L.B.*, 60 Kan. App. 2d 310, 495 P.3d 1036 (July 9, 2021).

CONSTITUTIONAL LAW

AVOIDANCE. Parents of school children sued to challenge a school district's Covid-19 mask mandate under the provisions of 2021 Kansas Senate Bill 40. A district court denied relief, finding the parents' claim was untimely and also that the law was unconstitutional. The Kansas Supreme Court held the trial court erred reaching the constitutional question when the case could be resolved on non-constitutional grounds.

> *Butler v. Shawnee Mission School District*, 314 Kan. 553, 502 P.3d 89 (Jan. 7, 2022).

FIFTH AMENDMENT—APPLICABILITY IN CINC PROCEEDINGS. The district court relied, in part, on Mother's failure to comply with a clinical or substance abuse

evaluation in a child in need of care proceeding to terminate Mother's parental rights. During the evaluation, Mother failed to explain injuries to E.L.'s siblings. On appeal, Mother argued that it was improper for the court to base its unfitness findings on her failure to explain the injuries because she had a criminal case pending on the subject and she wanted to maintain her Fifth Amendment right against self-incrimination. The Court of Appeals affirmed, holding that the right against self-incrimination does not prohibit a court from relying on a parent's failure to complete court ordered evaluations when terminating parental rights.

In the Interest of E.L., 61 Kan. App. 2d 311, 502 P.3d 1049 (Nov. 24, 2021), *petition for rev. filed* (Dec. 27, 2021), *petition for rev. denied* (Mar. 25, 2022).

RIGHT TO A JURY TRIAL; RIGHT TO A REMEDY. A Kansas statute that abrogated wrongful birth actions, which had been previously recognized by the state supreme court, violates neither the right to a remedy nor the right to a jury trial under sections 5 and 18 of the Kansas Constitution, even though some parents would have had a viable cause of action but-for the statute. Wrongful birth had been recognized as a new cause of action, and thus it was not constitutionally shielded from statutory abrogation.

Tillman v. Goodpasture, 313 Kan. 278, 485 P.3d 656 (Apr. 30, 2021).

CONTRACTS

PROMISSORY NOTES. A promissory note's waiver of the statute of limitations is not void as against public policy when the waiver is only "to the full extent permitted by law," the loan underlying the note is a commercial contract, and the borrower does not claim prejudice from the lender's delay in bringing suit.

First Security Bank v. Buehne, 314 Kan. 507, 501 P.3d 362 (Dec. 30, 2021).

MUNICIPALITIES. The Topeka city council entered into a contract to purchase an interest in a racetrack, in which it agreed to finance the purchase with Sales Tax and Revenue bonds. New members were elected to the council, and the new membership decided not to pursue the bond issue. The purchase contract imposed obligations on the city outside the general administrative functions of a municipality, so it was a governmental decision

that was not binding on the subsequent council. Accordingly, the seller was not entitled to damages for the council's breach of contract.

Jayhawk Racing Properties, et al. v. Topeka, 313 Kan. 149, 484 P.3d 250 (Apr. 9, 2021).

ESTATES AND TRUSTS

TIMELY FILING OF A WILL. Alma Faye Lessley died testate in June 2018. Shortly before her death, Lessley materially changed her will to substantially benefit one of her four children to the exclusion of her other three children. The heir given a larger share of assets under the terms of the will filed a petition for probate but did not file the will until almost 18 months after Lessley's death. The Court of Appeals held that the heir was not an innocent beneficiary and that the failure to timely file the will within six months from the date of the decedent's death rendered the will ineffective and not admissible to probate.

Matter of Estate of Lessley, ___ Kan. App. ___, ___ P.3d ___ 2022 WL 731363 (Mar. 11, 2022).

FAMILY LAW

SERVICE OF PROCESS. The district court terminated Father's parental rights after he failed to appear at the termination hearing. The State had sent notice of the hearing by certified mail, with a return receipt signed by someone who was not Father. Father appealed, arguing that service of notice of the hearing was invalid unless he signed for the notice's receipt. The Court of Appeals rejected Father's arguments, holding that Kansas law does not require restricted delivery when serving notice of a termination hearing by return receipt delivery, such as service by certified mail.

In re A.P., __ Kan. App. 2d __, __ P.3d __, 2022 WL 817026 (Mar. 11, 2022).

INTERNATIONAL TREATY – CHILD CUSTODY. Dutch child protective services took S.L. into custody when she was in the Netherlands. Her father and stepmother petitioned for her return under the 1980 Hague Convention on the Civil Aspects of Child Abduction. Dutch courts held that S.L. had sufficient age and maturity to take her views into consideration and S.L. did not want to return to the U.S. because of her stepmother's abuse. Then, S.L.'s father and stepmother petitioned the Johnson County District Court to

order S.L. returned, which it did. The Kansas Court of Appeals reversed, saying that the Dutch courts correctly applied the 1980 Hague Convention.

> *In the Interest of S.L., A Minor Child,* No. 123,535, 2021 WL 5274575, 61 Kan. App. 2d 276, 503 P.3d 244 (Nov. 12, 2021), *petition for rev. filed* (Dec. 8, 2021).

CHILD SUPPORT. Under the Uniform Interstate Family Support Act, a Kansas court's power to modification of an out of state's order is not conditioned on proper registration of the order. Failing to file a copy of another state's child support order when registering the order in Kansas does not deprive a Kansas court of jurisdiction to consider a subsequent motion to modify the order.

> *Chalmers v. Burrough*, 314 Kan. 1, 494 P.3d 128 (Aug. 27, 2021).

CHILD SUPPORT. In a proceeding to determine paternity, a district may impose support comprising the mother's prenatal medical care and childbirth expenses only in the initial support award entered in conjunction with the paternity order.

> *Carman v. Harris*, 313 Kan. 315, 485 P.3d 644 (Apr. 30, 2021).

GRANDPARENT VISITATION

JURISDICTION. The district court granted Grandmother's petition for grandparent visitation with her grandsons. Mother appealed, arguing that the district court violated her constitutional rights as a parent to decide the care, custody, and control of her children. The Court of Appeals affirmed, first addressing jurisdiction and agreeing with a previous panel that independent actions by grandparents are authorized by statute. The Court then ruled that Mother's proposed plan for her children to have no contact with Grandmother was not reasonable.

> *Schwarz v. Schwarz*, __ Kan. App. 2d __, __ P.3d __, 2022 WL 815699 (Mar. 18, 2022).

GOVERNMENT LIABILITY

MEDICAL TREATMENT FOR PERSONS IN CUSTODY. A governmental entity's obligation to pay an indigent criminal offender's medical expenses under K.S.A. 22-4612 is triggered when the entity has custody over the offender at the time the decision to

obtain medical treatment is made. The definition of custody for the statute's purposes is discussed and applied.

University of Kansas Hospital Authority v. Board of Franklin County Commissioners, 314 Kan. 74, 495 P.3d 1 (Sept. 10, 2021).

INSURANCE

DUTY TO SETTLE. Nancy Granados filed a garnishment against Key Insurance after she won a wrongful death judgment against Key's insured, John Wilson. The district court awarded the garnishment, finding Key acted in bad faith or negligently. On appeal, a panel of the Court of Appeals determined that Key had not acted in bad faith because there was no causal connection between Key's purported breach of duty and the excess judgment. The panel also found that an insurer owes no affirmative duty to initiate settlement negotiations with a third party until the third party makes a claim for damages.

Nancy Granados, Individually, as Heir-at-Law of Francisco Granados, Decedent, and as Class Representative of all Heirs-At-Law of Francisco Granados, Decedent v. John Wilson and Key Insurance Company, __ Kan. App. 2d __, __ P.3d ___, 2022 WL 497315 (Feb. 18, 2022), *petition for rev. filed* (Mar. 9, 2022).

UNDERINSURED MOTORIST COVERAGE. Plaintiff sought underinsured motorist benefits from his employer's automobile insurance carrier. Reversing the district court's rulings on competing motions for summary judgment, the Court of Appeals held: (1) The carrier wrongfully denied coverage based on a written rejection of coverage by the employer because the rejection specified only uninsured coverage, not underinsured coverage. (2) Plaintiff forfeited his right to underinsured motorist benefits by failing to provide notice of a tentative settlement under K.S.A. 40-284(f).

McLean v. National Union Fire Ins. Co., 60 Kan. App. 2d 283, 493 P.3d 968 (June 18, 2021), *petition for rev. filed* (July 14, 2021), *petition for rev. denied* (Sept. 27, 2021).

JUDGMENTS

WAGE GARNISHMENT. A judgment creditor may not attach a judgment debtor's wages which have been deposited into the judgment debtor's bank account. The bank garnishment statute, K.S.A. 61-3505, permits the judgment creditor to reach only "intangible

property, other than earnings . . . ." After wages are paid to the judgment debtor, they remain earnings and their garnishment is subject to limitations set out in the wage garnishment statutes.

Stormont-Vail Healthcare, Inc. v. Sievers, 314 Kan. 355, 498 P.3d 1217 (Nov. 24, 2021).

JURISDICTION

APPELLATE COURT'S ABILITY TO REMAND. Travelers Casualty Insurance was ordered by the Director of the Worker's Compensation Fund to reimburse OneBeacon American Insurance Company for preliminary medical benefits OneBeacon paid to a beneficiary. Unhappy with the order, Travelers sought review of the order by the district court. The district court denied Travelers' prayer for relief. Travelers appealed and, after review, this court remanded the case to the Workers Compensation Board. Before the Board, the parties agreed that the Board did not have jurisdiction to address the case on remand. The Board reluctantly disagreed and issued an opinion. The case was appealed to this court and a majority held that an intermediate appellate court cannot vest jurisdiction in a tribunal that does not otherwise have jurisdiction by remanding a case to the tribunal.

Travelers Casualty Insurance v. Larry G. Karns and OneBeacon American Insurance Company, 61 Kan. App. 2d 43, 499 P.3d 491 (Sep. 17, 2021).

OPEN RECORDS ACT

STANDING. An attorney who sues for access to recordings of a court proceeding under the Kansas Open Records Act loses standing on the claim if the recordings are produced during discovery. The attorney must allege a future injury stemming from the policy under which the records were originally withheld. An attorney who has received the recordings originally requested has lost any personal stake in the KORA litigation.

Baker v. Hayden, No. 117,989, 313 Kan. 667, 490 P.3d 1164 (July 2, 2021).

REAL PROPERTY

MORTGAGE FORECLOSURE — LOAN ACCELERATION. The district court granted Ashley and Timothy Holversons' summary judgment motion, ruling that Wilmington's foreclosure action fell outside a five-year statute of limitations because the prior noteholder's 2011 letter threatening foreclosure triggered the statute of limitations when the Holversons failed to cure their default by the letter's listed deadline. Wilmington appealed, arguing that the statute of limitations was not triggered until a later date because only a noteholder's clear and unequivocal expression of its intent to accelerate a loan triggers the

five-year statute of limitations. The Kansas Court of Appeals agreed, reversing and remanding for further proceedings.

> *Wilmington Savings Fund Society, FSB v. Holverson*, 60 Kan. App. 2d 142, 492 P.3d 492 (May 14, 2021).

SEXUALLY VIOLENT PREDATOR PROGRAM

CIVIL PROCEDURE. In 2018, Max R. Saiz petitioned for release from the Sexually Violent Predator Treatment Program alleging, in part, that the State failed to comply with a prior court order. The district court agreed and ordered Saiz' immediate release from the program. On appeal, the Kansas Court of Appeals reversed, holding that while courts have inherent authority to enter sanctions against a party for failing to comply with court orders—even in SVP proceedings—courts cannot ignore the SVPA's procedural requirements for release. In addition, the panel found the court erred in finding that the State violated the prior order.

> *In re Care and Treatment of Saiz*, 60 Kan. App. 2d 178, 492 P.3d 484 (May 14, 2021)

STATUTORY INTERPRETATION

RETAIL ELECTRIC SUPPLIERS ACT. Garden City and Wheatland Electric had an oral agreement permitting Garden City to supply electricity to an ethanol plant outside the city limits in Wheatland's service area. When Wheatland wanted to begin supplying electricity to the ethanol plant, Garden City annexed the land the plant was on. Wheatland sought fair and reasonable compensation under K.S.A. 66-1,176. The Court of Appeals held: Because K.S.A. 66-1,175 does not permit retail electric suppliers to make agreements that alter their service territories without the Kansas Corporation Commission's approval, equitable principles do not permit the court to enforce an agreement made without such approval. Wheatland never transferred its service rights to Garden City and was entitled to compensation under K.S.A. 66-1,176(c) even though it had no customers in the annexed area.

> *Wheatland Electric Cooperative, Inc. v. City of Garden City, Kansas*, 61 Kan. App. 2d 343, 504 P.3d 447, 2021 WL 5750942 (Dec. 3, 2021), *petition for rev. filed* (Dec. 30, 2021).

SUMMARY JUDGMENT

SHAM AFFIDAVIT DOCTRINE. Anita Christiansen filed a personal injury lawsuit after breaking her ankle in a parking lot owned by the Howard Silverbrand Living Trust.

Silverbrand moved for summary judgment, asserting Christiansen admitted only to slipping on ice, which the lessee of the parking lot was supposed to remove. Christiansen later submitted an affidavit stating she slipped on the ice before breaking her ankle on a crack/pothole. The district court struck the affidavit because it contradicted her prior statements and granted Silverbrand's motion. The panel reversed, finding the affidavit was not a sham affidavit because Christiansen was clarifying her previous statements.

> *Christiansen v. Silverbrand*, 61 Kan. App. 2d 8, 497 P.3d 1155 (September 3, 2021).

TAX

TAX CLASSIFICATION. Three well servicers (Well Servicers) challenged Pratt County's classification of their mobile well service rigs as oil and gas property in tax years 2015 and 2016. Well Servicers claimed their rigs should be tax exempt and that the applicable valuation guidelines violated their equal protection rights. On appeal, the Court of Appeals held the service rigs were properly taxed because Well Servicers' equipment was used in the operation of oil and gas leaseholds. The court reasoned that the tax classification did not involve a fundamental right or suspect classification and scrutiny under a rational basis standard was appropriate. The court concluded that the Legislature had a rational basis for imposing the tax.

> *Alliance Well Service, Inc. et al v. Pratt County*, 61 Kan. App. 2d 454, __ P.3d __, 2022 WL 186578 (January 21, 2022).

VALUATION OF COMMERCIAL PROPERTY. The Board of Johnson County Commissioners sought judicial review of the Board of Tax Appeal's decision establishing the value of nine Walmart stores and two Sam's Club stores for ad valorem tax purposes. Johnson County argued that *In re Prieb Properties*, 47 Kan. App. 2d 122, 275 P.3d 56 (2012), was wrongly decided. After reviewing the record, the panel majority concluded that Johnson County failed to satisfy its burden of showing the invalidity of BOTA's decision regarding the valuation of the Walmart Properties. The dissent opined that *Prieb*, which limited what BOTA may consider in determining the appraised value of real estate, should be overturned.

> *In re Equalization Appeals of Walmart Stores, Inc.*, ___ Kan. App. 2d ___, ___ P.3d ___ (Oct. 8, 2021).

TAXATION

OIL AND GAS. Oil and gas properties must be appraised at fair market value for tax purposes. In determining value, appraisers must use guides promulgated by the State Department of Revenue's Director of Property Valuation unless the taxpayer supplies just

cause to deviate from them. County Appraisers properly valued the taxpayer's working interest in natural gas leases and associated property using the applicable guide. The guide's minimum lease value provision, used under certain conditions to avoid zero-dollar valuations for working interests in producing leases, does not violate the statutory mandate that property be valued for property tax purposes at its fair market value. The taxpayer's evidence was insufficient to compel deviation from the guide.

In re River Rock Energy Company, No. 120,387, 313 Kan. 936, 492 P.3d 1157, (Aug. 6, 2021).

TERMINATION OF PARENTAL RIGHTS

UNFITNESS OF A PARENT. The district court terminated Father's parental rights after Father was sentenced to concurrent 68-month prison sentences. On appeal, Father argued the district court's decision he was unfit to parent T.H. was not supported by clear and convincing evidence. The Court of Appeals reversed, finding that Father's incarceration, standing alone, was not an automatic basis for a finding of parental unfitness.

In the Interest of T.H., 60 Kan. App. 2d 536, 494 P.3d 851 (Aug. 20, 2021), *petition for rev. filed* (Sept. 7, 2021), *petition for rev. denied* (Dec. 9, 2021).

TORTS

GOVERNMENTAL IMMUNITY. Absent evidence of wanton or malicious misconduct, a police officer's erroneous determination that reasonable suspicion exists to initiate an investigatory detention is a discretionary decision for which the officer is immune from civil liability under the Kansas Tort Claims Act, K.S.A. 75-6101 *et seq*.

Schreiner v. Hodge, __ Kan. __, 504 P.3d 410 (Feb. 18, 2022).

NEGLIGENCE—CAUSATION. After General Pest Control (GPC) sprayed the plaintiffs' office building for insects, the plaintiffs filed negligence claims against GPC alleging that the pesticides caused them medical injury. The district court ruled for GPC as a matter of law after finding that the plaintiffs failed to present sufficient evidence on causation. The Court of Appeals reversed, holding that circumstantial evidence of causation need not exclude every other reasonable conclusion. The plaintiffs' evidence, which showed that

they developed symptoms consistent with exposure to the pesticides GPC used to spray their office, was sufficient to present a question of fact to a jury.

Najera and Shope v. General Pest Control, LLC, 61 Kan. App. 2d 363, 503 P.3d 1054 (Dec. 10, 2021).

MALICIOUS PROSECUTION. H. Reed Walker and his law practice were sued by Donald E. Budd, Jr. for malicious prosecution stemming from an underlying divorce case asserting a claim of common law marriage. In the underlying case, the district court found there was no common law marriage and awarded Budd's former partner an equitable interest in the home the couple shared. But the formula used to calculate the former partner's share resulted in a net payment of $0 to her. In the malicious prosecution suit, a jury found for Budd. The Kansas Court of Appeals reversed, holding that, because Budd's former partner prevailed in being awarded an equitable interest in the home, Budd was not successful in the entire underlying litigation.

Budd v. Walker, 60 Kan. App. 2d 189, 491 P.3d 1273 (May 21, 2021), *petition for rev. filed* (Jun. 17, 2021), *petition for rev. denied* (Aug. 27, 2021).

TRUSTS

BENEFICIARY STANDING. James Kurt Schaake, beneficiary and co-trustee to a trust that owns properties in Lawrence, hired a law firm to represent the trust in a lawsuit against the City of Lawrence, alleging illegal taxation and seeking a temporary injunction of the City's plans to improve Lawrence districts. After the firm withdrew as counsel, the district court ordered Schaake to hire replacement counsel. Schaake did not comply, so the court dismissed the case. Schaake appealed pro se. The Court of Appeals found it did not have jurisdiction because Schaake, a non-attorney beneficiary, lacked standing and thus dismissed the appeal.

Schaake, Trustee of Donald Dean Schaake Revocable Trust v. City of Lawrence, 60 Kan. App. 2d 88, 491 P.3d 1265 (May 7, 2021), *petition for rev. filed* (Jun. 7, 2021), *petition for rev. denied* (Mar. 21, 2022).

BREACH OF TRUSTEE DUTIES. Casey Galloway appealed the denial of his requests to remove co-trustees for breach of duties and self-dealing and to assess double damages for loss incurred by an improper loan of trust funds. He also challenged the trustee and attorney fees awarded, alleging error in allowing any trustee fees and limiting his award to costs incurred before he declined co-trustees' settlement offer. The Court of Appeals affirmed, finding the trust provided co-trustees broad discretion in making investments and

managing the trust, the record lacked evidence of self-dealing or bad faith, and any benefit Galloway's lawsuit added to the trust ended before trial.

Matter of O.E. Bradley & E.L. Bradley Trust, 60 Kan. App. 2d 66, 490 P.3d 51 (May 7, 2021).

WORKERS COMPENSATION

WORKERS COMPENSATION FUND. Where the Workers Compensation Fund pays workers compensation benefits to an employee of a subcontractor that is financially unable to pay, the general contractor—the subcontractor's principal—is an "employer" against which the Fund has a cause of action under K.S.A. 44-532a(b) to recover the amounts paid.

Schmidt v. Trademark, Inc., No. 122,078, 2022 WL 815713, __ Kan. __, __ P.3d __ (Mar. 18, 2022).

SUBROGATION LIENS. Kendall Turner sustained a work-related injury as a result of a car accident. Turner subsequently filed both a workers compensation claim and a federal lawsuit against his employer's uninsured motorist carrier. Turner succeeded in his workers compensation action and also received a settlement in his federal lawsuit. The Kansas Workers Compensation Fund challenged the award on appeal. The Court of Appeals affirmed the award but held that the Board erred as a matter of law in finding that the Fund is not entitled to a subrogation lien under K.S.A. 44-504 for any duplicative recovery received in the settlement of his federal lawsuit.

Turner v. Pleasant Acres, LLC, __ Kan. App. 2d ___, 2022 WL 815834 (March 18, 2022).

FUNCTIONAL IMPAIRMENT RATING. In a divided opinion, the Court of Appeals reversed a Workers Compensation Board decision denying Guadalupe Garcia's application for work benefits. The court held that the Board erred by relying solely on the Sixth Edition of the AMA Guides in determining Garcia's functional impairment rating. The Board should also have considered any competent medical evidence a doctor determines to be relevant in calculating an accurate impairment rating.

Garcia v. Tyson Fresh Meats, Inc., 61 Kan. App. 2d 520, ___ P.3d ___, 2022 WL 261927 (Jan. 28, 2022).

COLLATERAL ESTOPPEL. KVC fired Carolyn Miller shortly after she filed a workers compensation claim. Miller sued KVC for wrongful termination. In the workers compensation case, the administrative law judge found KVC legitimately terminated Miller's employment when addressing Miller's eligibility for temporary total disability compensation. After the parties settled the remaining issues in the workers compensation case, KVC

moved for judgment on the pleadings in the wrongful termination case on the basis of collateral estoppel. The district court granted KVC's motion and dismissed Miller's wrongful termination suit with prejudice. The Court of Appels reversed and remanded because the ALJ's disability ruling was a preliminary order and did not satisfy the elements of collateral estoppel.

> *Carolyn L. Miller v. KVC Behavioral Healthcare, Inc., d/b/a/ KVC Prairie Ridge Hospital*, 61 Kan. App. 2d 512, ___ P.3d ___, 2022 WL 262157 (Jan. 28, 2022).

DEADLINE EXTENSIONS. Debbie Gerlach showed good cause to extend her workers compensation action beyond the statutory time limit of three years. An administrative law judge gave her a six-month extension. But when those six months had elapsed, Gerlach had not completed her claim or requested another extension. The employer and insurer moved to dismiss. But the administrative law judge adjudicated Gerlach's claim and awarded her compensation. On appeal, the Kansas Court of Appeals affirmed, holding the statutory time limit applies to the first extension and further extensions are at the discretion of the administrative law judge for good cause shown.

> *Gerlach v. Choices Network, Inc.*, 61 Kan. App. 2d 268, 503 P.3d 1033 (Nov. 12, 2021).

STATUTORY INTERPRETATION—IMPAIRMENT RATING. Gerline Zimero sustained injuries while working for Tyson. An ALJ found she sustained a 3% whole body permanent partial impairment based on the Sixth Edition of the AMA Guides. The Legislature adopted the Sixth Edition over the Fourth Edition in 2015 for determining the impairment rating. The Court of Appeals held the Fourth Edition is no longer relevant because the Sixth Edition is now the statutorily required starting point but must still be supported by competent medical evidence.

> *Zimero v. Tyson Fresh Meats, Inc.*, __ Kan. App. 2d. __, 499 P.3d 1153, 2021 WL 4501808 (October 1, 2021)

PREVAILING FACTOR. Prudencio Cuevas Perez filed a workers compensation claim for a knee injury he suffered at work for National Beef Packing Company (NBP). Following surgery to repair the knee, Perez' doctor recommended a total knee replacement. NBP referred Perez to a different doctor, who determined Perez' work injury was not the prevailing factor in his need for replacement surgery. The Board of Workers Compensation Appeals ultimately found that Perez' work injury was not the prevailing factor prompting the replacement. In reaching its decision, the Board consulted the American Medical Association Guides to the Evaluation of Permanent Impairment to assess its own impairment rating. Both Perez and NBP appealed. The Court of Appeals affirmed the Board, holding that (1) all injuries, including secondary injuries, must be caused primarily by the work

accident; (2) the Board may take judicial notice of the AMA Guides; and (3) the prevailing-factor rule was constitutional as applied to Perez.

> *Perez v. National Beef Packing Co.*, 60 Kan. App. 2d 489, 494 P.3d 268 (August 13, 2021).

WORKERS COMPENSATION FUND. The Fund paid compensation to an injured worker of an insolvent subcontractor that had no workers compensation insurance. The issue on appeal was whether the Fund could, in a separate lawsuit, recover from the contractor that hired the subcontractor under K.S.A. 44-503(a) and K.S.A. 44-532a(b). The court held it could. The court further held K.S.A. 44-532a(b) does not authorize the Fund to recover attorney fees.

> *Schmidt v. Trademark, Inc.*, 60 Kan. App. 2d 206, 493 P.3d 958 (May 28, 2021), *petition for rev. filed* (Jun. 28, 2021), *petition for rev. granted* (Aug. 27, 2021).

EMPLOYER'S SUBROGATION AND FUTURE CREDIT RIGHTS. When an employer has paid workers compensation benefits and the employee recovers for the injury from a third-party tortfeasor, the jury-determined percentage of the employer's fault for the employee's injury may be used to calculate the employer's subrogation right if settlement proceeds under a settlement agreement reached before verdict. The method of calculating the extent of the employer's subrogation interest is also discussed.

> *Hugh Michael Hawkins v. Southwest Kansas Co-Op Service*, 313 Kan. 100, 484 P.3d 236 (Apr. 2, 2021).

RECENT DECISIONS AND HOT ISSUES: CRIMINAL CASES

Cases: April 1, 2021-April 1, 2022

The following are summaries of case highlights from opinions filed in the last 12 months by the Kansas Supreme Court or the Kansas Court of Appeals. They have been prepared by staff attorneys for the two courts and are not to be used as an authoritative reference regarding the cases described. Only the portion of each case related to the topic noted is discussed. You are encouraged to read the entire case before relying upon it.

The effect of a petition for review: Pending determination of the Supreme Court on a petition for review and during the time in which a petition for review may be filed, an opinion of the Court of Appeals is not binding on the parties or on the district courts. If a petition for review is granted, the decision or opinion of the Court of Appeals has no force or effect, and the mandate will not issue until disposition of the appeal on review. If review is denied, the decision of the Court of Appeals is final as of the date of the denial. A denial of a petition for review expresses no opinion of the Supreme Court on the merits of the case. See Kan. Sup. Ct. R. 8.03

AFFIRMATIVE DEFENSES

SELF-DEFENSE IMMUNITY. The State charged Dexter Betts with reckless aggravated battery after a girl sustained injuries from bullet fragments when Betts discharged a firearm inside her home after a dog barked and lunged at him. Betts filed a pretrial motion to dismiss based on statutory immunity. The district court granted Betts' motion and dismissed the case. The Court of Appeals affirmed, holding that, for self-defense immunity claims, a district court is permitted to consider a defendant's claim of self-defense regardless of whether the State charged the defendant with conduct that constitutes an intentional, knowing, or reckless crime.

> *State v. Betts*, 60 Kan. App. 2d 269, 489 P.3d 866 (June 18, 2021), *petition for rev. filed* (Jul. 15, 2021), *petition for rev. granted* (Sept. 27, 2021).

SPEEDY TRIAL-CROWDED DOCKET EXCEPTION. Tony Lee Foster's trial was continued after the district court failed to summon jurors. There were no trial settings available before Foster's speedy trial deadline. The district court rescheduled the trial for three days after the speedy trial deadline, citing the "crowded docket" provision in K.S.A. 2020 Supp. 22-3402(e)(4). Foster objected, arguing that the district court's reason for con-

tinuing the trial was its failure to summon jurors, not a crowded docket. The Court of Appeals held that the district court properly relied on the exception because the crowded docket was the reason the trial could not be rescheduled within the deadline.

State v. Foster, 60 Kan. App. 2d 243, 493 P.3d 283 (June 11, 2021), *petition for rev. filed* (Jul. 15, 2021), *petition for rev. denied* (Sept. 27, 2021).

APPELLATE PROCEDURE

ISSUES RAISED FOR FIRST TIME ON APPEAL. When an issue raised for the first time on appeal requires factual determinations that could have been resolved before the appeal, an appellate court may not reach the issue even if a recognized exception permitting it to do so has been invoked. An appellate court cannot make credibility determinations, resolve evidentiary conflicts, or reweigh evidence.

State v. Allen, 314 Kan. 280, 497 P.3d 566 (Nov. 5, 2021).

PROCEEDINGS ON REMAND—RESTITUTION. When restitution is awarded in a criminal case, but on appeal it is determined that the award is not supported by substantial competent evidence, on remand the State may not present new evidence. Any award must be based on the existing evidentiary record.

State v. Dailey, 314 Kan. 276, 497 P.3d 1153 (Nov. 5, 2021).

JURISDICTION. An appellate court lacks jurisdiction over an untimely appeal by a defendant adjudicated as a juvenile offender who failed to appeal within 10 days of sentencing, as required by statute. Due process does not require an appellate court to exercise jurisdiction based on a district court's failure to inform the defendant of the right to appeal. No constitutional provision, statute, or court rule requires a district court to inform a defendant of the statutory right to appeal, and the district court's failure to do so does not offend a fundamental principle of justice.

In re I.A., 313 Kan. 803, 491 P.3d 1241 (Jul. 23, 2021).

JURISDICTION. An appellate court lacks jurisdiction to review the imposition of a consecutive sentence for a crime committed while on felony probation, as authorized by K.S.A. 21-6606, over the defendant's objection that the consecutive sentence results in a manifest injustice.

State v. Young, 313 Kan. 724, 490 P.3d 1183 (Jul. 9, 2021).

JURISDICTION. Although K.S.A. 22-3602 supplies limited statutory grounds for the State to file an appeal in a criminal case, that list is not exclusive. An appellate court has

jurisdiction under K.S.A. 60-2101 to hear the State's appeal of a sentence claimed to be illegal under K.S.A. 22-3404.

State v. Clark, 313 Kan. 560, 486 P.3d 591 (May 14, 2021).

CRIMINAL LAW

ILLEGAL SENTENCE. Robert Glenn Terrell appealed the denial of his motion to correct illegal sentence. The Kansas Court of Appeals reversed, holding the district court improperly scored Terrell's 2004 conviction for failure to register under the Kansas Offender Registration Act (KORA) as a person felony. The court ruled that the district court erred in applying the 2016 version of KORA to classify Terrell's prior conviction rather than applying the classification in effect at the time of the prior conviction.

State of Kansas v. Robert Glenn Terrell, 60 Kan. App. 2d 39, 488 P.3d 520 (Apr. 9, 2021), *petition for rev. filed* (Apr. 14, 2021), *petition for rev. granted* (Jun. 9, 2021).

DUE PROCESS

POST REMAND DELAY. Jose Jesus Rodriguez appealed the district court's denial of his motion to dismiss for failure to conduct a timely remand hearing. A prior Court of Appeals panel had remanded Rodriguez' case, but the district court had taken no action for nearly four years. In this appeal, the Court of Appeals adopted and applied the four-factor speedy trial test from *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972), but concluded that Rodriguez' claim failed because he did not assert his right and he did not allege any prejudice.

State of Kansas v. Jose Jesus Rodriguez, 60 Kan. App. 2d 320, 494 P.3d 155 (July 16, 2021), *petition for rev. filed* (Aug. 16, 2021), *petition for rev. denied* (Jan. 31, 2022).

BATSON CHALLENGE—TIMING. After the district court released the venire and empaneled the jurors, Shon Jackson challenged the State's peremptory strikes. The court denied the challenge as untimely. The Court of Appeals affirmed the ruling. Noting its prior

decision in *State v. Heiskell*, 21 Kan. App. 2d 105, 896 P.2d 1106 (1995), the panel reaffirmed that a *Batson* challenge requires a timely objection. And an objection is timely if raised before the jury is sworn and the venire dismissed.

State v. Jackson, 60 Kan. App. 2d 424, 494 P.3d 225 (July 30, 2021).

ELEMENTS

IDENTITY THEFT. The defendant obtained employment with a fraudulent social security number several years before the prosecution commenced. The defendant's receipt of a recent paycheck from the same employment constituted "using" the social security number on the date the paycheck was received, such that the crime was committed on the date of receipt.

State v. Valdiviezo-Martinez, 313 Kan. 614, 486 P.3d 1256 (May 21, 2021).

ELEMENTS OF CRIMES

DRIVING UNDER THE INFLUENCE. The Kansas DUI statute, K.S.A. 8-1567, requires determining if the defendant has any out-of-state convictions for a comparable offense to determine whether the crime charged is a first, second, third, or fourth or subsequent offense. Under 2018 amendments to the statute, an out-of-state conviction with elements broader than those required for a conviction under K.S.A. 8-1567 may be used to make this determination.

State v. Myers, 314 Kan. 360, 499 P.3d 1111 (Dec. 3, 2021).

DRUG POSSESSION—INTENT TO DISTRIUBUTE. A jury instruction that intent to distribute narcotics may be inferred from the defendant's possession of a statutorily-prescribed amount of the substance is legally inappropriate. The statute upon which the instruction is based provides for a rebuttable presumption of intent, not a permissive inference. And though instructing the jury on a permissive inference of intent based on quantity might not be error per se, the statutory threshold designated in the instruction lacked any connection to the evidence at trial, which demonstrated possession of a much larger amount of narcotics.

State v. Holder, 314 Kan. 799, 502 P.3d 1039 (Jan. 28, 2022).

KNOWLEDGE OF AGE OF CHILD VICTIM. Alexander Hunt was convicted of two counts of aggravated indecent liberties with an eight-year-old child. On appeal, Hunt argued that because the statute for aggravated indecent liberties with a child did not require the State to prove he knew the child victim's age, the offense violated his state jury trial right and his state substantive due process rights. The Court of Appeals found Hunt lacked

standing to raise these constitutional challenges because evidence admitted at trial established that Hunt knew the age of the child.

> *State v. Hunt*, 61 Kan. App. 2d 435, 503 P.3d 1067, 2021 WL 5992121 (Dec. 17, 2021), *petition for rev. filed* (Jan. 18, 2022).

MISTREATMENT OF AN ELDER PERSON. A jury convicted Shelby Frias of mistreatment of an elder person for taking her stepmother's money under "false pretenses." Frias had claimed to pay for her stepmother's nursing home bills but instead deposited the blank checks into her personal account. The Court of Appeals affirmed the conviction, interpreting "false pretenses" to mean "a representation of a fact that is untrue, calculated to mislead, and intended to induce the person to whom it is made to part ways with something of value."

> *State of Kansas v. Shelby Frias*, 61 Kan. App. 2d 234, 502 P.3d 650, 2021 WL 5143762 (November 5, 2021), *petition for rev. filed* (Dec. 5, 2022).

STATUTORY RAPE. Rape of a child under 14 years of age, K.S.A. 2020 Supp. 21-5503, does not require proof of any level of mental culpability. The requirement that a defendant's conduct be voluntary for criminal liability to attach to it is discussed.

> *State v. Dinkel*, 314 Kan. 146, 495 P.3d 402 (Sept. 24, 2021).

MENS REA-REBUTTABLE PRESUMPTION. Shameke Strong challenged his conviction for possession of methamphetamine with intent to distribute within 1,000 feet of school property, arguing that K.S.A. 2018 Supp. 21-5705(e) was facially unconstitutional by creating a mandatory presumption of intent from the amount of drugs possessed. The panel upheld the statute's constitutionality, finding it created a rebuttable presumption, which merely authorized the jury to infer intent to distribute if the State proved the defendant possessed the requisite weight of the drugs.

> *State v. Strong*, No. 121,865, 2021 WL 4127490, 61 Kan. App. 2d 31, 499 P.3d 481 (Sept. 10, 2021), *petition for rev. filed* (Oct. 12, 2021).

IDENTITY THEFT. A conviction for identity theft under K.S.A. 21-6107, requires that the personal identifying information stolen by a defendant belongs to a natural person. The defendant, convicted of identity theft for using a coworker's stolen credit card, was not eligible to be convicted of or sentenced for what the defendant alleged was a more specific

crime of criminal use of a financial card, since identity theft required an additional element that the victim be a natural person.

State v. Euler, 313 Kan. 901, 492 P.3d 1147 (Aug. 6, 2021).

RAPE. A defendant challenged his conviction for rape, arguing that it is a strict liability offense on account of K.S.A. 2020 Supp. 21-5503(e), which provides that it is not a defense that a defendant is not aware that the victim does not consent, is overcome by force or fear, or is unconscious or physically powerless. Assuming, arguendo, the defendant correctly characterized the provision's effect, the Legislature is free to create strict liability felony offenses and the defendant failed to show any lack of a *mens rea* requirement violated due process.

State v. Thomas, 313 Kan. 660, 488 P.3d 517 (Jun. 18, 2021).

UNLAWFUL VOLUNTARY SEXUAL RELATIONS. Kansas' Romeo and Juliet law, K.S.A. 2020 Supp. 21-5507, prohibits unlawful voluntary sexual relations with a child between 14 and 16 years old, when the offender is both under 19 years old and less than 4 years older than the child. The statute may be applied against both underage participants in a sexual relationship, overruling *In re E.R.*, 40 Kan. App. 2d 986 (2008).

In re A.B., 313 Kan. 135, 484 P.3d 226 (Apr. 2, 2021).

EVIDENCE

ADMISSION OF PHOTOGRAPHIC EVIDENCE. Ernesto Vazquez was arrested and charged with three counts of aggravated indecent liberties with a child. At trial, the State showed Vazquez's mugshot to the child witnesses for the purpose of identification and then published the mugshot to the jury. On appeal the Court of Appeals held the district court did not abuse its discretion when it allowed publication of the mugshot because it was clearly taken upon Vazquez's arrest for the crime for which he was on trial and did not suggest he had a history of criminality.

State v. Vazquez, __ Kan. App. 2d __, __ P.3d __, 2022 WL 817003 (March 18, 2022)

PRESERVATION UNDER K.S.A. 60-405. After Christopher Bliss was charged with various crimes, his wife provided a written recantation. Bliss sought to introduce the recantation but did not disclose its contents to the district court. The court denied the request, and a jury convicted him. Bliss challenged the exclusion on appeal. The court of appeals affirmed, finding Bliss had not preserved the issue under K.S.A. 60-405. Noting preservation exceptions do not apply to the erroneous admission of evidence under K.S.A. 60-404, the court questioned whether a similar bar applies to its erroneous exclusion under K.S.A.

60-405.The court, however, concluded controlling Kansas Supreme Court precedent permitted consideration of those exceptions but found none of the exceptions applied in this case.

> *State of Kansas v. Christopher M. Bliss*, 61 Kan. App. 2d 76, 498 P.3d 1220 (Sept. 24, 2021), *petition for rev. filed* (Oct. 20, 2021), *petition for rev. denied* (Jan. 31, 2022).

ELEMENTS OF CRIMES. A defendant's possession of a controlled substance is a necessary element of distribution of that controlled substance. Evidence does not support a defendant's conviction for conspiracy to distribute a controlled substance when the defendant gives another person money to obtain methamphetamine for her and there is no evidence concerning the defendant's intended use of the drugs. There was no evidence of an agreement for the defendant to distribute the drugs beyond herself.

> *State v. Hillard*, 313 Kan. 830, 491 P.3d 1223 (July 23, 2021).

ADMISSIBILITY OF POLYGRAPH. On appeal from his conviction for aggravated indecent liberties with a child, Johnny White challenged the exclusion of polygraph evidence. White failed the polygraph exam but sought to introduce evidence related to the circumstances of his interrogation and voluntariness of his current confession. The Court of Appeals affirmed White's conviction, upholding the longstanding rule precluding the use of unstipulated polygraph evidence.

> *State v. White*, 60 Kan. App. 2d 458, 494 P.3d 248 (Aug. 6, 2021), *petition for rev. filed* (Sept. 3, 2021), *petition for rev. granted* (Nov. 24, 2021).

ELEMENTS OF CRIMES. Intent to defraud Medicaid is an essential element of the crime of Medicaid fraud codified at K.S.A. 2019 Supp. 21-5927(a)(1)(B). The defendant's conviction stemming from inaccurate timesheets was reversed due to prejudice arising from prosecutorial and jury instruction error. The prosecutor's argument tended to negate the intent element, and the error was exacerbated by a jury instruction that permitted the jury to infer the defendant's employer, who merely passed the timesheets on for payment, had been convicted of the offense with which defendant was charged or a similar crime.

> *State v. Watson*, 313 Kan. 170, 484 P.3d 877 (Apr. 23, 2021).

EXPERT TESTIMONY—RELIABILITY. An expert's testimony must not only be plausible, but also reliable for it to be admissible. In this case, the trial court abused its discretion when it admitted a botanist's opinion testimony of the duration between a grave being dug and the internment of bodies in it, that had been based on the rate of leaf-fall from box elder trees. While the opinion was plausible, it was not reliable. The botanist had

admitted that he knew little about the leaf-fall rate of such trees and that he had not considered other variables that might have affected the opinion.

State v. Aguirre, 313 Kan. 189, 485 P.3d 576 (Apr. 23, 2021).

EXPERT TESTIMONY—RELIABILITY. The State charged Hatfield, a daycare provider, with aggravated battery after a child began exhibiting symptoms consistent with abuse while in her care. To exclude one of the State's proposed experts, who believed the injuries immediately preceded the onset of symptoms, Hatfield argued the expert's opinion was unreliable. The district court denied the challenge. The Kansas Court of Appeals affirmed, explaining the reliability of an expert's opinion is gauged by the soundness of the underlying methodology, not by the conclusion's correctness. Conclusions based on contested methodologies should generally be tested through cross-examination, not by excluding the witness.

State of Kansas v. Paige Hatfield, 60 Kan. App. 2d 11, 484 P.3d 891 (April 9, 2021), *petition for rev. filed* (May 7, 2021), *petition for rev. denied* (Aug. 31, 2021).

EXCLUSIONARY RULE

GOOD-FAITH EXCEPTION. Two Atchison police officers relied on a dispatcher's twice-made mistake regarding Randall Gilliland's driver license's status. Although Gilliland was driving on a restricted license, the dispatcher told the officers Gilliland's license was revoked. The officers arrested Gilliland for driving on a revoked license and, upon a search incident to arrest, found drugs on his person. The Court of Appeals held that the good faith exception applied because the mistake was the result of mere negligence, as opposed to systematic error or reckless disregard.

State v. Gilliland, 60 Kan. App. 2d 161, 490 P.3d 66 (May 14, 2021), *petition for rev. filed* (Jun. 14, 2021), *petition for rev. denied* (Aug. 31, 2021).

JURIES

TIME TO REQUEST A JURY TRIAL AFTER MUNICIPAL APPEAL. Geli Grasty was convicted in municipal court of offering to sell sexual services. Grasty appealed to the district court and the case was assigned to the district judge who would preside over the trial. The district court denied Grasty's request for a jury trial because she made it more than seven days after the case was assigned to the presiding judge. The Court of Appeals

affirmed the denial, holding that the seven-day clock to request a jury trial in an appeal from municipal court begins when a judge is appointed to preside over the case at trial.

> *City of Wichita v. Geli Grasty*, 61 Kan. App. 2d 202, 500 P.3d 1201, 2021 WL 4928764 (Oct. 22, 2021), *petition for rev. filed* (Nov. 22, 2021).

DELIBERATIONS—ALTERNATE JURORS. A jury convicted Leland L. Jackson of multiple child sex crimes, after he admitted at trial to paying and having sex with a 15-year-old girl. At trial, the district court inadvertently allowed the alternate juror into the jury room for a couple of minutes, during which the jury selected a foreperson. The Court of Appeals held that an alternate juror's participation in selecting the jury is not presumptively prejudicial requiring reversal of a conviction because such selection is not part of jury deliberations.

> *State of Kansas v. Leland L. Jackson III*, 61 Kan. App. 2d. 184, 500 P.3d 1188 (October 15, 2021), *petition for rev. filed* (Nov. 12, 2021), *petition for rev. denied* (Feb. 25, 2022).

JURISDICTION

STANDING. The district court dismissed as unconstitutional Arlando Trotter's municipal charges for operating an unlicensed after-hours and entertainment establishment. The State appealed, arguing that the district court lacked jurisdiction to make its rulings and otherwise relied on flawed legal analysis. The Court of Appeals agreed, holding that the district court lacked jurisdiction to sua sponte raise constitutional arguments that Trotter lacked standing to raise himself and that the properly raised First Amendment issue was meritless because the Wichita ordinances did not significantly compromise his assembly rights.

> *City of Wichita v. Arlando Trotter*, 60 Kan. App. 2d 339, 494 P.3d 178 (July 16, 2021), *petition for rev. filed* (Aug. 16, 2021), *petition for rev. granted* (Feb. 25, 2022).

JURY SELECTION

DEFENDANT'S PRESENCE DURING VOIR DIRE. Daniel Klavetter was convicted of two counts of aggravated indecent liberties. On appeal, Daniel Klavetter argued

he was denied his right to be present during voir dire. The Court of Appeals affirmed, finding the jury-selection proceedings were fair and that any error in questioning venire members outside of Klavetter's presence was harmless.

State of Kansas v. Daniel J. Klavetter, 60 Kan. App. 2d 439, 494 P.3d 235 (August 6, 2021), *petition for rev. filed* (Sept. 7, 2021), *petition for rev. denied* (Sept. 27, 2021).

JUVENILES

APPELLATE JURISDICTION. S.L. pleaded no contest to aggravated robbery and aggravated battery. The district court committed her to a juvenile correctional facility as a violent offender and gave her a presumptive sentence under the revised Juvenile Justice Code. The Court of Appeals ruled it possessed jurisdiction to review the presumptive sentence because the district court failed to make the required statutory finding before directly committing a juvenile. Accordingly, S.L.'s sentence was illegal.

In the Matter of S.L., __ Kan. App. 2d __, 2022 WL 414253 (Feb. 11, 2022).

OFFENDER REGISTRATION

CONSTITUTIONAL CHALLENGES. Mandatory lifetime registration under the Kansas Offender Registration Act does not constitute a punishment. Retroactive application of amendments to the registration scheme does not violate the United States Constitution's Ex Post Facto Clause, as applied to both adult and juvenile offenders. And the lifetime registration requirement as applied to a juvenile offender does not violate the Eighth Amendment to the United States Constitution's prohibition against cruel and unusual punishment. The court reaffirmed its decision in *State v. Petersen-Beard*, 304 Kan. 192 (2016).

State v. Davidson, 314 Kan. 88, 495 P.3d 9 (Sept. 17, 2021); *State v. N.R.*, 314 Kan. 98, 495 P.3d 16 (Sept. 17, 2021)

MUNICIPAL CONVICTIONS. Under the Kansas Offender Registration Act, offenses that are "comparable" to specifically enumerated sex crimes require registration. A defendant's municipal conviction for sexual battery requires registration since sexual battery as

defined by statute is one of the enumerated offenses, and the municipal ordinance under which the conviction arose was identical to the statute.

City of Shawnee v. Adem, 314 Kan. 12, 494 P.3d 134 (Aug. 27, 2021).

POSTCONVICTION MOTIONS

POSTCONVICTION MOTION FOR DNA TESTING. A motion for postconviction DNA testing under K.S.A. 21-2512, seeking to test biological material related to a defendant's investigation or prosecution, may be made before the defendant's conviction is final. A district court had jurisdiction to entertain the defendant's motion, even though the defendant's appeal from the underlying convictions and sentences has not been finally resolved.

State v. Thurber, 313 Kan. 1002, 492 P.3d 1185 (Aug. 13, 2021).

DISCOVERY. K.S.A. 22-3212 and K.S.A. 22-3213 set out notice and discovery requirements for parties in criminal trials. The statutes do not supply a basis for a defendant's postconviction motion to compel the State to produce discovery material from the trial that resulted in the conviction.

State v. Marks, 313 Kan. 717, 490 P.3d 1160 (July 2, 2021).

MANIFEST INJUSTICE. James Edward Rowell filed an untimely K.S.A. 60-1507 motion. At a hearing, Rowell's appointed counsel simply conceded the motion's untimeliness. The district court dismissed. Rowell filed a second K.S.A. 60-1507 motion challenging counsel's effectiveness. The district court again dismissed the motion as untimely. The Court of Appeals held that barring Rowell's ineffectiveness claim before it arose established manifest injustice warranting an extension of the one-year filing requirement. Applying the prison mailbox rule, the panel also found Rowell's second motion was timely as it was filed within one year of his first.

Rowell v. State, 60 Kan. App. 2d 235, 490 P.3d 78 (June 4, 2021).

SEARCHES & SEIZURES

ARREST—MISDEMEANORS. K.S.A. 22-2401(c)(2)(A) allows a police officer to arrest a suspect if there is probable cause to believe the offender is committing or has committed a misdemeanor and if there is probable cause to believe the suspect will not be

apprehended if not immediately arrested. The totality-of-the-circumstances test for the latter requirement is discussed and applied.

> *State v. Goodro*, No. 121,944, __ Kan. __, __ P.3d __ 2022 WL 982132 (Apr. 1, 2022).

GOOD-FAITH EXCEPTION. Police arrested Corey Posa on a bench warrant and found methamphetamine in a search incident to the arrest. Posa moved to suppress the evidence, arguing he provided police reliable proof the court vacated the warrant days earlier. The district court applied the good-faith exception to the exclusionary rule, finding police reasonably relied on dispatch and court records showing the warrant was still active. On appeal, Posa challenged the constitutionality and applicability of the good-faith exception. The Court of Appeals rejected Posa's claim, applying Supreme Court precedent extending the good-faith exception to reasonable reliance on inaccurate court records and negligently maintained police records.

> *State of Kansas v. Corey Posa,* 61 Kan. App. 2d 250, 500 P.3d 1212 (November 5, 2021), *petition for rev. filed* (Dec. 6, 2021), *petition for rev. denied* (Feb. 25, 2022).

SENTENCING

CONSOLIDATION FOR TRIAL. After a consolidated trial of two criminal cases, the district court sentenced Myers separately in each case. Myers argued that this violated his equal protection rights. A panel of the Court of Appeals agreed, holding that for K.S.A. 2020 Supp. 21-6819(b) to comply with the Equal Protection Clause of the Fourteenth Amendment, when two or more cases are consolidated for trial because all the charges could have been brought in one charging document, and the defendant is convicted of multiple charges at trial, the defendant must be sentenced using only one primary crime of conviction and one base sentence, as though all the charges had been brought in one complaint.

> *State of Kansas v. Anthony D.A. Myers*, __ Kan. App. 2d __, __ P.3d __, 2022 WL 1052077 (April 8, 2022).

PROBATION REVOCATION. Under K.S.A. 22-3716(e), within 30 days after a probation period ends, a district court may require a defendant to answer a charge that a probation term was violated, by issuing either an arrest warrant or a notice to appear. This

provision does not apply when a parole officer—not the court—issues an arrest-and-detain notice after the probation period ends.

State v. Darkis, 314 Kan. 809, 502 P.3d 1045 (Jan. 28, 2022).

CRUEL AND UNUSUAL PUNISHMENT—MINORS. A mandatory sentence of life without the possibility of parole for 50 years, imposed on a defendant who was convicted of a murder he committed while under the age of 18, does not violate the Eighth Amendment to the United States Constitution as construed by *Miller v. Alabama*, 567 U.S. 460 (2012). *Miller*, which prohibits the mandatory imposition of life without parole sentences on juvenile offenders, does not apply to sentences that offer parole within the offender's lifetime.

State v. Gulley, 2022 WL 628172, __ Kan. __, __ P.3d __ (Mar. 4, 2022).

CRUEL AND UNUSUAL PUNISHMENT—MINORS. The Eighth Amendment to the United States Constitution does not prohibit a hard 50 life sentence imposed on a juvenile offender under a statute requiring the penalty upon the sentencing court's finding that one or more statutory aggravating factors both existed and were not outweighed by any mitigating factors. The statutory scheme afforded the sentencing court the discretion in sentencing juvenile offenders required by the United States Supreme Court's Eighth Amendment precedent.

Williams v. State, 314 Kan. 466, 500 P.3d 1182 (Dec. 17, 2021).

PROBATION REVOCATION. A district court's failure to apply the correct legal standard when revoking probation is not amenable to harmless error review.

Williams v. State, 314 Kan. 517, 501 P.3d 885 (Jan. 7, 2022).

ILLEGAL SENTENCE—CRIMINAL HISTORY SCORE. If a defendant fails to object before sentencing to including a prior conviction in the criminal history score, then the defendant has the burden when subsequently challenging the prior conviction's validity to make that showing by a preponderance of the evidence.

State v. Roberts, 314 Kan. 316, 498 P.3d 725 (Nov. 19, 2021).

DRIVING UNDER THE INFLUENCE. K.S.A. 8-1567 establishes sentencing requirements for repeat driving-under-the-influence convictions. When imposing a sentence

for a repeat driving-under-the-influence conviction, the sentencing court must use the version of the statute in effect at the time of sentencing, except when a post-offense amendment increases the defendant's penalty or otherwise disadvantages the defendant.

State v. Patton, __ Kan. __, 503 P.3d 1022 (Feb. 11, 2022).

DEATH PENALTY. The right to life guaranteed by Section 1 of the Kansas Constitution Bill of Rights does not preclude application of the death penalty. A defendant forfeits the right upon conviction beyond a reasonable doubt of capital murder, and a lawful sentence may be imposed. On remand from the United States Supreme Court, the Kansas Supreme Court affirmed the death sentences imposed on Reginald and Jonathan Carr arising from a December 2000 Wichita crime spree that culminated in a home invasion and quadruple homicide.

State v. R. Carr, 314 Kan. 615, 502 P.3d 546 (Jan. 21, 2022); *State v. J. Carr*, 314 Kan. 744, 502 P.3d 511 (Jan. 21, 2022).

CRIMINAL HISTORY—OUT-OF-STATE CONVICTIONS. Matthew D. Hasbrouck pleaded guilty to possession of methamphetamine. The sentencing court found his criminal history score was A. On appeal, Hasbrouck challenged his criminal history score, contending the district court erred in classifying a prior Missouri conviction for burglary as a person felony. The Court of Appeals affirmed Hasbrouck's sentence. Analyzing the amended sentencing statute, the panel held that two of the eight listed "circumstances" in K.S.A. 21-6811(e)(3)(B)(i) were present in Missouri's burglary statute.

State of Kansas v. Matthew D. Hasbrouck, __ Kan. App. __, __ P.3d __, 2022 WL 628546 (Mar. 4, 2022).

ALTERNATIVE COUNTS. When a jury convicts a defendant of multiple alternatively-charged counts for a single crime, the verdicts merge into a single conviction. In this case, the defendant was convicted of alternative counts of fleeing and eluding police under different subsections of the statute. While the district court lacked authority to hold the sentence for the alternative count in abeyance pending the State's appeal of the conviction upon which sentence was imposed, the convictions merged to form one conviction for fleeing and eluding.

State v. Vargas, 313 Kan. 866, 492 P.3d 412 (Jul. 30, 2021).

DEPARTURE MOTIONS. For the purposes of deciding a defendant's motion for a downward departure sentence, the fact that the defendant's criminal history does not include crimes that are similar or identical to the crime of conviction cannot, as a matter of

law, be a mitigating factor. The sentencing guidelines already account for the difference in character between the defendant's past and present offenses.

State v. Montgomery, 314 Kan. 33, 494 P.3d 147 (Aug. 27, 2021).

POSTRELEASE SUPERVISION. Upon revoking Amber Sheets' probation, the district court failed to address postrelease supervision when announcing the sentence from the bench but imposed a term in its written order. On appeal, Sheets argued the district court imposed a postrelease supervision term of zero. The Court of Appeals disagreed, holding that the district court, by failing to announce postrelease supervision at sentencing, imposed an illegal sentence which required resentencing.

State v. Sheets, 60 Kan. App. 2d 378, 494 P.3d 168 (July 16, 2021).

PROBATION. A district court's imposition of probation violation sanctions cannot constitute an illegal sentence under K.S.A. 22-3504.

State v. McCroy, 313 Kan. 531, 458 P.3d 988 (May 14, 2021).

APPRENDI VIOLATION. A jury convicted Tristan Letterman of lewd and lascivious behavior for publicly masturbating, and the court imposed an increased postrelease supervision period, finding that Letterman committed the act for his own sexual gratification. Letterman appealed, arguing the court violated *Apprendi.* The Court of Appeals affirmed, explaining the error was harmless because the court's finding was encompassed by the jury verdict when there was no evidence Letterman sought to gratify the sexual desires of another.

State of Kansas v. Tristan T. Letterman, 60 Kan. App. 2d 222, 492 P.3d 1196 (May 28, 2021), *petition for rev. filed* (Jun. 28, 2021), *petition for rev. denied* (Aug. 31, 2021).

CRIMINAL HISTORY. Jeffrey Allen Rankin appealed his criminal history score, which included a juvenile adjudication for terroristic threat. Rankin asserted that if his adjudication was for reckless conduct, it should not have been included. The State included Rankin's terroristic threat complaint in the record on appeal and asked the panel to find he had been charged with intentional conduct. The Court of Appeals found that the complaint did not necessarily resolve whether Rankin was adjudicated of the reckless version and

declined to make such factual findings for the first time on appeal and, instead, remanded the case for further proceedings.

> *State of Kansas v. Jeffrey Allen Rankin*, 60 Kan. App. 2d 60, 489 P.3d 471 (April 30, 2021).

DOUBLE RULE. A jury convicted De'Andrew V. Dixon with multiple crimes after a consolidated trial on two complaints. The district court sentenced Dixon in each criminal case. On appeal, Dixon claimed that the district court's failure to apply the double rule—which states that the total prison sentence imposed in a case involving multiple convictions arising from multiple counts within a single charging document cannot exceed twice the base sentence—to his consolidated cases violated his equal protection rights. The panel agreed, holding that when a defendant is convicted of multiple charges arising from two or more cases consolidated for trial because all the charges could have been brought in one charging document, the defendant shall receive the benefit of the double rule.

> *State of Kansas v. De'Andrew V. Dixon*, 60 Kan. App. 2d 100, 492 P.3d 455 (May 14, 2021), *petition for rev. filed* (Jun. 4, 2021), *petition for rev. denied* (Sept. 27, 2021).

SPEEDY TRIAL

PRESUMPTIVE PREJUDICE. In 2013, the State filed a criminal complaint against Cass Wayne McDonald, alleging rape of a child under 14. The State failed to locate and arrest McDonald until 2019. McDonald filed a pretrial motion to dismiss the State's complaint based on a speedy trial right violation, which the district court granted. The Court of Appeals affirmed the dismissal, finding the six-year delay between the complaint and arrest

presumptively prejudicial based on the length of the delay and the State's negligence in locating McDonald.

> *State v. McDonald*, __ Kan. App. __, __ P.3d __, 2022 WL 727647, at *1 (Mar. 11, 2022).

SUFFICIENT EVIDENCE

DRUG POSSESSION. For the purposes of the Kansas statute dividing possession of narcotics into different degrees based on discrete ranges of the quantity possessed, possession of a given quantity is sufficient to support a conviction for a degree encompassing a quantity range lower than the given quantity.

> *State v. Scheuerman,* 314 Kan. 583, 502 P.3d 502 (Jan. 14, 2022).

STIPULATED FACTS. Robert Scheuerman stipulated to possessing at least 3.5 grams but less than 100 grams of methamphetamine with the intent of distribution. In exchange for his stipulation, the State amended the complaint to a lesser charge—possession of methamphetamine with intent to distribute at least 1 gram but less than 3.5 grams. The Court of Appeals reversed the conviction for insufficient evidence because the elements of the crime of conviction were not covered by the stipulation.

> *State v. Scheuerman*, 60 Kan. App. 2d 48, 486 P.3d 676 (Apr. 16, 2021), *petition for rev. filed* (May 6, 2021), *petition for rev. granted* (Jul. 7, 2021).

SUFFICIENCY OF THE EVIDENCE

CRIMINAL THREAT—THREAT TO COMMIT VIOLENCE. A jury convicted Justin McFarland of intentional criminal threat after he posted on Facebook that he was going to kill his ex-wife Chelsea. McFarland appealed, arguing the criminal threat jury instruction was erroneous. The Court of Appeals held the jury instruction was not erroneous because the complaint and the jury instruction both alleged intentional criminal threat and used the language of the statute. The court also concluded that the State supported the criminal threat conviction with evidence that McFarland intended to place "another"—

Chelsea—in fear and that McFarland threatened to commit violence by threatening to kill her.

State v. McFarland, 60 Kan. App. 2d 1, 458 P.3d 178, 2021 WL 1229578 (Apr. 2, 2021), *petition for rev. filed* (Apr. 28, 2021), *petition for rev. denied* (Aug. 27, 2021).

TRIAL RIGHTS

PLEA WITHDRAWAL. Evidence of the defendant's lack of criminal history and lack of experience with the criminal justice system did not compel a finding that the defendant demonstrated excusable neglect, as necessary to permit an untimely motion to withdraw the defendant's plea.

State v. Ellington, 314 Kan. 260, 496 P.3d 536 (Oct. 15, 2021).

PROSECUTORIAL ERROR. The phrase "we know" used in a prosecutor's arguments in connection with an inference drawn from the evidence—as opposed to an uncontroverted fact—is error.

State v. Alfaro-Valleda, 314 Kan. 526, 502 P.3d 66 (Jan. 7, 2022).

JURY TRIAL RIGHT—RESTITUTION. Criminal restitution orders imposed solely by judge-made findings do not violate the jury trial rights guaranteed by the state and federal constitutions. But the Kansas statutory provision giving restitution awards the effect of civil judgments violates the right to jury trial guaranteed by the Kansas Constitution.

State v. Arnett, 314 Kan. 183, 496 P.3d 928 (Oct. 15, 2021).

SPEEDY TRIAL—WAIVER. When a defendant waives the statutory right to a speedy trial in conjunction with a requested continuance and does not place clear conditions on the waiver's length, the waiver is presumed to be unconditional.

State v. Shockley, No. 117,216, 314 Kan.46, 494 P.3d 832 (Sept. 10, 2021).

MISTRIAL—SPECTATOR CONDUCT. The arrival of 15-20 police officers in the courtroom just before the jury instructions were read in the defendant's trial for attempted

capital murder of a police officer did not warrant a mistrial. The defendant failed to demonstrate the incident had any prejudicial impact. The standards for determining whether the courtroom spectators' conduct necessitates a mistrial are discussed.

State v. Harris, 313 Kan. 579, 486 P.3d 576 (May. 14, 2021).

PRETRIAL PUBLICITY. The statute governing the public availability of testimony or affidavits supporting arrest warrants or summonses after charges are filed, K.S.A. 2020 Supp. 22-2302, does not prevent courts from considering a defendant's constitutional rights when determining whether to redact or seal affidavits or sworn testimony.

State v. Bodine, 313 Kan. 378, 486 P.3d 551 (May. 7 2021).

JURY TRIAL RIGHT—SENTENCING. The right to a jury trial guaranteed by Section 5 of the Kansas Constitution Bill of Rights does not require the State to prove to a jury a defendant's prior conviction for purposes of enhancing a defendants' sentence. The traditional function of the jury is to determine the accused's guilt or innocence, and the traditional function of the court is to impose the legally appropriate punishment. When a prior conviction is an element of a statutory offense, the issue must be decided by a jury. But when prior convictions are considered in deciding punishment, the issue falls within the traditional function of the court to impose the sentence.

State v. Albano, 313 Kan. 638, 487 P.3d 750 (May 28, 2021).