19-121184-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

IN RE A PURPORTED LIEN AGAINST PROPERTY OF THE DISTRICT AT CITY CENTER, LLC,

HAREN & LAUGHLIN CONSTRUCTION COMPANY, INC.,
Movant / Appellee,

vs.

KANSAS CITY STEEL WERX, INC.,
Claimant / Appellant.

On Appeal from the District Court of Johnson County
Honorable James F. Vano, District Judge
District Court Case No. 2018-ML-275

BRIEF OF THE APPELLANT

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ORAL ARGUMENT REQUESTED

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Authorities:

Nature of the Case

This is a subcontractor's appeal from a judgment finding its mechanic's lien was "fraudulent" under K.S.A. § 58-4301(e)(1) for not being "a document or instrument provided for by the constitution or by federal or state law."

The subcontractor, a steel erection company, filed a timely mechanic's lien on a property in which the contractor had contracted with it to perform work on an ongoing project. The contractor conceded both that it entered into that contract and that the subcontractor did perform the work.

The contractor moved the district court for judicial review of whether the lien was "fraudulent" under § 58-4301(e), arguing that because some of the amounts in the lien statement were insufficiently supported, the lien was invalid and unenforceable under the statutes governing mechanic's liens, K.S.A. §§ 60-1101, *et seq*. It argued that "an insufficient lien is by definition a fraudulent lien under K.S.A. 58-4301" (R2 at 222). The district court agreed and held that because the lien's itemized statement was insufficiently supported, the lien was not "a document or instrument provided for by the constitution or by federal or state law" and so was "fraudulent" under § 58-4301(e)(1). The court vacated the lien as void and held it for naught.

The subcontractor appeals, contending this was error requiring reversal. Specifically, if its lien statement was insufficient for the lien to be enforceable under § 60-1102, that merely would render it invalid and unenforceable, not a document for which the law does not provide. Otherwise, every insufficiently supported lien would be "fraudulent". That is neither the intent nor the plain language of § 58-4301(e)(1).

Statement of the Issues

First issue: This Court has jurisdiction of Subcontractor's appeal. The district court erred in concluding that K.S.A. Chapter 60 "doesn't apply" to a motion to review a lien under K.S.A. § 58-4301. Under K.S.A § 60-201, Chapter 60 governs the procedure in every action in Kansas that is not a criminal case or a Chapter 61 limited action. Proceedings for a motion to review a lien under § 58-4301 are civil in nature, not criminal, and are not a limited action, so Chapter 60 governs their general procedure. Here, the district court's findings of fact and conclusions of law qualified as a "judgment" under K.S.A. § 60-258, Subcontractor's motion to alter or amend was timely and proper under K.S.A. § 60-259, and Subcontractor's notice of appeal was timely and proper under K.S.A. § 60-2103.

Second issue: The district court erred in holding that Subcontractor's mechanic's lien was "fraudulent" under K.S.A. § 58-4301(e)(1). "Fraudulence" under § 58-4301(e)(1) is limited to documents for which the law does not provide, but K.S.A. §§ 60-1101, *et seq*. plainly provide for mechanic's liens. Subcontractor's lien was in the form of a timely mechanic's lien and attempted to contain every requirement of a mechanic's lien. Contractor conceded both that it had contracted with Subcontractor for work on the Project and that Subcontractor performed that work. That Subcontractor's lien statement might have been insufficient to be enforceable under § 60-1102 would not render it a document for which the law does not provide.

Statement of Facts

A. KCSW's mechanics lien

In October 2018, Claimant / Appellant Kansas City Steel Werx, Inc. ("Subcontractor") filed in the District Court of Johnson County under K.S.A. §§ 60-1101, *et seq.*, a mechanic's lien for labor, materials, and incidentals it had furnished on a commercial project known as The District at City Center, 87th and Penrose Lane, Lenexa, Kansas ("the Project") (R1 at 4).

In its § 60-1102(a)(4) itemized statement in the lien, Subcontractor stated it was a subcontractor on the Project to the general contractor, Movant / Appellee Haren & Laughlin Construction Company, Inc. ("Contractor"), for which Subcontractor's work remained ongoing (R1 at 4-5). It stated that per the Project's original plans, Contractor agreed to pay Subcontractor $2,884,797.45 for fabricating, installing, erecting, and supervising all structural steel and miscellaneous steel (R1 at 5). It stated that due to numerous changes in the plans and specifications and incomplete plans and specifications, it was required to perform additional work and labor in the amount of $91,203 (R1 at 5). It stated that the value of the total work Subcontractor performed on the Project as of the date it filed the lien was $2,904,384.10, of which Contractor had paid $2,485,756.16, leaving an unpaid balance due and owing of $418,627.94, including retainage, which was the amount of its lien claim (R1 at 5-6).

Subcontractor attached records including the parties' contract (R1 at 9-63), approved change orders (R1 at 64-66), documentation of the additional work it performed (R1 at 67-136), and its pay applications (R1 at 137-98).

Subcontractor also included the sworn verification of its chief operating officer, Todd Raak, stating among other things that the lien statement and its exhibits were true and correct and that the lien statement was a just and true account of the demand due and the claim made (R1 at 8).

The contract provided for 10% retainage (R1 at 28) on "the Subcontract amount as adjusted by change orders" (R1 at 23). The contract stated its total amount was $2,859,387 (R1 at 32, 64). Early change orders for $1,224 (R1 at 64) and $24,186.45 (R1 at 66) increased that to $2,884,797.45 (R1 at 66), which was the same as the initial amount in Subcontractor's lien statement (R1 at 5).

The attachments to Subcontractor's lien statement stated that thereafter, it performed additional work as directed, with a change order to come afterward per the contract, in the amounts of:

- $925 (R1 at 67);
- $2,628 (R1 at 69);
- $6,117 (R1 at 70);
- $10,178 (R1 at 76);
- $1,565 (R1 at 84);
- $1,211 (R1 at 90);
- $1,237 (R1 at 98);
- $1,830 (R1 at 103);
- $872 (R1 at 107);
- $402 (R1 at 110);
- $34,271 (R1 at 114); and

- $10,989 (R1 at 132).

The attachments also showed that Subcontractor gave Contractor two credits, one for $1,315 (R1 at 72) and one for $4,664 (R1 at 89). Totaling the additional work in the attachments equals $72,225, and subtracting those credits equals $66,246. Adding that amount to the contract price plus change orders would be $2,951,043.45.

B. Proceedings below

1. Contractor's § 58-4301 motion

On December 27, 2018, Contractor filed what it titled a "Verified Motion for Judicial Review of Documentation or Instrument Purporting to Create a Lien or Claim", invoking K.S.A. § 58-4301 and seeking to "nullify" Subcontractor's lien (R2 at 1).

Contractor admitted that it had entered into the contract with Subcontractor that Subcontractor attached to its lien (R2 at 2). But it argued the lien was "fraudulent" under § 58-4301(e) for several reasons (R2 at 3).

First, Contractor argued Subcontractor's lien was fraudulent under § 58-4301(e)(2) – that it was "not created by implied or express consent or agreement of the obligor, debtor or the owner of the real or personal property or an interest in the real or personal property or by implied or express consent or agreement of an agent, fiduciary or other representative of that person" (R2 at 3). It argued this was because Subcontractor's lien improperly included amounts for retainage, which it argued were not yet ripe because the Project was not yet complete (R2 at 3-4).

Second, Contractor argued Subcontractor's lien was fraudulent under § 58-4301(e)(3) – that it "fails to create a lien imposed by a court with jurisdiction under the construction or laws of Kansas or of the United States" (R2 at 4). It argued this was because the lien did not include a reasonably itemized statement of the amount of its claim as § 60-1102(a)(4) required (R2 at 4). Specifically, it argued that while the lien statement claimed Subcontractor performed $91,203 in additional work, the total of the documents it attached showed only $66,246 in additional work (R2 at 6-7). It also argued that from the documentation, one could not arrive at the figure the lien statement claimed of $2,904,384.10 for total work performed to date, or the figure the lien statement claimed of $2,485,756.16 for payments Contractor had made to it, which were "the only two figures relied upon by [Subcontractor] to reach its final claim amount of $418,627.94" (R2 at 7). It noted that "the last application for payment attached to the lien statement admits that KCSW has only completed and stored $2,813,181 worth of labor, materials, equipment, and incidentals" (R2 at 7).

Besides the lien itself (R2 at 10-205), Contractor attached to its motion an affidavit of its corporate representative, Reuben Hamman (R2 at 206). Mr. Hamman stated that Contractor had contracted with Subcontractor, the contract was for a lump sum of $2,859,387, 10% retainage applied only to undisputed payment applications, Contractor disputed that Subcontractor was entitled to retainage, Contractor disputed Subcontractor's claims for additional work, and the project was still ongoing (R2 at 207-08).

2. Subcontractor's initial response

Contractor's motion included a certificate of service stating it was served by electronic mail on December 27, 2018 (R2 at 9). But it did not list any name or email address to which it was sent (R2 at 9).

Subcontractor's representative received a copy of Contractor's motion on December 28, 2018 (R2 at 211). As under Johnson County Local Rule 8.3 the deadline to respond to a motion is "14 days after service", counsel had until January 11 to respond (R2 at 211). On January 11, Subcontractor's counsel contacted Contractor's counsel to request an extension of time under Johnson County Local Rule 5.1(a) to respond to the Motion (R2 at 211). Contractor's counsel would not consent (R2 at 211).

So, Subcontractor's counsel logged onto the district court's e-filing system intending to move for an extension (R2 at 211). (Johnson County is not on Kansas's statewide e-filing system, and instead has its own.) But she discovered that the court already had ruled on Contractor's motion the day before, January 10 (R1 at 200; R2 at 211; App. A1).

3. District court's findings of fact and conclusions of law

The district court rejected Contractor's argument that the lien was fraudulent under §§ 58-4301(e)(2) or (3), stating that "we do not have a purported lien that was imposed by consent, like a mortgage on real estate" and "we do not have a purported equitable, constructive, or other lien imposed by a judicial decree" (R1 at 201; App. A2). Instead, it looked to § 58-4301(e)(1) – whether the lien "is a document or instrument provided for by the constitution or by federal or state law" – and stated, "we must look only to

the face of the purported lien documents to determine validity under the applicable statute" (R1 at 201; App. A2).

The court then held "that the lien statement does not set out 'a reasonably itemized statement and the amount of the claim,' which the mechanic's-lien statute requires" (R1 at 203; App. A4) (quoting K.S.A. § 60-1102). It held this was insufficient, because the numbers did not add up:

> the lien's itemized statement is insufficient, first because it does not account at all for nearly $25,000 in claimed "additional work," and second because the lien statement values the "total work performed" at $2,904,384.10, yet the stated total value of the contracted-for work plus the claimed "additional work" is much higher, at $2,976,000.45. Why the nearly $72,000 difference? …
>
> The claimed lien is for $418,627.94. The lien statement calculates this amount by subtracting payments received, $2,485,756.16, from the "value of [Subcontractor]'s total work," which the statement pegs at $2,904,384.10. The documents attached to the lien statement account for $2,859,387 (the original subcontract price), $1,224 (a first change order), and $24,186.45 (a second change order), along with "additional work" worth $66,246. Yet the lien statement says, without any support, that the "additional work" beyond the original agreement and change orders was worth $91,203. Thus, from the lien statement alone, [Contractor] has no way to evaluate $24,957 in claimed "additional work."
>
> For that matter, the statement's documentation appears to support finding $2,951,043.45 in work performed, yet the statement claims that "[t]he value of [Subcontractor]'s total work performed to date" is $2,904,384.10, nearly $50,000 less than what the documents suggest, and if one takes the statement's $91,203 claim for "additional work" at face value, the total comes to $2,976,000.45 (the subcontract amount plus the change orders plus the $91,203.00), about $25,000 more than what the documents suggest. Something is amiss.

(R1 at 203-04; App. A4-5) (internal footnotes omitted).

The court held that "[t]hese gaps make it impossible for [Contractor] to 'ascertain whether the material was furnished and the charges fair,' so the lien is facially deficient" (R1 at 203; App. A4) (citation omitted). It also held that while "the lien statement here does contain sufficient detail for much of the work, making this case's lien statement more complete than the statements previously rejected in the caselaw," it still was not a "true itemization to the description of the work or amount" because "the itemizations here differ from the claimed amounts by tens of thousands of dollars" (R1 at 204; App. A5).

The court held that therefore, "the lien statement here is not a document provided for by the constitution or by federal or state law. The purported mechanic's lien is therefore fraudulent under K.S.A. 58-4301(e) and must, upon [Contractor]'s application, be **VACATED** as void and **HELD FOR NAUGHT**" (R1 at 205; App. A6) (emphasis in the original).

4. Post-judgment proceedings

Seven days later, on January 17, 2019, Subcontractor moved the court to alter or amend its judgment to hold instead that the lien may have been invalid under § 60-1102, but was not fraudulent under § 58-4301(e)(1), and to allow it to amend its lien under K.S.A. § 60-1105(b) (R2 at 210).

Subcontractor argued that its failure to itemize the lien statement correctly only would mean it was invalid, not that it was a type of document that Kansas law did not recognize (R2 at 214). It argued § 58-4301(e) was limited to actual cases of bad faith, such as where the owner did not consent

to improvements to property or a party was just trying to cloud another's title (R2 at 214). It argued that even if the lien were invalid for failure to itemize adequately, it still "met and contained each of the requirements set forth in K.S.A. § 60-1102" and "was, in fact, a document provided for by state law" (R2 at 214). It argued it "prepared its itemized statement in good faith with the applicable statutory requirements and standards in mind" (R2 at 215).

Subcontractor argued that the proper remedy in these circumstances would be to allow it to amend its lien statement under § 60-1105(b) (R2 at 215). It stated that its doing so would not increase the lien amount "and would only provide the needed additional details and information outlined in" the district court's findings of fact and conclusions of law (R2 at 216).

Contractor opposed this (R2 at 219). It argued "that an insufficient lien is by definition a fraudulent lien under K.S.A. 58-4301" (R2 at 222). It also argued that an amendment would not be proper because Subcontractor "knowingly filed an inflated mechanic's lien prematurely in order to coerce payments not due", so it should not be allowed to "fix" that "once [its] antics have been stopped" under § 58-4301 (R2 at 229).

Subcontractor replied (R2 at 233), arguing that insufficiency of an otherwise bona fide mechanic's lien under § 60-1102 did not automatically equal fraud under § 58-4301(e)(1) (R2 at 236). It explored the only prior cases applying § 58-4301(e)(1), which all involved liens that were not any type of instrument the law recognized (R2 at 236-37). It argued there was nothing wrong with filing a lien before project completion, which the law allowed, and the law preferred amendments of liens that could be amended (R2 at 237-39).

5. Updated lien

On February 5, 2019, while the post-judgment proceedings were ongoing, and while the Project still was not complete, Subcontractor filed a new, updated lien (R2 at 242).

Subcontractor's updated lien stated that per the contract, plus two change orders, Contractor agreed to pay Subcontractor $2,884,797.45 (R2 at 243). It stated that due to changes in the plans and specifications and incomplete plans and specifications, it was required to perform additional work and additional labor in the amount of $91,203, "of which $66,246 was change order requests were submitted [*sic*] but wrongfully denied and $24,957 representing short-paid amounts on change order 2" (R2 at 243-44). It stated that the value of the total work Subcontractor performed on the Project as of the date it filed the new lien was $2,963,256.89, of which Contractor had paid $2,531,862.92, leaving an unpaid balance due and owing of $431,393.91, including retainage, which was the amount of its lien claim (R2 at 244).

Subcontractor attached a sworn verification of Mr. Raak (R2 at 245), a summary of the amounts agreed, due, and paid (R2 at 247), its contract with Contractor (R2 at 248-302), the two approved change orders (R2 at 303-305), documentation of the additional work it performed (R2 at 306-423), and its pay applications (R2 at 424-485). The amounts on these exhibits reflected the same amounts on the lien statement (R2 at 247).

6. Hearing and appeal

On April 1, 2019, the district court held a hearing on Subcontractor's motion to alter or amend (R4). In the meantime, due to the court's holding that under § 58-4301(e)(1) that Subcontractor's mechanic's lien was "fraudulent", Contractor filed an action against Subcontractor for corresponding damages under K.S.A. § 58-4302 (R4 at 14-16).

At the outset of the hearing, the district court *sua sponte* questioned its "jurisdiction to even hear a motion to alter or amend" its findings under § 58-4301(e), because "[t]his is an M.L. case. It's not a C.V. case, not an L.A. case" (R4 at 2). It stated, "I'm not even sure there's a process to appeal" a § 58-4301(e) determination (R4 at 2). It analogized this to the notion that "[t]here's no constitutional requirement" to appeal a criminal conviction (R4 at 3). It questioned where any Kansas statute contained "a right to an appeal out of this particular, very specialized Chapter 58 statute" (R4 at 5).

The district court concluded, "I don't think there's jurisdiction for a motion to alter or amend", but it let the parties make argument on Subcontractor's motion (R4 at 16). After hearing those arguments, the court stated, "I made a ruling that Chapter 60 doesn't apply" to these proceedings, and then denied Subcontractor's motion for that reason and on the merits (R4 at 34).

The next day, April 2, the district court entered a signed bench note that was filed in the record, stating Subcontractor's post-judgment motion was denied both on the merits and because the court found no jurisdiction for the motion (R2 at 489). It also stated it would permit Subcontractor's

updated lien statement to be filed with the payment of a new docket fee (R2 at 489), which Subcontractor then did (R1 at 3).

On May 1, 2019, Subcontractor filed a notice of appeal from the January 10 findings and conclusions, plus the denial of its motion to alter or amend, and all other rulings in the case (R1 at 207).

Five days later, on May 6, the district court entered a written order again denying Subcontractor's motion to alter or amend (R1 at 209; App. A7). First, it stated that "it does not have jurisdiction to" rule on Subcontractor's motion to alter or amend "as its judgment was governed by K.S.A. 58-4301, and not Chapter 60 of the Kansas Rules of Civil Procedure [*sic*]" (R1 at 209; App. A7). It also stated, "The Court find [*sic*] no error in its judgment finding the lien to be fraudulent as defined by K.S.A. 58-4301" (R1 at 209; App. A7).

Argument and Authorities

First issue: This Court has jurisdiction of Subcontractor's appeal. The district court erred in concluding that K.S.A. Chapter 60 "doesn't apply" to a motion to review a lien under K.S.A. § 58-4301. Under K.S.A § 60-201, Chapter 60 governs the procedure in every action in Kansas that is not a criminal case or a Chapter 61 limited action. Proceedings for a motion to review a lien under § 58-4301 are civil in nature, not criminal, and are not a limited action, so Chapter 60 governs their general procedure. Here, the district court's findings of fact and conclusions of law qualified as a "judgment" under K.S.A. § 60-258, Subcontractor's motion to alter or amend was timely and proper under K.S.A. § 60-259, and Subcontractor's notice of appeal was timely and proper under K.S.A. § 60-2103.

Standard of Appellate Review

Whether the Court has jurisdiction over this appeal is subject to unlimited review. *Mundy v. State*, 307 Kan. 280, 290, 408 P.3d 965 (2018).

* * *

Record Location Where Raised

The district court raised the issue of its jurisdiction to hear a motion to alter or amend and this Court's jurisdiction to hear an appeal *sua sponte* at the April 1, 2019 hearing (R4 at 2). In response, Subcontractor argued that Chapter 60 applied to the proceedings, so its post-judgment motion was timely and proper (R4 at 2-16). At the hearing (R4 at 16, 34) and then again in a bench note (R2 at 489) and an order (R1 at 209; App. A7), the district court held it did not have jurisdiction because Chapter 60 did not apply to these proceedings.

* * *

The law of Kansas is that Chapter 60 of the Kansas Statutes, the Rules of Civil Procedure, governs the procedure in all actions and proceedings in Kansas district courts, meaning all such actions that are not criminal and are not commenced under Chapter 61 for limited actions. This applies regardless of whether another chapter of the Kansas Statutes creates the civil cause of action at issue. A proceeding to review a lien under K.S.A. § 58-4301 is neither criminal nor a limited action commenced under Chapter 61, so it is a civil action that Chapter 60 governs. Nonetheless, the district court here held Chapter 60 "doesn't apply", so it could not hear Subcontractor's motion to alter or amend its judgment and Subcontractor could not appeal. This was error, and this Court has jurisdiction of Subcontractor's appeal.

A. Introduction

Seven days after the district court entered its findings of fact and conclusions of law granting Contractor's motion for review under § 58-4301 (R1 at 200; App. A1), Subcontractor moved to alter or amend them, seeking the district court to deny Contractor's motion (R2 at 210). The district court denied Subcontractor's motion to alter or amend on the merits (R1 at 209; R2 at 489; R4 at 34; App. A7).

But the district court also held it did not have "jurisdiction for a motion to alter or amend" because "Chapter 60 doesn't apply" to proceedings on a motion for review under § 58-4301 (R4 at 16, 34). It held, "it does not have jurisdiction to" rule on Subcontractor's motion to alter or amend "as its judgment was governed by K.S.A. 58-4301, and not Chapter 60 of the Kansas Rules of Civil Procedure [*sic*]" (R1 at 209; App. A7). It suggested this equally

meant that Subcontractor could not appeal from its ruling on Contractor's § 58-4301 motion (R4 at 2).

The district court seems to have believed that a § 58-4301 motion is a "one-and-done" proceeding, governed by no other procedures except the single motion and judgment mentioned in that statute. That is, it believed that once it rules on the motion, there is no opportunity for any further review, either by the district court itself in a standard post-judgment proceeding or by this Court on appeal.

This was error. The district judge in a § 58-4301 proceeding is not an absolute monarch who wields power with no recourse to an aggrieved party. Instead, per K.S.A. § 60-201(b), and just as in every other civil action in Kansas – that is, every action that is not either criminal or a limited action under K.S.A. Chapter 61, K.S.A. Chapter 60's rules of civil procedure govern. The district court's ruling on Contractor's § 58-4301 motion was a "judgment" under K.S.A. § 60-258. Subcontractor's motion to alter or amend that judgment was timely and proper under K.S.A. § 60-259(e). And when the court denied that motion, Subcontractor's notice of appeal was timely and proper under K.S.A. § 60-2103.

This Court has jurisdiction of this appeal.

B. Proceedings on a motion to review a lien under K.S.A. § 58-4301 are civil and are governed by K.S.A. Chapter 60's rules of civil procedure.

Section 60-201(b) provides that Chapter 60 "governs the procedure in all civil actions and proceedings in the district courts of Kansas, other than

actions commenced pursuant to the code of civil procedure for limited actions."

Under this statute, Chapter 60 applies to any action that is "civil in nature", rather than "criminal in nature", and that is not a commenced as a limited action under Chapter 61. *City of Lenexa v. A Maroon 1978 Chevrolet Caprice Classic* (this brief refers to this decision as "*Chevrolet*"), 15 Kan.App.2d 333, 334-36, 807 P.2d 694 (1991). This is because "in those areas of law in which the legislature has chosen to make chapter 60 nonapplicable, it has said so." *Id.* at 336 (citing K.S.A. § 22-2101, making the rules of criminal procedure apply to criminal proceedings, and what today is K.S.A. § 61-2802, making the rules of civil procedure for limited actions apply to limited actions).

So, even if a statute outside Chapter 60 itself creates a given cause of action, if the action is "civil in nature", rather than criminal, and is not a limited action under Chapter 61, under § 60-201(b) the code of civil procedure in Chapter 60 governs it. *Id.* at 334-36 (Chapter 60's code of civil procedure governed forfeiture proceedings arising under Chapter 65, because they were civil in nature, not criminal, and were not limited actions, and so a city could seek – and a district court could grant – summary judgment on the city's forfeiture petition); *see also Bd. of Educ. of Unified Sch. Dist. No. 215 v. L.R. Foy Constr. Co.* ("*L.R. Foy*"), 237 Kan. 1, 5, 697 P.2d 456 (1985) (Chapter 60's code of civil procedure governed proceedings in Chapter 5 seeking to compel arbitration, because "[p]roceedings to compel arbitration are civil proceedings

brought in district court", so a district court could grant a motion for rehearing under § 60-259).

As with the Chapter 65 forfeiture proceedings in the *Chevrolet* case and the Chapter 5 arbitration-compelling proceedings in the *L.R. Foy* case, proceedings under § 58-4301 are plainly equally civil in nature, not criminal, and so are governed by Chapter 60's rules of civil procedure. Under § 58-4301(a), a private party files a motion in district court seeking review of a document and a resulting declaration of that document's status. The district court then makes findings of fact and conclusions of law under §§ 58-4301(b) and (c). Notably, § 58-4301(b) even expressly refers to this Court's further review of those findings: "An appellate court shall expedite review of a district court's findings as provided in this section."

Section 58-4301 proceedings are most analogous to a declaratory judgment proceeding, the ordinary version of which arises under K.S.A. §§ 60-1701, *et seq*. *Cf. Chevrolet*, 15 Kan.App.2d at 335, 807 P.2d 694 (analogizing Chapter 65 forfeiture proceedings to ordinary *in rem* proceedings to hold that they are civil, not criminal, and so are governed by Chapter 60). A declaratory judgment proceeding is expressly deemed to be "tried and determined in the same manner as … other civil actions …." K.S.A. § 60-1710. And that procedure routinely is used to seek a declaration that a purported lien is unlawful. *See, e.g.*, *Jerby v. Truck Ins. Exch.*, 36 Kan.App.2d 199, 200, 138 P.3d 359 (2006) (declaratory action to declare insurer's purported lien on settlement proceeds unlawful).

Plainly, § 58-4301 proceedings are not *criminal*, nor do they arise under Chapter 61 for limited actions. Therefore, § 58-4301 proceedings are civil, and so under § 60-201(b) they are governed by Chapter 60's rules of civil procedure and the fact that the statute creating the cause of action appears in a different chapter besides Chapter 60 is irrelevant. *Chevrolet*, 15 Kan.App.2d at 334-36, 807 P.2d 694; *L.R. Foy*, 237 Kan. at 5, 697 P.2d 456.

Indeed, just § 58-4301(b) suggests by referring to this Court's review of a district court's findings entered under § 58-4301, this Court has reviewed § 58-4301 judgments four times, always under the ordinary rules for appeals in Chapter 60. *See McCracken v. Dawes*, No. 113,518, 2015 WL 9591372 (Kan. App. Dec. 31, 2015) (unpublished); *Linin v. Dawes*, No. 112,568, 2015 WL 1947452 (Kan. App. Apr. 24, 2015) (unpublished); *In re Mechanic's Lien Against City of Kan. City*, 37 Kan.App.2d 440, 154 P.3d 515 (2007); *In re Hill*, No. 95,829, 2007 WL 570214 (Kan. App. Feb. 23, 2007) (unpublished). And in *Hill*, the Court noted that the appellant had filed a "motion to reconsider" the § 58-4301 findings and conclusions, after which the appellant "timely appeal[ed]." *Id.* at *1-2. For jurisdictional purposes, "[a] motion for reconsideration is considered a motion to alter or amend a judgment" under § 60-259(e). *Honeycutt v. City of Wichita*, 251 Kan. 451, 460, 836 P.2d 1128 (1992).

C. Both Subcontractor's post-judgment motion and its notice of appeal were timely and proper, and this Court has jurisdiction.

Under Chapter 60's applicable rules of civil procedure, both Subcontractor's motion to alter and amend and its notice of appeal were proper and timely.

First, the district court's January 10 findings of fact and conclusions of law qualified as a "judgment form" under § 60-258 and made its judgment final and effective that day. It was a writing that a judge signed, entered on the record, and served on the parties, which made findings of fact and conclusions of law that conclusively addressed the district court's determination as to all the issues in Contractor's motion for review. *Smith v. Smith*, 8 Kan.App.2d 252, 252-53, 655 P.2d 469 (1982) (findings of fact and conclusions of law signed by judge and served on parties that determined all the issues in the case qualified as final "judgment form" under § 60-258). Moreover, it was a "final decision": it "finally decide[d] and dispose[d] of the entire merits of the controversy" raised in Contractor's motion for review "and reserve[d] no further questions or directions for the future or further action of the court." *Kan. Med. Mut. Ins. Co. v. Svaty*, 291 Kan. 597, 610, 244 P.3d 642 (2010) (citation omitted).

Under § 60-2103(a), Subcontractor therefore had "30 days from entry of the judgment" on December 30, 2016 in which to appeal, "terminated by timely motion … under K.S.A. 60-259 … to alter or amend the judgment …." If a timely motion to alter or amend was filed, the 30 days to appeal instead would "be computed from the entry of any" order "granting or denying" that motion. § 60-2103(a).

Subcontractor's motion to alter or amend the district court's judgment was timely. A motion to alter or amend a judgment is due 28 days from the date of the judgment to which it refers. § 60-259(f). 28 days from January

10, 2019 was February 7, 2019. Subcontractor filed its motion to alter or amend on January 17, only seven days after the judgment (R2 at 210).

Subcontractor's notice of appeal therefore also was timely. It was due 30 days "from the entry of" the district court's order "denying" its motion to alter or amend. § 60-2103(a). The district court denied Subcontractor's motion to alter or amend orally at the April 1, 2019 hearing (R4 at 34), in writing the next day in a signed bench note (R2 at 489), and then again in writing in an order on May 6 (R1 at 209; App. A7). 30 days from the earliest of these dates was May 1, 2019, which was the date Subcontractor filed its notice of appeal, stating it appealed from the January 10 findings and conclusions, plus the denial of its motion to alter or amend and all other rulings in the case (R1 at 207). (If anything, Subcontractor's notice of appeal may have been premature. But if so, it became validated upon the district court filing the order denying the motion to alter or amend. Supreme Court Rule 2.03; *see Resolution Trust Corp. v. Bopp*, 251 Kan. 539, Syl. ¶ 3, 836 P.2d 1142 (1992).)

The district court's conclusion that Chapter 60 "doesn't apply" to the proceedings below was error. Both Subcontractor's post-judgment motion and its notice of appeal were timely and proper. This Court has jurisdiction of this appeal.

<u>Second issue:</u> The district court erred in holding that Subcontractor's mechanic's lien was "fraudulent" under K.S.A. § 58-4301(e)(1). "Fraudulence" under § 58-4301(e)(1) is limited to documents for which the law does not provide, but K.S.A. §§ 60-1101, *et seq.* plainly provide for mechanic's liens. Subcontractor's lien was in the form of a timely mechanic's lien and attempted to contain every requirement of a mechanic's lien. Contractor conceded both that it had contracted with Subcontractor for work on the Project and that Subcontractor performed that work. That Subcontractor's lien statement might have been insufficient to be enforceable under § 60-1102 would not render it a document for which the law does not provide.

Standard of Appellate Review

Review of a judgment entered under K.S.A. 58-4301(e) that the district court based solely on written or documentary evidence is entirely unlimited. *In re Mechanic's Lien Against City of Kan. City*, 37 Kan.App.2d 440, 443, 154 P.3d 515 (2007). "Where the controlling facts are based solely on written or documentary evidence, an appellate court may determine de novo what the facts established." *Id.* (citation omitted).

"The interpretation of a statute" also "is a question of law over which an appellate court has unlimited review." *Id.*

> The fundamental rule of statutory construction is to ascertain the legislature's intent. The legislature is presumed to have expressed its intent through the language of the statutory scheme. Ordinary words are given their ordinary meanings. A statute should not be read to add language that is not found in it or to exclude language that is found in it. When a statute is plain and unambiguous, the court must give effect to the legislature's intent as expressed rather than determining what the law should or should not be.

Id. (quotation marks and citation omitted).

* * *

Record Location Where Raised

Without allowing Subcontractor an opportunity to respond to Contractor's motion for judicial review (R2 at 211), in its findings of fact and conclusions of law the district court held Subcontractor's mechanic's lien was "fraudulent" under K.S.A. § 58-4301(e)(1) (R1 at 200; App. A1). In its motion to alter or amend, Subcontractor then argued this was error for the reasons it now argues here (R2 at 214-15). The district court denied the motion to alter or amend on the merits (R1 at 209; R2 at 489; R4 at 34; App. A7).

* * *

A. Introduction

K.S.A. § 58-4301(e)(1) provides that an instrument recorded against real property is "fraudulent" if it "[i]s not a document or instrument provided for by the constitution or laws of this state or of the United States." A mechanic's lien is a document for which the laws of Kansas, specifically K.S.A. §§ 60-1101, *et seq.*, provide.

Subcontractor recorded a timely mechanic's lien under K.S.A. § 60-1102 on property on which it had performed work under a contract with Contractor, which Contractor conceded. Merely because Contractor disputed that Subcontractor had correctly stated the *amount* of the lien, possibly rendering the lien invalid and unenforceable under the mechanic's lien statutes, the district court declared the lien *fraudulent* under § 58-4301(e)(1).

This was error, requiring reversal. A mechanic's lien that fails to have a sufficient itemization statement *still is a mechanic's lien*, merely one that is

invalid and unenforceable (and is capable of being amended). That does not make it a document for which the law does not provide.

While no Kansas decision is directly on point, the legislature adopted § 58-4301(e)(1) word-for-word from a Texas statute, and Texas courts uniformly have held that a mechanic's lien that fails some technical part of Texas's mechanic's lien statutes, while perhaps invalid and unenforceable, is not "fraudulent" under Texas's identical statute. *See Cardenas v. Wilson*, 428 S.W.3d 130, 132-33 (Tex. App. 2014); *In re Purported Liens or Claims Against Samshi Homes, L.L.C.*, 321 S.W.3d 665, 667-68 (Tex. App. 2010).

The result under the law of Kansas is and must be the same.

B. The issue on appeal is limited to what the district court held: whether under K.S.A. § 58-4301(e)(1) Subcontractor's lien is "not a document or instrument provided for by the constitution or laws of this state."

Contractor brought its motion for judicial review generally under K.S.A. § 58-4301(e), but argued Subcontractor's mechanic's lien was fraudulent specifically either:

- under (e)(2) – that it was "not created by implied or express consent or agreement of the obligor, debtor or the owner of the real or personal property or an interest in the real or personal property or by implied or express consent or agreement of an agent, fiduciary or other representative of that person" (R2 at 3) or
- under (e)(3)– that it "fails to create a lien imposed by a court with jurisdiction under the construction or laws of Kansas or of the United States" (R2 at 4).

The district court rejected Contractor's contention that either (e)(2) or (e)(3) applied to this case (R1 at 201; App. A2). It held this was because "we do not have a purported lien that was imposed by consent, like a mortgage on real estate" and "we do not have a purported equitable, constructive, or other lien imposed by a judicial decree" (R1 at 201; App. A2).

Because Contractor does not cross-appeal, it cannot challenge these rulings adverse to it. K.S.A. § 60-2103(h) requires an appellee to file a notice of cross-appeal from an adverse ruling to obtain appellate review of that issue. *Lumry v. State*, 305 Kan. 545, 553-54, 385 P.3d 479 (2016). "When an appellee desires to have a review of rulings and decisions made by the district court, the appellee must file a cross-appeal; otherwise, the issue is not properly preserved." *Turner v. Kan. Dept. of Revenue*, 46 Kan. App. 2d 841, 846, 264 P.3d 1050 (2011). Contractor's failure to cross-appeal is a jurisdictional bar to this Court reviewing this adverse ruling against it that the lien was not "fraudulent" under either §§ 58-4301(e)(2) or (3).

Instead, the court looked to § 58-4301(e)(1) – whether the lien "is a document or instrument provided for by the constitution or federal or state law" (R1 at 201; App. A2). It then held that because Subcontractor's "lien statement does not set out 'a reasonably itemized statement and the amount of the claim,' which the mechanic's-lien statute requires", the lien was invalid and unenforceable under the mechanic's lien statutes (R1 at 203; App. A4) (quoting § 60-1102). It then held that because of this, "the lien statement here is not a document provided for by the constitution or by federal or state law" (R1 at 205; App. A6). Seizing on this, Contractor later argued this was

correct because "an insufficient lien is by definition a fraudulent lien under K.S.A. 58-4301" (R2 at 222).

The district court and Contractor were wrong as a matter of law. An insufficiently supported mechanic's lien is *not* a document for which state law does not provide. It is still a mechanic's lien, which is a document for which state law plainly *does* provide. Instead, an insufficiently supported mechanic's lien is merely at most an incorrectly filed – and therefore, invalid and unenforceable – document, but one that state law still provides for.

C. A mechanic's lien that fails to meet some specification of the mechanic's lien statutes is still in the form of a mechanic's lien, and so is not "fraudulent" under § 58-4301(e)(1) for being "not a document or instrument provided for by the constitution or laws of this state."

Section 58-4301(a) provides in relevant part that

> Any person … who is the purported … obligor and who has reason to believe that any document or instrument purporting to create a lien … against … real … property … previously filed … is fraudulent as defined in subsection (e) may complete and file … a motion for judicial review of the status of documentation or instrument purporting to create a lien … as provided in this section.

Section 58-4301(e) then states three circumstances in which, "[a]s used in this section," the "document or instrument" at issue "is presumed to be fraudulent", (e)(1) of which is that it "[i]s not a document or instrument provided for by the constitution or laws of this state or of the United States."

This statute, enacted in 1998,

> was promulgated in response to the activities of militias and common-law type groups such as the Freeman and the Christian Court. The activities of these antigovernment groups ranged

> from the issuance of bogus and fraudulent checks to filing and attempting to file frivolous liens. As a result of this threat from extremist groups, the legislature passed S.B. 408 to provide a quick and efficient method to remove facially bogus liens meant solely to intimidate and harass property owners.

In re Mechanic's Lien Against City of Kan. City (which this brief refers to as "*Mark One*"), 37 Kan.App.2d at 444, 154 P.3d 515.

Only four prior Kansas decisions address § 58-4301 at all, three of which are unpublished. *See McCracken v. Dawes*, No. 113,518, 2015 WL 9591372 (Kan. App. Dec. 31, 2015) (unpublished); *Linin v. Dawes*, No. 112,568, 2015 WL 1947452 (Kan. App. Apr. 24, 2015) (unpublished); *Mark One*, 37 Kan.App.2d at 440, 154 P.3d 515; *In re Hill*, No. 95,829, 2007 WL 570214 (Kan. App. Feb. 23, 2007) (unpublished).

Of these four decisions, only one, *Hill*, addresses 58-4301(e)(1): when a document is fraudulent because it "[i]s not a document or instrument provided for by the constitution or laws of this state or of the United States." In *Hill,* the lien claimant was a convicted sex offender, Brian Brown, who was serving a life sentence in federal prison. *Id.* at *1. After his conviction, Mr. Brown filed a $500 million lien against various people who played roles in his criminal case, including Kevin Hill, a county prosecutor who had testified at Mr. Brown's sentencing. *Id.* The lien included a fabricated agreement between Mr. Brown and Mr. Hill and cited provisions of the UCC that did not support filing a lien on real property. *Id.* This Court held that none of the UCC provisions cited established any legal basis for creation of the lien, so there was no legal basis for any lien. *Id.* at *2.

The other decisions illustrate that § 58-4301(e) is concerned with frivolous, legally baseless purported liens of that same caliber.

First, in *Mark One*, there was no evidence that a property owner ever had consented to any work on the property for which a mechanic's lien was filed, nor was there any evidence of any contract for the alleged work. 37 Kan.App.2d at 447. So, it was fraudulent under § 58-4301(e)(2) because it was "not created by implied or express consent or agreement of the obligor, debtor or the owner of the real or personal property ... or by implied or express consent or agreement of an agent, fiduciary or other representative of that person." 37 Kan.App.2d at 447.

Second, the two *Dawes* cases involved a litigious couple who lost their property in a tax foreclosure sale and responded by filing false deed "caveats" purportedly re-conveying those properties to themselves. *See Linin*, 2015 WL 1947452 at *2; *McCracken*, 2015 WL 9591372 at *1-2. They claimed this was proper "due to their God-given unalienable right protected by the Second Amendment to the United States Constitution." *Id.* at *2. Needless to say, this Court disagreed: "The Second Amendment does not say anything about people having a right to file caveats on previously-owned land that was taken away when they failed to pay their taxes." *Id.*

Conversely, a mechanic's lien is not "fraudulent" under § 58-4301 just because it may fail some part of the mechanic's lien enforcement statutes. To paraphrase Contractor here, an insufficient mechanic's lien *is not* "by definition a fraudulent lien under" § 58-4301(e)(1) (R2 at 222). It *is not* "not a

document or instrument provided for by the constitution or laws of this state or of the United States." *Id.*

The law of Kansas expressly provides for a mechanic's lien as a recognized, recordable document. Under K.S.A. § 60-1101,

> Any person furnishing labor, equipment, material, or supplies used or consumed for the improvement of real property, under a contract with the owner or with the trustee, agent or spouse of the owner, shall have a lien upon the property for the labor, equipment, material or supplies furnished at the site of the property subject to the lien, and for the cost of transporting the same.

Section 60-1102 then provides the form that the lien must take:

> (a) Filing. Any person claiming a lien on real property, under the provisions of K.S.A. 60-1101, and amendments thereto, shall file with the clerk of the district court of the county in which property is located, within four months after the date material, equipment or supplies, used or consumed was last furnished or last labor performed under the contract a verified statement showing:
>
> (1) The name of the owner,
>
> (2) the name and address sufficient for service of process of the claimant,
>
> (3) a description of the real property,
>
> (4) a reasonably itemized statement and the amount of the claim, but if the amount of the claim is evidenced by a written instrument, or if a promissory note has been given for the same, a copy thereof may be attached to the claim in lieu of the itemized statement.

Therefore, a mechanic's lien filed in this form is a document "provided for by the … laws of this state …." § 58-4301(e)(1). It is not like the unauthorized $500 million lien in *Hill*, the purported mechanic's lien *not*

under a contract in *Mark One*, or the disgruntled tax debtors' "caveats" in the *Dawes* cases. And this is true even if a party contests the validity or enforceability of that lien.

As *Hill*, *Mark One*, and the *Dawes* cases are the only previous Kansas decisions addressing § 58-4301, no previous Kansas decision directly addresses whether a mechanic's lien where a party contests the sufficiency of the itemization (or some other part of the form in § 60-1102(a)) becomes "not a document or instrument provided for by the constitution or laws of this state" and therefore "fraudulent" under § 58-4301(e)(1). But two Texas decisions directly address this question and squarely hold that it does not.

The Legislature largely adopted § 58-4301 in 1998 from a Texas statute enacted the previous year, Tex. Gov't Code Ann. §§ 51.901 through 51.903. Just like Kansas's § 58-4301, Texas's § 51.903 provides in relevant part that "[a] person who is the purported … obligor … and who has reason to believe that the document purporting to create a lien … against … real … property … previously filed … is fraudulent" as defined by § 51.901(c)(2) may complete and file with the district clerk a motion" alleging so. Texas's § 51.901(c)(2)(A) then defines "fraudulent" exactly the same as Kansas's § 58-4301(e)(1): that the document "is not a document or instrument provided for by the constitution or laws of this state or of the United States …."

Even the district court here noted this Texas statute is "substantially similar to" Kansas's § 58-4301, and that under both statutes "the expedited-review process 'was intended to address not the validity of the purported lien or interest in the property but the legitimacy of the document manifesting

the purported lien or interest'" (R1 at 202; App. A3) (quoting *Davis Powers Homes, Inc. v. ML Rendleman Co.*, 355 S.W.3d 327, 338 (Tex. App. 2011)).

In two decisions, the Texas Court of Appeals addressed whether a mechanic's lien filed under the mechanic's lien statutes and substantially in the form of a mechanic's lien, but which might be invalid for failure to follow some requisite form in the mechanic's lien statutes, became "not a document or instrument provided for by the constitution or laws of this state or of the United States" and so was "fraudulent." *See Cardenas*, 428 S.W.3d at 132-33; *Samshi Homes*, 321 S.W.3d at 667-68. In both cases, the Texas court held that an insufficient mechanic's lien still *was* a mechanic's lien and so was *not* "not a document or instrument provided for by the constitution or laws of this state or of the United States."

First, in *Samshi Homes*, a contractor filed five mechanic's liens against five separate properties, stating that "in accordance with a contract with [Vinay] Karna," it "furnished labor and materials for improvements to the … property" that Mr. Karna owned, and "$4633.00 remains unpaid and is due and owing under said contract." 321 S.W.3d at 666. Samshi Homes, of which Mr. Karna was the managing member, then moved to declare the lien "fraudulent" under Texas's § 51.901(c)(2), alleging that "it, and not Karna, was the owner of the five properties," and it "never entered into any agreement with" the contractor. *Id.*

Samshi Homes also argued that the mechanic's liens were invalid under Tex. Prop. Code Ann. § 53.054, as they

> did not meet the requirements of that section because they did not provide (1) "the name and last known address of the owner or

> purported owner," or (2) "a general statement of the kind of work done and materials furnished by the claimant." … Thus, Samshi Homes' contentions fall into two categories: those challenging whether [the contractor]'s instruments fulfilled the requirements of section 53.054(a) (i.e., name and address of owner and general statement of work and materials), and those raising substantive evidentiary issues (i.e., that Karna did not own the property and did not contract with [the contractor]).

Id. at 667 (quoting Tex. Prop. Code. Ann. § 53.054).

The Texas Court of Appeals held these contentions "go beyond the scope of" the fraudulent-lien statutes. *Id.* This is because under those statutes, "a trial court is limited to determining whether a particular instrument … is fraudulent as therein defined; it may not rule on the validity of the underlying lien itself or other claims between the parties." *Id.*

So, even if imperfectly filed, and even if perhaps invalid under Texas's mechanic's lien statutes, this did not make the contractor's mechanic's lien "fraudulent" for being "not provided by the … laws of this state." *Id.* at 668. To the contrary, "the instruments [the contractor] filed are in the form of mechanic's liens." *Id.* at 667. While

> Samshi Homes argues that [the contractor] failed to provide the purported owner's name and address and a general statement of the kind of work done and materials furnished, the instruments themselves show that [the contractor] attempted to comply with all of the requirements of Property Code section 53.054. Among other information in each instrument, [the contractor]: (1) averred that the respective property was owned by Karna; (2) gave Karna's home address (an address Karna acknowledges was correct); and (3) stated that "in accordance with a contract with [Karna], [contractor] furnished labor and materials for improvements to the ... property." Whether such statements were sufficiently specific to meet the requirements of section

> 53.054 is beyond the scope of a Motion for Judicial Review filed under Government Code section 51.903.

Id. at 667 n.4.

Therefore, "the documents filed by [the contractor were] instruments 'provided by the ... laws of this state' and [were] therefore not presumed to be fraudulent under section 51.901(c)(2)(A). Samshi Homes complaints [*sic*] based on section 53.054 are therefore beyond the scope of the current proceedings." *Id.* at 667-68. Instead, Samshi Homes could proceed under Texas's mechanic's lien statutes to seek to have the mechanic's liens declared invalid. *Id.* at 668 n.5.

The Texas Court of Appeals reached the same result in *Cardenas*. 428 S.W.3d at 132-33. There, an auto mechanic filed a mechanic's lien on a truck, alleging it had performed work on the truck for which it had not been paid. *Id.* at 131. The truck's owners moved to have the lien declared "fraudulent" under § 51.901(c)(2), alleging the lien was invalid because the mechanic had forged one of their signatures on an authorization form for the work, and that the amount of the lien was not what had been agreed anyway. *Id.*

When the trial court agreed that the mechanic's lien was "fraudulent", the Texas Court of Appeals reversed. *Id.* at 132-33. It held that as in *Samshi Homes*, even if the mechanic's lien was technically invalid under the mechanic's lien statutes, it still was a document for which Texas law provided and so was not fraudulent. *Id.* "Article 16, section 37 of the Texas Constitution and Chapter 53 of the Texas Property Code both provide a legal basis for a mechanic's lien. … [The mechanic's] document is provided for by the laws of Texas and is thus not presumed to be fraudulent." *Id.* at 133.

D. Subcontractor's mechanic's lien is in the form of a timely mechanic's lien, and even if under the mechanic's lien statutes Contractor might be able to seek to have it held invalid and unenforceable, it remains "a document or instrument provided for by the constitution or laws of this state" and so is not "fraudulent" under § 58-4301(e)(1).

This case is the same as *Samshi Homes* and *Cardenas*. It commands the same result under an identical Kansas statute to the Texas statute at issue in those cases. Subcontractor filed a document in the form of a timely mechanic's lien against the Property. It attempted to meet all the requisites of a mechanic's lien under § 60-1102. While Contractor argued it was invalid and unenforceable under § 60-1102 for failure to have a sufficiently itemized lien statement, as in *Samshi Homes* and *Cardenas* it remained a mechanic's lien, which is a document for which the law of Kansas provides. Therefore, it was not "fraudulent" within the meaning of § 58-4301(e)(2). The district court erred in holding otherwise.

Subcontractor's lien stated it was filed under §§ 60-1101, *et seq*. (R1 at 4). Per § 60-1101, it stated Subcontractor had furnished labor, equipment, material, and supplies for the Project under a contract with Contractor (R1 at 4-5). Per § 60-1102(a), it was filed within four months of the last time Subcontractor furnished work on the Property, and it stated the owner's name, Subcontractor's name and address, a description of the real property, and attempted to give a reasonably itemized statement and the amount of the claim, attaching the contract and other exhibits (R1 at 5-198). Moreover, Contractor admitted that it had entered into the contract with Subcontractor that Subcontractor attached to its lien, and that Subcontractor had performed work on the Property (R2 at 2).

Therefore, "the instrument[t] [Subcontractor] filed [is] in the form of [a] mechanic's lie[n]" and so was an "instrumen[t] 'provided by the ... laws of this state' and [was] therefore not presumed to be fraudulent under" § 58-4301. *Samshi Homes*, 321 S.W.3d at 667. While Contractor argues Subcontractor "failed to provide" sufficient documentation to support the claimed lien amount, "the instrumen[t itself] show[s] that [Subcontractor] attempted to comply with all the requirements of" § 60-1102(a). *Id.* at 667 n.4. "Whether" Subcontractor's lien statement was "sufficiently specific to meet the requirements of" § 60-1102(a) "is beyond the scope of a Motion for Judicial Review filed under" § 58-4301. *Id.*

Instead, to declare the lien invalid for insufficient specificity under § 1102(a), Contractor either can wait for Subcontractor to seek to foreclose on the lien under K.S.A. § 60-1105(a) and then mount a defense of that invalidity, *see, e.g.*, *Creme de la Creme (Kansas), Inc. v. R&R Int'l, Inc.*, 32 Kan.App.2d 490, 492, 85 P.3d 205 (2004), or Contractor can seek a declaratory judgment that the lien is invalid. *See, e.g.*, *Jerby v. Truck Ins. Exch.*, 36 Kan.App.2d 199, 200, 138 P.3d 359 (2006). And if there is anything insufficient about the itemization of the lien statement, Subcontractor then could request to amend it under § 60-1105(b). *See, e.g.*, *Scott v. Strickland*, 10 Kan.App.2d 14, 22, 691 P.2d 45 (1984).

Either way, Subcontractor's instrument remains a mechanic's lien, a recordable instrument for which the law of Kansas provides, and so is not "fraudulent" within the meaning of § 58-4301(e)(1). Contractor may have a bona fide complaint about the sufficiency of the itemization of Subcontractor's

lien statement. But that does not make it akin to the legally unauthorized hodgepodge in *Hill*, *Mark One*, or the *Dawes* cases. Simply put, §§ 60-1101, *et seq.* "provide a legal basis for a mechanic's lien. … [Subcontractor]'s document is provided for by the laws of [Kansas] and is thus not presumed to be fraudulent." *Cardenas*. 428 S.W.3d at 133.

To hold otherwise would turn § 58-4301(e)(1) into a vehicle for punitive damages anytime some portion of a mechanic's lien was slightly off-base, *see* K.S.A. § 58-4302 (providing action for damages after lien found "fraudulent" under § 58-4301), even if it ordinarily would be curable by amendment under § 60-1105. That was not the Legislature's intent behind § 58-4301(e)(1), and it would countermand that statute's plain language.

The district court erred in declaring Subcontractor's mechanic's lien "fraudulent" under § 58-4301(e)(1). This Court should reverse the district court's judgment.

Conclusion

This Court should reverse the district court's judgment.

Respectfully submitted,

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Certificate of Service

I certify that on June 21, 2019, I electronically filed a true and accurate Adobe PDF copy of the foregoing with the Clerk of the Court by using the electronic filing system, which will send notice of electronic filing to the following:

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Appendix

IN THE DISTRICT COURT OF JOHNSON COUNTY, KANSAS
CIVIL DEPARTMENT

IN RE: A Purported Lien Against Property of
THE DISTRICT AT CITY CENTER, LLC, Case No. 18 ML 275

Commonly known as:
87th and Penrose Lane, Lenexa, KS

JUDICIAL FINDINGS AND CONCLUSIONS OF LAW
(Ordering Release of a Purported Mechanic's Lien Claim)

NOW ON THIS 10th day of January, 2019, the captioned matter comes before the Court in chambers upon the Motion of Haren & Laughlin Construction Company, Inc., for expedited *ex parte* review of the purported mechanic's lien filed against the real property legally described as Lot 6 and 7, City Center Lenexa Sixth Plat, a Subdivision in the City of the Lenexa, Johnson County, Kansas. The claimant, Kansas City Steel Werx, Inc., filed the purported lien on October 26, 2018.

The Court determines that no testimony is allowed or needed in this process; nor is any notice of the Court's review required.[1] The Court can and does make this decision solely upon its review of the filed lien documentation as provided under K.S.A. 58-4301. The Court, upon review, finds the lien statement legally deficient.

STANDING

The Motion, supported by Affidavit, claims that the lien was fraudulent and sets forth with detail and specificity the alleged grounds for that claim. The threshold question is whether Movant,

[1] *See In re Mech.'s Lien Against City of Kansas City*, 37 Kan. App. 2d 440, 445–46 (2007) ("The statute allows any person who believes that a fraudulent lien has been filed against his or her property to file a motion for judicial review of the status of the lien. The district court is authorized to determine the status of the lien based solely on affidavits and documents attached to the motion. In fact, the district court is authorized to make this determination on an *ex parte* basis.").

CERTIFICATE OF CLERK OF THE DISTRICT COURT ... ABOVE IS A TRUE AND CORRECT COPY ... FILED ON THE 10 DAY OF JAN 19 ... RECORDED IN THIS COURT, 10th JUDICIAL DISTRICT, JOHNSON COUNTY, KANSAS ... DATED THIS 7 DAY OF JAN 19 ... CLERK OF THE DISTRICT COURT ... BY Katherine Hughes

DISTRICT COURT

Haren & Laughlin Construction Company, Inc., has standing to move for an expedited review of the lien, because Movant does not own the real property. The Court finds that Movant has standing because, as the mechanic's lien statement sets out, Movant is a "purported debtor or obligor," one of the parties statutorily authorized to move for expedited review under K.S.A. 58-4301.[2]

EXPEDITED REVIEW

The expedited and *ex parte* proceedings under K.S.A. 58-4301 apply to any purported liens filed in the District Court, like this mechanic's lien statement, as well as other liens that may be filed with the Register of Deeds or Secretary of State. The statute says, defining the type of fraud that is the subject for this review, the following:

> A document is presumed to be fraudulent if it purports to create a lien or assert a claim against property and (1) it is not a document or instrument provided for by the constitution or federal or state law, (2) it is not created by consent or agreement of the owner or obligor if such consent or agreement is required under state law, or (3) it is not an equitable, constructive or other lien imposed by a court with jurisdiction under the constitution or federal or state law.[3]

In this instance, we do not have a purported lien that was imposed by consent, like a mortgage on real estate. Likewise, we do not have a purported equitable, constructive, or other lien imposed by a judicial decree. Those alternatives for review are not applicable. This case deals with a purported mechanic's lien filed with the Clerk of the District Court under a Kansas statute. In this summary proceeding, we must look only to the face of the purported lien documents to determine validity under the applicable statute.

Mechanics' liens authorized by K.S.A. 60-1101 *et seq.* were not instruments or procedures recognized under the common law. They are creatures of statute. As such, the lien statement is

[2] K.S.A. 58-4301(a).
[3] K.S.A. 58-4301(e).

itemized statement and the amount of the claim," which the mechanic's-lien statute requires.[9] A "reasonably itemized" statement is one "which is neither excessive nor insufficient in detail but which is fair and sufficient to inform the landowner of the claim and to enable him or her to ascertain whether the material [service or work] was furnished and the charges fair."[10]

Here, the lien's itemized statement is insufficient, first because it does not account at all for nearly $25,000 in claimed "additional work," and second because the lien statement values the "total work performed" at $2,904,384.10, yet the stated total value of the contracted-for work plus the claimed "additional work" is much higher, at $2,976,000.45. Why the nearly $72,000 difference? These gaps make it impossible for Movant to "ascertain whether the material was furnished and the charges fair," so the lien is facially deficient.[11]

The claimed lien is for $418,627.94.[12] The lien statement calculates this amount by subtracting payments received, $2,485,756.16, from the "value of Claimant's total work," which the statement pegs at $2,904,384.10. The documents attached to the lien statement account for $2,859,387 (the original subcontract price), $1,224 (a first change order), and $24,186.45 (a second change order), along with "additional work" worth $66,246. Yet the lien statement says, without any support, that the "additional work" beyond the original agreement and change orders was worth $91,203.[13] Thus, from the lien statement alone, Movant has no way to evaluate $24,957 in claimed "additional work."

For that matter, the statement's documentation appears to support finding $2,951,043.45 in work performed, yet the statement claims that "[t]he value of Claimant's total work performed

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[9] K.S.A. 60-1102.
[10] *Huber Co. v. DeSouza*, 32 Kan. App. 2d 614, Syl. 2 (1986); *see also Kopp's Rug Co. v. Talbot*, 5 Kan. App. 2d 565, Syl. 4 (1980).
[11] *Huber*, 32 Kan. App. 2d at 614.
[12] Doc. 2 at 10.
[13] *Id.* at 11.

to date" is $2,904,384.10, nearly $50,000 less than what the documents suggest, and if one takes the statement's $91,203 claim for "additional work" at face value, the total comes to $2,976,000.45 (the subcontract amount plus the change orders plus the $91,203.00), about $25,000 more than what the documents suggest. Something is amiss.

Kansas law requires a "true itemization to the description of the work or amount" in a mechanic's-lien statement.[14] True, the lien statement here does contain sufficient detail for much of the work, making this case's lien statement more complete than the statements previously rejected in the caselaw.[15] At the same time, however, the itemizations here differ from the claimed amounts by tens of thousands of dollars, distinguishing this case from the instances where appellate courts have upheld "reasonably itemized" statements.[16] In other words, the lien statement gives Movant no way to figure out "whether the work described was performed, whether the material was furnished, and whether the amount claimed was reasonable."[17]

The case that comes closest to upholding the lien statement here is *Scott v. Strickland*,[18] in which the lien statement did not itemize the supplied materials but instead attached "very poor photocopies of invoices."[19] Although the court could not make out specific descriptions or charges for all items on the invoices, the court could read the totals on each invoice to divine "that most of the materials furnished were blocks, cement, pallets or masonry—the type of materials [the

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[14] *Huber*, 32 Kan. App. 2d at 616.
[15] *See Huber*, 32 Kan. App. 2d at 616; *Nicholson v. Hartnett*, No. 106,478, 2012 WL 2149811, at *8 (Kan. Ct. App. June 8, 2012); *In re The Bluffs, LLC*, No. 09-11978, 2011 WL 2414212, at *6 (Bankr. D. Kan. June 13, 2011); *Madison, Inc. v. W. Plains Reg'l Hosp.*, LLC, No. 17-1121-EFM-GLR, 2018 WL 928822, at *3 (D. Kan. Feb. 16, 2018); *In re Rim Dev., LLC*, No. 10-10132, 2011 WL 1299277, at *7 (Bankr. D. Kan. Mar. 31, 2011).
[16] *See Kopp's*, 5 Kan. App. 2d at 572; *J. Walters Const. Co. v. Greystone S. P'ship, L.P.*, 15 Kan. App. 2d 689, 697 (1991); *DaMac Drilling, Inc. v. Shoemake*, 11 Kan. App. 2d 38, 44 (1986); *Noll v. Bailes*, No. 110,767, 2015 WL 1782564, at *4 (Kan. Ct. App. Apr. 10, 2015).
[17] *Noll v. Bailes*, No. 110,767, 2015 WL 1782564, at *4 (Kan. Ct. App. Apr. 10, 2015).
[18] 10 Kan. App. 2d 14, 691 P.2d 45 (1984).
[19] *Id.* at 21.

claimant] would use on the project."[20] But in *Scott*, all the materials were at least accounted for, even if imperfectly, whereas in this instance, tens of thousands of dollars in labor or materials appear to be missing.

In sum, the lien statement here is not a document provided for by the constitution or by federal or state law. The purported mechanic's lien is therefore fraudulent under K.S.A. 58-4301(e) and must, upon Movant's application, be **VACATED** as void and **HELD FOR NAUGHT**.

The Court notes in passing that the statute enabling mechanic's liens speaks in the past tense about "labor, equipment, material, or supplies used or consumed" and "labor, equipment, material or supplies furnished." K.S.A. 60-1101. Thus, a contractor cannot claim a lien for future or anticipated labor, equipment, materials, or supplies. That limit is at least part of the reason, as a practical matter, for waiting until the end of a job to file a mechanic's lien statement—particularly on public projects with retention amounts and change orders uncertain, potential credits, and other possibilities—to be able to show a true basis for an actual final claim.

Except as noted, the Court, in this limited proceeding, makes no findings or conclusions as to any underlying claims of the parties involved and expressly limits these findings of fact and conclusions of law to the review of the ministerial act of filing the purported mechanic's lien statement in this matter only.

The Clerk shall file these Judicial Findings and Conclusions of Law in the same class of records as the original documentation was filed.

IT IS SO ORDERED.

/s/ James F. Vano
JAMES F. VANO
District Judge, Division 2

[20] *Id.* at 23.

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Mission Hills, KS66208

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A6

IN THE CIRCUIT COURT OF JOHNSON COUNTY, KANSAS
CIVIL DIVISION

IN RE: A PURPORTED MECHANIC'S LIEN AND CLAIM AGAINST HAREN & LAUGHLIN CONSTRUCTION COMPANY, INC.	**Lien No. 18ML00275**

ORDER

NOW ON THIS ____ day of May 2019, the captioned matter comes before the Court upon Kansas City Steel Werx, Inc.'s ("KCSW") Motion to Amend or Alter the Judgment of this Court and for Leave to File and Amended Lien Statement and Haren & Laughlin Construction Company, Inc.'s ("Haren & Laughlin") Opposition thereto.

The Court finds that it does not have jurisdiction to alter or amend its judgment as requested by KCSW. Haren & Laughlin filed it Verified Motion for Judicial Review of Documentation or Instrument Purporting to Create a Lien or Claim pursuant to K.S.A. 58-4301 et. seq. On January 10, 2019, this Court granted Haren & Laughlin's Motion and found that the purported mechanic's lien filed by KCSW to be fraudulent as defined by K.S.A. 58-4301(e). KCSW, in response, filed it Motion to Alter or Amend the Judgment pursuant to K.S.A. 60-259. The Court finds that it does not have jurisdiction to make such a ruling as its judgment was governed by K.S.A. 58-4301, and not chapter 60 of the Kansas Rules of Civil Procedure.

The Court find no error in its judgment finding the lien to be fraudulent as defined by K.S.A. 58-4301(e).

For the reasons set forth herein, KCSW's Motion to Alter or Amend Judgment and Suggestions in Support is hereby **DENIED**.

DISTRICT COURT

The Court finds that it does not have jurisdiction to grant KCSW's Motion for Leave to Amend its Mechanic's Lien Statement. KCSW requested leave, pursuant to K.S.A. 60-1105(b), to amend the mechanic's lien statement previously found to be fraudulent. K.S.A. 60-1105(b) provides:

> "Where action is brought to enforce a lien the lien statement may be amended by leave of the judge in furtherance of justice, except to increase the amount claimed."
>
> Kan. Stat. Ann. § 60-1105(b) (Wcst 1963).

The current action is not considered to be the action to enforce the lien. Therefore, this Court cannot grant leave pursuant to K.S.A. 60-1105(b) as it does not have jurisdiction to do so. For the reasons set forth herein, KCSW's Motion for Leave to Amend its Lien Statement and Suggestions in Support is hereby **DENIED**.

The Amended Lien Statement filed by KCSW on February 5, 2019, entered into the docket as **Document Number 7**, is permitted and will retain the same case number so long as KCSW pays the docket fee again.

/s/ JAMES F VANO
Dated: 05/06/19

Honorable Judge James F. Vano

Respectfully submitted,

LONG & ROBINSON, LLC

/s/ Colin M. Quinn
By:_____

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ATTORNEYS FOR HAREN & LAUGHLIN CONSTRUCTION COMPANY, INC.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing was filed through the Court's electronic filing system, and served via electronic mail, this 3rd day of May, 2019.

/s/Colin M. Quinn

Attorney

152 P.3d 110 (Table)
Unpublished Disposition
(Pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions are not precedential and are not favored for citation. They may be cited for persuasive authority on a material issue not addressed by a published Kansas appellate court opinion.)
Court of Appeals of Kansas.

In re: A Purported Lien or Claim Against
Kevin M. HILL, Brown County Attorney,
Kevin HILL, Brown County Attorney, Appellee,
v.
Brian BROWN, Appellant.

No. 95,829.
|
Feb. 23, 2007.
|
Review Dismissed June 21, 2007.

Appeal from Brown District Court; John L. Weingart, judge. Opinion filed February 23, 2007. Affirmed.

Attorneys and Law Firms

Brian Brown, appellant pro se.

Kevin Hill, county attorney, pro se.

Before GREEN, P.J., MARQUARDT, J., and BRAZIL, S.J.

MEMORANDUM OPINION

PER CURIAM.

***1** Brian Brown appeals the district court's summary dismissal of a purported lien that he filed against property owned by Kevin Hill, the Brown County Attorney. We affirm.

Brown is currently serving concurrent terms of life imprisonment on his federal convictions of kidnapping and aggravated sexual abuse of a child. See *United States v. Brown,* 330 F.3d 1073 (8th Cir.2003), *cert. denied* 540 U.S. 975 (2003).

One person named in Brown's purported lien was Kevin Hill, the Brown County attorney, who had been a witness for the federal government. Also attached was a public notice of default on the supposed security agreement. It stated each person in the alleged conspiracy was indebted to Brown in the amount of $500,000,000 because they failed to respond. This document was unsigned.

Hill filed a motion claiming Brown's purported lien was fraudulent and requested an order setting aside or terminating Brown's purported lien. Upon summary review, the district court found Brown's documentation was not a valid or lawful lien, ordered the purported lien be set aside, and directed the filing officer to nullify the lien documentation, or if applicable, terminate the lien documentation pursuant to the Uniform Commercial Code (UCC). Brown timely appeals.

Brown first argues the district court erred by terminating his UCC lien. Under K.S.A. 58-4301(e), a document is presumed to be fraudulent if it purports to create a lien against real or personal property and:

> "(1) Is not a document or instrument provided for by the constitution or laws of this state or of the United States;
>
> "(2) is not created by implied or express consent or agreement of the obligor, debtor or the owner of the real or personal property or an interest in the real or personal property, if required under the laws of this state, or by implied or express consent or agreement of an agent, fiduciary or other representative of that person; or
>
> "(3) is not an equitable, constructive or other lien imposed by a court with jurisdiction created or established under the constitution or laws of this state or of the United States."

The district court's findings are to be made solely upon review of the documentation purporting to create a lien against the property. K.S.A. 58-4301(b).

Because the district court's determination was based on the documentation filed by Brown, this court's standard of appellate review is de novo. "Where the controlling facts are based solely on written or documentary evidence, an appellate court may determine de novo what the facts establish. [Citations omitted.]" *Telegram Publishing*

Co. v. Kansas Dept. of Transportation, 275 Kan. 779, 784, 69 P.3d 578 (2003).

Brown's brief is vague and nonsensical. The UCC governs commercial transactions and practices. See K.S.A. 84-1-102(2)(a), (b) (purpose is to clarify "law governing commercial transactions" and permit expansion of "commercial practices through custom, usage and agreement of the parties"). Although he cites several UCC provisions, none of them apply. For example, to show an agreement, he cites K.S.A. 84-3-415 (obligation of endorser on negotiable instrument), K.S.A. 84-7-501 (endorsement of negotiable warehouse receipts), and K.S.A. 84-8-304(a) (transfer of a security by blank or special endorsement).

***2** Brown's documentation did not involve a commercial transaction or commercial practice between Brown and Hill. Rather, the documents alleged the civil tort of conspiracy between Hill and other individuals. See generally *Stoldt v. City of Toronto,* 234 Kan. 957, 966-67, 678 P.2d 153 (1984) (actionable tort of civil conspiracy has five elements), and *Knight v. Neodesha Police Dept.,* 5 Kan.App.2d 472, 475-76, 620 P.2d 837 (1980) (civil conspiracy becomes actionable upon commission of a wrong that gives rise to a cause of action independent of the conspiracy). However, Brown's documents were not a petition or a judgment filed with a court in a civil action of conspiracy.

Because Brown's documentation did not meet the requirements of a lien as defined by K.S.A. 58-4301(e)(1)-(3), the district court did not err by ordering the purported lien to be set aside or terminated.

Next, Brown contends the district court judge should have recused himself from deciding Hill's motion because the judge and Hill are law partners. Hill denies that he and the judge are law partners.

K.S.A.2006 Supp. 20-311d sets forth the procedure for a change of judge. A motion for a change of judge may be filed in a postjudgment proceeding. K.S.A. 20-311f. Our review of a judge's refusal to recuse is: (1) Did the judge have a duty to recuse himself or herself from the case because the judge was biased, prejudiced, or partial; (2) if the judge had a duty to recuse but did not, has the party shown actual prejudice or bias to warrant setting aside the judgment. *State v. Brown,* 266 Kan. 563, 569, 973 P.2d 773 (1999).

After the order was entered, Brown filed a motion to reconsider, but did not allege the district court judge was biased or partial because the judge was a law partner with Hill. Thus, Brown did not comply with K.S.A. 20-311f. A failure to comply with the filing requirements of K.S.A. 20-311f bars consideration of the issue on appeal. 266 Kan. at 570. Moreover, Brown's citation to the record does not support his allegation that Hill and the judge are law partners.

Additionally, because Brown's purported lien possessed no merit and was properly terminated, the issue of the district court judge's alleged partiality is moot. Even if this court concluded that the district court judge should have recused himself, there would be no change in the outcome of the case. See *Laubach v. Roberts,* 32 Kan.App.2d 863, 90 P.3d 961 (2004) (the issue of whether the district court judge erroneously failed to recuse himself was moot because our court determined petitioner's claims had no merit and were properly dismissed).

Affirmed.

All Citations

152 P.3d 110 (Table), 2007 WL 570214

347 P.3d 240 (Table)
Unpublished Disposition
(Pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions are not precedential and are not favored for citation. They may be cited for persuasive authority on a material issue not addressed by a published Kansas appellate court opinion.)
Court of Appeals of Kansas.

Brian W. LININ and Janda K. Linin and
Brent W. Linin and Ginny A. Linin, Appellees,
v.
Donald W. DAWES and
Phyllis C. Dawes, Appellants,
and
Plainsman Property Company, et al., Defendants.

No. 112,568.
|
April 24, 2015.

Attorneys and Law Firms

Appeal from Sherman District Court; Scott Showalter, Judge.

Donald W. Dawes, and Phyllis C. Dawes, appellants pro se.

Adam C. Dees, of Vignery & Mason L.L.C., of Goodland, for appellees.

Before McANANY, P.J., BRUNS, J., and JOHNSON, S.J.

MEMORANDUM OPINION

PER CURIAM.

***1** Donald and Phyllis Dawes, pro se, appeal from two separate judgments of the district court entered in favor of Brian and Janda Linin. In one district court case, 13 CV 29, the Daweses appealed out of time, and we confirm the dismissal of that appeal for lack of jurisdiction. In the other, 14 CV 22, the Daweses failed to provide a record on appeal. Thus, they have failed to support any claim they may have made under 14 CV 22 by citations to the record. Those failures and others described below preclude our review in 14 CV 22, and we affirm the district court's decision in that case.

PROCEDURAL AND FACTUAL BACKGROUND

The Daweses have provided us a record on appeal in 13 CV 29. They have provided no record on appeal at all in 14 CV 22. The Linins have attached to their brief a purported copy of the final order in 14 CV 22 from which the Daweses apparently appeal, although such attachments cannot be deemed a part of the record. We will do what we can from what we have to provide a brief history of the cases at issue.

The Daweses previously owned a substantial amount of rural real property. However, they failed to pay income taxes for several years, amassing a federal tax debt in excess of $1.5 million. The Internal Revenue Service (IRS) assessed those taxes on May 3, 2004, and placed a lien on the Daweses' real property. When the IRS moved to foreclose its tax lien, the Daweses filed bankruptcy. With the bankruptcy court's permission, the IRS was allowed by the United States District Court to foreclose its tax lien in order to sell the Daweses' property at a tax sale. The Daweses appealed the district court's order foreclosing the lien to the Tenth Circuit Court of Appeals, which affirmed the foreclosure.

Brent Lenin bought the property at the June 20, 2007, tax sale for $185,000 and received a Sheriff's deed to the entirety of the subject property. He subsequently transferred title to Brian and Janda Linin, the plaintiffs in 13 CV 29. As things happen, the county authorities duly registered the transfer of title to the real property to the Linins, but the treasurer continued to bill the Daweses or one of their alter ego entities for separate taxes on mineral rights. Over the years after the tax sale, the Daweses or one of those alter ego entities paid $258.98 in those taxes.

Under case 13 CV 29, the Linins filed a quiet title action regarding those mineral rights, seeking to confirm their ownership of the entirety of the property. Among many others, the Linins served the Daweses. The Linins moved for summary judgment, but the Daweses opposed that. On June 10, 2014, the district court heard the Linins' motion for summary judgment. The Daweses appeared and resisted, claiming that they still owned the fee simple freehold in the land and that the IRS had no right to

take the land because it was located more than 10 miles from the District of Columbia. They also claimed that, regardless of the decisions in the federal courts, all the Linins could own as a result of the tax sale was the IRS lien, not title to the real property. The district court orally granted summary judgment, confirming that the Linins owned all of the subject property including the mineral interests. The record from that hearing contains a discussion between the court and the Daweses regarding their right to appeal. The district court cautioned the Daweses that there was a timeframe in which to appeal in Kansas.

***2** The Linins' attorney sent the Daweses a proposed journal entry under Supreme Court Rule 170 (2014 Kan. Ct. R. Annot. 278). The Daweses objected to it. Finally, on July 14, 2014, the district court determined the matter of the journal entry and entered its written summary judgment order quieting title to the Linins.

The Daweses did not timely appeal from that order. Rather they, apparently from attachments to the Linins' brief and the Daweses' brief, filed with the register of deeds documents they called caveats on July 28, 2014, and August 26, 2014. These caveats purported to claim for the Daweses all title and interest in the Linins' property. The Linins' brief advises that on September 4, 2014, the Linins filed a motion for judicial review of those caveats pursuant to K.S.A. 58–4301, asking that the caveats be nullified. The motion was assigned case 14 CV 22. The Linins' brief further advises that on September 4, 2014, the court entered an order summarily nullifying those caveats. Again, the Daweses did not see to the inclusion in the record on appeal of any part of the district court file in 14 CV 22.

On September 15, 2014, the Daweses filed a notice of appeal in 13 CV 29, noting both case numbers but specifically referring only to an appeal from the September 4, 2014, judgment in 14 CV 22. The Daweses' brief, though, mainly challenges the summary judgment in 13 CV 29. Regarding 14 CV 22, their brief includes only summary allegations that the caveats confirm that the Daweses own "Fee Simple Freehold Absolute title" to the Linins' property. The Daweses' brief does not mention that the district court nullified their caveats. It makes no argument with citation to statutory or caselaw authority that the district court erred when it nullified the caveats.

Before the parties filed their briefs the Linins moved to dismiss the appeal. The Daweses responded. Our motions panel entered an order on November 20, 2014, which stated:

> "Appellants' response is noted. The Appellants' notice of appeal was timely from the district court's September 4, 2014, ruling. This court assumes jurisdiction over that ruling but does not have jurisdiction over the original July 14, 2014, ruling on summary judgment.
>
> "The September 4, 2014, ruling was made in case number 14 CV 22. The notice of appeal references case number 14 CV 22. Given that fact, it appears that the notice of appeal was reasonably certain to have provided adequate notice to Appellees."

As implicit as it might appear, the panel's order did not specifically dismiss the appeal from 13 CV 29.

ANALYSIS

We have no jurisdiction over the Daweses appeal from 13 CV 29 and it is dismissed

Whether jurisdiction exists is a question of law over which we exercise unlimited review. *Frazier v. Goudschaal,* 296 Kan. 730, 743, 295 P.3d 542 (2013). The right to appeal is entirely statutory and is not contained in the United States or Kansas Constitutions. If the record shows that the appellate court does not have jurisdiction, the appeal must be dismissed. *Kansas Medical Mut. Ins. Co. v. Svaty,* 291 Kan. 597, 609, 244 P.3d 642 (2010).

***3** Unless an exception applies, and none applies here, Kansas appellate courts have jurisdiction to consider an appeal only if a party files an appeal within the time limitations and in the manner prescribed by the applicable statutes. *Wilkinson v. Shoney's, Inc .,* 265 Kan. 141, 143, 958 P.2d 1157 (1998). By statute, then, this appeal had to be filed within 30 days from "entry of the judgment." K.S.A.2014 Supp. 60–2103(a). Judgment is entered when a journal entry or judgment form is filed. K.S.A.2014 Supp. 60–258. A judgment is effective only when a journal entry or judgment form is signed by the judge and filed with the clerk of the district court. *Valadez v. Emmis Communications,* 290 Kan. 472, 482, 229 P.3d 389 (2010).

On July 14, 2014, the district court settled the journal entry on its June 4, 2014, oral entry of summary judgment. That journal entry granted the Linins summary judgment quieting title in the Linins to mineral rights attached to the Linins' property. That journal entry was filed the same date, July 14, 2014. The Daweses did not file a notice of appeal referring to 13 CV 29 until September 15, 2014, well beyond 30 days from the entry of judgment. The Daweses notice of appeal was out of time. Just as our motions panel previously indicated, we have no jurisdiction over the appeal from the summary judgment entered in 13 CV 29, and we expressly, now, dismiss that portion of the appeal.

The Daweses' Failure to Properly Provide a Record on Appeal and Their Attendant Failure to Properly Brief Their Appeal in 14 CV 22 Precludes Our Review

As noted above, on September 15, 2014, the Daweses filed a notice of appeal in case 13 CV 29. It was captioned with that case number and stated that it was "Combined with Misc. Docket No. 14–CV–22." The text of the notice states the Daweses were appealing "from the JUDGMENT entered herein on September 4, 2014, by the Honorable Judge Scott Showalter who signed the above-captioned action." September 4, 2014, is, according to the order attached to the Limns' brief, the day the district court nullified the Daweses' caveats. We can infer, then, that the Daweses must have intended to appeal from the caveat nullification decision. But all we can really do is infer.

First of all, the Daweses have not caused us to be provided, other than their notice of appeal filed in 13 CV 29, any record on appeal in 14 CV 22. We officially have nothing from the district court's file to review, whether it is the Linins' original request to nullify the caveats or any order nullifying the caveats. We do have those documents the Linins attached to their brief, and one caveat the Daweses attached to their brief. However, including documents in an appendix to a brief does not make those documents part of the record that we can consider on appeal. *Romkes v. University of Kansas,* 49 Kan.App.2d 871, 886, 317 P.3d 124 (2014).

Moreover, the Daweses have failed in crucial respects to comply with Supreme Court Rule 6.02(a) (2014 Kan. Ct. R. Annot. 40) regarding the contents of their brief on the caveat issue in 14 CV 22. They do not include a "brief statement, without elaboration" that the caveat nullification is an issue to be decided on appeal. Rule 6.02(a)(3) (2014 Kan. Ct. R. Annot. 41). They do not include a "concise but complete statement, without argument, of the facts that are material to determining the issues to be decided on appeal" regarding the caveat nullification. Rule 6.02(a)(4) (2014 Kan. Ct. R. Annot. 41). They do not provide arguments and authorities they rely on for any challenge to the propriety of the caveat nullification, nor did they, or could they, include "a pinpoint reference to the location in the record on appeal where the issue was raised and ruled on." Rule 6.02(a)(5) (2014 Kan. Ct. R. Annot. 41). Their entire argument in the brief concerning the caveat nullification is as follows: "The Legislative Court failed to find the correct legal terms and meaning for the Caveat.... The Dawes" [*sic*] filed a Caveat which does attach to the original Warranty Deed granting the Dawes' their Fee Simple Freehold Absolute title." Then they quote the definition of caveat from Black's Law Dictionary.

***4** An issue not briefed by the appellant is deemed waived and abandoned. *Superior Boiler Works, Inc. v. Kimball,* 292 Kan. 885, 889, 259 P.3d 676 (2011). A point raised incidentally in a brief and not argued therein is also deemed abandoned. *Friedman v. Kansas State Bd. of Healing Arts,* 296 Kan. 636, 645, 294 P.3d 287 (2013). Failure to support a point with pertinent authority or show why it is sound despite a lack of supporting authority or in the face of contrary authority is akin to failing to brief the issue. *State v. Tague,* 296 Kan. 993, 1001, 298 P.3d 273 (2013). The burden is on the party making a claim to designate facts in the record to support that claim. Without such a record, the claim of error fails. See *Friedman,* 296 Kan. at 644–45.

We recognize that the Daweses are representing themselves in this appeal, not an easy task for those untrained in law. Nevertheless, as has been stated before:

> " 'A pro se litigant in a civil case is required to follow the same rules of procedure and evidence which are binding upon a litigant who is represented by counsel. Our legal system cannot function on any basis other than equal treatment of all litigants. To have different rules for different classes of litigants is untenable. A party in civil litigation cannot expect the trial judge or an attorney for the other party to advise him or her of the law or court rules, or to see that his or her case is properly presented to the court. A pro se litigant in a civil case cannot be given either an advantage or a disadvantage

solely because of proceeding pro se.' *Mangiaracina v. Gutierrez,* 11 Kan.App.2d 594, 595–96, 730 P.2d 1109 (1986)." *In re Estate of Broderick,* 34 Kan.App.2d 695, 701, 125 P.3d 564 (2005).

We also recognize that, while we adhere to these rules, we may be flexible when enforcing them on a self-represented party if the party has demonstrated some semblance of compliance with the rules. However, the Daweses' failures to provide us a record on appeal to review, and a brief that complies with Rule 6.02 sufficient to assist us in that review, do not justify any flexibility here. Assuming that the Daweses are appealing from the caveat nullification, we simply do not know what it is about the caveat nullification proceedings that they challenge in their appeal. The Daweses multiple failures to comply with our appellate procedural rules, their failure to identify what issue they actually want us to review, and their failure to adequately brief such an issue all preclude us from analyzing any claim of error regarding the nullification of the caveats. We must, then, affirm the district court's decision in 14 CV 22.

The Linins' motion for attorney fees on appeal

The Linins have moved for an assessment of their attorney fees on appeal against the Daweses pursuant to Supreme Court Rule 7.07(c) (2014 Kan. Ct. Annot. 70). In two separate motions, one seeking attorney fees of $1500 and one seeking an additional $300, the Linins succinctly state the reason for their requests: "Appellee asks for attorney fees and costs because this appeal was frivolous." Regarding frivolous appeals, Rule 7.07(c) (2014 Kan. Ct. R. Annot. 71–72) provides:

> ***5** "If an appellate court finds that an appeal has been taken frivolously, or only for the purpose of harassment or delay, it may assess against the appellant or appellant's counsel, or both, the cost of reproduction of the appellee's brief and a reasonable attorney fee for the appellee's counsel. A motion for attorney fees under this subsection must comply with subsection (b)(2). If the motion is granted, the mandate must include a statement of the assessment, and execution may issue on the assessment as for any other judgment, or in an original case the clerk of the appellate courts may issue an execution."

A frivolous appeal is an appeal that presents no justiciable question, is readily recognized as devoid of merit, or presents little prospect of success. *Peoples Nat'l Bank of Liberal v. Molz,* 239 Kan. 255, 257, 718 P.2d 306 (1986). Factually, as the Linins detail and support in their motions, each of the Daweses' appeals meets all of these standards for a frivolous appeal. In 13 CV 29, the Daweses filed their notice of appeal out of time even though, at the hearing of June 4, 2014, the district court responded to their questions about appealing with a caution that Kansas had time limits in which to appeal. Then they proceeded to brief their ongoing contention in 13 CV 29 that they had some ownership interest in the Linins' property, this after being assured by judgments of the United States District Court and, then, the Tenth Circuit, that any interest they previously had in the property was foreclosed for their tax debt. In 14 CV 22, the Daweses did not bother to provide a record on appeal, and their brief does not even state the actual judgment from which they appealed, let alone why the court erred when it entered it.

The Daweses filed an objection to the Linins' fee motion, arguing "[t]he Appeal is correctly written and should go forth pursuant to Appellant rules for Appellants, Donald and Phyllis Dawes." They also contended that the Linins' attorney, Adam Dees, should be sanctioned for filing a frivolous lawsuit because he "knew or should have known that the Fee Simple, Freehold was a Constitutional Issue, protected by the 2nd Amendment to the Constitution of the [U]nited States of America, and not subject to Legislative jurisdiction." The Daweses also asked this court to sanction Dees for harassment, vindictiveness, stress, wasting their time, and filing "voluminous amounts of paperwork" into the courts. The Daweses' objections to the fee requests maintain their frivolous claim that they retain an interest in the property. Their objections and requests for sanctions are without merit.

The Daweses' appeals were frivolous. The Linins' motions for attorney fees were timely filed and properly supported by affidavits and time records. Supreme Court Rule 7.07(b) (2014 Kan. Ct. R. Annot. 70). As the motions

contend, the fees requested appear to be consistent with the reasonableness factors they detail from KRPC 1.5(a) (2014 Kan. Ct. R. Annot. 515). Moreover, even though the Daweses' claims on appeal were frivolous, the Linins needed to protect themselves by responding.

***6** We determine that the Linins' fee requests are reasonable, equitable, and properly justified. We sustain the Linins' motions for attorney fees in these appeals and grant the Linins a judgment against Donald W. Dawes and Phyllis C. Dawes jointly and severally in the total amount of $1,800.

Affirmed in part, dismissed in part, and attorney fees are granted.

All Citations

347 P.3d 240 (Table), 2015 WL 1947452

2015 WL 9591372
Unpublished Disposition
Only the Westlaw citation is currently available.
(Pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions are not precedential and are not favored for citation. They may be cited for persuasive authority on a material issue not addressed by a published Kansas appellate court opinion.)
NOT DESIGNATED FOR PUBLICATION
Court of Appeals of Kansas.

Carl and Sue McCRACKEN; Tony M. Horinek and Anita M. Horinek, as Trustees of the Tony M. Horinek Revocable Trust and Trustees of the Anita M. Horinek Revocable Trust; Aaron M. Horinek; Rex and Joan Jamison; S & T Telephone Cooperative, Appellees,
v.
Donald W. DAWES and Phyllis C. DAWES, Appellants.

No. 113,518.
|
Dec. 31, 2015.

Appeal from Sherman District Court; Scott Showalter, judge.

Attorneys and Law Firms

Donald W. Dawes and Phyllis C. Dawes, appellants pro se.

Adam C. Dees, of Vignery & Mason L.L.C., of Goodland, for appellees.

Before SCHROEDER, P.J., PIERRON, J. and HEBERT, S.J.

MEMORANDUM OPINION

PER CURIAM.

***1** Donald W. and Phyllis C. Dawes (the Daweses) appeal from the district court's decision in two consolidated cases originally filed against them in Sherman and Thomas Counties. Because the Daweses' brief fails to comply with Supreme Court Rule 6.02(a) (2015 Kan. Ct. R. Annot. 41) and the Daweses fail to provide a reason for this court to reverse the district court's decision, we affirm. We also agree that the Daweses' appeal is frivolous, so we grant the Plaintiffs' motion for attorney fees.

Factual and Procedural Background

On November 25, 2014, in Sherman County District Court Case No. 14CV32, Carl and Wanda McCracken (the McCrackens) filed a motion for judicial review of a document purporting to create a lien or claim on property they alleged to own. The motion listed the Daweses as defendants. The McCrackens, as well as the other consolidated plaintiffs/appellees, are owners of property formerly owned by the Daweses. The Internal Revenue Service had foreclosed its liens and sold the property, based on substantial federal taxes which the Daweses had failed to pay. There is nothing in the record which would indicate that the Daweses ever atempted to redeem the property after the sale. The Daweses, however filed documents, referred to as "caveats", purporting to create or retain a lien or interest in the various properties, despite the foreclosure and sale and despite prior adverse determination in the federal courts regarding issues of ownership. On the same day the McCrackens filed their motion, the district court signed an order stating that it had considered the McCrackens' motion as well as the attached documents and determined that the document filed by the Daweses did not create a valid lien or claim.

Then on December 1, 2014, in Thomas County District Court Case No. 14CV52, Tony M. Horinek and Anita M. Horinek, as Trustees of the Tony M. Horinek Revocable Trust and Trustees of the Anita M. Horinek Revocable Trust; Aaron M. Horinek; Rex Jamison and Joan Jamison; and S & T Telephone Cooperative filed a motion for judicial review of a document purporting to create a lien or claim on property they alleged to own. The Daweses were the defendants in this motion as well, which was filed by the same attorney who filed the McCrackens' petition. The district court signed an order stating that it considered the Plaintiffs' motion as well as the attached documents and determined that the document did not create a valid lien or claim.

On December 4, 2014, the Plaintiffs in 14CV52 filed a motion to consolidate their case with the McCrackens' case in 14CV32. On December 12, 2014, the Dawes filed pro se objections to the motions in both 14CV32

and 14CV52. The Daweses maintained that the actions should be dismissed and that the attorney who filed the motions should be sanctioned for filing frivolous cases. The Daweses also claimed to be entitled to $2.5 million in sanctions for extreme stress and loss of crops.

On December 23, 2014, the district court consolidated the cases and transferred venue in 14CV52 to Sherman County District Court. That same day, all the plaintiffs in the consolidated cases (the Plaintiffs) filed a petition against the Daweses.

***2** On January 14, 2015, the Daweses filed a pro se motion to dismiss for lack of jurisdiction. They also filed an answer and counterclaim. The district court held a pretrial conference on January 28, 2015. That same day, the Plaintiffs filed an answer to the Daweses' counterclaim, a response to the motion to dismiss for lack of jurisdiction, and a motion for attorney fees. On February 9, 2015, the Daweses filed an objection to the motion for attorney fees. The Daweses also filed a motion for an extension of time in order to obtain counsel and receive an appellate ruling in Kansas Court of Appeals Case No. 112,568. The Plaintiffs filed an objection to the motion for an extension of time. The district court denied the motion to extend time and stayed the request for attorney fees until trial.

Although there is no trial transcript in the record on appeal, the district court's journal entry of judgment indicates that it held a trial on this matter on March 4, 2015, at which the court admitted exhibits filed by both parties and heard testimony from witnesses called by the Plaintiffs.

On March 5, 2015—the day after trial—the Plaintiffs filed with the court a proposed journal entry under Supreme Court Rule 170 (2015 Kan. Ct. R. Annot. 264). On March 11, 2015, the Daweses filed a notice of appeal of the March 4, 2015, ruling. This notice of appeal became effective and timely on March 17, 2015, when the district court filed a journal entry memorializing the rulings it apparently announced at the March 4, 2015, trial. See Supreme Court Rule 2.03(a) (2015 Kan. Ct. R. Annot. 13).

In the journal entry, the district court determined it had subject matter jurisdiction and denied the Daweses' motion to dismiss. The district court determined that the Daweses knew or should have known that the documents they filed and recorded violated K.S.A.2014 Supp. 58–4301; the Daweses wrongfully filed and recorded the documents; the Plaintiffs sustained an unknown amount of damages; and the Plaintiffs expended $7,000 in reasonable attorney fees. The district court, therefore, ordered that the Daweses were enjoined under K.S.A.2014 Supp. 58–4302(e)(2) from filing any future liens, claims, caveats, or other documents with any filing officer without approval of the Sherman or Thomas County District Courts; enjoined under K.S.A.2014 Supp. 584302(e)(3) from filing any future liens, claims, caveats, or other documents that would violate K.S.A.2014 Supp. 58–4301; required to pay the Plaintiffs $7,000 in attorney fees; and required to pay $50,000 in liquidated damages under K.S.A.2014 Supp. 58–4302(e)(1). The district court, however, stayed "the payment of liquidated damages until and unless the Dawes [*sic*] take further legal, physical, personal, or any other action against the plaintiffs or the plaintiffs' property."

The Daweses docketed their appeal with this court on April 7, 2015. After the appeal was docketed, the Plaintiffs filed a motion for supersedeas bond, which the district court granted. The Daweses docketed an appeal of the supersedeas bond in this case on May 4, 2015, but they do not argue the issue in their appellate brief.

***3** On August 17, 2015, the Plaintiffs filed a motion for $1,200 in appellate attorney fees with this court. The Plaintiffs' attorney attached to the motion an affidavit of counsel and an itemization of costs supporting the motion. The Daweses responded to the motion for attorney fees, arguing that this court should deny the motion. On August 25, 2015, this court ordered that the panel assigned to hear the case would consider the attorney fee issue.

After the district court issued its ruling in this case, another panel of this court considered an apparently consolidated appeal from two other Sherman County cases where different plaintiffs—Brian and Janda Linin—had filed actions against the Daweses regarding caveats the Daweses filed on property the Linins owned that the Daweses had previously owned. On April 24, 2015, this court decided that it had no jurisdiction over the appeal in one case because the Daweses did not timely appeal the decision in that case and that it could not consider the issues in the other case because the Daweses failed to provide the appellate court with the district court record in that case. *Linin v. Dawes,* No. 112,568, 2015 WL 1947452,

(Kan.App.2015) (unpublished opinion). On May 28, 2015, the mandate was issued on that opinion.

Sufficiency of the Daweses' Brief

We must affirm the district court's decision because the Daweses brief fails to comply with Supreme Court Rule 6.02(a) (2015 Kan. Ct. R. Annot. 41). Although the Daweses' brief appears to comply with the requirements in Rule 6.02(a)(1) and (2) that it begin with a table of contents and a nature of the case, it does not comply with the remaining requirements in Rule 6.02(a)(2)-(5). It does not contain a brief statement of the issues to be decided; a concise statement of the material facts that are keyed to the record on appeal by volume and page number; or the arguments and authorities relied on in each separate issue, beginning with a citation to the appropriate standard of review and a reference to the location in the record where the issue was raised and ruled on below.

After the nature of the case, the Daweses list eight issues for review. However, the listing of issues does not correspond with the arguments made later in the brief of which there are only four. Next, although the Daweses include a statement of facts, only a few of the statements have vague citations to the record. Moreover, the fact section is not particularly helpful in determining what the Daweses want this court to review on appeal. Therefore, it does not comply with Rule 6.02(a)(4)'s requirement the brief include a "concise but complete statement, without argument, of the facts that are material to determining the issues to be decided in the appeal."

A substantial problem with the Daweses' fact section is that they failed to provide us with the trial transcript as part of the record on appeal, so they cannot cite to the evidence relied on by the district court to make its decision. The appellant has the duty to request a hearing transcript necessary to properly present the appeal. Supreme Court Rule 3.03(a) (2015 Kan. Ct. R. Annot. 23). The Daweses became aware that the record was deficient when the Plaintiffs argued in their brief that this court should uphold the district court's decision due to the lack of a sufficient record to review that decision. The Daweses did not respond to the Plaintiffs' argument. The burden is on the party making a claim to designate facts in the record to support that claim; without such a record, the claim of error fails. See *Friedman v. Kansas State Bd. Of Healing Arts,* 296 Kan. 636, 644–45, 294 P.3d 287 (2013).

***4** To support their argument that this court should uphold the district court's decision based on the lacking transcript, the Plaintiffs cite this court's decision in the Daweses' other appeal. In that case, however, the Daweses failed to provide this court with any of the record from the district court. *Linin,* 2015 WL 1947452, at *3. In the present case, it appears that we have everything except the trial transcript. This court has no choice other than to assume the district court's factual findings are supported by trial testimony. See Supreme Court Rule 6.02(a)(4) (2015 Kan. Ct. R. Annot. 41) ("The court may presume that a factual statement made without a reference to volume and page number has no support in the record on appeal.") The Kansas Supreme Court has declined to address an appellant's argument when the appellant fails to "develop the record below or, at least, cite to the record." *State v. Reed,* 300 Kan. 494, 513, 332 P.3d 172 (2014).

The next requirement is that the brief contain an argument on each separate issue, starting with a citation to the appropriate standard of review and a reference to the location in the record where the issue was raised and ruled on below. Supreme Court Rule 6 .02(a)(5) (2015 Kan. Ct. R. Annot. 41). As stated previously, the Daweses' argument section only contains 4 issues. After each issue, the Daweses include a heading that states: "Standards of Review and Preservation of the Issue." This heading is followed by a paragraph that neither lists this court's standard of review nor shows that the Daweses preserved the issue by arguing it below. Clearly, the Daweses' brief fails to meet Rule 6.02(a)(5).

After the argument section, the Daweses' brief contains a public notice page from the January 7, 2014, Goodland Star–News giving notice of the Linins' lawsuit against the Daweses and five pages allegedly from a transcript of the hearing on the supersedeas bond. They do not suggest that the pages were submitted to the trial court or how they are relevant to the present case. The Daweses do not explain why these pages are in the brief. Merely including documents as an appendix to a brief does not make those documents part of the record that may be considered for appellate review. See *Romkes v. University of Kansas,* 49 Kan.App.2d 871, 886, 317 P.3d 124 (2014). Finally, there are then three pages titled: "Conclusion Closing Statement." In their conclusion, the Daweses twice argue that they rightly filed the caveat due to their God-given

unalienable right protected by the Second Amendment to the United States Constitution.

We recognize that the Daweses are representing themselves in this appeal—not an easy task for those untrained in law. Nevertheless, as has been stated before:

> " 'A pro se litigant in a civil case is required to follow the same rules of procedure and evidence which are binding upon a litigant who is represented by counsel. Our legal system cannot function on any basis other than equal treatment of all litigants. To have different rules for different classes of litigants is untenable. A party in civil litigation cannot expect the trial judge or an attorney for the other party to advise him or her of the law or court rules, or to see that his or her case is properly presented to the court. A pro se litigant in a civil case cannot be given either an advantage or a disadvantage solely because of proceeding pro se.' *Mangiaracina v. Gutierrez,* 11 Kan.App.2d 594, 595–96, 730 P.2d 1109 (1986)." *In re Estate of Broderick,* 34 Kan.App.2d 695, 701, 125 P.3d 564 (2005).

***5** We also recognize that, while we adhere to these rules, we may be flexible when enforcing them on a self-represented party if the party has demonstrated some semblance of compliance with the rules. However, the Daweses' failure to provide us with a complete record on appeal to review and file a brief that sufficiently complies with Supreme Court Rule 6.02 to assist us in that review, do not justify any flexibility here. See *Linin,* 2015 WL 1947452, at *4.

We will consider the one argument we can glean from the Daweses' brief contained in their conclusion section where they argue that they rightly filed the caveat due to their God-given unalienable right protected by the Second Amendment to the United States Constitution and that they filed the caveats to enforce their "2nd Amendment property rights."

The Second Amendment to the United States Constitution states: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." The Second Amendment does not say anything about people having a right to file caveats on previously-owned land that was taken away when they failed to pay their taxes.

Because of the deficiencies in the Daweses' brief, we cannot tell what the Daweses are challenging about the proceedings below. Their failure to adequately brief any issue precludes us from analyzing any claim of error regarding the district court's decision. We must affirm the district court's decision.

Attorney Fees

The Plaintiffs have moved for an assessment of their attorney fees on appeal against the Daweses pursuant to Supreme Court Rule 7.07(c) (2015 Kan. Ct. R. Annot. 72). In their motion seeking attorney fees of $1,200, the Plaintiffs succinctly state the reason for their request: "Appellee asks for attorney fees and costs because this appeal was frivolous." Regarding frivolous appeals, Supreme Court Rule 7.07(c) states:

> "If an appellate court finds that an appeal has been taken frivolously, or only for the purpose of harassment or delay, it may assess against the appellant or appellant's counsel, or both, the cost of reproduction of the appellee's brief and a reasonable attorney fee for the appellee's counsel. A motion for attorney fees under this subsection must comply with subsection (b)(2). If the motion is granted, the mandate must include a statement of the assessment, and execution may issue on the assessment as for any other judgment, or in an original case the clerk of the appellate courts may issue an execution." (2015 Kan. Ct. R. Annot. 72–73).

A frivolous appeal is an appeal that presents no justiciable question and is readily recognized as devoid of merit because it presents little prospect of success. *Peoples Nat'l Bank of Liberal v. Molz,* 239 Kan. 255, 257, 718 P.2d 306 (1986). The Plaintiffs argue that the Daweses' appeal was frivolous because the issues regarding property ownership have been decided by the United States District Court in *United States v. Dawes,* 344 F.Supp.2d 715, 718 (D.Kan.2004), which was affirmed by the Tenth Circuit Court of Appeals in *United States v. Dawes,* No. 04–3454, 2005 WL 3278027 (10th Cir.2005) (unpublished opinion), and noted by the Kansas Court of Appeals in *Linin,* 2015 WL 1947452. The Plaintiffs further argue that the Daweses failed to provide the court with a complete record to review the district court's decision, and the Daweses' brief failed to comply with Supreme Court Rule 6.02(a) because they did not cite to the record, provide a standard of review, or present any valid arguments to the court.

***6** The Daweses filed an objection to the Plaintiffs' fee motion, arguing that their appeal is not frivolous because it was timely filed and "[t]he issue of the ownership of the Fee Simple Freehold Absolute had never addressed [*sic*]." Additionally, the Daweses argue that the ruling in *Linin,* 2015 WL 1947452, does not apply to this court because it was dismissed due to their failure to timely appeal. While it is true that this court's ruling in *Linin,* 2015 WL 1947452, is not directly determinative of this case, it remains true that this appeal as filed by the Daweses is frivolous. Their objections to the fee requests reiterate their frivolous claim that they retain an interest in the property. That issue was long ago conclusively decided against them in the federal court case above cited and cited by the Plaintiffs in their motion. Their objections are without merit.

The Plaintiffs' motion for attorney fees was timely filed and properly supported by affidavits and time records as required by Supreme Court Rule 7.07(b) (2015 Kan. Ct. R. Annot. 72). The fees requested are consistent with the reasonableness factors detailed from Kansas Rules of Professional Conduct 1.5(a) (2015 Kan. Ct. R. Annot. 503). Even though the Daweses' claims on appeal were frivolous, the Plaintiffs needed to protect themselves by responding.

We determine that the Plaintiffs' fee request is reasonable, equitable, and properly justified. We sustain the Plaintiffs' motion for attorney fees and grant the Plaintiffs judgment against Donald W. Dawes and Phyllis C. Dawes jointly and severally in the total amount of $1,200.

Affirmed, and Plaintiffs' motion for attorney fees is granted.

All Citations

Slip Copy, 2015 WL 9591372 (Table)