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No. 114571

IN THE COURT OF APPEALS FOR THE STATE OF KANSAS

JONNI CULLISON, et al.,
Plaintiffs-Appellants,

v.

CITY OF SALINA, KANSAS
Defendant-Appellee,

BRIEF OF APPELLANTS JONNI CULLISON, et al.

APPEAL FROM THE DISTRICT COURT OF SALINE COUNTY, KANSAS
TWENTY-EIGHTH JUDICIAL DISTRICT
THE HONORABLE WILLIAM B. ELLIOTT, JUDGE
DISTRICT COURT CASE NO. 14CV55

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NATURE OF THE CASE

This is a dangerous premises case following the electrocution death of 12-year-old Jayden Hicks. Jayden was exposed to electricity from an in-ground electrical junction box on May 29, 2013 that was located on a public city sidewalk in downtown Salina, Kansas. The electrical junction box, owned and maintained by the City of Salina, provided electricity to the decorative street lights lining the east side of Santa Fe Avenue. The junction box housed the electrical connections for wires running from the City of Salina's circuit breaker (located in Campbell Plaza) to the Santa Fe Avenue decorative street lights.

The City had been aware that the wiring inside the junction box was in poor condition prior to Jayden's electrocution. On the day of the incident, one of the connecting wires had short circuited and was arcing against the inside of the box. This exposed electrical current to the entire junction box, which resulted in the metal lid to the junction box becoming electrically charged with lethal voltage each and every time the decorative street lights were illuminated. The short occurred because the electrical wiring was "outdated," in "poor condition," "problematic" and "deteriorating." The City was aware of these problems dating back to at least 2007.

After the accident, investigators also determined that the junction box did not have the ground wire that all applicable electrical safety standards and common practice require. The purpose of a ground wire is to prevent the very condition that killed Jayden Hicks. After Jayden's electrocution, the Master Electrician for the City admitted that before the accident "he knew there was no ground wire as they had not installed the ground." He further disclosed "…if they had installed the ground wire, every time there was a power surge, it would trip the breaker and all he would get done would be resetting the breaker." Thus, had the city properly grounded

the electrical junction box, the short circuit would have "tripped" the circuit breaker (cut off the supply of electricity) and immediately de-energized the box. This would have saved Jayden Hicks' life. The junction box and the electrical connections it housed had never been inspected by the City in the 27 years since their installation. Simple maintenance consisting of merely opening the junction box would have quickly identified the lack of the required electrical ground and the defective wiring.

Plaintiffs' claims address the City's failure to safely maintain the subject electrical circuit that provided power to the downtown decorative street lights.

ISSUES ON APPEAL

1. Whether the trial court erred in applying the recreational use immunity provision of the Kansas Tort Claims Act (KTCA) found in K.S.A. 75–6104(*o*) to the sidewalk where Jayden Hicks was electrocuted?
2. Whether the trial court erred in concluding that the evidence was not sufficient to show that the City of Salina's conduct was gross and wanton?
3. Whether the trial court erred in applying the recreational use exception because the exception does not immunize municipalities for injuries or death caused while conducting an inherently dangerous activity on public property?

STATEMENT OF FACTS

Santa Fe Avenue in Salina, Kansas runs north and south and has been the principal street running through the downtown district since the 1930s. (ROA, Vol. 3:786). There are numerous businesses located on the 100 block of Santa Fe Avenue, including but not limited to Coop's Pizzeria, Salina Running Co., Quilting Bee, Martinelli's Little Italy and S&P Coin Stamp and Jewelry. (ROA, Vol. 3:745-748). The city sidewalk provides means for walking to and from all businesses located on the 100 block of Santa Fe Avenue. (ROA, Vol. 3:745-751). The sidewalk also houses an electrical junction box. (ROA, Vol. 3:947, Appendix i). The electrical junction box houses the electrical connections for wires running from the city's circuit breaker that provide power to the decorative street lights on Santa Fe Avenue. (ROA, Vol. 3:942-943).

Campbell Plaza is also located in downtown Salina, Kansas. (ROA, Vol. 3:745-751). Campbell Plaza is an open-air, staged plaza between 129 and 131 on the east side of South Santa Fe Avenue, in front of Coop's Pizzeria. *Id.* Campbell Plaza was created during the "streetscape" upgrades in the 1980s. *Id.* The city circuit breaker is in Campbell plaza. (ROA, Vol. 3:994-995).

On December 31, 2013 Jayden Hicks died from an electric shock she received on May 29 of that same year originating from the electrical junction box located on the city sidewalk between Campbell Plaza and Santa Fe Avenue. (ROA, Vol. 3:752-756). One of the connecting wires had short circuited and was arcing against the inside of the box. (ROA, Vol. 3:942). This exposed electrical current to the entire junction box, which resulted in the metal lid to the junction box becoming electrically charged with lethal voltage each and every time the decorative street lights were illuminated. (ROA, Vol. 3:783). Witnesses found her lying in a puddle of water that covered the electrical junction box and sidewalk of Santa Fe Avenue.

(ROA, Vol. 3:752-754). First responders described that Jayden Hicks was found on the city sidewalk, 13 feet north of the south end of Campbell Plaza and approximately 15 feet east of Santa Fe Avenue. (ROA, Vol. 3:752-753).

The City knew the underground wiring for the decorative street lights was in poor condition prior to Jayden Hick's death. More than 5 years prior, on October 8, 2007, Michael Fraser, Director of Public Works for the City, wrote a memo to Jason Gage, City Manager, stating, "[T]he underground wiring for all the pedestrian lanterns is very old and problematic. How will painting the lanterns address this old underground wiring?" (ROA, Vol. 3:961-962). The wiring referenced in the October 2007 memo included the wiring contained in the subject electrical junction box. *Id.* Approximately eighteen months later on March 31, 2009, the City of Salina evaluated the downtown decorative lighting system. (ROA, Vol. 3:964-966). The City's March 31, 2009 memo stated: "The wiring and general condition of the electrical system is in fair to poor condition. The wiring has contributed to the recurring outages we experience in the downtown area. We have had to replace or repair some of the underground wiring to keep the lanterns operational." This memo also described the condition of the wiring as "Fair to Poor." *Id.*

In April 2009, the City received a Development of Lighting Recommendations Report from BWR Electrical Services[1], which found: "The existing lighting has been in place for over 20 years and electrical equipment (lamps, ballasts, wiring) will continue to deteriorate at an increasing rate." (ROA, Vol. 3:970) (emphasis added). Additionally, it stated, "The existing system has been in service for over 20 years and is reaching the end of its useful life." (ROA, Vol. 3:968-971). On February 23, 2010, Larry Stross, V.P. for BWR, emailed the City Manager

[1] BWR Electrical Services was the electrical contractor hired by the City of Salina to evaluate the downtown electrical circuits related to the decorative street lights.

stating, "[W]e will need to replace all existing wiring and conduit that is currently under the sidewalk." (ROA, Vol. 3:973). Again, this highlighted the problems with the downtown electrical wiring system. *Id.* In June 2010, the Final BWR Report and Recommendations again found that, "the existing lighting has been in place for over 20 years and electrical equipment (lamps, ballasts, wiring) will continue to deteriorate at an increasing rate." (ROA, Vol. 3:975-976). It also reiterates that the "existing system is reaching the end of its useful life." (ROA, Vol. 3:975-976).

On January 4, 2011, the City of Salina conducted a second evaluation of the downtown decorative lighting system. (ROA, Vol. 3:978-979). The City's January 4, 2011 memo downgraded the condition of the wiring to "Poor" from "Fair to Poor". This downgrade confirmed that the wiring was continuing to deteriorate just as the City had been warned. *Id.* Additionally, the City's January 4, 2011 memo stated: "The recurring maintenance problems we experience with our downtown lanterns may be contributed to the poor condition of the electrical connections and wiring. . ." *Id.* (emphasis added).

Michael Fraser, the Director of the Public Works Department, was ultimately responsible for the subject electrical circuit (subject wiring, electrical connections, conduit and junction box). (ROA, Vol. 3:984, 994). As of January 28, 2013, still four months prior to Jayden Hicks' electrocution, the City knew the decorative streetlights and the wiring had exceeded their rated life expectancy and was further aware that the electrical system had required significant maintenance over the preceding years[2]. (ROA, Vol. 3:988-989). Indeed, prior to Jayden Hicks death, the City had considered replacing the downtown electrical lighting system in part due to

[2] The City of Salina contracted with Johnson Controls to perform an investment grade audit of the downtown lighting system, and ultimately contracted with them to replace it. (ROA, Vol. 3:988).

concerns for the safety of the citizens. (ROA, Vol. 3:990). Yet despite notice of the potentially dangerous condition of the downtown decorative lighting system, the City did not replace the system due to cost. (ROA, Vol. 3:987-988, Deposition of Michael Fraser):

Q: And in response to the reports dated March 31st, 2009, and January 4th of 2011 where it's identified to the City that the wiring to the downtown decorative streetlights were in a poor to fair condition there was some discussion about trying to replace the wiring; correct?

A: That's correct.

Q: And I believe after a review of one of these documents that it was decided not to do it out of -- due to cost concerns; correct?

A: I think that would be -- I think that would be a fair statement.

Q: In the January of 2011 report the overall conclusion is that the downtown -- that "The recurring maintenance problems we experience with our downtown lanterns may be contributed to the poor condition of the electrical connections and wiring..." Did you read that?

A: Yes, sir.

Q: And that's knowledge the City had before this accident; correct?

A: That is correct.

(ROA, Vol. 3:987-988).

As of May 2013 the City was responsible for the safety, inspection and maintenance of the electrical wires that ran from the circuit breaker to the downtown decorative streetlights, which met in the subject junction box and the junction box itself. (ROA, Vol. 3:985-986).

However, the City neglected to maintain the lines and inspect or maintain the junction box for over 26 years. (ROA, Vol. 3:983-986, Deposition of Michael Fraser).

Q: And you agree that as -- the City of Salina as a provider of those electrical lines from the circuit breaker to the lights, that the City has a duty to maintain those lines safely; correct?

A: That's correct.

Q: And you agree that back in May of 2013 and before that, that the City had a responsibility to inspect and maintain those lines safely; correct?

A: I would assume that that would be the case.

(ROA, Vol. 3:983) (emphasis added).

Q: But certainly because those are City lines, the City had a responsibility at some point to inspect and maintain those lines; correct?

A: I would assume that that would be the case.

(ROA, Vol. 3:983) (emphasis added).

Q: And the electrical system that runs from the circuit breaker to the lights and between the lights is the responsibility of the City; correct?

A: Yeah, that's my understanding, is that because that's all part of the system that activates the lights is that the City has responsibility for that.

Q: And the City has an ongoing responsibility to provide maintenance to that electrical system; correct?

A: I would believe that would be correct.

Q: And the City's responsibility would also be to ensure that this electrical system that runs from the breaker to the decorative streetlights is Code compliant; correct?

A: I would believe that would be correct.

Q: And the City would have an ongoing duty to make sure that that system is Code compliant; correct?

A: I would believe that would be correct.

(ROA, Vol. 3:985-986).

Also as of May 2013, the City had responsibility to ensure that the subject electrical junction box complied with the National Electrical Code, which required a grounding wire. (ROA, Vol. 3:984). Yet despite repeated notice of problems and the overall poor condition of the downtown decorative lighting circuitry prior to the Jayden Hicks incident, the City did not inspect the lines between the circuit breaker and the downtown decorative street lights, including the subject junction box. (ROA, Vol. 3:988).

The City's Master Electrician, Steve Adams, began his employment with the City of Salina in 2009. (ROA, Vol. 3:1000-1001). His job responsibilities included inspecting, repairing and troubleshooting issues related to the downtown decorative streetlights. (ROA, Vol. 3:996-997, 1008-1009). Adams' job responsibilities further included assuring the City's compliance with City policies and building, health and safety codes applicable to the electrical trade, which includes the National Electrical Code. (ROA, Vol. 3:996-997, 1008-1009). The National Electrical Code required that the subject junction box be grounded. (ROA, Vol. 3:997).

Prior to the Jayden Hicks' electrocution, the City did not make its Master Electrician aware of the reports addressing the downtown decorative lighting system, including the March

31, 2009 and January 4, 2011 memos describing the system and wiring as "fair to poor" and "poor" respectively. (ROA, Vol. 3:998). The City's Master Electrician testified that if he had known about the March 31, 2009 and January 4, 2011 memos prior to May of 2013, he would have inspected the system, including, but not limited to, looking inside the subject electrical junction box. (ROA, Vol. 3:998). The following exchange took place regarding the City Electrician's review of the March 31, 2009 and January 4, 2011 memos during his deposition: (ROA, Vol. 3:1001, Deposition of Steve Adams).

Q: There's a report -- or an indication in this report of how many ballasts were changed on these lights. Can you find that portion of the report and read for the record how many ballasts were changed?

A: "Since 2005 we have had to replace seventy-eight ballasts."

Q: Does that seem like a lot of ballasts to you?

MR. NORDSTROM: Object to the form.

A: There's a lot of lights.

Q: A lot of lights. Do you know how many lights?

A: Off the top of my head, no, I do not.

Q: Can ballasts fail because of overcurrent problems?

A: Yes.

Q: As a master electrician would that cause you concern if you saw that many ballasts in that system being replaced?

A: Yes.

Q: Would that be indicative to you that there was something wrong with the entire wiring system in the downtown lighting system?

MR. NORDSTROM: Object to the form.

A: It would depend.

Q: Okay. But it would raise some questions for you?

A: Yes, it would raise questions.

Q: And as a master electrician what you would do is you'd go investigate, wouldn't you, because you told us that earlier in the deposition in response to questions by Mr. Rader?

A: That's correct.

Q: Do you remember that?

A: Yeah.

Q: Because those are the kinds of things that you're supposed to do when you see that information come across your desk or someone presented to you, "We've got an electrical problem, figure out what's doing this"?

MR. NORDSTROM: Object to the form.

Q: Is that a pretty much accurate statement that I just made?

A: Correct.

Q: And nobody did that?

A: Explain by nobody doing -- nobody coming to me and explaining to me –

Q: Yes, sir.

A: -- what they found, correct.

Q: Yes, sir. And certainly nobody did that before this tragic accident happened?

A: Correct.

(ROA, Vol. 3:1001).

Adams further testified that prior to Jayden Hicks' death, it was not his duty to inspect or maintain the downtown decorative street lights. (ROA, Vol. 3:995). Rather, he said that the public works department was responsible for inspection and maintenance of the downtown decorative street lights. (ROA, Vol. 3:995). However, the public works employees charged with responsibility for inspection and maintenance of the downtown decorative street lights were not electricians. (ROA, Vol. 3:1002-1003). From 2005 -2011, the City had to re-wire portions of the downtown underground wiring on 10 – 20 occasions, replace 118 ballasts and 657 light bulbs (ROA, Vol. 3: 1001, 1016-1022). This maintenance record further confirmed the extremely poor condition of the underground electrical wiring. (ROA, Vol. 3: 1001, 1016-1022).

Although disclaiming any responsibility to inspect the underground circuitry, following Jayden Hicks' electrocution the City's Master Electrician admitted that he knew prior to the accident that there was no ground wire present in the electrical junction box. (ROA, Vol. 3:943, 1012). He explained his failure to act by stating that if they had installed the ground wire, every time there was a power surge it would trip the breaker and all he would get done would be resetting the breaker. (ROA, Vol. 3:943, 1012). He agreed that the lack of ground in the junction box violated the National Electrical Code ("NEC"). (ROA, Vol. 3:997).

After Jayden Hicks was electrocuted, on August 5, 2013 Michael Fraser authored a Request for City Commission Action where he reported, "[D]ue to the age and life cycle status of the existing underground wiring as discussed in the final **2009** BWR Downtown Lighting Report and a recent lighting system evaluation by City staff, staff has re-evaluated the replacement of the existing underground wiring." (ROA, Vol. 3:1014).

Fraser further testified:

> Q: But certainly with the information you've been provided in Exhibits 8, 10 and 11 (*2009 and 2011 Jim Teutsch memos discussed above that pre-dated the accident)*, one of the reasons why you wanted to update the system was for the safety of the citizens; correct?
>
> A: I would say yes. I mean, I – I would think that yes, that the idea – the replacement of the system is that we wanted a system that was safe, that is correct, that is correct.
>
> Q: And the changes to that system, despite knowing about the concerns dating back to 2009, didn't occur until after May of 2013, correct?
>
> A: Yes.

(ROA, Vol. 3:990) (emphasis added).

Plaintiffs also retained an electrical engineering expert witness, John Palmer PhD, P.E., C.F.E.I, who reviewed the design plans for the accident scene, blueprints, investigative reports, photographs, and performed two separate inspections regarding the accident scene and subject junction box. (See ROA, Vol. 3:1024, Affidavit of John A. Palmer). Mr. Palmer offered the opinion that the City of Salina's negligence regarding their control, maintenance and management of the subject electrical junction box was gross and wanton and the cause of Jayden Hick's death. *Id.*

On September 28, 2015, the District Court entered summary judgment for the defendant. (ROA, Vol. 4:1111-1116). The trial court found that the City of Salina is immune from responsibility pursuant to K.S.A. 75–6104(o), the recreational use exception to liability under the Kansas Tort Claims Act, and that prior to the incident the City did not have notice of a dangerous

condition to support a claim for gross and wanton conduct. *Id.* However, the trial court's order does not address the comments made by the Master Electrician for the City regarding his pre-existing knowledge that there was no ground wire in the subject junction box. *Id.*

ARGUMENTS AND AUTHORITIES

1. Standard of Review for Summary Judgment.

On appeal from a grant of summary judgment, when there is no factual dispute, the standard of review is de novo. *Kuckhausen v. Tillman Partners, L.P.*, 291 Kan. 314, 318, 241 P.3d 75, 80 (2010). In evaluating the propriety of summary judgment, the Court of Appeals applies the same principles as the trial court and, where reasonable minds could differ as to the conclusions drawn from the evidence, summary judgment must be denied. *Estate of Draper v. Bank of America, N.A.*, 288 Kan. 510, 517, 205 P.3d 698 (2009).

Summary judgment is appropriate only where the record reflects there is an absence of a genuine dispute regarding the material facts and the movant is entitled to judgment as a matter of law. *Kuckhausen v. Tillman Partners, L.P.*, 291 Kan. 314, 318, 241 P.3d 75, 80 (2010). The trial court is required to resolve all facts and inferences which may be reasonably drawn from the evidence in favor of the party against whom summary judgment is sought. *Estate of Brodbeck v. James*, 22 Kan.App.2d 229, 235, 915 P.2d 145 (1996). Further, a trial court may not pass on credibility or balance and weigh evidence on a summary judgment motion. *Kaplinger v. Carter*, 9 Kan.App.2d 287, 293, 676 P.2d 1300 (1984).

The issue of the presence or absence of negligence in any degree, including gross and wanton, should be left for determination by the trier of fact. *Gruhin v. City of Overland Park*, 17 Kan. App. 2d 388, 392, 836 P.2d 1222, 1225 (1992). Only when reasonable persons could not reach differing conclusions from the same evidence may the issue be decided as a question of law. *Id.*, citing *Smith v. Union Pacific Railroad Co.*, 222 Kan. 303, 306, 564 P.2d 514 (1977).

II. The trial court erroneously applied the recreational use immunity provision of the Kansas Tort Claims Act (KTCA) found in K.S.A. 75–6104(o) to the sidewalk where Jayden Hicks was electrocuted.

Under the KTCA, governmental liability is the rule and immunity is the exception. *Jackson ex rel. Essien v. Unified Sch. Dist. 259, Sedgwick Cnty.*, 268 Kan. 319, 322, 995 P.2d 844, 847 (2000). "In order to avoid liability, the governmental entity has the burden of proving that it falls within one of the enumerated exceptions found in K.S.A. 75–6104." *Id.* The trial court ruled as a matter of law that the "recreational use" immunity provision set forth in K.S.A. 75-6104 (o) barred plaintiffs' claims despite the fact that Jayden Hicks suffered injury on a sidewalk serving downtown Salina rather than on a recreational use area. That provision states:

> A governmental entity or employee acting within the scope of the employee's employment shall not be liable for damages resulting from:
>
> (o) any claim for injuries resulting from the use of any public property intended or permitted to be used as a park, playground or open area for recreational purposes, unless the governmental entity or an employee thereof is guilty of gross and wanton negligence proximately causing such injury.

§ 75-6104(o).

In order for a location to fall within the recreational use exception found in K.S.A. 75–6104(o), the location must be intended or permitted to be used for recreational purposes. *Jackson*, 995 P.2d at 849. However, when the recreational use of the property in question is only "incidental" to the property's overall use, plaintiffs can assert a claim for simple negligence. *Wilson v. Kansas State Univ.*, 273 Kan. 584, 44 P.3d 454 (2002). Thus, immunity under the recreational use provision depends on the character of the property in question, not the activity

performed on the property when the injury occurs. *Jackson*, 995 P.2d at 851.[3] Accordingly, this case turns on whether the sidewalk on which Jayden was electrocuted is intended or permitted to be used for recreational purposes, or whether any recreational use of the sidewalk is incidental to the sidewalk's overall purpose.

Campbell Plaza was designed for recreational purposes. However, the trial court erred in applying the recreational use immunity provision of the Kansas Tort Claims Act (KTCA) to Plaintiffs' claims because Jayden Hicks was not injured in Campbell Plaza.[4] Rather, Jayden Hicks sustained injury on a sidewalk; and "main street" type sidewalks are not intended for recreational purposes. To the contrary, sidewalks provide a means of ingress and egress to the various businesses, restaurants and establishments that exist in a downtown landscape. The fact that a sidewalk may also incidentally provide access to a recreational use area is not sufficient to turn the sidewalk into a recreational use area itself. To do so would give rise to a circumstance in which the exception (immunity for injury sustained on a recreational use area) would completely swallow the rule (governmental liability for its negligence). In other words, characterizing the sidewalks and parking lots in downtown Salina, from which pedestrians can access Campbell Plaza, as comprising a single recreational area use would effectively immunize the entire Salina downtown district. Nothing within § 75–6104(o) suggests the legislature intended this exception to be so broad.

Indeed, Plaintiffs are aware of no Kansas case applying 75–6104(o) to a public sidewalk serving a business district such as the property at issue in this case. However, the Illinois Court of Appeals addressed this question in *Batson v. Pinckneyville Elementary Sch. Dist. #50*, 294 Ill.

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[3] Therefore, it is irrelevant that Jayden Hicks was "playing" with friends at the time of the injury. The issue involves the character of the property and not the activity being performed. *Jackson*, 995 P.2d at 851.

[4] Thus, it is also irrelevant that Jayden Hicks was briefly in Campbell Plaza prior to the injury.

App. 3d 832, 690 N.E.2d 1077 (1998) (ROA, Vol. 3:951-955). In *Batson*, a craft fair patron sued a school district for injuries she sustained in a fall on the sidewalk outside the gymnasium in which the fair was held. 294 Ill. App. 3d 832, 690 N.E.2d 1077 (1998). The Illinois Court of Appeals held that a genuine issue of fact remained as to whether the sidewalk was part of the school's "recreational property", which precluded summary judgment. *Id.* In it analysis, the court stated:

> Viewing recreational school areas, together with adjacent sidewalks and parking lots, as comprising a single recreational area would effectively immunize all school property, contrary to the purpose of section 3-106. Although this sidewalk is near the playground and gymnasium, we nonetheless consider it a parcel of property separate from those two entities for purposes of section 3-106. … Because we consider the subject portion of the sidewalk to be outside both the gymnasium enclosure and the playground area, the determination of the independent character of the sidewalk portion involved will control. *Id.* at 1081.

In conducting its analysis, the court noted the lack of physical indication from the sidewalk, such as painted markings, from which to glean recreational intent. *Id.* The court determined that the evidence showing the school allowed students to use the sidewalk for an occasional game of hide and seek or ball-tossing was insufficient to give rise to recreational use immunity. *Id.* Further, the court stated: "We believe that providing blanket immunity to any public property where recreation has ever been permitted is an absurd and unjust result not contemplated by the legislature." *Id.*; *see also Larson v. City of Chicago*, 142 Ill. App. 3d 81, 491 N.E.2d 165 (1986) (holding that public sidewalk in residential neighborhood was not "public property intended or permitted to be used as a park, playground or open area for recreational

purposes" within meaning of the Governmental Tort Immunity Act) (ROA, Vol. 3:956-959). It is important to note that the Kansas Supreme Court concluded that *Batson*, along with other Illinois cases, are persuasive because Illinois and Kansas have similar "recreational use" exceptions. *Jackson*, 268 Kan. 319, 327, 995 P.2d 844, 850 (2000) (citing *Batson v. Pinckneyville Elem. Sch. Dist.*, 294 Ill.App.3d 832, 229 Ill. Dec. 30, 690 N.E.2d 1077 (1998) at 329).

The cases principally relied upon by the City and trial court address the separate issue of whether injuries sustained on property adjoining a recreational facility are exempt from liability under K.S.A. 75–6104(*o*)[5]. All of the cases are distinguishable because they address injuries sustained on property the primary purpose of which was to access recreational sports facilities. The sidewalk in this case though was not designed specifically to access the Campbell Plaza. This is evidenced by the fact that the sidewalk and electrical junction box predated the Campbell plaza by some 20 years. (ROA, Vol. 3:745-751). Rather, the sidewalk promotes the use of all commercial businesses, buildings and areas, all of which are primarily non-recreational, within the Salina downtown district. The fact that the City subsequently chose to build a recreational plaza adjacent to its existing city sidewalk does not transform that sidewalk into recreational use property.

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[5] *Wilson v. Kansas State Univ.*, 273 Kan. 584, 44 P.3d 454 (2002) (injury in football stadium restroom); *Nichols v. Unified Sch. Dist. No. 400*, 246 Kan. 93, 785 P.2d 986 (1990) (injury while running across "grassy swale" from football practice field to locker room); *Dye v. Shawnee Mission School Dist.*, 2008 WL 2369847 (Kan. Ct. App. June 6, 2008) (unpublished) (injury on grassy area between soccer field and parking lot); *Robison v. State*, 30 Kan. App. 2d 476, 43 P.3d 821 (2002) (injury in hallway between swimming pool and locker room); *Stone ex rel. Stone v. City of La Cygne*, 88,996, 2003 WL 1961969 (Kan. Ct. App. Apr. 11, 2003) (injury in public swimming pool shed); *Poston v. Unified Sch. Dist. No. 387, Altoona-Midway, Wilson Cnty.*, 286 Kan. 809, 189 P.3d 517 (2008) (injury in school's commons leading to basketball practice in gymnasium).

Similarly *Wilson v. Kansas State Univ.* does not support the entry of summary judgment in this case. In *Wilson*, the Kansas Supreme Court held that immunity under the recreational use exception of the KTCA extends to restrooms integral to public property intended or permitted to be used as a park, playground, or open area for recreational purposes. 273 Kan. 584, 44 P.3d 454 (2002). The plaintiff in *Wilson* alleged that she was injured while sitting on a toilet seat at a Kansas State University football game. *Id.* The Supreme Court concluded that while restrooms independently have a non-recreational usage, they serve no purpose but for the recreational nature of the public property, and thus, they are "necessarily" connected to the property by plan, rather than being "incidentally" connected. *Id.* at 590. Had Jayden Hicks been electrocuted in a restroom specifically designed for the patrons of Campbell Plaza, the recreational use exception may very well apply. But unlike the restrooms in *Wilson*, the sidewalk at issue in the present case serves other businesses and buildings that are proprietary in nature and not recreational. In other words, the sidewalk provides only a minimal or "incidental" recreational purpose by allowing access to Campbell Plaza. This is insufficient to give rise to recreational use immunity.

Additionally, immunizing a municipality for maintaining a dangerous electrical condition underneath a "main street" style sidewalk does nothing to further the purpose underlying the recreational use exception. The purpose of the exception is to encourage the development and maintenance of parks, playgrounds, and other recreational areas. *Jackson*, 268 Kan. at 330, 995 P.2d at 851. However, when it comes to the development of sidewalks, and more importantly the potentially lethal electrical equipment that sometimes resides beneath them, the government must be encouraged to both design and maintain such property safely. Immunizing the City for its gross negligence in maintaining an electrical junction box underneath its main street sidewalk will not deter the city for developing parks, playgrounds and other recreational areas.

III. The trial court erroneously concluded that evidence was insufficient to submit a claim against the City of Salina for gross and wanton negligence.

Plaintiffs dispute that the recreational use immunity provision of the KTCA is applicable to the sidewalk where Jayden Hicks suffered a fatal electrical shock. If the Court agrees, it need read no further. However, if the Court determines that Jayden Hicks' injury occurred on recreational use property, there is sufficient evidence from which a jury could conclude that the City acted with gross and wanton negligence, which conduct would strip the City of any immunity afforded under the recreational use exception. § 75-6104 (o). *See Byers v. Hesston Appliance, Inc.*, 212 Kan. 125, 125, 509 P.2d 1151, 1152 (1973) (holding defendant's failure to ground an electrical control box or communicate the lack of ground to constitute wanton conduct). In *Byers*, the plaintiff widow brought suit to recover for the wrongful death of a lessee who was electrocuted when he took hold of a 'breaker,' switch handle, in an electric control box. *Id.* Plaintiff claimed that the defendant attached the control box without grounding the box and without telling the lessee that the box was not grounded. *Id.* Plaintiff alleged that the defendant's conduct constituted both simple negligence and wanton conduct. *Id.* at 126, 1153. The Supreme Court noted that because electricity is extremely lethal and well known for its capacity to inflict death or injury, that judicial note may well be taken of its dangerous propensities. *Id.* at 129, 1155. Further, the Court stated, "those who are wont to deal with such a dangerous agency for their own advantage, either in the installation or repair of facilities which transmit or employ electric power, may be said to rest under a similar legal obligation to exercise the utmost care in the pursuit of their trade." *Byers v. Hesston Appliance, Inc.*, 212 Kan. 125, 129, 509 P.2d 1151, 1155 (1973).

A wanton act is something more than ordinary negligence but less than a willful act; it indicates a realization of the imminence of danger and a reckless disregard and indifference for

the consequences. *Gruhin v. City of Overland Park*, 17 Kan. App. 2d 388, 836 P.2d 1222 (1992). Acts of omission (i.e. the decision to not place a ground wire) can be wanton since reckless disregard and indifference are characterized by failure to act when action is necessary to prevent injury. *Id.* Additionally, several acts of negligence, which separately may not amount to gross negligence, when combined may have a cumulative effect showing a form of reckless behavior or total disregard for another's safety. The Kansas Supreme Court recognizes that the cumulative effect of several negligent acts can be sufficient to constitute gross and wanton conduct in *Howse v. Weinrich*, 133 Kan. 132, 298 P. 766, 766 (1931).

> It is not permissible to segregate the various acts of defendant and treat each one separately, as if it were all that occurred. Defendant did not simply drive at a high rate of speed. He drove down a steep incline at a high rate of speed. He did this with a defective tire, likely to collapse and create a crisis in the management of the car. When the foreseeable crisis did occur, he used the brakes in a manner almost certain to increase unmanageability. Each act bore a relation to the others, and the cumulative effect was injury to plaintiff. *Id.*

Likewise, in *Reeves v. Carlson*, 266 Kan. 310, 969 P.2d 252 (1998), the Kansas Supreme Court affirmed a punitive damage award against an intoxicated driver. In finding the conduct to be gross and wanton, the court focused on the cumulative effect of the driver's actions. First, the court said "Carlson kept his eyes on the rearview mirror instead of on the road ahead;" As a result, "he approached the 'T' intersection at 35 mph, oblivious to the requirement to stop until it was too late." Additionally, the court said: "Carlson admitted at trial that because of his intoxicated state, he failed to compensate for the wet road conditions and the 500-gallon steel sewage tank in the back of the truck." *Id.*

This Court in *Deaver* recently clarified the two-prong test for gross and wanton negligence in the context of the recreational use exception:

> In order to show gross and wanton negligence, a plaintiff must demonstrate "something more than ordinary negligence but less than a willful act. [Wantonness] indicates a realization of the imminence of danger and a reckless disregard and indifference for the consequences." *Gruhin,* 17 Kan.App.2d at 392, 836 P.2d 1222. **To avoid summary judgment, a plaintiff must show reasonable persons could disagree based on the facts that a defendant had knowledge of existing conditions that would probably cause injury to another, yet acted, or refused to act, with reckless disregard as to whether that injury would occur**. See *Reeves v. Carlson,* 266 Kan. 310, 314, 969 P.2d 252 (1998) (keys to finding of gross and wanton negligence are knowledge of dangerous condition and indifference to consequences). *Deaver v. Bd. of Cnty. Comm'rs of Lyon Cnty.*, 342 P.3d 970 (Kan. Ct. App. 2015) (emphasis added).

Regarding the first prong, the defendant's knowledge of the danger may be actual or constructive and can be established through either direct or circumstantial evidence. *Id.*, citing *Wagner v. Live Nation Motor Sports, Inc.*, 586 F.3d 1237, 1244–45 (10th Cir.2009). Regarding the second prong, the Kansas Supreme Court has explained that "a token effort to prevent [harmful consequences] would not avoid liability under this [prong], while definite acts which materially lessen the chances of [those consequences] would avoid liability." *Id.*, citing *Friesen v. Chicago, Rock Island & Pacific Rld.*, 215 Kan. 316, 323, 524 P.2d 1141 (1974). Courts still apply this preventive-measures approach today. See *Wagner,* 586 F.3d at 1247.

As a general rule, the presence or absence of negligence in any degree is not subject to determination by the court on summary judgment, for such a determination should be left to the trier of fact. *Gruhin v. City of Overland Park*, 17 Kan. App. 2d 388, 392, 836 P.2d 1222, 1225 (1992). Only when reasonable persons could not reach differing conclusions from the same evidence may the issue be decided as a question of law. *Id.* at 392, *citing Smith v. Union Pacific Railroad Co.*, 222 Kan. 303, 306, 564 P.2d 514 (1977). Here, the trial court made a factual determination that the City did not have notice of a dangerous condition. However, there is conflicting evidence on this point. Reasonable persons could certainly disagree as to whether the City knew or should have known of the risk and danger created by its failure to inspect or maintain the subject electrical system.

Notably, the City's Master Electrician, Steve Adams, admitted that he knew prior to this incident that the subject junction box was not grounded and did not comply with the well-known, mandatory safety codes.[6] Adams further admitted that if the City had simply installed a ground wire (a cheap and easy fix), every time there was a power surge the breaker would trip and prevent deadly electricity from energizing the lid of the box that was exposed to the sidewalk, and therefore, the public. The fact that the City's Master Electrician knew there was no ground wire but did nothing about it would permit a jury to find that the City had notice of a dangerous condition and chose to do nothing about it until it was too late.

But this is not the only evidence from a jury could reach this conclusion. It is common knowledge that old, outdated, deteriorating wiring carrying large voltages of electricity is

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[6] The City's Master Electrician job responsibilities included assuring the City's compliance with City policies and building, health and safety codes applicable to the electrical trade, which includes the National Electrical Code. (ROA, Vol. 3:996-997, 1008-1009). The National Electrical Code required that the subject junction box be grounded. (ROA, Vol. 3:997).

dangerous. The record showed the City did absolutely nothing to inspect or maintain the subject electrical system[7], despite knowing since 2007 (over six years prior to the Jayden Hicks incident) that there were problems presenting danger. Additionally, the City ignored multiple red flags, of which it was aware, regarding the dangerous electrical circuit beginning as early as in 2007. These include:

1) An October 8, 2007 memo from Director of Public Works to the City Manager (ROA, Vol. 3:961-962) (need to say what it states)
2) A March 31, 2009 memo from Operation Manager to Director of Public Works (ROA, Vol. 3:964-966) (same)
3) The April 2009 BWR Development of Lighting Recommendation Report (ROA, Vol. 3:968-971) (same)
4) A February 23, 2010 e-mail from BWR to City Manager (ROA, Vol. 3:973) (same)
5) A June 2010 Final BWR Report (ROA, Vol. 3:975-976) (same)
6) A January 4, 2011 memo from Operations Manager to Director of Public Works (ROA, Vol. 3:978-979) (same)

Despite this notice, the City chose not to inspect or remedy the system due to the cost. In fact, if the City did not have the funds to properly maintain and repair the system, employees simply could have turned off the decorative street lights as there were other non-decorative street lights lining the sidewalk of Santa Fe Street. The combination of the City's ongoing choice to ignore

[7] Even though the City attempted to limit the focus of the analysis on the junction box itself, it was the dangerous "**electrical circuit**" that necessitated the ground and ultimately caused Jayden Hicks to be electrocuted. The electrical circuit encompasses everything from the City's breaker box, to the wires, the junction box, and the lights. The condition of the electrical circuit goes to the very heart of the cause of this accident.

the problems with the electrical circuit have a cumulative effect from which a jury could easily find a reckless, total disregard for the safety of the Salina general public, including Jayden Hicks.

Even the City's Master Electrician admitted that the information contained in the March 31, 2009 and January 4, 2011 memos was concerning and warranted further investigation. (ROA, Vol. 3:998). The City's failure to provide such information to Mr. Adams and its related to decision to allow public works employees with no electrical training to maintain the system goes beyond the scope of ordinary negligence. Tragically, Mr. Adams testified that if he had been provided with any of this information before the accident, he would have inspected the subject wiring and junction box:

Q: Prior to the date of this accident, had you seen any reports where Johnson Control identifies problems within the City's electrical system?

A: No, sir.

Q: Prior to the date of this accident, had you seen any reports whatsoever that in any way addressed the downtown electrical lighting system?

A: No, sir.

(ROA, Vol. 3:997-998, Adams, Pg. 48, ln. 22 – Pg. 49, ln. 5)

Q: The lines that are discussed in these reports are the electrical service lines that provide electricity to the downtown decorative lighting; okay? That's part of the reports. Those reports indicate that those lines were in poor to fair condition and that they were outdated; okay? Had you have known that in May of 2013 or had you had known that prior to May of 2013, would you have made any attempt to at least inspect those lines?

A: If I had known about these reports?

Q: Yes, sir.

A: Yes, I would have.

Q: And would that inspection have included looking inside this junction box?

A: Yes.

(ROA, Vol. 3: 998, Adams, Pg. 50, ln. 13 – Pg. 51, ln. 5)

Adams also testified that the City did not notify him of the significant number of ballasts being replaced in the downtown lighting system, and if he had known he would have suspected a problem.

Q: Can ballasts fail because of overcurrent problems?

A: Yes.

Q: As a master electrician, would that cause you concern if you saw that many ballasts in that system being replaced?

A: Yes.

Q: Would that be indicative to you that there was something wrong with the entire wiring system in the downtown lighting system?

A: It would depend.

Q: But it would raise some questions for you?

A: Yes, it would raise questions.

Q: And as a master electrician what you would do is you'd go investigate, wouldn't you, because you told us that earlier in the deposition in response to questions by Mr. Rader?

A: That's correct.

Q: Because those are the kinds of things that you're supposed to do when you see that information come across your desk or someone presented to you, "We've got an electrical problem, figure out what's doing this"? Is that pretty much an accurate statement that I just made?

A: Correct.

Q: And nobody did that?

A: Explain by nobody doing -- nobody coming to me and explaining to me --

Q: Yes, sir.

A: -- what they found, correct?

Q: Yes, sir. And certainly nobody did that before this tragic accident happened?

A: Correct.

(ROA, Vol. 3:1001, Adams, Pg. 111, ln. 10 – Pg. 112, ln. 23)

Had this junction box been opened or inspected in any manner prior to this tragedy, the lack of the necessary ground wire and poor condition of the wiring would have been timely discovered. After merely opening the lid and visually inspecting the junction box, accident investigators were quickly able to identify the lack of the ground wire and the short in the electrical wiring. (ROA, Vol. 3:943).

Thus, aside from the fact that Adams knew there was no ground wire in the electrical junction box, the City's choice not to communicate the fact that the downtown electrical wiring had deteriorated into a dangerous condition to the very person who had ultimate responsibility and expertise regarding the City's electrical services shows a conscious disregard for the safety of the Salina public. It was only after Jayden Hick's death by electrocution that Michael Fraser authored a Request for City Commission Action on August 5, 2013 in which he reported, "[D]ue

to the age and life cycle status of the existing underground wiring as discussed in the final 2009 BWR Downtown Lighting Report and a recent lighting system evaluation by City staff, staff has re-evaluated the replacement of the existing underground wiring." (ROA, Vol. 3:1014). This response, however, was too late.

Regarding the second prong, indifference to the potential consequences of a dangerous condition, the evidence in the record shows the City took zero preventative measures to lessen the chances of injury from its aging and deteriorating electrical lighting system. Despite knowing that the system wires had deteriorated and that the junction box was not grounded, the City took no preventative measures to protect its citizens from danger, including Jayden Hicks. The City had both actual and constructive knowledge of danger and took absolutely no steps to prevent harmful consequences.

Plaintiffs' claims of "gross and wanton negligence" against the City are also supported by expert testimony. Plaintiffs' expert, John Palmer holds a Ph.D. in Electric Power Engineering, Maters in Engineering in Electric Power Engineering and a B.S. in Electrical Engineering. He is also a registered Professional Engineer and an adjunct instructor at the University of Utah in the Electrical Engineering Department. Dr. Palmer reviewed the design plans for the accident scene, blueprints, investigative reports, photographs, in addition to performing two (2) separate sight inspections and inspections regarding the subject junction box. He opined *via* affidavit that the City of Salina was not only negligent, but also showed gross and wanton negligence regarding their control, maintenance and management of the subject electrical junction box and such negligence and gross/wanton negligence proximately caused Jayden Hick's injury. (See ROA, Vol. 3:1024, Affidavit of John A. Palmer, PH.D., P.E., C.F.E.I.).

Because the jury could find from the evidence that the City acted with gross and wanton negligence in disregarding the dangers associated with the subject junction box and wiring system, the trial court erred in determining as a matter of law that the recreational use immunity exception applies.

IV. The trial court erred in applying the recreational use exception because the exception does not immunize municipalities for injuries or death caused while conducting an inherently dangerous activity on public property.

The Kansas Supreme Court characterizes certain instrumentalities such as explosives, gas distribution systems, ***electrical transmission lines*** and firearms as inherently dangerous *Long v. Turk*, 265 Kan. 855, 860-61, 962 P.2d 1093, 1097 (1998) (emphasis added), *citing Cope v. Kansas Power & Light Co.*, 192 Kan. 755, 391 P.2d 107 (1964) (a high voltage wire); *Sternbock v. Consolidated Gas Utilities Corp.*, 151 Kan. 81, 98 P.2d 162 (1940) (gas leaking from a utility's lines); *Clark v. E.I. Dupont De Nemours Powder Co.*, 94 Kan. 268, 146 P. 320 (1915) (solidified glycerin explosive); *Byers v. Hesston Appliance, Inc.*, 212 Kan. 125, 125, 509 P.2d 1151, 1152 (1973) (holding defendant's failure to ground electrical control box or communicate the lack of ground constituted wanton conduct). Likewise, an inherently dangerous activity is one in which the danger so inheres in the activity so as to require special precautions to be taken to prevent injury. See generally, 65 C.J.S. Negligence § 169, at 503-506, n. 19 (2010). With respect to such instrumentalities and activities, "[t]he care required is always reasonable care. This standard never varies, but the care which it is reasonable to require of the actor varies with the danger involved in his act, and is proportionate to it. The greater the danger, the greater the care which must be exercised." *Long v. Turk*, 265 Kan. 855, 861, 962 P.2d 1093 (1998) (quoting with approval, Restatement (Second) of Torts § 298, Comment b (1964)). When inherently dangerous activities are at issue, the necessary degree of care is often referred to as "the highest

degree of care" or the "utmost care." 65 C.J.S. *supra* at § 169. This requires the exercise of "all the care and diligence possible in the nature of the case; such degree of care as would be exercised by a very careful, prudent, and competent person under the same or similar circumstances." *Id.* at § 112, p. 423.

The Kansas Supreme Court has recognized that the provision of electricity is unquestionably an inherently dangerous activity:

> By any standard, electricity has been a tremendous boon to mankind generally. Modern man, snug in his civilized society, has become fearfully dependent on its beneficence, as any stout fellow will loudly proclaim once his current has been cut off. However, this fundamental entity or phenomenon of nature is fraught with a vast potential of hazard to the careless and the unwary. So lethal is its charge and so well known its capacity for inflicting death or injury that judicial note may well be taken of its dangerous propensities. This court has frequently spoken of the high degree of care required of those who generate and supply electric power. *Byers*., 212 Kan. 125, 129, 509 P.2d 1151, 1155 (1973).

Plaintiffs have been unable to identify a case in Kansas or any other jurisdiction determining whether a governmental body may shield itself with immunity for negligence while engaged in an inherently dangerous activity. However, the standard to be applied to a governmental entity that chooses to conduct an inherently dangerous activity, and place inherently dangerous instrumentalities in public areas where pedestrians may encounter them, should be same standard the law would apply to a private person.

The language of the KTCA supports this conclusion. Under the KTCA, liability is to be the rule and immunity the exception. Immunity is further unavailable where the conduct at issue

amounts to gross and wanton negligence. § 75-6104. In the absence of specific legislative intent to the contrary, there is no justification to suggest it was ever intended the government would be shielded from immunity for injuries or death caused while conducting an inherently dangerous activity on public property.

This Court recognized the appeal of such an interpretation in *Deaver v. Bd. of Cty. Comm'rs of Lyon Cty.*, 342 P.3d 970 (Kan. Ct. App. 2015). In *Deaver*, the plaintiffs filed a wrongful death claim against The Board of County Commissioners of Lyon County, Kansas and The Lyon County Fairboard over the death of their daughter, who was killed at the Lyon County Mud--A--Thon when a racing vehicle left the track and landed on her, causing fatal injuries. The defendants filed motions for summary judgment based on the recreational use exception in the KTCA, which the trial court granted. Finding there were genuine issues of material fact that precluded summary judgment, the Court of Appeals reversed and remanded the case. Specifically, the Court concluded that reasonable minds could differ on whether the City's preventative measures materially lessened a spectator's chance of injury, and held that the district court erred by finding that the defendant's actions did not constitute gross and wanton negligence as a matter of law. *Id.* In its opinion, the Court noted that the Deavers argued:

> …the legislature never intended the government to be shielded from liability for injuries or death to its citizens caused by an inherently dangerous activity conducted by the government on public property. They claim caselaw has expanded the recreational use exception beyond its intended purpose and has made government immunity the rule and liability the exception. We acknowledge some amenability to this argument, but unfortunately, the Deavers did not proffer such an argument before the district court….

Id. at * 7.

While this Court in *Deaver* declined to decide this issue based upon the failure to preserve the issue before the district court, the plaintiffs in this case properly raised the issue below. And while Plaintiffs acknowledge the precedent for broad application of the recreational use exception, plaintiffs respectfully assert that appellate decisions have expanded the recreational use exception well beyond its intended purpose. Indeed, decisions interpreting the exception have failed to tailor the liability of governmental entities to that of private parties. See generally, William E. Westerbeke, *The Immunity Provisions in the Kansas Tort Claims Act: The First Twenty-Five Years*, 52 U. Kan. L. Rev. 939 (2004). Because electricity is inherently dangerous, and because the law requires heightened care in its safekeeping, plaintiffs ask the Court to do so here. *See Long v. Turk*, 265 Kan. 855, 860-61, 962 P.2d 1093, 1097 (1998) (citing *Cope v. Kansas Power & Light Co.*, 192 Kan. 755, 391 P.2d 107 (1964) (involving a high voltage wire).

V. CONCLUSION

Wherefore, Plaintiffs-Appellants pray this Court for its Order reversing the trial court's entry of summary judgment and remanding this case for a trial on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was filed with the Court by electronic filing, and a copy delivered by U.S. Mail, on the 30th day of November, 2015, addressed as follows:

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EXHIBIT

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