

No. 114571

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

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JONNI CULLISON, et al.,

Plaintiffs/Appellants,

v.

CITY OF SALINA, KANSAS,

Defendant/Appellee.

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BRIEF OF APPELLEE

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APPEAL FROM THE DISTRICT COURT OF  
SALINE COUNTY, KANSAS  
THE HONORABLE WILLIAM B. ELLIOTT  
DISTRICT COURT CASE NO. 14 CV 55

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**ORAL ARGUMENT REQUESTED**

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## NATURE OF THE CASE

This case involves the electrocution of a minor girl, Jayden Hicks, while she was playing in a designated recreational use area, Campbell Plaza, in downtown Salina, Kansas. Appellants brought a wrongful death claim against Appellee, the City of Salina, Kansas, alleging the City negligently installed and maintained the junction box that electrocuted Hicks. The City of Salina moved for summary judgment pursuant to K.S.A. 75-6104(o). The district court entered an order granting the City's motion for summary judgment, which is the basis for Appellants' present appeal.

## STATEMENT OF THE ISSUES

- I. The district court correctly held that Appellants' claims were barred by K.S.A. 75-6104(o).**
- II. The district court correctly held that Appellants failed to present evidence of gross and wanton conduct.**
- III. The district court did not err in applying recreational use immunity to an electrical junction box.**

## STATEMENT OF FACTS

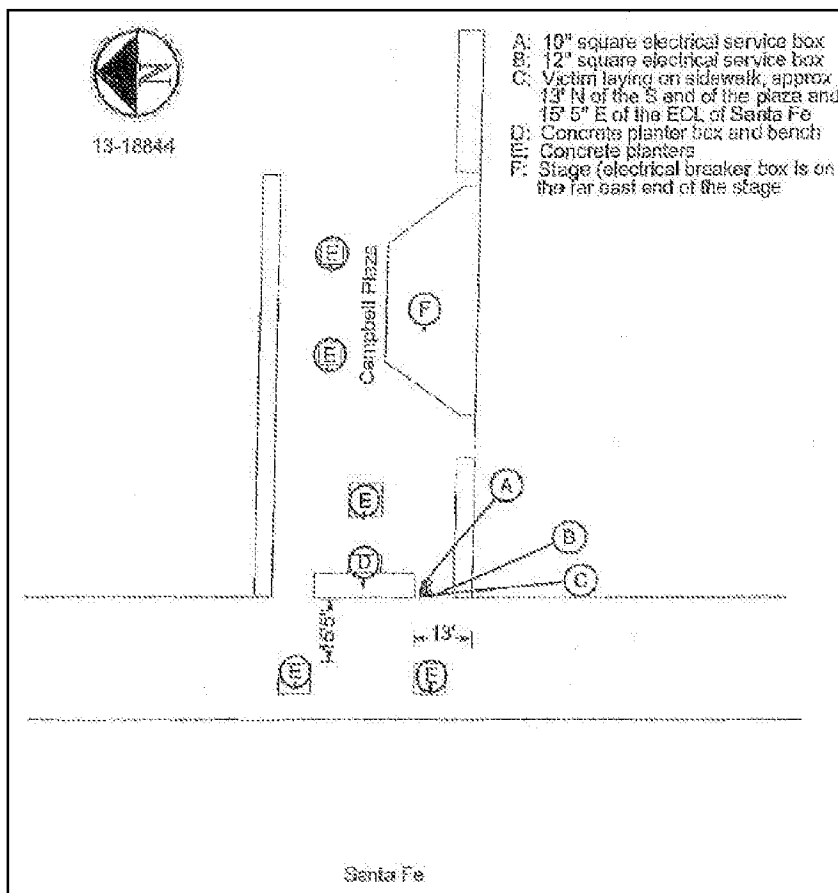
The facts of this tragic accident are generally undisputed. Sante Fe Avenue is a north-south street that runs through the City of Salina's downtown district. (Brief of Appellants, p. 9). Campbell Plaza is an open-area, staged plaza on the east side of south Sante Fe Avenue. (R. Vol. 3, p. 785). Campbell Plaza was created in the 1980s, and is used by the public for varying recreational events such as concerts, the creation of art murals, visits with Santa Claus, and a meeting point for charity races. (R. Vol. 1, p. 209-216; R. Vol. 3, p. 785).

On May 29, 2013, 12-year-old Jayden Hicks was playing with her two siblings and two friends in and around Campbell Plaza. (R. Vol. 3, p. 782-783). While playing,

Hicks slipped in a puddle of rain water and landed on the metal lid to a junction box. (R. Vol. 3, p. 783). At the time Hicks came into contact with the lid, it was or became electrically charged. (R. Vol. 3, p. 783). As a result, when Hicks came into contact with it, she received a severe electrical shock. (R. Vol. 3, p. 784). Emergency personnel eventually pulled Hicks away from the junction box, placed her in an ambulance, and transported her to Salina Regional Health Center. (R. Vol. 3, p. 784). On December 31, 2013, Hicks passed away as a result of her injuries. (R. Vol. 3, p. 784).

The layout of Campbell Plaza is critical to disposition of this appeal. Between the sidewalk on Sante Fe Avenue and the entrance to Campbell Plaza, there is a concrete planter box and bench that contains outlets for use within the plaza. (R. Vol. 3, p. 752, 783, 823). Because the planter box blocks ingress and egress, citizens can enter the plaza either north of the planter (left, in the diagram below) or just south (right on the diagram below), where the junction box at issue is located. (R. Vol. 3, p. 752, 823). The City of Salina Police Department's drawing of accident shows the general layout of the plaza:





(R. Vol. 3, p. 752).

The location of the junction box is static and thus cannot be the basis of any reasonable dispute. The photograph attached to Appellants' brief (R. Vol. 3, Appendix i) accurately identifies the junction box's location. The box routes electricity from a breaker box inside Campbell Plaza to its intended sources, including decorative street lights both in Campbell Plaza and on Santa Fe Avenue. (R. Vol. 3, p. 912).<sup>1</sup> The concrete area that houses the junction box predates Campbell Plaza by more than thirty (30) years. (R. Vol. 3, p. 785). The box itself was installed by independent contractors in 1987, and is owned and maintained by the City of Salina. (R. Vol. 3, p. 784). Since its

<sup>1</sup>An example of the decorative lighting in Campbell Plaza can be found at R. Vol 3, p. 876.

installation in 1987, the junction box has undisputedly never been opened. (R. Vol. 3, p. 784).

Dion Louthan, the Director of Parks and Recreation for the City of Salina, was asked about the demarcation between Campbell Plaza and the sidewalk, and testified that for maintenance purposes, the City considered everything “at least from the planters in” to be part of Campbell Plaza. (R. Vol. 3, p. 818; Louthan depo. 20:17-21:2). Louthan was also asked about Schuessler Deposition Exhibit 8 (R. Vol. 3, p. 823), included below:



Louthan testified:

“Q: Okay. And so these two boxes that we’re looking at in Exhibit 8 are the Westar box, which is closer to the planter, and the city box, which is farther away from the planter?

A: I believe that’s correct, yes.

...

Q: Okay. Now, I notice that there’s brickwork to the right of the picture. Do you see that?

A: I do.

Q: There’s - - looks like a patch of sort of a concrete strip in which these two boxes are located; is that right?

...

A: Yes.

Q: Okay. And then to the - - what would be the left side or the west side and sort of running on a straight line with the edge of the planter is more brickwork?

A: Correct.

Q: What’s the sidewalk and what’s the plaza?

A: Certainly my interpretation would be anything that is inside of this is in the plaza, but I think you could classify that all your in-and-out is going to occur from the sidewalk into the plaza as well. So the - all of that space to me, to a degree, would be considered part of what we are maintaining hardscapes on.”

Q: Okay. Now you were mentioning the western edge of this south planter as being a demarcation of the plaza?

A: Yes.

Q: Would that also include a straight line and would take in also those two boxes?

A: Yes. And I don’t know that we got specific enough in our maintenance. I mean, we cleaned certainly outside and inside - -

Q: Right.

A: - - that, but I think - -

Q: Sure.

A: -- that a fair demarcation - -

Q: Right.

A: - - with regard to that - - the west side of that being inside the plaza.”

(R. Vol. 3, p. 819; Louthan depo. 60:8-62:7).

There is no evidence that the City of Salina ever received any report or notice indicating the underground electrical wiring in or near Campbell Plaza was dangerous or

posed an immediate harm. Appellants' recitation of the various reports regarding the City's decorative lights mischaracterizes the record that was before the district court. For example, although Appellants have accurately quoted the October 8, 2007 memorandum, they have failed to address city manager Jason Gage's uncontroverted testimony regarding the memo:

“Q: What do you remember being told about the underground wiring?”

A: Well, I remember more about what was in the final report than I do being told prior to that, but I believe the - - again, you'd had the report, but I believe my recollection of that report is basically the same, it's old, they recommended that we ought to consider at least changing it. **I don't ever recall any communication or conversation about an unsafe situation.**”

(R. Vol. 3, p. 862) (emphasis added).

Although Appellants have accurately quoted the April 2009 BWR Report, the report does not mention or discuss any safety concern regarding the electrical wiring system. In fact, one of the possible courses of action the report identifies is:

“Do nothing. Maintain the existing lighting system as it is. The age of the existing street lighting, and pedestrian lighting, poles and fixtures will cause the amount of maintenance required to increase. 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.”

(R. Vol. 3, p. 970).

Despite Appellants' attempt to characterize the February 23, 2010 e-mail from BWR to the City as “highlight[ing] the problems with the downtown electrical wiring system,” the record does not support that claim. While it is true that Stoss's e-mail states “We will need to replace all existing wiring and conduit that is currently under the sidewalk,” that statement was made in the context of what would occur if the City adopted BWR's proposal to replace the system with new LED lighting fixtures. (R. Vol.

3, p. 973). Stoss's e-mail does not mention any problem with the existing system, much less a safety problem.

Likewise, although Appellants claim the January 4, 2011 memorandum from Jim Teutsch to Mike Fraser "downgrades" the condition of the entire electrical lighting system, the report is prefaced by the explanation that the report is an evaluation of the City's lanterns, as opposed to the entire electrical wiring system. (R. Vol. 3, p. 978). The part of the report referring to the wiring states: "The connections and wiring **from the ballasts** (located at the base of the lantern) **to the luminaires** are in poor condition, which contributes to the recurring outages we experience." *Id.* (emphasis added). The January 4, 2011 report (1) does not evaluate the entire lighting system, and (2) does not identify any safety issue with the lighting system.

Appellants' brief suggests the City considered replacing its lighting system "due to safety concerns" but "despite notice of the potentially dangerous condition of the downtown lighting system, the City did not replace the system due to cost." Brief of Appellants, p. 12. These allegations misconstrue the record. Although Fraser did testify that one of the reasons the City was considering updating the lighting system was that it wanted a system that was safe, his testimony does not establish the current system was not safe. (R. Vol. 3, p. 990, Fraser Depo. 89:10-18). Likewise, while the quoted portion of Fraser's deposition reflects that the City did not replace its lighting system due to cost considerations, it does not reflect "notice of [a] potentially dangerous condition." To the contrary, Fraser simply acknowledged that as of January 4, 2011, the City was aware that the maintenance problems regarding the lanterns "may be contributed [sic] to the poor

condition of the electrical connections and wiring . . . .” (R. Vol. 3, p. 990, Fraser depo. 81:12-25).

Appellants’ claim that that the City’s master electrician knew prior to the accident that the junction box was not grounded is equally without merit. The junction box was installed in 1987 and was not opened from that time until after this incident. (R. Vol. 3, 784, 919). It is undisputed that Mr. Adams was not employed by the City at the time the junction box was installed. (R. Vol. 4, p. 1060; Adams Deposition 71:7-18). Thus, Adams plainly cannot have had personal knowledge as to the contentions of the junction box prior to this accident. Moreover, Adams testified that during his inspect *after* the accident, he made the logical conclusion that there must not have been a ground wire because if there had been, “it would have tripped the breaker and we would have known about a problem a long time ago, or whenever [a short] would have happened.” (R. Vol. 3, p. 828; Adams depo. 36:1-5).

Finally, although Appellants attempt to establish culpability by pointing out that the City re-evaluated replacing the electrical lighting system after Hicks’ injury, any evidence regarding subsequent remedial measures is unquestionably inadmissible and cannot create an issue of fact capable of defeating summary judgment. *See* K.S.A. 60-451.

## **ARGUMENTS AND AUTHORITIES**

### **Standards of Review**

The standard of review on summary judgment is as follows:

“Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The trial court is required to resolve all facts and inferences which may reasonably

be drawn from the evidence in favor of the party against whom the ruling is sought. When opposing a motion for summary judgment, an adverse party must come forward with evidence to establish a dispute as to a material fact. In order to preclude summary judgment, the facts subject to the dispute must be material to the conclusive issues in the case.”

*Shamberg, Johnson & Bergman, Chtd. v. Oliver*, 289 Kan. 891, 900, 220 P.3d 333 (2009).

On appeal of a summary judgment proceeding, appellate courts apply the same standard; where reasonable minds could differ as to the conclusion drawn from the evidence, summary judgment must be denied. *Drouhard-Nordhus v. Rosenquist*, 301 Kan. 618, 622, 345 P.3d 281 (2015).

**I. The district court correctly held that Appellants’ claims were barred by K.S.A. 75-6104(o).**

The Kansas Tort Claims Act (“KTCA”) governs the liability of the State, municipalities, and other governmental entities. K.S.A. 75-6103. The City of Salina is a governmental entity subject to the provisions of the KTCA. *See* K.S.A. 75-6102(b),(c). Under the KTCA, liability is the rule and immunity is the exception. *Carpenter v. Johnson*, 231 Kan. 783, 784, 649 P.2d 400 (1982). K.S.A. 75–6104 provides a number of exceptions to liability. Once established, an exception raises a complete jurisdictional bar to the claim. *Carpenter*, 231 Kan. at 786; *Lamb v. State*, 33 Kan.App.2d 843, 851-52, 109 P.3d 1265 (2005). Whether the City of Salina is immune from liability under the provisions of the KTCA is a question of law and subject to this Court’s unlimited review. *See Soto v. City of Bonner Springs*, 291 Kan. 73, 78, 238 P.3d 278 (2010).

The KTCA exception relied on by the City and the district court, referred to as the “recreational use exception,” provides that governmental entities are immune from liability for damages for “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 . . . .” K.S.A. 75-6104(o).

K.S.A. 75-6104(o) “is to be broadly applied to accomplish the legislative purpose of the exception.” *Poston v. U.S.D. No. 387, Altoona-Midway, Wilson Cnty.*, 286 Kan.

809, 812, 189 P.3d 517 (2008). The Kansas Supreme Court has explained:

“The purpose of K.S.A. 75–6104(o) is to provide immunity to a governmental entity when it might normally be liable for damages which are the result of ordinary negligence. This encourages governmental entities to build recreational facilities for the benefit of the public without fear that they will be unable to fund them because of the high cost of litigation. The benefit to the public is enormous. The public benefits from having facilities in which to play such recreational activities as basketball, softball, or football, often at a minimal cost and sometimes at no cost. The public benefits from having a place to meet with others in its community . . . .”

*Jackson v. U.S.D. 259, Sedgwick Cnty.*, 268 Kan. 319, 331, 995 P.2d 844 (2000); *see*

*also, Lane v. Atchison Heritage Conf. Ctr.*, 283 Kan. 439, 445, 153 P.3d 541 (2007)

(“[T]his court has repeatedly held that [K.S.A. 75-6104(o)] . . . should be read broadly, and Kansas courts should not impose additional hurdles to immunity that are not specifically contained in the statute.”).

To qualify for recreational use immunity, a property must be (1) intended or permitted to be used (2) as a park, playground, or open area (3) for recreational use.

*Poston*, 286 Kan. at 813. “Recreation,” means “refreshment of strength after toil,

diversion, or play.” *Id.* (citing *Jackson*, 268 Kan. at 330). K.S.A. 75-6104(o) has been

applied to a variety of properties, ranging from indoor spaces designed for performances

to a large hill. *See Lane*, 283 Kan. at 445 (area used in the past for weddings, dances,

theater events, and concerts was recreational); *Tullis v. Pittsburg State Univ.*, 28

Kan.App.2d 347, 350-51, 16 P.3d 971 (2000) (discussing that indoor and outdoor open



spaces with designated areas for performance are recreational); *Boaldin v. Univ. of Kan.*, 242 Kan. 288, 294, 747 P.2d 811 (1987) (applying K.S.A. 75-6104(o) to Daisy Hill, used by students at the University of Kansas for sledding).

There is no dispute that Campbell Plaza is intended or permitted to be used as a park or open area that hosts public events such as concerts and visits with Santa Claus. In fact, Appellants do not dispute that Campbell Plaza was designed for recreational purposes. Brief of Appellants, p. 22 (“Campbell Plaza was designed for recreational purposes”). Nonetheless, Appellants raise several challenges to the district court’s application of K.S.A. 75-6104(o). None are meritorious. The district court correctly held that Appellants’ claims are barred by K.S.A. 75-6104(o), and its ruling should be affirmed.

a. The junction box is located in Campbell Plaza.

Appellants first argue the district court erred because the junction box is not in Campbell Plaza, but rather on the sidewalk just outside the plaza. Brief of Appellants, p. 22. From this premise, Appellants argue that if K.S.A. 75-6104(o) is found applicable, Pandora’s box will be opened and governmental entities will be immune from suit for all claims related to injuries on any sidewalk or parking lot that eventually leads to a recreational facility. The fundamental problem with this argument is that Appellants’ only basis for suggesting the junction box is not in Campbell Plaza is their own *ipse dixit*.

The junction box’s physical location is static and not subject to any genuine dispute. The City agrees that the photograph attached to Appellants’ brief (R. Vol. 3, Appendix i) accurately depicts the junction box’s location. However, as part of its motion for summary judgment, the City presented evidence from Dion Louthan, the

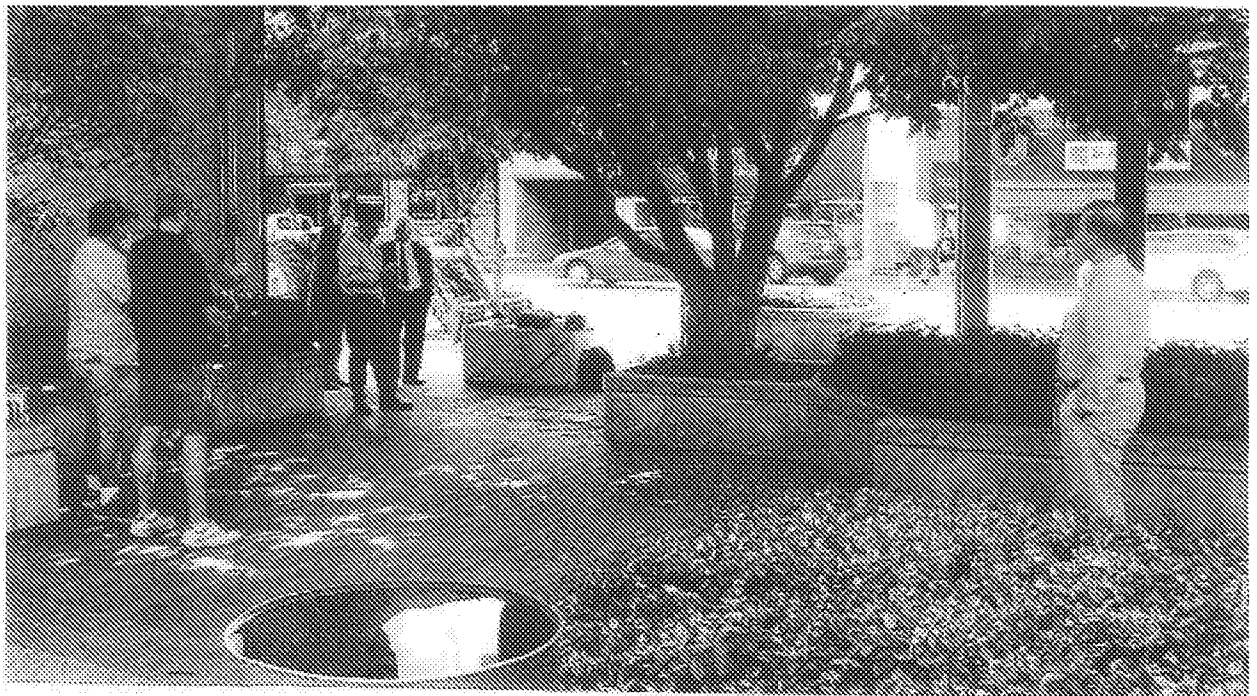
Director of Parks and Recreation for the City of Salina, that established the junction box is part of Campbell Plaza. (R. Vol. 3, p. 783, 818). In their response in opposition (R. Vol. 3, p. 919), Appellants attempted to controvert Louthan's testimony with three photographs of the junction box (R. Vol. 3, p. 754-756) and an excerpt from the Salina Police Department's incident report (R. Vol. 3, p. 752-753). *See* R. Vol. 3, p. 919, Response to DSOF ¶¶ 25-27. The photographs that Appellants cited are as follows:



(R. Vol. 3 p. 754)



(R. Vol. 3 p. 755)



(R. Vol. 3 p. 756).

In response to a motion for summary judgment, the nonmovant must “actively come forward with something of evidentiary value to establish a disputed material fact.”

*Hare v. Wendler*, 263 Kan. 434, 444, 949 P.2d 1141 (1997). “Evidentiary value” means “a document or testimony must be probative of [the nonmovant’s] position on a material issue of fact.” *Id.*; *see also*, Kan. Sup. Ct. Rule 141(b). The City acknowledges that Appellants cited the above-referenced photographs in an attempt to controvert Louthan’s testimony. However, while these pictures do show where the junction box is located, they are not probative of whether that location is inside or outside of Campbell Plaza. Likewise, the measurements in the incident report are immaterial to where Campbell Plaza starts or stops, or whether the junction box was in the plaza.

Although Appellants apparently disagree with Louthan’s testimony, they have not identified any evidence that is inconsistent or contrary to that testimony. The parties agree the City is immune from negligence claims based on injuries that occur in Campbell Plaza. Because there is no evidence from which a reasonable trier of fact could have concluded the junction box is outside of Campbell Plaza, the district court correctly held that Appellee was entitled to summary judgment, and its order should be affirmed.

b. The junction box is integral or necessary to Campbell Plaza.

The City of Salina is also entitled to summary judgment because the area where Hicks was injured is necessary or integral to Campbell Plaza, regardless of whether the junction box is actually within the confines of the plaza itself. A brief overview of Kansas caselaw on this issue is helpful. In *Nichols v. U.S.D. 400*, 246 Kan. 93, 97, 785 P.2d 986 (1990), the Kansas Supreme Court held that K.S.A. 75-6104(o) barred a plaintiff’s claim for injuries occurring on a “grassy swale” or waterway between a practice field and locker room. The court has subsequently summarized *Nichols* as follows: “School districts are not liable for injuries which are the result of ordinary

negligence and which occur on or near a football playing field.” *Jackson ex rel. Essien v. U.S.D. 259, Sedgwick Cnty.*, 268 Kan. 319, 324, 995 P.2d 844 (2000) (emphasis added).

In *Robison v. State*, 30 Kan.App.2d 476, 43 P.3d 821 (2002), a plaintiff sued the State of Kansas after falling in a hallway between a swimming pool and locker room. Although the plaintiff argued the hallway was not used for recreational purposes, the Court of Appeals disagreed, citing *Nichols* in support of its conclusion that “[t]he Kansas Supreme Court has already rejected this argument when it applied the KTCA recreational statute to injuries occurring on the way from a practice field to the locker room.” 30 Kan.App.2d at 479.

In *Wilson v. Kansas State Univ.*, 273 Kan. 584, 44 P.3d 454 (2002), perhaps the seminal case on the issue, a plaintiff sued Kansas State University after receiving chemical burns from a toilet seat in a football stadium restroom. On appeal, the Kansas Supreme Court concluded:

“The restrooms are part of the stadium. The restrooms allow people to continue enjoying the recreational purposes provided by the football games at the stadium without leaving. Likewise, the usefulness of the park is increased and the legislative purpose is advanced. As the trial court in this case noted, the restrooms are ‘an integral part of a football stadium.’ To the extent the legislature intended to encourage the building of recreational facilities with K.S.A. 75–6104(o), extending immunity to cover negligent acts in restrooms is consistent with the legislative intent because such extension further increases the incentive to build recreational facilities.”

*Wilson*, 273 Kan. at 589 (emphasis added).

In *Poston v. U.S.D. No. 387, Altoona-Midway, Wilson Cty.*, 286 Kan. 809, 189 P.3d 517 (2008), a plaintiff sued U.S.D. 387 after a door bracket in a middle school commons area came loose and hit him in the head. The district court held that K.S.A. 75-

6104(o) barred the claim, relying on *Robison* and *Wilson* (discussed *supra*). *See Poston*, 286 Kan. at 809. On appeal, the plaintiff attempted to distinguish *Wilson*, arguing the restroom in *Wilson* had been *inside* the stadium, whereas his injuries occurred *outside* of the adjacent gymnasium. *See id.* at 816. The Kansas Supreme Court rejected this argument, explaining that *Wilson* relied on *Nichols* “extending immunity when injuries ‘occur on *or near* a football playing field.’” *Id.* (quoting *Wilson*, 273 Kan. at 591) (emphasis in original).

The plaintiff also argued that *Wilson* was inapplicable because K-State’s football stadium and restroom were solely intended for recreational use, whereas the commons area’s primary purposes were student dining and providing access to other areas of the school, making any recreational use “merely incidental.” *See id.* Again, the court disagreed, citing *Lane v. Atchison Heritage Conf. Ctr.*, 283 Kan. 439, 447, 153 P.3d 541 (2007). In *Lane*, the Court of Appeals held that K.S.A. 75-6104(o) did not apply because a conference center’s recreational use was “incidental” to its primary use as a source of economic development. 283 Kan. at 447. The Kansas Supreme Court reversed, noting that “a particular facility must be viewed collectively to determine whether it is used for recreational purposes” and “[u]nder this reasoning, the court in *Wilson* held that the restrooms at Kansas State University’s football stadium, although not in and of themselves recreational, were immune from liability because they were ‘necessarily connected’ to property that had a recreational use.” *Lane*, 283 Kan. at 446. “[T]he correct test to be applied under [K.S.A. 75-6104(o)] is “‘whether the property has been used for recreational purposes in the past or whether recreation has been encouraged.’” *Id.* at 447 (quoting *Jackson*, 268 Kan. at 330).

Based on *Wilson* and *Lane*, the court in *Poston* affirmed the district court's decision, holding:

“Although the commons was not used exclusively for recreational use, it was an integral part of the use of the gymnasium. Like the restrooms, the use of the commons to serve concessions allowed patrons to enjoy the recreational events conducted in the gymnasium. Additionally, ticket sales were integral to the public being invited into the gymnasium for many of the events. Moreover, the commons was not incidentally connected to the gymnasium but was necessarily connected by plan as a principal means for the public to gain physical access to the gym, to purchase a ticket to gain entry, and to purchase concessions for enjoyment during the event . . . Also, extending immunity is consistent with the legislative intent underlying the exceptions. A school would be discouraged from opening a gymnasium for recreational use if liability attached to injuries incurred in an area that is an integral part of the gymnasium's recreational use.

...

[W]hile the commons' primary use may have been nonrecreational, during recreational use of the gymnasium the commons has a recreational use integrally tied to the gymnasium—to provide refreshments and tickets to the patrons at the sporting events in the gymnasium. The use is undisputed. And, although the commons provided access to several different educational areas of the school, it provided the public with access to the gymnasium. As such, the commons was connected to the gymnasium by plan and was an integral part of the recreational use of the gymnasium and its recreational use was more than incidental. Therefore, U.S.D. No. 387 is immune from liability under the recreational use exception of K.S.A.2007 Supp. 75–6104(o) for Poston's injury that occurred in the middle school's commons while recreational activities were in progress in the gymnasium.”

*Poston*, 286 Kan. at 815-16, 819 (internal citations omitted).

The above-cited cases (*Nichols*, *Jackson*, *Wilson*, and *Poston*, among others) make clear that Kansas law does not require an injury to occur inside a recreational facility in order for recreational use immunity to apply. *Poston*, 286 Kan. at 816; *Wilson*, 273 Kan. at 591; *see also*, *Dye v. Shawnee Mission Sch. Dist.*, 2008 WL 2369847 (Kan. Ct. App. 2008) (unpublished) (applying recreational use immunity to claim for injuries in

a grassy area *near* a soccer field).<sup>2</sup> Although Appellants suggest the district court’s ruling will “swallow” the general rule of liability, that position is far-fetched. The area where Hicks was injured is not blocks from Campbell Plaza. Rather, like the commons area in *Poston*, the area in question is undisputedly, if not in the plaza, at least adjacent to and bounded by the plaza. The Court’s focus has always been on whether the area in question is (1) “in” or “near” the recreational facility, and (2) “integral” or “necessary” to a facility. *See, e.g., Poston*, 286 Kan. at 819. Because the area in question plainly meets this criteria, there is no basis for Appellants to believe the court’s holding would also apply to the entirety of the sidewalk running along Sante Fe Street or, for that matter, any other location that is simply in the general area of the plaza. The district court’s ruling simply does not carry the wide-ranging impact Appellants suggest.

Appellants attempt to frame the issue as “whether any recreational use of the sidewalk is incidental to the sidewalk’s overall purpose.” Brief of Appellant, p. 22 (emphasis added). This analysis purposely seeks the answer to the wrong question. The actual issue before the Court is whether the location where Hicks was injured is “necessary” or “integral” to Campbell Plaza, and whether the recreational use of the facility, collectively, is “more than incidental.” *Poston*, 286 Kan. at 818-819 (viewing

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<sup>2</sup>Appellants cite to *Batson v. Pinckneyville Elementary Sch. Dist. #50*, 690 N.E.2d 1077 (1998) as persuasive authority. In *Batson*, the Illinois Court of Appeals held that Illinois’ recreational use immunity statute did not “afford immunity to a nonrecreational structure, even though the structure might be useful to a recreational public property, unless that structure is *within* the recreational property.” 690 N.E.2d at 1080 (emphasis in original). However, in addition to being contrary to binding Kansas precedent on this issue, Illinois has subsequently distanced itself from *Batson*. For example, in a subsequent decision, *Callaghan v. Vill. of Clarendon Hills*, 929 N.E.2d 61 (2010), the Illinois Court of Appeals held that recreational use immunity *did* apply to a sidewalk that led to a nearby public park. Although the plaintiff in *Callaghan* cited *Batson*, the court clarified that that Illinois’ recreational use immunity does apply to properties bounded to recreational facilities and “does not require that the property . . . be within the boundaries of the recreational property.” 929 N.E.2d at 71 (emphasis added).



the commons area and gymnasium collectively to determine recreational purpose); *see also*, *Lane*, 283 Kan. at 447 (applying recreational use immunity to loading dock outside of a conference center).

As discussed *supra*, in *Poston*, the Kansas Supreme Court held that a commons area that provided access to a recreational facility, and facilitated concessions and ticket sales, was immune from suit. *See* 286 Kan. at 819. Similarly, in *Stone v. City of La Cygne*, 2003 WL 1961969 (Kan. Ct. App. April 11, 2003) (unpublished), the Court of Appeals held that a pool shed that housed cleaning chemicals and equipment was integral to a public swimming pool. 2003 WL 1961969 at \*2; *see also*, *Lane*, 283 Kan. at 452 (applying recreational use immunity to loading dock outside of recreational conference center); *Wilson*, 273 Kan. at 589 (restroom held to be an integral part of football stadium). Like these ancillary facilities, there is no dispute that the area housing the junction box was a primary means of ingress and egress into Campbell Plaza. There is likewise no dispute that the junction box provided electricity to the planters and decorative lighting in the plaza, which in turn facilitated the plaza's use at night. *Poston* and *Stone* make clear that such uses are "integral" or "necessary" to Campbell Plaza. Although Appellants argue the above-cited cases are distinguishable because they "address injuries sustained on property the primary purpose of which was to access recreational sports facilities," (Brief of Appellant, p. 24) even a cursory review of the areas in question in *Poston* (commons area primarily used for student dining), *Stone* (pool chemical shed), and *Lane* (loading dock outside of a conference center) reveals that Appellants are incorrect.

Appellants next suggest that K.S.A. 75-6104(o) is inapplicable because unlike *Wilson* and the other above-cited cases, the area housing the junction box was not specifically designed for Campbell Plaza. This argument, while factually accurate, is also irrelevant. There is no dispute that Campbell Plaza existed on the date of Appellants' injury, or that the junction box served Campbell Plaza on that date. Moreover, there is no requirement that the area be specifically designed for or contemporaneous with a recreational facility. *See, e.g., Nichols*, 246 Kan. at 97 (applying recreational use immunity to a "grassy swale" or waterway between a practice field and locker room); *Dye*, 2008 WL 2369847 (applying recreational use immunity to claim for injuries in a grassy area between soccer field and parking lot). Appellants cite no caselaw to the contrary. *See McCain Foods USA, Inc. v. Central Processors, Inc.*, 275 Kan. 1, 15, 61 P.3d 68 (2002) ("A litigant who fails to press a point by supporting it with pertinent authority, or by showing why it is sound despite a lack of supporting authority or in the face of contrary authority, forfeits the point."). Requiring all recreational facilities to have specifically designed ancillary support facilities would be cost prohibitive and would discourage governmental entities from building recreational facilities. Further, the Kansas Supreme Court has "has repeatedly held that . . . Kansas courts should not impose additional hurdles to [recreational use] immunity that are not specifically contained in the statute." *Lane*, 283 Kan. at 445.

Finally, despite Appellants' suggestions to the contrary, the district court's decision is entirely consistent with the underlying purpose of K.S.A. 75-6104(o), which is to "encourage[] governmental entities to build recreational facilities for the benefit of the public without fear that they will be unable to fund them because of the high cost of

litigation.” *Jackson*, 268 Kan. at 331. In *Poston*, the court noted: “[E]xtending immunity is consistent with the legislative intent underlying the exceptions. A school would be discouraged from opening a gymnasium for recreational use if liability attached to injuries incurred in an area that is an integral part of the gymnasium’s recreational use.” 286 Kan. at 815-16. The same logic rings true here. Municipalities would be discouraged from making areas such as Campbell Plaza open and available to the public at night if doing so exposed them to liability. K.S.A. 75-6104(o) is plainly meant to encourage, rather than discourage, the city from making its facility available. *See Lane*, 283 Kan. at 445 (“[T]his court has repeatedly held that [K.S.A. 75-6104(o)] . . . should be read broadly, and Kansas courts should not impose additional hurdles to immunity that are not specifically contained in the statute.”).

The area where Jayden Hicks was injured is an integral part of the recreational use of Campbell Plaza, and the recreational use of the facility, collectively, is more than incidental. The district court correctly held that the City of Salina is immune from liability under the recreational use exception of K.S.A. 75-6101(o), and its ruling should be upheld.

**II. The district court correctly held that Appellants failed to present evidence of gross and wanton conduct.**

Although the City acknowledges that K.S.A. 75-6104(o) does not provide governmental entities with immunity from liability for gross and wanton negligence, the district court correctly held that plaintiffs failed to present evidence from which a trier of fact could find gross and wanton negligence in this case.

Gross and wanton conduct is not a degree of negligence. *Muhn v. Schell*, 196 Kan. 713, 715-16, 413 P.2d 997 (1966). The mental attitude of the wrongdoer, rather

than a particular negligent act, establishes wantonness. *Friesen v. Chicago, Rock Island and Pacific Railroad*, 215 Kan. 316, 323, 524 P.2d 1141 (1974). The Kansas Supreme Court has explained:

“[A]t least two attitudes must be present. There must be realization of imminent danger and reckless disregard, indifference and unconcern for probable consequences.”

*Muhn*, 196 Kan. at 716. “Without knowledge of a dangerous condition, indifference to the consequences does not become a consideration.” *Lanning By & Through Lanning v. Anderson*, 22 Kan.App.2d 474, 481, 921 P.2d 813 (1996). The issue of whether there is sufficient evidence upon which a reasonable jury could base a finding of gross and wanton conduct is a question of law. *Vaughn v. Murrey*, 214 Kan. 456, 459-60, 521 P.2d 262 (1974).

In their brief, Appellants raise three areas from which they contended a trier of fact could have found the City’s conduct to be gross and wanton: (1) reports about the City’s lighting system; (2) testimony from the City’s master electrician, Steven Adams; and (3) testimony from plaintiffs’ expert, John Palmer. Appellee will address each of these arguments in turn.

a. The City reports do not establish gross and wanton negligence.

Appellants claim a trier of fact could have found the City’s conduct to be gross and wanton because (1) “[i]t is common knowledge that old, outdated, deteriorating wiring carrying large voltages of electricity is dangerous” and (2) the City knew or should have known as of 2007 that the electric circuit running through the junction box had problems that presented an imminent danger. Brief of Appellant, p. 29-30. This is not the case.

Appellants have not cited any evidence that supports the contention that the wiring at issue was “old, outdated, or deteriorated,” much less that it is common knowledge such conditions create an *imminent* danger. *See Jarboe v. Bd. of Cnty. Comm’rs of Sedgwick Cnty.*, 262 Kan. 615, 622, 938 P.2d 1293 (1997) (noting that a party opposing summary judgment cannot create a genuine issue of material fact without citing factual authority for support).

Appellants’ claim is also unsupported by any of the reports they cite. *See* Brief of Appellant, p. 29-30. On October 8, 2007, the City’s public works director, Michael Fraser, sent city manager Jason Gage a memorandum stating: “The underground wiring for all the pedestrian lanterns is very old and problematic. How will painting the lanterns address this old underground wiring?” (R. Vol. 3, p. 961-962). When asked about the memorandum, Gage testified: “I believe my recollection of that report is basically the same, it’s old, they recommended that we ought to consider at least changing it. **I don’t ever recall any communication or conversation about an unsafe situation.**” (R. Vol. 3, p. 862; Fraser Depo. 30:13-23) (emphasis added). Thus, despite Appellants’ assertions to the contrary, the October 8, 2007 memorandum does not establish a “realization of imminent danger,” as required for a finding of gross and wanton negligence.

Appellants also cite a March 31, 2009 memorandum from operations manager Jim Teutsch to public works director Mike Fraser that evaluated the condition of the wiring as “fair to poor” and noted, “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.” (R. Vol. 3, p. 964-965). Like the October 8, 2007 memorandum, this memo does not identify any safety concern and, in

fact, does not even evaluate the wiring at its lowest potential rating, “very poor,” which presumably would have been the case had Teutsch believed the wiring posed an imminent danger.

Appellants next cite the April 2009 BWR Development of Lighting Recommendation Report (R. Vol. 3, p. 968-971). The 2009 BWR report advised: “The existing system has been in service for over 20 years and is reaching the end of its useful life. A new raceway system and conductors would provide the City with an expected useful life of 20 years.” (R. Vol. 3, p. 971). Again, the BWR report does not reflect the City’s lighting system posed an imminent danger. To the contrary, one of the options BWR identified was:

“Do nothing. Maintain the existing lighting system as it is. The age of the existing street lighting, and pedestrian lighting, poles and fixtures will cause the amount of maintenance required to increase. 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.”

(R. Vol. 3, p. 970). Given that one of the options BWR proposed was to do nothing, its 2009 report cannot have created actual or constructive knowledge of an imminent danger.

Although Appellants cite the February 23, 2010 e-mail from Larry Stoss at BWR to Mr. Fraser, which states: “We will need to replace all existing wiring and conduit that is currently under the sidewalk,” that statement was made in reference to the work that would be completed if the City agreed to undertake Stoss’s proposal to replace the existing system with new LED lighting fixtures. Thus, this language is wholly immaterial to the question of whether the City’s conduct was gross and wanton.

Appellants next cite to BWR’s June 2010 report, which again states: “The existing system has been in service for over 20 years and is reaching the end of its useful

life. A new raceway system and conductors would provide the City with an expected useful life of 20 years.” Like BWR’s report from 2009, however, the 2010 BWR report does not identify any danger or safety concern regarding the City’s lighting system.<sup>3</sup>

Finally, Appellants cite to a January 4, 2011 memorandum from the City’s operations manager, Jim Teutsch, to public works director Michael Fraser that evaluated the wiring inside the decorative lanterns as “poor” on a scale from “very good” to “very poor.” (R. Vol. 3, p. 977). In the memorandum, Teutsch reflects that the “wiring from the ballasts (located at the base of the lantern poles) to the luminaires are in poor condition, which contributes to the recurring outages we experience.” *Id.* As noted in the City’s reply in support of summary judgment, the January 4, 2011 memo is limited to the wiring from the top of the lanterns to the bottom of the lanterns, and thus does not implicate the wiring inside the junction box. Further, the memorandum does not identify any safety concern, and thus cannot establish gross and wanton negligence.

Despite the fact that Appellants have not identified any evidence indicating the City knew or should have known its electrical wiring posed an imminent danger, Appellants now suggest the culmination of these reports was sufficient to create a question of fact on the issue. This argument is akin to suggesting that even though a series of numbers individually multiplied by zero may each equal zero, if that same series of numbers is added together and *then* multiplied by zero, a different outcome will be reached. Kansas law does not require such a result. Although Appellant has accurately quoted *Howse v. Weinrich*, 133 Kan. 132, 298 P. 766, 767 (1931), the court’s justification

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<sup>3</sup>Only brief excerpts of the 2010 BWR report are part of the record on appeal. However, for purposes of clarity, Appellee would point out that like the 2009 BWR report, the 2010 BWR report, a full copy of which is attached to this brief, listed “Do nothing” as one of the City’s options with respect to the electrical circuit at issue.

for viewing the defendant's conduct in the aggregate was that "[e]ach act bore a relation to the others, and the cumulative effect was injury to plaintiff." Unlike *Howse or Reeves v. Carlson*, 266 Kan. 310, 969 P.2d 252 (1998), the documents identified by Appellants are not cumulative conditions that as a whole, contributed to an accident. Instead, these exhibits reflect the same general information, presented at different times to different individuals. The summation of the documents in this case cannot establish gross and wanton conduct where the individual documents themselves fail to do so.

Appellants have failed to present any evidence from which a trier of fact could find that the City had one of the two requisite mindsets necessary for a finding of gross and wanton negligence—realization of imminent danger. *See Muhn*, 196 Kan. at 716. "Without knowledge of a dangerous condition, indifference to the consequences does not become a consideration." *Lanning By & Through Lanning v. Anderson*, 22 Kan.App.2d 474, 481, 921 P.2d 813 (1996). The district court correctly held that Appellants failed to present evidence from which the trier of fact could find that the City's actions were gross and wanton, and its ruling should be affirmed.

b. Adams' testimony does not establish gross and wanton negligence.

In addition to the reports discussed *supra*, Appellants raise two areas from the deposition of the City's master electrician, Steven Adams, from which they contend the trier of fact could have found the City's conduct to be gross and wanton.

Appellants first claim that gross and wanton negligence could have been inferred from testimony by Sergeant Furbeck that after the accident, he heard Mr. Adams say he knew there was no ground wire in the junction box. There are multiple problems with this argument. The parties agree the junction box was installed in 1987 and was not



opened from that time until after this incident. (R. Vol. 3, 784, 919). It is also undisputed that Mr. Adams was not employed by the City at the time the junction box was installed. (R. Vol. 4, p. 1060; Adams Deposition 71:7-18). As it is without dispute that Adams was not present when the box was installed in 1987 and further undisputed that he never inspected inside the box prior to this incident, Adams plainly lacked personal knowledge of the box's condition either at the time of installation or at any time prior to the incident. Moreover, Adams testified that during the inspection *after* the accident, he then came to the logical conclusion that the box must not have been grounded because if it had been grounded, "it would have tripped the breaker and we would have known about a problem a long time ago, or whenever [a short] would have happened." (R. Vol. 3, p. 828; Adams Deposition 36:1-5). Although Appellants contend that the City knew there was no grounding wire prior to this accident, the district court correctly held that no evidence supported that position. (R. Vol 4, p. 1115-1116).

The second area from which Appellants erroneously contend Adams' testimony should have created an issue of fact stems from testimony that although Adams had not seen the City's March 31, 2009 or January 4, 2011 until after this accident, if he had, he would have inspected the inside of the junction box. *See* Brief of Appellant, p. 31-33. Adams' testimony is incapable of creating a genuine issue of material fact for two reasons. First, wantonness is a state of mind. *See Elliot v. Peters*, 163 Kan. 631, 634, 185 P.2d 139 (1947). Because Adams undisputedly had not seen the reports prior to this accident, his testimony about what he would have done if he had is immaterial to whether the City or its employees possessed the requisite state of mind on the date of the accident.

Second, Adams' testimony is inadmissible. Opinion testimony from a lay witness is only admissible if "rationally based on the perception of the witness" and "helpful to a clearer understanding of his or her testimony." K.S.A. 60-456. "Perceive" means "acquire knowledge through one's own senses." See K.S.A. 60-459(c). Pure speculation is not admissible into evidence. *Hagood v. Hall*, 211 Kan. 46, 52, 505 P.2d 736 (1973). A witness must "show personal knowledge. It is not enough for a witness to tell all she knows; she must know all she tells." *Carmen v. San Francisco Unified School District*, 237 F.3d 1026, 1028 (9th Cir. 2001).

In *Messenger v. Bucyrus-Erie Co.*, 507 F.Supp. 41, 42 (W.D. Pa. 1980) *aff'd*, 672 F.2d 903 (3d Cir. 1981), a products liability case related to the absence of a back-up buzzer or lights, the district court considered the admissibility of the following statement from the plaintiff: "If I had had a back up light, I wouldn't have got hurt. I would have been under that trailer so fast you wouldn't know what happened." 507 F.Supp. at 42. Relying on F.R.E. 701, the federal equivalent of K.S.A. 60-456(a), the court held that the testimony was inadmissible speculation because it was neither based on the witness's "perceptions" nor "helpful to a clear understanding of his testimony . . . ." *Id.* at 43. Other cases are in accord. See, e.g., *Kloepfer v. Honda Motor Co., Ltd.*, 898 F.2d 1452, 1456 (10th Cir. 1990) (witness's testimony that if he had been presented with a proper ATV warning, he would have obeyed it was inadmissible speculation); *Magoffe v. JLG Indus., Inc.*, 2008 WL 296765, at \*32 (D.N.M. May 7, 2008) *aff'd*, 375 F. App'x 848 (10th Cir. 2010) (F.R.E. 701 does not permit a lay witness to testify as to what he would have done in a hypothetical scenario he or she never actually perceived).

Like the witnesses in *Messenger* and *Kloepfer*, there is no dispute that Mr. Adams did not read the 2009 or 2011 reports prior to this incident. As such, Adams' opinion testimony about what he would have done if he had seen the reports is neither (a) based on his actual perceptions, or (b) helpful to a clearer understanding of his testimony. Because Adams' speculation is inadmissible, it was incapable of creating a genuine issue of material fact, and the district court did not err in granting the City summary judgment. *See Seitz v. The Lawrence Bank*, 36 Kan. App.2d 283, 298, 138 P.3d 388 (2006) (where the only evidence put forth by plaintiff is speculation, there is no genuine issue of material fact).

c. Palmer's testimony does not establish gross and wanton negligence.

Appellants also claim that a trier of fact could have found the City's conduct to be gross and wanton based on the affidavit of their expert, John Palmer. In his affidavit, Palmer expresses the following opinion:

"I've reviewed the design plans for the accident scene, blueprints, investigative reports, photographs, in addition to performing two (2) separate sight [sic] inspections and inspection regarding the subject junction box. It is my opinion 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 [sic] injury."

R. Vol. 3, p. 1024.

Appellants cannot defeat summary judgment by relying on inadmissible evidence. *See Kan. Sup. Ct. Rule 141(d)* ("A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence."). Palmer's unadorned legal conclusions that the City's conduct was (1) negligent, and (2) gross and wanton, are inadmissible and thus incapable of defeating summary judgment.

*See Estate of Belden v. Brown Cnty.*, 46 Kan.App.2d 247, 285, 261 P.3d 943 (2011) (expert's affidavit that "repeatedly offers his opinion that various aspects of the defendant's operation reflected 'negligence' and 'deliberate indifference'" provided inadmissible legal conclusions); *Puckett v. Mt. Carmel Reg'l Med. Ctr.*, 290 Kan. 406, 409, 228 P.3d 1048 (2010) ("Testimony expressing a legal conclusion should ordinarily be excluded because such testimony is not the way in which a legal standard should be communicated to the jury."); *Frase v. Henry*, 444 F.2d 1228, 1231 (10th Cir. 1971) (unadorned legal conclusions are inadmissible opinion testimony under K.S.A. 60-456). Palmer's proffered testimony is inadmissible and the district court did not err by refusing to deny defendant's motion for summary judgment on the basis of Palmer's affidavit.

**III. The district court did not err in applying recreational use immunity to an electrical junction box.**

Finally, Appellants argue that the district court erred in applying recreational use immunity because (1) the City's underground lighting circuit is an "inherently dangerous" activity and (2) K.S.A. 75-6104(o) does not apply to inherently dangerous activities. Appellants are wrong on both counts.

a. The City's conduct is not inherently dangerous.

Whether an activity is "inherently dangerous" is a question of law. *Falls v. Scott*, 249 Kan. 54, 61-62, 815 P.2d 1104 (1991). The Kansas Supreme Court has explained:

"To be inherently dangerous, a commodity or condition must be so imminently dangerous in kind as to imperil the life or limb of any person who uses it, or, burdened with a latent danger or dangers that derive from the very nature of the commodity or condition itself and not from any defect in the thing. 'Inherently dangerous' has also been said to mean a type of danger inhering in an instrumentality or condition itself at all times, requiring special precautions to be taken to prevent injury, and not a danger arising from mere casual or collateral negligence of others under particular circumstances. Instrumentalities or substances which, by their

very nature are calculated to do injury are considered to be dangerous per se. An instrumentality is dangerous per se if it may inflict injury without the immediate application of human aid.”

*Id.* at 58 (emphasis added).

Appellants cite to *Cope v. Kan. Power & Light Co.*, 192 Kan. 755, 761, 391 P.2d 107 (1964) for the premise that electrical wiring is “inherently dangerous.” The problem with this position is that the “inherently dangerous” instrumentality in *Cope* was an uninsulated, above-ground 7200-volt transmission line. *See* 192 Kan. at 755-56. The Supreme Court concluded that such lines were inherently dangerous because “the ordinary person has no means of knowing whether any particular wire is carrying a deadly current or is harmless . . . .” *Id.* at 761.

Unlike the wire in *Cope* or the authority cited therein, it is undisputed that the electrical wiring in this case was both insulated and underground. Thus, the primary justification for the court’s decision in *Cope* is inapplicable here. Further, the city’s master electrician, Steve Adams, while explaining how the junction box could have become electrically charged, testified:

“Q: All right. Okay. Now, for this - - this tragic event to have occurred we had to have these two wires that are shown, for example, in Exhibit 7, such that the insulation was gone and they were able to either make metal-to-metal contact or arc across a gap to the cover; correct?”

A: Correct.”

(R. Vol. 3, p. 829; Adams depo. 134:12-18).

Adams’ testimony establishes that the danger associated with the City’s underground wiring derived from the fact that part of the wiring inside the box had deteriorated to the point of no longer being insulated. Deteriorated insulation is a defect,

not an inherent danger. *See e.g., Voelker v. Delmarva Power & Light Co.*, 727 F. Supp. 991, 995 (D. Md. 1989) (“Injuries caused by contact with electrical wires are usually the result of negligence on the part of either the power company, the victim, or a third-party. Injuries do not generally occur because of the nature of the activity itself . . . As such, claims arising out of this unfortunate accident are better suited for resolution through traditional negligence claims.”). Thus, the City’s electrical wiring circuit is not inherently dangerous as a matter of law.

b. K.S.A. 75-6104(o) applies to inherently dangerous conduct.

Appellants take the position that K.S.A. 75-6104(o) does not apply to inherently dangerous activities. This premise stems from *Deavers v. Bd. of Cnty. Com’rs of Lyon Cnty.*, 2015 WL 715909, 342 P.3d 970 (Feb. 6, 2015). Importantly, neither *Deavers* nor any other Kansas case has ever held that inherently dangerous activities fall outside the scope of K.S.A. 75-6104(o). Instead, Appellants appear to suggest that K.S.A. 75-6104(o) was not intended to apply to inherently dangerous activities based solely on the following statement by the court in *Deavers*:

“[Appellants] argue 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, and the long-standing general rule is that issues not raised before the district court cannot be raised on appeal.”

2015 WL 715909 at \*7.

Neither the appellants in *Deavers*, nor Appellants in this case have ever cited any authority that supports their bald assertion that the legislature did not intend for K.S.A.

75-6104(o) to apply to inherently dangerous activities. *See McCain Foods USA, Inc. v. Central Processors, Inc.*, 275 Kan. 1, 15, 61 P.3d 68 (2002) (“A litigant who fails to press a point by supporting it with pertinent authority, or by showing why it is sound despite a lack of supporting authority or in the face of contrary authority, forfeits the point.”). In *Lane v. Atchison Heritage Conference Ctr., Inc.*, 283 Kan. 439, 153 P.3d 541 (2007), the Kansas Supreme Court reiterated: “Kansas courts **should not impose additional hurdles** to immunity that are not specifically contained in [K.S.A. 75-6104(o).” 283 Kan. at 445 (emphasis added). Despite the Court’s admonition to the contrary, Appellants are asking this Court to find that the Kansas Legislature intended to exempt inherently dangerous activities from its grant of immunity, even though neither the language of the statute nor its legislative history says as much.

In *Jackson v. U.S.D. 259, Sedgwick Cnty.*, 268 Kan. 319, 995 P.2d 844 (2000), the Kansas Supreme Court noted:

“The purpose of K.S.A. 75–6104(o) is to provide immunity to a governmental entity when it might normally be liable for damages which are the result of ordinary negligence. This encourages governmental entities to build recreational facilities for the benefit of the public without fear that they will be unable to fund them because of the high cost of litigation.”

268 Kan. at 331.

As discussed *supra*, Kansas case law makes clear that the Legislature intended for K.S.A. 75-6104(o) to apply to integral components of a recreational facilities, such as lighting components. *See Wilson v. Kansas State University*, 273 Kan. 584, 590, 44 P.3d 454 (2002) (recreational use immunity applied to plaintiff’s claim for injuries from chemicals found on toilet in football stadium); *Stone v. City of La Cygne*, (Kan. Ct. App. April 11, 2003) (unpublished) (claim for injuries occurring in pool shed housing

chemicals were barred by K.S.A. 75-6104(o) because the shed was integral to a recreational facility); *Poston v. Unified Sch. Dist. No. 387, Altoona-Midway, Wilson Cnty.*, 286 Kan. 809, 810, 189 P.3d 517 (2008) (applying recreational use immunity to injuries caused by a door that allowed guests to enter the school, where they could then walk through a commons area to gain access to the school gymnasium). The district court's holding in this case is consistent with the Legislature's intended purpose in enacting K.S.A. 75-6104(o), as well as the large body of case law on this topic. The ruling of the district court should be affirmed.

### CONCLUSION

For all of the reasons set forth above, the district court's ruling that all of Appellee's claims were barred pursuant to K.S.A. 75-6104(o) was correct and must be upheld. Appellee requests costs and such other and further relief as the Court deems just and equitable under the circumstances.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing was electronically filed with the court and a service copy emailed by counsel for appellees, on the 3<sup>rd</sup> day of February, 2016, to:

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IN THE COURT OF APPEALS OF THE STATE OF KANSAS

JONNI CULLISON, et al.,

Case No. 114571

Plaintiffs/Appellants,

Appealed From:

District Court of Saline County

vs.

Case No. 14 CV 55

CITY OF SALINA, KANSAS,

Defendant/Appellee.

# APPENDIX



**BWR** | Right in the Center

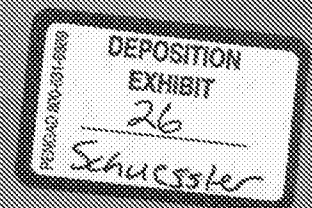
# FINAL REPORT

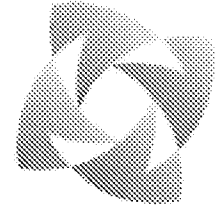
## DEVELOPMENT OF LIGHTING RECOMMENDATIONS

for

DOWNTOWN  
SALINA, KANSAS

June 2010





**BWR** | Right in the Center

# **DEVELOPMENT OF LIGHTING RECOMMENDATIONS**

FOR

## **DOWNTOWN SALINA, KANSAS**

Prepared By:

**BUCHER, WILLIS & RATLIFF CORPORATION**

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engineering | planning | architecture

# Report

# Development of Lighting Recommendations

Downtown Salina, Kansas  
June 2010

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## EXECUTIVE SUMMARY

The Development of Lighting Recommendations Report is the result of a thorough investigation of the existing lighting systems that are currently in place in downtown Salina. The primary purpose of this report is to determine the existing lighting systems, lighting levels, and recommendations for improvements.

Field data was gathered by Bucher, Willis & Ratliff Corporation (BWR) personnel to determine the existing lighting fixture locations along with current lighting levels.

Public input was solicited during a public hearing. Input was also gathered from the Board of Directors of Salina Downtown, Inc.

### Definitions

The following are definitions for words used in this report:

Avg/Min Ratio: A relationship between the numerical average of a set of values and the lowest (minimum) value.

Bollard: A short post, typically less than 4'-0" tall that can be either lighted or not, used to block access or delineate an area. Lighted bollards are used for pedestrian lighting of sidewalks.

Cobra Head: A type of lighting fixture most commonly associated with roadway lighting. The fixture loosely resembles the head of a Cobra snake.

Conduit: A raceway for the placement of electrical conductors.

Cutoff: A light distribution pattern where the amount of light to exit the light fixture above the horizontal plane of the light fixture lens does not exceed 2.5% of the lamp output.

Footcandle: A unit of illuminance equal to 1 lumen/square foot. A measurement of light level.

Foundation: An embedded structural member that provides support and stability to an attached item.

LED: Light Emitting Diode.

Light Pole: A structural member that supports a lighting fixture.

Lighting Fixture: An object that contains a light source and the necessary components that when electrical energy is applied, will produce visible light.

Lumen: SI unit of luminous flux. A unit of measurement of the amount of light that is produced from a light source.

Maintained: The light output from a given source, just prior to being replaced at end of lamp life.

Max/Min Ratio: A relationship between the highest measured or calculated value and the lowest (minimum) value.

Non-Cutoff: A light distribution pattern that allows for light to exit the light fixture at any angle, and more specifically above the horizontal plane of the light fixture lens.

Panelboard: Electrical equipment that contains circuit breakers that control and protect electrical loads being served by this equipment.

Photoelectric Cell: A control device that senses ambient light levels and opens or closes a contact based upon this level.

Shoe Box: A type of lighting fixture that is in the shape of a "shoe box" with either a flat or drop-down lens.

SI: International System of Units.

Tunnel: A pedestrian pathway that is comprised of a floor, ceiling, and two walls with open ends. This does not refer to tunnels for vehicular traffic.



## SECTION 1 - INTRODUCTION

### 1.1 Background

The City of Salina has contracted with Bucher, Willis & Ratliff Corporation (BWR) to review the existing downtown lighting system and to propose future lighting options. The lighting systems evaluated included the City owned parking lots, streets, alleys, covered crosswalks, and tunnels. The parts of the system investigated included the lighting fixtures, poles, raceway, power sources and controls that are City owned, and lighting fixtures and poles owned by Westar Energy.

### 1.2 Scope of Services

The items to be included in this study are as follows:

- a. Field work to verify locations of existing street and pedestrian lighting as included in the City GIS database (approximately 350 poles).
- b. Perform field lighting footcandle level readings of current lighting levels to assist with developing a model of the lighting levels.
- c. Perform lighting calculations to model existing downtown light levels.
- d. Meet with Phyll Klima, Executive Director of Salina Downtown, Inc. (SDI), to narrow down lighting fixture styles for evaluation.
- e. Evaluate and propose future lighting options. Options to include rehabilitation of existing pedestrian lighting, as well as new lighting.
- f. Create report that describes design procedure and lighting options/recommendations.
- g. Attend one meeting to present Draft Report to Owner for review and comment.
- h. Submit Final Report.

## 1.3 Study Area

The study area is defined as bounded from Elm and Santa Fe, south to Santa Fe and Ash, east to Ash and Fifth Street, south to Iron and Fifth, east to Iron and Fourth, south to Fourth and Mulberry, west to Mulberry and Eighth, north to Eighth and Ash, east to Ash and Seventh, and north to Seventh and Elm (Refer to Appendix A for map of study area). The areas studied include roadways, parking lots, alleys, tunnels, plazas and crosswalks.

## SECTION 2 - STUDY APPROACH

### 2.1 Data Gathering

Field work was completed to verify the location and type of existing lighting in the downtown area. A legend for the lighting fixtures is located in Appendix B. Four (4) plan sheets, located in Appendix C: Lighting Inventory Preliminary, indicate the location and type of lighting fixtures and poles in the study area. A breakdown of the types of lighting fixtures and poles is as indicated in Table 1. Refer to Appendix D for photographs of light fixtures.

**Table 1: Lighting Inventory**

Lighting Inventory						
Plan Designation	Fixture Type	Quantity of Lamps	Lamp Type	Pole Type	Ownership	Quantity
A	Octagon	1	Metal Halide	Sq. Steel	City	346
B	Shoe Box	1	Mercury Vapor	Octagon Steel	Westar	47
C	Flood Light	1	Mercury Vapor	Wooden Pole	Westar	1
D	Lantern	2	High Pressure Sodium	Cast Metal	Private	6
E	Shoe Box	3	Metal Halide	Sq. Steel	City	4
F	Cobra Head	1	High Pressure Sodium	Round Tapered Steel	Westar	16
G	Shoe Box	2	Metal Halide	Sq. Steel	City	15
H	Capped Acorn	1	High Pressure Sodium	Cast Metal	Private	14
I	Shoe Box	4	Metal Halide	Sq. Steel	City	10
K	Cobra Head	2	Mercury Vapor	Round Tapered Steel	Westar	5
L	Recessed	6	Fluorescent	N/A	City	35
O	Globe	5	Incandescent	Cast Metal	Private	6
ST	Cobra Head	1	Mercury Vapor	Round Tapered Steel	Westar	106
WD	Cobra Head	1	Mercury Vapor	Wooden Pole	Westar	57

In addition, field data was collected as to the level of existing lighting that was falling upon the pavement and walkways. This data was collected between the hours of 10:00 p.m. and 3:00 a.m. over several evenings. The light levels on the streets were recorded in a grid pattern, basically from light pole to light pole. Light levels in the parking lots were taken at identifiable locations throughout the lot. Special care was taken to avoid inaccurate readings due to supplemental lighting from adjacent lighting and storefronts. A Greenlee Model 93-172, Digital Light Meter, with an accuracy of  $\pm 7\%$  was utilized for the data gathering.

Data was collected from the following locations:

- Santa Fe between Iron and Walnut
- Santa Fe between Ash and Elm
- Seventh Street between Ash and Elm
- Eighth Street between Ash and Iron
- Eighth Street between Iron and Walnut
- Fifth Street between Iron and Walnut
- City Parking Lots
- Tunnels
- Crosswalks
- Plazas

Refer to Appendix F for results of gathered data.

Data was not gathered in some areas, especially those that had limited or no lighting, such as South 5<sup>th</sup> and South 4<sup>th</sup> Streets near Mulberry, where there are few, if any, lighting fixtures in the area. Where there are no lights, the measured levels would have been approaching zero. This does not mean that the lighting in these areas is inadequate for the area designation per the Illuminating Engineering Society, North America (IESNA). See additional information below. Also, areas that had an appreciable amount of supplemental lighting, (i.e. bright storefronts, lighted crosswalks, area floodlights with spillover light) were not included in the data gathering as this would provide inaccurate light level readings on the pavement with respect to a representative street lighting arrangement. For modeling of the lighting system, comparable data was utilized in the lighting program to generally represent the lighting system as it currently exists. The AGI32 lighting program, version V2dot0 2.03 was utilized to model the downtown street lighting.

## 2.2 Illuminating Engineering Society of North America (IESNA) Recommendations

The Illuminating Engineering Society of North America (IESNA) has established recommended lighting levels for various types of road and area classifications. These lighting levels are not required by law, but are to be utilized as a guideline for lighting design.

The first step in determining the recommended lighting level for a specific roadway is to establish the classification of the roadway. Classifications vary from freeway to bikeway. The classification that best suits the roadway usage is Collector. The definition of Collector is as follows:

*Collector:* "The roadways serving traffic between major and local roadways. These are roadways used mainly for traffic movements within residential, commercial, and industrial areas." <sup>1</sup>

There are, however, locations within the study area that do not meet this classification. For example, the residential area along Fourth Street is served more with a Local classification of roadway as it does not handle a large amount of traffic movement. Similar areas have isolated lighting either at intersections or dispersed along the roadway path.

The second step is to determine an Area Classification. This classification is based upon the land use that abuts the roadway. Of the three possible definitions available, Commercial fits the main core of the downtown area. As discussed above, there are other locations within the study area that would fall under the two other definitions, Intermediate and Residential. The definitions<sup>1</sup> are as follows:

*Commercial:* A business area of a municipality where ordinarily there are many pedestrians during night hours. This definition applies to densely developed business areas outside, as well as, within, the central part of a municipality. The area contains land use that frequently attracts a heavy volume of nighttime vehicular and pedestrian traffic.

*Intermediate:* Those areas of a municipality characterized by frequent moderately heavy nighttime pedestrian activity, as in blocks having libraries, community recreation centers, large apartment buildings, industrial buildings, or neighborhood retail stores.

*Residential:* A residential development, or a mixture of residential and small commercial establishments, characterized by few pedestrians at night. This definition includes areas with single-family homes, town houses, and small apartment buildings.

The third and final determination that is required is the Pavement Classification. This designation, which varies from R1 to R4, is based upon the type of pavement installed. The R1 classification is for a concrete road surface. An R4 classification is for a very smooth texture asphalt road surface. Based upon field observations, the majority of the road would be classified as either R2 or R3. The definitions<sup>1</sup> are as follows:

R2: Asphalt road surface with an aggregate composed of a minimum 60 percent gravel (size great than 10 millimeters). Asphalt road surface with 10 to 15 percent artificial brightener in aggregate mix (not normally used in North America).

R3: Asphalt road surface (regular and carpet seal) with dark aggregates (e.g. trap rock, blast furnace slag); rough texture after some months of use (typical highways).

## 2.3 Roadways

Based upon the above classifications and selection criteria, BWR has selected the following classifications and lighting criteria for the various roadway areas:

Collector – Commercial Classification for the core downtown area:

- *1.2 footcandles average, Average to Minimum Ratio of 4:1*

Collector – Intermediate Classification for the transitional area between commercial and residential

- *0.9 footcandles average, Average to Minimum Ratio of 4:1*

Collector – Residential Classification for the areas without commercial activity that is residential in nature

- *0.6 footcandles average, Average to Minimum Ratio 4:1*

The map in Appendix E identifies the areas and lighting criteria classification, within the study area.

## 2.4 Parking Lots

The primary goal of parking lot lighting is to provide for pedestrian safety in addition to providing general ambient light for vehicular traffic. The IESNA has recommended lighting levels for parking lots. There are two levels of lighting criteria, Basic and Enhanced Security. The minimum horizontal illuminance for the basic level is 0.2

footcandles with a maximum to minimum ratio of 20:1. For an enhanced security level, the minimum is 0.5 footcandles with a maximum to minimum ratio of 15:1. Additionally, there is a recommendation of a minimum vertical illuminance of 0.1 and 0.25 footcandles, for the basic and enhanced security levels, respectively.

Areas that would typically require the enhanced lighting level would be areas with vandalism or personal security problems. None of the existing parking lots, in the downtown area, were identified as requiring increased lighting levels.

## 2.5 Alleys

While the main purpose for an alley is to provide rear access to buildings, the IESNA does not provide any guidance on the illumination levels recommended for alleys.

## 2.6 Plazas

IESNA does not have a recommended lighting level for plazas but they do have a designation for "Pedestrian Ways." Utilizing this information, for a walkway that is away from the roadway, the minimum average horizontal footcandles are recommended to be 0.5 footcandles, for pedestrian use.

## 2.7 Tunnels

The tunnels, that connect the alleys to sidewalks along streets, are not directly covered by the IESNA. There are tunnels addressed, but all lighting recommendations are aimed toward vehicular traffic and not pedestrian use. Therefore BWR utilized the IESNA recommended lighting level for a hotel corridor, recommended to be a maintained 5 footcandles, for this evaluation. The tasks that are performed are similar in nature, movement, and facial recognition.

## 2.8 Crosswalks

As with alleys, IESNA does not give specific recommendations to crosswalk areas. The recommendations are to provide increased light levels to help draw attention to the crosswalk and to allow for greater recognition of objects (people or otherwise) in the crosswalk area. The increased lighting level allow for greater safety for pedestrians and motorist.





than adjacent and visibly newer lamps. A modern replacement for such lamps is a metal halide lamp which has a similar median lamp life, but with a reduction in light output over the life of the lamp of around 40 percent, or half of the mercury vapor lamp.

It was also noted the intermixing of high pressure sodium lamps with the mercury lamps in the roadway lighting fixtures. These high pressure sodium lamps provide a higher level of light output for the energy consumed, as compared to mercury vapor or metal halide lamps, but provide a yellow-orange light. The new traffic signal poles all have high pressure sodium lamps. The life of these lamps is comparable to the metal halide, but the light output versus energy input is greater; therefore it is possible to utilize a smaller wattage lamp in high pressure sodium as compared to a comparable light output metal halide lamp.

Westar Energy currently utilizes high pressure sodium lamps for all roadway lighting but will provide metal halide lamps at the customer's request for an additional monthly charge.

A Lighting Summary Map is included in Appendix H which indicates the calculated lighting levels that are below or meeting the IENSA recommendations. The current street lighting levels are summarized in the following table. Refer to Appendix L for 'point-by-point' calculations.

**Table 2: Summary of Current Street Lighting Levels** (Calculations based upon computer program modeling of field gathered data.)

<i>Roadway Designation</i>	<i>Avg. fc</i>	<i>Min. fc</i>	<i>Avg/Min<sup>1</sup></i>	<i>Recommend Avg.</i>
Walnut between 7 <sup>th</sup> & 8 <sup>th</sup>	0.01	0.0	0.00	0.6
Walnut between 7 <sup>th</sup> & Santa Fe	0.17	0.0	0.00	1.2
Intersection Walnut & Santa Fe	1.48	0.2	7.40	2.4
Intersection Walnut & 7 <sup>th</sup>	0.45	0.1	4.50	1.8
Intersection Walnut & 8 <sup>th</sup>	0.22	0.0	0.00	1.2
Mulberry between 8 <sup>th</sup> & 7 <sup>th</sup>	0.24	0.1	2.40	0.6
Intersection Mulberry & 8 <sup>th</sup>	0.18	0.00	0.00	1.2
8 <sup>th</sup> between Walnut & Mulberry	0.07	0.0	0.00	0.6
Intersection Mulberry & 7 <sup>th</sup>	0.33	0.1	3.30	1.5
7 <sup>th</sup> between Walnut & Mulberry	0.08	0.0	0.00	1.0
Mulberry between 7 <sup>th</sup> & Santa Fe	<b>1.22*</b>	0.5	2.44	1.2
Santa Fe between Walnut & Mulberry	0.60	0.1	6.00	1.2
Mulberry between Santa Fe & 5 <sup>th</sup>	0.65	0.2	3.25	0.9
Intersection Mulberry & 5 <sup>th</sup>	0.28	0.1	2.80	2.1
5 <sup>th</sup> between Walnut & Mulberry	0.11	0.0	0.00	1.0

# Report

# Development of Lighting Recommendations

Downtown Salina, Kansas

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<i>Roadway Designation</i>	<i>Avg. fc</i>	<i>Min. fc</i>	<i>Avg/Min<sup>1</sup></i>	<i>Recommend Avg.</i>	<i>cont.</i>
Intersection Mulberry & 4 <sup>th</sup>	0.12	0.0	0.00	0.6	
Mulberry between 5 <sup>th</sup> & 4 <sup>th</sup>	0.06	0.0	0.00	0.9	
4 <sup>th</sup> between Walnut & Mulberry	0.04	0.0	0.00	0.6	
Walnut between 5 <sup>th</sup> & 4 <sup>th</sup>	0.12	0.0	0.00	0.9	
Intersection Walnut & 4 <sup>th</sup>	0.27	0.0	0.00	1.8	
Intersection Walnut & 5 <sup>th</sup>	0.49	0.2	2.45	2.1	
Walnut between Santa Fe & 5 <sup>th</sup>	0.16	0.0	0.00	1.2	
4 <sup>th</sup> between Walnut & Iron	0.10	0.0	0.00	0.9	
5 <sup>th</sup> between Iron & Walnut	0.22	0.0	0.00	1.0	
Intersection Iron & 4 <sup>th</sup>	0.13	0.0	0.00	1.8	
Iron between 5 <sup>th</sup> & 4 <sup>th</sup>	0.22	0.1	2.20	0.9	
Intersection Iron & 5 <sup>th</sup>	1.82	0.9	2.02	2.1	
Iron between Santa Fe & 5 <sup>th</sup>	0.35	0.1	3.50	1.0	
5 <sup>th</sup> between Ash & Iron	0.33	0.1	3.30	0.9	
Santa Fe between Ash & Iron	0.79	0.3	2.63	0.9	
Intersection Ash & Santa Fe	1.14	0.4	2.85	1.8	
Ash between Santa Fe & 5 <sup>th</sup>	0.64	0.3	2.13	0.9	
Intersection Ash & 5 <sup>th</sup>	0.43	0.2	2.15	1.8	
5 <sup>th</sup> between Elm & Ash	0.04	0.0	0.00	0.9	
Santa Fe between Elm & Ash	0.29	0.1	2.90	0.9	
Ash between 7 <sup>th</sup> & Santa Fe	0.45	0.1	4.50	0.9	
Intersection Ash & 7 <sup>th</sup>	0.41	0.2	2.05	1.8	
Ash between 8 <sup>th</sup> & 7 <sup>th</sup>	0.32	0.1	3.20	0.9	
Intersection Ash & 8 <sup>th</sup>	0.33	0.1	3.30	1.8	
8 <sup>th</sup> between Ash & Iron	0.26	0.1	2.60	0.9	
7 <sup>th</sup> between Elm & Ash	0.34	0.1	3.40	0.9	
Intersection Elm & 7 <sup>th</sup>	0.39	0.2	1.95	1.8	
Elm between 7 <sup>th</sup> & Santa Fe	0.09	0.0	0.00	0.9	
Intersection Elm & Santa Fe	0.25	0.1	2.50	1.8	
Elm between Santa Fe & 5 <sup>th</sup>	0.05	0.0	0.00	0.9	
Intersection Elm & 5 <sup>th</sup>	0.15	0.0	0.00	1.8	
7 <sup>th</sup> between Ash & Iron	0.36	0.1	3.60	0.9	
Intersection 8 <sup>th</sup> & Iron	0.37	0.1	3.70	1.8	
Iron between 8 <sup>th</sup> & 7 <sup>th</sup>	0.31	0.1	3.10	0.9	
Intersection Iron & 7 <sup>th</sup>	<b>2.06*</b>	1.0	2.06	2.1	
Iron between 7 <sup>th</sup> & Santa Fe	0.35	0.1	3.50	1.2	
Intersection Iron & Santa Fe	1.21	0.2	6.05	2.1	
Santa Fe between Iron & Walnut	0.76	0.2	3.80	1.2	
7 <sup>th</sup> between Iron & Walnut	0.37	0.1	3.70	1.0	
8 <sup>th</sup> between Iron & Walnut	0.24	0.1	2.40	0.9	
Intersection Mulberry & Santa Fe	1.34	0.3	4.47	2.1	

- Notes:
1. The Avg/Min ratio for all calculation areas is to be no greater than 4:1
  2. Calculation areas marked with "\*" met recommended light level.
  3. Calculated lighting levels based upon a sampling of representative areas and then generating a computer model of the lighting system.





up to the edge of the alley. Permission would need to be acquired to place an area lighting fixture in this location.

### 3.5 Tunnels

The lighting in the tunnels is provided by recessed, 4' x 4', fluorescent lighting fixtures. The lighting fixtures are spaced at 15 feet on center. Each lighting fixture contains six lamps. The width of the tunnels vary from 8 feet wide (between First Bank Conference Center and Sunflower Insurance Group) to 15 feet wide (between Simply Baby & More and the former Brown Mackie College). In the tunnels where the lighting fixtures were functioning properly, the average light level was in the range of 15 to 20 footcandles which is above the IESNA recommended minimum level of 5 footcandles.

### 3.6 Crosswalks

Lighting in the crosswalk is provided by fluorescent lighting fixtures located in the crosswalk structure. Two of the crosswalk structures had a total of 22 8-foot, single lamp fluorescent lamps. The third crosswalk structure, due to its angle across Santa Fe Avenue, had a total of 28 8-foot, single lamp fluorescent lamps. The light level at the crosswalks was more than four times the lighting level of the street, providing a visual cue to motorist and adequately lighting pedestrians and objects in the crosswalk.

### 3.7 Lighting Control Equipment

The parking lots, streets, tunnels and crosswalks are all fed from numerous lighting control centers. The basic arrangement is a photoelectric cell that is connected to a lighting contactor that turns "off" and "on" the power to the lighting fixtures. With the photoelectric cell, the lights are turned "on" at dusk and "off" at dawn. The lighting control centers are typically located in the same fenced in area as the trash carts and dumpers. The control equipment is all enclosed in individual weatherproof enclosures. Bollards are installed to protect the equipment from damage. A few exceptions, with respect to the location of the controllers, can be found for the parking lot and walkway lighting controller on Seventh Street, south of Walnut, where the panels are located in a concrete wall. Another location is the controller for the parking lot on the west side of Seventh Street, south of Iron, where the controller is located just east of the alley at the southeast corner of the Clark, Mize and Linville office building. In the City lot at the northwest corner of Santa Fe and Ash, the controller and photoelectric cell are located on the center pole.



## SECTION 4 - SALINA DOWNTOWN, INC.

### 4.1 Input

As part of the downtown lighting study, BWR was directed to meet with Salina Downtown, Inc. (SDI) to narrow down lighting fixture styles for evaluation. BWR attended a board meeting of the SDI and recorded the following comments:

- Consider revamping and repainting the existing pedestrian lights.
- There are two poles and lanterns, in front of Mokas, that have been repainted. Poles were cleaned and painted with marine quality paint. Cost was \$150 for two poles.
- Retain the existing pedestrian lights.
- BWR to investigate maintenance on existing pedestrian lights.
- The existing lanterns fit in with the historic area.
- The existing poles have receptacles and any new poles would need to have the same.
- A survey conducted by the SDI indicated that 40 people are in favor of keeping the existing pedestrian lighting.
- Several people like the new lighting fixtures installed by Jim Ravenkamp at Fifth and Walnut.
- The current lanterns are dingy and need cleaning.
- Paint the existing poles to match the new traffic signal poles, benches and trash can containers.

This information will be considered in the recommendations portion of the report.

## SECTION 5 - FUTURE LIGHTING OPTIONS

### 5.1 General

As there are no “legally” required light levels for roadway, parking lot, or pedestrian area lighting, the IESNA is a valuable resource to consult to determine recommended levels. But lighting is also a very much a community decision. Preparing lighting standards such as restricting light pollution in the form of light spill onto adjacent property, or allowing the light to brighten the night sky, are very much community type decisions. What is important to the community? What is the visual impression that the community would like to portray? Are a few of the questions that need to be asked.

The first step in establishing a community’s lighting standards is to determine what the community’s goals are for lighting. Are they to prevent crime, aid in security, establish an identity, require energy efficient lighting, or protect the community’s “dark sky” (avoid spilling lighting into the night sky)?

What are the needs for lighting other than the lighting of roadways or paths? The answers to these questions help a community select a direction for their lighting standards.

The current downtown street lighting, focusing mostly on the core business area, consists of “shoe box” light fixtures on 30-foot poles. These lighting fixtures are responsible for the majority of the street lighting. In addition to the “shoe box” fixtures are the octagonal shaped pedestrian lighting fixtures. These pedestrian lighting fixtures do supplement the street lighting fixtures but their main function is to provide aesthetics. The light output from these lighting fixtures is minimal and this can be viewed on Walnut Street between Santa Fe and Fifth Street where the pedestrian lights are the main source of light and the area has a very low light level.

In the area around the main business core, the roadway is illuminated with “cobra head” lighting fixtures on 30-foot poles. The spacing of these poles in areas of business, such as north Santa Fe and north Seventh Street, is in a regular pattern and provides a uniform lighting level.

In other areas that are mostly residential, the pole placement is irregular and provides lighting along the street more as a means of identifying the street routing and not





pole, for 346 poles, amounts to \$51,900. Removing, painting and replacing the poles, for 346 poles in the downtown area, amounts to \$121,100.

**5.2.3** Repaint existing pedestrian light poles black to match the new traffic signal poles, benches and trash can holders. The process for this option is similar to Option 2, above. The end result is a black pole rather than a bronze or dark bronze pole. The cost to paint a pole black, in-place, is approximately \$150 per pole. The same concerns, as expressed above, about painting the poles in-place, are also a concern with this option.

**5.2.4** Powder coat existing poles. To refinish the existing poles with a powder coat finish would require the removal of the lanterns, from the poles, and the removal of the pole and base cover from the pole foundation. The poles and covers would need to be sand or shot blasted to remove the existing painted finish as a clean, bare steel surface is required for the powder coat process. Sand blasting utilizes sand to erode away the paint and rust. The shot blast method utilizes steel shot to remove the paint and rust. The poles and bases could be shot blasted at a local facility that performs this task, for approximately \$40 per pair (pole and base). Then, once the poles are clean, they would need to be transported to a powder coat facility. The powder coat process involves the application of paint to an electrically charged clean piece of metal. The charge attracts the paint to allow for a uniform adhesion to the metal. The painted metal is then placed in, or passed through, an oven which bakes and cures the paint. The poles and bases could be powder coated, if run through the process in lots of 150 at a time, for approximately \$30 per pair (pole and base). With the additional costs for the removal of the poles, transportation to be shot blasted, transportation to be powder coated, and reinstallation, at an estimated cost of \$250 per pole, the total, per pole cost for powder coating, is approximately \$320. Powder coating 346 poles in the downtown area amounts to \$110,720.

**5.2.5** Refurbish existing lanterns. The existing lanterns consist of a brass frame, along with top and bottom plates. The eight sided lanterns have a total of 24 acrylic panels that are held in the brass frame with silicone and screws (four for each top and bottom panel and six for the side panels). The brass frame and plates are covered with a lacquer coating to prevent the brass from tarnishing. However, all of the lanterns have varying amounts of tarnishing with some that appear almost all tarnished to a few that have very limited tarnishing. The tarnishing does not damage the integrity of the lantern and can be left to add to the "charm" of the lantern. Inside the lantern is a 175

watt metal halide lamp that is mounted vertically with the base of the lamp down. Around the lamp is an acrylic refractor to distribute the light in a controlled manner. The refractor has yellowed as a result of the ultraviolet (UV) light from the lamp. Additionally, the acrylic panels are yellowed at an elevation that is horizontally above the top of the internal refractor (approximately 12-inches above the bottom of the lantern). This is in addition to the original "golden" color of the acrylic panels.

To refurbish the lanterns would require the removal of the lantern and the use of a lacquer thinner to remove the remaining lacquer covering the brass and then the use of a cleaning and polishing compound to remove the tarnish from the brass. After the brass is cleaned, a protective lacquer finish would be applied to protect the brass from tarnishing. Additionally, new acrylic panels would need to be installed to replace the panels that are discolored from the lamp UV rays, the internal acrylic refractor would need to be replaced due to the discoloring from the lamp's UV rays, and the lamp socket would be replaced as the porcelain deteriorates due to the heat of the lamp. The refurbished lantern should maintain its "new" look with the lacquered brass for approximately 10 years along with the acrylic lens and refractor before the UV rays start to "yellow" these items. Removing the lanterns, refurbishing and reinstalling the lanterns will cost approximately \$400 per lantern. With 346 pedestrian light poles, this amounts to \$138,400.

**5.2.6** Replace existing lanterns with new. New lanterns with metal halide lamps, equal to the existing 175 watt lamps, could be placed upon the existing square poles. The lanterns would not be identical to the existing and could actually be significantly different. A mounting adapter to connect to the square shaft would be required for mounting of the new lantern. Within the lantern could be mounted the ballast, rather than locating it in the base of the pole. Removing the existing lanterns and installing new lanterns will cost approximately \$970 per lantern. With 346 pedestrian lanterns, this amounts to \$335,620.

**5.2.7** Replace existing lanterns with new LED light source. New lanterns with an LED light source with output equal to a 100 watt metal halide lamp (75 watts less than current lantern lamp wattage) could be placed upon the existing square poles. The lanterns would not be identical to the existing fixtures and the light contribution to the roadway and sidewalk light levels would be reduced due to the lower lumen output from the LED light source. A mounting adapter to connect to the existing square pole would be required for the mounting of the LED lantern. The electronic for the LEDs