No. 17-118212-A

IN THE
COURT OF APPEALS
OF THE
STATE OF KANSAS

IN THE MATTER OF THE ADOPTION OF C.D.F.
DOB XX/XX/2009

BRIEF OF APPELLEE / CROSS-APPELLANT

Appeal from the District Court of Shawnee County, Kansas
Honorable Frank J. Yeoman, Judge
District Court Case No. 2017-AD-000022

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Oral Argument: 15 Minutes

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Statement of the Facts

D.O.F., Appellee, is the natural father of C.D.F. an eight-year old girl. D.O.F. and K.J.R., the natural mother, were married in Arkansas at the time of the child's birth in 2009. The natural parents divorced in 2010. (R. I, 44). At the time of the divorce, the Arkansas court ordered a parenting plan order and directed natural father to pay child support. While there have been changes to the parenting plan since the divorce – particularly when the child moved to Kansas in 2011, natural father has exercised parenting time (R. I, 46-49) and diligently paid 100% of his child support obligations since the divorce. (R. I, 46).

The Arkansas court continues to exercise jurisdiction over the child custody and child support issues of C.F.D. and her natural parents. Natural father acknowledges he has failed to provide natural mother with copies of income tax returns as is required in the

2010 Decree of Divorce. (R. I, 46) (These were provided to natural mother during this case.) However, natural mother has never attempted to enforce this aspect of the Decree of Divorce. Natural mother has never attempted to demonstrate father was failing to meet the Arkansas Court's expectations. (R. I, 46, 56-65). While she alleges he has failed to pay a substantial portion of his income in child support, she has never filed in court, either in Arkansas or in Kansas, any pleading detailing specific claims – or evidence thereof - that father owes additional child support. Natural father's child support obligations have increased twice since the divorce and he has neither been in arrears on his child support obligations nor been late with a child support payment. (R. I, 56-65).

In 2011, K.F.R. married W.E.R., the step-father and petitioner. (R. I, 8). In September 2011, the court issued an order allowing K.J.R. to move to Kansas with the minor child. (R. I, 23-25). The Arkansas court also ordered a long-distance parenting plan. Since C.D.F. moved to Kansas with her mother and step-father, natural father's parenting times have been extended periods, lasting from four or five days to up to two weeks. (R. I, 24). The child is exchanged at Lamar, Missouri, a point halfway between Topeka, Kansas, and Van Buren, Arkansas. (R. I, 25). The Court's initial orders required the minor child to stay with paternal grandparents while in Arkansas. (R. I, 24). That specific Court requirement ended at the end of 2011, but this arrangement continued to be used without any objection from natural mother – until now. In the two years preceding the adoption petition, natural father exercised ten weeks of parenting time with his daughter. He has daily contact with his daughter while she is in Arkansas. (R. I, 24).

On March 28, 2017, W.E.R. filed a Petition seeking a stepparent adoption of C.D.F. K.J.R. had consented to the step-parent adoption. Natural father had not consented. (R.I, 9). Appellant's petition states, "The natural father has not consented, but shall be given notice, if he can be located." (R. I, 8). W.E.R. did know the natural father would not consent to the stepparent adoption. Less than a month before the petition was filed, W.E.R. met with the natural father and asked him to consent to a step-parent adoption. Natural father told him he would not. (R. I, 21-22). Among other things, natural father did not view Petitioner as an adequate parent for his daughter, particularly after Petitioner has waived his parental rights and allowed his own two children to be adopted by a step-parent. (R. I, 50). Petitioner later acknowledged knowing how to contact and find the natural father (Brief of Appellant, 3), but at another point noted a diligent search had not preceded the filing of the adoption petition. (R. I, 67).

On March 30, 2017, relying upon W.E.R.'s representation that natural father's whereabouts were unknown and pursuant to Shawnee County D.C.R. 3.604, the District Court appointed an attorney to represent D.O.F, locate him, and provide him notice of the adoption petition. This was achieved on the same day. After requesting and receiving from petitioner's counsel a copy of the petition and the Arkansas Decree of Divorce, appointed counsel located D.O.F., who refused to consent to the stepparent adoption. (R. I, 72-73). Appointed counsel immediately notified the court by phone. On March 31, 2017, appointed counsel filed a limited scope attorney entry of appearance to represent D.O.F. in the adoption case.

The natural father immediately sought dismissal of the adoption petition. On April 10, 2017, he answered the petition reflecting the efforts by Petitioner and natural mother to terminate his parental rights. (R. I, 18-37). Natural father provided the court with documents from the Arkansas Child Support Clearinghouse proving he had made 100% of his monthly child support payments since October 18, 2010. (R. I, 28-37). The natural father also provided information about the parenting plan from the Arkansas court, as well as a list of the parenting times his daughter was in Arkansas with him and his family during the two years preceding the filing of the adoption petition. (R. I, 23-24). W.E.R. never contested these child support and parenting time facts in any responsive pleading or during any court hearing. Because of petitioner's silence with respect to these facts, the District Court treated them as "undisputed." (R. I, 88).

After the Court found no facts in the initial petition supporting Petitioner's requests, his counsel requested and was allowed to submit an amended petition. (R. II, 8-10). The amended petition alleged that, during the time the child resided in Kansas, natural father: (1) had not contacted his daughter by telephone, email, or skype; (2) did not have a room in his home for her and the child stayed with her paternal grandparents for her extended parenting times in Arkansas; and (3) had not provided cards, gifts, or letters, for the child. (R, I, 39-41). The amended petition also referenced an eight (8) year old domestic violence case between the parties that had been dismissed. (R. I, 41). The Court specifically discounted this last claim, noting it had been dismissed, was irrelevant as a matter of law (See K.S.A. 59-2136(d)). There was also no evidence of violence against the child. (R. I, 86).

Natural father is represented by an attorney who was initially court-appointed, but who later became privately retained. (R. III, 11-12). The District court assigned an attorney based on the statement in W.E.R.'s petition that, "The natural father has not consented, but shall be given notice, if he can be located." The court found this statement "misleading." (R. I, 3-4). On May 26, 2017 W.E.R.'s counsel objected to the court-appointed attorney representing natural father. Petitioner alleged natural father's court-appointed attorney had a conflict of interest and sought to disqualify natural father's attorney and to strike from the record any pleadings made by this attorney on behalf of father. (R. III, 10-11). The allegation was that the court-appointed attorney was "incentivized" by agreeing to represent natural father whom he had been appointed to notify about the proceedings. (R. I, 10). The court denied the disqualification request and noted the conflict of interest argument was "without merit" because natural father "has a right to counsel." (R. I, 11). Natural father's court-appointed counsel continues to represent him.

On August 3, 2017, the District Court granted natural father's motion to dismiss the case. (R. I, 84-44). The Court noted the "undisputed facts" made it clear petitioner "will not be able to show that this natural father has failed or refused to assume his parental duties with respect to support and with respect to parent-child relationship." (R. I, 88). In each of his pleadings, natural father raised the issue of attorney fees and sought to have them assigned to the petitioner. The district court denied the request for attorney fees. (R. I, 88). Petitioner now appeals the order sustaining the motion to dismiss and seeks to disqualify natural father's counsel. Natural father cross-appeals for fees.

Arguments and Authorities

Issue 1: The District Court appropriately sustained natural father's Motion to Dismiss after Petitioner failed to state facts that would legally justify eliminating the necessity of natural father's consent to the adoption and failed to deny or dispute natural father's evidence he had continuously assumed his parental duties under an Arkansas domestic court order.

Standard of Review and Preservation of Appeal

Motions for summary judgment (or motions to dismiss) are reviewed de novo and apply the same summary judgment standards as did the district court. *Osterhaus v. Toth*, 291 Kan. 759, 768, 249 P.3d 888 (2011). Summary judgments are 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 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. On appeal, we apply the same rules and *where we find reasonable minds could differ as to the conclusions drawn from the evidence, summary judgment must be denied.*" (Emphasis added.) *Warner v. Stover*, 283 Kan. 453, 455-56, 153 P.3d 1245 (2007)." Cited in *Osterhaus v. Toth*, 291 Kan. 759, 768, 249 P.3d 888 (2011).

Petitioner timely appealed from the court's decision sustaining natural father's motion to dismiss.

Analysis

Because the Court granted natural father's motion to dismiss based on "uncontested facts" as determined by a review of the parties' pleadings, including petitions and answers, the legal standard for summary judgment, applicable statutes from the Kansas Adoption and Relinquishment Act (KARA), and the rules of civil procedure regarding pleadings are relevant to this analysis.

K.S.A. 59-2136(d) governs this step-parent adoption proceeding. The child's natural mother has consented to the adoption. Natural father has not. The consent of natural father "must be given to the adoption unless such father has failed or refused to assume the duties of a parent for two consecutive years next preceding the filing of the petition." K.S.A. 59-2136(d). K.S.A. 59-2128(a)(10) requires any petition by a person desiring to adopt the child shall state, among other things, "the facts relied upon as eliminating the necessity for the consent, if the consent of either or both parents is not obtained[.]"

K.S.A. 60-208(b) and K.S.A. 256(e)(2) governs the issue of what facts the court can view as admitted. K.S.A. 60-208(b) requires a party's response to any pleading must: (A) state in short and plain terms its defenses to each claim asserted against it; and (B) admit or deny the allegations asserted against it by an opposing party. Any denial must fairly respond to the substance of the allegation. K.S.A. 60-208(b)(2). The provisions of subsection (b) generally prohibit use of general denial. The lawyer must make specific

denials of what can be justifiably denied, or else allege lack of knowledge or information sufficient to form a belief. If the lawyer denies generally he must mean it. 4 Kan. Law & Prac., Code Of Civil Proc. Anno. § 60-208 (5th ed.)(2017). Failing to deny an allegation in a responsive pleading effectively treats the allegation as admitted. K.S.A. 60-208(b)(6). Categorically denying what the pleader knows to be true violates Rule 11. *United States v. Long*, 10 F.R.D. 443 (D. Neb. 1950). When the true facts are so obviously in the pleader's knowledge, an answer alleging no knowledge or insufficient knowledge to form a belief is not sufficient because it is apparent to the court the allegation is untrue. Under these circumstances the allegation will not be construed as a denial. 4 Kan. Law & Prac., Code Of Civil Proc. Anno. § 60-208 (5th ed.)(2017). When the pleader does so intend to controvert all averments, the pleader may do so by general denial, subject to the obligations set forth in K.S.A. 60-211.

K.S.A. 256(e)(2), which governs motions for summary judgment, also applies. This statute states:

> (2) Opposing party's obligation to respond. When a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must, by affidavits or by declarations pursuant to K.S.A. 53-601, and amendments thereto, or as otherwise provided in this section, set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party.

While a District Court considering such a motion must view any evidence most favorably to the party opposing the motion, it may treat factual representations made in support of the motion as fact for purposes of deciding the motion, particularly when the

party opposing summary judgment failed to identify evidence disputing these factual representations. K.S.A. 256(e)(2). *See also Seitz v. Lawrence Bank*, 36 Kan. App.2d 283, 289-90, 138 P.3d 388, *rev. denied* 282 Kan. 791 (2006); Supreme Court Rule 141 (2014 Kan. Ct. R. Annot 257). "A party opposing summary judgment may not rest merely on allegations, but must set forth specific facts to support its position. K.S.A. 60-256(e)." *Lloyd v. Quorom Health Resources, L.L.C.*, 31 Kan. App.2d 943, 954, 77 P.3d 993 (2003); *See* K.S.A. 60-256(e)(2); *See also Carr v. Vannoster*, 48 Kan. App.2 19, 21, 281 P.3d 1136 (2012). "The law is clear that 'an inference cannot be based upon evidence which is too uncertain or speculative or which raises merely a conjecture or possibility." *Virginia Surety Co. v. Schlegal*, 200 Kan. 64, 89-70, 434 P.2d 772 (1967).

Natural father avers Petitioner never stated facts upon which the requested relief could be granted. In each of his pleadings, he asked the court to dismiss the adoption petition. On April 13, 2017, the Court found Petitioner's initial Petition for Adoption and Termination of Parental Rights did not allege any specific facts that, if true, would have eliminated the necessity of obtaining natural father's consent to the step-parent adoption. (R. I, 21). The Court noted, "So we have nothing telling me, or anyone, to say why – what the basis would be for terminating his parental rights. It just cites a statute." (R. II, 8).

Petitioner's amended petition was only slightly more forthcoming. Because natural father had already pled a motion to dismiss, petitioner had an obligation to set out specific facts showing a genuine issue of material fact for trial. K.S.A. 60-256(e)(2). Petitioner avered natural father never provided any income information to mother as

required by the Arkansas Decree of Divorce. He stated, "Petitioner has reason to believe that the natural father has not been providing a substantial portion of the child support as required by judicial decree when financially able to do so." (R. I, 39-40), but the basis for Petitioner's "reason to believe" was never stated. It was undisputed natural mother had never asked the Arkansas domestic court to enforce this provision of the decree. (R. I, 44). The Court found Petitioner's argument father may not have paid enough child support to be "speculative." (R. I, 86).

Petitioner further alleged "natural father has failed to provide more than incidental contact with the child in the two (2) years prior to the filing of the Petition[,]" (R. I, 40). He claimed natural father's telephone, email or Skype contacts were not "independently" made but initiated by paternal grandmother and natural father did not have a room for the child at his home but the child instead stays at paternal grandparents' home during times she is in Arkansas for parenting time.

Natural father addressed each of Petitioner's allegations in answers to the initial petition and the amended petition. He acknowledged failing to provide his income tax returns each year, but he provided seven years of tax returns as part of discovery in this case (2010 to 2016). He reported telephone calls to his daughter do not go well and are often made with him and paternal grandmother on the line. (R. I, 45). He admitted the child stayed with paternal grandmother when in Arkansas, noting this was required by court order in 2010 and continued without objection over the years for several reasons, including the fact these phone calls do not go well with natural mother making comments

in the background. The child staying with paternal grandmother also works best because natural father works a 6 p.m. to 6 a.m. graveyard shift at a local factory. (R. I, 45).

Petitioner never established a genuine issue of material fact with legal controlling force for which a trial might be required. While one could characterize Mother's alleged facts as disputed, even if the Court accepted them as true, these facts by themselves do not constitute adequate proof natural father failed to assume his parental duties for two years prior to the filing of the adoption petition. An issue of fact is not genuine unless it has legal controlling force as to the controlling issue. A disputed question of fact which is immaterial to the issue does not preclude summary judgment. In other words, if the disputed fact, however resolved, could not affect the judgment, it does not present a " genuine issue" for purposes of summary judgment. *Northern Natural Gas Co. v. ONEOK Field Services Co.*, 296 Kan. 906, 935, 296 P.3d 1106 (2013); *See also Muhl v. Bohi*, 37 Kan. App. 2d 225, 229, 152 P.3d 93 (2007). Here, none of the facts alleged by Petitioner in his amended petition would be sufficiently controlling as to terminate natural father's parental rights.

What is more telling is Petitioner's lack of denial of facts alleged by natural father, facts that would certainly be known to Petitioner and natural mother, namely, the facts of natural father's child support payments and the dates the child was in Arkansas with natural father and his family. Petitioner's only substantive response to alleged facts in natural father's answers came in Petitioner's Reply on June 1, 2017, which stated,

> The Respondent's Answer on May 1, 2017, which "listed general defenses contained in ¶¶ 06, 07, 08, 11-33 that are conclusory, lacking a short and

> plain statement of facts showing the Respondent is entitled to relief.") (R. I, 67).

Natural father's pleadings are the opposite of conclusory. Black's Law Dictionary defines "conclusory" as "expressing a factual inference without stating the underlying facts on which the inference is based." BLACK'S LAW DICTIONARY 123 (2nd Pocket Edition). Natural father's pleadings specifically state the factual basis for the inference that natural father has continuously assumed his parental duties throughout the life of his daughter. Natural father's child support payments were supported by documents from the Arkansas Child Support Clearinghouse, the accuracy of which was never contested or denied. These documents showed natural father was current on his child support, had made all his payments in a timely manner, and had never been in arrears. The records also revealed his monthly child support obligations had increased twice. These facts are not "conclusory." Petitioner, along with his wife (e.g., natural mother) certainly have knowledge of natural father's monthly child support payments, having continuously received them for the past seven years.

Natural father avers his contact with his daughter is governed by a long-distance parenting plan set in place by the Arkansas domestic court in DR-2010-15-1. Petitioner's silence regarding natural father's recitation of the numerous specific dates the child was with him and his family in Arkansas led the court to accept them as undisputed facts.

In his answer to the initial petition, Natural father described his long-distance parenting plan and the times he has exercised his parenting time by having the child come to Arkansas. He provided dates for a total of ten weeks of parenting time. At least three

of these times were for two-week periods. (R. I, 24). He sees the child nearly every day while she is in Arkansas, working around his graveyard shift job (6 p.m. to 6 a.m.). He has also provided the child with gifts, which are exchanged in Arkansas.

Natural father also provided the court with an email between natural mother and his mother within which the parenting time was negotiated. (R. I, 54-55). These emails detailed the following: one week during Spring Break each year; two weeks at the end of May each year; two weeks each July with this time including the child's birthday every other year; one week on or around Thanksgiving each year – to include Thanksgiving every other year; and, one week each December every other year. (R. I., 47-48). *See also* (R. I, 54-55). The Arkansas court order directs the parties to exchange the child in Lamar, Missouri, a point halfway between Van Buren, Arkansas, and Topeka, Kansas. It is not an easy long-distance parenting plan, but it is a parenting plan and it allows natural father to maintain his parent-child relationship and for his family members to also have a relationship with his daughter.

Issue 2: Natural father is entitled to counsel, whether by court-appointment or of his own choosing, and natural father's counsel should neither be disqualified nor should the Court ignore pleadings made on natural father's behalf.

Standard of Review and Preservation of the Issue

The standard for appellate review of an attorney disqualification case is whether the district court's findings of fact are (1) supported by substantial competent evidence and (2) sufficient to support the conclusions of law. *Barragree v. Tri-County Elec. Co-op., Inc.*, 267 Kan. 440, 454-455, 950 P.2d 1351 (1997). The right to be represented by

counsel of choice is an important one, subject to override only upon a showing of compelling circumstances. *See Barragree*, 267 Kan. at 455. Motions to disqualify are often disguised attempts to divest a party of its counsel of choice. *Chrispens v. Coastal Refining & Marketing, Inc.*, 257 Kan. 745, 772, 897 P.2d 104 (1995). The purpose of the [Model Rules of Professional Conduct] can be subverted when they are involved by opposing parties as procedural weapons." Rule 226, Scope (1993) Kan. Ct. R. Annot. 256." Cited in *Barragree*, 267 Kan. at 455. "Such motions should not be allowed to divest a party of its counsel of choice, particularly on bald and unsupported allegations and conclusions." J. Nick Badgerow, *Conflicts of Interests*, KANSAS ETHICS HANDBOOK, 3rd Edition, at 5.8.4 Motions to Disqualify, 5-27 (2015).

In deciding a motion to disqualify counsel, the court must balance several competing considerations, including the privacy of the attorney-client relationship, the prerogative of a party to choose counsel, and the hardships that disqualification imposes on the parties and the entire judicial process. *Qualify Developers, Inc. v. Thorman*, 29 Kan. App. 2d 702, 711, 31 P.3d 296 (2001).

Natural father is entitled to counsel and counsel has legitimately represented his interests. It is undisputed that natural father's counsel was initially court-appointed. The Court telephoned counsel and assigned him to the case. Petitioner did not file any Motion or obtain any Order limiting the court-appointment to notice of natural father. (R. I, 71-72). Nor did Petitioner file any Affidavit of Diligent Search that he had attempted to locate natural father.

The appointment of counsel to locate the natural father stemmed directly from language in W.E.R.'s Petition for Adoption and Termination of Parental Rights, filed on March 28, 2017. The Petition stated, "The natural father has not consented, but shall be given notice, if he can be located." (R. I, 9.) The district court proceeded to appoint an attorney to locate the unfound natural father. The district court relied on K.S.A. 59-2136(c) which states in relevant part, "In stepparent adoptions… the court may appoint an attorney to represent any father… **whose whereabouts are unknown**." (emphasis added). On April 13, 2017, the Court described the above language in the initial pleading as "an effort to mislead the Court into thinking that this case is about one of those that we often have, where the father is some missing person. And that's not even close to what the facts appear to be just based on what's alleged here." (R. II, 4).

Petitioner has taken contradictory positions regarding knowing the natural father's whereabouts. On the one hand, Petitioner's attorney acknowledged she "had not yet begun to attempt to locate father" prior to filing the initial Petition for Adoption and Termination of Parental Rights. (R. I, 67). Even in the Amended Petition for Adoption and Termination of Parental Rights, which was filed on April 17, 2017, at the Court's direction after natural father had definitively been located, the "if father can be located" language again appears. (R. I., 39). On the other hand, Petitioner also claimed that natural father's whereabouts were never unknown. Petitioner's attorney claimed she advised the Court "W.E.R. knew the natural father, his address, and phone number." (Brief of Appellant, p. 3). W.E.R. had in fact met directly with natural father to request

his consent for the step-parent adoption in March, 2017. (R. I, 45). Natural father informed Petitioner in that meeting he would not consent to a step-parent adoption.

Pleadings immediately filed on behalf of the natural father placed Petitioner on notice that natural father had retained counsel and would not consent to the adoption. On March 31, 2017, natural father's appointed counsel filed a limited entry of appearance (limited to the Kansas adoption case), which notified Petitioner that natural father had agreed to be represented. On April 10, 2017, natural father filed an answer that, among other things, effectively placed the petitioner on notice the case was being contested by the natural father. (R. I, 18.).

No statute or court rule limits an appointed attorney from fully representing an unfound natural father. Neither K.S.A. 59-2136(c) nor District Court Rule (DCR) 3.604 outline any limitations that a court appointed attorney cannot continue to represent a natural father once his "whereabouts are known" or he no longer qualifies as "absent." When the court appoints counsel to represent a natural father, it does so under K.S.A. 59-2136(c). There is nothing in K.S.A. 59-2136(c) limiting the representation to assisting the court in supplying notice to the father whose whereabouts are unknown. Logically, appointed counsel would at a minimum also inquire as to the father's wishes with respect to the adoption so as to communicate these wishes to the court.

Petitioner sought to disqualify natural father's counsel and argued that pleadings filed by natural father's counsel are not properly before the court. Petitioner argued natural father's "authority in this matter ceased once he was able to locate and serve" natural father (R. III, 3). On May 26, 2017, Petitioner requested removal of natural

father's counsel, alleging a conflict of interest between the court-appointment and counsel continuing his legal representation of the natural father beyond simply providing him with notice of the proceedings. (R. III. 10-12). Petitioner argued natural father's attorney was "incentivized" when "going from appointment for finding and providing notice to [natural father] to actually representing him throughout the life of the case." R. III, 10). Petitioner's citation in his appellate brief that "the appointed counsel can continue only if the birth father is unable to afford an attorney" refers to whether the attorney can continue as court-appointed counsel, not whether the attorney can represent the natural father. (Brief of Appellant at 12). In May 26, 2017, counsel for natural father informed the court his client desired continued legal representation as privately retained counsel. (R. III, 12).

Notifying natural father and legally representing him do not conflict. DCR 3.604 provides, "An Attorney, chosen by the Court, will be appointed, to **represent** the absent … father's interest **and** to aid in providing him notice." This rule directs the court appointed attorney to "**represent**" the father "**and**" aid in providing him notice. This is in direct opposition to Petitioner's argument. An attorney appointed by the court to represent an unfound father, as happened here, is ethically bound to continue the representation after locating the father until the court appointment ends or the case is completed. Supplying notice to an unfound father in no way conflicts with continued representation. The Court correctly rejected Petitioner's conflict of interest argument, noting it was "without merit." (R. III, 11). From a evidentiary perspective, whether natural father's counsel is court-appointed or chosen is a distinction without a difference.

Natural father has a right to counsel of his choosing. Petitioner alleges no compelling circumstances justifying disqualification of natural father's counsel. Petitioner cites to no authority for ignoring natural father's pleadings in the case. The Court correctly found counsel could continue to fully represent natural father in the adoption proceedings, including filing pleadings on natural father's behalf.

Issue 3: The District Court abused its discretion when failed to award natural father attorney fees when statutory authority exists for such an award and where there is substantial competence evidence criteria for sanctions under K.S.A. 60-211(b) were met.

Standard of Review and Preservation of Issue

There are two possible methods for the District Court to award natural father attorney fees: pursuant to statutes in the Kansas Adoption and Relinquishment Act and pursuant to K.S.A. 60-211. Natural father argued for attorney fees based on both of these methods.

First, where the District Court has authority to grant attorney fees under K.S.A. 59-2134(c) and K.S.A. 59-104(d), its decision is reviewed under the abuse of discretion standard. *Tyler v. Employers Mut. Cas. Co.*, 274 Kan. 227, 242, 49 P.3d 511 (2002). Judicial discretion is abused when judicial action is arbitrary, fanciful, or unreasonable. *In the Marriage of Bradley*, 282 Kan. 1, 137 P.3d 1030 (2006).

Second, when an appellate court reviews a district court's decision to impose sanctions under K.S.A. 60-211, its function is to determine whether substantial competent evidence supports the district court's findings of fact that the statutory requirements for sanctions are present. *Evenson Trucking Co. v. Aranda*, 280 Kan. 821, 127 P.3d 292

(Kan. 2006). Substantial competent evidence possesses both relevance and substance and provides a substantial basis of fact from which the issues can be reasonably resolved. *U.S.D. No. 233 v. Kansas Ass'n of American Educators*, 275 Kan. 313, 318, 64 P.3d 372 (2003).

Natural father's request for attorney fees appeared in each of his pleadings, thereby raising the issue and preserving it for his cross-appeal. *See* (R. I, 18-26, at 26); *See also* (R. I, 43-53, at 53); (R. I, 71-83, at 76-78).

Attorney Fees Rule Analysis under KARA

A Kansas court may not award attorney fees unless a statute authorizes the award or there is an agreement of the parties allowing attorney fees. *Snider v. American Family Mut. Ins. Co.*, 297 Kan. 157 (2013). There is no agreement regarding payment of attorney fees in this case. Natural father has made two distinct and separate arguments that he is entitled to an award of attorney fees.

First, Natural father avers attorney fees are appropriate under two KARA statutes (K.S.A. 59-2134 and 59-104) because the District Court's decision not to award fees was unreasonable and an abuse of discretion. There is statutory and case law authority for an award of attorney fees in adoption cases. KARA, specifically K.S.A. 59-2134(c), directly provides that the costs of adoption proceedings, "shall be paid by the petitioner or as assessed by the court." K.S.A. 59-104(d) states, in relevant part, "Other fees and expenses to be assessed as additional court costs shall be approved by the court, unless specifically fixed by statute. Other fees shall include, but are not limited to … attorney fees." These two statutes should be read to support natural father's request that Petitioner

pay his attorney fees at the court-appointed rate. *See In re Adoption of D.S.D.*, 28 Kan. App. 2d 686, 687, 19 P.3d 204, 205 (2001) (reading these two statutes together as indicating the legislature expressly provided "attorney fees may be assessed as costs, the District Court had the authority to order the adoptive parents to pay the fees for biological father's court-appointed attorney.").

Attorney Fees Rule Analysis Under K.S.A. 60-211 ("Rule 11")

In natural father's second argument for an award of attorney fees, he avers sanctions are required and appropriate under KS.A. 60-211(b). A two-step analysis is required to address natural father's request for attorney fees under K.S.A. 60-211. The first step concerns whether the conduct of petitioner and/or his attorney meet the criteria for sanctions under K.S.A. 60-211(b). The second step determines the nature and type of any sanctions that are applied. K.S.A. 60-211(c).

K.S.A. 60-211(b) reads:

> By presenting to the court a pleading, written motion or other paper, whether by signing, filing, submitting or later advocating for it, an attorney . . . certified that to the best of the person's knowledge, information and belief formed after **an inquiry reasonable under the circumstances** emphasis added): (1) It is not being presented for any improper purpose, such as to harass, cause unnecessary delay or needlessly increase the cost of litigation; (2) the claims, defenses and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying or reversing existing law or for establishing new law; " (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

The second step in the Rule 11 analysis is to determine what sanctions are appropriate. Under K.S.A. 60-211(c), a district court shall impose appropriate sanctions, which may include attorney fees, against a party or an attorney for signing pleadings, motions, and other papers filed with the court stating claims, defenses, and other legal contentions not warranted by existing law or a frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law. *Vondracek v. Mid-State Co-op, Inc.*, 32 Kan. App.2d 98, 79 P.3d 197 (2003).

In *Schumacher v. Morris*, No. 100,447, 2009 WL 4639516 (Kan. App. 2009)(*Unpublished opinion*), the Kansas Court of Appeals applied K.S.A. 60-211(b) and upheld a district court's grant to summary judgment and an assessment of sanctions against counsel. The District Court found the plaintiff had not conducted a reasonably diligent inquiry and had filed claims that had no evidentiary support, either at the time of the appeal or at the time they were filed.

In *Wood v. Groh*, the Kansas Supreme Court set forth the following factors which should be considered when determining the nature and extent of the sanction pursuant to violations of K.S.A. 60-211: (1) whether the improper conduct was willful or negligent; (2) whether the conduct was part of a pattern or an isolated incident; (3) whether the entire pleading was infected; (4) whether the person has engaged in similar conduct in other litigation; (5) whether there was intent to injure; (6) what effect the conduct had on litigation time or expense; (7) whether the responsible person is an attorney; (8) what is needed to deter the litigant, given the litigant's financial resources, from the same conduct

in the future; and (9) what is necessary to deter future litigants from the same conduct. *Wood v. Groh*, 269 Kan. 420, 431, 7 P.3d 1163 (2000).

The Kansas Court of Appeals has held a district court abused its discretion when it made no attempt to consider the factors in *Wood v. Groh* before making an award of attorney fees. *Vondracek v. Mid-State Co-op, Inc.*, 32 Kan. App.2d 98, 79 P.3d 197 (2003) (attorney fees awarded without review of *Wood* factors). The *Vondracek* court noted the attorney fees sanction under K.S.A. 60-211 "is generally utilized when a party files a claim based upon a legal theory that is clearly contrary to statute or case law." *Vondracek*, 32 Kan. App.2d at 104, 79 P.3d 197.

Facts for Both Attorney Fees Analyses

Natural father is requesting Petitioner pay attorney fees pursuant to K.S.A. 60-211(b)-(c). Natural father avers this step-parent adoption proceeding should never have been filed and petitioner has continued to press claims that have lacked evidentiary support throughout the proceedings. For the reasons stated below, he avers the criteria of K.S.A. 60-211(b) are net and denial of attorney fees by the District Court is an abuse of discretion as unreasonable and unjust.:

1. Petitioner's counsel failed to perform a reasonable inquiry into the case prior to filing the Petition for Adoption and Termination of Parental Rights.
    - In a face-to-face meeting less than a month prior to filing of the adoption petition, Natural father had told Petitioner he would not consent to the step-parent adoption.

- Petitioner and his counsel filed misleading documents. On the one hand, petitioner's Petition for Adoption and Termination of Parental Rights was "misleading" when it referenced notice shall be given to natural father, "if he can be located," when in fact Petitioner knew where and how to locate natural father.
- On the other hand, it was misleading for petitioner's attorney to state she had not yet begun a diligent search for father, then to later claim this was unnecessary because natural father's whereabouts were always known.
- Petitioner and his counsel had knowledge of facts, or should have had knowledge of facts, that showed natural father's consent was required to achieve a step-parent adoption because he had assumed his parental duties for the two years next preceding the adoption petition (e.g., natural father's steady payment of child support obligations for several years without missing a payment, the child visiting natural father and his family in Arkansas on a regular basis as part of a long-distance parenting plan pursuant to the jurisdiction of an Arkansas domestic court that awarded natural mother and natural father their divorce in 2010). These were facts the court accepted as "uncontested" because petitioner, who would certainly have had knowledge of them, never denied them.

2. Petitioner's defenses and other legal contentions were not founded on existing law and no argument was made for extending, modifying, or reversing existing law.

- Neither Petitioner's initial petition nor his amended petition, filed and signed by a licensed attorney experienced in adoption law and practicing primarily in adoption law, stated sufficient facts or grounds upon which the requested relief (e.g., termination of parental rights so a step-parent adoption could occur) could be granted.
- Petitioner and his counsel also made allegations within pleadings about issues not relevant to the step-parent adoption case in an apparent attempt to prejudice the court, namely, referencing a domestic violence case that was completed in 2010, when adoption attorneys know such facts are irrelevant in a step-parent adoption case under K.S.A. 59-2136(d).
- In efforts to disqualify natural father's counsel, petitioner advanced frivolous arguments (e.g., that natural father counsel had a conflict of interest because he was initially court-appointed to provide notice and took on natural father as a legal client) when no conflict of interest existed.
- Petitioner claimed pleadings made on behalf of natural father were not "properly before the court," despite the limited entry of appearance made by natural father's counsel. Petitioner provide no legal basis for arguing these pleadings were improper and did not object to the limited entry of appearance filed by natural father's counsel to represent natural father at any time in the proceedings because there was no sound legal basis for any such objection.

3. Petitioner never stated facts sufficient to prove natural father had failed to assume his parental duties in the two years next preceding the adoption petition.

- Even the court noted an adoption was not an appropriate remedy for a presumed failure to pay enough child support, particularly when this argument was advanced in the absence of evidence that additional money was owed. In its decision, the court labeled as "speculation" petitioner's argument that natural father might owe additional child support while noting mother had never asked the Arkansas court to enforce its order about provision of income tax returns.
- Neither petitioner nor his counsel have stated the basis for their "reasons to believe" natural father was failing to pay enough child support, when he was working a factory job receiving a $11 per hour salary. Even now while possessing natural father's income tax returns for the past seven years, no argument has been advanced that he should be paying more child support.

4. Petitioner's denials of factual contentions made by natural father were unreasonable and disingenuous.
    - Rather than respond to natural father's factual contentions which formed the basis for his motion to dismiss, petitioner described these statements as "conclusory," when in fact they were supported by documents provided to the court as part of the pleadings (e.g., records from Arkansas Child Support Clearinghouse). At a minimum, this was disingenuous.

The District Court unreasonably failed to award natural father attorney fees despite sustaining the Motion to Dismiss based on facts that were undisputed (R. I, 84).

The standard for sanctions under K.S.A. 60-211(b) was met. The court opinion noted the injustice of the case in its decision and order,

> Requiring father to come from another state to defend his rights as a parent when there is not substantive evidence to challenge his parental rights is not in the interest of justice. (R. I, 88).

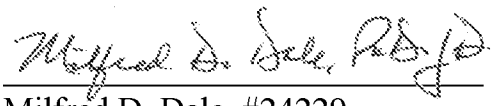
Natural father, a man not indigent but of limited means, has had to pay considerable legal fees for defending against an adoption proceeding that should never have been filed. The lack of evidence for terminating natural father's parental rights finally recognized by the court in August, 2017, was the same lack of evidence that existed at the time the petition was filed.

When the District Court issued its Memorandum Decision and Order on August 3, 2017, natural father thought the ordeal was over. But petitioner and his attorney persisted via this appeal. In it, they ask this Court to allow them their day in court to try to terminate the parental rights of natural father, against whom they have never pled adequate facts for their proposed goal and whom they insist should not be allowed counsel of his choice. They simultaneously ask this Court, like they asked the District Court before, to accept without real or proposed legal authority their request for the court to ignore indisputable evidence of natural father's financial support of his daughter and undisputed evidence of natural father's parenting time, parent-child relationship, and emotional commitment to her. Natural father views attorney fees as necessary to end this ordeal and allow him and his daughter to enjoy their father-daughter relationship free from the threat of unjustified efforts to terminate it.

Conclusion

For the aforementioned reasons, natural father respectfully requests that this Court (1) affirm the District Court's order sustaining his motion to dismiss, (2) affirm the District Court's decision allowing his counsel to continue to represent him until the case is completed in its entirety, and (3) reverse, as unreasonable and an abuse of discretion, the District Court's refusal to grant him attorney fees, then remand the case back to the court for calculation of appropriate attorney fees.

Respectfully submitted,



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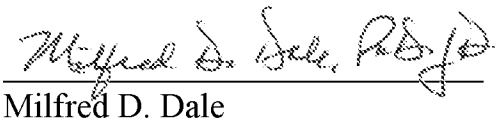
Certificate of Service

The undersigned hereby certified that the foregoing Brief of Appellee/Cross-Appellant was served by electronic mail on November 13, 2017 to Lisa M. Williams-McCallum, 1620 SW Washburn Avenue, Topeka, KS 66604, lisa.williams@wmsfamilylaw.com.



Milfred D. Dale

APPENDIX A – UNPUBLISHED CASE CITED IN BRIEF

Schumacher v. Morris, No. 100,447, 2009 WL 4639516 (Kan. App. 2009)(*Unpublished opinion*)

219 P.3d 1243 (Kan.App. 2009)

Bertha J. SCHUMACHER, Individually and in Her Capacity as the Representative of the Estate of Leo Robert Schumacher, Appellant,

v.

Edna MORRIS, Mark Morris, and Vivian Morris, Appellees,

(George W. Yarnevich, Larry Michel, and Chris J. Kellogg), Nonparty Appellants.

No. 100,447.

Court of Appeals of Kansas.

December 4, 2009

Editorial Note:

This case does not have precedential value under Kansas supreme court rule 7.04 (f) and may only be cited as persuasive authority on a material issue not addressed by a published Kansas appellate court decision.

Appeal from Morris District Court; Steven L. Hornbaker, Judge.

Lynn D. Preheim, Alisa Nickel Ehrlich, and Megan E. Garrett, of Stinson Morrison Hecker LLP, of Wichita, for the appellant and nonparty appellants.

Jennifer M. Hannah, of Lathrop & Gage LLP, of Overland Park, for the appellees.

Before MALONE, P.J., PIERRON and LEBEN, JJ.

MEMORANDUM OPINION

PER CURIAM.

Bertha J. Schumacher, individually and as the representative of the Estate of Leo Robert Schumacher, deceased, appeals the district court's granting of summary judgment in favor of the defendants Edna Morris, Mark Morris, and Vivian Morris. Bertha filed a lawsuit against the defendants alleging breach of contract, fraud, and conversion in the sale of real estate to Mark and Vivian using funds given them by Bertha's late husband, Leo Robert Schumacher. Bertha also challenges the $50,000 sanctions imposed against her attorney for filing a frivolous action.

The district court entered lengthy and exhaustive journal entries for both its summary judgment and sanctions rulings.

Bertha and Robert lived in Seattle, Washington. They did not have any children. Edna lives in Abilene, Kansas, and is Robert's sister. Mark is Edna's son, and he is married to Vivian. Mark and Vivian reside in Geneva, Illinois, with their son Leo. The parties dispute whether Leo is named after Robert or Robert's father.

It is undisputed that Edna and Robert had a close brother/sister relationship. Robert also had a close relationship with Mark because they shared mutual interests in sports and investments. The parties do not dispute that Robert gave monetary gifts to Edna and also to Mark and Vivian. Edna testified that Robert had given her $10,000 to help with the down payment for her daughter's house. Mark testified that Robert had given him money while he was at Stanford University, his first two sets of golf clubs, and money for tickets to attend the Olympics.

In 2003, Mark and Vivian were considering the purchase of real estate in Kansas for investment purposes and also to own real estate near the family's homestead property. Mark told Edna of this interest. In March 2004, Mark Kickhaefer told Edna that he heard Dean and Maryem Floyd were selling their land in Morris County and Mark should look into purchasing it because it was near property owned by their family. Edna contacted Mark with the information that the Floyds were asking $600 per acre for the pasture/crop farmland.

In April 2004, Edna and Kickhaefer visited the Floyd property and told the Floyds that Mark and Vivian were interested in buying the land. Edna testified in her deposition that she told Dean that Mark and Vivian were buying the land and Dean said that he would have his attorney draft a real estate contract. In an affidavit dated June 15, 2006, Dean stated: " I was contacted by Edna Morris and was told that she, her son Mark Morris, and her brother L. Robert Schumacher wanted to purchase this real estate." However, in his deposition on October 23, 2006, Dean testified that he " assumed" that Robert and Edna were purchasing the land, but he had never been told that by Edna, Mark, or Vivian, and he had not talked to Robert since they had been in first grade together.

After the meeting, Dean contacted his attorney, Charles Rayl, and requested that Rayl prepare a real estate contract selling the property to Mark and Vivian. There is no evidence that Dean told Rayl that Robert was an intended purchaser of the real estate or that Robert was involved in the transaction in any way. During contract preparation, Mark and Vivian explored financing options to purchase the Floyd real estate. On April 16, 2004, Mark and Vivian wrote a check from their checking account in St. Charles, Illinois, for $6,000 payable to First National Bank in Hope, Kansas (Hope Bank), for the earnest money deposit to purchase the Floyd real estate.

Mark testified that while he and Vivian were exploring financing options, Edna told them that Robert wanted to give them money as a gift to help purchase the property. Vivian testified that Mark indicated Robert wanted the purchase to happen because the real estate was near the family's property and their son Leo could inherit the real estate and have a connection to the property. On

the other hand, Bertha testified that she had conversations with Robert before he died and he said he was buying land in Kansas with Mark.

On April 16, 2004, Robert wrote a check to Edna in the amount of $6,000. Edna testified that Robert gave her the money to give to Mark and Vivian " in case they [didn't] have the money to do the escrow." Nowhere on the check is there any qualification, limitation, or statement of the intended use of the money. Edna deposited the check in her account at First National Bank in Abilene (Abilene Bank).

On April 20, 2004, Dean sent Mark and Vivian's $6,000 check to Patty Fells, the escrow agent at the Hope Bank. At that time, a draft of the real estate contract also began circulating. There is no evidence or testimony that Robert was ever listed as a purchaser of the real estate or that the Floyds ever requested that Robert be listed as a purchaser of the real estate. Similar to the real estate contract, the title insurance and the joint tenancy warranty deed contemplated a transfer of the real estate from the Floyds to Mark and Vivian.

Dean stated in his deposition that he told Fells at the Hope Bank that Edna, Robert, and Mark were going to be the buyers of the real estate in order to pass it on to their grandchildren. In her deposition, Fells testified that she never had a conversation with Dean where he told her that Robert was supposed to be a purchaser of the property.

The parties agreed on a purchase price of $174,738. After subtracting the $6,000 earnest money, the balance of $168,738 was due at closing which was set to occur on or before July 1, 2004. Mark and Vivian worked with the United Missouri Bank (UMB) to finance the purchase of the property.

On June 12, 2004, Robert wrote a second check to Edna in the amount of $15,600. Nowhere on the check is there any qualification, limitation, or statement of the intended use of the money. On June 23, 2004, Edna deposited the check in her account at the Abilene Bank. On June 14, 2004, Mark and Vivian executed a contract to purchase the real estate in question. Robert passed away on June 20, 2004. Dean's affidavit states: " Upon the death of L. Robert Schumacher on June 20, 2004 I was concerned that this sale would not be completed since I understood he was one of the buyers of the real estate. However, on July 1, 2004 this agreement was closed and I executed a deed conveying said real estate to Mark J. and Vivian Morris."

On June 24, 2004, Mark and Vivian wrote a check from their Charles Schwab account in the amount of $17,363.40 payable to the Hope Bank for half of the down payment on the real estate purchase. As scheduled, the real estate transaction closed on June 30, 2004, or July 1, 2004, wherein UMB issued a check on behalf of Mark and Vivian in the amount of $130,000 to the Hope Bank. As part of the closing, Edna contributed $21,600 toward the real estate purchase representing the checks she had received from Robert for $6,000 and $15,600.

Following the critical events in this case, Bertha discovered Robert's notes and letters between he and Edna that led Bertha to believe that Robert was purchasing the real estate in question as

opposed to giving it to Mark and Vivian a gift. One note contained Dean's name as seller and other calculations involving the purchase price and financing options. In letters from Edna to Robert, she discussed the purchase price of the real estate, kept him updated on discussions with the Floyds, the preparation of the contract, and the closing.

A day short of 2 years after closing-June 29, 2006-Bertha filed her lawsuit alleging claims of breach of oral contract for the sale of land, fraud, and conversion. Bertha filed an identical first amended petition wherein she removed her claim alleging punitive damages for fraud. The defendants filed a motion to dismiss, arguing that Bertha lacked standing, the statute of frauds barred her claim, she failed to plead her fraud claim with specificity, and she failed to state a claim for conversion. The defendants also requested sanctions for the filing of a frivolous lawsuit pursuant to K.S.A. 60-211. On November 22, 2006, the district court addressed each of the defendants' claims: (1) Bertha's standing was now proper because the estate of Robert-Bertha being the executor-had been added to the lawsuit; (2) the statute of frauds issue was taken under advisement; (3) Bertha had 20 days to file a bill of particulars concerning her fraud claim; (4) a ruling on the conversion claim would be premature; and (5) the sanctions issue was also taken under advisement. Instead of filing a bill of particulars, on December 11, 2006, Bertha filed a second amended petition wherein the following facts were listed in support of the fraud claim:

" 24. Upon information and belief, defendants, while they were aware that the late L. Robert Schumacher was to be one of three buyers of the above-described real estate, represented to Ms. Schumacher, after her husband's death, that the $15,600.00 check written to them was intended to be a gift.

" 25. The entire escrow amount as well as the down payment for the real estate above-described came solely from L. Robert Schumacher, and was in no way provided by the Defendants.

" 26. Dean Floyd, seller of the real estate described above, stated in an affidavit that it was his understanding that L. Robert Schumacher was to be one of the purchasers of the real estate above-described.

" 27. Bertha Schumacher had at least one conversation with Defendant Mark Morris about where the property would be purchased.

" 28. Dean Floyd was advised by defendants that they were apprehensive about continuing with the purchase of the above-described real estate following the death of L. Robert Schumacher. Nevertheless, they proceeded with the purchase while neglecting to inform Plaintiff, and failing to return the $21,600.00 paid to them by L. Robert Schumacher.

" 29. Defendants switched banks from the First National Bank in Hope, Kansas to UMB Bank, in an effort to conceal their activities from Plaintiff"

The defendants filed an extensive motion for summary judgment and a request for sanctions.

Bertha filed an extensive response to the defendants' motion. On October 12, 2007, the district court granted summary judgment in favor of the defendants and also held that sanctions against Bertha were warranted and appropriate. The court concluded that Bertha's claims for conversion, fraud, and breach of oral contract were barred by the statute of frauds and the conversion claim was also without merit because Bertha had offered no evidence that any defendant, without authorization, exercised ownership or control over the money given by Robert. The court deferred a ruling on the amount of sanctions to be imposed.

After a separate sanctions hearing on November 27, 2007, the district court awarded the defendants $68,807.28 in attorneys fees and expenses and also ordered sanctions against Bertha personally in the amount of $21,600 for pursuing the subject litigation. The court stated that Bertha's petition " had little evidentiary support at the time it was filed nor was it warranted by existing law." In its later ruling, the court stated that " even when it became clear after discovery that [Bertha's] allegations did not have any evidentiary support, [Bertha] and her counsel continued to pursue these claims." However, the court had reservations concerning the amount of sanctions and ordered a rehearing on the sole issue of sanctions. After reconsideration, the court modified the original sanction order by sanctioning Bertha's counsel in the amount of $50,000 and retracting the personal sanction against her.

It is necessary to first address the statute of frauds question. Bertha argues the district court erred in barring her claims under the statute of frauds.

The statute of frauds was enacted to prevent fraud and injustice. It requires, among other things, that an enforceable contract for the sale of real estate be in writing and signed by the party against whom enforcement is sought. K.S.A. 33-106; See *Bank of Alton v. Tanaka,* 247 Kan. 443, 452-53, 799 P.2d 1029 (1990). K.S.A. 33-106 provides in relevant part the following:

" No action shall be brought whereby to charge a party upon ... any contract for the sale of lands, tenements, or hereditaments, or any interest in or concerning them ... unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him or her lawfully authorized in writing."

The district court relied heavily on *Ayalla v. Southridge Presbyterian Church,* 37 Kan.App.2d 312, 152 P.3d 670 (2007), for authority based on the statute of frauds. The *Ayalla* court held: " Because Southridge Presbyterian has asserted the defense of the statute of frauds, the only material fact is whether the parties' alleged agreement was evidenced by a writing signed by Southridge Presbyterian." 37 Kan.App.2d at 316, 152 P.3d 670. Ayalla gave a written offer and an earnest money deposit for purchase of a residence. She argued that she had received an oral acceptance of the offer. However, Southridge Presbyterian later accepted a higher offer from another buyer. The *Ayalla* court held that Ayalla's claim was barred by the statute of frauds in the absence of a writing signed by Southridge Presbyterian. See 37 Kan.App.2d 316-19.

The facts in *Ayalla* are distinguishable. However, the *Ayalla* decision is beneficial for recitation of the appropriate standard of review. " Because the issue of whether an alleged contact satisfies the statute of frauds involves the interpretation of a statute, this court's review is unlimited." 37 Kan.App.2d at 317, 152 P.3d 670 (citing *Foster v. Kansas Dept. of Revenue,* 281 Kan. 368, 374, 130 P.3d 560 [2006]). Whether the statute of frauds is even applicable in this case is a question of law. Bertha argues that her breach of oral contract claim is not barred by the statute of frauds because it was not a contract for the sale of lands or interests therein. Rather, she argues the oral contract is outside the statute of frauds because it is a contract for a joint venture or partnership.

The defendants argue Bertha's claim of a joint venture is not properly before the court. The defendants argue Bertha did not make this claim in any of her petitions and only raised the claim in the motion for reconsideration. The defendants claim the motion for reconsideration was improperly before the district court and the consequence is that Bertha cannot raise the issue for the first time on appeal. See *Miller v. Bartle,* 283 Kan. 108, 119, 150 P.3d 1282 (2007) (Issues not raised before the trial court cannot be raised on appeal.).

A short history of the pleadings and hearings is necessary to understand the context of the defendants' claim that Bertha's joint venture claim should not be considered. In opposition to the defendants' use of the statute of frauds as a defense, Bertha's memorandum in opposition to summary judgment stated: " Accordingly, [Bertha's] position has always been that the oral contract between the parties has been partially executed, thus removing it from the purview of the statute of frauds."

After granting summary judgment, the district court ordered reconsideration solely on the issue of sanctions. The summary judgment remained intact. The order stated:

" The court has reservations concerning its order granting sanctions. Therefore, the court sua sponte, sets aside its previous order regarding the issue of sanctions and orders that the matter be reheard upon oral argument on the 26th of February, 2008 at 10:00. Attorneys for the parties are invited to be present and re-present their arguments and authorities."

Bertha filed a motion for reconsideration of the *entire* summary judgment motion, not just the ruling on sanctions. In the motion to reconsider, she argued:

" Furthermore, although the contract at issue relates to the purchase of land, due to the nature of the agreement, it may not even come under the statute of frauds. The plaintiff does not seek to enforce an agreement to purchase land against a seller, rather, it is an agreement between [Robert] and the defendants for [Robert] to become a co-purchaser, or perhaps ' partner,' in the land purchased."

The defendants objected to Bertha's motion for reconsideration of the *entire* summary judgment ruling. In the memorandum in support of sanctions, the defendants stated that the district court's journal entry on summary judgment was entered on October 11, 2007. Pursuant to K.S.A. 60-

259(f), the defendant's argued Bertha had 10 days in which to file a motion to alter or amend the judgment, she failed to do so, and her motion for reconsideration filed on February 20, 2008, was clearly untimely. The defendants argued that at no time was Bertha granted leave to file additional briefing and her motion for reconsideration should be stricken in its entirety.

At the hearing for reconsideration of sanctions, the parties cleared up the confusion as to why Bertha had filed a motion to reconsider the *entire* summary judgment ruling. In the summary judgment ruling of October 12, 2007, the district court granted judgment and then ordered a separate hearing to determine the appropriate amount of sanctions. The separate hearing occurred on November 27, 2007. However, the court filed the journal entry from the separate hearing on January 24, 2008, wherein it granted $68,000 and $21,600 in sanctions respectively. Counsel for the defendants prepared the journal entry, and the court signed it. On the signature lines for both of Bertha's counsel, the district court entered " Rule 170," along with the judge's initials. It was determined that copies of the journal entry from January 24, 2008, were never mailed to counsel.

To add to the confusion, on the same date and at nearly the same time that the sanctions journal entry was filed, the district court entered an order setting aside the January 24, 2008, sanctions journal entry it had filed almost simultaneously. It appears that only the order was mailed to counsel. Since the sanctions journal entry of January 24, 2008, was not mailed to counsel and when Bertha's counsel received the order setting aside the " previous order regarding the issue of sanctions," it became obvious that Bertha's counsel thought the parties were reconsidering a " previous order regarding ... sanctions," which could be interpreted to relate to the original October 12th summary judgment ruling where the court entered its ruling that sanctions were warranted but the amount would be determined at a later date.

At the final sanctions hearing on February 26, 2008, the district court stated, " [T]o the extent that the motion to reconsider that granting of summary judgment is filed in time, it's denied." Now on appeal, the defendants argue Bertha's claim of a joint venture was improperly raised in the district court and should not be considered on appeal. Bertha argues she raised the issue in court and even if improperly raised in its motion for reconsideration, the district court's denial of the motion demonstrates the court considered and rejected the issue. The defendants argue that even if the issue is considered, Bertha has failed to present clear and convincing evidence of the oral agreement. The defendants did not address the substance of Bertha's claim, *i.e.*, joint venture and statute of frauds, and only addressed the claim on procedural grounds.

The defendants cite *Troutman v. Curtis,* 36 Kan.App.2d 633, 143 P.3d 74 (2007), *aff'd* 286 Kan. 452, 185 P.3d 930 (2008), for authority that we should not consider Bertha's claim of a joint venture. In *Troutman,* a products liability case, the plaintiff sued Perclose, Inc., for state law claims of negligence in the design, manufacturing, and labeling of its catheterization devise called the Closer. The *Troutman* court affirmed the district court's granting of summary judgment of these state law claims based on federal preemption by the Medical Devices Amendments of 1976, 21 U.S.A. § 360k(a) (2000), as alleged by Perclose. However, the court held that federal preemption

did not apply to a claim that the manufacturer of a medical device failed to comply with the approved federal standards in the design, manufacturing, and labeling of the medical device. 36 Kan.App.2d at 650-51, 143 P.3d 74.

On appeal, Perclose conceded this preemption but argued that plaintiffs never raised such a claim in the district court and could not raise it on appeal. There was no mention in the record of such a claim until the plaintiffs filed their motion for reconsideration after the district court had granted summary judgment based on federal preemption. The *Troutman* court held that even if it liberally construed the Plaintiffs' pleadings to include a claim for noncompliance with federal standards, Perclose would still be entitled to summary judgment because the plaintiffs failed to come forward with any evidence to support such a claim. 36 Kan.App.2d at 651, 143 P.3d 74. The *Troutman* court concluded:

Our Supreme Court affirmed the Court of Appeals decision affirming the district court's grant of summary judgment. *Troutman v. Curtis,* 286 Kan. 452, 454-59, 185 P.3d 930 (2008). " Here, the plaintiffs came forward with no evidence in district court supporting a claim that Perclose failed to comply with the approved federal standards in the design, manufacturing, and labeling of the Closer. The plaintiffs did not even properly assert such a claim in their pleadings. Accordingly, the plaintiffs are precluded from raising this issue on appeal, and the district court did not err in granting summary judgment in favor of Perclose on all claims." 36 Kan.App.2d at 652, 143 P.3d 74.

After sorting through this procedural puzzle, we find that Bertha's motion for reconsideration was untimely pursuant to K.S.A. 60-259(f). The judgment was filed on October 12, 2007, but the motion to reconsider was not filed until February 20, 2008. The misunderstanding by Bertha's counsel did not toll the 10-day time period under K.S.A. 60-259(f).

Bertha also argues the summary judgment was not a " final judgment" because the issue of sanctions was still pending. In *Smith v. Russell,* 274 Kan. 1076, Syl. ¶ 1, 58 P.3d 698 (2002), the court held that K.S.A. 60-211 sanctions must be decided before the case is final for purposes of appeal. An outstanding motion for sanctions under K.S.A. 60-211 tolls the timely filing of a notice of appeal, but it has no procedural ramifications for the 10-day motion to amend judgment pursuant to K.S.A. 60-259(f). The district court should have rejected Bertha's motion outright on procedural grounds. The only issue still in play at that point in the proceedings was the appropriate amount of sanctions. The difference between *Troutman* and the present case is that here, the issue raised on appeal was raised and argued in the district court. The defendants raised the issue of statute of frauds as a defense to Bertha's lawsuit. Whether the lawsuit falls within the statute of frauds is a conclusion of law over which appellate courts have unlimited review. *Owen Lumber Co. v. Chartrand,* 283 Kan. 911, 916, 157 P.3d 1109 (2007). The court considered the issue of the statute of frauds and it is our responsibility to make sure the court was correct in its application.

We disagree with the district court that any oral contract that may exist in this case is void under

the statute of frauds. The alleged oral contract did not deal with the sale of real estate. Bertha is not suing the Floyds' for purchase of the real estate. Compare *Ayalla,* 37 Kan.App.2d at 313-14, 152 P.3d 670 (disgruntled buyer sued seller). Rather, this case involves the personal relationships between Bertha, Robert, Edna, Mark, and Vivian concerning money to be used to buy real estate.

Early Kansas jurisprudence provides case authority that is clearly on point. In *Goodrich v. Wilson,* 106 Kan. 452, 188 P. 225 (1920), the plaintiff acquired information that certain land could be purchased at an attractive price and proposed that defendant purchase it with him. It was orally agreed they would purchase the property jointly or in partnership. However, with the intent to cheat and defraud plaintiff, defendant bought the property for himself. The *Goodrich* court held a constructive trust was created and plaintiff could maintain an action to establish and enforce his interest in the property. In reversing the demurrer entered against the plaintiff's, the court held: " This is not a contract between these parties for the sale of any land or interest therein, but a contact to enter upon a joint venture to buy some land." 106 Kan. at 454, 188 P. 225; see also *Tenney v. Simpson,* 37 Kan. 353, 363, 15 P. 187 (1887) (" In the case of *Morrill v. Colehour,* 82 Ill. 61 [8, Syl. ¶ 1, (1876)], it was held as follows:' Where land is purchased by several for the purpose of sale and the acquisition of profits only, and not for permanent use, it will be regarded in equity as personal property among the partners in the speculation; and one of the parties may release his interest in the same verbally, and the same will not be within the stature of frauds.' ").

While we find the district court erroneously applied the statute of frauds, we also find the court correctly granted summary judgment to the defendants on Bertha's breach of oral contract claims. But not based on the statute of frauds. *Robbins v. City of Wichita,* 285 Kan. 455, 472, 172 P.3d 1187 (2007)(If a district court reaches the correct result, its decision will be upheld even though it relied upon the wrong ground or assigned erroneous reasons for its decision.) The evidence simply does not support Bertha's claim of an oral agreement and that the money Robert gave was intended to be some sort of joint venture in the purchase of the real estate. The defendants cite *In re Estate of Countryman,* 203 Kan. 731, 738, 457 P.2d 53 (1969), where the court stated that when an alleged " oral contract with a person since deceased is made the basis of an action for specific performance it is not sufficient that the contract be established by a mere preponderance of the evidence, but such evidence must be clear, cogent, and convincing. [Citation omitted.]"

The evidence of an oral contract in this case is anything but clear and convincing. While we recognize the summary judgment posture of this case, Bertha still has the duty to come forward with sufficient evidence to show there is something of evidentiary value to establish a disputed material fact. *Cunningham v. Riverside Health System, Inc.,* 33 Kan.App.2d 1, Syl. ¶ 5, 99 P.3d 133 (2003). The defendants contend the only clear and convincing evidence was that Mark and Vivian were intended to be the purchasers of the property. After the statute of frauds question is taken out of the equation, our analysis shifts to the district court's consideration of the evidence in granting summary judgment.

Bertha argues the district court impermissibly weighed the evidence in granting summary

judgment to the defendants.

The standard for reviewing a district court's decision granting summary judgment is well known:

" 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. On appeal, [appellate courts] apply the same rules and where we find reasonable minds could differ as to the conclusions drawn from the evidence, summary judgment must be denied. [Citations omitted.]" *Miller v. Westport Ins. Corp.*, 288 Kan. 27, 32, 200 P.3d 419 (2009).

In order to survive summary judgment, Bertha had the burden to establish there was a disputed material fact regarding whether the money Robert gave to Mark and Vivian was a gift or if Robert entered into an oral contract to have an interest in the property. PIK Civ. 4th § 124.01-A sets forth the following essential elements of an action based on a breach of contract: (1) The existence of a contract between the parties; (2) sufficient consideration to support the contract; (3) the plaintiff's performance or willingness to perform in compliance with the contract; (4) the defendant's breach of the contract; and (5) damages to plaintiff caused by the breach. *Commercial Credit Corporation v. Harris,* 212 Kan. 310, Syl. ¶ 2, 510 P.2d 1322 (1973); *City of Andover v. Southwestern Bell Telephone,* 37 Kan.App.2d 358, 362, 153 P.3d 561 (2007). Bertha had the burden of proof regarding the existence of an oral contract between Robert and Mark and Vivian to purchase the real estate in Kansas.

Bertha argues that the burden of proving that the funds Robert gave to the defendants were a gift rested with the defendants. In determining whether a inter vivos transfer of money was a gift or loan, the court in *In re Estate of Button,* 17 Kan.App.2d 11, Syl. ¶ ¶ 1, 2, 830 P.2d 1216, *rev. denied* 251 Kan. 938 (1992), stated:

" To establish a valid inter vivos gift, there must be (a) an intention to make a gift; (b) a delivery by the donor to the donee; and (c) an acceptance by the donee."

" The burden of proving that a gift was made, including the existence of all the elements necessary to its validity, is upon the party asserting the gift."

There really is no question in this case concerning delivery or acceptance. The critical element is Robert's intent and whether he intended the money he gave to Mark and Vivian to be a gift.

" When the moving party in a motion for summary judgment demonstrates a lack of evidence on

an issue as to which the nonmoving party will have the burden of proof at trial, the nonmoving party has a duty to come forward with sufficient evidence to show that there is something of evidentiary value to establish a disputed material fact." *Cunningham,* 33 Kan.App.2d 1, Syl. ¶ 5, 99 P.3d 133.

Bertha argues the disputed facts in this case prohibit the district court's resolution of the critical question on summary judgment. She claims each party presented evidence supporting their position and it was up to a jury, not the court, to decide if Robert intended to make a gift to Mark and Vivian.

Bertha relies on several pieces of evidence in support of her claim that the funds were not a gift. First, she relies on Robert's letters and notes that she discovered describing his involvement in a land purchase in Kansas. She maintains Robert's participation in the purchase is evident from the use of his money and his concern with financing and closing.

Second, she argues the district court weighed the credibility of Dean's testimony where he stated in his affidavit that Robert was going to be a purchaser of the property and that Dean told Fells at the Hope Bank that Robert, Edna, and Mark were going to be part of the purchase.

Third, Bertha relies heavily on Dean's claim that shortly after Robert's death, Edna told him, " I don't know whether we can go through with this contract or not" and his statement in the affidavit that after Robert's death: " I was concerned that this sale would not be completed since I understood he was one of the buyers of the real estate."

Fourth, Bertha relies on her statement that Robert told her he was buying land with Mark, Robert had never given a large gift to Mark and Vivian, and Mark never thanked Robert for the gift. Bertha cites her deposition testimony that the money Robert used was hers, the money came from a joint checking account in her name, Robert's relationship with Mark was no different than with other nephews, and she was not filing the lawsuit out of spite.

We agree with the district court that the undisputed evidence does not support Bertha's claim of an oral agreement for the purchase of the Kansas real estate. There is no express evidence in this case of an oral agreement. Bertha's entire case in premised on the inference that Robert intended to enter into an oral agreement with Mark and Vivian for the purchase of the real estate. All the written documents in this case demonstrate that the only intended owners of the real estate were Mark and Vivian. It is not a weighing of the evidence to find there is a lack of express written or oral agreement in Robert's notes and written correspondence between he and Edna. The undisputed evidence supports a finding that absent an oral agreement, the money given by Robert was intended to be a gift. Robert was known for giving gifts to family members. This was not a unique occurrence. Although Bertha argues the amount of money given for the real estate was out of proportion to the other monetary gifts, the existence of the other gifts shows a pattern of gifting by Robert. Further, the absence of any limitation or direction or evidence of an agreement noted on the checks Robert gave to Edna is additional evidence of the lack of any written confirmation of

an oral agreement.

We also note that if Edna made a comment about not knowing whether the deal would go through after Robert's death, this does not show that monies the defendants had already received from Robert were not gifts.

Even viewing the evidence in Bertha's favor, including reasonable inferences, the undisputed evidence fails to demonstrate an oral contract between Robert and Mark and Vivian which could survive a summary judgment ruling.

Next, Bertha argues the district court erred in granting summary judgment on her fraud and conversion claims.

First, Bertha argues the district court erroneously held these claims were barred by the statute of frauds. Based on our analysis above, we agree with Bertha. Since the statute of frauds is inapplicable in this case, it cannot remain a basis for granting summary judgment. We have no problem with the district court's analysis that a contract unenforceable under the statute of frauds affords no basis to recover damages occasioned by its breach whether premised in contract, tort, or otherwise. See *Mildfelt v. Lair,* 221 Kan. 557, 566-68, 561 P.2d 805 (1977). However, this principle is not applicable here.

Bertha also argues her claim for fraud has evidentiary support and the district court erroneously held that she could not establish any type of fraudulent misrepresentation or that she relied upon the defendants' silence.

Bertha's allegations of fraud taken from the second amended petition were listed as follows, along with her additional responses to the individual paragraphs from her response filed to the motion of summary judgment italicized below:

" 24. Upon information and belief, Defendants, while they were aware that the late L. Robert Schumacher was to be one of three buyers of the above-described real estate, represented to Mrs. Schumacher, after her husband's death, that the $15,600.00 check written to them was intended to be a gift."

[PLAINTIFF'S RESPONSE TO SUMMARY JUDGMENT MOTION:] " As discussed above, a letter written from Sid Reitz to George Yarnevich on behalf of Edna Morris, represented that the checks from Bob to Enda [sic] Morris were intended to be a gift. So, Paragraph 24 of Plaintiffs Second Amended Petition has evidentiary support, and is not ' completely lacking in factual support. ' "

" 25. The entire escrow amount as well as the down payment for the real estate above-described came solely from L. Robert Schumacher, and was in no way provided by the Defendants."

[PLAINTIFF'S RESPONSE TO SUMMARY JUDGMENT MOTION:] " It came to light in

discovery that Mark and Vivian Morris did, in fact, contribute some of their own money to the escrow and down payment. However, it is clear from [Bertha's] deposition, as stated in Plaintiffs Additional Material Facts, that at the time the Second Amended Petition was filed, she believed the truth of her allegation in Paragraph 25. More importantly, the facts show that [Robert], at a minimum, paid ... the lion's share of the escrow and down payment. "

" 26. Dean Floyd, seller of the real estate described above, stated in an affidavit that it was his understanding that L. Robert Schumacher was to be one of the purchasers of the real estate above-described."

[PLAINTIFF'S RESPONSE TO SUMMARY JUDGMENT MOTION:] " This paragraph is true on its face. Dean Floyd's Affidavit does, in fact, state that he understood that [Robert] was going to be one of the purchasers. Further, Mr. Floyd's Affidavit states that he was even told by Edna that was the case. Mr. Floyd also recalled Edna Morris was worried about closing the transaction without [Robert], Both of these statements by Mr. Floyd indicate that [Robert] was intended to be a purchaser of the real estate, not a person helping to facilitate the transaction by giving a $21,600 ' gift.' This theory is lent further credence by Mr. Floyd's statement that he was not concerned when the transaction closed without [Robert], because he figured that the Defendants had managed a way to finish the transaction without him. This suggests the money was not a gift, because if it were, the Defendants would have been counting on having [Robert's] money to close the transaction. "

" 27. Bertha had at least one conversation with Defendant Mark Morris about where the property would be purchased."

[PLAINTIFF'S RESPONSE TO SUMMARY JUDGMENT MOTION:] This is the only allegation in Plaintiffs Second Amended Petition that did not have any basis in fact [Bertha] attributes the inclusion of this paragraph as an error in communication with her attorneys. "

" 28. Dean Floyd was advised by Defendants that they were apprehensive about continuing with the purchase of the above-described real estate following the death of L. Robert Schumacher. Nevertheless, they proceeded with the purchase while neglecting to inform Plaintiff, and failing to return the $21,600 paid to them by L. Robert Schumacher." *[[PLAINTIFF'S RESPONSE TO SUMMARY JUDGMENT MOTION:] " Once again, this allegation is true on its face, and based upon the evidence in the record. See [Bertha's] response to Paragraph 26, above.* "

" 29. Defendants switched banks from the First National Bank in Hope, Kansas to UMB Bank, in an effort to conceal their activities from Plaintiff."

[PLAINTIFF'S RESPONSE TO SUMMARY JUDGMENT MOTION:] " While this allegation later proved to be false, [Bertha], as stated in Plaintiffs Additional Material Facts, believed this statement to be true at the time the Second Amended Petition was filed. It was only after the deposition of Patricia Fells that it was [d]etermined that none of the Defendants had a banking

relationship with the First National Bank of Hope, Kansas. "

In reviewing whether the district court erred in granting summary judgment on Bertha's fraud claim, this court reviews the facts in the light most favorable to her. See *Patterson v. Brouhard,* 246 Kan. 700, 702, 792 P.2d 983 (1990). The existence of fraud is normally a question of fact. See *Gragg v. Rhoney,* 20 Kan.App.2d 123, Syl. ¶ 1, 884 P.2d 443 (1994), *rev. denied* 256 Kan. 994 (1995). Therefore, on appeal, our standard of review is limited to determining whether the district court's findings of fact are supported by substantial competent evidence and whether the findings are sufficient to support the court's conclusions of law. *Alires v. McGehee,* 277 Kan. 398, 403, 85 P.3d 1191 (2004).

Furthermore, " [a] court should be cautious in granting a motion for summary judgment when resolution of the dispositive issue necessitates a determination of the state of mind of one or both of the parties. [Citations omitted.]" *Ruebke v. Globe Communications Corp.,* 241 Kan. 595, 605, 738 P.2d 1246 (1987). Even though fraud must be proved by clear and convincing evidence, a party resisting a motion for summary judgment in an action for fraud need not present clear and convincing evidence of fraud to oppose the motion. *Dugan v. First Nat'l Bank in Wichita,* 227 Kan. 201, 207, 606 P.2d 1009(1980).

Actionable fraud may be based upon a suppression of facts which the party is under a legal or equitable obligation to communicate or upon an affirmative misrepresentation made as to existing and material facts. See *Wolf v. Brungardt,* 215 Kan. 272, Syl. ¶ 4, 524 P.2d 726 (1974) (fraud by silence); *Broberg v. Boling,* 183 Kan. 627, 634-35, 331 P.2d 570 (1958) (affirmative misrepresentation).

The district court did not err in finding there was simply no evidence that the defendants made any misrepresentations, or even any type of representation at all, regarding whether either of the $6,000 or the $15,600 checks written by Robert to Edna were gifts. It is elementary, that in order to have a fraudulent misrepresentation, there must be a representation. This element is completely absent in Bertha's case, and the court correctly held that Bertha's amended petition, her response to the summary judgment motion, and her deposition testimony make it abundantly clear that she cannot in any way meet an essential element of any fraudulent misrepresentation claim. We are also in agreement concerning the relevance of the June 28, 2005, letter from Sidney Reitz to George Yarnevich wherein Reitz stated the $15,600 check to Edna represented " a gift to [Edna] and her family from [Robert] and is not related in any manner to the loans made to MEBCO, Inc." The letter was not a representation to Bertha and there is no evidence this letter was written on behalf of or even attributable to any of the defendants.

Bertha cites *Citize's State Bank v. Gilmore,* 226 Kan. 662, 667, 603 P.2d 605 (1979), for the proposition that a claim for fraudulent misrepresentation is not necessarily predicated upon affirmative statements and an action may also lie for concealment of facts. Bertha's proposition is correct and is termed fraud by silence. To establish fraud by silence, Bertha must show by clear

and convincing evidence the following elements:

" (1) that defendant had knowledge of material facts which plaintiff did not have and which plaintiff could not have discovered by the exercise of reasonable diligence; (2) that defendant was under an obligation to communicate the material facts to the plaintiff; (3) that defendant intentionally failed to communicate to plaintiff the material facts; (4) that plaintiff justifiably relied on defendant to communicate the material facts to plaintiff; and (5) that plaintiff sustained damages as a result of defendant's failure to communicate the material facts to plaintiff. [Citation omitted.]" *Miller v. Sloan, Listrom, Eisenbarth,* Sloan & Glassman, 267 Kan. 245, 260, 978 P.2d 922 (1999).

The district court held that Bertha failed to provide evidence in support of several elements of a fraud by silence claim, namely that the defendants were under an obligation to communicate the material facts to Bertha or that she justifiably relied on the defendants to communicate the material facts to her. The district court rejected Bertha's claim that the defendants owed her some undefined duty to communicate material facts to her because she was the widow, sole heir at law, and representative of Robert's estate.

Even if we accept Bertha's constructive fraud argument and find that the familial situation in this case created a confidential relationship, her claim for fraud by silence would still fail. See *Brown v. Foulks,* 232 Kan. 424, 430-31, 657 P.2d 501 (1983) (A fiduciary relation can arise in a relationship of blood, business, friendship, or association in which one of the parties reposes special trust and confidence in the other who is in a position to have and exercise influence over the first party.). The evidence demonstrated why Bertha did not rely on the defendants for any communication, let alone talk to them at all. She confirmed this in her deposition. Further, we also find it difficult to understand why Bertha could not have discovered the existence of any alleged oral agreement simply by researching debits to the joint checking account used by her and Robert to write the checks to Edna. Even with reasonable diligence in this regard, she could have discovered the material facts. We are hard pressed to reverse the district court's ruling on summary judgment where Bertha cannot present evidence on all the elements of a claim of fraud by silence.

Bertha further argues her claim for conversion should not have been rejected on summary judgment. We disagree.

In Kansas, a conversion is defined as an " unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another." *Muhl v. Bohi,* 37 Kan.App.2d 225, Syl. ¶ 5, 152 P.3d 93 (2007). The district court cited *Geer v. Cox,* 242 F.Supp.2d 1009, 1023 (D.Kan.2003), for the additional principle that " [a] claim of conversion is barred where the owner of the property consents to the defendants' possession."

Applying the principles of conversion, Bertha argues that consent does not preclude liability for conversion where funds are used contrary to given instructions. Bertha cites *Ford v. Guarantee Abstract & Title Co.,* 220 Kan. 244, Syl. ¶ 9, 553 P.2d 254 (1976), and *Drumm-Standish Com. Co. v. Farmers State Bank,* 132 Kan. 736, Syl. ¶ 2, 297 P. 725 (1931), for authority that a party may

be guilty of conversion when it disburses the funds of another contrary to express instructions. Bertha contends the defendants had neither a contractual right to possess Robert's money, nor does the undisputed evidence establish that Robert gave " carte blanche permission" for the defendants to use the funds. If the evidence is construed in her favor, Bertha argues there is evidence to survive summary judgment that Robert gave funds to the defendants to purchase his share of the property and their use of the funds for their own personal interests was conversion.

The district court properly granted summary judgment on Bertha's claim of conversion. Bertha does not cite any evidence, nor can we find any in the record on appeal, where express instructions were given by Robert on how the funds were to be used. There were no instructions, qualifications, or limitations given with any of the checks. Even viewing the evidence in the light most favorable to Bertha, there is no evidence the defendants exercised unauthorized control over the money given to them by Robert.

Bertha further argues the district court erred by imposing sanctions against her counsel.

Bertha claims the district court erred in ordering sanctions against her attorneys for asserting fraud claims in her petition that had little evidentiary value at the time of filing and that her counsel did not make a reasonable inquiry prior to filing suit as required by K.S.A. 60-211(b). The sanctions were assessed against Bertha's counsel under K.S.A. 60-211(b)(3) because the fraud allegations " on which the Court relied upon allowing the fraud count to temporarily remain in the case, as well as a number of other allegations in Plaintiff's Petition, have no evidentiary support, at this time and did not have evidentiary support at the time they were filed." K.S.A. 60-211(c) provides that if a motion is signed in violation of this section, the trial court " shall impose ... an appropriate sanction."

K.S.A. 60-211(b) provides in pertinent part:

" (b) The signature of a person constitutes a certificate that the person has read the pleading, motion or other paper and that to the best of the person's knowledge, information and belief formed after an inquiry reasonable under the circumstances:

....

" (2) the claims, defenses and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification or reversal of existing law or the establishment of new law;

" (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; "

" ' [T]he appellate court's function is to determine whether substantial competent evidence supports the trial court's findings of fact that the statutory requirements for sanctions are present.'

[Citations omitted.]" *Evenson Trucking Co. v. Aranda,* 280 Kan. 821, 835, 127 P.3d 292 (2006). " Substantial evidence is that which possesses both relevance and substance and which furnishes a substantial basis of fact from which the issues can reasonably be resolved. [Citation omitted.]" *Griffin v. Suzuki Motor Corp.,* 280 Kan. 447, 459, 124 P.3d 57 (2005).

The district court held that Bertha's attorneys did not make a reasonable inquiry prior to filing suit as required by K.S.A. 60-211(b). The court acknowledged that attorneys sometimes get into a statute of limitations pinch, but they have a duty to react to discovery and when their case falls apart, they are under a duty to dismiss. See *Summers v. Montgomery Elevator Co.,* 243 Kan. 393, 398-99, 757 P.2d 1255 (1988); *Nelson v. Miller,* 227 Kan. 271, 276, 607 P.2d 438 (1980). The district court stated that Bertha's counsel continued with the claim that the defendants had transferred their accounts from the Hope Bank to UMB in an attempt to conceal their fraud, yet this claim was found to be completely groundless. Dean was never directly told that Robert would be purchasing the land. The court held that none of the allegations of fraud turned out to be true and that continuation of the lawsuit was a violation of K.S.A. 60-211.

Bertha argues each one of the factors relied upon by the district court in granting sanctions is without merit. First, she argues her counsel conducted a reasonable presuit inquiry, which was not the case in either *Evenson Trucking Co.,* 280 Kan. at 839-43, 127 P.3d 292 or; *Bus.Opportunities Unlimited, Inc. v. Envirotech Heat. & Cooling, Inc.,* 26 Kan.App.2d 616, 620-23, 992 P.2d 1250 (1999). She states the material facts and circumstances were within the control of the defendants. Bertha read Robert's notes and Edna's letters. Bertha contacted Dean, the seller of the real estate, and obtained a favorable affidavit. Bertha states it would have been impossible for her to obtain confidential information from the Hope Bank prior to filing the lawsuit. She contends the district court improperly " raised the bar" for claims of fraud against professionals.

The district court's findings of fact concerning the baseless allegations of fraud in this case are supported by substantial competent evidence. The factual allegations of fraud raised by Bertha are listed above, along with the additional comments by Bertha in her response to summary judgment. The court found that " none of the allegations as to fraud turned out to be true." First, none of the defendants ever told Bertha that the $15,600 check written to them was intended to be a gift. Second, Mark and Vivian made the escrow payment, and then the remaining down payment was split between the funds given by Robert and money from Mark and Vivian. Third, Dean may have understood that Robert was to be one of the purchasers, but none of the defendants ever told him that was to be the case, and written documents dispelled any suggestion that Robert was one of the purchasers. Fourth, Bertha never had any conversation with Mark about the property. Fifth, the defendants never switched banks from Hope Bank to UMB.

We share the district court's concern involving the allegations of fraud in this case. With reasonable inquiry, Bertha could have discovered the claims of fraud were false. We are equally troubled with Bertha's pursuit of the fraud claim after discovery in the case dispelled the allegations of fraud. See *Summers,* 243 Kan. at 399, 757 P.2d 1255 (" Where an attorney is forced by

circumstances outside his control to file a case without investigation and before demand can be made on the proposed defendant, he has the obligation thereafter to use diligence in promptly determining whether there is good cause against all parties."). Yet, Bertha remained firm in her prosecution for fraud. We disagree with her claim that the district court applied a heightened standard of fraud based on the professional status of the defendants. Fraud applies equally to all, but it has higher ramifications for certain individuals and their employment. The district court stated:

" The Court notes that the mere fact that a fraud claim was asserted against defendants (two of which are licensed professionals) could have cost the defendants their license to practice law, sell insurance, or to be a stockbroker. The Court further notes that you do not file a lawsuit for fraud without shoring up the reason for that fraud and securing documentation that there is in fact a case for fraud. This is what happened, however, in this case."

All people are entitled to seek a remedy for a perceived wrong. However, that remedy needs be contemplated and evaluated before seeking the assistance of the courts. Frivolous lawsuits simply cannot be tolerated. The court in *Summers,* 243 Kan. at 400, 757 P.2d 1255, stated:

" As in all difficult decisions, there are meritorious arguments on both sides. It is the trial court's duty to weigh the dangers of each. The risk of overtaxing the judicial system with frivolous litigation and its excess expenses to the defendants must be weighed against the proposition that the courts are constitutionally committed to the promise that every person is entitled to a remedy for a wrong by due process of law. To keep this promise, the system must be sufficiently open to tolerate an innovative challenge to present theories of the law. Otherwise, we remain mired in the mistakes of the past."

See also *Subway Restaurants, Inc. v. Kessler,* 266 Kan. 433, 443, 970 P.2d 526 (1988), *cert. denied* 526 U.S. 1112, 119 S.Ct. 1756, 143 L.Ed.2d 788 (1998) (" A dismissal on summary judgment does not itself indicate that the claim was frivolous. [*Rood v. Kansas City Power & Light Co.,* 243 Kan. 14, 24, 755 P.2d 502 (1988)]. Every lawyer who loses on summary judgment should not be vulnerable to sanctions."). The district court here did not err in awarding sanctions.

Next, we turn to the district court's award of $50,000. " The district court has the discretion to determine what type of sanctions are appropriate in a given case." *Wood v. Groh,* 269 Kan. 420, 431, 7 P.3d 1163 (2000). The factors to be considered in determining a sanction under K.S.A. 60-211 are:

" (1) whether the improper conduct was willful or negligent;

" (2) whether it was part of a pattern of activity or an isolated event;

" (3) whether it infected the entire pleading or only one particular count or defense;

" (4) whether the person has engaged in similar conduct in other litigation;

" (5) whether it was intended to injure;

" (6) what effect it had on the litigation process in time or expense;

" (7) whether the responsible person is trained in the law;

" (8) what amount, given the financial resources of the responsible person, is needed to deter that person from repetition in the same case; and

" (9) what amount is needed to deter similar activity by other litigants. [Citation omitted.]" 269 Kan. at 431, 7 P.3d 1163.

In addressing the above nine factors, the district court concluded as follows:

" 1. This court finds that the actions of counsel for plaintiff were negligent; 2. The court has no evidence regarding Number 2; 3. The court finds that the entire pleading was infected; 4. The court has no knowledge of similar conduct by plaintiff or her attorneys; 5. There is no evidence that counsel for plaintiff had intent to injure; 6. This litigation has had an enormous effect in terms of defendants time and expenses; 7. This court finds that the responsible parties are the plaintiff's counsel and they are trained in the law; 8. This court finds that the amount that the court sanctions counsel as stated herein is an appropriate amount which will deter repetition; 9. Lastly, the court finds that the amount awarded will deter similar activity by other litigants and counsel."

In *Vondracek v. Mid-State Co-op, Inc.,* 32 Kan.App.2d 98, 105, 79 P.3d 197 (2003), this court held the trial court had abused its discretion in assessing sanctions against the Vondraceks where the court made no attempt to consider the factors in *Wood.* Moreover, the court noted the sanctions under K.S.A. 60-211 are " generally utilized when a party files a claim based upon a legal theory that is clearly contrary to statute or case law." 32 Kan.App.2d at 104, 79 P.3d 197. The object of a sanction should be to prevent a party against whom the sanction is being imposed from profiting by its own violation. *Rodreick v. Wikoff,* 29 Kan.App.2d 726, 733-34, 31 P.3d 307 (2001).

Bertha argues that if sanctions are to be assessed, the district court abused its discretion in awarding the $50,000 sanction against her counsel. We disagree. Sanctions may include " the amount of the reasonable expenses incurred ... including reasonable attorney fees." K.S.A. 60-211(c); see *In re Marriage of Burton,* 29 Kan.App.2d 449, 454, 28 P.3d 427, *rev. denied* 272 Kan. 1418 (2001) (" The district court is vested with wide discretion to determine the amount and the recipient of an allowance of attorney fees.").

In the district court's journal entry of January 24, 2008, the court found the entire amount of defense counsel's attorney fees and expenses totaled $68,807.28. The court concluded: " Based on the attorney fee statements and affidavits presented to the Court, and the Court's knowledge of this case, the Court finds that the amount of fees and expenses incurred by defendants in defending this action were reasonable and necessary, and further are the appropriate amount to be awarded as a sanction." Bertha has not challenged the validity of defense counsel's attorney fees and expenses (

i.e., reasonableness of fees, hourly rate, amount of work performed). In the order determining the amount of sanctions filed on March 24, 2008, the court stated its finding that Bertha's counsel had amassed legal fees of $47,000 and the defendants' legal fees were $68,000. The court indicated: " Frankly, the court is astounded that a case that had a value of less that $25,000 could result in attorney fees for all parties in excess of $100,000. And that does not include the costs of a trial."

Nor, might we add, the costs of an appeal.

In granting the amount of sanctions, the district court stated: " Given the amount of money the defendants have spent to defend this case, the court finds that an appropriate sanction to be $50,000." Our question is whether the sanction imposed was an abuse of discretion. Without any argument regarding the validity of the fees, and considering the amount of time expended by both parties, we cannot find imposing sanctions in an" amount nearly $20,000 less than the actual fees and expenses exhausted by defense counsel and approximately the same amount as expended by Bertha's counsel was an abuse of discretion.

There are other issues that could be discussed, but they are somewhat tangential and their apparent resolution would not change the outcome of this matter.

Affirmed.

MALONE, J., concurring:

I respectfully concur in the result.

LEBEN, J., concurring:

I agree with the majority that the district court properly granted summary judgment to the defendants and that the district court's order granting sanctions against the plaintiff's attorneys was within the district court's discretion and supported by the record. I write separately because I have taken some additional turns in the route I have followed to reach these conclusions.

A lawsuit is a serious thing. We have rules that allow both sides to use pretrial depositions of the witnesses under oath and otherwise to discover the relevant facts. We also allow liberal amendment of the claims so that they reflect what has been learned in discovery.

A lawsuit alleging fraud is especially serious. We have special rules requiring that fraud claims must be pled-even at the outset of the suit-with particularity. See K.S.A. 60-209(b). In combination with other rules that require parties and attorneys to state claims only when they have factual and legal support for them, see K.S.A. 60-211, the requirement that fraud be pled with particularity serves as a check on the reckless assertion of fraud claims.

In this case, Bertha Schumacher filed an initial petition, and she later amended it twice to refine her claims. The parties then took discovery, including interrogatory answers under oath to written questions about the suit and depositions, which provided a full opportunity to respond under oath

to more questions about the suit. After discovery, the defendants filed a motion for summary judgment, accompanied by excerpts from the depositions and other discovery. The plaintiff filed a detailed response. As is normal summary-judgment practice, the defendants set out in separately numbered paragraphs all of their factual contentions. The plaintiff responded in a paragraph-by-paragraph fashion, and the plaintiff also noted some additional facts that she said were important. The defendants replied to those additional factual statements, paragraph by paragraph.

After that, the district court granted summary judgment.

Central to Schumacher's legal claim is her assertion that her husband, Robert, had entered an agreement with Mark and Vivian Morris to buy land jointly with them. Initially, in answer to an interrogatory that asked her to identify all facts or documents supporting her claim that Robert entered into such a contract with the Morrises, Bertha did not mention any of Robert's oral statements to her about the matter. When her deposition was taken, however, she responded to a question from the defendants' attorney about what facts supported her claim that Robert had entered into an oral contract to buy land jointly with the Morrises with a single oral statement from Robert:

" Q: ... Ms. Schumacher, what facts to do you have to support this allegation?

" A: Telephone calls.

" Q: With whom?

" A: Bob had with Mark and then he discussed them with me.

" Q: When did Bob have these telephone calls with Mark?

" A: Well, I can remember one when he said he was going to buy some land with Mark and I said, ' Why don't you buy it here where you can keep an eye on it?' And there's a man by the name of Mr. Frame that he went out and looked at the property with.

" Q: Mr. Frame?

" A: Mr. Frame.

" Q: Who is Mr. Frame?

" A: Mr. Frame worked for the Wildlife Department and helped us out with the coyotes and his name is Mike Frame.

....

" Q: So you say that Bob and Mr. Frame went and looked at property in Seattle?

" A: Yes.

" Q: For the purpose of buying property with Mark Morris, is that what you're-

" A: No. Instead of buying it in Kansas, buy it here where you can take care of it.

" Q: When do you recall having those conversations with Bob?

" A: Before he died."

That's the portion of the deposition Bertha cited to the district court and again cites on appeal to support her claim that Robert told her that he was buying land in Kansas with Mark Morris. She said that her husband had said that he was going to buy some land with Mark and that she suggested that he instead buy some land in the Seattle area. After that, she said he went out to look at land in the Seattle area with another man. And there's no other evidence that Robert made any further comments to her about buying land in Kansas, either instead of or in addition to a possible land purchase in the Seattle area. Bertha agreed in her deposition that Robert never told her where the property in Kansas was located, what the purchase price was, or why he was going to buy it together with Mark Morris.

No matter how Bertha's claim is characterized, it depends upon her allegation that Robert and the Morrises had an oral contract to purchase the land together. As the majority notes, since Robert is deceased and there's no written contract, the claim of an oral contract ultimately would have to be supported by clear and convincing evidence. See *In re Estate of Countryman,* 203 Kan. 731, 738, 457 P.2d 53 (1969). Bertha's evidence about what Robert told her-that he planned to buy some unspecified land in Kansas with Mark Morris-could not meet the clear-and-convincing-evidence standard, even combined with the few notes and other materials Bertha found after Robert's death. Even in Bertha's recounting of the conversation, she had suggested that Robert instead buy land in the Seattle area, and Robert investigated that option without ever again telling Bertha that he had any plans to proceed with a land purchase with Mark Morris in Kansas.

For the purposes of our decision, though, one final hurdle remains before we can affirm the district court. In other cases, we have generally said that the clear-and-convincing-evidence standard is not applied at the summary-judgment stage except in libel cases, where it helps to enhance First Amendment considerations favoring free speech. See *Rebarchek v. Farmers Co-op. Elevator & Mercantile Ass'n,* 272 Kan. 546, 552, 35 P.3d 892 (2001); *Linden Place v. Stanley Bank,* 38 Kan.App.2d 504, Syl. ¶ 2, 167 P.3d 374 (2007).

This rule appears first to have been announced in *Dugan v. First Nat'l Bank in Wichita,* 227 Kan. 201, 207, 606 P.2d 1009 (1980). Our Supreme Court relied upon two federal cases, which were cited for the proposition that " federal courts apply the usual summary judgment rules to actions based upon fraud." 227 Kan. at 207, 606 P.2d 1009 (citing *Knoshaug v. Pollman,* 148 F.Supp. 16 [D.N.D.], *aff'd* 245 F.2d 271 [8th Cir.1957]; *United States v. Gill,* 156 F.Supp. 955 [W.D. Pa.1957]). Based on those precedents, the Kansas Supreme Court concluded that " a party resisting a motion for summary judgment in an action based upon fraud need not present ' clear and convincing

evidence' of fraud in opposing the motion." *Dugan,* 227 Kan. at 207, 606 P.2d 1009.

The court's premise for adopting the rule-that it matched the practice under the federal rules that Kansas adopted-has proved incorrect over time. Even when applying Kansas law, the United States Court of Appeals for the Tenth Circuit has held that, under *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 254, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986), the substantive evidentiary burden applicable to the claim must be considered at the summary-judgment stage. *Foster v. Alliedsignal, Inc.,* 293 F.3d 1187, 1195 (10th Cir.2002).

While this rule has continued to be followed in Kansas state courts, one significant aspect of Kansas law has recently changed. At the time this rule was adopted, Kansas considered clear-and-convincing evidence to measure the quality of a party's proof, not its quantity. See *Ortega v. IBP, Inc.,* 255 Kan. 513, 528, 874 P.2d 1188 (1994). The Kansas Supreme Court recently reset the understanding of what clear-and-convincing evidence is under Kansas law: it now constitutes evidence that shows that the truth of the facts asserted is " highly probable." *In re B.D.-Y.,* 286 Kan. 686, Syl. ¶ 3, 187 P.3d 594 (2008).

But the Kansas Supreme Court's most recent case that dealt with summary judgment and cited the rule that the clear-and-convincing-evidence standard is not applied on summary judgment included the specific note that clear-and-convincing evidence is a quality of proof, not a quantity of proof. *Rebarchek,* 272 Kan. at 552, 35 P.3d 892. It seems to me, then, that the underpinnings of the Kansas rule that the clear-and-convincing-evidence standard is not considered on summary judgment have been substantially undercut. First, the premise that this rule reflected a common interpretation of the parallel federal rule simply does not withstand scrutiny. Second, Kansas' understanding of what clear-and-convincing evidence is has been substantially revised, now much more closely matching the understanding in other jurisdictions where, as in federal practice, the evidentiary standard is considered on summary judgment.

We are of course bound to follow the rulings of the Kansas Supreme Court unless there's some indication that it is departing from its previous position. *State v. Merrills,* 37 Kan.App.2d 81, 83, 149 P.3d 869, *rev. denied* 284 Kan. 949 (2007). While I believe that the Kansas Supreme Court should modify its position on whether the evidentiary standard is considered at summary judgment, I cannot conclude that the *In re B.D.-Y.* decision necessarily indicates that it will do so. Nonetheless, it seems to me that there must be *some* point at which the evidence simply is too weak to go forward. As the Kansas Supreme Court noted in one recent case, the question on summary judgment ultimately is " whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.' " *Warner v. Stover,* 283 Kan. 453, 456, 153 P.3d 1245 (2007) (quoting *Anderson,* 477 U.S. at 251-52). In other contexts, even when general rules indicate that a factual question for the jury is ordinarily presented, summary judgment is nonetheless sometimes appropriate when the evidence is especially one-sided. *E.g.,Hale v. Brown,* 287 Kan. 320, 197 P.3d 438 (2008) (affirming grant of summary judgment on negligence claim even though questions of negligence

ordinarily are factual questions for a jury); *Berthelson v. Developmental Services of N.W. Kansas,* 2006 WL 3774332 (Kan.App.2006) (unpublished opinion), *rev. denied* 283 Kan. 930 (2007) (affirming grant of summary judgment on negligence claim based on weakness of causation evidence); see 11 Stempel, Moore's Fed. Prac. § 56.1l[6] [a] (3d ed.2009); 10A/10B Wright, Miller & Kane, Fed. Prac. & Proc: Civil 3d §§ 2729, 2730 (1998).

So how does all of this affect the outcome of Bertha's claims here? First in response to the summary-judgment motion, she claimed an oral contract to buy land that was taken out of the bar of the statute of frauds by part performance-Robert's payment of the down payment for the land purchase. She'd had plenty of time to develop her evidence and legal theories before responding to the summary-judgment motion. Second, the claim she has presented ultimately must rest or fall on her testimony about what Robert told her regarding one telephone call Robert had with Mark Morris. Without that testimony, she has absolutely no evidence of any agreement between Robert and Morris. But that testimony proves far too little, especially since even Bertha said she tried to talk Robert out of the Kansas land purchase and that Robert then proceeded to investigate a potential land purchase in Washington, which she had suggested as an alternative. In my view, the combination of the legal argument she put forth and the evidence she provided to support it were so weak that the case was-as required for summary judgment-so one-sided that the defendants must prevail as a matter of law.