NOT DESIGNATED FOR PUBLICATION

No. 124,002

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

VIRGIL and MELIA ELLIOTT,
Appellees,

v.

KINGDOM CAMPGROUND, et al.,
Appellants.

MEMORANDUM OPINION

Appeal from Cherokee District Court; OLIVER K. LYNCH, judge. Opinion filed August 4, 2023. Reversed and remanded with directions.

Jarrod C. Kieffer, of Stinson LLP, of Wichita, for appellants.

Christopher Gunn, of Beck & Gunn Law Office, LLC, of Topeka, for appellees.

Before ARNOLD-BURGER, C.J., BRUNS and ISHERWOOD, JJ.

ISHERWOOD, J.: Kingdom Campground and its trustees appeal the district court's judgment granting injunctive relief and damages to Virgil and Melia Elliott. The court's order enabled the Elliotts to remove their house from real estate belonging to Kingdom Campground and compensated them for damages they purportedly suffered as a product of Kingdom Campground's interference with their water usage while they occupied the home and increased moving expenses incurred in removing the house. Kingdom Campground asserts the district court erred in both respects. First, they claim the house is properly considered a fixture to the realty and therefore it could not be removed. Next, according to Kingdom Campground, the Elliotts never pled a cause of action for water

damages so that portion of the award was unjustified, and because removal of the house was impermissible, the Elliotts were also not entitled to compensation for costs associated with that move. Following a thorough analysis of the claims, we find the district court failed to apply the appropriate test in arriving at its conclusion that the Elliotts were entitled to relocate the cabin. The matter must be reassessed at a new hearing where the proper analysis is employed. We further find that the district court was never afforded the opportunity to analyze any of the three claims the Campground now raises concerning the monetary award the Elliotts received as compensation for interference with their water usage at the cabin. We decline to weigh in on the merits of those claims for the first time on appeal.

FACTUAL AND PROCEDURAL BACKGROUND

Kingdom Campground (the Campground) is closely affiliated with Faith Community Chapel in Galena, Kansas. The Campground includes houses and cabins where some church members live to assist with its operations and maintenance. Virgil and Melia Elliott were members of the Chapel for many years and lived on the Campground's premises.

In 1993, the Elliotts started construction of a house on the Campground premises. Virgil personally performed the majority of the construction work, but some church members and contractors assisted with framing the house and pouring its concrete foundation. Construction of the house required footings to be dug and a foundation poured 12 inches below surface level. Concrete blocks were then placed on top of the footing and filled with gravel. It was capped with a layer of cement over the concrete blocks to create a slab floor. The house was then constructed on top of the concrete slab.

The Elliotts remitted property taxes solely on the home every year since 1994 but paid nothing in association with the land on which it was constructed. They were also

responsible for the general upkeep and maintenance of the house. Even so, they were expected to cede occupancy to campground attendees when dormitories were filled to capacity or when attendees sought nicer accommodations. At no time did they ever pay any form of rent to the Campground for the house or the land.

The Elliotts also held a homeowner's insurance policy on the house since construction began in 1993. In 2007, a fire destroyed the house, and the policy provided them with the funds necessary to reconstruct their home. None of the proceeds were paid to the Campground. During the reconstruction period, the Elliotts rented a cabin from one of the Campground's trustees.

When the Elliotts began construction of the house in 1993, they did not enter into a written agreement with the Campground to clearly delineate and memorialize each party's respective rights. But in January 2000, the parties formed a lease agreement to comply with requirements mandated by Cherokee County. According to the terms of that agreement, Virgil had permission from the Campground "to have his personal property located [there]." It went on to restrict the use of "the property" to the needs of the church people and to serve the purposes of the church. The agreement was amended in February 2016 to include Melia as an interest holder.

The Elliotts gradually stopped attending services at the Campground and ultimately distanced themselves from the church altogether. In early 2018, the Elliotts decided to remove what they considered to be their home from the Campground's premises. The parties dispute whether the Elliotts ever formally notified the Campground of their intentions. But there is every indication that once that objective was clear, a fair amount of hostility began to simmer between the parties. For example, Benoni Pennock, one of the Campground's trustees, placed an inoperative dump trailer across the pathway leading to the Elliotts' house, fully obstructing the main access to the residence, and diverting the Elliotts to a dirt path instead. The following month, the Campground erected

a 20-foot pole in front of the Elliotts' house, presumably to stymie any efforts to move the structure, although Pennock claimed it was done at the behest of counsel in order to install a security camera. A few more months passed and Pennock allegedly used heavy equipment to form an earthen mound over the dirt path, thus rendering that alternative route inaccessible to the Elliotts as well. As a result, the couple was forced to seek permission to park at their neighbor's house and walk to their own home.

In February 2019, Pennock tried to install a shut-off valve on the Campground's water line supply but broke a water line in the process, effectively cutting off water to most of the Campground. Water supply was eventually restored to all buildings on the premises except the Elliotts' house. The Campground recommended that the Elliotts drill their own water well, but the couple lacked the financial resources for such remedial measures, so they were forced to obtain water from a rural water source on another property. The process was less than ideal as it required them to fill barrels of water, drive the barrels back home, and use a system of tanks and pumps to supply water to the house. The Elliotts endured the process, 8 to 10 trips on average, per week. But due to rather poor water quality, it was necessary to rely on bottled water for drinking and visits to the laundromat to clean their clothes.

Unsurprisingly, there is no consensus between the parties as to why the Elliotts were excluded from the water restoration measures. According to Virgil, the Campground never offered to restore their water supply. The Campground refutes that claim and asserts that it offered to do so several times, but the Elliotts refused. The parties never established a formal agreement that contemplated the Campground would provide the Elliotts with water. While the Elliotts never received bills for the service, they regularly tithed around $25.00 each month expressly for water services until the termination of their relationship with the church.

The Elliotts eventually contacted Tilton & Sons to discuss the possibility of relocating the house off the Campground. Tilton submitted a total bid of $45,000 for relocation services—$37,500 to move the structure and an additional $7,500 to place the structure over a dug basement. By the time of trial in January 2021, that relocation cost had increased to $56,500—$40,000 to move the structure, $10,000 to place it over a dug basement, and $6,500 for equipment costs. Tilton estimated it would take three to six months to complete the process.

A bench trial was required to air out the dispute between the parties. Following its conclusion, the district court found the Elliotts had a right to remove the home from the Campground and that nothing in the lease agreement required them to obtain permission prior to such removal. The district court stated the Elliotts were permitted to remove trees as necessary to facilitate their move and ordered the Campground to remove the pole and the trailer, and to restore water to the home. For the loss of water supply, the district court granted $17,000 in damages to the Elliotts, and it awarded another $11,500 for the increased relocation costs the Elliotts incurred as a result of the delay.

The Campground filed a motion seeking to suspend enforcement of the court's order, but the motion was denied. The Elliotts proceeded with the removal process at the conclusion of the litigation.

The Campground now timely brings the case to us to determine the propriety of the district court's order.

LEGAL ANALYSIS

The Campground's motion to stay judgment pending appeal was sufficient to avoid preclusion under the acquiescence doctrine.

Before reaching the merits of the Campground's arguments, the Elliotts raise a preliminary matter that must be resolved—whether the Campground acquiesced in the district court's judgment and therefore, is precluded from obtaining review of that ruling.

Acquiescence in the lower court's judgment by an appealing party creates jurisdictional concerns. See *Almack v. Steeley*, 43 Kan. App. 2d 764, 770, 230 P.3d 452 (2010) (citing *Varner v. Gulf Ins. Co*., 254 Kan. 492, 497-98, 866 P.2d 1044 [1994]). Jurisdictional issues can be raised by the appellate court at any time. *State v. Gill*, 287 Kan. 289, 294, 196 P.3d 369 (2008) (finding appellate court has duty to question jurisdiction on its own initiative).

Generally, acquiescence in a judgment, which closes the gate to appellate review, occurs when a party voluntarily complies with all or part of the judgment by assuming the burdens or accepting the benefits of the judgment they seek to contest on appeal. *Varner*, 254 Kan. at 494-98; *Younger v. Mitchell*, 245 Kan. 204, 206-07, 777 P.2d 789 (1989). The doctrine of acquiescence is based on the inconsistency between accepting the blessing or bane of a judgment but appealing the judgment itself. *Brown v. Combined Ins. Co. of America*, 226 Kan. 223, Syl. ¶ 6, 597 P.2d 1080 (1979). When examining acquiescence in a judgment, the test has always been whether the position taken by the party on appeal is inconsistent with the judgment. *Layne Christensen Co. v. Zurich Canada*, 30 Kan. App. 2d 128, 138, 38 P.3d 757 (2002) (citing *First Nat'l Bank in Wichita v. Fink*, 241 Kan. 321, 324, 736 P.2d 909 [1987]).

The Elliotts argue that the Campground acquiesced in the district court's judgment by accepting the order for injunctive relief and allowing the removal of the house from

the premises. The Campground moved to stay the judgment pending appeal, which was later denied. The Elliotts acknowledge the same to be true yet argue further mechanisms existed that the Campground should have pursued and exhausted in order to suspend the action and their failure to do so is tantamount to compliance with the judgment.

We find the contrary to be true. The Campground's motion to stay the order pending appeal was sufficient to avoid preclusion under the acquiescence doctrine because it shows they were not on board with the judgment. See *Harsch v. Miller*, 288 Kan. 280, 200 P.3d 467 (2009) (finding party would not have acquiesced to lower court's denial of motion to stay if they proceeded with jury trial because objections were stated in record and preserved for appeal); see also *Haberer v. Newman*, 219 Kan. 562, 549 P.2d 975 (1976) (rejecting defendants' claim that they involuntarily complied with judgment under threat of being held in contempt of court when they delivered deed to plaintiffs and voluntarily withdrew motion to reconsider). There is no inconsistency between the Campground's actions and the relief it now requests on appeal. It seeks to overturn the damages portion of the judgment, not the removal of the house. There is nothing in the record nor any assertions by the Elliotts showing that the Campground paid the damages included in the court's order. Accordingly, we find that the Campground did not acquiesce in the district court's judgment and is not precluded from pursuing an appeal therefrom.

The district court failed to use the correct legal analysis when determining whether the Elliotts' cabin was properly considered a fixture.

The Campground asserts that because the district court failed to use the appropriate legal analysis when assessing whether the Elliotts could properly remove the home from the premises, its conclusion is fatally flawed.

Whether a particular piece of property is a fixture of real property presents a mixed question of law and fact. *Smith v. Anguiano*, No. 122,135, 2021 WL 2171155, at *5 (Kan. App. 2021) (unpublished opinion). When reviewing such questions, we are required to use a bifurcated standard. That means we review the district court's factual findings under the substantial competent evidence standard and its resulting legal conclusions under a de novo standard. See *Gannon v. State*, 305 Kan. 850, 881, 390 P.3d 461 (2017). Substantial evidence is such legal and relevant evidence as a reasonable person might accept as sufficient to support a conclusion. In evaluating the evidence to determine whether it truly provides a foundation for the district court's factual findings, we are not permitted to reweigh conflicting evidence, evaluate witnesses' credibility anew, or reassess questions of fact. *Bicknell v. Kansas Dept. of Revenue*, 315 Kan. 451, 481, 509 P.3d 1211 (2022).

We first turn to the district court's legal conclusions. In arriving at its decision that the Elliotts had the right to remove a home built on leased property the district court cited exclusively and perfunctorily to *Hogan v. Manners, et al.*, 23 Kan. 551 (1880), without any real insight into the corresponding analysis it presumably drew from that authority. We take a different view of *Hogan*'s relevance. A fair reading of that case reveals that it does not establish a legal right for a home to be removed from leased land. Rather, it largely addresses whether a lender is permitted to foreclose upon a mortgage against the lessee's home because the lessee claimed a homestead exception. The structure at issue there was erected upon leased land and a specific contractual provision enabled Manners to remove the building upon termination of the lease. The court dismissed the argument that Manners home was personal property finding instead that a residence is a fixture to real estate, whether that real estate be leased or otherwise, until such time as it is removed. Stated another way, the structure remained an improvement to the real estate until removal. 23 Kan. at 556, 559. In following *Hogan*, the district court strayed down the wrong path and arrived at a conclusion that is not legally sound.

Because the central issue at trial was whether the house was the Elliotts' personal property or the Campground's real property, the district court should have used the three-part fixture test set forth under *Stalcup v. Detrich*, 27 Kan. App. 2d 880, 10 P.3d 3 (2000). The general rule in Kansas is that once personal property is affixed to the real estate, the property becomes part of the realty. The factors the district court should have considered when making its assessment of whether the building was personal property or a fixture on the real estate include: (1) annexation to the realty; (2) adaptation to the use of that part of the realty with which it is attached; and (3) the intention of the party making the annexation. 27 Kan. App. 2d at 886.

An Athenian poet once said, "How ingenious an animal is a snail . . . When it falls in with a bad neighbor it takes up its house and moves off." See Elisabeth Tova Bailey, The Sound of a Wild Snail Eating 66 (Algonquin Books 2010), quoting Philemon 3rd or 4th century B.C. Athenian poet. What is simple and natural for a snail is not so simple and natural for humans. We are guided by human laws as well as natural laws. We are not free as a snail to move on because we must also obey our society's laws. Stalcup instructs us that there is a particular legal analysis which governs disputes such as these. And, if a court fails to follow that analysis, then that court's decision carries no legal force.

The hearing before the district court was extensive with a considerable amount of witness testimony received and evidence admitted. Thus, if we were so inclined, we could likely cull the record before us and extract the facts necessary to filter this issue through the three phases of the *Stalcup* inquiry. But to do so would most assuredly transcend the boundaries of our role. As reviewing courts, we are tasked with the responsibility of analyzing the rulings entered by the district court and discerning whether they are legally sound. Fact-finding is simply not the role of appellate courts. *State v. Gutierrez-Fuentes*, 315 Kan. 341, 347, 508 P.3d 378 (2022). We trust the district court will thoroughly and fairly conduct the appropriate analysis on remand.

In so finding, we remain mindful of the fact that the cabin has already been moved and the Campground is not seeking its return. But the outcome of this issue necessarily informs the related question of what, if any, damages the Elliotts may be entitled to for expenses incurred in relocating the structure. Thus, it is necessary to remand the case with directions to conduct a new hearing, tailored to the *Stalcup* framework, to determine whether the cabin is properly classified as a fixture.

The Campground failed to raise a claim before the district court that the Elliotts neglected to identify their cause of action with specificity, and we will not address their argument for the first time on appeal.

Kingdom Campground argues for the first time on appeal that the district court erred in awarding the Elliotts damages for loss of water because: (1) The Elliotts did not plead a cause of action for loss of water usage, (2) Kingdom Campground did not owe the Elliotts a duty to provide water, and (3) the Elliotts failed to mitigate their damages.

Generally, appellants are prohibited from raising issues on appeal that were not first argued before the district court. *Gannon v. State*, 303 Kan. 682, 733, 368 P.3d 1024 (2016). Even so, as is often the case with such general rules, exceptions have been established. In this context, those exceptions include when:

> "'(1) The newly asserted claim involves only a question of law arising on proved or admitted facts and is determinative of the case; (2) consideration of the claim is necessary to serve the ends of justice or to prevent the denial of fundamental rights; and (3) the district court is right for the wrong reason.'" *143rd Street Investors, L.L.C. v. Board of Johnson County Comm'rs*, 292 Kan. 690, 706, 259 P.3d 644 (2011).

The party asserting the claim carries the burden to explain why an exception is applicable and thereby opens the door for us to reach the merits of an issue. *State v. Daniel*, 307 Kan. 428, 430, 410 P.3d 877 (2018); Supreme Court Rule 6.02(a)(5) (2023 Kan. S. Ct. R. at 36) ("If the issue was not raised below, there must be an explanation

why the issue is properly before the court."). Unfortunately, here, the Campground does not even acknowledge the issue only just surfaced on appeal. Thus, they likewise do not enlighten us with a discussion outlining how any of the exceptions enable us to delve into the merits of their contention.

The decision to review an unpreserved claim under an exception is a prudential one. *State v. Parry*, 305 Kan. 1189, 1192, 390 P.3d 879 (2017); *State v. Frye*, 294 Kan. 364, 369, 277 P.3d 1091 (2012). Thus, even if an exception would support a decision to review a new claim, we have no obligation to do so. *Parry*, 305 Kan. at 1192. We decline to utilize any potentially applicable exception to review the Campground's belated claim. They had every opportunity to present these arguments to the district court yet failed to do so. We are an error-correcting court and will not attribute error to a ruling of the district court for which the Campground expressed no objection. We therefore decline to address any arguments concerning the damages awarded for the Campground's interference with the Elliotts' water usage.

We remand this case with directions to the district court to conduct a new hearing, under the appropriate test, to reassess whether the Elliotts' cabin constituted a fixture to the leased land upon which it was constructed. The conclusion the district court reaches on that matter will necessarily impact whether the Elliotts are entitled to receive damages for any costs sustained in relocating the structure. We note, however, that the award for water damages is final as a product of this appeal and may not be relitigated as part of the remand hearing.

Reversed and remanded with directions.