NOT DESIGNATED FOR PUBLICATION

No. 125,220

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

KRISTIAN D. VAN METEREN,
and
THE SINGULARIS GROUP, LLC,
Appellees,

v.

JARED SUHN,
Appellant.

MEMORANDUM OPINION

Appeal from Johnson District Court; PAUL C. GURNEY, judge. Opinion filed March 31, 2023. Appeal dismissed.

Ryan Kriegshauser and *Joshua Ney*, of Kriegshauser Ney Law Group, of Olathe, for appellant.

Karl Kuckelman, of Wallace Saunders, Chartered, of Overland Park, for appellees.

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

PER CURIAM: This interlocutory appeal is brought pursuant to K.S.A. 2022 Supp. 60-5320(f)(2). Kristian D. Van Meteren and The Singularis Group, LLC filed a petition in district court against Jared Suhn alleging—among other things—that he had breached the terms of a noncompete clause in a Buy-Sell Agreement. In response to the plaintiffs' petition, Suhn filed a motion to strike the claims asserted in the petition under the provisions of the Kansas Public Speech Protection Act (KPSPA), K.S.A. 2022 Supp. 60-5320. Although the district court struck one of the claims, it denied Suhn's motion to strike the remaining claims.

After the 14-day deadline for filing an interlocutory appeal as a matter of right under K.S.A. 2022 Supp. 60-5320(f)(2) had expired, Suhn filed a motion for reconsideration in the district court. After the district court denied his motion, Suhn filed a notice of appeal. Based on the plain and unambiguous language of K.S.A. 2022 Supp. 60-5320(f)(2), we find that this interlocutory appeal was not timely filed. As a result, we do not have appellate jurisdiction. Thus, we dismiss the appeal and deny both parties' motions for appellate attorney fees.

FACTS

Van Meteren and Suhn each owned a 50% interest in The Singularis Group, LLC. The limited liability company provides various consulting and marketing services to political candidates, governmental agencies, law firms, businesses, and other organizations. On September 6, 2019, Van Meteren and Suhn executed a Buy-Sell Agreement. Under the terms of the agreement, Van Meteren agreed to purchase Suhn's ownership interest in The Singularis Group, LLC for $760,000.

In addition to other terms, the Buy-Sell Agreement contained a noncompete clause. Notwithstanding, the agreement also provided:

> "Nothing in this [agreement] shall be construed to prevent Seller from engaging in general, media (including broadcast and digital), or strategic consulting for political or business clients without geographic or other restriction. Such general consulting and media consulting services offered by the Seller may include, but are not limited to, giving advice on marketing matters including direct mail, producing advertisements for radio, television, and digital spaces, advising on vendor relationships, and all other duties commonly performed by a general or media consultant. Nothing in this [agreement] shall be construed to prevent Seller from

> engaging in work of any type for corporate clients that are not Company clients, so long as said corporate clients do not compete with Company in the political marketing industry. At no time shall Seller advise a Company client to stop doing business with Company, to reduce its planned business with Company, or to redirect any portion of any Company client's business or planned business to a competitor or Seller. Nothing in this [agreement] shall be construed to prevent Seller from, in good faith, advising his clients or prospective clients in their best interests and the best interests of a campaign."

On October 21, 2019, legal counsel for Van Meteren and The Singularis Group, LLC sent a letter to Suhn asserting that he had violated the terms of the noncompete provision of the Buy-Sell Agreement. After the parties were unable to resolve their differences, Van Meteren and The Singularis Group, LLC filed a lawsuit against Suhn. The petition—which was filed on April 2, 2021—alleged three counts of breach of contract, one count of tortious interference with a prospective business relationship, and one count of breach of fiduciary duty. In response to the claims asserted in the petition, Suhn filed a motion to strike pursuant to the provisions of the KPSPA.

On August 25, 2021, the district court entered a journal entry granting the motion to strike in part and denying it in part. In doing so, the district court found that the KPSPA applies to the claims asserted against Suhn in the petition. Regarding the first count of the petition, the district court determined that Van Meteren and The Singularis Group, LLC had failed to make a prima facie showing for relief. However, the district court concluded that Van Meteren and The Singularis Group, LLC had adequately made a prima facie showing for relief as to the remaining counts. Consequently, Count I of the petition was dismissed but the other counts were allowed to go forward.

Suhn did not file an interlocutory appeal as a matter of right within the 14 days authorized by K.S.A. 2022 Supp. 60-5320(f)(2). Instead, he filed a motion for reconsideration and sought to renew his motion to strike in the district court. This motion was filed on September 21, 2021, which was nearly two weeks after the statutory deadline for the filing of an interlocutory appeal had expired.

At a hearing held on November 30, 2021, the district court orally denied Suhn's motion for reconsideration. Several months later, on April 4, 2022, the district court entered a journal entry explaining its reasons for denying the motion. Two days later, Suhn filed a notice of appeal pursuant to K.S.A. 2022 Supp. 60-5320(f). In response, Van Meteren and The Singularis Group, LLC then asked this court to involuntarily dismiss the appeal for lack of appellate jurisdiction. In order to give the parties the opportunity to brief and argue the jurisdictional issue, the motion to dismiss was denied on present showing.

ANALYSIS

Kansas Public Speech Protection Act, K.S.A. 60-5320

In 2016, the Kansas Legislature enacted the KPSPA—which is also known as the "anti-SLAPP" statute—and it is codified in K.S.A. 60-5320. See L. 2016, ch. 58, § 1. The term "SLAPP" is an acronym for "'strategic lawsuits against public participation,'" and the KPSPA was enacted to prevent meritless lawsuits that chill free speech. *Doe v. Kansas State University*, 61 Kan. App. 2d 128, 135, 499 P.3d 1136 (2021). The express purpose of the KPSPA "is to encourage and safeguard the constitutional rights of a person to petition, and speak freely and associate freely, in connection with a public issue or issue of public interest to the maximum extent permitted by law while . . . protecting the rights of a person to file meritorious lawsuits for demonstrable injury." K.S.A. 2022

Supp. 60-5320(b). Moreover, the KPSPA is to "be applied and construed liberally to effectuate its general purposes." K.S.A. 2022 Supp. 60-5320(k).

Under the KPSPA, the "'[e]xercise of the right of free speech' means a communication made in connection with a public issue or issue of public interest." K.S.A. 2022 Supp. 60-5320(c)(4). Likewise, the "'[e]xercise of the right of association' means a communication between individuals who join together to collectively express, promote, pursue or defend common interests." K.S.A. 2022 Supp. 60-5320(c)(3). In turn, a "'public issue'" or "'issue of public interest'" is defined as one involving: (1) health or safety; (2) environmental, economic, or community well-being; (3) the government; (4) a public official or public figure; or (5) a good, product, or service in the marketplace. K.S.A. 2022 Supp. 60-5320(c)(7).

The KPSPA "represents a dramatic departure from typical civil litigation in Kansas" and "provides a mechanism not otherwise available under the Kansas Rules of Civil Procedure for a defendant to seek early dismissal of an action via a motion to strike prior to filing an answer." Phillips and Willoughby, *Game-Changer?: The Kansas Public Speech Protection Act*, 91 J.K.B.A. 27, 27 (November/December 2022). Specifically, the KPSPA sets forth a procedure allowing for a remedy "'early in the litigation for those parties claiming to be harassed by a SLAPP lawsuit.' [Citation omitted.]" *Doe*, 61 Kan. App. 2d at 135. This unique procedure allows a party to move to strike a claim that "is based on, relates to or is in response to [the movant's] exercise of the right of free speech, right to petition or right of association." K.S.A. 2022 Supp. 60-5320(d).

Under the KPSPA, the movant must first make a prima facie showing that one or more of the claims asserted in the petition concerns the exercise of freedom of speech, freedom to petition, or freedom of association. If the movant is successful in making this showing, the burden shifts to the party asserting the claim or claims to establish a likelihood of prevailing on the merits by coming forward with substantial competent

evidence to establish a prima facie case. K.S.A. 2022 Supp. 60-5320(d). In other words, the KPSPA provides a procedure early in the judicial process for a "determination whether the lawsuit has been filed to harass the defendant or to stifle the defendant's right of free speech [or other rights identified in the statute]." *T&T Financial of Kansas City v. Taylor*, No. 117,624, 2017 WL 6546634, at *3 (Kan. App. 2017) (unpublished opinion).

Appellate Jurisdiction in Kansas

In Kansas, the right to appeal is controlled by statute. As a result, appellate courts only have jurisdiction to entertain an appeal if it is filed in the manner prescribed by the Kansas Legislature. *Wiechman v. Huddleston*, 304 Kan. 80, 86-87, 370 P.3d 1194 (2016). Also, there is a strong public policy against piecemeal appeals. See *AMCO Ins. Co. v. Beck*, 258 Kan. 726, 728, 907 P.2d 137 (1995). As a result, interlocutory appeals from non-final or provisional orders issued by district courts are not common and are only permitted to the extent allowed by statute. As a general rule, the decision whether to grant permission to a party to take an interlocutory appeal is left to the sound discretion of the appellate courts upon the filing of an appropriate application filed under K.S.A. 2022 Supp. 60-2102(c).

On rare occasions, the Kansas Legislature grants a party the statutory right to file an interlocutory appeal. Significant to this case, when a district court denies a motion to strike filed under the KPSPA, K.S.A. 2022 Supp. 60-5320(f)(2) grants the movant a statutory right to file an interlocutory appeal within 14 days after the entry of the order denying the motion. Here, it is undisputed that Suhn did not file a notice of appeal within the 14-day period authorized by the KPSPA. Likewise, it is undisputed that Suhn's motion for reconsideration and renewal of his motion to strike was not filed until after the statutory deadline set forth in K.S.A. 2022 Supp. 60-5320(f)(2) had expired.

Our interpretation of a statute involves a question of law. As a result, our review is unlimited. See *Nauheim v. City of Topeka*, 309 Kan. 145, 149, 432 P.3d 647 (2019). The most fundamental rule of statutory construction is that the intent of the Kansas Legislature governs if that intent can be ascertained. Consequently, in interpreting a statute, we must first attempt to ascertain legislative intent based on the express statutory language and by giving common words their ordinary meanings. 309 Kan. at 149-50. Furthermore, when a statute is plain and unambiguous, we are to refrain from reading something into the statute that is not readily found in its words. 309 Kan. at 149-50.

In summary, Kansas appellate courts have the authority to hear only those matters over which we have been granted jurisdiction by the Kansas Legislature. *In re A.A.-F.*, 310 Kan. 125, 135, 444 P.3d 938 (2019). Moreover, "[a]n appellate court has no authority to create an exception to statutory jurisdictional requirements." *Wiechman*, 304 Kan. 80, Syl. ¶ 2. If we do not have appellate jurisdiction over a particular appeal, the appropriate remedy is dismissal. See *Wiechman*, 304 Kan. at 84-85.

Application of K.S.A. 2022 Supp. 60-5320(f)(2)

K.S.A. 2022 Supp. 60-5320(f)(2) explicitly states that "[t]he movant . . . has the right to . . . file an interlocutory appeal from a trial court order denying [a] motion to strike, if notice of appeal is filed within 14 days after entry of such order." A review of the record reveals that the district court entered the journal entry granting in part and denying in part Suhn's motion to strike on August 25, 2021. As a result, Suhn had the statutory right to file an interlocutory appeal under K.S.A. 2022 Supp. 60-5320(f)(2) on or before September 8, 2021. Instead of filing a notice of appeal, Suhn filed a motion for reconsideration in the district court on September 21, 2021. As discussed above, this was filed 13 days *after* the statutory time limit for the filing of an interlocutory appeal under the KPSPA had expired.

Nevertheless, Suhn argues that the statutory deadline for bringing an interlocutory appeal under the KPSPA should be deemed to have been tolled in light of the filing of his motion for reconsideration. In support of this argument, Suhn points us to K.S.A. 2022 Supp. 60-2103(a), which tolls the time for appeal when certain motions are filed following the entry of a final judgment. Significantly, the plain language of K.S.A. 2022 Supp. 60-2103(a) does not address the filing of an interlocutory appeal from a non-final or provisional order entered by a district court.

It is also important to recognize that specific statutes normally control over general statutes. See *State v. Turner*, 293 Kan. 1085, 1088, 272 P.3d 19 (2012) (citing *State v. Chavez*, 292 Kan. 464, 466, 254 P.3d 539 [2011]). Here, the Kansas Legislature has enacted a specific 14-day time period for the filing of interlocutory appeals as a matter of right following the denial of a motion to strike brought under the KPSPA. K.S.A. 2022 Supp. 60-5320(f)(2). There is nothing in the plain language of the KPSPA to suggest that the statutory deadline may be tolled, suspended, extended, or revived by the filing of a motion to reconsider or similar motion. As such, we conclude that the specific provisions of K.S.A. 2022 Supp. 60-5320(f)(2) establish the jurisdictional requirements applicable to this appeal and, as such, there is no reason for us to look to the more general provisions of K.S.A. 2022 Supp. 60-2103(a).

In reaching this conclusion, we note that our court has previously applied the specific language of the KPSPA in determining that the filing of cross-appeals is not authorized under the act. In *T&T Financial of Kansas City v. Taylor*, the plaintiff asserted claims for defamation and tortious interference with a business relationship against the defendant. In response, the defendant filed a motion to strike pursuant to the KPSPA. After the district court denied the defendant's motion to strike, she timely filed an interlocutory appeal within the 14-day deadline set forth in the KPSPA. In response, the plaintiff attempted to file a cross-appeal. However, our court dismissed the cross-appeal, "finding this court lacked jurisdiction because nothing in K.S.A. 2016 Supp. 60-5320

authorized a cross-appeal." 2017 WL 6546634, at *2. Similarly, nothing in the KPSPA authorizes the filing of an interlocutory appeal as a matter of right after the expiration of the 14-day deadline set forth in K.S.A. 2022 Supp. 60-5320(f)(2).

Even if the Kansas Legislature had intended to graft the tolling provisions of K.S.A. 2022 Supp. 60-2103(a) onto the KPSPA, we do not find the statute would assist Suhn under the circumstances presented in this case. This is because a motion to reconsider or other applicable posttrial motion triggers the tolling of the statutory deadline for the filing of an appeal only when it is filed *prior* to the expiration of the statutory deadline. See *Sibley v. Culliver*, 377 F.3d 1196, 1204 (11th Cir. 2004) (a state court filing after the federal habeas filing deadline expired does not revive the petition because "once a deadline has expired, there is nothing left to toll"); see also *Lambert v. Nutraceutical Corp.*, 783 Fed.Appx. 720, 722 (9th Cir. 2019) (unpublished opinion) (a motion for reconsideration filed within the time allowed by the Federal Rules of Civil Procedure, but after a 14-day time limit for certifying a class, does not resuscitate the deadline). Because Suhn's motion for reconsideration was not filed until well after the 14-day deadline for filing an interlocutory appeal under K.S.A. 2022 Supp. 60-5320(f)(2) had expired, there was nothing left to toll.

In support of his argument, Suhn cites *Anderson v. Beech Aircraft Corp.*, 237 Kan. 336, 699 P.2d 1023 (1985)—which was subsequently superseded by statute—for the proposition that a statutory deadline for the filing of an interlocutory appeal may be deemed to be tolled by the filing of a motion to reconsider. However, unlike this case, *Anderson* dealt with an application for leave to take a *permissive* interlocutory appeal pursuant to K.S.A. 60-2102 while this case involves the filing of an interlocutory appeal as a matter of right under K.S.A. 60-5320(f)(2). Additionally, unlike this case, the defendant in *Anderson* filed a motion to amend the district court's order granting the plaintiffs partial summary judgment prior to the expiration of the statutory deadline for

the filing of an application for leave to file an interlocutory appeal had expired. 237 Kan. at 338-39.

Suhn also cites two unpublished opinions in criminal cases in which panels of our court found that a motion to reconsider filed by the State following a district court's suppression of evidence tolled the statutory time period to file an interlocutory appeal under K.S.A. 2022 Supp. 22-3603. Neither of these opinions are binding on this panel. *State v. Fleming*, 308 Kan. 689, 706, 423 P.3d 506 (2018) (Court of Appeals panels are not required to follow decisions of previous panels.). Regardless, we find both of the cases distinguishable from the present case. In *State v. Wilson*, No. 114,203, 2016 WL 1169487, at *3 (Kan. App. 2016) (unpublished opinion), unlike this case, the State filed its motion to reconsider before the 14-day statutory deadline for the filing of an interlocutory appeal had expired. Similarly, in *State v. Little*, No. 105,221, 2011 WL 4035796 (Kan. App. 2011) (unpublished opinion), a review of the official records maintained by our court reveals that the State filed its motion to reconsider 13 days after the entry of the suppression order entered by the district court.

Again, it is not the role of the judicial branch to read additional language into a statute that the legislative branch did not include in its clear and unambiguous language. Likewise, appellate courts do not have the authority to create exceptions to appellate jurisdiction requirements enacted by the Kansas Legislature. *Wiechman*, 304 Kan. 80, Syl. ¶ 2. In enacting the KPSPA, our Legislature made a policy decision to grant a movant only 14 days to file an interlocutory appeal as a matter of right from the denial of a motion to strike brought under the provisions of the KPSPA. We find this policy decision to be consistent with the unique procedure set forth in the KPSPA as well as with the legislative intent of safeguarding the constitutional rights of the movant while also protecting the rights of those filing meritorious lawsuits. K.S.A. 2022 Supp. 60-5320(b). Ultimately, it is the role of the Kansas Legislature—and not the role of the

courts—to properly balance these conflicting interests. See *O'Brien v. Leegin Creative Leather Products, Inc.*, 294 Kan. 318, 348, 277 P.3d 1062 (2012).

For these reasons, we conclude that we lack jurisdiction over this appeal. We further conclude that the appropriate remedy under these circumstances is dismissal of this interlocutory appeal. See *Wiechman*, 304 Kan. at 84-85. Of course, because this opinion does not reach the substantive issues that Suhn attempted to present in this interlocutory appeal, they may still be raised in future proceedings in the district court and, if necessary, in an appeal from the final judgment.

Appellate Attorney Fees

Both parties have requested that we award them attorney fees on appeal. On the one hand, Suhn seeks to recover attorney fees pursuant to Kansas Supreme Court Rule 7.07(b) (2022 Kan. S. Ct. R. at 52) and as authorized by K.S.A. 2022 Supp. 60-5320(g). On the other hand, Van Meteren and The Singularis Group, LLC seek to recover attorney fees pursuant to Rule 7.07(b) and (c) as well as under K.S.A. 2022 Supp. 60-5320(g). For the reasons stated below, we do not find that an award of appellate attorney fees to either party is appropriate.

Under Rule 7.07(b), "[a]n appellate court may award attorney fees for services on appeal in a case in which the district court had authority to award attorney fees." (2022 Kan. S. Ct. R. at 52). Here, the district court had the authority to award attorney fees pursuant to the provisions of K.S.A. 2022 Supp. 60-5320(g). Furthermore, Rule 7.07(c) provides that "[i]f an appellate court finds that an appeal has been taken frivolously, or only for the purpose of harassment or delay, it may assess against the appellant or appellant's counsel, or both, the cost of reproduction of the appellee's brief and a reasonable attorney fee for the appellee's counsel." (2022 Kan. S. Ct. R. at 52).

K.S.A. 2022 Supp. 60-5320(g) provides:

> "The court shall award the defending party, upon a determination that the moving party has prevailed on its motion to strike, without regard to any limits under state law: (1) Costs of litigation and reasonable attorney fees; and (2) such additional relief, including sanctions upon the responding party and its attorneys and law firms, as the court determines necessary to deter repetition of the conduct by others similarly situated. If the court finds that the motion to strike is frivolous or solely intended to cause delay, the court shall award to the responding party reasonable attorney fees and costs related to the motion."

In light of the dismissal of this appeal for lack of appellate jurisdiction, we find that Suhn is not entitled to recover appellate attorney fees. Again, we do not decide the issue of whether the district court erred in denying his request to recover his attorney fees for partially prevailing on his motion to strike. This is one of the issues that can be raised in future proceedings as this case moves forward.

We also deny the request for appellate attorney fees filed by Van Meteren and The Singularis Group, LLC. Specifically, we do not find that the issues presented in this appeal to be frivolous. Moreover, we do not find that this appeal was filed for the purposes of harassment or delay. Rather, we find that counsel for both parties presented good faith and well-framed legal arguments in support of their respective legal positions.

Appeal dismissed.