NOT DESIGNATED FOR PUBLICATION

Nos. 113,675
113,834

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

CENTRAL KANSAS MEDICAL CENTER, d/b/a
St. Rose Ambulatory and Surgery Center,
Appellant,

v.

STANLEY M. HATESOHL, M.D.; GREAT BEND
REGIONAL HOSPITAL, L.L.C.; and
CENTRAL KANSAS FAMILY PRACTICE, P.C.,
Appellees.

MEMORANDUM OPINION

Appeal from Barton District Court; RON SVATY, judge. Opinion filed March 18, 2016. Reversed and remanded with directions.

Samuel L. Blatnick, *G. Mark Sappington*, and *Meredith A. Webster*, of Kutak Rock LLP, of Kansas City, Missouri, for appellant.

Arthur S. Chalmers, *Stephen H. Netherton*, and *Randy J. Troutt*, of Hite, Fanning & Honeyman, L.L.P., of Wichita, for appellee Stanley M. Hatesohl, M.D.

Michael J. Fleming and *Franke J. Forbes*, of Forbes Law Group, LLC, of Overland Park, for appellees Great Bend Regional Hospital LLC and Central Kansas Family Practice, PC.

Before MALONE, C.J., SCHROEDER, J., and BURGESS, S.J.

Per Curiam: Stanley M. Hatesohl, M.D., a board-certified family practitioner, entered into an employment agreement with Central Kansas Medical Center (CKMC),

operating as St. Rose Ambulatory and Surgery Center. After Hatesohl resigned his position, CKMC filed suit against him for breach of a covenant not to compete. CKMC also asserted claims against Hatesohl's new employer, Great Bend Regional Hospital and its family practice clinic, Central Kansas Family Practice. After a 3-day hearing, the district court granted summary judgment in the defendants' favor, finding that the employment agreement between CKMC and Hatesohl was illegal and unenforceable because it violated Kansas public policy that forbids a corporation from employing licensed medical doctors to provide medical services to third-parties that the corporation is not licensed to perform. Specifically, the district court determined that CKMC held an ambulatory surgical center license, not a hospital license, and therefore was not authorized to hire Hatesohl to provide family practice medical services. CKMC appealed. The district court later awarded the defendants costs and ordered the costs taxed at the highest rate of postjudgment interest. CKMC appealed the costs order, and this court consolidated the two appeals. For the reasons set forth herein, we reverse the summary judgment and costs granted to the defendants and remand the case for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

CKMC is a Kansas general nonprofit corporation and a wholly controlled subsidiary of Catholic Health Initiatives. Prior to May 2011, it had operated as a hospital, but in May 2011, CKMC relinquished its hospital license and obtained a license to operate an ambulatory surgical center. An ambulatory surgical center provides outpatient surgical services. See K.S.A. 65-425(f). As part of the transition from a hospital to its new outpatient structure, CKMC began operating under the name St. Rose Ambulatory and Surgery Center (SRASC).

In July 2012, CKMC, operating as SRASC, entered into a 2-year employment agreement with Hatesohl. Under the employment agreement, Hatesohl agreed to provide

at least 40 hours per week of family medicine services at SRASC's St. Joseph Family Medicine Clinic, as well as to perform other related duties. Relevant to this lawsuit, the employment agreement included explicit covenants regarding postemployment behavior:

> "E.1 Covenant Not to Compete. In consideration of the confidential and proprietary information that Physician will have access to as an employee of SRASC, which the parties acknowledge and agree that SRASC has a valid business interest to protect, Physician hereby agrees that, during the Term of the Agreement and for a period of one (1) year following the expiration or termination of the Agreement (the 'Restricted Period'), Physician shall not engage in any of the Restricted Activities (as defined below) at any location within a fifty (50) mile radius of SRASC, located at 3515 Broadway, Great Bend, Kansas 67530, St. Joseph Family Medicine Clinic, located at 3520 Lakin Avenue, Suite 103, Great Bend, Kansas 67[53]0, or the SRASC practice location at which Physician is then working (the 'Restricted Territory') without the prior written approval of SRASC. For purposes of this Section, the term 'Restricted Activities' shall mean Physician providing, directly or indirectly, any type of physician services in the specialty of Family Medicine (whether patient care, management or administrative services and whether on a full or part-time basis) in any capacity on behalf of any person or entity at any location within the Restricted Territory, including, without limitation, on behalf of any hospital, health system, medical group, clinic, health care facility, physician network, or as a solo practice physician.
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> "E.2 Covenant Not to Employ. Physician covenants and agrees that he/she shall not employ or otherwise contract with, directly or indirectly, any physician or non-physician employee of or independent contractor to SRASC who performs services in relation to the services performed by Physician under the Agreement for a period of one (1) year subsequent to such person's termination with SRASC for any cause or reason whatsoever unless SRASC elects to discontinue the service line and is no longer in need of the services provided by any such physician or non-physician employee or independent contractor.
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> "E.3 Non-solicitation. For a period of one (1) year after the termination of the Agreement for any reason, whether prior to or upon expiration of the then current Term, Physician shall not solicit, correspond or contact any patient treated by SRASC and/or its physicians."

In September 2012, Hatesohl began working at the St. Joseph Family Medicine Clinic, which was located in a different building than SRASC's main headquarters. In January 2013, SRASC closed the St. Joseph clinic and Hatesohl moved to work in what was designated the Family Medicine and Urgent Care Clinic, located in SRASC's main building, which also housed an ambulatory surgical clinic.

Hatesohl's relationship with his employer was not smooth. He was unhappy with the situation to the point that he submitted his resignation in March 2014. SRASC informed him that it intended to enforce the noncompete covenants in the employment agreement if necessary. Hatesohl rescinded his resignation in May 2014.

On August 29, 2014, Hatesohl informed SRASC that he would not be renewing his contract at the end of the 2-year term. On October 1, 2014, Hatesohl began working for Great Bend Regional Hospital (GBRH) at its Central Kansas Family Practice (CKFP) location, which was across a parking lot from SRASC. An SRASC administrator later testified that after Hatesohl left SRASC, she found emails that appeared to violate the employment agreement by encouraging continued communication with SRASC patients and by forwarding allegedly proprietary information to Hatesohl's personal email address.

Meanwhile, at the beginning of October 2014, St. Catherine Hospital, another wholly controlled subsidiary of Catholic Health Initiatives—like CKMC—signed a non-binding letter of intent to create a joint venture with Hays Medical Center. The new entity would be called St. Rose Health Center, LLC, and would begin operating on January 1, 2015. St. Rose Health Center would offer family practice medicine, urgent care, imaging services, internal medicine, surgical services, home health care, hospice care, and some basic laboratory services. It was anticipated that CKMC would sell most of its assets to the new St. Rose Health Center, LLC.

On November 6, 2014, CKMC, operating as SRASC, filed a petition for injunctive relief and damages against Hatesohl, GBRH, and CKFP. The petition requested declaratory judgment that the employment agreement was valid and binding, including the postemployment covenants. CKMC also asserted a breach of contract claim against Hatesohl, a tortious interference claim against GBRH and CKFP (hereinafter referred to collectively as GBRH), and an unjust enrichment claim against Hatesohl. CKMC requested a declaratory judgment, money damages, injunctive relief, punitive damages, attorney fees, and costs. That same day, CKMC filed a motion for and a lengthy memorandum in support of a restraining order and temporary injunction to prevent Hatesohl from continuing to practice medicine within a 50-mile radius of SRASC or otherwise violating the employment agreement's provisions.

On November 18, 2014, GBRH filed suggestions in opposition to CKMC's motion. GBRH argued that because CKMC was licensed as an ambulatory surgical center, it was in the business of providing surgical services and therefore could not enter into a legal contract to employ Hatesohl to provide family medicine services. Accordingly, GBRH claimed the employment agreement was unenforceable. In the alternative, GBRH argued that enforcing the employment agreement would be adverse to the welfare of the public. GBRH asked the district court to deny the motion for injunctive relief. Hatesohl also filed his opposition to the motion for a restraining order and temporary injunction, asserting the same arguments.

After hearing argument on the motion for a temporary restraining order, the district court denied that part of CKMC's request and set a hearing on the motion for a temporary injunction. CKMC filed a reply to Hatesohl's objections to the injunction, contending that because it was a licensed medical care facility, it could legally employ a family medicine practitioner.

The 3-day evidentiary hearing took place on December 19, 22, and 23, 2014. CKMC first presented testimony from Leanne Irsik, senior vice president and site administrator for Centura Health Physician Group, the managing organization for SRASC. She was the administrator for "ambulatory services, which is physician clinics, internal medicine, family practice and urgent care, imaging services, cardiopulmonary diagnostic services, laboratory services, home health and hospice," which were offered in various locations with SRASC. Irsik explained CKMC's evolution from a hospital to operating as SRASC. Irsik testified that in addition to its license to operate an ambulatory surgical center, SRASC also held licenses for its pharmacy, home health agency, and radiation materials. She testified that "[t]he licensed ambulatory surgical center and St. Rose Family Medicine and Urgent Care clinic are two separate sections of CKMC, doing business as St. Rose Ambulatory and Surgery Center."

Irsik then testified about her knowledge of Hatesohl's duties and privileges during his employment at SRASC. Irsik had been directly involved with Hatesohl, trying to resolve his complaints about his employment, and speaking with him about the post-employment covenants when she heard rumors that he might be considering going to work across the street. Irsik also testified that after Hatesohl left SRASC, she went through his emails and found emails she believed showed he had violated the employment agreement.

CKMC also presented testimony from Vincent Vandehaar, whom it had hired to analyze the healthcare provider needs of the Great Bend area in order to identify supply and demand of the medical care needs in that area. Vandehaar concluded that there was an oversupply of family medicine providers in the county and that oversupply would continue even if Hatesohl stopped providing family medicine services for a year. CKMC also presented testimony from general counsel Kris Ordelheide about the anticipated structure of the upcoming joint venture to be called St. Rose Health Center, LLC, and

from Brent Hanson, GBRH's Chief Executive Officer, who testified that as of the time of the hearing, Hatesohl was providing family medicine services at CKFP.

Hatesohl testified on his own behalf. He conceded that he had signed the employment agreement at issue and that he had subsequently begun working for GBRH. He affirmed the timeline of his employment with SRASC and stated that his resignation was based in part on his moving to the combined family medicine and urgent care clinic; he did not want to work in urgent care. Hatesohl also testified about his perception that there was a shortage of doctors in the 50-mile radius around SRASC.

Hatesohl also presented testimony from a nurse and two physician assistants with whom he had worked at SRASC. They all testified that Hatesohl had not solicited them to work for GBRH or CKFP. In addition, Hatesohl called Ladeska Makings, the CEO and director of adult services at Sunflower Diversified Services, which provided 24-hour support to Hatesohl's adult son, Mason, who lived in Great Bend. Makings testified about the type of care Mason received and that Hatesohl taking a job outside of Great Bend would influence Mason's care. Brandi Demel, the medical services coordinator at Sunflower Diversified Services, testified that she believed if Hatesohl was no longer available to treat her clients, it would negatively impact their health care by resulting in increased waiting times to see a doctor and potentially lower quality of care.

GBRH presented no witnesses. CKMC called Andrea Price, a medical assistant ward clerk at SRASC, in rebuttal. She testified that Hatesohl's former nurse had told her that Hatesohl said he would "take her" when he left SRASC and "he was just looking for an offer that would be worth breaking his contract." After the testimony, the district court requested written suggested findings of fact and conclusions of law.

CKMC filed its proposed finding of fact and conclusions of law on January 7, 2015. On January 8, 2015, Hatesohl filed his proposed findings of fact and conclusions of

law. On January 30, 2015, GBRH filed suggestions in opposition to CKMC's proposed findings of fact and conclusions of law, as did Hatesohl on February 2, 2015.

Also on February 2, 2015, Hatesohl filed "final prop[o]sed findings of fact" and a motion for summary judgment. In an accompanying memorandum in support of summary judgment, Hatesohl again asserted that SRASC, as an ambulatory surgical center, was not licensed to provide family medical services and therefore could not enforce an employment agreement ostensibly contracting with Hatesohl to provide such services. On February 3, 2015, GBRH filed a motion for summary judgment and a memorandum in support of the motion, also arguing that SRASC could not, by virtue of its license as an ambulatory surgical center, enforce the contract.

On February 9, 2015, CKMC filed a motion to join St. Catherine Hospital as a necessary party plaintiff and for leave to amend its petition to assert claims of (1) tortious interference with contract by Ann Hatesohl, Hatesohl's wife; (2) intentional spoliation of evidence by Ann and Hatesohl, and (3) unjust enrichment of the corporate defendants. CKMC stated that on January 19, 2015, it had transferred its right to enforce the employment agreement to St. Catherine Hospital. Because St. Catherine Hospital possessed the right to enforce the agreement, CKMC asserted that St. Catherine Hospital was a contingently necessary party. GBRH filed an opposition to the motion to add an unjust enrichment claim against the corporate defendants. Hatesohl filed a pleading stating that he did not oppose the motion to join St. Catherine Hospital or Ann but reserving his right to later challenge claims against Ann. Finally, on February 17, 2015, CKMC filed a motion for summary judgment on counts I, II, and III of its petition.

On February 23, 2015, the district court by email granted summary judgment for the defendants, concluding:

"Hatesohl entered in the employment agreement which is the subject of this action on 7-30-2012 with CKMC. The main provision of the contract was his agreement to provide a minimum of 40 hours a week of professional family medicine services at the St. Joseph Family Medicine Clinic. All sides agree with these facts.

"At the time of signing the contract, CKMC was not operating under a hospital license but under a license as an ambulatory surgical center.

"CKMC never had a license as a hospital during the contract time with Dr. Hatesol [*sic*]. All sides agree with these facts.

"Under my reading of The Wilson and Weiss cases, the contract is illegal and thus unenforceable.

"Summary judgment is granted for all defendants.

"This ruling thus makes moot any contentions by the plaintiff(s) of interference with contract or unjust enrichment.

"Defendant Hatesol [*sic*] can prepare a formal journal entry."

On April 6, 2015, the district court filed its journal entry of judgment. The district court found that the employment agreement between CKMC and Hatesohl was illegal and unenforceable because it violated Kansas public policy that forbids a corporation from employing licensed medical doctors to provide medical services to third parties that the corporation is not licensed to perform. Specifically, the court determined that CKMC held an ambulatory surgical center license, not a hospital license, and therefore was not authorized to hire Hatesohl to provide family practice medical services. This ruling rendered moot the claims of tortious interference with contract and unjust enrichment.

The district court also denied CKMC's motion to amend its petition to add claims and parties since those claims would necessarily fail because the employment agreement was unenforceable. In addition, the district court ruled that because St. Catherine Hospital was in privity with CKMC, it was bound by the journal entry and it was unnecessary to join St. Catherine Hospital as a party. Accordingly, the court granted summary judgment to the defendants and assessed costs against CKMC.

CKMC timely appealed. On April 20, 2015, Hatesohl filed a motion for taxation and bill of costs. He asked for $50 in statutory witness fees; $1,964.70 in court reporter charges for Irsik's deposition, which he claimed was used to impeach Irsik during the December 2014 hearing; and $1,295 in court reporter charges for transcripts of the December hearing, which he used to support his motion for summary judgment and write the proposed findings of fact. GBRH filed a similar motion for costs, requesting $587.10 for court reporter fees for the transcript of Irsik's deposition and $1,295 for court reporter fees for the transcript of the hearing. Hateshol and GBRH also requested the district court to assess postjudgment interest on the costs.

On April 30, 2015, CKMC filed objections to the motions for costs, arguing that the costs for Irsik's deposition transcripts were not permitted because those transcripts had not been admitted into evidence and there was no statutory authority to assess the hearing transcript costs. CKMC also noted that neither motion for costs attested to the accuracy of the costs under penalty of perjury, as the judicial council form required. Finally, CKMC objected to Hatesohl and GBRH's requests for postjudgment interest on costs awarded, arguing that costs are not subject to postjudgment interest. Hatesohl and GBRH filed replies to the opposition to costs, arguing that the costs were appropriate; neither reply addressed the issue of postjudgment interest.

On May 5, 2015, the district court filed its journal entry awarding Hatesohl $3,309.70 in costs and GBRH $1,882.10 in costs and awarding "post-judgment interest at the highest amount authorized by statute." CKMC timely appealed the order on costs. This court consolidated the two appeals.

ANALYSIS

On appeal, CKMC argues that the district court erred in finding that CKMC was not authorized to provide the medical services for which it had contracted with Hatesohl,

rendering the employment agreement unenforceable. CKMC also argues that the district court erred by denying its motion to add St. Catherine Hospital as a plaintiff. Next, CKMC argues that the district court erred by denying its motion to add a claim against Ann Hatesohl for tortious interference with contract and a claim against both Hatesohls for intentional spoliation of evidence. Finally, CKMC argues that the district court erred in awarding costs to the defendants and in awarding postjudgment interest on the costs. We will address each of these claims in turn.

Did the district court err in finding that CKMC was not authorized to provide the medical services for which it had contracted with Hatesohl, rendering the employment agreement illegal and unenforceable?

CKMC first argues that the district court erred in finding that CKMC was not authorized to provide the medical services for which it had contracted with Hatesohl, rendering the employment agreement illegal and unenforceable. The district court found that when CKMC and Hatesohl entered into the employment agreement, CKMC was operating under an ambulatory surgery center license, not a hospital license, and was therefore unable to legally provide the family medicine services which it contracted with Hatesohl to provide. CKMC contends that it is a "health care provider" and operates a "medical care facility." Under the definition of these terms, CKMC argues that it was not prohibited from employing Hatesohl and his employment did not violate public policy.

Hatesohl and GBRH argue that the district court correctly found that CKMC exceeded the scope of its license by hiring Hatesohl. They agree with the district court's finding that because CKMC was not licensed to provide family medicine services, the employment agreement purporting to contract for family medicine services was illegal and unenforceable. Hatesohl also argues that even if the employment agreement is legal, the noncompete clause is unenforceable because it is unreasonable and because CKMC no longer has a legitimate business interest for the noncompete covenant to protect.

The parties agree that this court should review the district court's findings de novo. 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, summary judgment is appropriate. *Stanley Bank v. Parish*, 298 Kan. 755, 759, 317 P.3d 750 (2014). Moreover, to the extent the district court's ruling was based on statutory interpretation, appellate review is unlimited. *Siruta v. Siruta*, 301 Kan. 757, 761, 348 P.3d 549 (2015).

In granting the defendants' motions for summary judgment, the district court stated, in relevant part:

> "Hatesohl entered in the Employment Agreement, which is the subject of this action, on July 30, 2012 with CKMC. The main provision of the contract was his agreement to provide a minimum of 40 hours a week of professional family medicine services at the St. Joseph Family Medicine Clinic. At the time of signing the contract, CKMC was not operating under a hospital license, but under a license as an ambulatory surgical center ("ASC"), as defined in K.S.A. 65-425(f). CKMC never had a license as a hospital during the contract time with Defendant Hatesohl. CKMC's ASC license did not authorize it to provide family practice medical services in a clinic.
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> "3. The Employment Agreement is illegal and thus unenforceable because it violates Kansas public policy that forbids a corporation from employing licensed medical doctors to provide medical services to third-parties that the corporation is not licensed to perform. See *Early Detection Center, Inc. v. Wilson*, 248 Kan. 869[, 811 P.2d 860] (1991) ([']A general corporation is prohibited from providing medical services or acting through licensed practitioners; therefore, there can be no contract between the general corporation and third parties to perform medical services').
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> "4. [*Early Detection Center, Inc.*] also stated, '[I]t is well settled both in law and in equity that the courts will not aid either party to an illegal agreement. The law leaves the parties where it found them' *Id.* at 879. Therefore, the covenants and promises [in the employment agreement] are unenforceable and invalid.
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> "5. In *St. Francis Medical Center, Inc. v. Weiss*, 254 Kan. 728[, 869 P.2d 606] (1994), the Court acknowledged its precedent, which rejected corporate ownership of

> medical practices, *Id.* at 734, but found them distinguishable because the plaintiff was a licensed hospital. [*St. Francis Medical Center, Inc.*] does not support the Employment Agreement is enforceable because CFMC's medical license, as an ASC, did not extend to provision of family practice medical services in a clinic."

It is difficult to understand the relationship between the various medical entities involved in this litigation. Because those relationships are important to whether the district court ruled correctly, we will discuss them first. Prior to 2011, CKMC was operating as a licensed general hospital. In a January 2011 letter to the Kansas Department of Health and Environment, counsel for CKMC described its intention to "terminate its hospital license and seek licensure *for part of its existing facility* as an ambulatory surgery center. The *entire new facility* will now be referred to as St. Rose Ambulatory & Surgery Center." (Emphasis added.) Similarly, in a March 2011 letter, counsel referred to "copies of the policies and procedures for CKMC's new ASC which will be part of its new ambulatory care model known as St. Rose Ambulatory & Surgery Center." These letters implied that the licensed ambulatory surgical center would operate as part of the larger organization known as St. Rose Ambulatory and Surgery Center.

Irsik's testimony at the evidentiary hearing supports this understanding of the structure of St. Rose Ambulatory and Surgery Center, as did a demonstrative exhibit she endorsed as correctly reflecting the structure. The exhibit, which was marked and admitted into evidence as PX-1(d), showed "CKMC d.b.a. St. Rose" in a central box with offshoots representing the different clinics, including "Primary Care," "Ambulatory Surgical Center," "lab.," "imaging," and several others.

In July 2012, Hatesohl and CKMC, "operating as St. Rose Ambulatory and Surgery Center," entered into the employment agreement under which Hatesohl agreed to provide at least 40 hours a week of professional family medicine services at "SRASC's Family Medicine clinic, known as St. Joseph Family Medicine Clinic." At the time

Hatesohl began working for SRASC, St. Joseph was located in a different building than the ambulatory surgical center. Subsequently, however, St. Joseph closed its separate location and moved into the building that already housed the ambulatory surgical clinic, offering family medicine services in a clinic called the Family Medicine and Urgent Care Clinic, where Hatesohl worked from January 2013 until February or March 2014.

Irsik testified at the evidentiary hearing that "[t]he licensed ambulatory surgical center and St. Rose Family Medicine and Urgent Care clinic are two separate sections of CKMC, doing business as St. Rose Ambulatory and Surgery Center." She understood St. Rose Ambulatory and Surgery Center to be the overarching provider of the various medical services, including an ambulatory surgical center, family medicine services, a pharmacy, home health services, and radiation services.

The district court ultimately based its ruling at least in part on the conclusion that a licensed ambulatory surgical center may not, as a matter of law, provide family practice medical services. The problem with applying that conclusion in this case is that it appears that Hatesohl did not enter into an employment agreement with a licensed ambulatory surgical center to provide family practice medical services. Rather, Hatesohl contracted with CKMC, doing business as the confusingly named St. Rose Ambulatory and Surgery Center, which held multiple licenses, including a license to operate an ambulatory surgical center. St. Rose Ambulatory and Surgery Center also held a license to operate a pharmacy, a home health agency, and to use radiation materials. CKMC also offered family medicine services, initially at the St. Joseph Family Medicine Clinic and later at a clinic within the same building as the ambulatory surgical center.

The district court's factual finding that St. Rose Ambulatory and Surgery Center was a licensed ambulatory surgical center and no more is not supported by the evidence in the record on appeal. To the extent that the factual finding was not supported by the evidence, it calls into question the district court's legal conclusion that St. Rose

Ambulatory and Surgery Center could not contract with Hatesohl for family medical services. The district court's public policy concerns, which it grounded in prior Kansas appellate caselaw, are addressed later in this opinion. First, we take up the issue of whether a licensed ambulatory surgical center is prohibited, statutorily or through applicable administrative regulations, from hiring a family practice doctor to provide family practice services. Evaluating this issue requires statutory interpretation.

> "[T]he fundamental goal of statutory construction is to ascertain the intent of the legislature. [Citation omitted.] But in determining legislative intent, the starting point is not legislative history; rather, we first look to the plain language of the statute, giving common words their ordinary meaning. [Citations omitted.] If the plain language of a statute is unambiguous, we do 'not speculate as to the legislative intent behind it and will not read into the statute something not readily found in it.' [Citation omitted.]" *University of Kan. Hosp. Auth. v. Board of Comm'rs of Unified Gov't*, 301 Kan. 993, 998-99, 348 P.3d 602 (2015).

The plain language of the Kansas statutes and regulations governing ambulatory surgical clinics do not restrict them to surgery only. K.S.A. 65-425 provides certain relevant statutory definitions:

> "(f) 'Ambulatory surgical center' means an establishment with an organized medical staff of one or more physicians; with permanent facilities that are equipped and operated primarily for the purpose of performing surgical procedures; with continuous physician services during surgical procedures and until the patient has recovered from the obvious effects of anesthetic and at all other times with physician services available whenever a patient is in the facility; and which does not provide services or other accommodations for patient to stay more than 24 hours. Before discharge from an ambulatory surgical center, each patient shall be evaluated by a physician for proper anesthesia recovery. Nothing in this section shall be construed to require the office of a physician or physicians to be licensed under this act as an ambulatory surgical center.
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> . . . .

> "(h) 'Medical care facility' means a hospital, ambulatory surgical center or recuperation center, but shall not include a hospice which is certified to participate in the medicare program under 42 code of federal regulations, chapter IV, section 418.1 *et seq.* and amendments thereto and which provides services only to hospice patients.
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> . . . .
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> "(k) 'Physician' means a person licensed to practice medicine and surgery in this state."

GBRH asserts that "the policy of the State of Kansas is to limit an ASC to only provide surgical services." The plain language of the applicable statutes and regulations belie this contention. Both K.S.A. 65-425(f) and the corresponding administrative regulation, K.A.R. 28-34-50(b), state that an ambulatory surgical center is "an establishment . . . with permanent facilities that are equipped and operated *primarily* for the purpose of performing surgical procedures." (Emphasis added.) The statute and regulation do not say "operated *exclusively* for the purpose of performing surgical procedures," and GBRH points to no authority for such a limited reading.

As CKMC points out, it was also licensed to provide services other than surgical procedures; it held licenses for its pharmacy, home health agency, and radiation materials. No party points to any statute or regulation that requires a specific license for a medical care facility to offer family medicine services. In addition, K.A.R. 28-34-59a(a) actually requires ambulatory surgical centers to "provide, either directly or through agreement, laboratory, radiology, and pharmacy services to meet the needs of the patients." The fact that the legislature expressly allows an ambulatory surgical center to directly provide services other than surgical procedures flies in the face of notion that Kansas policy limits an ambulatory service center to only provide surgical services.

CKMC claims that it is a medical care facility, which covers both a hospital and an ambulatory surgical center. See K.S.A. 65-425(h). GBRH challenges this claim, arguing that CKMC's admission that SRASC provides hospice services removes it from eligibility

to be a medical care facility. GBRH misreads the statute, however, because the statute only excludes hospices "which provide[] services *only to hospice patients*." (Emphasis added.) See K.S.A. 65-425(h).

GBRH also contends that SRASC's "structure is a violation of state and federal law" because federal regulations governing participation in the federal Medicare program require that an ambulatory surgical center must operate "'exclusively for the purpose of providing surgical services.'" GBRH argues that when SRASC obtained a license to operate as an ambulatory surgical center, its failure to restrict its scope to surgical services only was a violation of federal law that rendered the subsequent employment agreement with Hatesohl illegal and unenforceable.

CKMC replies that the requirements for reimbursement under the federal Medicare program are irrelevant to the determination of whether SRASC attempted to contract outside the scope of its Kansas license and, by doing so, entered into an illegal and unenforceable employment agreement with Hatesohl. We agree with CKMC that federal Medicare regulations are not germane to the issue at hand. Even if SRASC is engaging in Medicare fraud by applying for reimbursement without complying with the federal regulations' requirements, that would not render the employment agreement with Hatesohl illegal and unenforceable.

To sum up, neither GBRH nor Hatesohl provide any statutory or regulatory support for its assertion—and the district court's conclusion—that an entity duly licensed to operate an ambulatory surgical center may not also employ physicians to provide family medicine services. This is especially the case when the entity in question is licensed and structured to provide other medical services including a pharmacy, home health services, and radiation services. Next, this court must determine whether the district court erred in finding the contract illegal and unenforceable based upon the

applicable caselaw, which focused greatly on public policy concerns. To better present the evolution of caselaw on this subject, we address the cases in chronological order.

The earliest case is *Winslow v. Board of Dental Examiners*, 115 Kan. 450, 223 P. 308 (1924). This was an action to enjoin the Board of Dental Examiners (Board) from enforcing its order revoking Winslow's license to practice dentistry. Winslow, a licensed dentist, was employed by Eastern Dental Company, a Missouri corporation certified to engage in business in Kansas. Eastern Dental Company operated dental parlors in Kansas for which it advertised, with no mention of Winslow's name. Eastern Dental Company also controlled contracts, billing, and Winslow's salary. The district court overruled the Board's demurrer to Winslow's petition, and the Board appealed.

On appeal, the *Winslow* court noted that dentistry is subject to regulation to protect the public from ignorance and fraud and, to that end, the State requires that "the relation of the dental practitioner to his patients and patrons must be personal." 115 Kan. at 451-52. The court observed that "[c]orporations may not be graduated from dental colleges, they have neither learning nor skill, and they may not be examined, registered, nor licensed as dentists." 115 Kan. at 452. Thus, the court concluded that corporations, domestic or foreign, are not authorized to practice dentistry in Kansas. 115 Kan. at 452. The court went on to find that because Winslow was practicing dentistry under a name other than his own, the Board was authorized to revoke his license. 115 Kan. at 452.

Next, in 1935, our Supreme Court decided *State, ex rel., v. Goldman Jewelry Co.*, 142 Kan. 881, 51 P.2d 995 (1935). The State filed suit to determine whether Goldman Jewelry Company (Goldman), a Missouri corporation conducting authorized "'retail jewelry business'" in Kansas, was improperly engaged in practicing optometry. 142 Kan. at 881. Goldman employed a registered optometrist to perform eye examinations, prepare lenses, and fit glasses. Subsequently, Goldman changed its agreement with the optometrist and rented store space to him, contracting with him to practice optometry in

the rented space. The contract between Goldman and the optometrist stated that Goldman was "engaged in the business of selling 'optical goods and jewelry'" and stated the terms under which the optometrist would provide his services to Goldman's customers. 142 Kan. at 882-83. The State contended that Goldman was engaged in the unauthorized practice of optometry, while Goldman argued that its actions were permissible because the optometrist it employed was duly registered with the State and was identified in all the advertisements for optometric services.

The Kansas Supreme Court reviewed the applicable statutes governing the examination and registration of optometrists and prior cases in Kansas and other states that had held that corporations could not practice certain professions because corporations could not satisfy the examination and registration requirements. 142 Kan. at 885-89. The court determined that the practice of optometry is limited to individuals and that corporations may not engage in the profession either directly or indirectly through the employment of duly registered optometrists. 142 Kan. at 890. Because Goldman had engaged in activities statutorily recognized as practicing optometry, the court concluded that it had abused its corporate privileges and should be ousted and enjoined from practicing optometry in Kansas. 142 Kan. at 890-91.

Approximately 20 years later, in *State, ex rel., v. Zale Jewelry Co.*, 179 Kan. 628, 298 P.2d 283 (1956), the Supreme Court again took up the issue of a jewelry corporation engaging in the practice of optometry. Zale had rented space in its building to a licensed optometrist and an optical company; Zale handled their bookkeeping, collections, and accounts receivable, and the lessees agreed not to engage in any competition with Zale. The State brought an original action in quo warranto to oust Zale from the practice of optometry. After examining the terms of the leases, the particular circumstances of advertising, and the operation of the optometrist's office and the optical company, the Kansas Supreme Court held that the relationship between Zale and the optometrist was one of employer and employee. 179 Kan. at 638. Therefore, by virtue of that relationship,

the court determined that Zale was practicing optometry as well, which it could not do as a corporation. 179 Kan. at 638. The Kansas Supreme Court accordingly ousted Zale from the practice of optometry in Kansas. 179 Kan. at 638.

The next case is *Early Detection Center, Inc. v. Wilson*, 248 Kan. 869, 811 P.2d 860 (1991). In 1983, Dr. Wilson and Dr. Powell, both licensed to practice medicine and surgery in Kansas, incorporated their preexisting partnership as a professional corporation. Two years later, Wilson and Powell filed Restated Articles of Incorporation as a general corporation, which allowed people not licensed to practice medicine to be directors and own corporation stock. Wilson and Powell then sold 40 percent of their stock to individuals not licensed to practice medicine. The corporation, Early Detection Center, Inc. (EDC), provided noninvasive vascular testing medical services.

In 1987, Wilson was removed as president and CEO and later from the board of directors. He formed a competing business, Advanced Diagnostic Center (ADC) and began soliciting business from hospitals served by EDC. EDC brought suit, alleging that Wilson breached the noncompete provisions of his contract. Similar to the instant case, both Wilson and EDC filed motions for summary judgment in the district court. The district court ruled, among other things, that EDC "could not legally provide healing arts services" and granted summary judgment in Wilson's favor. 248 Kan. at 871.

On review, our Supreme Court, noted that the Kansas Healing Arts Act, K.S.A. 65-2801 *et seq.*, prohibits any person from engaging in the practice of any branch of the healing arts unless the person obtains a license, which requires successful completion of an examination. 248 Kan. at 872. The court then noted cases in which it had held that corporations could not practice dentistry or optometry, including *Winslow, Goldman,* and *Zales.* 248 Kan. at 872-73. The court noted that the Professional Corporation Law, K.S.A. 17-2006 *et seq.*, allows physicians, surgeons, or doctors of medicine to form professional corporations to provide medical services, but both the person and the professional

corporation must be licensed. 248 Kan. at 873. A professional corporation can elect to convert to a general corporation, but the court determined that a professional corporation involved in the practice of healing arts that converted to a general corporation could no longer practice any branch of the healing arts. 248 Kan. at 876.

The court ultimately determined that when EDC converted from a professional corporation to a general corporation, it no longer was permitted to provide medical services to third parties by hiring licensed medical practitioners. 248 Kan. at 880. The court affirmed the district court's refusal to enforce the contract, concluding:

> "Here, EDC, a general corporation, agreed to provide medical services to third parties by hiring licensed medical practitioners. A general corporation is prohibited from providing medical services or acting through licensed practitioners; therefore, there could be no contract between the general corporation and the third parties to perform the services. Where the parties enter into an agreement that cannot be enforced, the courts will not aid either party to the prohibited contract and will ordinarily leave the parties where it finds them." 248 Kan. at 880.

The final case is *St. Francis Regional Med. Center, Inc. v. Weiss*, 254 Kan. 728, 869 P.2d 606 (1994), which is factually similar to the case now before this court. In July 1989, Dr. Weiss entered into an employment agreement with Physicians Clinic of Kansas, P.A., assigning him to work at St. Francis Medical Center. The agreement was effective for 5 years and provided for liquidated damages if Weiss terminated the agreement through election, breach, or default. In July 1991, Weiss resigned, and St. Francis filed suit against him alleging breach of the employment agreement.

Weiss filed a motion for summary judgment, claiming that the contract was unenforceable because a general corporation cannot contract with a person to provide medical services. Weiss cited *Early Detection Center*, but the district court found it inapplicable "because St. Francis is a nonprofit charitable corporation rather than a

general corporation." 254 Kan. at 732. The case went to trial and a jury found that St. Francis had breached the contract entitling Weiss to damages, but that St. Francis was entitled to liquidated damages as well.

On appeal, Weiss argued, among other things, that the district court had erred in denying his motion for summary judgment based on the prohibition against the corporate practice of medicine. In considering this argument, our Supreme Court summarized its holdings in earlier cases as follows:

> "In Kansas, the practice of medicine requires a license. An examination must be taken in order to obtain a license. Because only individuals can take examinations, only individuals can be licensed to practice medicine. The *Zale*, *Goldman*, and *Winslow* cases . . . equated a corporation's employing a licensed professional individual who practiced dentistry or optometry with a corporation's practicing that profession. When the legislature subsequently enacted the Healing Arts Act, the Professional Corporation Law, and the General Corporation Code, it had the opportunity to include provisions which would have changed the judicial interpretation, but it did not do so. Thus, the rule that a general corporation is prohibited from providing medical services or acting through licensed practitioners still applies." 254 Kan. at 734-35.

Weiss contended that "general corporations" included stock corporations and nonprofit corporations and that the public policy considerations underlying the prohibition on corporate practice of medicine apply no matter which type of general corporation is implicated. For its part, St. Francis argued that there was no Kansas statute prohibiting a licensed hospital from employing a physician and no Kansas case holding that a hospital or nonprofit corporation may not employ physicians. St. Francis argued that the Kansas Supreme Court should not extend *Early Detection Center* to apply to hospitals or nonprofit corporations. St. Francis pointed out that "'a medical care facility licensed by the department of health and environment' and 'a Kansas not-for-profit corporation organized for the purpose of rendering professional services by persons who are health care providers' are statutorily defined as health care providers." 254 Kan. at

737. Because it fit into those categories as well as the general corporation category, St. Francis argued that it could legally provide medical services by employing licensed practitioners.

The Kansas Supreme Court pointed out that the definition St. Francis proffered was from the Health Care Provider Insurance Availability Act and was not the only or exclusive statutory definition of the term "health care provider." 254 Kan. at 737. Yet the court agreed that defining some general corporations as health care providers in the statute tended to support St. Francis' argument that *Early Detection Center* should not be extended beyond its facts. 254 Kan. at 737. The court also noted that certain other states had agreed with St. Francis' reasoning that the public policy considerations in play did not apply to nonprofit institutions. 254 Kan. at 737-38, 741-42.

The *St. Francis* court also noted that hospitals have employed physicians prior to and since the court's first ruling on the corporate practice of medicine. 254 Kan. at 743-44. In addition, the court noted that K.S.A. 65-427 requires Kansas hospitals to be licensed by the Kansas Department of Health and Environment. 254 Kan. at 744. The court noted that this requirement applies to medical care facilities, which are defined by statute as "a hospital, ambulatory surgical center or recuperation center." 254 Kan. at 744. After reviewing statutory definitions, our Supreme Court stated:

> "By definition, to be licensed in Kansas, a hospital must provide 'physician services,' 'provide diagnosis and treatment for patients who have a variety of medical conditions,' or who have 'specified medical conditions.' This is true for hospitals organized for profit or not for profit. It would be incongruous to conclude that the legislature intended a hospital to accomplish what it is licensed to do without utilizing physicians as independent contractors or employees.
>
> " . . . [H]ospitals employ physicians. Without physicians, nurses, and medical technicians, a hospital cannot achieve that for which it is created and licensed—to treat

> the sick and injured. To conclude that a hospital must do so without employing physicians is not only illogical but ignores reality." 254 Kan. at 745.

The *St. Francis* court noted that earlier cases prohibiting the corporate practice of licensed professions implemented the prohibition because to do otherwise would imperil the public welfare. 254 Kan. at 745-46. The court recognized, however, that

> "[n]one of these early cases dealt with a hospital's employing a physician nor prohibited such employment. None of these cases dealt with a corporation in the business of providing health care to the general public. We agree that *Early Detection Center* should not be extended beyond its facts and is distinguishable from the present case. Here, the corporation employing the physician is a hospital licensed by the State of Kansas as a medical care facility and a health care provider. This difference is crucial to our determination and it distinguishes a hospital from a 'diagnostic clinic,' which was involved in *Early Detection Center*.
>
> "In light of the above, we conclude that neither Kansas case law nor statutory law prohibits a licensed hospital from contracting for the services of a physician. Such contracts are not contrary to the interest of public health, safety, and welfare and, therefore, are legally enforceable. We find no valid reason to distinguish between profit and nonprofit hospitals in this regard." 254 Kan. at 746.

Returning to our case, the district court relied on *Early Detection Center* for the proposition that a general corporation may not provide medical services through licensed practitioners and any contract between a general corporation and a third party to perform medical services is invalid. The district court distinguished *St. Francis* because CKMC's "medical license, as an ASC, did not extend to provision of family practice medical services in a clinic."

On appeal, Hatesohl and GBRH argue that the rule that a general corporation is prohibited from providing medical services or acting through licensed practitioners still applies in Kansas, subject only to the exception in *St. Francis* for licensed hospitals.

CKMC argues that the district court read *St. Francis* too narrowly because that case actually stands for the proposition that any corporation licensed by the State of Kansas as a medical care facility and a health care provider may contract for a physician's services. CKMC points out that St. Rose Ambulatory and Surgery Center, the entity that employed Hatesohl, is a "health care provider" as that term is defined in K.S.A. 2015 Supp. 40-3401(f) and a "medical care facility" as that term is defined in K.S.A. 65-425(h).

CKMC's position has merit under a public policy standpoint. CKMC was not engaged in the "retail jewelry business" as were the corporations in *Goldman* and *Zale*, nor was its practice limited to a "diagnostic clinic" as was the general corporation in *Early Detection Center*. Although CKMC did not hold a hospital license when it entered into the employment agreement with Hatesohl, CKMC was a nonprofit corporation "in the business of providing health care to the general public," as was the hospital in *St. Francis*. See 254 Kan. at 746. It makes little practical sense to allow a licensed hospital to contract for the services of a physician but to prohibit a licensed ambulatory surgical center from contracting for the services of a physician since both of these entities are included within the definition of a "medical care facility" at K.S.A. 65-425(h). Like a hospital, an ambulatory surgical center may—and in some cases must—provide services other than those directly involving surgery, especially when the facility is also licensed to provide other medical services including a pharmacy, home health services, and radiation services. Applying our Supreme Court's rationale in *St. Francis*, we conclude the contract between CKMC and Hatesohl for Hatesohl to provide medical services in CKMC's family medicine clinic was "not contrary to the interest of public health, safety, and welfare" and was therefore legally enforceable under Kansas law. See 254 Kan. at 746.

In the alternative, Hatesohl argues that even if the district court erred in its reasoning, this court should affirm its ruling as right for the wrong reason. See *Schoenholz v. Hinzman*, 295 Kan. 786, 797, 289 P.3d 1155 (2012) (affirming district court as right for the wrong reason). Hatesohl contends that the employment agreement's

noncompete covenant was unenforceable because it is unreasonable and because CKMC no longer has a legitimate business interest for the noncompete covenant to protect.

Our Supreme Court has stated:

> "A noncompetition covenant ancillary to an employment contract is valid and enforceable if the restraint is reasonable under the circumstances and not adverse to the public welfare. [Citations omitted.] The rationale for enforcing a noncompetition covenant is based on the freedom of contract. [Citation omitted.] However, it is well settled that only a legitimate business interest may be protected by a noncompetition covenant. If the sole purpose is to avoid ordinary competition, it is unreasonable and unenforceable. [Citations omitted.] Additionally, noncompetition covenants included in employment contracts are strictly construed against the employer. [Citations omitted.]" *Weber v. Tillman*, 259 Kan. 457, 462, 913 P.2d 84 (1996).

The *Weber* court identified four factor courts should consider when determining the enforceability of covenants not to compete in employment agreements:

> "(1) Does the covenant protect a legitimate business interest of the employer? (2) Does the covenant create an undue burden on the employee? (3) Is the covenant injurious to the public welfare? [and] (4) Are the time and territorial limitations contained in the covenant reasonable? The determination of reasonableness is made on the particular facts and circumstances of each case." 259 Kan. at 464.

Hatesohl contends that pursuant to the joint venture that was completed on January 1, 2015, resulting in the operation of St. Rose Health Center, CKMC no longer provides family practice medical services and has agreed not to provide family practice medical services in the future in Barton County; thus, it has no legitimate business interest for the noncompete covenant to protect. To support this assertion, Hatesohl relies upon multiple portions of the record on appeal. None of the portions cited, however, contain a clear statement that the new joint venture will not provide family practice medical services.

Hatesohl cites to a letter in the record on appeal outlining the anticipated scope of the joint venture, but the letter and its attachments indicate that the joint venture will provide "primary care" in Barton County, among other services. Hatesohl also points this court to Ordelheide's testimony at the December 2014 hearing as evidence that the joint venture would not provide family practice medical services, but Ordelheide also testified that the joint venture would provide primary care to patients in the Barton County area. In fact, when specifically asked whether "one of the services that won't be provided is the general practitioner clinic service," Ordelheide responded, "The primary care clinic will be transferred to and become a part of the joint venture." Also, Irsik specifically testified at the hearing that "St. Rose Health Center will offer family practice and urgent care."

Hatesohl's argument that CKMC will no longer provide family medicine services is premised on the understanding that CKMC, operating as SRASC, will no longer exist upon the creation of the new joint venture, operating as St. Rose Health Center. Hatesohl contends that only St. Rose Health Center will have any right to enforce the noncompete clause in the employment agreement. Because CKMC did not assign the right to enforce the employment agreement to St. Rose Health Center, Hatesohl argues there is no legitimate business interest at issue for CKMC to protect.

In its reply brief, CKMC responds that St. Catherine Hospital has a legitimate interest in enforcing the employment agreement as a joint venture partner in the ownership and operation of St. Rose Health Center. Moreover, as CKMC argues, it assigned the right to enforce the employment agreement to St. Catherine Hospital and it filed a motion to add St. Catherine Hospital as a necessary party to the lawsuit.

Generally speaking, "the ultimate question of whether a restrictive covenant is contrary to public policy is a question of law over which this court exercises unlimited review." *Graham v. Cirocco*, 31 Kan. App. 2d 563, 569, 69 P.3d 194, *rev. denied* 276 Kan. 968 (2003). Here, however, the existence and legitimacy of any business interest the

joint venture might have at stake is a question of fact. Because the evidence presented in district court was submitted prior to the anticipated closing date of the joint venture, the evidence is unclear as to what extent the newly established joint venture will provide family medicine services in Barton County. However, there is evidence in the record that the parties intended for the joint venture to include a family practice clinic.

"Appellate courts do not make factual findings but instead review those made by district courts or administrative agencies." *Douglas v. Ad Astra Information Systems*, 296 Kan. 552, 562, 293 P.3d 723 (2013). Based on the limited record before us, we decline Hatesohl's request to find the district court was right for the wrong reason. To attempt to do so would require this court to make factual findings on Hatesohl's claim, and we will not make such findings for the first time on appeal.

Similarly, GBRH argues that the district court correctly granted summary judgment in its favor on CKMC's claim against it for tortious interference with a prospective business relationship. GBRH claims that CKMC failed to show that, without GBRH's actions, its business relationship with Hatesohl would have continued, a required element of a successful claim of tortious interference with a prospective business relationship. See *Cohen v. Battaglia*, 296 Kan. 542, 546, 293 P.3d 752 (2013) (listing elements of tortious interference with a prospective business relationship).

As CKMC notes, however, its claim against GBRH was for tortious interference with a contract. That claim does not require a showing that but for GBRH's actions CKMC would have continued its business relationship with Hatesohl. See 296 Kan. at 546 (listing elements of tortious interference with a contract). Therefore, because GBRH argues that CKMC failed to establish an element that is necessary to show tortious interference with a prospective relationship but is not necessary to show tortious interference with an existing contract, GBRH's contention that the district court was right for the wrong reason is unpersuasive.

For its part, CKMC asks this court to remand to the district court with directions to enter a declaratory judgment that the employment agreement is enforceable and to grant summary judgment in CKMC's favor on its claims that Hatesohl breached the contract and that GBRH and CKFP committed tortious interference with an existing contract. Based on the analysis above, we decline to do so. The only conclusion we reach in this appeal is that the district court erred by granting summary judgment to the defendants based on its conclusion that CKMC was not authorized to employ Hatesohl to provide family practice medical services. However, the resolution of CKMC's claims of breach of contract and tortious interference with an existing contract require findings on the elements of those claims that this court will not make for the first time on appeal.

To summarize, the district court erred in granting summary judgment to the defendants. The district court appears to have misunderstood the actual corporate structure of CKMC, erroneously finding that St. Rose Ambulatory and Surgery Center was the equivalent of its ambulatory surgical center clinic. This led to the legally erroneous conclusion that the ambulatory surgical center was limited to providing only surgical services, a conclusion that is contrary to the plain language of the applicable statutes. Further, the district court erred in its interpretation and application of the relevant caselaw, which should not be interpreted to hold that an entity such as CKMC violates public policy by employing a physician to engage in family practice medicine. Finally, we reject the claims of Hatesohl and GBRH that we should affirm the district court's ruling as right for the wrong reason. Thus, we reverse the district court's grant of summary judgment in the defendants' favor and remand for further proceedings.

Did the district court err by denying CKMC's motion to add St. Catherine Hospital as a plaintiff?

Next, CKMC argues that the district court erred by (1) denying as moot its motion to add St. Catherine Hospital as a necessary plaintiff and (2) finding that St. Catherine

Hospital was nonetheless bound by the order of summary judgment because it was in privity with CKMC. GBRH did not respond to this argument in its appellate brief. For his part, Hatesohl notes that he did not object to CKMC's motion to add St. Catherine Hospital but nonetheless contends that the issue became moot once the district court granted summary judgment for the defendants.

"A district court decision that denies a motion to join a party as a necessary party under K.S.A. 60-219(a) is . . . subject to an abuse of discretion standard of review." *Landmark Nat'l Bank v. Kesler*, 289 Kan. 528, 532-33, 216 P.3d 158 (2009). In its written journal entry, the district court stated: "Plaintiff's motion to amend its petition to add parties and claims is denied. . . . [T]he proposed additional plaintiff, St. Catherine Hospital, is in privity with C[K]MC and is bound by the judgment hereby entered so that it is not . . . necessary to join it as a party." Because we are reversing the district court's summary judgment granted in favor of the defendants, the district court's finding that St. Catherine is bound by its order is also necessarily reversed. The district court did not examine the merits of CKMC's request to add St. Catherine Hospital as a contingently necessary party, see K.S.A. 2015 Supp. 60-219(a), and this court will not do so for the first time on appeal. However, it is worth noting that neither GBRH nor Hatesohl objected in the district court to CKMC's motion to join St. Catherine Hospital.

Did the district court err by denying CKMC's motion to amend its petition to add a claim against Ann Hatesohl for tortious interference with contract?

Next, CKMC claims that the district court erred by denying its motion to amend its petition to include a claim against Ann Hatesohl for tortious interference with contract. The district court found that its ruling that the employment agreement was illegal and unenforceable rendered moot any contentions of tortious interference with the contract. CKMC argues that because the district court erred in granting summary judgment to the defendants, the district court likewise erred in finding that the motion to amend the

petition was moot. Hatesohl argues that the district court's ruling should be affirmed, and GBRH does not respond to this issue.

K.S.A. 2015 Supp. 60-215(a) gives a district court broad discretion to permit parties to amend pleadings. Kansas appellate courts review the district court's decision to amend pleadings for an abuse of discretion. See *Osterhaus v. Toth*, 291 Kan. 759, 793, 249 P.3d 888 (2011). A judicial action constitutes an abuse of discretion if the action is (1) is arbitrary, fanciful, or unreasonable; (2) is based on an error of law, or (3) is based on an error of fact. *Northern Natural Gas Co. v. ONEOK Field Services Co.*, 296 Kan. 906, 935, 296 P.3d 1106, *cert. denied* 134 S. Ct. 162 (2013).

Here, the district court denied the motion to amend the petition to bring a claim against Ann Hatesohl based solely on its finding that the employment agreement was invalid and unenforceable. As we have stated, the finding that the employment agreement was invalid and unenforceable was based on an error of law. Therefore, the denial of the motion to amend the petition, because it was based on an erroneous legal finding, was an abuse of discretion. We reverse and remand with directions that CKMC may renew its motion if it so desires.

Did the district court err by denying CKMC's motion to amend its petition to add claims against the Hatesohls for intentional spoliation of evidence?

Next, CKMC contends that the district court erred by denying its motion to amend its petition to add claims against Hatesohl and Ann Hatesohl for intentional spoliation of evidence. The district court found that its ruling that the employment agreement was illegal and unenforceable rendered the additional proposed claims moot. CKMC asserts that the viability of its claims of intentional spoliation of evidence does not depend upon the enforceability of the employment agreement. GBRH does not respond to this issue.

Hatesohl argues that Kansas does not recognize a tort action for spoliation and, even if Kansas did, CKMC has not shown any evidence that spoliation occurred here.

We have previously set forth the standard of review on a motion to amend pleadings. Here, the district court denied the motion to amend the petition to add a claim of intentional spoliation of evidence based solely on its finding that the employment agreement was invalid and unenforceable. As we have stated, the finding that the employment agreement was invalid and unenforceable was based on an error of law. Thus, the denial of the motion to add a claim of intentional spoliation of evidence, because it was based on an error of law, was an abuse of discretion.

Hatesohl cites *Koplin v. Rosel Well Perforators, Inc.*, 241 Kan. 206, 215, 734 P.2d 1177 (1987), as stating that Kansas does not recognize a tort action for spoliation of evidence. But Hatesohl misstates *Koplin*'s holding. As our Supreme Court later stated in *Superior Boiler Works, Inc. v. Kimball*, 292 Kan. 885, 886, 259 P.3d 676 (2011), *Koplin*

> "concluded that 'absent some independent tort, contract, agreement, voluntary assumption of duty, or special relationship of the parties, the new tort of "the intentional interference with a prospective civil action by spoliation of evidence" should not be recognized in Kansas.' [Citation omitted.] In reaching this holding, this court reserved the question of whether Kansas would recognize the tort if a defendant or potential defendant in an underlying case destroyed evidence to their own advantage. [Citation omitted.]"

Hatesohl is wrong in asserting that Kansas may not recognize a cause of action for intentional spoliation of evidence under any circumstance. Our Supreme Court has not entirely closed the door on recognition of an independent tort of spoliation; rather, it has left for another day the question of the validity of such a tort action when brought by a plaintiff against a defendant or potential defendant who destroyed evidence to his or her own advantage. That is what CKMC contends here. Therefore, we reverse the district

court's denial of CKMC's motion to add claims of spoliation to its petition and remand with directions that CKMC may renew the motion if it desires to do so.

Did the district court err in awarding costs to the defendants and in awarding postjudgment interest on the costs?

Finally, CKMC argues that the district court erred in awarding costs to the defendants and in awarding postjudgment interest on the costs. Specifically, CKMC argues that the defendants' motions for costs failed to attest to the accuracy of the costs under penalty of perjury, as the judicial council form requires. CKMC also argues that the district court erred by awarding costs for transcripts that were not admitted into evidence. Finally, CKMC argues that the district court erred in awarding postjudgment interest on the costs because there is no legal authority to do so. GBRH and Hatesohl respond that the district court did not err in awarding costs to the defendants and in awarding postjudgment interest on the costs.

This court need not examine the costs issues in this appeal because our decision that the district court erred in granting the defendants' motions for summary judgment necessarily requires reversal of the award of costs. See *T.S.I. Holdings, Inc. v. Jenkins*, 260 Kan. 703, 727-28, 924 P.2d 1239 (1996). Because there is no longer a final judgment, any calculation or assessment of costs is improper. See K.S.A. 2015 Supp. 60-2002(a) ("[C]osts shall be allowed to the party in whose favor judgment is rendered."). After final resolution of the substantive issues, the district court may revisit the issue of costs.

Reversed and remanded with directions.