No. 22-125299-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

SHELBY DEVELOPMENT, LLC,

Plaintiff/Appellant,

v.

SHAWNEE COUNTY, KANSAS, SHAWNEE COUNTY, KANSAS APPRAISER'S OFFICE, STEVE BAUMAN, in his official capacity as Shawnee County, Kansas Appraiser and individual capacity, and STACY BERRY, in her official capacity as Shawnee County, Kansas Assistant Appraiser and individual capacity,

Defendants/Appellees.

BRIEF OF APPELLEES

APPEAL FROM THE DISTRICT COURT OF
SHAWNEE COUNTY, KANSAS
HONORABLE THOMAS G. LUEDKE
DISTRICT COURT CASE NO. 2019-CV-000845

Blake K. Porter #28289
FISHER, PATTERSON, SAYLER & SMITH, L.L.P.
3550 S.W. 5th Street
Topeka, KS 66606
Office: (785) 232-7761 - Fax: (785) 232-6604
Email: bporter@fpsslaw.com
Attorneys for Defendants/Appellees

ORAL ARGUMENT NOT REQUESTED

TABLE OF CONTENTS

TABLE OF CONTENTS 2

NATURE OF THE CASE 5

STATEMENT OF THE ISSUES 6

STATEMENT OF THE FACTS 6

ARGUMENTS AND AUTHORITIES 14

Standard of Review 14

Kuxhausen v. Tilman Partners, L.P., 291 Kan. 314, 241 P.3d 75 (2010) 14

I. Shelby fails to prove damages because it concedes the stipulated value is agreeable and it is not asking to revisit the valuation. 14

Mortg. Elec. Registration Sys., Inc. v. Graham, 44 Kan. App. 2d 547, 247 P.3d 223 (2010) 15

II. Shelby claims are barred based on its failure to exhaust administrative remedies 17

Ackley v. Dep't of Corr. of State of Kan., 844 F. Supp. 680 (D. Kan. 1994) 18

Back-Wenzel v. Williams, 279 Kan. 346, 109 P.3d 1194 (2005) 19

Colo. Interstate Gas Co. v. Beshears, 18 Kan. App. 2d 814, 860 P.2d 56 (1993) 19

In re Panhandle E. Pipe Line Co., 272 Kan. 1211, 1223, 39 P.3d 21 (2002) 19

Tri-County Public Airport Auth. v. Morris Cty. Bd. of Cty. Comm'rs, 233 Kan. 960, 666 P.2d 698 (1983) 19

Vondracek v. Mid-State Co-op, Inc., 32 Kan. App. 2d 98, 79 P.3d 197 (2003) 18

K.S.A. 45-221 20-21

K.S.A. 60-226 20-21

K.S.A. 79-2005 18-19

III. Res judicata bars Shelby from relitigating its property valuation dispute in district court. 22

Colo. Interstate Gas Co. v. Beshears, 18 Kan. App. 2d 814, 860 P.2d 56 (1993) 23

Cain v. Jacox, 302 Kan. 431, 354 P.3d 1196 (2015) 22

In re Application of Fleet for Relief from a Tax Grievance in Shawnee Cty., 293 Kan. 768, 272 P.3d 583 (2012) 25

O'Keefe v. Merrill Lynch & Co., 32 Kan. App. 2d 474, 84 P.3d 613 (2004), *rev. denied* (May 25, 2004) 22

Rhoten v. Dickson, 290 Kan. 92, 223 P.3d 786 (2010) 22

K.S.A. 79-1455 24

K.A.R. 95-4-18 24-25

Restatement (Second) of Judgment § 24 22

IV. Shelby's claims are barred by the doctrine of waiver. 25

Lyons v. Holder, 38 Kan. App. 2d 131, 138, 163 P.3d 343 (2007) 25

State Farm Mut. Auto. Ins. Co., v. Petsch, 261 F.2d 331 (10th Cir. 1958) 26

Sultani v. Bungard, 35 Kan.App.2d 495, 131 P.3d 1264 (2006) 25

V. Shelby's breach of contract claim fails. 27

Osterhaus v. Toth, 291 Kan. 759, 769, 249 P.3d 888 (2011) 27

Stechschulte v. Jennings, 297 Kan. 2, 23, 298 P.3d 1083 (2013) 27

VI. Breach of the duty of good faith and fair dealing is not a separate cause of action. 29

H&C Animal Health, LLC v. Ceva Animal Health, LLC, 499 F. Supp. 3d 920 (D. Kan. 2020) 30

Wayman v. Amoco Oil Co., 923 F. Supp. 1322 (D. Kan. 1996) 29

VII. Shelby's fraud, fraud in the inducement, and negligent misrepresentation claims are deficient. 30

Alires v. McGehee, 277 Kan. 398, 85 P.3d 1191 (2004) 30

Stechschulte v. Jennings, 297 Kan. 2, 19, 298 P.3d 1083 (2013) 31

Waxse v. Reserve Life Ins. Co., 248 Kan. 582, 809 P.2d 533 (1991) 30

PIK Civ. 4th 127.40 (Fraud – Elements) 30

PIK Civ. 3d 127.40 31

VIII. Shelby's civil conspiracy claim fails based on a lack of any underlying unlawful act, lack of damages, and is barred by the intracorporate conspiracy doctrine 31

State ex rel. Mays v. Ridenhour, 248 Kan. 919, 811 P.2d 1220 (1991) 32

IX. Shelby's constitutional claims fail, and Bauman and Berry are entitled to qualified immunity. 32

Ashcroft v. al-Kidd, 563 U.S. 731 (2011) 34

Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100 (1981) 32

In re Kinnet, 26 Kan. App. 2d 250, 984 P.2d 725 (1999) 32

Shield Oil Producers, Inc. v. Cty. of Russell, 229 Kan. 579, 629 P.2d 152 (1981) 32

Ullery v. Bradley, 949 F.3d 1282 (10th Cir. 2020) 33

X. Shelby's property damage claim is not cognizable. 34

CONCLUSION 34

CERTIFICATE OF SERVICE 36

NATURE OF THE CASE

Shelby Development ("Shelby") owns various parcels comprising Heartland Park, located in South Topeka. To value Heartland Park for tax assessment purposes in 2017, the Shawnee County Appraiser's Office engaged an outside appraiser, Chris Williams, to conduct an appraisal. This engagement resulted in the County valuing Heartland Park at $10,400,000 for tax year 2017. Shelby appealed this valuation to the Board of Tax Appeals ("BOTA").

During ensuing Kansas Open Records Act ("KORA") requests and BOTA discovery, Shelby learned that Williams prepared an earlier draft appraisal and that his value conclusion increased between this draft and the final appraisal. The County objected to producing this draft based on exemptions under KORA and the Kanas Rules of Civil Procedure ("KRCP"). Shelby did not file a motion to compel and did not depose Williams during the BOTA case.

Days before the 2017 valuation was to be heard by BOTA, Shelby and the County entered into a stipulated valuation for Heartland Park at $7,500,000—nearly two million dollars less than the County's appraisal. Shelby and the County also entered into a settlement agreement whereby Heartland Park would be valued at $8,900,000 for 2018 and would not increase in 2019 provided there no new improvements.

Later, the County disclosed the details of the draft appraisal to Shelby via a KORA request in 2019. Shelby now claims it was wholly unaware of the draft, attempts to invalidate the stipulation and settlement, and relitigate the valuation issued decided by BOTA.

Shelby brought a myriad of tort and constitutional claims at district court. The district court granted defendants/appellants' (hereafter the "County") summary judgment motion on all claims. Among other things, the district court found Shelby did not suffer any damages based on their agreement with the BOTA stipulation and that Shelby's claims were barred by a variety of doctrines broadly standing for the proposition that these issues should have been addressed during the BOTA action.

STATEMENT OF THE ISSUES

I. Shelby fails to prove damages because it concedes the stipulated value is agreeable and it is not asking to revisit the valuation.

II. Shelby claims are barred based on its failure to exhaust administrative remedies.

III. Res judicata bars Shelby from relitigating its property valuation dispute in district court.

IV. Shelby's breach of contract claim fails.

V. Breach of the duty of good faith and fair dealing is not a separate cause of action.

VI. Shelby's fraud, fraud in the inducement, and negligent misrepresentation claims are deficient.

VII. Shelby's civil conspiracy claim fails based on a lack of any underlying unlawful act, lack of damages, and is barred by the intracorporate conspiracy doctrine.

VIII. Shelby's constitutional claims fail, and Bauman and Berry are entitled to qualified immunity.

IX. Shelby's property damage claim is not cognizable.

STATEMENT OF THE FACTS

Steve Bauman is the Shawnee County Appraiser and began serving in this role in January of 2015. (R. I, 131). The Shawnee County Appraiser's Office also employs Stacy

Berry, who joined the Appraiser's Office in 2015 and oversees the commercial department. (R. I, 154–55). Shelby Development, L.L.C. acquired property in south Topeka commonly referred to as Heartland Park in 2016. (R I, 116). Chris Payne is the sole member of Shelby Development. *Id.*

Prior Valuation Appeal and Engagement of Outside Appraiser

For tax year 2016, Berry valued the 29 parcels comprising Heartland Park at $8,944,330. (R. I, 215, 223). Shelby Development appealed this valuation to the Board of Tax Appeals ("BOTA"). (R. I, 228–233). Because Shelby Development appealed the 2016 valuation, the County anticipated the 2017 valuation would also be appealed. (R. I, 138–139, 167, 170). For that reason, the Appraisers Office consulted with the County Counselor's Office about hiring an outside appraiser to conduct the 2017 valuation. *Id.*

In anticipation of 2017 valuation, Bauman engaged Chris Williams, MAI of CBRE, Inc., on December 29, 2016, to perform the appraisal for tax year 2017. (R. I, 141–142, 244). Chris Williams accepted the assignment and quoted the appraisal for $4,000. (R. I, 243). Williams also quoted "[a]ny litigation, negotiating, or court, tax appeal court time will be billed separately at $400/hr for myself and $250/hr for other appraisers in my office." *Id.* As this email shows, by engaging Williams to appraise the property, it was inherent that he would serve as the expert witness if the valuation was appealed. (R. I, 182).

On February 22, 2017, Bauman and Berry met with Payne, Williams and Shannon McCollam of CBRE, Inc. at Heartland Park to inspect the property. (R. I, 250, 254). Value notices are supposed to be mailed by March 1 each year, but extensions can be

secured from the Director of the Division of Property Valuation. (R. I, 210). For Heartland Park, Bauman secured an extension of time to March 31, 2017, to mail the valuation. (R. I, 139, 257).

March 2, 2017, Draft Appraisal

On March 2, 2017, McCollam emailed a draft appraisal of Heartland Park authored by Williams to Bauman (the "draft appraisal"). (R. I, 251). The draft appraisal valued Heartland Park at $7,500,000. (R. I, 258–340). Upon receipt of the draft appraisal, Bauman reviewed the appraisal, called CBRE, and left a voicemail asking whether deferred maintenance was recognized. (R. I, 251). The following day, McCollam responded to the voicemail via email with "no data was provided by the owner." *Id.*

Between March 3 and March 13, 2017, Bauman arranged for a telephone conference with Williams and Berry to discuss questions arising from Bauman and Berry's review of the appraisal. (R. I, 251). Williams, Bauman, and Berry participated in a telephone conference on March 14, 2017, which lasted approximately five to ten minutes. (R. I, 251, 255). The questions asked of Williams during the phone call concerned size and track design adjustments related to his sales comparison approach to valuation. *Id.* Bauman and Berry made specific inquiry into whether Williams accounted for the significant differences in the amount of land between Heartland Park and the chosen comparables. *Id.* Additionally, Bauman and Berry needed to understand Williams' methodology so they could apportion the value among Heartland Park's various parcels. *Id.* At the conclusion of the call, Williams said he would look into these questions and get back to Bauman and Berry. (R. I, 252).

March 29, 2017, Final Appraisal

McCollam contacted Bauman in mid-March advising that she and Williams were doing additional research and would provide a revised report correcting issues with the draft appraisal. (R. I, 252). Bauman received the revised and final appraisal of Heartland Park on March 29, 2017, (the "final appraisal") and forwarded to Berry to allocate among the various parcels. (R. I, 253, 256). The final appraisal valued Heartland Park at $10,400,000. (R. I, 370–453).

The final appraisal explicitly disclaims Shelby Development—or anyone other than the Shawnee County Appraiser's Office—from relying on the appraisal. (R. I, 372, 380; R. II, 36, 44). It contains the following limitations and notices:

> The intended use and user or our report are specifically identified in our report as agreed upon in our contract for services and/or reliance language found in the report. No other use or user of the report is permitted by any part for any other purpose. Dissemination of this report by any part to any non-intended users does not extend reliance to any such party, and CBRE will not be responsible for any authorized use of or reliance upon the report, its conclusions or contents (or any portion thereof).
>
> . . .
>
> INTENDED USE OF REPORT
>
> This appraisal is to be used for internal decision making purposes, and no other use is permitted.
>
> INTENDED USER OF REPORT
>
> This appraisal is to be used by Shawnee County, KS Office of County Appraiser, and no other user may rely on our report unless as specifically indicated in the report.

Id. The Shawnee County Appraiser's Office sent property valuation notices for the parcels that make up Heartland Park on March 31, 2017. (R. I, 22, 51, 187; R. II, 5–9).

Differences Between Draft Appraisal and Final Appraisal

Williams explained the differences between the March 2, 2017, draft appraisal and the March 29, 2017, final appraisal in his deposition. (R. I, 341–369). The principal explanation for the differences in valuation is the inclusion of the building residual technique which had not been included in the March 2 report. (R. I, 349, 362). According to Williams, the building residual technique is "a way of backing out the land and … valuing the improvements of all of the sales comparables that you utilize." (R. I, 351). This method is frequently used in valuing car dealerships because they "can vary widely from a lot of acreage to a very small site compared to the improvement on the land." *Id.*

The purpose of this technique is "to figure out the contributory value of the improvements by taking out the value of the land." (R. I, 361). For Heartland Park, Williams and CBRE "backed out the land value estimated for each with the one of the comparable sales to get the building value or the net contributing value of the improvements for each one of the sales" and then added that land value back in. (R. I, 349). Williams testified that it was solely his and CBRE's decision to use the building residual technique and had nothing to do with the Shawnee County Appraiser's Office. (R. I. 362).

Williams estimates he had five or less conversations with Bauman and can only explicitly remember the on-site inspection on February 22, 2017, and the March 14, 2017, conference call. (R. I, 351–52). Williams testified as follows:

> Q: Okay. What response if any do you have to the accusation that you changed your appraisal from 7.5 to 10.4 million based on pressure applied by the county?

. . .

A: I've never changed an appraisal value in my career based on anybody's pressure or coercion or whatever you want to decide, term-wise.

(R. I, 354). Additionally, it is not Williams' practice to give an oral value and he never gave the County an oral value of Heartland Park. *Id.*

KORA Requests

On April 4, 2017, counsel for Shelby Development submitted a KORA requested to Shawnee County. (R. II, 10–13). The request asked for: (1) communications between the Appraiser's Office and CBRE; (2) communications with Chris Williams regarding Heartland Park; and (3) all appraisal reports for Heartland Park from Chris Williams. *Id.* Ashley Biegert, Assistant County Counselor, responded to the request on May 5, 2017, and produced 296 pages of documents—including the March 29, 2017, final appraisal of Heartland Park. (R. II, 14–120).

In her response, Biegert informed counsel for Shelby Development drafts were being withheld from the KORA response:

> The Kansas Open Records Act states that a public agency is not required to disclose records which are specifically prohibited from disclosure. K.S.A. 45-221(a)(1). Thus, records containing returns or return information of CBRE are not provided pursuant to 26 U.S.C.A. § 6103(a). CBRE's bank account identification information has also been redacted. ***All preliminary drafts, research data in the process of analysis, recommendations or other records in which opinions are expressed are also not provided pursuant to K.S.A. 45-221(a)(20).***

(R. II, 123) (emphasis added). Counsel for Shelby Development responded by asking whether the County was "taking the position that the information it received from CBRE regarding all valuation is not subject to disclosure under K.S.A. 60-221(a)(20) or are you

just withholding preliminary drafts." (R. II, 122). Biegert replied, "Just any preliminary drafts. You should have the final appraisal from CBRE for 2017." (R II, 125).

BOTA Proceeding

On June 15, 2017, Shelby Development filed its appeal with the BOTA. (R, I, 34, 51; R. II, 141–171). On March 9, 2018, the County designated Chris Williams as an expert witness for the appeal of the 2017 valuation. (R. II, 130–31). One month later, as part of the County's expert witness disclosures, the County disclosed the March 29, 2017, final appraisal of Heartland Park. (R II, 132–33).

The draft appraisal was discussed multiple time throughout the BOTA proceeding. During settlement negotiations, counsel for Shelby Development wrote:

> As an aside – there are numerous references in the KORA produced documents in emails to a "Revised" appraisal report from Mr. Williams, but there is not "original" appraisal report was not included. The "Revised" report emails indicate that there were several discussions and telephone calls and voice messages exchanged between the "original report" and the "revised report" as well.

(R. II, 134). Biegert replied, "See my response to your 2017 KORA request regarding preliminary drafts, etc. being excluded per K.S.A. 45-221(a)(20)." *Id.* Relatedly, Shelby Development submitted a request for production of documents asking for "all document representing drafts, edits or changes to any appraisal conducted by any expert identified by the County." (R. II, 136). The County objected to production of expert drafts based on K.S.A. 60-226. *Id.*

Counsel for Shelby Development also discussed the existence of the draft appraisal when he took Stacy Berry's deposition. (R. I, 209, 211). Berry disclosed that

revisions from the draft report were based on differences between Heartland Park which sits on approximately 630 acres whereas the comparable properties had much less land and that the value conclusion increased from the draft. (R. I, 209–10). Berry further disclosed that she was involved in a phone call discussing the preliminary number in the draft appraisal and that the March 29, 2017, final appraisal had a larger value conclusion that the draft. (R. I, 210–11).

Stipulation and Settlement

Days before the BOTA hearing, Shelby Development and the County signed an Agreed Order of Stipulation for the 2017 valuation of Heartland Park. (R. II, 175–78). The Stipulation, entered as a final order by the BOTA, states:

> The above-captioned matters come on for consideration and decision by the Kansas Board of Tax Appeals pursuant to a proposed stipulation of value entered into by the parties as set forth herein. Upon consideration, the Board finds and concludes as follows:
>
> 1. The Board has jurisdiction of the subject matter and the parties hereto.
> 2. After full consideration of the pertinent facts and governing law, the parties enter into a stipulation of value as set forth herein with the total original value of $10,400,000 being reduced to $7,500,000. . . .
>
> . . .
>
> 3. The Board hereby adopts the stipulation of the parties as set forth herein and orders termination of the above-captioned matters.

(R. II, 175–76). The County and Shelby Development incorporated this 2017 value into their settlement agreement signed by Payne and Bauman on May 25, 2018. (R. II, 172–74).

The agreement states: "Collectively, the parcels were valued at $10,400,000 for both years 2017 and 2018 by the Shawnee County Appraiser's Office. Shelby

Development appealed that valuation for tax year 2017." (R. II, 172). The agreement established an agreed value of $7,500,000 for 2017 and $8,900,000 for 2018. (R. II, 172–73). Additionally, the agreement provided the 2019 value would not increase from the 2018 value absent construction of new structures on the property. (R. II, 173). The agreement further provided: "This Agreement is admissible [at] any future hearing as evidences of the Parties agreement as to the valuation of the Property for tax years 2017, 2018, and 2019." *Id.*

ARGUMENTS AND AUTHORITIES

Standard of Review

The District Court granted the defendants/appellees' motion for summary judgment on all claims. A summary judgment determination based on undisputed facts is reviewed de novo. *Kuxhausen v. Tilman Partners, L.P.*, 291 Kan. 314, 318, 241 P.3d 75 (2010).

I. Shelby fails to prove damages because it concedes the stipulated value is agreeable and it is not asking to revisit the valuation.

Damages are a necessary component to all of Shelby Development's claims. The district court found this element wholly lacking and its absence permeated through all of Shelby's claims. Specifically, the district court noted Shelby's position that it was not challenging the stipulated value and its agreement with the fair market value determination contained in the stipulation. Because any possible damage based on the tax consequences of that value would necessarily require a challenge to the value, Shelby did not suffer any damages. The district court also noted the inconsistency between Shelby's

claim that it was not asking to revisit the valuation of Heartland Park with their requested relief which included a new appraisal by an independent third-party appraiser.

A. District Court applied proper summary judgment standard.

Instead of addressing these inconsistencies, Shelby takes issue with the standard of review applied by the district court. Shelby claims the district court improperly shifted the burden on Shelby to prove their case at the summary judgment phase. This misconstrues the district court finding and the summary judgment standard.

Although Shelby is not required to prove its case at summary judgment, it must produce evidence sufficient to establish each element of their claims. "When a plaintiff lacks evidence to establish an essential element of his or her claim, summary judgment is appropriate." *Mortg. Elec. Registration Sys., Inc. v. Graham*, 44 Kan. App. 2d 547, 557, 247 P.3d 223 (2010). One necessary element of each claim asserted by Shelby is damages. Because the district court found no evidence establishing this element, it granted summary judgment.

In finding Shelby failed the prove damages, Shelby claims the district court's ruling is flawed because it relied on certain facts where defendants failed to provide citations. The two facts at issue state:

> 79. There is no evidence Plaintiff designated an expert witness in the 2016 or 2017 BOTA Appeals.
>
> 80. Plaintiff has not designated an expert to testify that <u>any</u> of the values assigned by the Shawnee County Appraiser's Office (whether the original $10.4 million valuation) or the stipulated values for years 2017 and/or 2018, are incorrect.

(R. I, 79–80). The district court incorporated these facts into its memorandum and order granting summary judgment. (R. III, 351). Nothing about the district court's reliance on these facts is improper and Shelby's argument fails for a number of reasons.

First, it is impossible to cite to the absence of evidence. Fact #79 (above) points out that Shelby did not designate an expert witness in their BOTA appeals in 2016 and 2017. The only way to cite to this fact would be to cite the entire BOTA records for each year for the proposition that an expert designation was never made. Such a citation is unhelpful and would needlessly expend judicial resources by requiring someone to comb through those records. The same is true for Fact #80 (above). Shelby designated an expert, but not one that would testify as to the accuracy of the value of Heartland Park. The only way to cite to this fact would be to cite the entire record of the case for the proposition that such a designation was never made. Such a citation is unhelpful as the court is well-apprised of the record and expert designations.

Second, Shelby was given an opportunity to controvert these facts in its summary judgment response and failed to do so. Shelby's only response to Fact #79 was to state "controverted" and point out that the fact contained no citation. Shelby failed to provide any substantive response such as citation to the BOTA record where it designated an expert. Of course, such a citation was impossible as no such designation ever occurred. Shelby also fails to controvert Fact #80. Shelby merely states: (1) that it designated an expert who speculated about whether the March 29, 2017, appraisal was a product of undue influence; and (2) that Payne could testify as to Heartland Park's value. Neither of these controvert the fact as stated. Shelby's expert was not retained to provide an opinion

as to the value of Heartland Park (or opine as to the propriety of the value in the March 29, 2017, appraisal) and Payne was not designated as an expert.

B. Disputed facts about Payne's alleged phone call with Williams are irrelevant to the question of damages.

In its attempt to prove damages, Shelby points to the Payne's recounting of a phone call with Williams. Generally, Payne claims that Williams was pressured by the County to increase the valuation of Heartland Park. Even if true, this fails to establish damages given Shelby's repeated insistence that it agreed with the stipulated value and that it was not asking to revisit the valuation.

In order for Shelby to be damaged, there must be some evidence that the stipulated value was improper thereby damaging Shelby via increased tax burden. Not only is there no evidence of this, but Shelby does not even challenge the stipulated value and requests the stipulation remain intact. Because Shelby fails to challenge the stipulated value, Shelby suffered no damages and alleged conversations between Payne and Williams have no bearing on this conclusion.

II. Shelby claims are barred based on its failure to exhaust administrative remedies.

Shelby's opportunity to challenge the valuation of Heartland Park was during its BOTA appeal. Instead of moving forward with a hearing and decision by BOTA, Shelby elected to settle. Because Shelby's BOTA appeal is the exclusive remedy for challenging the County's assessment and valuation of Heartland Park and because all other claims are a subset of this valuation, Shelby claims are barred because it failed to exhaust administrative remedies.

A. Shelby was on notice of this defense, and it was properly considered by the district court.

Shelby reiterates its argument that the County waived this defense by not pleading it in their answer. This overly simplistic claim was summarily rejected by the district court which found Shelby was on notice of this defense. Shelby offers no new argument as to why Shelby was not on notice of this defense and merely recycles the one case it believes supports its position.

Under the notice pleading standard, defendants are only required to put a plaintiff on notice of its defenses. *See Vondracek v. Mid-State Co-op, Inc.*, 32 Kan. App. 2d 98, 101, 79 P.3d 197 (2003). The substance of the County's failure to exhaust administrative defense is that K.S.A. 79-2005 provides the exclusive remedy for challenging the County's valuation of Heartland Park. This overlaps significantly which other defenses pleaded in the County's answer—namely waiver and res judicata. Additionally, the County in ¶ 29 of its answer stated: "Plaintiff pursued settlement through the pendency of the tax appeal and that a settlement was reach on May 25, 2018" and pled the defenses of waiver, laches, and accord and satisfaction. (R. I, 51, 57).

The County's responses to Shelby's allegations and defenses listed in their answer provided ample notice to Shelby of the County's failure to exhaust administrative remedies defense and it was properly considered by the district court. *See Ackley v. Dep't of Corr. of State of Kan.*, 844 F. Supp. 680, 685 (D. Kan. 1994) (concluding that

plaintiff's interpretation of Rule 8(c) was "too stringent" and refusing to bar an affirmative defense when plaintiff had "fair notice" of the defense).[1]

B. All of Shelby's claims are premised on the valuation of Heartland Park and Shelby is precluded from collaterally raising these issues at the district court in a tort proceeding.

"The well-recognized rule in this state is that where a full and adequate administrative remedy is provided in tax matters by statute, such remedy must ordinarily be exhausted before a litigant may resort to the courts." *Tri-County Public Airport Auth. v. Morris Cty. Bd. of Cty. Comm'rs*, 233 Kan. 960, 966–67, 666 P.2d 698 (1983). K.S.A. 79-2005 provides the exclusive remedy for challenging the County's assessment and valuation of Heartland Park. *See Colo. Interstate Gas Co. v. Beshears*, 18 Kan. App. 2d 814, 820, 860 P.2d 56 (1993). This statute provides the exclusive remedy because "BOTA is considered the paramount, lawfully constituted taxing authority in Kansas." *In re Panhandle E. Pipe Line Co.*, 272 Kan. 1211, 1223, 39 P.3d 21 (2002).

Shelby availed itself of this remedy. The County mailed Shelby property valuation notices for the parcels that make up Heartland Park on March 31, 2017. On June 15, 2017, Shelby filed its notice of appeal with the BOTA. During the BOTA appeal, Shelby issued written discovery, issued subpoenas, submitted KORA, took depositions, and was afforded the opportunity for a hearing before the BOTA. Days before the hearing, Shelby settled its tax appeal with the County and stipulated to values of $7,500,000 for 2017 and $8,900,000 for 2018.

[1] "[B]ecause the Kansas Rules of Civil Procedure are patterned after the federal rules, Kansas appellate courts often turn to federal case law for persuasive guidance." *Back-Wenzel v. Williams*, 279 Kan. 346, 349, 109 P.3d 1194 (2005).

Shelby's exclusive remedy for a valuation dispute was through BOTA. As the foregoing shows, Shelby availed itself of this remedy but elected to settle instead of moving forward with a hearing and decision by BOTA. Shelby fails to exhaust its administrative remedies by failing to see their appeal through to the end, by conceding the stipulation remains agreeable, and by attempting to collaterally challenge the valuation in district court through a tort proceeding. It is nothing but speculation to assert any different (lower or higher) valuation would have resulted had Shelby elected to proceed to hearing rather than resolve the BOTA proceedings through stipulation and agreement.

C. The County properly asserted objections under the Kansas Rules of Civil Procedure and the Kansas Open Records Act.

Throughout the BOTA appeal, the County asserted valid and lawful objections to Shelby's discovery requests and KORA requests. These objections pertained to the March 2, 2017, draft appraisal prepared by Williams. For the KORA request, the County objected to production based on K.S.A. 45-221(a)(20) which exempts preliminary drafts from production under KORA. Separately, for the BOTA appeal, the County objected to the production of the draft appraisal because drafts of expert opinions are not discoverable under K.S.A. 60-226(b)(5).

Shelby learned about the existence of a draft appraisal as early as May 5, 2017, when the County withheld the draft from their KORA production. The County reiterated their position to Shelby's counsel that the draft appraisal was exempt from KORA during settlement discussions on April 5, 2018. The following day, Shelby took the deposition of

Stacy Berry who acknowledged the draft existed, explained her understanding of the changes between the two appraisals, and testified that the final appraisal contained a higher value conclusion than the draft. Less than two weeks later, the County objected to producing the draft appraisal as part of the BOTA appeal because it was a draft of an expert opinion.

Shelby cannot claim the County hid the draft appraisal, that it was surprised to learn it existed, or that it contained a higher valuation. The County and Shelby entered into the settlement agreement on May 25, 2018, and entered into the stipulation on June 4, 2018. More than a year before the settlement, Shelby learned the draft existed. Nevertheless, Shelby failed to take steps to acquire or learn about the draft appraisal. During the BOTA appeal, Shelby could have filed a motion to compel production of the draft appraisal; Shelby could have taken the deposition of the County's expert, Chris Williams, to learn about the details of the draft appraisal; and Shelby could have learned about the details of the draft appraisal through cross examination of the County's witnesses (including Williams) during the BOTA hearing.

The propriety of the County's objections cannot be seriously challenged. The BOTA filings make clear they designated Williams as their expert and K.S.A. 60-226(b)(5) specifically protects expert drafts from disclosure. Additionally, Shelby pursed a separate civil action against the County for violation of the KORA for, *inter alia*, withholding the draft appraisal under K.S.A. 45-221(a)(20). (Shawnee County District Court, Case No: 19-cv-543). The Court declined to find the County committed anything more than a technical violation of KORA and found no evidence of bad faith.

III. Res judicata bars Shelby from relitigating its property valuation dispute in district court.

All of Shelby's claims are based on an appraisal by Williams and subsequent valuation and tax assessment by the County. All of these claims were or could have been raised at BOTA. Because the BOTA stipulation constitutes a final judgment, res judicata bars Shelby from re-litigating these same issues at district court.

Res judicata or claim preclusion bars a successive claim when four conditions are met: (1) the same claim; (2) the same parties; (3) claims that were or could have been raised; and (4) a final judgment on the merits. *Cain v. Jacox*, 302 Kan. 431, 434, 354 P.3d 1196 (2015).

A. Shelby's claims are the same as those involved at BOTA or claims that could have been raised.

Kansas courts apply a transaction approach to determine if two suits involve the same claim. *See Rhoten v. Dickson*, 290 Kan. 92, 207, 223 P.3d 786 (2010) (applying a transaction approach to determine whether new litigation contains the same claim based on federal law); *O'Keefe v. Merrill Lynch & Co.*, 32 Kan. App. 2d 474, 481, 84 P.3d 613 (2004), *rev. denied* (May 25, 2004) (adopting transaction approach to determine whether state law claims are the same). Under this approach, the same claim "connotes a natural group or common nucleus of operative facts." Restatement (Second) of Judgment § 24, cmt. b (1982).

Shelby claims it could not have raised its present claims at BOTA because BOTA cannot hear tort claims like the ones it raises and because its claims were not known during BOTA.

Shelby's claims stem from its belief that the value conclusion reached by Chris Williams and the County's subsequent valuation and tax assessment were incorrect. If these amounts were correct, plaintiff's claims alleging the County coerced Williams or wrongfully withheld a draft of a lower value would be unintelligible. This makes clear that Shelby's claims are valuation and assessment issues and BOTA was the proper venue. *See Beshears*, 18 Kan. App. 2d at 817.

As noted in Section II(C) (above), Shelby is incorrect in alleging these claims were not known during BOTA. Shelby knew a draft appraisal existed more than one year before entering into the stipulation. Shelby knew the value conclusion increased between the draft and final version of the appraisal. Armed with this information, it declined to employ necessary means to obtain the appraisal or learn more information about. Shelby's failure and subsequent stipulation and settlement does not become an actionable tort in district court to relitigate the same value and assessment issues at BOTA.

B. The parties to Shelby's current claims are the same as its BOTA appeal.

Shelby Development was the taxpayer challenging the valuation and assessment at BOTA and the County defended the valuation. Thus, this suit involves the same parties. Shelby cannot avoid res judicata simply by naming Steve Bauman and Stacy Berry in their individual capacity. Steve Bauman is the County Appraiser and Stacy Berry is an Assistant County Appraiser—both of whom are in privity with the County.

Shelby's only attempt at disproving this element of res judicata is to claim Bauman and Berry acted outside the scope of their employment. Shelby's claim that

Bauman and Berry "merely assess[ed] values" is not supported by the facts of this case. Although the County engaged an outside appraiser to value the property, it is ultimately the County Appraiser's responsibility and statutory duty to assign a value. K.S.A. 79-1455. The Appraiser's Office, through Bauman and Berry, performed this duty by issuing valuation notices for the parcels comprising Heartland Park on March 31, 2017.

Bauman and Berry acted in the course and scope of their employment and in furtherance of their statutory duty in assigning value to Heartland Park. As employees of the Appraiser's Office they were in privity with the County. The suit involves the same parties as those involved at BOTA and res judicata applies,

C. The stipulation entered by the BOTA and agreed to by Shelby and the County constitutes a final judgment on the merits for purposes of res judicata.

Shelby's property valuation appeal for tax year 2017 ended with an Agreed Order of Stipulation signed by representatives for Shelby and the County. The parties agreed to a stipulated value of $7,500,000 for Heartland Park—nearly $2,000,000 less than the County's initial appraisal of the property. The stipulation was entered as an order by the BOTA and signed by BOTA board members.

Under Kansas law, this stipulation operates as a final judgment on the merits. Specifically, K.A.R. 94-5-18 states: "Each stipulation that finally and conclusively settles an appeal involving the valuation of county-assessed property shall be made by means of a fully executed order of stipulation and dismissal." Shelby claims "[t]his regulation does nothing more than provide a mechanism as to how to record the stipulation." *Appellant's Brief, pg. 27*. Shelby made this same argument at district court, but the foundation for its

claim is still a mystery. As noted by the district court, Shelby's argument ignores the plain wording of the regulation.

Shelby cites *In re Application of Fleet for Relief from a Tax Grievance in Shawnee Cty.*, 293 Kan. 768, 780, 272 P.3d 583 (2012) in support of its position, but this case has no bearing on whether a stipulation constitutes a final judgment on the merits. This case does not analyze or interpret K.A.R. 9-5-18 nor does it include any meaningful discussion of whether a stipulation constitutes a final judgment on the merits for purposes of res judicata. Instead, the holding from *Fleet* is issue preclusion prevents a County from retroactively taxing aircraft where the taxpayer obtained a judgment from BOTA finding the aircraft exempt.

Nothing about this case is relevant to the facts of this case where the County and taxpayer entered into an agreed stipulation to resolve a tax appeal. K.A.R. 95-4-18 is plain and unambiguous and the stipulation operates as a final judgment on the merits. Res judicata precludes Shelby from collaterally attacking this judgment via a tort action in district court.

IV. Shelby's claims are barred by the doctrine of waiver.

Waiver is "the intentional relinquishment of a known right and is a voluntary act." *Lyons v. Holder*, 38 Kan. App. 2d 131, 138, 163 P.3d 343 (2007). "Although waiver must be knowing and intentional, *intent may be inferred from conduct*, and the knowledge may be actual or actual or constructive, but both knowledge and intent are essential elements.'" *Id.* (quoting *Sultani v. Bungard*, 35 Kan.App.2d 495, 498, 131 P.3d 1264 (2006) (emphasis in original). "The constituent elements of waiver are an existing right,

knowledge of that right, and an intention to relinquish or surrender it." *State Farm Mut. Auto. Ins. Co., v. Petsch*, 261 F.2d 331, 334 (10th Cir. 1958).

Shelby and the County entered into a stipulation to resolve the BOTA appeal for the 2017 valuation. Shelby and the County also entered into a settlement agreement agreeing to values for 2018 and 2019. The language of both the stipulation and settlement is unambiguous and shows a clear intention by parties to extinguish any claims by Shelby stemming from Heartland Park's valuation. Despite Shelby's agreement to not appeal or protest Heartland Park's value for tax years 2017 through 2019, Shelby's current claims plainly seek to have this Court invalidate the settlement, re-open its protest and appeal of its BOTA cases, and have this Court supplant the role of BOTA in determining Heartland Park's market value.

Shelby claims disputed facts preclude summary judgment on the issue of whether its waiver was knowing and intentional. Shelby again bases this claim on its belief that the County hid information from it. The district court resoundingly rejected this claim and went into detail about how Shelby learned about the draft appraisal more than one year before entering into the stipulation. The County addressed this argument in Section II(C) (above).

Shelby learned about draft appraisal approximately one year before entering into the stipulation and settlement agreement. From Stacy Berry's deposition, Shelby learned the value increased from the draft to the final appraisal. Despite having this knowledge, Shelby failed to take steps necessary to overcome the County's objections and by

entering into a stipulation and settlement agreement, Shelby assumed the risk about what the exact number contained in the draft appraisal would be.

Shelby entered into the stipulation and settlement agreement with its eyes wide open about the existence of a draft appraisal. By entering into the stipulation and settlement, Shelby waived all of its present claims and its after-the-fact attempt to invalidate these agreements should be rejected.

V. Shelby's breach of contract claim fails.

A breach of contract claim requires that the plaintiff prove the following elements: (1) existence of contract; (2) consideration; (3) performance by plaintiff; (4) breach by defendant; and (5) damages to plaintiff caused by the breach. *Stechschulte v. Jennings*, 297 Kan. 2, 23, 298 P.3d 1083 (2013). When a plaintiff's breach of contract claim is based on defendant's alleged misrepresentations, plaintiff must also prove that it relied upon those representations. *Id.* (citing *Osterhaus v. Toth*, 291 Kan. 759, 769, 249 P.3d 888 (2011).

A. No breach occurred because Shelby failed to show the $10.4 million appraisal was inaccurate and Shelby cannot justifiably rely on this appraisal which it contested at BOTA.

The basis of Shelby's breach of contract claim is the settlement agreement represents that the County valued Heartland Park at $10,400,000 and this is false. No matter how many draft appraisals existed or what Payne claims he was told by Williams, this fact remains true. According to the 2017 valuation notices for Heartland Park, the County valued Heartland Park at $10,400,000. Additionally, the County produced a copy of Williams' appraisal detailing the components of how the County arrived at this

number through KORA and BOTA expert disclosures. As noted by the district court, "Shelby seems to conflate falsity with accuracy." (R. 3, 372).

Shelby believed this number was inaccurate from the outset as evidenced by their appeal to BOTA. Shelby now claims the valuation was a result of coercion by the County on Williams, but that does not change the fact that Heartland Park was appraised at $10,400,000. Despite having the opportunity to challenge the appraisal and prove any alleged inaccuracies or improprieties at BOTA and the district court, there remains no evidence that any part of the appraisal was false. Because Shelby is unable to show any false representation made by the County, Shelby breach of contract claim fails.

Shelby is also faced with an impossible contradiction. To prove its breach of contract, it must show that it justifiably relied on the $10,400,000 valuation of Heartland Park. Clearly, Shelby did not rely on this valuation and instead disagreed with the valuation and challenged the accuracy of the appraisal in the BOTA proceeding. As noted by the district court, "Shelby only relied on the $10.4 million valuation insofar as it objected to it." (R. 3, 371). Shelby's breach of contract claim fails because it cannot pretend to justifiably rely on an appraisal it objected to and challenged before BOTA.

B. Shelby fails to provide evidence of damages based on their agreement with the stipulation and inability to find any inaccuracies in the County's appraisal.

The only possible damage Shelby could have suffered is increased tax burden based on a valuation they claim was fraudulently inflated. As explained in detail by the district court, no such damages exist. Shelby's tax burden was not calculated based off the $10,400,000 appraisal. Instead, their tax burden was calculated based off the

$7,500,000 agreed stipulation entered by the BOTA. As explained in Section I (above), Shelby does not object to this stipulated value and this issue was conclusively resolved through the BOTA process. Additionally, Shelby failed both at BOTA and the district to demonstrate any deficiency, inaccuracy, or unreliability in the creation of the $10,400,000 valuation.

Shelby failure to prove damages is a result of its web of contradictions. Shelby vehemently objects to the $10,400,000 valuation, but claims it is not attempting to revisit valuation. It claims it was damaged by the $10,400,000 valuation despite agreeing to a significantly lower stipulated value at BOTA. It claims the County's valuation of Heartland Park was inaccurate but failed to identify even a single deficiency in the appraisal. Shelby's breach of contract claim fails for its inability to show how it was damaged.

VI. Breach of the duty of good faith and fair dealing is not a separate cause of action.

"[T]o prevail on an implied duty of good faith and fair dealing theory under Kansas law, plaintiffs must (1) plead a cause of action for breach of contract, not a separate cause of action for "breach of duty of good faith," and (2) point to a term in the contract which the defendant allegedly violated by failing to abide by the good faith spirit of that term." *Wayman v. Amoco Oil Co.*, 923 F. Supp. 1322, 1359 (D. Kan. 1996). As these elements indicate, "breach of the implied covenant of good faith and fair dealing is not a separate claim, but rather a legal argument related to a breach of contract claim."

H&C Animal Health, LLC v. Ceva Animal Health, LLC, 499 F. Supp. 3d 920, 940 (D. Kan. 2020).

The County cited these cases in its motion for summary judgment for the proposition that breach of the duty of good faith and fair dealing is not a separate cause of action. (R. I, 92–93). The district court relied on similar authority in granting the County's motion for summary judgment on this claim. (R. 3, 374–75). Nevertheless, Shelby maintains this claim as a separate cause of action from its breach of contract claim but provides no meaningful response to the County or district court's analysis and conclusion.

Kansas appellate courts and Federal District Courts interpreting Kansas law make clear that this is not an independent cause of action, and it was properly disposed of by the district court.

VII. Shelby's fraud, fraud in the inducement, and negligent misrepresentation claims are deficient.

Actionable fraud requires an untrue statement of material fact, known to be untrue, made with the intent to deceive or with reckless disregard for the truth and on which another party justifiably relies to his or her detriment. *See Alires v. McGehee*, 277 Kan. 398, 403, 85 P.3d 1191 (2004); PIK Civ. 4th 127.40 (Fraud – Elements). Fraud must be proven by clear and convincing evidence. *See Waxse v. Reserve Life Ins. Co.*, 248 Kan. 582, Syl. ¶ 3, 809 P.2d 533 (1991). The elements of fraudulent inducement are: (1) false representation by defendant of an existing material fact; (2) defendant made the representation with knowledge or reckless disregard as to their truth or falsity; (3) the

representations were intended to induce action by plaintiff; (4) plaintiff reasonably relied and acted upon the representations; and (5) plaintiff sustained damage by relying upon the representation. *Stechschulte v. Jennings*, 297 Kan. 2, 19, 298 P.3d 1083 (2013).

The elements of fraud are indistinguishable from the elements for fraud in the inducement (PIK Civ. 3d 127.40). The negligent misrepresentation claim is identical to its claims for fraud in the inducement and fraud. The only difference between fraud and negligent misrepresentation is fraud requires intentional or reckless misrepresentations, whereas negligent misrepresentation only requires the lack of reasonable care.

Shelby makes no new arguments as to how which representations were false, how it relied on those representations, or how it was damaged. The facts remain: (1) nothing about the County's representation that Heartland Park was valued at $10.4 million is false; (2) Shelby did not rely on this representation as evidenced by their disagreement with value and appeal to BOTA; and (3) Shelby fails to show how it was damaged by this representation because it led to a stipulation which Shelby agrees with.

Instead, Shelby repeats it claims that the County hid information from it and claims the district court should have considered evidence of Payne's call with Williams. These arguments were addressed previously and do not cure Shelby's deficiencies.

VIII. Shelby's civil conspiracy claim fails based on a lack of any underlying unlawful act, lack of damages, and is barred by the intracorporate conspiracy doctrine.

For an actionable civil conspiracy claim, plaintiff must prove the following: (1) two or more persons; (2) an object to be accomplished; (3) a meeting of the minds in the object or cause of action; (4) one or more unlawful overt acts; and (5) damages as the

proximate result thereof." *State ex rel. Mays v. Ridenhour*, 248 Kan. 919, 923, 811 P.2d 1220 (1991).

Shelby fails to provide an analysis of the elements and instead references its prior discussion of damages. *Appellant's Brief, pg. 34*. While damages are absent, Shelby also fails to prove that two or more persons carried out the alleged conspiracy and fails to identify the underlying unlawful act.

IX. Shelby's constitutional claims fail, and Bauman and Berry are entitled to qualified immunity.

Shelby's use of the BOTA process belies any claim they were denied adequate due process. The adequacy of this process is evidenced by Shelby's repeated stance that the stipulation reached at the conclusion of the BOTA case remains agreeable. Because Shelby fails to show Bauman and Berry violated any clearly established right, they are entitled to qualified immunity.

A. Shelby was afforded constitutionally adequate due process.

"[T]axpayers must seek protection of their federal rights by state remedies, provided of course that those remedies are plain, adequate, and complete, and may ultimately seek review of the state decisions in this Court." *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 116 (1981). "The constitutional requirements of due process are satisfied where the taxpayer, at some stage of the assessment procedures, has an opportunity to appear and contest the assessment." *In re Kinnet*, 26 Kan. App. 2d 250, 253, 984 P.2d 725 (1999) (citing *Shield Oil Producers, Inc. v. Cty. of Russell*, 229 Kan. 579, 582, 629 P.2d 152 (1981)).

Shelby received constitutionally adequate due process based on its use of the BOTA proceeding to pursue its valuation dispute. In pursuit of its claim at BOTA, Shelby took depositions, obtained documents, and had an opportunity for a hearing in front of BOTA. In lieu of a hearing, Shelby agreed to a stipulated value.

Shelby claims the County's objection to producing the March 2, 2017, appraisal through KORA and BOTA renders this process inadequate. Shelby ignores the tools it had available to it to challenge the County's objection and obtain the March 2, 2017, appraisal. *See Section II(C) (above)*. As is commonplace with discovery objections, Shelby could have filed a motion to compel production of the draft appraisal. Shelby failed to do this, and it failed to take other steps to learn about the appraisal. As noted by the district court, "if indeed [the March 2, 2017, appraisal] were the 'key piece of information that would give them necessary relief,' their pursuit of it was rather lackluster." (R. 3, 369).

Shelby's lack of pursuit to obtain information it deemed important does not render the process it received inadequate. As further evidence of the adequacy of the BOTA process, it concluded with an agreed stipulation which Shelby maintains is agreeable. Because Shelby received adequate due process, its claims under the U.S. Constitution fail.

B. Bauman and Berry are entitled to qualified immunity.

"When a defendant raises the qualified-immunity defense, the plaintiff must . . . establish (1) the defendant violated a federal statutory or constitutional right and (2) the right was clearly established at the time of the defendant's conduct." *Ullery v. Bradley*,

949 F.3d 1282, 1289 (10th Cir. 2020). For a right to be clearly established, "existing precedent must have placed the statutory or constitutional question beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011).

Shelby only provides conclusory claims on the issue of qualified immunity. It claims Bauman and Berry violated "statutes governing the conduct of appraisers, for which they were acutely aware." *Appellant's Brief, pg. 35*. Shelby fails to identify which statutes it is referring to and it abandoned its negligence per se claims on appeal. So too has Shelby failed to identify precedent placing its alleged statutory or constitutional question beyond debate.

The district court found Shelby made "no effort to specifically detail the rights violated and present caselaw to demonstrate those rights were clearly established." (R. 3, 387). Shelby failed to remedy this glaring deficiency on appeal. Bauman and Berry are entitled to qualified immunity.

X. Shelby's property damage claim is not cognizable.

Shelby's property damage claim was unintelligible at district court and Shelby has done nothing to change this on appeal. Shelby alleges the County damaged it property "in the form of an increased tax burden, a reduction in property value, and reduced profitability." (R. I, 47).

The claim is not cognizable for at least two reasons. First, property damage is actionable in Kansas as a trespass. Shelby does not allege any trespassed occurred. Second, Shelby's claim of reduced property value is contradictory with the rest of their claims. Shelby's chief complaint is about a value conclusion reached by Williams and the

County that was too high. Shelby now claims it has been damaged by a reduction in property value.

The district court noted that Shelby failed to resolve this confusion and inconsistency in their summary judgment response and summarily disposed of its claim.

CONCLUSION

For the reasons set forth above, the ruling of the District Court should be affirmed. Shelby forwent it challenge to the Heartland Park valuation by failing to evidence any inaccuracies in the County's appraisal and by entering into a settlement with knowledge that prior drafts existed. Shelby's repeated agreement with the stipulation and insistence that it is not attempting to revisit valuation shows that it suffered no damages and its collateral attack on the BOTA resolution should be denied.

Respectfully submitted,

Fisher, Patterson, Sayler & Smith, LLP
3550 S.W. 5th Street
Topeka, Kansas 66606
Tel: (785) 232-7761 | Fax: (785) 232-6604
dcooper@fpsslaw.com | bporter@fpsslaw.com

/s/Blake K. Porter
David R. Cooper #16690
Blake K. Porter #28289
Attorney for Defendants/Appellees

Certificate of Service

I hereby certify that on the 6th day of January, 2023, I caused the foregoing document to be electronically submitted to the district court as captioned above for filing. The same will be deemed filed as indicated on the court's electronic file stamp, providing notice to the following:

Wesley J Carrillo, KS #23984
Christopher M. Napolitano, KS #25499
ENSZ & JESTER, P.C.
1100 Main Street, Suite 2121
Kansas City, Missouri 64105
T: (816) 474-8010 | F: (816) 471-7910
wcarrillo@enszjester.com
cnapolitano@enszjester.com

David N. Holstead, Esq., KS. #12853
LAW OFFICE OF DAVID N. HOLSTEAD, LLC
5100 S.W. 10th Avenue, Suite 202
Topeka, Kansas 66604
T: (785) 228-1901 | F: (785) 228-2048
david@holsteadlaw.com
Attorneys for Plaintiff/Appellant

/s/Blake K. Porter