IN THE COURT OF APPEALS OF THE STATE OF KANSAS

SHELBY DEVELOPMENT, LLC, a Missouri limited liability company, Plaintiff/Appellant, v. SHAWNEE COUNTY, KANSAS, *et al.*, Defendants/Appellees.	Appellate Court Case No. 22-125299-A Appeal from the District Court of Shawnee County Case No. 2019-CV-000845 The Honorable Thomas G. Luedke, Judge

BRIEF OF APPELLANT

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Oral Argument 20 minutes

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STATEMENT OF THE NATURE OF THE CASE

The case before this Court involves a breach of contract action as well as tort actions. This matter is being appealed from the Memorandum Decision and Order on Defendants' Motion for Summary Judgment, which was entered on April 8, 2022.

STATEMENT OF THE ISSUES

Appellant will raise the following proposed issues: (1) that Shelby Development LLC's claims are not barred by the doctrine of failure to exhaust administrative remedies, because the wrongful acts committed by Shawnee County were not within the purview of the administrative remedy; (2) that Shelby Development LLC's claims are not barred by the doctrine of *res judicata*, because they do not arise out of the same facts, nucleus of operative facts, do not involve the same parties, and could not have been raised in the administrative action before the Kansas Board of Tax Appeals and did not constitute a final judgment on the merits; (3) that Shelby Development, LLC's claims are not barred by the doctrine of waiver; (4) that a genuine issue of material fact exists as to whether or not a breach of contract occurred; (5) that a genuine issue of material fact exists as to the breach of the duty of good faith and fair dealing; (6) that a genuine issue of material fact exists as to the Counts of fraud in the inducement, fraud, and fraud in negligent misrepresentation asserted by the Appellant in the District Court; (7) that Appellant's claim of negligence *per se* is subject to a private right of action; (8) that the Kansas Constitution, specifically the Kansas Bill of Rights, creates a private right of action; (9) that Shelby Development LLC's claims under 42 USC § 1983 present a genuine issue of material fact that precluded the granting of Summary Judgment against Shelby Development LLC's claims under 42 USC § 1983; and (10) that there is a genuine issue of material fact as to whether Shelby Development, LLC suffered compensational damages under Kansas law.

STATEMENT OF FACTS

1. Plaintiff/Appellant Shelby Development, LLC's ("Appellant") pleadings clearly indicate that there are detailed and described damages suffered. Specifically, these are pleaded in the Petition. [Volume 1, page 26, paragraph 66; Volume 1, page 27, paragraph 74; Volume 1, page 29, paragraph 81; Volume 1, page 31, paragraph 88; Volume 1, page 33, paragraph 95; Volume 1, page 35, paragraph 100; Volume 1, page 37, paragraph 108; Volume 1, page 39, paragraph 118; Volume 1, page 43, paragraph 132; Volume 1, page 46, paragraph 147; Volume 1, page 47, paragraph 151.]

2. Stacy Berry ("Berry") has been employed by the Shawnee County Appraiser's Office since April 2015. She oversees the Commercial Department and values some commercial properties. [Volume 2, page 195, paragraph 3.] Value notices are supposed to be mailed by March 1st of each year, extensions of that deadline can be secured from the Director of the Division of Property Valuation. [Volume 2, page 195.]

3. On December 29, 2016, Steve Bauman ("Bauman") wrote Chris Williams ("Williams"), an employee of CBRE, Inc. ("CBRE"), and asked if he conducted appraisals of Heartland Park for the 2016 and 2017 tax years. [Volume 2, page 197, paragraph 12.]

4. On January 24, 2017, Williams declined to do an appraisal for the 2016 year, then quoted an appraisal for the 2017 tax year for Four Thousand and 00/100 Dollars ($4,000.00), and further quoted "[a]ny litigation, negotiating, or court, tax appeal court time will be billed separately at $400/hour for myself and $250/hour for other appraisers in my office." [Volume 2, page 197, paragraph 14.]

5. On or about February 2, 2017, the County engaged Williams to appraise Heartland Park for the 2017 tax year. [Volume 2, page 198, paragraph 15.]

6. Bauman secured an extension of time until March 31, 2017, to send the valuation notices out in 2017. [Volume 2, page 198, paragraph 18—Volume 2, page 199.]

7. On March 2, 2017, CBRE emailed a draft appraisal by Williams to Bauman. [Volume 2, page 199.]

8. The March 2, 2017, appraisal report from Williams contained the value of Heartland Park at Seven Million Five Hundred Thousand and 00/100 Dollars ($7,500,000.00). [Volume 2, page 199, paragraph 20.]

9. Between March 3 and March 13, 2017, a telephone conference between Williams, Berry, and CBRE was scheduled for review of the March 2, 2017, appraisal. [Volume 2, page 199.]

10. On March 14, 2021, Williams, Bauman, and Berry participated in a telephone conference, which last[ed] approximately five to ten minutes. [Volume 2, page 200, paragraph 24.]

11. Between the County's engagement of Williams and CBRE on February 2, 2017, and their completion of the final appraisal on March 29, 2017, Berry answered a request for data via email from Shannon McCollam. [Volume 2, page 201, paragraph 31.]

12. The final appraisal report by Williams dated March 29, 2017, valued Heartland Park at Ten Million Four Hundred Thousand and 00/100 Dollars ($10,400,000.00). That appraisal was received by the County on March 29, 2017. [Volume 2, page 202, paragraph 32.]

13. Bauman then forwarded the appraisal to Berry for allocation among the parcels that make up Heartland Park. [Volume 2, page 201, paragraph 33.]

14. Berry then allocated the value of the Motorsports Park received from CBRE among the multiple parcels that comprise the Park. She did not herself appraise the Park in 2107. [Volume 2, page 202, paragraph 34.]

15. Property valuations were then sent out on or about March 31, 2017. [Volume 2, page 202, paragraph 35.]

16. The draft reports were disclosed through discovery. The existence of the draft reports was disclosed through discovery in KORA responses [Volume 2, page 202, paragraph 36; Volume 2, page 303, paragraphs 37-39.]

17. On March 9, 2018, the County designated Williams as an expert witness for the appeal of the 2017 valuation. [Volume 2, page 203, paragraph 40.]

18. And, in doing so, the County disclosed Williams as an expert for his March 29, 2017, appraisal in April of 2018, with its expert exhibits during the appeal of the 2017 valuation. [Volume 2, page 204, paragraph 41.]

19. Counsel for the County refused to produce the March 2, 2017, draft in the course of discovery. [Volume 2, page 204, paragraphs 40—Volume 2, page 205, paragraph 44.]

20. The County's position was that the preliminary draft Report was not subject to disclosure under KORA or discovery. [Volume 2, page 205, paragraph 46.]

21. The County objected to the production of its expert's draft appraisals. [Volume 2, page 206, paragraph 48.]

22. Appellant requested all correspondence and information related to the appraisals and all prior drafts or valuation determinations by Williams in an April 4, 2017, KORA request. [Volume 2, page 207, paragraph 50.]

23. The County objected to the production of any draft appraisals, indicating that they were not subject to KORA disclosure or to discovery. [Volume 2, page 207, paragraph 51.]

24. On or about May 25, 2018, the parties resolved the 2017 Board of Tax Appeals ("BOTA") appeal, and any dispute of the 2018 valuation, and agreed to specify values of $7.5M

for tax year 2017, and Eight Million Nine Hundred Thousand and 00/100 Dollars ($8,900,000.00) for tax year 2018. [Volume 2, page 208, paragraph 55.]

25. Those were resolved by stipulation entered by the BOTA. [Volume 2, page 208, paragraph 56.]

26. On May 25, 2018, the parties reached a settlement agreement as to the 2018 and 2019 values. [Volume 2, page 209, paragraph 57; page 210.]

27. Williams cannot identify which appraisal he intended to reply on in 2017. [Volume 2, page 215, paragraph 81; Volume 2, page 263.]

28. Williams does not recall whether or not he had a conversation with Chris Payne ("Payne") wherein Williams called Payne and told him that the value conclusion in Williams' March 29, 2017, appraisal report was not his value. [Volume 2, page 263.]

29. Williams cannot recall whether or not there was an inquiry being made for adjustment of comparables in his multiple appraisal reports. [Volume 2, page 216; Volume 2, page 264.]

30. Williams' only identification of the differences between the two appraisals were the depreciation and/or external obsolescence rather than the building residual technique. [Volume 2, page 216, paragraphs 84-86; Volume 2, page 264-265.]

31. Williams could not recall why he used the building residual technique in his March 29, 2017, appraisal, nor could he recall conversations he had with either Ashley Biegert ("Biegert") or James Crowl ("Crowl"). [Volume 2, page 216, paragraphs 86-87; Volume 2, page 263; Volume 2, page 265; Volume 2, page 267.]

32. Williams cannot recall whether or not he told Payne that the value conclusion in the March 29[sic], 2017, appraisal was not his value. [Volume 2, page 216, paragraphs 84-86; Volume 2, page 263.]

33. Williams cannot honestly say whether or not he told Payne that the March 29[sic], 2017, appraisal was not his number. [Volume 2, page 216, paragraph 89; Volume 2, page 269.]

34. The March 2, 2017, appraisal was Williams' appraisal and it was signed and certified. [Volume 2, page 216; Volume 2, page 269.]

35. Likewise, the March 14, 2017, appraisal was signed and certified. [Volume 2, page 216; Volume 2, pages 269-270.]

36. Of all the conversations revolving around the 2017 appraisals, Williams does not have a good recollection of any of them. [Volume 2, page 216; Volume 2, page 217.]

37. He does not have a detailed recollection of any of the conversations. [Volume 2, page 217; Volume 2, page 270.]

38. In fact, Williams does not have a recollection as to whether or not the conversations with Payne regarding the appraisals even occurred. [Volume 2, page 217; Volume 2, page 270.]

39. Specifically, Williams was not saying that those conversations did not occur, but just that he does not remember them or any details related to them. [Volume 2, page 217; Volume 2, page 270.]

40. Williams also qualified any answer of "not to my knowledge." It typically means that he does not remember one way or the other. [Volume 2, page 217, paragraph 97; Volume 2, page 270.]

41. Williams does not recall discussions between him and the County. [Volume 2, page 218; Volume 2, page 271.]

42. Williams performed four (4) different appraisals on the property from 2015 through 2017. [Volume 2, page 218; Volume 2, pages 271-273.]

43. Williams testified that after creating, signing, and certifying three (3) prior appraisal reports not using the building residual technique, he does not know why he changed to utilize the building residual technique. [Volume 2, page 273; Volume 2, page 218, paragraphs 107 and 109.]

44. Between providing the March 2, 2017, value of $7.5M and the March 14, 2017, value of Nine Million and 00/100 Dollars ($9,000,000.00), Williams has no idea as to what happened between those two (2) dates which caused the change in valuation. [Volume 2, page 218; Volume 2, pages 273-274.]

45. Williams has no idea whether or not information was provided to him regarding deferred maintenance on the property. [Volume 2, page 218; Volume 2, page 274.]

46. Having such information is very important to the appraisal process. [Volume 2, page 219, paragraph 112; Volume 2, page 274.]

47. Williams admits that clients always have a significant impact on the outcome of values seen, because they are the ones supplying data to him, and they are the ones supplying information to get the job done. He relies on the data at that particular point in time, and has to rely upon that being as accurate and true at that point in time. [Volume 2, page 219, paragraph 113; Volume 2, page 274.]

48. If a client withholds or cherry picks information it can be problematic for the accuracy of its appraisal. [Volume 2, page 219; Volume 2, page 275.]

49. The County withheld information regarding deferred maintenance on the property. [Volume 2, page 221, paragraphs 132-133; Volume 2, pages 293-294.]

50. Williams has no idea what information he received between March 14, 2017, and March 29, 2017. [Volume 2, pages 219-220; Volume 2, page 275.]

51. If a client withholds information it can be problematic for the accuracy of the appraisal. [Volume 2, page 219; Volume 2, page 270.]

52. Williams believes that the March 2, 2017, appraisal report and the March 13, 2017, appraisal report were ripe based upon the information he was given at the time or whatever was in the values. [Volume 2, page 219; Volume 2, page 276.]

53. In order to disregard the approach in the prior three (3) appraisals to determine whether the value was accurate or correct, Williams does not even know what information he would have needed to gain between March 14, 2017, and March 29, 2017, or if it was just an idea brought up from whomever. [Volume 2, pages 219-220, paragraph 120; Volume 2, page 276.]

54. Williams has no idea what would have changed numberwise in his calculations regarding external obsolescence. [Volume 2, page 220; Volume 2, page 277.]

55. In fact, Williams had difficulty at his deposition even recalling the conversation between him and counsel for Defendants a week prior to his depositions. [Volume 2, page 220, paragraph 121; Volume 2, page 279.]

56. Biegert, County Counsel, does not recall when she would have received the March 2, 2017, appraisal. [Volume 2, page 220; Volume 1, page 273.]

57. Biegert never learned about draft appraisals until the subpoena response from CBRE. [Volume 2, page 220; Volume 2, page 273.]

58. Biegert does not recall when she received the March 2, 2017, appraisal the first time it came across her desk. [Volume 1, page 173.]

59. The Shawnee County Appraiser's office ever analyzed the appraisal by CBRE, but rather took their appraisal number and assigned it to each parcel [Volume 2, page 220; Volume 2, page 289.]

60. Berry testified that the Shawnee County Appraiser's office did not go in and say "okay, I think this is right about the appraisal, this isn't right about the appraisal." [Volume 2, page 289.]

61. Rather, all the County does is say, "[t]his is their appraisal number and that's how we're going to assign the appraisal number to each parcel." [Volume 2, page 289.]

62. Berry agreed that information that when making appraisals, it is important to have actual information. [Volume 2, page 291.]

63. And actual information is what should be used. [Volume 2, page 291.]

64. If you have actual information, that is what should be used in an appraisal. [Volume 2, page 291.]

65. Berry agrees that Shawnee County can have an effect on how the appraisal report comes out, and have an opportunity to revise it. [Volume 2, page 291; Volume 2, page 221.]

66. The information in the County's file related to Heartland Park was not transferred to CBRE, even though it could affect the value. [Volume 2, page 221, paragraphs 132-133; Volume 2, pages 293-294.]

67. Shawnee County had in its possession from documents and records that can affect the value of Heartland Park, but did not transfer all of that information to CBRE. [Volume 2, pages 293-294.]

68. Specifically, Shawnee County withheld environmental reports from CBRE. [Volume 2, page 294.]

69. Shawnee County withheld information regarding repairs completed and a list of items that were to be completed from CBRE. [Volume 2, page 295.]

70. Berry did not know when CBRE was hired to handle the 2017 appraisal. [Volume 2, page 296.]

71. Shawnee County knew of two (2) prior appraisals of Heartland Park conducted by CBRE. [Volume 2, page 296.]

72. No one from Shawnee County provided the 2017 appraisal. [Volume 2, page 298.]

73. Shawnee County did not make any decisions based on their own inspection of the property for the appraisal of Heartland Park in 2017. [Volume 2, page 298.]

74. Berry only allocated the values to each parcel based upon the appraisal determination. [Volume 2, page 298.]

75. The value that was placed on the property for 2017 was the opinion arrived at through CBRE that the County did choose to place on there. [Volume 2, page 299.]

76. The County had the option to either accept or reject the value of CBRE. [Volume 2, page 299.]

77. There were questions internally from Shawnee County as to why the property value went down so much in 2015 after the reversion. [Volume 2, pages 300-301.]

78. Williams requested the hiring of a third-party to determine more critical items and actually provide dollar amounts for those, and the County instructed him not to do so. [Volume 2, page 306.]

79. Despite receiving substantial information from Shelby Development, that information was withheld from CBRE. [Volume 2, page 307.]

80. Shawnee County requested an "established number" and was told that CBRE "will make it happen." [Volume 2, page 308.]

81. Berry could not testify whether or not there was an exchange of valuation numbers on March 1, 2017, despite email traffic indicating the same would be forthcoming. [Volume 2, pages 307-308.]

82. Biegert testified that she did not know whether or not they received a revised report or even a report on March 1, 2017. [Volume 2, page 11.]

83. She does not recall which revisions were made to any report. [Volume 2, page 311.]

84. She recalled that the only revisions made were to the difference between comparables. [Volume 2, page 311.]

85. She does not remember what effect the comparables' lot sizes had on the value. [Volume 2, page 311.]

86. She did not remember how much the value increased. [Volume 2, page 312.]

87. There was an established value, but a request for extension was made by Shawnee County on the auspices that a value had not been determined. [Volume 2, page 312.]

88. The land value remained Four Million and 00/100 Dollars ($4,000,000.00) throughout the multiple appraisals by CBRE. [Volume 2, page 81; Volume 1, pages 265, 377.]

89. The County accepted the March 29, 2017, appraisal by CBRE. [Volume 2, pages 316-317.]

90. Williams informed Payne prior to Shawnee County's arrival that Payne should not take such pride in ownership and essentially informed him to be quiet about his property. [Volume 2, page 360.]

91. Williams specifically informed Payne that "the county was reaching for a higher value on the property than he thought it was worth." [Volume 2, page 361.]

92. Williams also informed Payne that the County had ordered [a] prior appraisal of Fifteen Million and 00/100 Dollars ($15,000,000.00) and that that was the threshold that the County was trying to get to. [Volume 2, page 361.]

93. After resolution with Shawnee County, Payne and Williams had a conversation that he did not value the property at the price of $10.4M, which caused an in-depth conversation wherein Williams informed Payne that the original appraised amount was around $5.5M and that the County was pushing Williams, and Bauman specifically gave Williams orders to raise the appraiser higher, and that Bauman said, "I need a higher appraisal." [Volume 2, pages 364-365.]

94. Williams stated to Payne that when the second appraisal came back to Bauman again, Bauman said that he had to have a higher appraisal, because the current one was not high enough, and proceeded to tell him reasoning or give him things to make it worth more, wherein Williams repeatedly told Bauman "this is not my appraisal." [Volume 2, page 365.]

95. Bauman informed Williams that there was a need for a higher value of the property and informed Williams that Williams "works for [the Appraiser's Office]." [Volume 2, page 365.]

96. Williams was coached by Bauman for a higher value. [Volume 2, page 365.]

97. Williams then informed Payne that he would stop sending him values in writing, but rather gave him values over the phone that were shot down or not, and it went back and forth for a period of time. [Volume 2, page 365.]

98. Williams stated that he felt uncomfortable where they ended. [Volume 2, page 365.]

99. Williams made it clear to Payne that the value presented as $10.4M was the value. [Volume 2, page 365.]

100. After Payne, Crowl, Biegert, Commissioner Cook, Go To Topeka representatives, and Visit Topeka representatives had a meeting, the County reached out to Williams and tried to get him to say that he is an expert witness and that Williams was not going to do it because he was not then and cannot be now, that the County attempted to go back in time to determine that he was an expert witness from the beginning. [Volume 2, pages 365-366.]

101. In conducting the "investigation," Crowl called the allegations asserted by the Plaintiff as outrageous and groundless. [Volume 3, page 31.]

102. Appellant's expert witness analyzed the three (3) appraisals of March 2, March 15, and March 29, 2017, identifying numerous issues with the appraisals, and concluded that his review of the appraisals left one to assume that, given the reports tendencies outlined on the previous pages appeared to suggest that the appraisers received atypical direction or undue pressure in performing this appraisal assignment from the client. [Volume 3, pages 34-54.]

103. In the Kansas Open Records Act request or Shawnee County Case No. 2019-CV-00845, the District Court determined that Shawnee County did not violate KORA by failing to produce prior copies of the March 2, 2017, appraisal, because the draft appraisals were provided after resolution of the 2017 BOTA appeal. [Volume 3, pages 66-82.]

104. Despite having a "number" on March 1, 2017, Bauman informed the Director of the Department of Revenue that the appraisal was not yet complete. [Volume 3, page 133.]

105. Bauman's timelines were fuzzy. [Volume 3, page 147.]

106. Bauman had a hard time putting together a timeline perspective for 2015, 2016, and 2017. [Volume 3, page 147.]

107. His memory in 2020 was not as good as it was before regarding the events surrounding Heartland Park. [Volume 3, page 147.]

108. And he had difficulty recalling details about specific timelines or specific things. [Volume 3, page 147.]

ARGUMENTS AND AUTHORITIES

Even though erroneous, the structure of the District Court's Memorandum Decision and Order provides an appropriate order in which matters of error may be discussed.

A. Overarching Standard of Review.

The standard of review for a motion for summary judgment is *de novo*. *First Security Bank v. Buehne*, 314 Kan. 507, 510, 501 P.3d 362, 365 (2021). On appeal, the Appellate Court is bound by the doctrine which shows:

> A party seeking summary judgment bears a heavy burden. The trial court is required to resolve all inferences which may reasonably be drawn from the evidence in favor of the party against whom summary judgment is sought. Summary judgment is proper where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The party opposing summary judgment has the affirmative duty to come forward with facts to support its claim, although it is not required to prove its case. If factual issues exist, they must be material to the case to preclude summary judgment.

Hammig v. Ford, 246 Kan. 70, 72, 785 P.2d 977, 980 (1990). Both the trial court and the appellate court should refrain from weighing evidence. *Esquivel v. Watters*, 286 Kan. 292, 297, 183 P.3d 847, 850 (2008).

Here, genuine issues of material facts exist in this matter and the Record supports that, at the very least, Appellees have failed to meet their burden, and Summary Judgment should be reversed.

B. The District Court's determination that Shelby Development failed to prove damages is erroneous and places an undue burden on the non-moving party.

1. The failure to prove damages is subject to de novo review.

The standard of review for a motion for summary judgment is *de novo*. *First Security Bank v. Buehne*, 314 Kan. 507, 510, 501 P.3d 362, 365 (2021). "A party seeking summary judgment bears a heavy burden." *Hammig v. Ford*, 246 Kan. 70, 72, 785 P.2d 977, 980 (1990). "Summary judgment is proper where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, 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." *Id.*

2. Preservation of damages issue for appeal.

Shelby preserved the issue of damages for appeal purposes by controverting SOF Nos. 79 and 80 [Volume 2, page 215], and stating additional SOFs Nos. 106-111 [Volume 2, page 218]; SOF No. 121 [Volume 2, page 220]; SOF Nos. 152-158 [Volume 2, pages 223-224]; and in its briefing at Volume 2, pages 237, 238, 243 and Tr. 52:6-15; 46:13-17; 54:18—55:10. The Court ruled on these issues addressing them primarily at Volume 3, pages 357-358.

3. Shelby provided adequate evidence to avoid summary judgment under the standard of review.

The District Court impliedly relied on Defendants' Motion for Summary Judgment's Statement of Uncontroverted Facts Nos. 79 and 80. Despite Defendants having an appendix in excess of 300 pages, there is no citation to any record or document supporting the factual assertions whatsoever. However, Plaintiff's factual assertions clearly contradict the issues raised in Defendants' Statement of Facts Nos. 79 and 80, wherein Plaintiff identifies that it can testify as to the value of the property itself. *City of Wichita v. Sealpak Co., Inc.*, 279 Kan. 799, 802, 112 P. 3d 125, 128 (2005) ("It is well settled that a landowner is a competent witness to testify as to the value

of his or her property."). Payne, the sole member of Plaintiff, was deposed and was never asked his opinion on an accurate value. Shelby is not required to prove its case at the summary judgment stage—all it must do is raise questions of fact, which it has done. *Hammig v. Ford*, 246 Kan. 70, 72, 785 P.2d 977, 980 (1990). The Record clearly provides evidence that the appraised value of $10.4M is incorrect. Plaintiff's Expert's Report makes it clear that Williams' appraised values were likely the result of undue influence. While the District Court points out that these were "assumptions" made by Plaintiff's expert witness—these "assumptions" are bolstered by Williams' statements to Payne that he was directly and repeatedly pressured by Bauman to raise the valuation until it reached a number that was satisfactory to Bauman and the County. The existence of Williams' statements is not in dispute. [Tr. 6:14-20.] Williams' rejection of the appraised value as "not his number" makes it clear that the valuation of $10.4M is not only incorrect, but it was also a forced fabrication by the County, a process to which Williams acquiesced. There is no requirement that Shelby, at this stage prove its valuation, and the District Court clearly weighed the evidence in this case rather than recognizing the existence of a genuine issue of material fact. The weighing of evidence violates well-established Kansas law which requires district courts to "refrain from the temptation to pass on credibility and to balance and weigh evidence which are the proper functions for the factfinder at trial." *Esquivel v. Watters*, 286 Kan. 292, 297, 183 P.3d 847, 850 (2008).

Making matters worse, the County actively hid this information from Shelby in KORA Requests and the BOTA appeal process by refusing to produce communications and "draft appraisals," only to later produce them after the BOTA appeal was settled, Willliams' conversation with Payne, the meeting identifying the wrongdoing of the County Appraiser's Office, and an investigation which illustrated its inherent bias by calling the allegations groundless before the

investigation was completed. The *pièce de résistance* for Shawnee County was that it was able to steer clear of punitive KORA violations by providing the evidence giving rise to this litigation after the dust had cleared.

The District Court's decision improperly shifts the burden upon Shelby to absolutely prove its case at the Summary Judgment stage. A defendant is entitled to summary judgment if defendant can establish the absence of evidence necessary to support an essential element of a plaintiff's case. *Klose v. Wood Valley Racquet Club, Inc.*, 267 Kan. 164, 167, 975 P.2d 1218 (1999). There is no evidentiary basis asserted from Shawnee County in support of the facts asserted to negate the damage element of Plaintiff's claims. Allowing summary judgment movants such latitude shifts the burden to the non-movant to prove its case, rather than illustrate issues of fact. Taken to its logical end, movants could state nothing more than a naked assertion such as "Plaintiff has no evidence of [insert element] rather provide the factual basis for such assertion with a citation to the record."

C. The District Court erred by determining Shelby's claims were barred by the failure to exhaust administrative remedies.

1. Standard of Review.

Generally, "an allegation that a party is required to or has failed to exhaust its administrative remedies presents a question of law" and "this court's review is unlimited." *NEA-Coffeyville v. Unified Sch. Dist. No. 445, Coffeyville, Montgomery County*, 268 Kan. 384, 387, 996 P.2d 821, 824 (2000).

2. Preservation.

Appellant briefed the issue of the waiver of the defense of failure to exhaust administrative remedies and briefed the argument related to the alleged failure to exhaust administrative remedies. [Volume 2, pages 229-230.] The District Court ruled on those issues at Volume 3, pages 358-361.

3. Shelby provided adequate evidence to avoid summary judgment under the standard of review by showing the lack of an adequate remedy and the hiding of essential evidence by Appellees.

The District Court erroneously determined that Shelby's claims were barred by the failure to exhaust its administrative remedies. In doing so, the District Court neglects the undisputed facts that Shawnee County withheld vital evidence and information from Shelby in the course of that administrative proceeding, an act the same District Court held did not constitute a violation of the KORA and, if it did, the violation was cured by a later release of the records. The hiding of information by County officials in an effort to secure either a favorable tax hearing result or settlement only to release it later resulting in both the District Court and the County thumbing their noses at the taxpayer is the antithesis of a full and adequate administrative remedy. The District Court relied on *Colorado Interstate Gas Co. v. Beshears*, 18 Kan. App. 2d 814 (1993) as persuasive authority that Shelby should have submitted the issues it raises in this lawsuit to the BOTA to be considered part of the validation dispute. This is premised on a fundamental falsity—that Shelby would have been able to gain the knowledge of the prior appraisals at the BOTA stage.

This very same District Court ruled that the documents hidden by the County were not discoverable in the KORA action because they are exempted by K.S.A. § 45-221(20) as preliminary drafts, and that Williams was an expert witness. Moreover, the County expressly admits that there was no legal obligation to ever give that information to Shelby. [Tr. 67:21—68:13.] The District Court's reliance on those findings makes it clear that there would be no way such information would have been discoverable in the course of the BOTA decision, because the drafts of expert opinions are not discoverable under K.S.A. § 60-226(b)(5). The District Court's ruling on this matter literally requires Shelby to litigate matters of which it did not know the extent of or could not have known the extent of until after the BOTA was completed. Even the County

itself maintained the position that it was not required to give draft appraisals but had the discretion to give them should they so desire. The facts of this case are highly opposite from *Board of Osage County Comm'rs v. Schmidt*, 12 Kan. App.2d 812, 758 P.2d 254 (1988) because in *Schmidt* the first challenge to the valuation was not until the tax foreclosure action and there is no indication whatsoever, that information was hidden from the Schmidts in that case, as is here. The Schmidts did not even attempt the BOTA action as Shelby did here, and neither did the plaintiff in *Tri-County Public Airport Authority v. Board of Morris County Comm'rs*, 233 Kan. 960, 966, 666 P.2d 698, 703 (1983) ("[Tri-County] made no attempt to avail itself of the administrative remedy; it had no right to resort to the courts in an independent action.") Shelby followed the statutory scheme, attempted to obtain the information giving rise to this action, and the County refused to provide it.

Moreover, *Beshears* held that "the law recognizes certain exceptions to the exhaustion doctrine. If no administrative remedy is available or if it is inadequate to address the problem at issue, exhaustion is not required." *Colorado Interstate Gas Co. v. Beshears*, 18 Kan. App. 2d 814 (1993) (internal quotations omitted). "Where, there are no issues raised to which lend themselves to administrative determination and only issues present ... require judicial determination ..., it follows that plaintiffs should be permitted to seek court relief without first presenting the case to the administrative agency." *Id.* This is because the BOTA appeal, after discovering the wrongful acts of Defendants, would be pointless—a reason why they were likely so willing to expose the key piece of evidence once they had used it to their ends. *See Chelf v. State*, 46 Kan.App.2d 522, 530 (2011).

Finally, the District Court should have never considered the defense of failure to exhaust administrative remedies, because the County never asserted the affirmative defense not pleaded in

their Answer. A review of the Answer shows that Defendants did not assert the defense of "failure to exhaust administrative remedies," and therefore such an assertion is waived, as a matter of law. Assuming, *arguendo*, that exhaustion of the administrative remedy is required—Defendants have waived that affirmative defense by failing to assert such defense in its Answer, and instead proceeded to address the merits of Plaintiff's claims. *See Sperry v. McKune*, 305 Kan. 469, 491 (2016) (reversing a trial court's dismissal of a claim for failure to exhaust administrative remedies holding the dismissal "improper because KDOC waived its right to assert exhaustion of administrative remedies as an affirmative defense when it addressed the merits of Sperry's initial grievance that was later deemed improper.")

D. The District Court erred by determining Shelby's claims were barred by *res judicata.*

1. Standard of Review.

"Whether the doctrine of *res judicata* applies in a certain situation is an issue of law over which appellate courts exercise de novo review." *Miller v. Glacier Development Co.*, 293 Kan. 665, 668, 270 P.3d. 1065, 1068 (2011).

2. Preservation.

Appellant briefed the issue of the defense of *res judicata* at Volume 2, pages 230-233. The District Court ruled on those issues at Volume 3, pages 361-365.

3. Genuine issues of material fact exist negating Appellees' *res judicata* defense.

In Kansas, four elements must be met to invoke the doctrine of *res judicata* or claim preclusion: (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. *Winston v. State Dept. of SRS*, 274 Kan. 396, 413, 49 P.3d.

1274 (2002). The *Beshears* decision makes it clear that if the claims are outside the purview of the administrative agency, the administrative agency has no ability to adjudicate those claims.

Here, there is nothing which indicates that the BOTA has expanded authority to hear tort claims such as those raised by Shelby in this case. "*Res judicata* precludes a second administrative proceeding with the first administrative proceeding provides the procedural protections similar to court proceedings with an agency is acting in a judicial capacity." *Winston v. State Dept. of Soc. & Rehab. Services*, 274 Kan. 396, 413, 49 P.3d 1274, 1285 (2002). *In re Tax Application of Fleet*, 293 Kan. 768, 779, 272 P.3d 583 (2012) supports Shelby's position. Specifically, *Fleet* involved two separate BOTA decisions—both directly related to tax exemption status. The appeal to the district court was a determination of tax exempt status of aircraft for specific years wherein the BOTA had already determined the aircraft exempt. The County then went to the BOTA to ask it to change its decision and the BOTA rejected it, initiating the review in District Court. Unlike the case before this Court, there was no "claim the owners withheld relevant details or acting in a misleading or deceptive manner with either BOTA or the County." *Id.* at 770. Here, those are the exact allegations giving rise to the cause of action.

Shelby's claims could not have been raised before the BOTA during the prior appeal because they were not known to Shelby. The District Court incorrectly states in the Memorandum Decision that, "the information, however, was available for resolution by Shelby had it chosen to pursue it." This is absolutely untrue and completely contradictory to the District Court's ruling in the KORA matter where the Court expressly held the County had a right to withhold the information under the Kansas Open Records Act. The District Court's determination regarding the stipulated value and that the challenge to the process related to the stipulated value are separate

and distinct is incorrect. Shelby is not arguing that it did not agree to the value—it is the argument that Shelby was misled and deceived in reaching the stipulated value.

4. The Court erred in ruling that the parties were the same because there was a genuine issue of material fact as to privity of Bauman, Berry, and Shawnee County.

The District Court found that Bauman and Berry were acting pursuant to their appraisal duties and therefore were in privity. The Court even states that the facts surrounding privity were "undisputed," which is far from the truth. The cases cited by the District Court are the result of individuals being sued in their "official capacity" rather than their individual capacities, or both as is the case before this Court. The County never even asserted the fact that Bauman and Berry were acting within the course and scope of their employment. Rather, it is clear, by their own admission, that Berry and Bauman were merely assessing values—and assessing values is not within the course and scope of their employment because it is outside of their statutory limitations. K.S.A. § 79-1412a limits the powers and duties of a county and district appraiser

5. The District Court erred in determining the claims could have been raised before the BOTA.

The District Court erroneously held that the claims are all premised on the "value conclusions" and are therefore claims which could have been brought before the BOTA. This conclusion ignores that the BOTA does not have the jurisdiction to hear tort claims because the BOTA's sole authority is to hear tax appeals, not tort claims. Such an analysis completely ignores, for example, the breach of contract and fraud in inducement claims. If the District Court's analysis is illogical, it would require the contract and fraud in inducement claims to be brought after the inducement to enter the agreement which is what ultimately resolved the BOTA action. That would have literally been impossible, because a party cannot bring those causes of action until after the inducement or contract was entered.

6. The Stipulation is not a "judgment on the merits."

The District Court held that K.A.R. 94[sic]-5-18 means the stipulation is a "judgment on the merits." However, K.A.R. 94-5-18(c) has no indication that the same is a judgment on the merits and there is no law cited by either the Defendants nor the District Court which indicates that a settlement and stipulation is a judgment on the merits. This regulation does nothing more than provide a mechanism as to how to record the stipulation. Likewise, *In re: Application of Fleet for Relief from a Tax Grievance in Shawnee Cty.*, 293 Kan. 768, 780, 272 P.3d. 583 (2012) is inapposite to the case before this Court. *In re: Application of Fleet* did not involve stipulations and a settlement agreement, but rather final decisions by the BOTA. A BOTA appeal was brought on two separate occasions. The second was found in favor of the taxpayer on preclusion grounds and then appealed to the district court. There is no evidence of information being withheld or a deviation from the process, or even a separate and distinct tort action occurred as is the case here. The claims were, in that case, literally the same claims and issues which the BOTA had already determined. The BOTA cannot hear claims of fraud or other tort claims and as such, could not have entered a judgment on the merits as to those issues.

E. The District Court erred in determining Shelby waived its claims.

1. Standard of Review.

The party raising an affirmative defense also bears the burden of proving the defense. *Munck v. Kansas Pub. Employees Ret. Sys.*, 35 Kan. App. 2d 311, 322, 130 P.3d 117, 125 (2006). Here, the standard of review on Appellees' affirmative defenses is the summary judgment standard of review –*de novo*.

2. Preservation.

Appellant briefed the defense of waiver at Volume 2, pages 233-234. The District Court ruled on those issues at Vol. 3, pages 366-369.

3. The District Court's ruling that Shelby waived its claims is erroneous, because genuine issues of material fact exist as to the knowing and voluntary nature of the agreement which resulted in the alleged waiver.

The District Court's decision is based, again, on the false premise that Shelby had adequate information to assert the challenges it does in this action. The District Court based that decision on email exchanges disclosing the existence of the drafts. The District Court then failed to recognize the facts and evidence in the Record which illustrated not only did the District Court determine that Shelby had no right to access of those documents and that additional, subsequent information from Williams brought light to the falsity of the appraisals themselves.

Moreover, the District Court ignored evidence that neither Berry nor Bauman could provide much insight into the contents of the draft appraisal. Shelby has lost the argument that the appraisals should have been provided in the initial KORA requests and through the course of discovery. The ultimate discovery of that information after the call between Williams and Payne illustrates that there was, at the very least, a genuine issue of material fact as to whether the waiver was knowingly and voluntarily relinquished.

The District Court argued that the information could have been discoverable if Williams was deposed. This analysis ignores that such "prior opinions" would not have been discoverable. "A deposition of an expert witness is an opportunity for the parties to inquire about the opinions that are disclosed pursuant to K.S.A. 2019 Supp. 60-226(b)(6)(B)." *Acord v. Porter*, 58 Kan.App.2d 747, 769, 474 P.3d 665, 684 (2020). The only "disclosed" opinion was the valuation at $10.4M. Any other opinion, including draft opinions, would have been not have been disclosed,

not subject to questioning, and there would have been no foundation for the questioning, as the other report had been hidden. Likewise, conversations between the County and Williams would have also been protected under K.S.A. § 60-226(b)(5) limiting the discovery of such information. The District Court's determinations that the County did not violate KORA by failing to provide the draft documents and information related to Williams' retention as an expert witness and then arguing on behalf of the County that Shelby should have received the information sufficient to make a valid challenge in Williams deposition defies logic. The District Court has allowed the County to withhold documents without punishment and then benefit from the withholding of those documents by excluding Shelby's cause of action.

F. Breach of Contract

1. Standard of Review.

Appellate courts review determinations of a breach of contract *de novo*. *Wittig v. Westar Energy, Inc.*, 44 Kan.App.2d 216, 220, 235 P.3d 535, 540 (2010).

2. Preservation.

Appellant briefed the issue of the breach of contract at Volume 2, pages 235-236. The District Court ruled on those issues at Volume 3, pages 370-374.

3. The Court erred in granting summary judgment on Shelby's breach of contract claim, because genuine issues of material fact existed as to the existence of a breach and damages suffered by Shelby.

The District Court determined made two (2) determinations as to the Breach of Contract Claim, first that the contract was not breached, and second that no damages were suffered, even if the contract was breached. Whether a contract has been breached is a question of fact. *Waste Connections of Kansas, Inc. v. Ritchie Corp.*, 296 Kan. 943, 964, 298 P.3d 250, 265 (2013). When those facts are in dispute. In other words, "when reasonable persons could differ on inferences to

be drawn from facts," such "question[s] must be determined by trier of fact" and "summary judgment is improper." *Id.* summarizing *Dutta v. St. Francis Regional Med. Ctr., Inc.*, 18 Kan.App.2d 245, 257, 850 P.2d 1057 (1994).

The District Court predicates its finding on the concept that the property was appraised at $10.4M, but ignores the facts that the Appraiser's role was to do nothing more than "allocate the value," and the Appraiser's office routinely took the position that they were "hands off" and only provided the "information requested" to Williams. And, based on information obtained after the BOTA Stipulation, it has become apparent that there were at least three (3) written appraisals and two (2) oral appraisals. The testimony of Payne reflects that Williams indicates that the appraisal "was not his" and that "was not his number." While the District Court does not believe the statements of Payne, that is not the District Court's function at this stage in the litigation. The District Court goes as far as to say that there "is no allegation that any part of the appraisal that resulted in the $10.4 million valuation was fictitious, maliciously inflated, or inaccurate." This wholly ignores Plaintiff's expert testimony which states that the $10.4M appraisal appears to be the result of undue influence, and Payne's testimony that Williams specifically said that the County kept trying to get him higher and higher. It is clear the District Court picked and chose facts while ignoring evidence before that Court, which created a genuine issue as to material facts precluding Summary Judgment.

In its analysis, the District Court again erroneously determined that Shelby suffered no damage, arguing that there are no facts which identify "any deficiency with this valuation that questions its accuracy or reliability." As explained above, this conclusion can only be found if the District Court ignored the facts in evidence, including Payne's testimony and Plaintiff's expert

report or weighed those facts. The record is sufficient with genuine issues of material facts and inferences from those facts which preclude Summary Judgment.

G. Breach of the Duty of Good Faith and Fair Dealing.

1. Standard of Review.

Appellate courts review determinations of a breach of the covenant of good faith and fair dealing at the summary judgment stage is *de novo*. *Waste Connections of Kansas, Inc. v. Ritchie Corp.*, 296 Kan. 943, 964, 298 P.3d 250, 265 (2013).

2. Preservation.

Appellant briefed the argument related to the breach of the duty of good faith and fair dealing. [Volume 2, pages 236-237.] The District Court ruled on those issues at Volume 3, pages 374-375.

3. The District Court's error in granting of summary judgment is the same as with the breach of contract claim.

The District Court based its granting of summary judgment on the Breach of the Duty of Good Faith and Fair Dealing on the premise that there was no breach of contract. Because the District Court erred in entering Summary Judgment on the breach of contract claim, that error extends to the judgment on the breach of duty of good faith and fair dealing.

H. The District Court erred in granting summary judgment on Shelby's Fraud in the Inducement, Fraud, and Negligent Misrepresentation Claims.

1. Standard of Review.

Appellate courts review for claims of fraud in the inducement, fraud, and negligent misrepresentation *de novo* and applying the typical summary judgment standard. *Osterhaus v. Toth*, 39 Kan.App.2d 999, 1006, 187 P.3d. 126, 132 (2008).

2. Preservation.

Appellant briefed the argument related to the fraud, fraud in the inducement, and negligent representation claims. [Vol. 2, pages 237-241.] The District Court ruled on those issues at Vol. 3, pages 376-380.

3. The District Court erred in granting summary judgment because its finding is based upon matters where a genuine issue of material fact exists, and upon facts not contained in the Record.

Again, the District Court's decision is premised on the contentions that the $10.4M appraisal," in the view of Williams, was the most appropriate valuation, considering the relevant factors, that Shelby knew of a previous value, and a lack of damages. Each is fundamentally flawed and ignores the Record of this case. Williams stated that each one of his appraisals were correct, accurate, and appropriate—he never testified that one is better than the other, and there were no such facts in the Motion for Summary Judgment. All three (3) written appraisals were executed by Williams certifying that they were complete. In reaching this finding, the District Court would have had to exclude the evidence from Plaintiff's expert challenging the validity and accuracy of the $10.4M appraisal, as well as the express admission by Williams that he was pressured to continue to reach a higher and higher number. It ignores that there was no "attachment" to the email of the "revised" opinion, and more importantly that discovery of that revised opinion was precluded from even the broadest of access—KORA—from Shelby. The District Court blanketly states, "Shelby should at least demonstrate some reason to believe the valuation might be lower than stipulated in the BOTA proceedings a fact never asserted by the County) passed on the disclosure of the March 2, 2017, valuation," and then stating that "a moving party is not required to produce evidence showing an absence of an issue of material fact," wholly misconstruing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)

and *Unified Sch. Dist. No. 232, Johnson Cty. V. CWD Invs., LLC*, 288 Kan. 536, 555, 205 P.3d 1245 (2009), because it is not the absence of proof of damages, it is the absence of an issue for material fact.

Furthermore, the District Court completely ignores Shelby's expert report which indicates that undue influence caused the elevated values and Williams' admissions that he was pressured to increase the value. The District Court weighs the evidence of Shelby's expert and negates it rather than recognizing that it, combined with Williams' admissions, clearly shows a genuine issue of material fact as to the propriety of the valuation. The Court then rejects Shelby's contravention that a property owner can testify to the value of the Property itself by stating there is "no citation to any fact in support." That is a statement of the law, one the Court was apprised of at the hearing on the matter—an assertion that is not only true, but also not disputed. *City of Wichita v. Sealpak Co., Inc.*, 279 Kan. 799, 802, 112 P. 3d 125, 128 (2005) ("It is well settled that a landowner is a competent witness to testify as to the value of his or her property."). [Tr. 52:6:15.] The Court's weighing of the damage evidence and making that decision itself is improper in the summary judgment stage of litigation.

I. Civil Conspiracy

1. Standard of Review.

Appellate courts review summary judgment determinations of civil conspiracy *de novo*. *Mid-Continent Anesthesiology, Chtd. V. Bassell*, 61 Kan.App.2d 411, 420-21, 504 P.3d 1069, 1077 (2021).

2. Preservation.

Appellant briefed the argument related to the breach of the duty of good faith and fair dealing. [Volume 2, pages 246-248.] The District Court ruled on those issues at Volume 3, pages 382-384.

3. The District Court erred in entering summary judgment on Shelby's Civil Conspiracy claim, because the Judgment is based on the erroneous damage analysis by the District Court.

The District Court's sole determination on Shelby's Civil Conspiracy claim is through an analysis of damage—a matter that has been repeatedly addressed as above. In accordance with the judicial efficiency, a mere repeating of the damages issue is unnecessary here.

J. Claims under the United States Constitution.

1. Standard of Review.

Appellate courts review summary judgments determinations claims under 42 U.S.C. § 1983, *de novo* utilizing the typical summary judgment standard. *Potts v. Board of County Com'rs of Leavenworth County*, 39 Kan.App. 71, 77, 176 P.3d 988, 992 (2008).

2. Preservation.

Appellant briefed the argument related to the breach of the duty of good faith and fair dealing. [Volume 2, pages 249-252.] The District Court ruled on those issues at Volume 3, pages 384-386.

3. The District Court erred in entering summary judgment on Shelby's Civil Conspiracy claim, because the Judgment is based on the erroneous damage analysis by the District Court.

The District Court's sole determination on Shelby's Civil Conspiracy claim is through an analysis of damage—a matter that has been repeatedly addressed as above. In accordance with the judicial efficiency, a mere repeating of the damages issue is unnecessary here.

The District Court erred by determining that an adequate state remedy existed and that Bauman and Berry were protected by Qualified Immunity.

Shelby was deprived of adequate process. Again, the District Court relies on the contention that Shelby could have obtained the information it complains it was lacking if it would have run the issue to ground. This is another instance of the same issues above. The County never provided the information until after the process was over, the District Court said they did not have to provide the information, and no KORA violation occurred, and now the District Court says, Shelby should have tried harder to reach the same ultimate conclusion—no access to the information. Moreover, the District Court argues that Shelby is "satisfied" with the $10.4M valuation—which is not supported by any factual information. In fact, the evidence before the District Court is pretty clear that Shelby is not satisfied of such a valuation and never has been.

It is impossible for Shelby to have adequately challenged Williams' appraisal when the Defendants took actions to hide the documents and information which give Shelby a fair shot at the hearing to challenge Williams' appraisals adequately. Considering that in their depositions during the tax appeals, Berry and Bauman had no recollection of the conversations or of the values associated with the one prior valuation, and then the years-long battle of whether or not the information was subject to disclosure with the County coming out victorious, there is no sound basis to assert that Shelby had an adequately protected right to process. What Defendants are effectively arguing is that they can rig the process, lie, cheat, and steal, and there is no recourse to recover damages from the County, and that is not the law.

Berry and Bauman are not entitled to judgment as a matter of law, because the facts of this case are clear that there are statutes governing the conduct of the appraisers, for which they were acutely aware. They violated those statutes—but most importantly, they did so in a manner that

was intentional and wanton. They manipulated an appraiser to increase the value of Heartland Park, continued to push him to raise the value of the property higher and higher, and then took actions to intimidate him after the truth was outed, and finally took actions to cover up their clear and unequivocal violations of state law. Bauman understood his obligations and authority granted to him by statute—that is why he believed he had the authority to hire Williams in the first place.

K. The District Court erred in entering summary judgment on the Property Damage claim.

1. Standard of Review.

The standard of review for a motion for summary judgment is *de novo*. *First Security Bank v. Buehne*, 314 Kan. 507, 510, 501 P.3d 362, 365 (2021).

2. Preservation.

Appellant briefed the argument related to the breach of the duty of good faith and fair dealing. [Vol. 2, page 252.] The District Court ruled on those issues at Volume 3, page 387.

3. The District Court erred in entering summary judgment on Shelby's Property Damage claim, because the Judgment is based on the erroneous damage analysis by the District Court.

The District Court's sole determination on Shelby's Property Damage claim is through an analysis of damage—a matter that has been repeatedly addressed above. In accordance with the judicial efficiency, a mere repeating of the damages issue is unnecessary here.

CONCLUSION

When viewing the record in the light most favorable to Shelby, drawing inferences from the evidence in favor of Shelby Development, and removing the District Court's weighing of said facts, it is clear that genuine issues of material fact exist in this case and that the District Court's Memorandum Decision and Order should be reversed, and the matter remanded to the District Court for a trial on all counts.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above was served as indicated below on this 7th day of October 2022, to:

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