No. 23-126005-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

HERITAGE TRACTOR, INC.,
Plaintiff-Appellant

vs.

EVERGY KANSAS CENTRAL, INC.,
Defendant-Appellee,

BRIEF OF APPELLANT HERITAGE TRACTOR, INC.

Appeal from the District Court of Douglas County, Kansas
Honorable James R. McCabria, Judge
District Court Case No. 2020-CV-000136

Court T. Kennedy, KS #22067
Gates Shields Ferguson Swall Hammond, P.A.
10990 Quivira, Suite 200
Overland Park, KS 66210
Telephone: 913.661.0222
Facsimile: 913.491.6398
CKennedy@gatesshields.com

ATTORNEYS FOR PLAINTIFF-APPELLANT HERITAGE TRACTOR, INC.

Oral Argument 30 minutes

TABLE OF CONTENTS

TABLE OF CONTENTS ..... ii-vi

APPENDIX vii

NATURE OF THE CASE 1

STATEMENT OF ISSUES 3

STATEMENT OF FACTS 4

Condition of the Subject Pole 4

Westar's Expert Opinions 5

Westar's Inspection Plan 6

Tariff 7

ARGUMENTS AND AUTHORITIES 8

I. WHETHER THE DISTRICT COURT ERRED IN FINDING THAT THE LIMITATIONS OF LIABILITY PROVISION IN THE KCC TARIFF APPLIED TO THE FACTS OF THIS CASE 8

A. Preservation of the Issue and Standard of Review 8

Drouhard-Nordhus v. Rosenquist, 301 Kan. 618, 345 P.3d 281 (2015) .. 9

B. None of the Limitation of Liability Subsections of the Westar Tariff Apply to the Facts of this Case 9

Grindsted Prod., Inc. v. Kansas Corp. Comm'n, 262 Kan. 294, 937 P.2d 1 (1997) 9
Danisco Ingredients USA, Inc. v. Kansas City Power & Light Co., 267 Kan. 760, 986 P.2d 377 (1999) 9
Farmland Indus., Inc. v. Kansas Corp. Comm'n, 29 Kan. App. 2d 1031, 37 P.3d 640, 648 (2001) 12
Burdick v. Southwestern Bell Tel. Co., 9 Kan. App. 2d 182, 675 P.2d 922 (1984) 12
Kansas Statute 77-201 12
Arnett, 307 Kan. at 654, 413 P.3d 787 12

State v. Frierson, 298 Kan. 1005, 319 P.3d 515 (2014) 12

II. WHETHER THE DISTRICT COURT ERRED IN FINDING THAT THE KCC TARIFF WAS ENFORCEABLE UNDER KANSAS LAW WHEN THE APPLICATION OF THE KCC TARIFF'S LIMITED LIABILITY PROVISIONS CONSTITUTED AN UNCONSTITUTIONAL ABROGATION OF KANSAS LAW 17

A. Preservation of the Issue and Standard of Review 17

In re C.M.J., 259 Kan. 854, 915 P.2d 62 (1996) 17
Botkin v. Security State Bank, 33 Kan. App. 2d 914, 111 P.3d 182 (2005) 17
Drouhard-Nordhus v. Rosenquist, 301 Kan. 618, 345 P.3d 281 (2015) 17

B. The Westar Tariff is Unenforceable to the Extent it Abrogates Common Law 18

1. Only the Legislature May Abrogate Common Law 18

K.S.A. § 66-101 18
K.A.R. 82-1-201 18
Danisco Ingredients USA, Inc. v. Kansas City Power & Light Co., 267 Kan. 760, 986 P.2d 377 (1999) 18, 19, 20
Southwestern Bell Tel. Co. v. Kansas Corp. Comm'n, 233 Kan. 375, 664 P.2d 798 (1983) 18
Farmland Indus., Inc. v. Kansas Corp. Comm'n, 29 Kan. App. 2d 1031, 37 P.3d 640, 648 (2001) 18
Grindsted Prod., Inc. v. Kansas Corp. Comm'n, 262 Kan. 294, 937 P.2d 1 (1997) 18
McNally Pittsburg, 186 Kan. at 714–15, 353 P.2d 199 20
Milling Co., 101 Kan. at 310, 166 P. 493 20
Kan. Stat. Ann. § 77-109 (West) 21
Territorial Laws 1855, ch. 96, Laws 1862, ch. 135, G.S.1935, 77–109.. 21
Gonzales v. Atchison T. & S. F. Ry. Co., 189 Kan. 689, 371 P.2d 193 (1962) 21
Hilburn v. Enerpipe Ltd., 309 Kan. 1127, 442 P.3d 509 (2019) 21
Am. Gen. Fin. Servs., Inc. v. Carter, 39 Kan. App. 2d 683, 184 P.3d 273 (2008) 21
In re Estate of Mettee, 10 Kan.App.2d 184, 694 P.2d 1325, aff'd 237 Kan. 652, 702 P.2d 1381 (1985) 21

In re Estate of Roloff, 36 Kan.App.2d 684, 143 P.3d 406 (2006) 21
Bair v. Peck, 248 Kan. 824, 811 P.2d 1176 (1991) 21
Pub. Serv. Comm'n of State v. Missouri Gas Energy, 388 S.W.3d 221 (Mo. Ct. App. 2012) 22

2. Limiting Liability for Service Interruptions is Not an Abrogation of Common Law; Limiting Liability for Claims Involving Property Damage or Personal Injuries is an Abrogation of Common Law 23

Szeto v. Arizona Pub. Serv. Co., 252 Ariz. 378, 503 P.3d 829 (Ct. App. 2021), as amended (Dec. 8, 2021), review denied and ordered depublished sub nom. *Szeto v. Arizona Pub. Serv.*, 253 Ariz. 466, 515 P.3d 155 (2022) 25, 27, 28, 29
Adams v. N. Illinois Gas Co., 211 Ill. 2d 32, 809 N.E.2d 1248 (2004)... ..... 26, 28, 29
National Food Stores, Inc. v. Union Electric Co., 494 S.W.2d 379 (Mo.App.1973) 26
Satellite System, Inc. v. Birch Telecom of Oklahoma, Inc., 51 P.3d 585 (Okla.2002) 26
Hall v. Consolidated Edison Corp., 104 Misc.2d 565, 428 N.Y.S.2d 837 (1980) 26
Kroger Co. v. Appalachian Power Co., 244 Va. 560, 422 S.E.2d 757 (1992) 26
State Farm Fire & Casualty Co. v. Southern Bell Telephone & Telegraph Co., 245 Ga. 5, 7, 262 S.E.2d 895 (1980) 26
Danisco Ingredients USA, Inc. v. Kansas City Power & Light Co., 267 Kan. 760, 986 P.2d 377 (1999) 26, 30
Pub. Serv. Comm'n of State v. Missouri Gas Energy, 388 S.W.3d 221 (Mo. Ct. App. 2012) 27
Salt River Project Agric. Improvement & Power Dist. v. Westinghouse Elec. Corp., 143 Ariz. 368, 694 P.2d 198 (1984) 28
Morganteen v. Cowboy Adventures, Inc., 190 Ariz. 463, 949 P.2d 552 (App. 1997) 28
Uncle Joe's Inc. v. L.M. Berry & Co., 156 P.3d 1113 (Alaska 2007) 28
Forte Hotels, Inc. v. Kan. City Power & Light Co., 913 S.W.2d 803 (Mo. App. 1995) 28

III. WHETHER THE DISTRICT COURT ERRED IN FINDING THAT THE KCC TARIFF WAS NOT UNREASONABLE AS APPLIED TO THE FACTS OF THE CASE 30

A. Preservation of the Issue and Standard of Review 30

In re C.M.J., 259 Kan. 854, 915 P.2d 62 (1996) 30
Botkin v. Security State Bank, 33 Kan. App. 2d 914, 111 P.3d 182 (2005) 31
Drouhard-Nordhus v. Rosenquist, 301 Kan. 618, 345 P.3d 281 (2015). 31

B. The Westar Tariff is Unreasonable 31

Danisco Ingredients USA, Inc. v. Kansas City Power & Light Co., 267 Kan. 760, 986 P.2d 377 (1999) 31, 32, 33, 34, 35
Waters v. Pacific Telephone Co., 12 Cal.3d at 7, 114 Cal.Rptr. 753, 523 P.2d 1161 33
Landrum v. Florida Power & Light Co., 505 So.2d at 554 ..... 33, 34
Woodburn, 275 N.W.2d at 405 33
State Farm Fire & Casualty Co. v. Southern Bell Telephone & Telegraph Co., 245 Ga. 5, 7, 262 S.E.2d 895 (1980) 33
National Food Stores, Inc. v. Union Electric Co., 494 S.W.2d 379 (Mo.App.1973) 33
Kroger Co. v. Appalachian Power Co., 244 Va. 560, 422 S.E.2d 757 (1992) 33
Est. of Pearson ex rel. Latta v. Interstate Power & Light Co., 700 N.W.2d 333 (Iowa 2005) 33
Szeto v. Arizona Pub. Serv. Co., 252 Ariz. 378, 503 P.3d 829 (Ct. App. 2021), as amended (Dec. 8, 2021), review denied and ordered depublished sub nom. *Szeto v. Arizona Pub. Serv.*, 253 Ariz. 466, 515 P.3d 155 (2022) 35

IV. WHETHER THE DISTRICT COURT ERRED IN FINDING THAT THERE WERE INSUFFICIENT FACTS TO SUBMIT THE ISSUE OF WANTON CONDUCT TO THE JURY 38

A. Preservation of the Issue and Standard of Review 38

Drouhard-Nordhus v. Rosenquist, 301 Kan. 618, 345 P.3d 281 (2015). 39

B. Sufficient Evidence Exists for a Jury to Conclude that Westar was Wanton in Exercising Its Highest Duty of Care. 39

Bowman v. Doherty, 235 Kan. 870, 686 P.2d 112 (1984) 39
Kniffen v. Hercules Powder Co., 164 Kan. 196, 188 P.2d 980 (1948) 40

Robison v. State, 30 Kan.App.2d 476, 43 P.3d 821 (2002) 40
Friesen v. Chicago, Rock Island & Pacific R.R., 215 Kan. 316, 524 P.2d 1141 (1974) 40, 41
Reeves v. Carlson, 266 Kan. 310, 969 P.2d 252 (1998) 40, 41
Gould v. Taco Bell, 239 Kan. 564, 722 P.2d 511 (1986) 40, 42
Lanning ex rel Lanning v. Anderson, 22 Kan.App.2d 474, 921 P.2d 813 (1996) 40, 41
Boaldin v. Univ. of Kan., 242 Kan. 288, 747 P.2d 811 (1987) 40
Wagner v. Live Nation Motor Sports, Inc., 586 F.3d 1237 (10th Cir. 2009) 41, 45
Smith v. Union Pacific Railroad Co., 222 Kan. 303, 564 P.2d 514 (1977) 42
Cope v. Kansas Power & Light Co., 192 Kan. 755, 391 P.2d 107 (1964) 43
Railway Co. v. Gilbert, 70 Kan. 261, 78 P. 807 43
Wade v. Empire Dist. Electric Co., 94 Kan. 462, 147 P. 63 43
Snyder v. Leavenworth Light, Heat & Power Co., 98 Kan. 157, 160, 165, 157 P. 442 43
Worley v. Kansas Electric Power Co., 138 Kan. 69, 23 P.2d 494 43
Jackson v. Kansas Gas & Electric Co., 152 Kan. 90, 102 P.2d 1038 43
Cerretti v. Flint Hills Rural Elec. Co-op. Ass'n, 251 Kan. 347, 356-357 (1992) 46

CONCLUSION 48

CERTIFICATE OF SERVICE 49

APPENDIX

A. Select Photos from Nelson Bingel's Report

NATURE OF THE CASE

Plaintiff Heritage Tractor, Inc., ("Heritage Tractor") owned and operated a farm machinery business located at 1110 East 23rd Street, Lawrence, KS 66046 ("the Property"). Defendant Evergy Kansas Central, Inc. f/k/a Westar Energy, Inc. ("Westar") owned a utility pole ("Subject Pole") that connected the Property to Westar's electrical distribution system.

Westar was authorized by the Kansas Corporation Commission ("KCC") to supply electric service for residential, commercial, and industrial uses, and for many years, Westar has been engaged in this proprietary function. Pursuant to its agreement with the KCC to supply electric service, Westar was required to maintain, repair, or replace, when necessary, all electric service facilities installed by Westar, including but not limited to, the Subject Pole.

On or about May 5, 2018, the Subject Pole collapsed and landed on the Property, causing a fire to erupt within the Property. Subsequent investigation revealed that the base of the Subject Pole had suffered significant decay, which compromised its strength and led to its subsequent collapse.

Heritage Tractor has alleged that Westar knew or should have known of the Subject Pole's dangerous condition, but they took no steps to repair or replace the Subject Pole or warn Heritage Tractor of the dangerous condition. Moreover, if Westar had taken the necessary steps to repair or replace Subject Pole, the Subject Pole would not have fallen.

As a result of the fire, Heritage Tractor suffered damages in excess of $3,000,000.00. Heritage Tractor sued Westar for negligence, breach of warranty and trespass, and Westar made several affirmative defenses, including that Heritage Tractor's claims are barred by the tariff Westar has with the KCC. Westar ultimately brought a motion to for summary judgment arguing that the tariff with the KCC barred Heritage Tractor's claims, and the District Court granted Westar's Motion.

Heritage Tractor filed this appeal seeking to have the District Court's Order reversed and the case remanded back to the District Court.

STATEMENT OF ISSUES

Issue I. **WHETHER THE DISTRICT COURT ERRED IN FINDING THAT THE LIMITATIONS OF LIABILITY PROVISION IN THE KCC TARIFF APPLIED TO THE FACTS OF THIS CASE.**

Issue II. **WHETHER THE DISTRICT COURT ERRED IN FINDING THAT THE KCC TARIFF WAS ENFORCEABLE UNDER KANSAS LAW WHEN THE APPLICATION OF THE KCC TARIFF'S LIMITED LIABILITY PROVISIONS CONSTITUTED AN UNCONSTITUTIONAL ABROGATION OF KANSAS LAW**

Issue III. **WHETHER THE DISTRICT COURT ERRED IN FINDING THAT THE KCC TARIFF WAS NOT UNREASONABLE AS APPLIED TO THE FACTS OF THE CASE.**

Issue IV. **WHETHER THE DISTRICT COURT ERRED IN FINDING THAT THERE WERE INSUFFICIENT FACTS TO SUBMIT THE ISSUE OF WANTON CONDUCT TO THE JURY.**

STATEMENT OF FACTS

1. Heritage Tractor owned and operated a farm machinery business located at 1110 East 23rd Street, Lawrence, KS 66046 ("the Property"). (R. Vol. I, p. 22) On May 5, 2018, a utility pole owed by Westar ("the Subject Pole") collapsed onto the Property causing a fire to erupt within the Property. (Id) (R. Vol. I, p.333) (Appendix Exhibit A)

2. Heritage Tractor has alleged that the base of the Subject Pole had suffered significant decay, which compromised its strength and led to its subsequent collapse. (R. Vol. I, p. 22-23) (R. Vol. I, p.328) (Appendix Exhibit A)

Condition of the Subject Pole:

3. The Subject Pole was approximately 50 years old at the time of its collapse. (R. Vol. II, p. 186)

4. The average expected life span of a wood utility pole is 53 years. (R. Vol. III, p. 62)

5. Heritage Tractor retained the services of Matthew Anderson, Wood Scientist, to investigate why the Subject Pole fell. (R. Vol. I, p. 415)

6. Mr. Anderson opined that, "(t)he entire cross section of the pole at the ground line contained advanced wood decay. As a result, there was virtually no remaining strength." (R. Vol. I, p. 418) (R. Vol. I, p.328) (Appendix Exhibit A)

7. Moreover, Mr. Anderson's investigation revealed no evidence that the Subject Pole had ever been inspected by Westar or any qualified subcontractor on behalf of Westar. (R. Vol. I, p. 418)

8. Mr. Anderson further opined that "(h)ad the pole been inspected following industry standards and specifications, this pole would have been identified for remedial treatment long in advance of failing." (R. Vol. I, p. 418)

9. Mr. Anderson's opinion is that the significant advanced decay at the groundline is what caused the Subject Pole to fail. (R. Vol. III, p. 26)

Westar's Expert Opinions:

10. Westar retained the services of Todd Shupe, Wood Scientist, to determine the amount of wood decay present in the Subject Pole. (R. Vol. I, p. 357) (R. Vol. I, p.328) (Appendix Exhibit A)

11. In addition to retaining the services of Mr. Shupe, Westar retained Nelson Bingel, the former Vice President of Product Strategy at Osmose Utilities Services, Inc., current chairmen at the NESC, and hired consultant for Westar in this matter. (R. Vol. I, p. 314-315)

12. In order to determine the amount of sound wood, Mr. Shupe took a wood awl and inserted it at various locations around the circumference of the Subject Pole at the spot he designated the groundline of the Subject Pole. (R. Vol. I, p. 360) Mr. Shupe explained that he "inserted the awl with sufficient force so that it would easily penetrate any decayed wood in the shell but stop

when it encountered solid wood in the center." (Id) When asked to quantify this amount of force applied, Mr. Shupe was unable to do so, and simply referenced using "reasonable" force. (R. Vol. I, p. 372) Nonetheless, he measured how far the awl was inserted at each spot and used those measurements to "calculate" the average amount of decay present around the circumference. (R. Vol. I, p. 360)

13. However, Mr. Shupe conceded that there is no article, treatise, or scientific literature on the use of an awl to quantitatively measure wood decay. (R. Vol. I, p. 382-383) Mr. Shupe admitted he had never performed such a test before in his over-20-year career as a wood scientist. (R. Vol. I, p. 370-371)

14. Nonetheless, those measurements were then provided to Westar's other expert, Nelson Bingel. (R. Vol. I, p. 330)

15. Using the circumference obtained by Mr. Shupe from the awl test performed, Mr. Bingel concluded that, based upon NESC standards, the Subject Pole complied with the NESC strength requirements. (R. Vol. I, p. 337)

Westar's Inspection Plan:

16. The KCC requires that, as a regulated Kansas electric utility, Westar have an "effective preventive maintenance system." (R. Vol. II, p. 372)

17. Westar admitted it only inspected poles within circuits that were lesser performing. (R. Vol. II, p. 190)

18. According to Westar, the Property was located in a well-performing service area (the Lawrence Service Area), and was not encompassed in these inspections prior to the time of the fire. (R. Vol. II, p. 308)

19. The standards in the industry are to inspect a utility pole every 10 years. (R. Vol. III, p. 68 and 72)

20. In 2017 Mr. Bingel testified that there was an industry standard for the frequency of pole inspections. (R. Vol. III, p. 35)

21. Mr. Bingel admitted that southern pine poles in Kansas should be inspected every ten (10) years. (Id)

22. Mr. Bingel acknowledged that the Westar inspection program did not meet the industry recommendation of inspecting southern pine poles every ten (10) years. (R. Vol. III, p. 36-37)

23. Pursuant to industry standards and specifications, the Subject Pole should have been inspected by Westar during its service life. (R. Vol. I, p. 418)

Tariff:

24. On or about February 25, 2014, the KCC and Westar entered into a tariff, which included a section on Limitations of Liabilities ("Westar Tariff"). (R. Vol. II, p. 466-472)

ARGUMENTS AND AUTHORITIES

I. WHETHER THE DISTRICT COURT ERRED IN FINDING THAT THE LIMITATIONS OF LIABILITY PROVISION IN THE KCC TARIFF APPLIED TO THE FACTS OF THIS CASE.

A. Preservation of the Issue and Standard of Review

Heritage Tractor raised this issue in its Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment. (R. Vol. III, p. 9-10) The trial court found that the limitation of liability provision of the Westar Tariff was applicable to the facts of this case and granted Westar's Motion for Summary Judgment. (R. Vol. III, p. 138)

The standard for reviewing summary judgment is well established and appellate courts apply the same rules as trial courts. "Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The trial court is required to resolve all facts and inferences which may reasonably be drawn from the evidence in favor of the party against whom the ruling is sought. When opposing a motion for summary judgment, an adverse party must come forward with evidence to establish a dispute as to a material fact. In order to preclude summary judgment, the facts subject to the dispute must be material to the conclusive issues in the case. On appeal, we apply the same rules and when we find

reasonable minds could differ as to the conclusions drawn from the evidence, summary judgment must be denied." *Drouhard-Nordhus v. Rosenquist*, 301 Kan. 618, 622, 345 P.3d 281 (2015)

B. None of the Limitation of Liability Subsections of the Westar Tariff Apply to the Facts of this Case.

Westar argues that it is insulated from any liability in this case by the General Terms and Conditions entered into with the Kansas Corporation Commission ("KCC"), filed on February 25, 2014. (R. Vol. II, p. 466-472) As done by other District Courts, this Court can interpret the Westar Tariff for itself as a matter of law. *See, Grindsted Prod., Inc. v. Kansas Corp. Comm'n*, 262 Kan. 294, 310, 937 P.2d 1, 11 (1997)

Kansas allows reasonable limitations on liability as part of the rate-making process, but "the ultimate determination of whether a duly filed and approved tariff limiting a public utilities liability to its customers is reasonable is a question for the courts to decide." *Danisco Ingredients USA, Inc. v. Kansas City Power & Light Co.*, 267 Kan. 760, 768, 986 P.2d 377, 384 (1999) Westar cites to three sections of the Westar Tariff that it believes limit Westar's liability in the present case by the willful or wanton conduct standard. Subsection, § 7.02(A), of the Westar Tariff states:

> Company shall use commercially reasonable efforts to supply steady and continuous Electric Service at the Point of Delivery. Company shall not be liable to customer for any loss, damage or injury whatsoever

> caused by or arising from Company's operations including loss, damage or injury occasioned by irregularities of or interruptions in Electric Service, leakage, escape or loss of electric energy after same has passed the Point of Delivery or for any other cause unless it shall affirmatively appear that the injury to persons or damage to property complained of has been caused by the Company's willful or wanton conduct.

(R. Vol. II, p. 466) Subsection, § 7.02(B), states:

> Customer shall save Company harmless from all claims for trespass, injury to persons and damage to lawns, trees, shrubs, buildings or other property that may be caused by reason of or related to Company's operations, the provision of Electric Service hereunder and the installation, maintenance or replacement of Company's service lines or other facilities necessary to serve customer, unless it shall affirmatively appear that the injury to persons or damage to property complained of has been caused by the Company's willful or wanton conduct.

(R. Vol. II, p. 467) Subsection §7.02(C), states:

> In accordance with its normal work procedures, Company shall exercise reasonable care when installing, maintaining and replacing Company's facilities located on customer's premises. However, beyond such normal procedures, Company assumes no responsibility for trespass, injury to persons or damage to lawns, trees, shrubs, buildings or other property that may be caused by reason of or related to" Company's operations, the provision of Electric Service hereunder or the installation, maintenance or replacement of Company's facilities to serve customer, unless it shall be shown affirmatively that the injury to persons or damage to property

> complained of has been caused by Company's willful or wanton conduct.

(Id)

In its filings in support of its Motion for Summary Judgment, Westar argues that subsections §7.02(A), §7.02(B) and §7.02(C) of the Westar Tariff all applied to the underlying facts in this case. (R. Vol. III, p. 96) At the hearing on the Motion for Summary Judgment, counsel for Westar reiterated the claim that all three subsections of the Westar Tariff applied to the facts in this case. (R. Vol. IV, p. 4) However, when pressed by the District Court, counsel stated that if he had to pick one, and only one subsection that was most applicable, he would pick Subsection §7.02(C) as it "would seem to be the closest to the center of the bull's-eye, if you will." (R. Vol. IV, p. 5-6) Without any explanation in its written order, the District Court indicated that it was most persuaded that Subsection § 7.02(B) applied to the facts of this case. (R. Vol. III, p. 138) Notably, all three subsections purport to limit the liability of a utility provider unless the damages are the result of the utility provider's willful or wanton conduct.

Given that: (i) Westar believes all three subsections of the Westar Tariff apply to the facts of this case but that subsection §7.02(C) is most applicable, (ii) the District Court held that subsection §7.02(B) applies, (iii) and Heritage Tractor contends that none of the subsections apply, there can be little doubt that the various subsections are ambiguous. Legally

established tariffs are construed in the same manner as statutes and have the binding force and effect of law. *See Farmland Indus., Inc.*, 29 Kan. App. 2d at 1043, 37 P.3d at 648; *See also, Burdick v. Southwestern Bell Tel. Co.*, 9 Kan. App. 2d 182, 186, 675 P.2d 922, 925 (1984) Therefore, this Court can and should consider several rules or canons of statutory construction in order to resolve the ambiguity.

First, words and phrases shall be construed according to the context and the approved uses of the language. Kansas Statute 77-201. Second, a court "must construe a statute to avoid unreasonable or absurd results." *Arnett*, 307 Kan. at 654, 413 P.3d 787 as the court must presume the Legislature "does not intend to enact useless or meaningless legislation... Equally fundamental is the rule of statutory interpretation that courts are to avoid absurd or unreasonable results." *State v. Frierson*, 298 Kan. 1005, 1013, 319 P.3d 515 (2014)

As noted above, Westar asserts that all three subsections of the Westar Tariff apply to the facts of this case. Such interpretation runs afoul of the canon that the Legislature does not intend to enact useless or meaningless legislation. Additionally, such broad interpretation of all three subsections that they all cover the same fact pattern would be absurd and unreasonable.

Heritage Tractor contends that Subsection, § 7.02(A), exclusively addresses damages incurred as a result of a failure to provide "steady and

continuous service." The first sentence of this subsection imposes an obligation on Westar to use commercially reasonable efforts to supply steady and continuous Electric Service; the next sentence limits the liability of the utility provider to customers for loss, damage, or injury occasioned by irregularities of or interruptions in Electric Service, leakage, escape or loss of electric energy after same has passed the Point of Delivery. The limitations of liability in this subsection all logically relate to the corresponding duty imposed on Westar provider to provide steady and continuous service. Additionally, the last sentence in Subsection §7.02(A) addresses defects in a customer's wiring or appliance, which again relates to Westar's obligation to provide steady and continuous service. As such, subsection §7.02(A) is not applicable to the facts of this case.

Subsection §7.02(B) provides that:

> Customer shall save Company harmless from all claims for trespass, injury to persons and damage to lawns, trees, shrubs, buildings or other property that may be caused by reason of or related to Company's operations, the provision of Electric Service hereunder and the installation, maintenance or replacement of Company's service lines or other facilities necessary to serve customer.

(emphasis added) (R. Vol. II, p. 467) Heritage Tractor contends this subsection limits the liability of Westar only in situations where Westar is installing, maintaining or replacing equipment necessary to serve a

customer. The use of the term "and" conjoins the two clauses. Under the required interpretation, the hold harmless clause applies only when Westar is installing, maintaining, or replacing services lines or other facilities necessary to serve a customer. The District Court did not address how subsection §7.02(B) applied to the facts of this case or what the use of the word "and" meant. (R. Vol. III, p. 138) As provided hereinabove, the present case did not involve damages caused while Westar was on the Property. As such, subsection §7.02(B) is not applicable to the facts of this case.

Subsection §7.02(C) is markedly and materially different from Subsections §7.02(A) and (B); those subsections apply only to customers, and they affirmatively limit the liability of Westar. Subsection §7.02(A) says the "Company shall not be liable to customer…" Subsection §7.02(B) requires the "(c)ustomer to hold the Company harmless from…" Subsection §7.02(C), however, is *not* limited to customers, nor does it affirmatively limit the liability of Westar. It says only that Westar "assumes no responsibility" for certain damages.

The first sentence of subsection §7.02(C) states that "(i)n accordance with its normal work procedures, Company shall exercise reasonable care when installing, maintaining and replacing Company's facilities located on a customer's premise. The second sentence, which begins "(h)owever, beyond such normal procedures, Company assumes no responsibility." A logical and

common sense reading of "normal work procedures" would mean that if and when Westar is doing ordinary, routine work, i.e., not emergency, unplanned work, it shall exercise reasonable care. That understanding of the phrase makes perfect sense in the context of the paragraph as a whole as the next sentence then means that if Westar is performing work *outside* its normal procedures, i.e., emergency or unplanned work, Westar does not assume responsibility for damages to persons or property unless those damages were caused by Westar's willful or wanton conduct. Presumably, this is due to the emergent nature of the work and the difficulty it would impose if it must be performed with reasonable care. For example, property may be damaged if the utility is focused on repairing downed powerlines as quickly as possible. If Westar is installing, maintaining, and replacing the Company's facilities located on a customer's premises pursuant to its normal work procedures, Westar must exercise reasonable care, i.e., avoid negligence. If Westar fails to use reasonable care in that situation, it is liable for the damages pursuant to a negligence standard.

In summary, subsection §7.02(A) addresses damages resulting from a failure to provide steady and continuous service. Subsection §7.02(B) addresses damages to the customer's property when the utility provide is installing, maintaining or replacing equipment *on* the customer's property. Subsection §7.02(C) addresses damages to a non-customer's property when

the utility provide is installing, maintaining or replacing equipment on the customer's property. As such, none of these subsections apply to the facts in this case.

If the fire at issue in this case were the result of failure to provide "steady and continuous service," Westar could have argued the subsection §7.02(A) limited its liability. Likewise, if the Subject Pole fell as a result of Westar working on the pole or knocking it over when it was working on the electrical line, i.e., as it had done six weeks prior to the fire, Westar could have argued that subsection §7.02(B) limited its liability. Finally, if the fire was the result of Westar installing, maintaining, or replacing equipment on an adjacent parcel, Westar might then argue subsection §7.02(C) applies.

However, none of those scenarios are the case at hand. This is merely a case of property owned by Westar damaging property owned by Heritage Tractor. The Limitation of Liability Section of the Westar Tariff is not applicable and therefore, there is no limitation on its liability for the damages caused by the fire at the Property.

II. WHETHER THE DISTRICT COURT ERRED IN FINDING THAT THE KCC TARIFF WAS ENFORCEABLE UNDER KANSAS LAW WHEN THE APPLICATION OF THE KCC TARIFF'S LIMITED LIABILITY PROVISIONS CONSTITUTED AN UNCONSTITUTIONAL ABROGATION OF KANSAS LAW.

A. Preservation of the Issue and Standard of Review

This issue was raised by Heritage Tractor in its response to Westar's Motion for Summary Judgment. (R. Vol. III, p. 11-14) The trial court found that the Westar Tariff did not abrogate common law, and granted Westar's Motion for Summary Judgment. (R. Vol. III, p. 140)

Where the District Court's factual findings are supported by the evidence, such rulings will not be disturbed on appeal. However, a *de novo* standard of review is applied where the appellant seeks only to apply the law to uncontroverted facts and admissions. *See In re C.M.J.*, 259 Kan. 854, 857, 915 P.2d 62 (1996) (stating that, where the facts are uncontroverted, a district court's application of the law to those facts is reviewed *de novo*); *Botkin v. Security State Bank*, 33 Kan. App. 2d 914, 917, 111 P.3d 182 (2005) ("When there are no factual disputes and the issues are determined by applying the law to undisputed facts, the standard of review is de novo."). Moreover, on a review of a motion for summary judgment the Court of Appeals applies the same standard of review as the district court, i.e. if reasonable minds could differ as to the conclusions drawn from the evidence, summary judgment must be denied. See *Drouhard-Nordhus* at 622. Thus, the

issues presented herein are issues concerning the application of the law to uncontroverted facts, which should be reviewed *de novo*.

B. The Westar Tariff is Unenforceable to the Extent it Abrogates Common Law.

1. Only the Legislature May Abrogate Common Law.

In each state, including Kansas, the provision of electric service is governed by statutes and regulations as well as tariffs filed with and approved by a state regulatory agency. As a provider of electric service in Kansas, Westar operates under the supervision of the KCC. See K.S.A. § 66-101, et seq.; see also K.A.R. 82-1-201, et seq. The KCC is a state administrative agency responsible for the regulation of public utilities, including electric companies, in Kansas. It has statutory authority to adopt safety rules effective against public utilities in the interest of utility employees and customers. See Id. Tariffs are those terms and conditions which govern the relationship between a utility and its customers. *See, Danisco at* 381, *citing, Southwestern Bell Tel. Co. v. Kansas Corp. Comm'n*, 233 Kan. 375, 377, 664 P.2d 798 (1983) Tariffs duly filed with the regulatory agency are binding on both the utility and the customers. *See, Farmland Indus., Inc. v. Kansas Corp. Comm'n*, 29 Kan. App. 2d 1031, 1043, 37 P.3d 640, 648 (2001), *citing, Grindsted Prods., Inc. v. Kansas Corp. Comm'n*, 262 Kan. 294, 309, 937 P.2d 1 (1997)

While this issue was raised before the District Court, that Court did not believe it necessary to probe further into Heritage Tractor's argument that the Westar Tariff was unenforceable. (R. Vol. II, p. 139) The District Court relied solely on *Danisco* as a full and complete statement by the Kansas Supreme Court that the Westar Tariff was enforceable in its entirety. (Id) As explained hereinbelow, the *Danisco* case was limited in its scope.

Without question, the KCC has the right to enter into reasonable tariffs in its oversight of public utilities such as Westar. However, the KCC's Tariff with Westar includes limitations of liability that abrogate the common law right to sue for damages as a result of ordinary negligence. While the Kansas Supreme Court has addressed the enforceability of one of the provisions in the KCC's tariffs with public utilities and limitations of liability contained therein, it has not addressed the issue of whether the Kansas Legislature has granted KCC the right to abrogate common law with its tariffs. Indeed, in *Danisco*, the preeminent case in Kansas on the issue of tariffs, the parties in that case agreed from the onset that the KCC had the authority to issue tariffs:

> The certified questions assume that KCP & L has the authority to adopt tariffs which impose reasonable limits on its liability to its customers for interruptions of service. In their briefs and arguments before this court, the parties agree that under Kansas law such authority exists. The certified questions also assume that the court has the

> authority to determine whether such tariff restrictions are reasonable even though the tariffs have been approved by the KCC.

Danisco at 765. It should first be noted, however, that the *Danisco* Court speaks to tariffs that limit liability relating to interruptions of service. As outlined above, the current case does not arise from interruptions of service. Second, as the parties in *Danisco* agreed that KCC had the authority to enter the tariff, it was not an issue before the Court. The Court notes in dicta that:

> Thus, we may conclude from the Electric Public Utilities Act and our prior cases that the Act does not explicitly confer upon the *768 public utility or the KCC the power to make tariffs which limit the liability of a public utility to its customers. See *McNally Pittsburg*, 186 Kan. at 714–15, 353 P.2d 199; *Milling Co.*, 101 Kan. at 310, 166 P. 493. However, Kansas allows reasonable limitations on such liability as an integral part of the rate making process.

Id. at 766-768. While the Court did not find it necessary for the Kansas legislature to specifically state KCC's power to make tariffs, the same standard does not apply if the KCC proposes tariffs that abrogate common law.

The legislature has promulgated that "the common law as modified by constitutional and statutory law, judicial decisions, and the conditions and wants of the people, shall remain in force in aid of the General Statutes of this state; but the rule of the common law, that statutes in derogation thereof

shall be strictly construed, shall not be applicable to any general statute of this state, but all such statutes shall be liberally construed to promote their object." Kan. Stat. Ann. § 77-109 (West) The Supreme Court has explained, "from the beginning of our history as a state (Territorial Laws 1855, ch. 96, Laws 1862, ch. 135, G.S.1935, 77–109) the common law of England has been the basis of the law of this state, and except as modified by constitutional or statutory provisions, by judicial decisions, or by the wants and needs of the people, it has continued to remain the law of this state. *Gonzales v. Atchison T. & S. F. Ry. Co.*, 189 Kan. 689, 695, 371 P.2d 193, 198 (1962) It is within the power of the Legislature to modify the common law. *Hilburn v. Enerpipe Ltd.*, 309 Kan. 1127, 1136, 442 P.3d 509, 516 (2019) The Kansas Court of Appeals has stated, "when the legislature has intended to abolish a common-law rule, it has done so in an explicit manner. In the absence of such an expression of legislative intent, the common law remains part of our law." *Am. Gen. Fin. Servs., Inc. v. Carter*, 39 Kan. App. 2d 683, 687, 184 P.3d 273, 277 (2008) (citing, *In re Estate of Mettee*, 10 Kan.App.2d 184, 187, 694 P.2d 1325, aff'd 237 Kan. 652, 702 P.2d 1381 (1985) and *In re Estate of Roloff*, 36 Kan.App.2d 684, 689, 143 P.3d 406 (2006)). Moreover, the legislature can only modify the common law if it provides an adequate substitute remedy for the right infringed or abolished. *Bair v. Peck,* 248 Kan. 824, 839, 811 P.2d 1176, 1188 (1991)

Here, the Kansas legislature did not even explicitly give the KCC the right to make a tariff, much less a tariff that abrogates common law. There is no evidence that the legislature intended to abrogate common law by granting authority to the KCC, let alone provide a substituted remedy for the removal of an ordinary negligence cause of action by the tariff later imposed by the KCC. Most importantly, the Kansas legislature did not delegate its exclusive ability to abrogate common law to the KCC.

This is exactly the issue the Missouri Court faced in 2012 when it ruled "because we find no statute abrogating a customer's right to sue a public utility company for negligence involving personal injury or property damage, we conclude that the Commission's decision is unlawful because it acted beyond its authority." *Pub. Serv. Comm'n of State v. Missouri Gas Energy*, 388 S.W.3d 221, 232 (Mo. Ct. App. 2012) The Missouri Court aptly pointed out, "it is axiomatic that what the legislature must itself do explicitly it cannot impliedly empower the Commission to do…the legislature is the appropriate entity to abrogate negligence claims against public utilities involving personal injury or property damage or it is the entity to expressly delegate that power to the Commission." *Id.* at 231

In short, if the Kansas legislature wants to abrogate common law, it must specifically and clearly do so, and if the Kansas legislature wants to delegate that authority to the KCC, it must also specifically and clearly give

that authority to the KCC. The Kansas legislature has not done so, and in that absence, the KCC has no right to abrogate the common law. Any attempt by the KCC to do so in the Westar Tariff would be unconstitutional and therefore unenforceable.

2. Limiting Liability for Service Interruptions is Not an Abrogation of Common Law; Limiting Liability for Claims Involving Property Damage or Personal Injuries is an Abrogation of Common Law.

In a survey of all cases against public utilities, very few involved property damages or personal injuries unrelated to service interruptions. That scarcity reflects the fact that many of the States', for instance Texas, Michigan, Colorado, and Wisconsin, public utility tariffs do not limit liability of the public utility. *See,* Xcel Energy, Southwestern Public Service, PCU of Texas Approved, January 10, 2022, Section No. V, Rules, Regulations and Conditions of Service, Section 6, Continuity of Service: https://www.xcelenergy.com/staticfiles/xe/Regulatory/Regulatory%20PDFs/rates/TX/SPSRules.pdf; M. P. S. C. No. 2 – Electric NORTHERN STATES POWER COMPANY, Terms and Conditions of Service, C.2.11: https://www.xcelenergy.com/staticfiles/xe/Regulatory/Regulatory%20PDFs/rates/MI/Mie_Section_3.pdf; Public Service Company of Colorado Electric Tariff – Schedule of Rates for Electric Service, COLO. PUC No. 8 Electric, RULES AND REGULATIONS ELECTRIC SERVICE STANDARDS:

https://www.xcelenergy.com/staticfiles/xe-responsive/Company/Rates%20&%20Regulations/Regulatory%20Filings/PSCo_Electric_Entire_Tariff.pdf; Wisconsin Electric Rate Book – Volume 7, Rules and Regulations, Section5.92: https://www.xcelenergy.com/staticfiles/xe-responsive/Archive/2We_Section_4.pdf Those that do limit liability, such as Minnesota, Iowa, South Dakota, North Dakota, and Oklahoma, only do so for claims relating to service interruptions. *See,* Minnesota Electric Rate Book - MPUC NO. 2, Section No. 6, General Rules and Regulations, Subsection 1.4: https://www.xcelenergy.com/staticfiles/xe/PDF/Regulatory/Me_Section_6.pdf; MidAmerican Energy Company, Electric Tariff No. 2, Section 1, Electric Service Policies, Limitation of Liability: https://wcc.efs.iowa.gov/cs/idcplg?IdcService=GET_FILE&allowInterrupt=1&RevisionSelectionMethod=latest&dDocName=002043&noSaveAs=1; South Dakota Electric Rate Book - SDPUC NO. 2, Section No. 6, General Rules and Regulations, Subsection 1.4: https://www.xcelenergy.com/staticfiles/xe-responsive/Company/Rates%20&%20Regulations/Se_Section_6.pdf; North Dakota Electric Rate Book - NDPUC NO. 2, Section No. 6, General Rules and Regulations, Subsection 1.4: https://www.xcelenergy.com/staticfiles/xe-responsive/Company/Rates%20&%20Regulations/Ne_Section_06.pdf; Public Service Company Of Oklahoma, 38th Revised Sheet, Electric Service Rules, Regulations And Conditions Of Service:

https://www.psoklahoma.com/lib/docs/ratesandtariffs/Oklahoma/PSO%20Tariff%20Package%20Complete%20Mar%202023.pdf In the few cases involving claims not related to service interruptions, the courts were easily able to distinguish those cases from service interruption cases. For example, the Arizona Court of Appeals reviewed a case involving fires that were caused by arcing service lines. *See, Szeto v. Arizona Pub. Serv. Co.*, 252 Ariz. 378, 381, 503 P.3d 829, 832 (Ct. App. 2021), as amended (Dec. 8, 2021), review denied and ordered depublished sub nom. *Szeto v. Arizona Pub. Serv.*, 253 Ariz. 466, 515 P.3d 155 (2022) The Arizona Court Appeals made the distinction between limiting liability of the utility for cases involving interruption of service and those involving property damage or personal injury as the result of the utility's negligence. *Id.* at 836. The Court found that the latter implicated Arizona's anti-abrogation statute. As a result, the Court refused to apply the tariff to claims involving property damage or personal injury not caused by service interruptions as the application of the limitation of liability in a tariff as it would implicate the state's anti-abrogation clause. *Id* at 838.

The Illinois Court has also faced this issue in a case involving the death of a gas utility's customer in her home and found, in part, that:

> a court cannot construe a statute in derogation of the common law beyond what the words of the statute expresses or beyond what is necessarily implied from what is expressed. In construing statutes in derogation of the common law, a court will not presume that an innovation

> thereon was intended further than the innovation which the statute specifies or clearly implies.

Adams v. N. Illinois Gas Co., 211 Ill. 2d 32, 69, 809 N.E.2d 1248, 1271 (2004) The *Adams* Court aptly pointed to several other states that have similarly refused to interpret utility tariffs in a manner that would abrogate common law. *Id.* at 1272 (c*iting, National Food Stores, Inc. v. Union Electric Co.*, 494 S.W.2d 379 (Mo.App.1973); *Satellite System, Inc. v. Birch Telecom of Oklahoma, Inc.*, 51 P.3d 585, 588 (Okla.2002); *Hall v. Consolidated Edison Corp.*, 104 Misc.2d 565, 568–70, 428 N.Y.S.2d 837, 840–41 (1980); *Kroger Co. v. Appalachian Power Co.*, 244 Va. 560, 563, 565, 422 S.E.2d 757, 759–60 (1992); and *State Farm Fire & Casualty Co. v. Southern Bell Telephone & Telegraph Co.*, 245 Ga. 5, 7, 262 S.E.2d 895, 897 (1980))

To be clear, the Arizona, Illinois, and Missouri Courts allowed their respective tariffs to limit liability for service interruptions, just as the *Danisco* Court had, but those courts refused to extend the limitations of liability to claims for personal injury or property damage. The Missouri Court rationalized the distinction as the difference between purely economic claims and those involving personal injury or property damages:

> Again, this case concerned limitations of liability concerning the company's mistakes, delays, or non-delivery of messages, which, like Warner, concerned economic damages and not personal injury or property damages. In so holding, the Western Union court noted: "The basing of rates in part on the liability involved in a given service is

> not ... a limitation of liability; it is a mere determination in advance of the maximum amount thereof, a liquidation of the damages, contingent upon the nonperformance or the negligent performance of the service." Id. at 671. The court concluded, therefore, that "the liability involved in providing the service" is a proper element to be considered in rate-making. *Id.* The type of limitations in Western Union and in Warner concerned economic damages which are most definitely a type of liability involved in a utility company's service. *Id.* Liabilities in a negligence action involving personal injury or property damage are not the type of liabilities involved in the service of providing natural gas that the Commission may limit in establishing rates unless the Legislature provides the Commission with such explicit authority by statute.

Pub. Serv. Comm'n of State at 232. The Arizona Court made a similar distinction, noting, "we have upheld tariffs limiting purely economic damages incurred when a public service corporation's ordinary negligence causes an interruption in service" *Szeto at* 836.

The *Szeto* Court clarified that "[e]conomic loss caused by a service interruption is meaningfully different from property damage or personal injury caused by the negligent maintenance of a service line." *Id.* at 835. The *Szeto* Court also aptly pointed out that economic damages are generally handled in contract rather than tort law. *Id.* at 836. The *Szeto* Court explained:

> An exculpatory clause that eliminates liability for a failure to provide a contracted service generally waives only a plaintiff's right to seek contract damages and does not offend the traditional notion that "[t]he law disfavors contractual provisions by which one party seeks to

> immunize himself against the consequences of his own torts."

Id. at 837. (*Quoting, Salt River Project Agric. Improvement & Power Dist. v. Westinghouse Elec. Corp.*, 143 Ariz. 368, 383, 694 P.2d 198, 213 (1984) (abrogated on other grounds)) In contrast, the *Szeto* Court pointed out:

> A waiver of tort remedies provided by contract is enforceable only when there has been "an intentional relinquishment of a known right." *Salt River*, 143 Ariz. at 385, 694 P.2d at 215. Our supreme court has explained that even waivers of tort remedies in commercial contracts between sophisticated parties, which are subject to a more relaxed standard, will only be enforced where "parties have equal bargaining positions so that the choice was freely and fairly made and not forced by the circumstances," and that "the parties must have negotiated the specifications of the product and have knowingly bargained for the waiver." *Id.; Morganteen v. Cowboy Adventures, Inc.*, 190 Ariz. 463, 466, 949 P.2d 552, 555 (App. 1997) (Courts take the most relaxed view of tort liability waiver when parties are business entities.)

Id. The *Szeto* Court found that a similar requirement would be true of a tariff. *Id.* (citing, *Uncle Joe's Inc. v. L.M. Berry & Co.*, 156 P.3d 1113, 1119 (Alaska 2007) and *Forte Hotels, Inc. v. Kan. City Power & Light Co.*, 913 S.W.2d 803, 806 (Mo. App. 1995))

The Illinois Court too sought to distinguish between purely economic losses and claims for property damage or personal injury. *Adams* at 1270. The *Adams* Court noted the similarities to the *Moorman* Doctrine recognized in Illinois:

> This doctrine stands for the proposition that under the common law purely economic damages are generally not recoverable in tort actions. Three exceptions were articulated (1) where the plaintiff has sustained damage resulting from a sudden or dangerous occurrence (2) where the plaintiff's damages are the proximate result of a defendant's intentional, false representation and (3) where the plaintiff's damages are a proximate result of a negligent misrepresentation by a defendant in the business of supplying information for the guidance of others in their business transactions.

Id. The *Adams* Court also noted that while the tariff is treated as a statute, it is similar to a contract and should not be treated more lightly than a contract, "we cannot interpret the tariff provision that NI–Gas wrote to completely absolve it of any duty in this regard, when we would not so interpret the same provision in a contract that NI–Gas wrote." *Id* at 1271. Moreover, just as in the *Szeto* case, the Illinois Court concluded that because the utility company drafts a tariff, exculpatory language must be strictly construed against the utility company and in favor of the customer. *Id.*

Finally, it is important to point out that there is no common law duty to provide continuous electrical service. Any such duty arises from the contract and/or tariff with the public utility. A limitation of liability for claims arising from a failure to provide continuous electrical service would not be an abrogation of common law, but a contractual limitation of liability on a contractually based duty. The same cannot be said for claims that do not

arise from the failure to provide continuous electrical service, such as the case at present.

In short, Heritage Tractor is not asking this Court to overrule the *Danisco* Court's enforcement of the tariff's limitation of liability on claims relating to interruption of service at Westar Tariff § 7.02(A). Rather, it asks this Court to find that, to the extent the Westar Tariff intends to abrogate common law tort claims for property damage and personal injury, the Westar Tariff is unconstitutional and unenforceable.

III. WHETHER THE DISTRICT COURT ERRED IN FINDING THAT THE KCC TARIFF WAS NOT UNREASONABLE AS APPLIED TO THE FACTS OF THE CASE.

A. Preservation of the Issue and Standard of Review

This issue was raised by Heritage Tractor in its response to Westar's Motion for Summary Judgment. (R. Vol. III, p. 14-16) The trial court found that the Westar Tariff was reasonable, and granted Westar's Motion for Summary Judgment. (R. Vol. III, p. 139-140)

Where the District Court's factual findings are supported by the evidence, such rulings will not be disturbed on appeal. However, a *de novo* standard of review is applied where the appellant seeks only to apply the law to uncontroverted facts and admissions. *See In re C.M.J.*, 259 Kan. 854, 857, 915 P.2d 62 (1996) (stating that, where the facts are uncontroverted, a district court's application of the law to those facts is reviewed *de novo*);

Botkin v. Security State Bank, 33 Kan. App. 2d 914, 917, 111 P.3d 182 (2005) ("When there are no factual disputes and the issues are determined by applying the law to undisputed facts, the standard of review is de novo."). Moreover, on a review of a motion for summary judgment the Court of Appeals applies the same standard of review as the district court, i.e. if reasonable minds could differ as to the conclusions drawn from the evidence, summary judgment must be denied. See *Drouhard-Nordhus* at 622. Thus, the issues presented herein are issues concerning the application of the law to uncontroverted facts, which should be reviewed *de novo*.

B. The Westar Tariff is Unreasonable.

Even if this Court determines that the KCC had the authority to abrogate common law and that the Westar Tariff applicable to the facts of this case, the Westar Tariff cannot be enforced as it unreasonable. "The ultimate determination of whether a duly filed and approved tariff limiting a public utilities' liability to its customers is reasonable is a question for the courts to decide." *Danisco* at 768.

As stated several times hereinabove, the tariff provision analyzed by the Court in *Danisco* was one limiting liability for damages resulting from service interruptions. *Id.* at 763. This is similar to the Westar Tariff at § 7.02(A). In *Danisco*, the damages incurred by the Plaintiff were due to three

power outages which, it argued, the utility could have prevented. *Id.* at 762.

The *Danisco* Court held:

> In answer to the first certified question, we conclude that it was reasonable for the KCC to allow a tariff to become effective which relieves KCP & L of liability for damages resulting from its own simple negligence *in regard to the supply of electrical service.*

Id. at 772. (*Emphasis Added*) In holding that the tariff was unreasonable only to the extent that the tariff limited liability beyond ordinary negligence, the Court reasoned:

> it is also clear that the intention of the KCC and KCP & L in establishing the tariffs was that KCP & L have some limits on its liability in return for the rates established in this case. An interpretation that voids the tariffs in their entirety would undermine the purpose of providing reasonable and effective service at reasonable rates. This is especially true where KCP & L has fulfilled its duties in providing electrical service at the established rates.

Id. at 773.

Unfortunately, the *Danisco* Court did not specifically outline what would make a tariff reasonable versus unreasonable, but it seemed to be necessary for the limitation to relate back to the overall purpose of the tariff:

> The tariffs at issue in this case represent an attempt by the KCC to fulfill its statutory mandate. They represent a bargained-for compromise between the KCC and KCP & L with the intention of trading liability limits for a lower rate for electrical services. In establishing rates, the KCC is required to balance the public need for adequate, efficient, and reasonable service with the public utility's need for

> sufficient revenue to meet the cost of furnishing service and to earn a reasonable profit. As we noted above, reasonable rates are dependent in no small measure on rules limiting liability, for the broader the liability exposure, the greater the cost of electric service. *See Waters v. Pacific Telephone Co.*, 12 Cal.3d at 7, 114 Cal.Rptr. 753, 523 P.2d 1161; *Landrum v. Florida Power & Light Co.*, 505 So.2d at 554.

Danisco at 386. This is consistent with other courts' review of limitations of liability:

> A tariff can only limit the liability of a utility if the limitation is within the tariff's ambit. *See Woodburn*, 275 N.W.2d at 405 (allowing the plaintiff to proceed on *343 his claim dealing with a yellow-page listing because yellow-page listings were not covered by the phone company's tariff) accord *State Farm Fire & Cas. Co. v. S. Bell Tel. & Tel. Co.*, 245 Ga. 5, 262 S.E.2d 895, 897 (1980)(holding tariff limiting a general claim for failure to provide telephone service does not preclude a state claim arising out of the utility's alleged negligence); *Nat'l Food Stores, Inc. v. Union Elec. Co.*, 494 S.W.2d 379, 384 (Mo.Ct.App.1973)(holding a tariff fixing a utility's liability for interruption of service did not preclude a state action based on the utility's failure to give notice to a consumer prior to a known interruption); *Kroger Co. v. Appalachian Power Co.*, 244 Va. 560, 422 S.E.2d 757, 759 (1992) (holding tariff purporting to shield a utility from all liability in providing power to a customer beyond the delivery point does not shield the utility from the common-law duty not to reenergize a customer's lines when it knows the lines located beyond the delivery point are defective).

Est. of Pearson ex rel. Latta v. Interstate Power & Light Co., 700 N.W.2d 333, 342–43 (Iowa 2005) In other words, a tariff is reasonable if serves the purpose of the tariff and does not extend to limitations beyond the purpose of the tariff.

To date, the Court has only has only addressed the reasonableness of limitations of liability for damages caused by service interruptions. The *Danisco* Court exclusively referenced the reasonableness of tariffs that limit liability for service interruption-related damages. *Id. inter alia.* Even when citing to other states that support the position of Kansas on limitations of liability in tariffs, the Court delineated only those service interruption related damages: "generally, other jurisdictions have held that rules promulgated by public utilities which absolve them from liability for simple negligence *in the delivery of their services* are reasonable and will be upheld." *Id.* at 769 [*Emphasis Added*].

Indeed, opening up liability for any interruptions in service may well cause rates to increase, which is why the other states' cases cited to by the *Danisco* Court also agreed to limitations on liability for interruptions in service. *Id.* The *Danisco* Court reasoned:

> A public utilities' liability exposure has a direct effect on its rates, and this court, as well as the majority of jurisdictions addressing the question of such a liability limitation, has concluded that it is reasonable to allow some limitation on liability such as that for ordinary negligence *in connection with the delivery of the service*s. See *Landrum v. Florida Power & Light Co.*, 505 So.2d at 554.

Danisco at 771 [*emphasis added*] The *Danisco* Court was specifically speaking to a carved out set of claims. In fact, no Kansas cases have dealt with tariffs limiting liability for claims of property damage or personal injury,

nor have they considered the limitation of liability in claims other than negligence claims against a public utility for service interruptions.

As provided for hereinabove, the present case does not involve service interruptions, but rather property damage caused by lack of maintenance by Westar. While the District Court surmised that the provision being reviewed in *Danisco* did not apply to the present facts, it still relied upon *Danisco* to uphold the limitation of liability.

Unfortunately, the District Court did not provide any analysis as to the reasonableness of that particular provision as the *Danisco* Court had for limitation of liability relating to service interruptions. The Arizona Court of Appeals in *Szeto* pointed out that the policy considerations in service interruptions cases do not follow in property damage cases:

> But while policy favors limiting liability for damages resulting from service interruptions that can have far-reaching effects, no such policy consideration supports eliminating liability when a public utility company's negligence causes property damage or a personal injury.

Szeto at 383. The *Szeto* Court also pointed out that the tariff did not disclaim the utility's "duty to exercise the highest degree of skill and care." *Id.*

There is nothing in the record provided by Westar or the KCC that evidences any connection between rate setting and the broadly sweeping limitation of liability, which Westar has argued is limitation of liability on any and all claims against Westar, contained in the Westar Tariff. Indeed, in

the review of surrounding States' tariffs, none have extended a limitation to liability for anything beyond service interruptions seemingly because no such connection between property damage and personal injury unrelated to service interruptions and rate making exists, at least to the extent that it would make the limitation reasonable. *See*, e.g., Xcel Energy, Southwestern Public Service, PCU of Texas Approved, January 10, 2022, Section No. V, Rules, Regulations and Conditions of Service, Section 6, Continuity of Service:https://www.xcelenergy.com/staticfiles/xe/Regulatory/Regulatory%20PDFs/rates/TX/SPSRules.pdf; M. P. S. C. No. 2 – Electric NORTHERN STATES POWER COMPANY, Terms and Conditions of Service, C.2.11: https://www.xcelenergy.com/staticfiles/xe/Regulatory/Regulatory%20PDFs/rates/MI/Mie_Section_3.pdf; Public Service Company of Colorado Electric Tariff – Schedule of Rates for Electric Service, COLO. PUC No. 8 Electric, RULES AND REGULATIONS ELECTRIC SERVICE STANDARDS: https://www.xcelenergy.com/staticfiles/xe-responsive/Company/Rates%20&%20Regulations/Regulatory%20Filings/PSCo_Electric_Entire_Tariff.pdf; Wisconsin Electric Rate Book – Volume 7, Rules and Regulations, Section5.92: https://www.xcelenergy.com/staticfiles/xe-responsive/Archive/2We_Section_4.pdf; Minnesota Electric Rate Book - MPUC NO. 2, Section No. 6, General Rules and Regulations, Subsection 1.4: https://www.xcelenergy.com/staticfiles/xe/PDF/Regulatory/Me_Section_6.pdf;

MidAmerican Energy Company, Electric Tariff No. 2, Section 1, Electric Service Policies, Limitation of Liability: https://wcc.efs.iowa.gov/cs/idcplg?IdcService=GET_FILE&allowInterrupt=1&RevisionSelectionMethod=latest&dDocName=002043&noSaveAs=1; South Dakota Electric Rate Book - SDPUC NO. 2, Section No. 6, General Rules and Regulations, Subsection 1.4: https://www.xcelenergy.com/staticfiles/xe-responsive/Company/Rates%20&%20Regulations/Se_Section_6.pdf; North Dakota Electric Rate Book - NDPUC NO. 2, Section No. 6, General Rules and Regulations, Subsection 1.4: https://www.xcelenergy.com/staticfiles/xe-responsive/Company/Rates%20&%20Regulations/Ne_Section_06.pdf; Public Service Company Of Oklahoma, 38th Revised Sheet, Electric Service Rules, Regulations And Conditions Of Service: https://www.psoklahoma.com/lib/docs/ratesandtariffs/Oklahoma/PSO%20Tariff%20Package%20Complete%20Mar%202023.pdf

While power outages and shorts might be commonplace, fires caused by fallen, rotten poles are not. It is unreasonable to say that every cause of action brought against Westar for negligence must rise to the level of willful or wanton. If a Westar employee is driving down the road and strikes another vehicle causing damages, it would be unreasonable to hold that driver to a willful or wanton level of negligence. Here, Westar is essentially arguing that

it has no liability for any cause of action until and unless it rises to the level of willful or wanton conduct.

Moreover, it should be noted that damages relating to service interruptions can generally be avoided by back-up generators. Customers are in a much better position to anticipate and mitigate losses due to interruption than they are to Westar damaging their property while servicing or maintaining their facilities and equipment. Indeed, this case is even further removed from the realm of reasonable foreseeability as the damages suffered by Heritage Tractor were not incurred while Westar repairing or maintaining its equipment. Rather, the outright failure of Westar to maintain its equipment caused Heritage Tractor's damages.

As provided above, this is nothing more than a case of Westar's property damaging Heritage Tractor's property. Payment of the claim should not have any impact on Westar's rates, and as such the limitation of liability is unreasonable as applied to the facts of this case

IV. WHETHER THE DISTRICT COURT ERRED IN FINDING THAT THERE WERE INSUFFICIENT FACTS TO SUBMIT THE ISSUE OF WANTON CONDUCT TO THE JURY.

A. Preservation of the Issue and Standard of Review

Heritage Tractor raised this issue in its Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment. (R. Vol. III, p. 16-20) The trial court found that there were no facts a reasonable juror could

find that the conduct of Westar was wanton and granted Westar's Motion for Summary Judgment. (R. Vol. III, p. 140-143)

The standard for reviewing summary judgment is well established and appellate court applies the same rules as the trial court. "Summary Judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The trial court is required to resolve all facts and inferences which may reasonably be drawn from the evidence in favor of the party against whom the ruling is sought. When opposing a motion for summary judgment, an adverse party must come forward with evidence to establish a dispute as to a material fact. In order to preclude summary judgment, the facts subject to the dispute must be material to the conclusive issues in the case. On appeal, we apply the same rules and when we find reasonable minds could differ as to the conclusions drawn from the evidence, summary judgment must be denied." *Drouhard-Nordhus v. Rosenquist,* 301 Kan. 618, 622, 345 P.3d 281 (2015)

B. Sufficient Evidence Exists for a Jury to Conclude that Westar was Wanton in Exercising Its Highest Duty of Care.

In Kansas, wanton conduct "is distinct from negligence and differs in kind." *Bowman v. Doherty,* 235 Kan. 870, 686 P.2d 112, 118 (1984) (citing

Kniffen v. Hercules Powder Co., 164 Kan. 196, 188 P.2d 980 (1948)). Unlike negligence, "[w]anton conduct is established by the mental attitude of the wrongdoer rather than by ... particular negligent acts." *Robison v. State,* 30 Kan.App.2d 476, 43 P.3d 821, 824 (2002) (citing *Friesen v. Chicago, Rock Island & Pacific R.R.,* 215 Kan. 316, 524 P.2d 1141 (1974)). Wanton conduct requires a reckless disregard or complete indifference to the risk associated with the conduct, or lack thereof. As explained by the 10th Circuit Court of Appeals:

> To establish wanton conduct, a plaintiff must make a two-pronged showing: (1) that the act was "performed with a realization of the imminence of danger"; and (2) that the act was performed with "a reckless disregard [of] or complete indifference to the probable consequences of the act." *Reeves v. Carlson*, 266 Kan. 310, 969 P.2d 252, 256 (1998); see also *Gould*, 722 P.2d at 518. Thus, "[t]he keys to a finding of wantonness are the knowledge of a dangerous condition and indifference to the consequences." *Reeves*, 969 P.2d at 256. The plaintiff need not prove any intent or willingness to injure. *Lanning ex rel Lanning v. Anderson*, 22 Kan.App.2d 474, 921 P.2d 813, 818 (1996) (*citing Boaldin v. Univ. of Kan.*, 242 Kan. 288, 747 P.2d 811, 814 (1987)); *see also Reeves*, 969 P.2d at 256.
>
> 6 The first prong of the tort—that the act was performed with a realization of the imminence of danger—may be established in two ways. First, the plaintiff may put on direct evidence of the defendant's actual "knowledge of a dangerous condition." *Lanning*, 921 P.2d at 819. Second, the plaintiff may establish, through circumstantial evidence, the defendant's "reason to believe that his

> act [might] injure another," because that act *1245 was taken "in disregard of a high and excessive degree of danger, either known to [the defendant] or apparent to a reasonable person" in the defendant's position. *Id.* (quotations and emphasis omitted).
> 78
>
> As to the tort's second prong, reckless disregard of or indifference to probable consequences, the Kansas Supreme Court has explained that "a token effort to prevent [harmful consequences] would not avoid liability under this [prong], while definite acts which materially lessen the chances of [those consequences] would avoid liability." *Friesen*, 524 P.2d at 1148. Critical to our analysis of such precautions is whether they materially lessen the chances of the consequences of the particular "dangerous condition" that we analyze under the tort's first prong.

Wagner v. Live Nation Motor Sports, Inc., 586 F.3d 1237, 1244–45 (10th Cir. 2009)

In assessing whether a plaintiff has established wanton conduct, then, the Court must take care to apply both prongs of the tort to the same alleged risk, whether that risk be described narrowly (e.g., the risk of the specific accident that occurred) or broadly (e.g., the risk of any serious accident occurring because of the conduct at issue—e.g., the risk of any accident when the driver is intoxicated. *See Reeves, supra.*)

As a general rule, the presence or absence of negligence in any degree is not subject to determination by the court on summary judgment, for such a determination should be left to the trier of fact. Only when reasonable

persons could not reach differing conclusions from the same evidence may the issue be decided as a question of law. *Smith v. Union Pacific Railroad Co.,* 222 Kan. 303, 306, 564 P.2d 514 (1977) Because "wantonness" derives from "the mental attitude of the wrongdoer[,]... acts of omission as well as acts of commission can be wanton." *Gould v. Taco Bell,* 239 Kan. 564, 722 P.2d 511, 518 (1986)

In the present case, the District Court did not properly analyze both prongs of the two-part test and focused only on the only a narrow risk, namely that the Subject Pole would catastrophically fail thereby causing the fire at the Property. The District Court then incorrectly viewed the second prong of the test against that narrow risk when it held that Heritage Tractor did not "demonstrate awareness of any imminent risk by Evergy [Westar]", and therefore summary judgment was appropriate. (R. Vol. III, p. 142) The emphasis on this narrow risk is highlighted by the statement from the District Court that "(i)n the absence of any basis to believe that Evergy [Westar] knew or had reason to know the pole at issue had soundness issues, it is hard to make the argument that Evergy [Westar] was even negligent with respect to the maintenance of this pole." (Id at p. 143)

As argued by Heritage Tractor, the District Court should have focused on the broad risk associated with aging wooden utility poles instead of solely focusing on the narrow risk of an imminent failure of the Subject Pole. (R.

Vol. IV, p. 39) The District Court's insistence that Heritage Tractor prove Westar was aware of an imminent risk would only encourages Westar to exhibit willful blindness toward these types of risks.

There can be little doubt that Westar had knowledge of the broad risk that aging utility poles can create dangerous conditions. In 1964, the Kansas Supreme Court, in considering whether the conduct of a public electric utility rose to the level of wanton conduct, relied upon the well-established principle that "from the beginning, it has been the rule that a high-voltage line is one of the most dangerous things known to man; that not only is the current deadly, but the ordinary person has no means of knowing whether any particular wire is carrying a deadly current or is harmless, and that distributors of electricity which erect and maintain electric power lines are under a duty to exercise the highest degree of care to protect the public from danger." *Cope v. Kansas Power & Light Co.*, 192 Kan. 755, 761, 391 P.2d 107, 112 (1964)(*citing Railway Co. v. Gilbert*, 70 Kan. 261, 78 P. 807; *Wade v. Empire Dist. Electric Co.*, 94 Kan. 462, 465, 147 P. 63; *Snyder v. Leavenworth Light, Heat & Power Co.*, 98 Kan. 157, 160, 165, 157 P. 442; *Worley v. Kansas Electric Power Co.*, 138 Kan. 69, 23 P.2d 494; *Jackson v. Kansas Gas & Electric Co.*, 152 Kan. 90, 97, 102 P.2d 1038) This concept was codified in Kansas Pattern Jury Instructions:

> A person that possesses, or has under that person's control, an instrumentality that is exceptionally dangerous in character is bound to take exceptional precautions to prevent an injury being done by the instrumentality. The degree of care must be equal to the degree of danger involved.

126.81 Dangerous Instrumentalities, Pattern Inst. Kan. Civil 126.81

Given that Westar must exercise the highest degree of care, a breach rising to the level of wanton conduct is not as difficult to prove as it would be for a person or entity only owing only a duty to exercise reasonable care. More importantly, in the context of the standard of wanton conduct, the realization of the imminence of danger is met by the mere fact that Westar is a distributor of electricity, and the Subject Pole carries electricity. As evidence of the same, in response to a concern that even the line might have been touching the Property, Westar immediately sent a serviceman to assess and address the situation. (R. Vol. II, p. 185) Therefore, no citation to the record necessary to support the notion that if the entire pole, transformer, and line came into contact with the Property, as it did on May 5, 2018, such contact would be catastrophic.

If the District Court would have properly applied the first prong of the two-part test, it would have found, when viewing the light most favorable to Heritage Tractor, that a reasonable person could find that Westar knew or should have known of the danger to people and property as a result of aging

wood utility poles. To then satisfy the second part of the two-part test for wanton conduct associated with this risk, Heritage Tractor must demonstrate that Westar acted with reckless disregard of or complete indifference to the probable consequences of its conduct.

In order to answer the question concerning whether or not Westar's conduct was wanton, this Court must look at the preventative measures deployed by Westar to determine if Westar's actions materially lessened the risk associated with the catastrophic failure of aging wooden utility poles. *Wagner* at 1245.

Westar claims it took definite steps that materially lessened the general risks of poles failing. Those steps include: tracking and reporting of work performed on the Westar system most in need of immediate attention; circuit walkdowns; rolling, targeted excavation of and inspection of specific polis under a contractor-based program; and workplace policies that directed employees to report and fix safety issues. (R. Vol. II, p. 205) Westar also claims that its alleged compliance with the NESC and the KCC with respect to its inspection program negates a finding of wanton conduct. (Id at p. 206-207) However, Kansas law does not provide that compliance will negate negligence:

> Conformity with the NESC or an industry-wide standard is not an absolute defense to negligence. While it may be evidence of due care, compliance

> with industry standards, or standards legislatively or administratively imposed, does not preclude a finding of negligence where a reasonable person engaged in the industry would have taken additional precautions under the circumstances. Whether the company is negligent, even though it complied with the code, is usually a question to be determined by the jury under proper instructions by the court.

Cerretti v. Flint Hills Rural Elec. Co-op. Ass'n, 251 Kan. 347, 356-357 (1992) Missing from Westar's alleged comprehensive program is that the program lacked any methodically or requirement that would have let reasonably led to the inspection of the Subject Pole or to necessarily the inspection of other older poles that could catastrophically fail. The evidence, in the light most favorable to Heritage Tractor shows that the Subject Pole was rotted through and, had an inspection been performed even the year prior, Westar would have known this and could have taken steps to protect Heritage Tractor from the damages it ultimately incurred. (R. Vol. I, p. 418)

Westar was well aware of the industry standard for pole inspections and recommendation put forth by its own contractor for inspections, Osmose. (R. Vol. III, p. 30) Osmose warned in every contract with Westar that the "inspections" it required any serviceman to conduct when on site with a pole were not sufficient to detect issues with a pole. The standard in the industry is to inspect a utility pole every 10 years. (R. Vol. III, p. 68 and 72) Nelson Bingel, the former Vice President of Product Strategy for Osmose Utilities

Services, Inc., current chairmen at the NESC, and hired consultant for Westar, testified that there was an industry standard for the frequency of pole inspections. Mr. Bingel admitted that the Subject Pole should have been inspected every ten (10) years. (R. Vol. III, p. 35) Furthermore, Mr. Bingel acknowledged that the Westar inspection program did not meet the industry recommendation of inspecting southern pine poles every ten (10) years. (R. Vol. III, p. 36-37) One could quibble it should be more or less often, but that is unnecessary in this case as in the entire 50-year history of the Subject Pole, it was never inspected. More shockingly, there was absolutely no plan to inspect the Subject Pole at any time in the future. As Westar explained, it only inspected poles within circuits that were lesser performing and the circuit that the Subject Pole was on, according to Westar, was one of the highest performing. (R. Vol. II, p. 308)

While Westar undertook some nominal actions that may incidentally have lessened the risk of a catastrophic pole failure, none of those actions were designed to identify aging and decaying poles, much less avoid a catastrophic pole failure. The public benefits if Westar is encouraged to analyze and investigate the risks of its aging utility poles, not if the system encourages Westar to ignore the risks and escape liability for damages.

Viewing the evidence in the light most favorable to Heritage Tractor, reasonable minds could easily differ on whether such preventative measure

materially lessened the risk of a catastrophic pole failure, and therefore the District Court erred in ruling as a matter of law that Westar's conduct was not wanton.

CONCLUSION

Westar has asked the Court to agree that it has unlimited protection by the Westar Tariff for all types of claims of damage, all the while turning a blind eye to the known risks electricity poses. The Westar Tariff does not apply to a situation in which property damage is suffered not by an interruption in service but a reckless abandonment of responsibility for its equipment. To the extent the Westar Tariff purports to extent the limitation of liability to claims beyond those relating to interruption of service, it is unenforceable as an unconstitutional abrogation of common law. Moreover, the Westar Tariff's limitation of liability is unreasonable, as no connection exists as to limitation of liability for claims not arising from the interruption of service. Finally, Westar's wanton disregard for the safety of the public is evidenced in its willful refusal to protect the public from its dangerous equipment.

For these reasons, Heritage Tractor requests that the District Court's Order Granting Summary Judgment be reversed and the matter remanded back to the District Court for trial.

Respectfully submitted,

GATES SHIELDS FERGUSON
SWALL HAMMOND, P.A.

By: */s/ Court T. Kennedy*
Court T. Kennedy, KS # 22067
10990 Quivira; Suite 200
Overland Park, KS 66210-1284
Telephone: 913.661.0222
Facsimile: 913.491.6398
CKennedy@gatesshields.com

Michelle D. Hurley, *Pro Hac Vice*
YOST & BAILL, LLP
220 South Sixth Street
Suite 2050
Minneapolis, MN 55402
Telephone: 612.244.2926
Facsimile: 612.344.1689
mhurley@yostbaill.com

ATTORNEYS FOR PLAINTIFF-APPELLANT HERITAGE TRACTOR, INC.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Brief of Appellant Heritage Tractor, Inc. was e-filed with the Clerk of Appellate Court by using the electronic filing system, which will send notice of electronic filing to the following:

J. Eric Weslander
John T. Bullock
ATTORNEYS FOR DEFENDANT-APPELLEE

The undersigned, does hereby further certify that on July 27, 2023, a copy of the Brief of Appellant was sent via electronic address to the following:

J. Eric Weslander via email at: eweslander@stevensbrand.com
John T. Bullock via email at: jbullock@.stevensbrandcom
ATTORNEYS FOR DEFENDANT-APPELLEE

/s/ Court T. Kennedy
Court T. Kennedy