No. 21-124156-S

IN THE
SUPREME COURT OF THE
STATE OF KANSAS

CITY OF OLATHE, KANSAS
Plaintiff - Appellant/Cross-Appellee

vs.

CITY OF SPRING HILL, KANSAS; AND
JAMES HENDERSHOT, CITY ADMINISTRATOR
CITY OF SPRING HILL, KANSAS
Defendants - Appellees/Cross-Appellants.

REPLY BRIEF AND CROSS-APPELLEE BRIEF OF CITY OF OLATHE

Appeal from the District Court of Johnson County, Kansas
Honorable Rhonda K. Mason, Judge
District Court Case No. 21-CV01003

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APPELLANT REPLY BRIEF

I. Introduction

Spring Hill's argument is premised on its claim that "[t]he District Court correctly dismissed Olathe's lawsuit because it sought to enforce a perpetual contract binding future governing bodies in violation of *Jayhawk Racing*." Appellee Br. at 6. This premise is wrong. The district court's June 14, 2021 judgment includes 17 fact-findings—none of them find that the Annexation Contract was perpetual or contain any purported criticism of the Contract on that basis. (R. III, 96-99). Likewise, the conclusions of law do not mention the word "perpetual," do not address whether the Contract is a perpetual contract, and do not address the remedy had such a finding been made. (R. III, 99-105).

Spring Hill does not cite in its brief where it preserved any argument about the alleged "perpetual" nature of the Contract. Rather, the district court's conclusion is clearly stated as follows: "The annexation agreement between Spring Hill[ ] and Olathe is unenforceable upon the subsequent city council boards because it is a governmental action, rather than an administrative action." (R. III, 99). The district court applied its interpretation of *Jayhawk Racing Properties, LLC v. City of Topeka*, 313 Kan. 149, 484 P.3d 250 (2021), to reach that conclusion. Olathe submits that the district court's interpretation of *Jayhawk Racing* is erroneous as set forth in Olathe's Appellate Brief. See Appellant Br. at 16-18.

II. Contrary to Spring Hill's argument, *Jayhawk Racing* does not render the Annexation Contract unenforceable.

Jayhawk Racing does not render unenforceable contracts between municipalities that are authorized by statute or the Home Rule Amendment of the Kansas Constitution, Kan. Const. art. XII, § 5. Spring Hill's brief does not cite any cases that apply common law to overrule statutory law or the Constitution. Nor could it. Rather, Spring Hill suggests that K.S.A. 12-2908 and the Home Rule Amendment are somehow inapplicable to the question of whether cities can engage in long-term contracts with one another "to perform any governmental service, activity or undertaking which each contracting municipality is authorized by law to perform." K.S.A. 12-2908(b).

By failing to cite any caselaw to the contrary, Spring Hill effectively concedes that the common law ruling in *Jayhawk Racing* does not take precedence over either the Kansas Constitution or statutory law.

Spring Hill spends much of its brief probing the governmental v. proprietary distinction set forth in *Jayhawk Racing*. See Appellee Br. 6-11. As explained in the Appellant Brief, *Jayhawk Racing* is readily distinguishable because it involved a private-public contract, not one between municipalities. See Appellant Br. at 16-18. That distinction aside, however, the *Jayhawk Racing* rubric cannot apply here without violating statutory or constitutional law. In other words, even if *Jayhawk Racing* applied to these facts, it would

give way to the preemptive force of K.S.A. 12-2908 and the Home Rule Amendment. The *Jayhawk Racing* rubric is practically and legally unworkable in this context, where common law doctrine confronts the practical needs of cities to engage in long-term planning—or even planning that can survive quick turnover in the governing body—and conflicts with statutory and constitutional authority. See *Jayhawk Racing*, 313 Kan. at 163 (Stegall, J., concurring) (exploring the "strong argument that the governmental-proprietary distinction is 'practically unworkable and conceptually incoherent' and 'is notorious for its inconsistent and unprincipled applicability'").

A. Spring Hill's perpetual contract argument is not properly preserved for review.

On appeal, Spring Hill characterizes the district court's ruling this way: "the District Court held that the contract was unenforceable, as a matter of law, because it attempted to bind future City Councils to **perpetual territorial restrictions** in violation of *Jayhawk Racing*." Appellee Br. at 1. (Emphasis added). However, this rendition misstates the court's ruling and injects a new issue of "perpetual contracts" into this appeal, which was not briefed or ruled upon below and is thus unpreserved.

In its motion to dismiss, Spring Hill made only a passing reference to the Contract being perpetual. See R. III, 33. It did not provide any substantive briefing and did not ask the court to invalidate the Contract on that basis. (R.

III, 33). Instead, Spring Hill argued that the Contract was not approved by the Attorney General and not binding on subsequent governing bodies under *Jayhawk Racing*. See R. III, 31-34. At subsequent hearings, Spring Hill again made passing references to what it deemed the "perpetual" nature of the Contract, without citing caselaw in support or even asking the court to invalidate the Contract on that basis. Tellingly, Spring Hill does not cite where its argument on perpetual contracts was briefed and ruled upon below.

Spring Hill mistakenly conflates two separate issues: (1) whether the Contract is binding on successive governing bodies, and (2) if the contract is binding, when it terminates. See Appellee Br. at 6-7. The first issue concerns whether a contract survives any change in a governing body's composition; the second concerns the contract's end date. Spring Hill confuses these issues in its argument on appeal and its rendition of the district court's ruling.

The district court did not (1) address the Contract's termination provisions, (2) address whether the Contract is perpetual, or (3) make any ruling regarding the enforceability of a perpetual contract in this context. In fact, the court did not mention the term "perpetual" in any ruling. Instead, the court limited its dispositive ruling to the threshold issue of whether the Contract is binding on successive governing bodies. The court ruled that "[t]he annexation agreement between Spring Hill[ ] and Olathe is unenforceable

upon the subsequent city council boards because it is a governmental action, rather than an administrative action" under *Jayhawk Racing*. (R. III, 99).

Likewise, *Jayhawk Racing* only considered and ruled upon the threshold issue of whether a private-public contract was enforceable on successive governing bodies under common law. It did not consider the contract's termination provisions or whether it was perpetual in nature.

"As a general rule, issues not raised before the trial court cannot be raised on appeal." *State v. Williams*, 311 Kan. 88, 92, 456 P.3d 540 (2020). If this Court reverses the district court and holds that the Contract is binding on successive governing bodies, then questions about the Contract's termination provisions may be addressed on remand.

B. The Contract's termination provisions are enforceable.

Spring Hill presumes, without providing authority, that the contract is "perpetual" and automatically invalid under Kansas law. This presumption is false.

Analysis of the Contract begins with the presumption that it is legal; Spring Hill, who fairly entered into the Contract, now bears the burden to prove it is illegal. See *Matter of Acquisition of Land by Eminent Domain*, 261 Kan. 125, 129, 928 P.2d 73 (1996); *First Sec. Bank v. Buehne*, __ Kan. __, 501 P.3d 362, 365-66 (2021). "It is the duty of courts to sustain the legality of contracts in whole or in part when fairly entered into, if reasonably possible to

do so, rather than to seek loopholes and technical legal grounds for defeating their intended purpose." *Foltz v. Struxness*, 168 Kan. 714, 721, 215 P.2d 133 (1950); see *Nat'l Bank of Andover v. Kansas Bankers Sur. Co.*, 290 Kan. 247, 257, 225 P.3d 707 (2010).

Spring Hill labels the Contract as "perpetual" without citation to authority beyond *Jayhawk Racing* (which is inapplicable). The Contract states: "This Agreement shall be and remain in effect until terminated. Termination shall occur only upon mutual consent of the parties as evidenced by a resolution adopted by official vote of each governing body." Appellant Br., Ex. 1 at 4. By its plain terms, the Contract provides for termination by mutual consent, not a perpetual or infinite duration. The parties contemplated a long relationship of cooperation and provided for termination at a reasonable and mutually acceptable time. The Contract even requires periodic discussion and planning between the parties. (R. I, 28). See Appellant Br. at 5.

Moreover, Kansas courts' equitable jurisdiction to reform contracts is "'well settled.'" *Frazier v. Goudschaal*, 296 Kan. 730, 745, 295 P.3d 542 (2013) (quoting *Stauth v. Brown*, 241 Kan. 1, 11, 734 P.2d 1063 (1987)). For example, courts may modify the temporal scope of noncompetition contracts to provide a reasonable end date. See *Bruce D. Graham, M.D., P.A. v. Cirocco*, 31 Kan. App. 2d 563, 572, 69 P.3d 194 (2003). Thus, if the Contract's temporal scope is

deemed too broad, reformation would be an appropriate remedy to address on remand.

Regardless, however, the Contract is authorized by K.S.A. 12-2908, which removes any requirement of a specific duration. See Cross-Appellee Br., Section I below. Accordingly, cities may enter contracts with each other under K.S.A. 12-2908 without establishing a fixed end date.

III. The Contract is independently valid and enforceable under K.S.A. 12-2908, the Home Rule Amendment, and the *Simmons* Rule.

A. The Contract is authorized by K.S.A. 12-2908.

Olathe incorporates its argument from the Cross-Appellee Brief, Section I below.

B. Olathe preserved its Home Rule argument.

Spring Hill suggests that Olathe's Home Rule argument is not preserved, claiming it was "belatedly-articulated" in Olathe's response to Spring Hill's motion to dismiss. Appellee Br. at 18. However, Olathe raised its Home Rule authority in the Verified Petition, which incorporated the Contract. (R. I, 22). The Contract states that it is authorized by "public policy in general and K.S.A. 12-2901 *et seq.*" Appellant Br., Ex. 1 at 1. The reference to "public policy" includes Olathe's broad Home Rule authority "to determine local public policy and regulation." *Farha v. City of Wichita*, 284 Kan. 507, 512, 161 P.3d 717 (2007). Kansas is a notice-pleading state, and the Petition gave Spring Hill

more than sufficient notice that Home Rule was a basis for the Contract. See *Berry v. Nat'l Med. Servs., Inc.*, 292 Kan. 917, 918, 257 P.3d 287 (2011).

Olathe's Home Rule argument is also preserved for review because Olathe briefed the issue in its response to Spring Hill's motion to dismiss. (R. III, 69-71.) Spring Hill cannot claim that Olathe has raised Home Rule as a basis for the Contract's authority for the first time on appeal, and tellingly, it does not try. Indeed, briefing an argument in response to a motion to dismiss is sufficient to preserve it for appeal. See *State ex rel. Kline v. Transmasters Towing*, 38 Kan. App. 2d 537, 540, 168 P.3d 60 (2007) (holding that argument addressed in response to motion to dismiss was preserved for appeal). Regardless, the Court should consider the Home Rule issue because it involves a question of law that is determinative of this case and necessary to serve the ends of justice. See *Matter of Adoption of Baby Girl G.*, 311 Kan. 798, 804, 466 P.3d 1207 (2020).

C. Spring Hill misconstrues the scope of the Home Rule Amendment.

Spring Hill claims that the Home Rule Amendment and *Jayhawk Racing* operate in separate spheres. Spring Hill is correct in that Home Rule, as a constitutional provision, is separate from and takes precedence over the common law pronounced in *Jayhawk Racing*. However, Spring Hill incorrectly suggests that the Home Rule Amendment is neatly contained to only "the

question of whether the parties to the Annexation Agreement had the authority to execute it in the first instance; not whether it could bind future governing bodies." Appellee Br. at 19-20.

Under the liberal construction of Home Rule, a city's action is valid unless it conflicts with another constitutional provision or a state law uniformly applicable to all cities that governs the subject. See *Dwagfys Mfg., Inc. v. City of Topeka*, 309 Kan. 1336, 1340, 443 P.3d 1052, (2019); Kan. Const. art. XII, § 5(d). Spring Hill has identified no constitutional or statutory provision that would render the Contract unenforceable, and indeed, there is none.

Olathe submits that the Home Rule Amendment, not common law, has the final say on whether a city has the power to enter a contract with another city to protect the public interest for a length of time beyond the next change in the governing body's composition. *Jayhawk Racing* did not address this issue and cannot override cities' power under the Home Rule Amendment to solve complex problems with long-term solutions that are not proscribed by statutory or constitutional law.

D. The *Simmons* Rule applies to contracts, as here, that are reasonably necessary to protect the public interest.

Spring Hill claims the *Simmons* Rule does not apply here because the Contract serves a "governmental function" under the *Jayhawk Racing* rubric.

Appellee Br. at 22. However, assuming for rebuttal that the Contract may serve a governmental function, the *Simmons* Rule would still apply to exempt the Contract from the prohibition against binding successive governing bodies.

The *Simmons* Rule does not apply only to "administrative" contracts under the *Jayhawk Racing* rubric, as Spring Hill contends. Appellee Br. at 22. The *Simmons* question is not whether the Contract is strictly administrative or governmental in nature, as those terms are defined in *Jayhawk Racing*, but whether "it is a commitment of a sort reasonably necessary to protection of the public property, interests or affairs being administered." *Bd. of Comm'rs of Edwards Cty. v. Simmons*, 159 Kan. 41, 151 P.2d 960, 969 (1944). If a contract is reasonably necessary to protect the public interest, then it is binding on successive governing bodies. 151 P.2d at 969.

Thus, the *Simmons* Rule operates to uphold contracts that extend past the enacting body's term but are necessary to protect the public interest. This principle is demonstrated in *Verdigris River Drainage Dist. No. 1, in Montgomery Cty. v. State Highway Comm'n*, 155 Kan. 323, 125 P.2d 387 (1942), which *Simmons* cited as a source of authority. See *Simmons*, 151 P.2d at 968-69. In *Verdigris*, the Court upheld a county contract to maintain a floodgate that bound successive governing bodies, reasoning:

> Counties are given broad powers with reference to constructing drains and ditches necessary in road construction. See G.S. 1935, 68–115. These provisions must be construed to confer on county

> commissioners the authority to enter into contracts such as we have here to extend beyond the term of office of the particular officials who made the contract. Were it not so no comprehensive program of road building could ever be carried out.

Verdigris, 125 P.2d at 392. Likewise, cities have broad power under the Home Rule Amendment and K.S.A. 12-2908 to contract with each other regarding governmental services to promote the public interest. As in *Verdigris*, without the Contract, no comprehensive plan for development and the extension of services could be carried out for property in Olathe's growth area. A governing body's composition can change every few years (or less), but comprehensive planning requires decades. See Appellant Br. at 5, 24.

The *Simmons* Rule does not apply, however, to contracts "incident to [a governing body's] own administration and responsibilities." *Simmons*, 151 P.2d at 969. This principle is demonstrated in *Leavenworth Cty. Bd. of Cty. Commissioners v. Copeland*, No. 120,616, 2020 WL 4379132 (Kan. Ct. App. 2020) (unpublished opinion), where the Court of Appeals held that an employment contract with the county's human resources director was not binding on successive governing bodies. 2020 WL 4379132 at *6.

In contrast, contracts that are "necessary for the promotion of broad policies or programs directly improving the services delivered to the citizenry at large" fall squarely under the *Simmons* Rule and bind successive governing bodies. 2020 WL 4379132 at *6. Thus, if anything, the *Simmons* Rule leans in

favor of "governmental" contracts under the *Jayhawk Racing* rubric. But regardless of such label, the Contract is binding on successive governing bodies because it is reasonably necessary to protect the public interest under the *Simmons* Rule, for the reasons set forth in the Appellant Brief.

IV. The district court erred when it denied Olathe's request for temporary injunction.

Standard of Review

Spring Hill bears the burden to establish mootness, which is reviewed de novo. See *State v. Roat*, 311 Kan. 581, 590, 593, 466 P.3d 439 (2020).

A. Olathe's request for temporary injunction to protect its entire border with Spring Hill is not moot.

Spring Hill alleges that Olathe's request for this Court to reverse the district court's denial of temporary injunction is moot because the land for Project Extract has already been annexed into Spring Hill and "the entire purpose of the request for a temporary injunction was to prevent these annexations." Appellee Br. at 26-27. This claim is both factually and legally inaccurate. Olathe's request for temporary injunction is not moot because Olathe seeks to enforce the Contract for the *entire* Boundary Line, to prevent development of Project Extract in Spring Hill rather than Olathe, and to ultimately obtain de-annexation or other appropriate remedies on remand.

"A case is moot when a court determines it is clearly and convincingly shown that the actual controversy has ended, that the only judgment that

could be entered would be ineffectual for any purpose, and that it would not have an impact on any of the parties' rights." *Roat*, 311 Kan. 581, Syl. ¶ 1. Mootness is a prudential doctrine that "must be exercised with caution and only upon due consideration of the wide variety of interests a party asserts." 311 Kan. at 447.

From the outset, Olathe requested injunctive relief to protect its entire border with Spring Hill—including but not limited to the land designated Project Extract. (R. I, 18-19). In its initial request for temporary restraining order and preliminary injunction, Olathe asked the district court to "restrain and enjoin Defendants from taking any action to further the annexation of land north of the Boundary Line, including but not limited to … land designated for Project Extract." (R. III, 1). After Spring Hill annexed Project Extract, Olathe promptly asked the district court to "prohibit Spring Hill from taking any further steps to annex, approve, develop, or issue permits for any land north of the Boundary Line set forth in the Annexation Contract, including but not limited to land designated Project Extract." (R. III, 112).

Olathe seeks a temporary injunction to prevent development on Project Extract land, so it may be readily de-annexed after appeal, and to protect its entire border from unlawful annexations by Spring Hill. The lower courts recognized these irreparable harms when they issued injunctions to prohibit Spring Hill from pursuing annexation of any land north of the Boundary Line

and taking any steps to develop Project Extract during appeal. (R. IV, 4; 9-2-2021 Order).

In sum, Olathe's appeal is not moot because the Contract's enforceability is still in controversy; Olathe's entire boundary with Spring Hill is at stake; and Olathe seeks to redress the harm Spring Hill has already caused by annexing Project Extract during a special call meeting of the Spring Hill City Council within hours of the district court's ruling. Without injunctive relief, Olathe's entire boundary with Spring Hill is vulnerable to annexation at any moment. While the injunction is in place, the character of the land comprising Project Extract remains unchanged. Without judgment in its favor, Olathe cannot obtain redress, whether by de-annexation or other appropriate remedies on remand, for the harm Spring Hill has already caused.

B. The district court's fact findings are sufficient to support temporary injunction in Olathe's favor.

As quoted in the Appellant Brief, the district court made extensive fact-findings that Olathe would suffer irreparable harm, that threat of harm to Olathe outweighed any injury to Spring Hill, that Olathe lacked an adequate remedy, and that upholding the Contract would promote the public interest. (R. III, 20, 98-99; R. IV, 2-3). See Appellant Br. at 6-7, 11-14. Most recently, the district court made these findings after the evidentiary hearing when it issued the stay and injunction pending appeal. (R. IV, 2-4). Thus, Spring Hill's

contention that the fact-findings are insufficient to support the temporary injunction is mistaken.

The remaining factor for temporary injunction is substantial likelihood of success on the merits. *Downtown Bar & Grill, LLC v. State*, 294 Kan. 188, 191, 273 P.3d 709 (2012). This factor boils down to a novel question of law—whether the Annexation Contract is enforceable on successive governing bodies. As the district court observed, "this is a novel case," and the merits decision was a close call. (R. V, 199). This Court should defer to the district court's robust factual findings but correct its error of law regarding the Contract's enforceability, for the reasons stated in the Appellant Brief. Thus, reversal of the district court's denial of temporary injunction is appropriate based on its error of law.

CROSS-APPELLEE BRIEF

STATEMENT OF ISSUE ON CROSS-APPEAL

K.S.A. 12-2908 authorizes cities to contract with each other to perform a governmental service, activity, or undertaking without obtaining Attorney General approval. The Annexation Contract between Olathe and Spring Hill concerns the performance of a governmental service, activity, or undertaking under K.S.A. 12-2908. Did the district court err when it held that Attorney General approval was not required for the Contract to be enforceable?

STATEMENT OF FACTS

Olathe incorporates the Statement of Facts from its Appellant Brief.

ARGUMENTS AND AUTHORITIES

I. The district court correctly held that the Contract is authorized by K.S.A. 12-2908.

Spring Hill responds to Olathe's K.S.A. 12-2908 argument by claiming the Contract falls under K.S.A. 12-2904. Appellee Br. at 31. Again, Spring Hill apparently does not dispute Olathe's proposition that, if the Contract is authorized by K.S.A. 12-2908, then the statute takes precedence over common law. See, e.g., *Stanley v. Sullivan*, 300 Kan. 1015, Syl. ¶ 1, 336 P.3d 870 (2014) ("When the legislature chooses to enact statutes that control specific areas that were formerly controlled by the common law, the statutory enactments

supersede the common-law rules."). Spring Hill only disputes the district court's declaration that the Contract is authorized by K.S.A. 12-2908.

The district court's ruling that K.S.A. 12-2908 authorizes the Contract is supported by the statute's plain language. Spring Hill makes the conclusory claim that Olathe "virtually ignore[d] the language of K.S.A. 12-2908." Appellee Br. at 32. But Spring Hill does not rebut Olathe's construction of the operative terms of K.S.A. 12-2908. See Appellant Br. at 18-24 (explaining how the Contract qualifies as a contract between municipalities "to perform any governmental service, activity or undertaking which each contracting municipality is authorized by law to perform" under K.S.A. 12-2908). Indeed, Spring Hill appears to concede that the Contract, by its terms, qualifies as a contract between municipalities under K.S.A. 12-2908.

The district court's ruling about K.S.A. 12-2908's applicability is also supported by the factual record. The court had the advantage of hearing testimony and weighing evidence about the Contract's formation. In particular, it heard the testimony of former Olathe City Attorney Tom Glinstra, who testified, "During the drafting -- discussing it, the city attorn[ey]s, in not only Spring Hill but all the other agreements that we had, we determined that it could be done under 12-2908. We put the language 2901 et seq, meaning et seq., that follows to include 2908." (R. V, 115).

The district court appropriately weighed evidence on the issue of the Contract's formation under K.S.A. 12-2908 in favor of Olathe, which is entitled to the deferential substantial competent evidence standard. See *Tucker v. Hugoton Energy Corp.*, 253 Kan. 373, 377, 855 P.2d 929 (1993). Based on the Contract's language and formation, the court reasonably found that the municipalities relied on K.S.A. 12-2908 to form the Contract and concluded that K.S.A. 12-2908 authorized the Contract. (R. III, 105.)

II. The district court correctly held that Attorney General approval is not required to enforce the Contract.

Spring Hill mistakenly argues that K.S.A. 12-2904's requirements, including Attorney General approval, apply because the Contract "attempts to track" the contents of K.S.A. 12-2904. Appellee Br. at 33. Of course, the Contract does not "track" K.S.A. 12-2904's requirement for Attorney General approval—any reference to, or signature line for, the Attorney General is conspicuously omitted. Indeed, at the evidentiary hearing opposing counsel stipulated that the Contract contains no condition precedent that it must be submitted to the Attorney General. (R. V, 113-114.) Regardless, the Contract's partial resemblance to K.S.A. 12-2904 does not diminish its independent authority under K.S.A. 12-2908.

The district court correctly held that Attorney General approval is not required for the Contract, which is independently authorized by K.S.A. 12-2908. In so ruling, the court explained:

> K.S.A. 12-2908 allows municipalities to contract with each other to perform governmental services and tasks. It does not require Attorney General approval. K.S.A. 12-2904 does require Attorney General approval, and the statute lists the necessary components for an interlocal agreement. The terms in the agreement between Olathe and Spring Hill looked similar to those required by K.S.A. 12-2904. **But including those terms does not force the agreement to require Attorney General approval when a different statute can enable the agreement.** It is a reasonable inference to conclude that the municipalities looked to K.S.A. 12-2908 for guidance in what ought to be considered, then expanded from there to fit their needs. The [Interlocal Cooperation Act] does not require the Court place an agreement containing similar contents to a K.S.A. 12-2904 agreement under K.S.A. 12-2904 when it also complies with K.S.A. 12-2908. Therefore, K.S.A. 12-2908 authorizes this agreement.

(R. III, 104-105). (Emphasis added). Thus, any similarity between the Contract and K.S.A. 12-2904 is irrelevant to the question of whether the Contract is independently authorized by K.S.A. 12-2908. Any inspiration the drafters may have derived from K.S.A. 12-2904 does not detract from the plain language of the Contract, which falls squarely under K.S.A. 12-2908. See Appellant Br. at 18-24 (addressing the Contract's enforceability under K.S.A. 12-2908).

Spring Hill's argument about K.S.A. 12-2904's exclusive applicability rests on the false premise that K.S.A. 12-2908 and K.S.A. 12-2904 are always mutually exclusive. Indeed, Spring Hill misunderstands Olathe's argument

when it claims that "Olathe asks this Court to determine that *all* contracts between municipalities fall into K.S.A. 12-2908 and *none* fall into K.S.A. 12-2904 which requires Attorney General approval." Appellee Br. at 32. On the contrary, Olathe argues that contracts between municipalities must meet the plain language requirements of K.S.A. 12-2908(b) to be enforceable under that statute (as the Contract does) and that contracts between municipalities could, in some circumstances, be authorized by *both* K.S.A. 12-2904 and K.S.A. 12-2908. In other words, K.S.A. 12-2904 and K.S.A. 12-2908 share an overlapping sphere of authority, like a Venn diagram.

Under K.S.A. 12-2904, a city may enter into an "Interlocal Agreement" with a wide range of state and federal government entities, including Kansas agencies, federal agencies, sister state agencies, Native American Tribes, and private entities, regarding a wide range of issues, from (for example) economic development to flood control. See K.S.A. 12-2904(a). Interlocal Agreements uniquely require Attorney General approval. K.S.A. 12-2904(g). This makes sense because Interlocal Agreements can include federal, tribal, and out-of-state agencies and may authorize the creation of a separate legal entity.

In contrast, the Legislature adopted K.S.A 12-2908 to streamline contracts between Kansas municipalities without Attorney General Approval or K.S.A. 12-2904(d)'s other requirements. See Appellant Br. at 23-24 (analyzing plain language and legislative history). Though the scope of

activities covered by K.S.A. 12-2904 and K.S.A. 12-2908 contracts overlap to some degree, only municipalities can use the simplified contracting process under K.S.A. 12-2908.

Notably, the Legislature included a duration requirement in K.S.A. 12-2904(d) but omitted one in K.S.A. 12-2908. Compare K.S.A. 12-2904(d)(1) with K.S.A. 12-2908. This conspicuous omission in K.S.A. 12-2908 should be presumed to be intentional. See *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452, 122 S. Ct. 941, 151 L. Ed. 2d 908 (2002) ("[W]hen 'Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'"). Accordingly, the Legislature gave cities broad authority to contract with each other pursuant to K.S.A. 12-2908 without imposing a fixed duration. See 10A McQuillin Mun. Corp. § 29:104 (3d ed.) ("The fact that a city's contract is by its terms perpetual does not make it void as against public policy, where it is made pursuant to statutory authority delegated to the municipalities, and the statute contains no limitation with respect to length of time for which an agreement may be made.").

CONCLUSION

The Contract is valid, enforceable, and binding against successive governing bodies because it is authorized by statute, the Kansas Constitution,

and common law. Attorney General approval under K.S.A. 12-2904 is not required for the Contract to be enforceable. For these reasons, Olathe asks this Court to dismiss Spring Hill's cross-appeal, reverse the dismissal of Olathe's lawsuit, reverse the order denying the temporary injunction, enter an injunction under K.S.A. 60-262(f), and remand to the district court for remedies consistent with this Court's Order.

APPENDIX

1. *Leavenworth Cty. Bd. of Cty. Commissioners v. Copeland*, No. 120,616, 2020 WL 4379132 at * 3 (Kan. Ct. App. 2020) (unpublished opinion).

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EXHIBIT 1

467 P.3d 540 (Table)
Unpublished Disposition
This decision without published opinion is referenced in the Pacific Reporter.
See Kan. Sup. Ct. Rules, Rule 7.04.
NOT DESIGNATED FOR PUBLICATION
Court of Appeals of Kansas.

LEAVENWORTH COUNTY BOARD OF COUNTY COMMISSIONERS, Appellee,

v.

Tamara COPELAND, Appellant.

No. 120,616

Opinion filed July 31, 2020

Appeal from Leavenworth District Court; Edward E. Bouker, judge.

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Before Buser, P.J., Atcheson, J., and Walker, S.J.

MEMORANDUM OPINION

Atcheson, J.:

*1 In 2016, the Leavenworth County Board of Commissioners approved a five-year employment contract with Tamara Copeland, who then served as the county's human resources director. After a change in commissioners, the board filed an action in the Leavenworth County District Court to have the contract declared void. The board later terminated Copeland, and she counterclaimed to enforce the contract's exceptionally generous severance package. The district court found the contract to be unenforceable as a legally impermissible attempt by one elected composition of the board to bind a later composition of that board. Copeland has appealed. The district court correctly applied settled Kansas law to undisputed material facts in granting the board's motion for summary judgment. We, therefore, affirm the decision.

Factual History, Procedural Progression, and Standard of Review

Given the controlling issue and the governing law, much of the convoluted factual history leading up to this litigation and the progression of the legal battle itself fade into the background. We dispense with what have become extraneous details to provide a focused overview, recognizing the parties are familiar with what we have omitted from this narrative. Because the standards for granting and reviewing summary judgment shape how we must view the relevant facts, we begin there.

A party seeking summary judgment has the obligation to show the district court, based on appropriate evidentiary materials, there are no disputed issues of material fact and judgment could, therefore, be entered in that party's favor as a matter of law. *Trear v. Chamberlain*, 308 Kan. 932, 935-36, 425 P.3d 297 (2018); *Shamberg, Johnson & Bergman, Chtd. v. Oliver*, 289 Kan. 891, 900, 220 P.3d 333 (2009). In essence, the party submits there is nothing for a jury or a district court judge sitting as fact-finder to decide that would make any difference. Conversely, the party opposing summary judgment must point to record evidence calling into question a material factual representation made in support of the motion. *Trear*, 308 Kan. at 935-36; *Shamberg*, 289 Kan. at 900. When a party has identified disputed material facts, the motion should be denied in favor of a trial to permit a judge or jury to resolve those disputes after hearing witnesses testify and reviewing any relevant documentary evidence.

In ruling on a motion for summary judgment, the district court must view the evidence most favorably to the party opposing the motion, here Copeland, and give that party the benefit of every reasonable inference that might be drawn from the evidentiary record. *Trear*, 308 Kan. at 935-36; *Shamberg*, 289 Kan. at 900. An appellate court applies the same standards in reviewing the entry of a summary judgment. Because a summary judgment presents a question of law—it entails the application of legal principles to uncontroverted facts—an appellate court owes no deference to the district court's decision to grant the motion, and review is unlimited. See *Adams v. Board of Sedgwick County Comm'rs*, 289 Kan. 577, 584, 214 P.3d 1173 (2009). In making that review here, we consider the factual record to Copeland's best advantage as the party that opposed summary judgment.[1]

*2 [1]The district court judges regularly sitting in the First Judicial District, which includes Leavenworth County, recused themselves from this case. Senior Judge Edward E. Bouker, who sat in the Twenty-Third Judicial District before his retirement, was assigned to hear this case.

Factual Background and Procedural History

The board hired Copeland as the human resources director in late May 2015 with a one-year contract that included severance pay for six months if she were terminated other than for reasons that did not amount to good cause. She and the board agreed to a three-month extension of the contract while they negotiated a new employment agreement. As the record indicates, the human resources director is hired and fired by and reports directly to the three-member board of commissioners. During the contract negotiation in 2016, the commissioners were Robert Holland, Clyde Graeber, and Dennis Bixby.

The new contract came before the board at its September 1, 2016 meeting, for public consideration. By then, Bixby had been defeated in the primary election and had to go off the board in January 2017. As negotiated, the contract recited a five-year term. But other provisions of the agreement indicated a term beginning on September 1, 2016, and ending on December 31, 2021. The discrepancy is irrelevant here. The agreement outlined Copeland's job duties, salary, and fringe benefits, provisions that also do not bear directly on this legal dispute. The contract included a severance clause requiring the county to pay Copeland the balance of her salary for the remainder of the five year period, so long as she was "willing and able" to perform her work and had not been convicted of a felony or fraud "directly relating to her [job] duties."

According to the minutes of the September 1, 2016 board meeting, Holland offered remarks lauding what Copeland had achieved during her first year as human resources director as a justification for the new contract. But Holland also said "high level officials" he did not identify had tried to impugn Copeland's abilities and character because they opposed the changes; he described the contract as insulating her from continued attacks "in the next several years." The board approved the contract with Copeland on a 2-1 vote, with Graeber voting against the agreement. The minutes reflect Graeber saying he would have "no problem" extending Copeland's contract for a year but could not support the five-year contract and "the liability" some of the provisions created for the county.

Doug Smith, who defeated Bixby in the August primary and won the general election in November, joined the board in January 2017. Six months later, the board filed this action asking the district court to declare Copeland's contract unenforceable and to enter an order rescinding it. Copeland duly responded and asserted counterclaims for breach of the agreement and for tortious interference with a contract.[2]

[2]The board's petition sought similar relief against three subordinates of Copeland who also had individual employment contracts with the county. The claims involving those employees were resolved in some fashion during the district court proceedings. Those employees were dismissed as parties by agreement before the district court issued any substantive rulings on the merits of the contracts. The board and Copeland are the only parties to this appeal.

*3 In mid-September 2017, Graeber announced his resignation from the board effective September 28. Louis Kemp replaced him on October 12. Over the next three weeks, the board disbanded the human resources department, transferring those functions to the county clerk's office and later to the county administrator; placed Copeland on administrative leave and required the department employees to return their office keys and county credentials; and fired Copeland on October 30. The board took all of those actions on 2-1 votes over Holland's objection.

As the docket entries in the district court suggest, the parties vigorously litigated this case. In July 2018, the district court issued a detailed written decision finding the severance provision of Copeland's contract to be unenforceable as a legally improper restraint by one board on a successor board given the duration of the contract. The district court, however, requested additional submissions from the parties on several issues, including Copeland's counterclaim for tortious interference and the efficacy of the remainder of the employment contract. With that briefing, the district court issued a final summary judgment in December in another written decision that denied Copeland's counterclaim and found the entire employment contract to be unenforceable. Copeland has appealed the district court's rulings on the employment contract itself but not the denial of her counterclaim for tortious interference.

Legal Analysis

A. Limitation on Length of Municipal Contracts: The Simmons *Rule*

The Kansas appellate courts have long recognized that the elected members of a municipality's legislative body, such as a county commission, generally cannot enter into contracts that obligate the body beyond its current term. See *Edwards County Comm'rs v. Simmons*, 159 Kan. 41, 53-54, 151 P.2d 960 (1944); *Fisk v. Board of Managers*, 134 Kan. 394, 398, 5 P.2d 799 (1931). A municipal legislative body, thus, lacks the authority to make " 'a contract longer than [its] life' " where " 'no necessity exist[s].' " *Simmons*, 159 Kan. at 53 (quoting *Fisk*, 134 Kan. at 398). Absent necessity, the legislative exercise amounts to an impermissible attempt of the elected officials " 'to tie the hands of their successors.' " *Simmons*, 159 Kan. at 53 (quoting *Fisk*, 134 Kan. at 398). As those cases and the authority cited in them show, the rule reaches back deep into Kansas legal history. Although longevity is not necessarily veneration, the limitation on municipal authority continues to be observed. See *Kennedy v. Board of Shawnee County Comm'rs*, 264 Kan. 776, 792-93, 958 P.2d 637 (1998) (recognizing rule stated in *Simmons*); *Jayhawk Racing Properties, LLC v. City of Topeka*, 56 Kan. App. 2d 479, 499, 432 P.3d 678 (2018) (noting continued viability of rule and criteria in *Simmons*), *rev. granted* 309 Kan. 1348 (2019).

As *Simmons* suggests, the rule limiting the duration of a contract is not ironclad, and the court fashioned a test separating the permissible from the impermissible:

> "[W]hether the contract at issue, extending beyond the term, is an attempt to bind successors in matters incident to their own administration and responsibilities or whether it is a commitment of the sort reasonably necessary to protection of the public property, interests or affairs being administered. In the former case the contract is generally held to be invalid, and in the latter case valid." *Simmons*, 159 Kan. at 54.

A contract exceeding the elected body's term must be reasonable and consistent with sound public policy. *Simmons*, 159 Kan. at 54-55. The test has been cited with favor in *Kennedy*, 264 Kan. at 792, and *Jayhawk Racing*, 56 Kan. App. 2d at 498-99. What the courts outlined in *Simmons* and *Fisk* more than 75 years ago remains the governing law.

***4** If a legislative body violates the rule, it acts outside its authority, and the resulting contract is void. As an *ultra vires* municipal act, the offending contract has no binding force. It is a legal nullity. *Genesis Health Club, Inc. v. City of Wichita*, 285 Kan. 1021, Syl. ¶ 6, 181 P.3d 549 (2008); *Blevins v. Douglas County Bd. of Comm'rs*, 251 Kan. 374, Syl. ¶ 8, 834 P.2d 1334 (1992). Parties contracting with municipalities may not assert unjust enrichment, estoppel, or other equitable doctrines to obtain the benefit of the bargain from an *ultra vires* contract even if they have rendered their contractual performance. *Genesis Health Club*, 285 Kan. at 1042-43; see *Blevins*, 251 Kan. at 383-84.

B. Copeland's Five-year Contract Exceeded Board's Term

In applying those principles, we confront a gatekeeper issue: What is the "term" of a board of county commissioners? If it is more than five years, then the *Simmons* rule doesn't apply to the contract with Copeland. The district court concluded the term of the board could not be that long but declined to identify a specific period. We ultimately take the same approach and arrive at the same endpoint, although our path differs here and there.

We start with common ground. Each commissioner serves a four-year term. K.S.A. 2019 Supp. 19-202(d). The terms are staggered: Voters choose one commissioner in a given election year and the other two in the next election two years later, although that pattern may be altered when vacancies are filled between elections. K.S.A. 2019 Supp. 19-202(c). Over the course of four years, the voters elect all three commissioners. Those givens do not provide an obvious answer to the term of the board as a collective legislative body.

The parties and the district court all refer to K.S.A. 19-219, which requires county commissioners to meet the second Monday in January of *each year* to choose a chair "for a term of one (1) year" to preside over meetings. The balance of the statute discusses selection of a substitute if the elected chair is absent for a particular meeting or if he or she leaves the board during the year. Although we do not ultimately decide the point, we doubt K.S.A. 19-219 defines the term of a board of commissioners. The statute really drives nothing more than an internal administrative decision of the board members to select one of their own to preside over meetings and sets a one-year term for the presiding commissioner. The selection of a chair amounts to a bureaucratic function divorced from the makeup of the board itself or its authority to conduct the business of the county, attributes that do bear directly on what might fairly be considered the board's term.

We think the term of a municipal legislative body necessarily ties to the election cycles for the body, since the voters effectively pass on the makeup of the body. For a three-

member county commission, the term of the body would be either two years, corresponding to each election cycle regardless of the number of seats on the ballot, or four years, corresponding to the period for all of the seats to have been on a ballot. Four years also replicates the term of office, arguably lending weight to the longer period. We don't see the appointment of a replacement for a commissioner leaving office before completing his or her term as triggering a new term for the body. See K.S.A. 2019 Supp. 19-203(a) (statutory procedure for filling commission vacancy). That would render the body's term unpredictable and arbitrary. Likewise, the voters' decision to return incumbents to office wouldn't extend the body's term for precisely the same reason.

***5** The term of a county commission necessarily must be a fixed, knowable period. But the parties have pointed us to nothing definitively declaring the term, and we have fared only marginally better in our own search. Discussion in *Shelden v. Board of Commissioners*, 48 Kan. 356, 358, 29 P. 759 (1892), and repeated in *Board of Commissioners v. Smith*, 50 Kan. 350, 355, 32 P. 30 (1893), favors the idea that a board is reconstituted each election cycle, meaning the applicable term here would be two years. But we choose not to read those cases as controlling precedent, given the constitutional and statutory changes in the composition, terms of office, and other mechanics governing county commissions in the interceding century and a quarter.

In short, we think the term of the board probably was either two years or four years and under no circumstances more than four years. Since we have no need to refine the determination to decide this case, we decline the opportunity. The five-year contract the board approved for Copeland exceeded the body's term and, therefore, was subject to the rule outlined in *Simmons*.

In an effort to avert that conclusion, Copeland suggests the board had no fixed term as a legislative body because one and possibly two positions would not be on the ballot in a given election cycle, so there always would be at least one carryover commissioner from election to election. According to Copeland, the board would have a perpetual or infinite term as a result. We find the suggestion improbable. Although counties and cities, as political subdivisions of the state, have continuing and uninterrupted corporate existences, that's materially different from suggesting the elected legislative body itself operates in perpetuity unless all of its members stand for election at one time. Distinguishing legislative bodies that way because some have staggered terms of office and others don't makes no particular sense. We are disinclined to impute arbitrariness or irrationality to a common-law rule by reading into it something our predecessors have not expressly identified as one of its components.

Similarly, were the *Simmons* rule constrained in the way Copeland suggests, the *Kennedy* court presumably would have said so and relied on that ground for rejecting the contract argument made against Shawnee County in that case. The court did not and, instead, outlined and applied *Simmons* in rejecting the contract claim. *Kennedy*, 264 Kan. at 792-93. Finally, there apparently could be a sequence of vacancies and replacements between elections on a three-member county commission resulting in all three positions being on the next following general election ballot. See K.S.A. 2019 Supp. 19-202(a). The possibility, though remote, also undercuts Copeland's argument.

C. Applying the Simmons *Rule to Copeland's Contract*

We, therefore, should apply the test laid down in *Simmons* to the five-year employment contract the board entered into with Copeland. The test does not impose a categorical rule prohibiting all contracts exceeding a board's term. The limitation focuses on contracts "incident to" the board's "own administration and responsibilities." *Simmons*, 159 Kan. at 54. The hiring of a county department head answerable directly to the board falls within that rule. And the conclusion is only redoubled here, since Copeland oversaw personnel practices and decisions. Those are distinctly administrative functions tied most immediately to the internal operation of the county. The hiring of executive level employees who implement the board's decisions on—and, indeed, its vision of—how the county will operate as a governmental entity cuts to the core of the sort of administrative functions and responsibilities embraced in the *Simmons* rule.

***6** By contrast, contracts excepted from the rule secure public property or are necessary for the promotion of broad policies or programs directly improving the services delivered to the citizenry at large. The county typically contracts with third parties to accomplish those objectives. The cases offer illustrative examples that demonstrate by counterpoint why the rule applies to the contract with Copeland.

So the City of North Newton, a comparatively small municipality, could lawfully enter into a 15-year contract with the City of Newton to use the latter's sewage treatment system. See *City of North Newton v. Regier*, 152 Kan. 434, 438, 103 P.2d 873 (1940). The benefit to the residents of North Newton

seems manifest: They received a vital service without having to make the capital investment in a treatment facility. The duration of the contract was reasonable, given the effort and expense to install the required collection pipes. And North Newton paid for the service based on a fee schedule tied to usage. More recently, the Kansas Supreme Court upheld a five-year contract between Gove County and a private entity to provide trash collection because the service was vital to the public health and welfare and the arrangement avoided significant costs to purchase trucks and hire employees to pick up and dispose of trash throughout the county. See *Zerr v. Tilton*, 224 Kan. 394, 400, 581 P.2d 364 (1978).

The contract in *Simmons* also promoted a public interest, although, perhaps, in a less direct way. There, the board hired a private lawyer on a contingent fee basis to pursue delinquent taxes from a railroad in receivership with the expectation the litigation would be protracted and time consuming and any recovery uncertain. The court recognized that the contract exceeded the board's term but found it to be appropriate and enforceable, emphasizing that lawyers employed to handle extended litigation, such as the receivership action, "cannot reasonably be said ... [to] lose all authority to act the moment the term of the contracting board expires, regardless of the status of matters pending." *Simmons*, 159 Kan. at 54.

As those cases show, boards properly entered into contracts extending beyond their terms to provide essential services, such as sewage treatment and trash collection, through outside parties, when the arrangements were fiscally responsible and otherwise reasonable. The contract for legal services in a particularly involved piece of litigation similarly advanced an objective public benefit by both ensuring continuity of representation and curtailing ongoing costs through a contingent fee.

The employment contract with Copeland, as a department head reporting directly to the board, rests on demonstrably different footing. The five-year contract intruded directly and deeply into the board's administration of county operations, most particularly personnel policies and practices. The severance provision compounded the impermissible intrusion. A future board would face a material economic detriment in terminating Copeland, since she was to receive her full salary and fringe benefits for the duration of the contract. And she would have to be replaced or her duties delegated to other county employees presumably already working at capacity. When Holland urged his fellow board members to approve the contract, he touted the arrangement, in part, because Copeland "needs our protection from those that may still want to try to fire her in the next several years because of the work she is doing for the County." If Copeland were to be terminated, it would be a future board that would do it. That's precisely how things played out in October 2017. Holland, thus, promoted the contract as a means of tying the hands of a successor board.

*7 The United States Court of Appeals for the Tenth Circuit recognized a corollary to the *Simmons* rule for certain employment contracts and upheld a three-year agreement the Kansas Turnpike Authority's board made with John E. Kirchner, its preferred candidate to be the agency's general manager. *Kirchner v. Kansas Turnpike Authority*, 336 F.2d 222, 228-29 (10th Cir. 1964). The court cited *Simmons* and other Kansas cases generally limiting the duration of a contract with a governmental entity to the term of the entity's board. And the court acknowledged a potential problem with the contract because a majority of the positions on the appointed KTA board would turn over within three years.

The court held the contract with Kirchner to be valid because the three-year term was itself reasonable and likely necessary to secure the services of a qualified candidate at an acceptable salary. Those prospects would have dimmed considerably if the offer were for an at-will arrangement—all to the disadvantage of the agency. 336 F.2d at 228-29. The court pointed out that Kirchner's predecessor worked under a similar contract with a three-year term and the Kansas Attorney General's office had issued an opinion affirming the board's ability to hire a general manager for such a term. According to the court, those circumstances cut against any "ulterior motives" by the board to subvert a future board's authority. 336 F.2d at 228.

Not surprisingly, Copeland tries to fit her contract within the confines of the *Kirchner* exception. We assume that twist on the *Simmons* rule is consistent with and ought to be engrafted to Kansas law. A federal court opinion is not, however, a binding declaration of state law. *KPERS v. Reimer & Koger Associates, Inc.*, 262 Kan. 635, Syl. ¶ 12, 941 P.2d 1321 (1997). But even with that assumption, Copeland's effort fails. First, of course, Copeland accepted the position as human resource director with a one-year contract. We gather the board had reorganized how the county handled personnel functions, and Copeland was the first to occupy the newly created position of human resources director. But nothing in the record supports the notion that a five-year contract was

essential for attracting or retaining well-qualified candidates for the job.

In the same vein, Copeland argues that the contract conferred a public benefit because under her direction, with the support of the board that brought her in, the county moved from personnel processes rooted in cronyism to ones based on merit with some civil service protections for some employees. And Copeland characterizes her ouster as part of the new board's plan to return to a less-than-professional system apparently affording the commissioners considerable say-so in who would get what jobs with the county. Holland also suggested the county realized cost savings through an improved payroll system and other bureaucratic changes. The appellate record is skimpy on evidence establishing those claims. Still, taking them as facially accurate, they don't establish a tenable legal basis for upholding the contract, especially given its duration and severance provision.

Improvements to internal personnel functions, like payroll, don't reflect the sort of core public services warranting extended contractual commitments upheld in *City of North Newton* and *Zerr*, even if they may be more efficient or less expensive. Although each member of this panel may have a general preference between patronage and civil service systems for local governments, we would overstep our judicial prerogative to treat one as inherently and inestimably good and the other as similarly bad in deciding this case. Given the limited record and the absence of evidence the county has engaged in impermissible hiring or other personnel practices based on political affiliation or protected characteristics such as race or sex, our choice would be a generic one intruding upon the board's legislative authority. In short, Copeland's generalized claim that she and Holland were advancing the cause of good government doesn't save her contract.

D. Copeland Identifies No Factual Disputes Precluding Summary Judgment

***8** Copeland suggests summary judgment was inappropriate because there remain disputed facts bearing on the board's intent in entering a five-year contract with her and the question of intent is material to the outcome. But Copeland doesn't point to specific disputes in the summary judgment papers or the supporting evidentiary materials submitted to the district court. We are not obligated to scour the record for some particular factual dispute that may be material simply because the party losing on summary judgment generally asserts there must be one.

The record does show the board had the intent to contract with Copeland to remain as the human resources director for five years; that's apparent from the agreement itself. The contract facially appears to violate *Simmons*—it exceeds a term of the board and simply retains a high-level county employee answerable directly to the board in excess of that term. We understand Copeland to be arguing, in part, that there are factual disputes about why the board (or more precisely Holland and Bixby) believed a five-year contract served a beneficial public purpose or was necessary in a way fitting it within an exception to the *Simmons* rule.

In opposing the county's motion for summary judgment, Copeland offered evidence to the district court bearing on the board's reasons or motives for the contract. She says there may be disputes about that evidence requiring a jury trial. But we have considered that evidence in the best light for her, consistent with the proper standard of appellate review, and found it insufficient to bring the contract within an exception to *Simmons*.

As Copeland suggests, a jury could consider and resolve conflicts in the material evidence. In doing so, the jury might weigh the evidence *against* Copeland on some of those points. But we have resolved any possible conflict *in favor of* Copeland—the best she could possibly do in front of a jury. Even in that light, she has failed to establish sufficient legal grounds to warrant enforcement of the contract. Accordingly, the existence of such a factual dispute would not preclude the district court from entering summary judgment against Copeland or us from affirming that ruling. See *Estate of Belden v. Brown County*, 46 Kan. App. 2d 247, 276, 261 P.3d 943 (2011) (Summary judgment may be entered on what is normally a fact question for a jury when the evidence taken in the best light for the nonmoving party fails to establish a basis for the jury to return a verdict for that party.).

We have defused Copeland's argument by assuming away any conflict by considering the factual record entirely in her favor. We, therefore, have no reason to reverse the summary judgment simply because there might have been material factual disputes.

E. Severability

Finally, Copeland argues that the clause in the contract fixing the term at five years may be severed or excised and the remainder of the agreement enforced. The argument misapprehends the *Simmons* rule. If the rule applies (and we

have determined that it does), then the contract is void as an *ultra vires* exercise. The board did something it has no legal authority to do. As we have said, the result is a legal nullity. Just as equitable doctrines will not protect a party contracting with the municipality from the adverse consequences of the agreement being declared void, a district court may not sever the offending portion of the contract or reform its terms to resuscitate the bargain. Simply put, if a contract with a municipality is void under *Simmons*, there is nothing that can be manipulated into a viable agreement. See *Blevins*, 251 Kan. at 383-85. The impact on the party contracting with the municipality is undeniably harsh, and that party's protection lies in assessing the municipality's authority to act before entering into the arrangement. 251 Kan. at 385.

***9** In fashioning her argument, Copeland first points to the severability clause in the contract. The clause states that if a court were to find "any provision ... of this agreement ... to be invalid, the remaining terms shall remain in full force and effect." But the clause does not apply here. Because the contract was void as a violation of the *Simmons* rule, none of its terms ever became effective. So there was nothing that could remain in effect. By way of a contrasting example, suppose a city entered into a service contract with a private party that included a forum selection clause requiring any suit for a breach be filed in that city's municipal court. Municipal courts in Kansas don't have the authority to hear civil actions, such as breach of contract claims. If the contracting party sued the city in the district court and the city objected, the district court could find the forum selection clause invalid and enforce the remainder of the agreement. The ineffective forum selection clause would not taint the rest of the otherwise valid contract. Here, however, the contract's legally impermissible duration contaminated every aspect of the agreement.

Copeland cites *Gilhaus v. Gardner Edgerton Unified School Dist. No. 231*, 138 F. Supp. 3d 1228, 1239-40 (D. Kan. 2015), as supporting a different conclusion. In that case, several school district employees sued the district and other defendants under both federal civil rights law and Kansas law, and the federal district court denied defendants' motion to dismiss on the grounds the complaint failed to state claims upon which relief could be granted. As to a state law contract claim, the court held that if a "post-employment benefits clause" in School Superintendent William Gilhaus' contract exceeded the school board's "authority," it could be severed, and the remainder of the agreement could be enforced. The court cited cases relying on general contract principles governing severability. And the court also determined the contract did not impermissibly bind future school boards because various provisions merely allowed those boards to freely exercise or decline options. 138 F. Supp. 3d at 1138-39. So the court recognized the contract as a whole to be viable rather than void. The court was not addressing a legal circumstance it would consider analogous to this one. Nor do we see them that way. In turn, the court's treatment of severability is inapposite to Copeland's situation. If they were legally comparable, we would find the court's willingness to sever portions of the contract to be inconsistent with *Simmons* and *Blevins* and their specific treatment of *ultra vires* municipal contracts.

Copeland alternatively argues the district court in this case could have treated the contract as one for a year, paralleling the original agreement, and, thus, replacing the offending five-year term. This alternative solution suffers from multiple problems. Again, the five-year contract was void, so there was nothing to reform or revise. Even if there were, the district court would have been imposing a contract term on the parties that bore no relationship to their actual intent or the resulting written agreement. Typically, courts cannot and do not rewrite the parties' contract to insert new or different terms. See *Fourth Nat'l Bank & Trust Co. v. Mobil Oil Corp.*, 224 Kan. 347, 353, 582 P.2d 236 (1978) ("It is not the function of the courts to make contracts but to enforce them."); *Lindsey Masonry Co. v. Murray & Sons Construction Co.*, 53 Kan. App. 2d 505, 533, 390 P.3d 56 (2017) (Atcheson, J., concurring) ("[C]ourts typically cannot make contracts for the parties by imposing essential terms that the parties themselves have failed to agree upon.").

In addition, as the County points out, a one-year term would not have helped Copeland. The board adopted the contract on September 1, 2016, and she signed it the same day. The successor board first voted to take some arguably adverse action against Copeland inconsistent with the contract on October 12, 2017, and voted to fire her on October 30. Copeland's hypothetical one-year contract would have expired by then. Just what their employment relationship would have been at that stage isn't entirely clear, but the contract itself would not have governed. Copeland's suggestion of a one-year contract doesn't stave off summary judgment.

Conclusion

***10** Having considered the parties' arguments and authority and having examined the summary judgment record, we find

no legal or factual errors in the district court's determination that the five-year contract between the board and Copeland is void and, thus, unenforceable as a matter of law.

Affirmed.

All Citations

467 P.3d 540 (Table), 2020 WL 4379132

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CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing Appellant's brief was served on the counsel of record by notice of electronic filing on the 25th day of March 2022 with a copy of the same foregoing document being served via electronic mail upon:

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