NOT DESIGNATED FOR PUBLICATION

No. 108,127

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

SARA LOU SILKS and LOUIS ALFRED SILKS, III,
Appellants,

v.

SARAH J. GNAEGY, Individually and as Personal Representative of the ESTATE OF LOUIS ALFRED SILKS, JR.,
Appellees.

MEMORANDUM OPINION

Appeal from Johnson District Court; GERALD T. ELLIOTT, judge. Opinion filed February 15, 2013. Reversed and remanded.

Michael S. Martin, of Westwood, for appellants.

John Ivan, of Law Offices of John Ivan, of Shawnee Mission, for appellees.

Before ARNOLD-BURGER, P.J., GREEN, J., and HEBERT, S.J.

Per Curiam: Louis Alfred Silks, Jr. (Silks) and Nona Ruth Silks (Nona) divorced in 1976. At the time, they had three grown children, Susan, Sara, and Louis. Susan was disabled. The property settlement entered as part of their divorce provided that the parties would execute wills within 30 days of the agreement devising or bequeathing all of their real and personal property that was part of the settlement agreement in equal shares to their children. It also provided that the parties could establish priority as to one of more of the children to insure that Susan's future needs could be met. They further agreed to exchange any future wills they may execute within 10 days of execution.

When Silks died, 34 years later, his will bequeathed half of his estate to his daughter, Susan, and half to his friend, Sarah Gnaegy. Sara and Louis (collectively Plaintiffs) sued Silks' estate and Gnaegy, the personal representative of his estate (collectively Defendants), for breach of contract and unjust enrichment. The district court dismissed their petition for failure to state a claim, and they appeal. Because we find that the district court improperly considered evidence outside the petition and drew inferences against, as opposed to in favor of Plaintiffs to resolve material disputed facts, we reverse and remand for further proceedings.

FACTUAL AND PROCEDURAL HISTORY

The dispute centers on a property settlement agreement Plaintiffs' parents reached in 1976.

Plaintiffs' claims stem from the following provision of a property settlement agreement (Agreement) their parents reached in 1976 in their divorce action:

> "Each of the parties shall receive as their sole and separate properties, free and clear of all right, title or interest of the other, the real and personal properties shown and indicated on the attached 'Exhibit A' [which included lake properties in Missouri, rental properties, Silks' law practice, and other real properties in Johnson County, Kansas, that were set aside to Silks] . . . . Each of the parties shall receive such properties so designated and be free to sell, encumber or divest for their own personal needs, investments or enjoyment during their respective lifetimes, however, each of the parties agrees not to dispose of any material part of the properties designated and received hereunder without receiving in return valuable consideration therefor. *It is further agreed that each of the parties will execute within thirty (30) days hereafter separate wills devising and bequeathing all of their real and personal properties hereunder in equal shares (subject to conditions hereafter stated) to their natural children,* SUSAN A. COOK, LOUIS A. SILKS, III, and SARA LOU SILKS, *per stirpes*, provided, however, either party shall have the right to make intervivos gifts or transfers of their properties received hereunder to one or more of

> said children and to establish intervivos or testamentary trust or trusts to which part or all of the properties received hereunder may be conveyed. It is further agreed that either party may by will, gift or trust establish priority as to one or more of such children in the extent of the benefits to be received by such children as circumstances in the future may require and to insure in the future that the needs of their daughter, SUSAN A. COOK, [who is disabled,] can be best provided. . . . Finally, *each party hereto agrees to provide the other with copies of all wills, trusts, agreements, or any other testamentary documents whether specifically referred to herein or not, into which they may enter, within ten (10) days after the execution of any such document.*" (Emphasis added.)

All three children were adults when their parents reached this Agreement, which was incorporated into the final divorce decree.

After Silks died in 2010, Plaintiffs learned he had specifically disinherited them in his will executed in 1997 and divided his estate (valued at more than $2.9 million) equally among Gnaegy and their disabled sister, Susan.

The children sued for their father's breach of the Agreement.

Three months later, Plaintiffs filed the lawsuit at issue in this appeal to challenge Silks' bequeathal to Gnaegy. Allegations in their petition include the above-summarized details of the language of the Agreement, Silks' death, and the terms of his will submitted for probate. Plaintiffs also made the following pertinent allegations in support of their two claims in their petition:

"Count I – <u>Breach of Contract</u>

. . . .

"26. The provisions of the Agreement were intended for the direct benefit of Plaintiffs . . . , who are two of the three children of [Silks] and [Nona].

. . . .

"29. [Silks] breached the Agreement by failing to bequeath the property he received pursuant to the Agreement to his children and by bequeathing one-half of his estate to Sarah J. Gnaegy.

"30. [Nona] was in full compliance with the terms and provisions of this Agreement at the time of her death and, on information and belief, [Silks] had done nothing to otherwise satisfy the requirements of the Agreement.

. . . .

Count II – Unjust Enrichment

. . . .

"33. [Silks] accepted and retained the benefit of the property received pursuant to the Agreement and the Decree. Had he not agreed to these terms, he would have received a significantly smaller portion of his marital estate at the time of the dissolution proceedings.

"34. It is inequitable and unjust that [Silks] should receive and retain the benefit of the property without honoring the Agreement to make and execute a will for the benefit of his three children or otherwise provide for them."

Defendants moved to dismiss for failure to state a claim.

Defendants moved to dismiss Plaintiffs' petition for failure to state a claim under K.S.A. 2011 Supp. 60-212(b)(6). Though they raised several alternative grounds for dismissal, at issue here is their argument that the 5-year statute of limitations had long ago expired on the breach of contract claim. In support, Defendants argued Silks breached the Agreement either by executing his will contrary to the Agreement in 1997 or by failing to exchange the contemplated will with Nona within 30 days of entering the Agreement.

In their response, Plaintiffs argued the breach that commenced the running of the statute of limitations did not occur until Silks died because the primary purpose of the Agreement was to provide a death benefit to the children, not just to execute and exchange wills. Alternatively, Plaintiffs argued any *presumed* failure of their parents to insist that the other produce a copy of executed wills would indicate either a waiver or partial breach of a nonessential provision of the Agreement, neither of which would trigger the running of the statute of limitations.

Plaintiffs appeal from the district court's order granting Defendants' motion to dismiss and denial of their motion to alter or amend that order.

Following a nonevidentiary hearing, the district court granted Defendants' motion to dismiss on three grounds. The first two grounds were alternative to one another and based on the court's finding that Plaintiffs' parents failed to execute and exchange wills within 30 days of the divorce decree. First, the court held that if that failure is construed as a breach of the Agreement, then it triggered the running of the 5-year statute of limitations on Plaintiffs' breach of contract claim. Consequently, the court held the time to sue on that contract had long ago expired in 1982, or 5 years and 30 days after the divorce decree was signed. Alternatively, citing to Plaintiffs' partial-waiver argument

based on the presumption that wills were not exchanged, the court held that if the failure to execute and exchange wills is construed as a "waiver of the provision," then plaintiffs cannot enforce "the waived provision." Third, the court ruled that, as a result of its first two conclusions, Plaintiffs' alternative claim for unjust enrichment necessarily fails because when Silks executed his will in 1997, he was free to distribute his estate however he saw fit. Accordingly, the district court held as a matter of law that Plaintiffs cannot show Gnaegy's retention of the property bequeathed to her was unjust. Additional details of the court's judgment are discussed below where necessary to the analysis.

Plaintiffs moved to alter or amend the court's judgment. Highly summarized, they claimed the district court's decision incorrectly applied the standards that governed its decision on Defendants' motion to dismiss and incorrectly applied the law governing the statute of limitations and partial waiver. Plaintiffs urged the court to hold that any breach by their parents in failing to exchange wills did not trigger the running of the statute of limitations or amount to a waiver of the right to enforce the first, and primary, contractual promise to provide a death benefit.

After a hearing, the district court denied Plaintiffs' motion. In support, the court simply highlighted the fact that it was not obligated to make assumptions not supported by, or contrary to Plaintiffs' allegations in their petition. This timely appeal by Plaintiffs follows.

ANALYSIS

Plaintiffs contend that the district court's judgment is procedurally flawed because its legal conclusions are based on an improper resolution of material disputed facts that are unsubstantiated by the record, *i.e.*, the court improperly found that their parents did not execute or exchange wills within 30 days of the divorce decree.

The standard governing dismissal for failure to state a claim under K.S.A. 2011 Supp. 60-212(b)(6) is highly deferential to Plaintiffs.

In ruling on a motion to dismiss a petition for failure to state a claim under K.S.A. 2011 Supp. 60-212(b)(6), the court is required to determine whether Plaintiffs state any possible valid claim for relief when viewing the allegations in their petition in a light most favorable to them and resolving every doubt in their favor. See *Nungesser v. Bryant*, 283 Kan. 550, 559, 153 P.3d 1277 (2007); accord *Weaver v. Frazee*, 219 Kan. 42, 52, 547 P.2d 1005 (1976) (noting it is only when affirmative defenses, such as expiration of statutes of limitations, clearly appear on face of petition that it is subject to dismissal under 60-212[b][6] for failure to state claim). Importantly, "factual disputes cannot be resolved or decided on a motion to dismiss for failure to state a claim." *Rector v. Tatham*, 287 Kan. 230, 232, 196 P.3d 364 (2008).

Plaintiffs complain that the district court's decision must be reversed for violating this standard in two separate ways: because it resolved factual disputes based on its review of evidence outside the petition and because it erroneously drew inferences from their petition against them instead of in their favor. We address these arguments in turn.

The district court improperly considered facts outside the petition by sua sponte *taking judicial notice of two other court cases.*

First, Plaintiffs contend that the district court improperly considered documents and circumstances outside of Plaintiffs' petition in granting Defendants' motion to dismiss. In support, they properly point out that the court took judicial notice of proceedings in both Plaintiffs' parents' divorce action and in the proceedings to probate their mother's will following her death in 1996. The court also looked to allegations Plaintiffs made concerning the legal effect of any failure to exchange wills in their response to Defendants' motion to dismiss. According to Plaintiffs, this procedure

employed by the district court, alone, constitutes reversible error because "[t]he case was decided on the motion to dismiss, not a motion for summary judgment submitted under Supreme Court Rule 141."

Defendants answer that the court properly took judicial notice of pleadings filed in the probate and divorce proceedings under K.S.A. 60-409. Although they cite *Catholic Housing Services, Inc. v. State Dept. of SRS*, 256 Kan. 470, 478, 886 P.2d 835 (1994), in support, we find that case actually supports the opposite conclusion. In *Catholic Housing Services*, the Supreme Court found that there was no authority for a trial court to take judicial notice of factual conclusions reached by another court in another case. 256 Kan. at 478 (citing *Jones v. Bordman*, 243 Kan. 444, 759 P.2d 953 [1988]). Nonetheless, our Supreme Court found any error by the trial court in taking judicial notice of such conclusions was harmless because it had no effect on the outcome of the case. 256 Kan. at 479.

This holding is consistent with the clear language of K.S.A. 60-409. Judicially noticed divorce and probate proceedings do not fall under either of the categories of information that courts can, *sua sponte*, judicially notice under K.S.A. 60-409(a) and (b); and no request under K.S.A. 60-409(c) was found in the record for the court to take judicial notice of facts arising in these other proceedings. Moreover, neither of the court files from the probate or divorce proceedings are in the record on appeal, so this court has no way to independently assess the propriety of the judicially noticed facts.

We find that the district court improperly considered information outside the petition in ruling on a motion to dismiss, but that does not end our inquiry.

We review the court's decision as one for summary judgment.

Both parties' arguments overlook K.S.A. 2011 Supp. 60-212(d). That statute provides:

> "If, on a motion under subsection (b)(6) or (c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under K.S.A. 60-256, and amendments thereto. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion." K.S.A. 2011 Supp. 60-212(d).

So regardless of how the district court characterized its decision, we find that the district court's consideration of matters outside the petition does not warrant the automatic reversal Plaintiffs seek. Rather, the district court effectively converted the proceeding on Defendants' motion to dismiss to one for summary judgment under K.S.A. 2011 Supp. 60-256. Thus, this court must determine if the district court's decision can be affirmed under the standards governing summary judgments. See *Davidson v. Denning*, 259 Kan. 659, 666-67, 914 P.2d 936 (1996) (finding that while district court's decision did not expressly state that it considered defendants' motion to dismiss as summary judgment motion, the Court of Appeals properly treated it as such because "the court clearly considered matters beyond the face of the petition in granting the motion") (citing and *rev'd on other grounds Davidson v. Denning*, 21 Kan. App. 2d 225, 227-28, 897 P.2d 1043 [1995]); see also *Admire Bank & Trust v. City of Emporia*, 250 Kan. 688, 692-93, 829 P.2d 578 (1992) (holding trial court erred in not treating motion to dismiss for failure to state claim as motion for summary judgment because court's decision demonstrates it considered matters outside the pleadings but concluding decision could be upheld on appeal as right for wrong reason if court's granting of motion to dismiss for failure to state a claim "withstands application of summary judgment standards").

We examine our standard of review governing summary judgment motions.

This means the well-known standard governing summary judgments applies. That standard, applicable at both the trial and appellate levels, provides that summary judgment is appropriate only where 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. *O'Brien v. Leegin Creative Leather Products, Inc.*, 294 Kan. 318, 330, 277 P.3d 1062 (2012). With regard to how any factual contentions are to be viewed or resolved, the summary judgment standard does not vary significantly from the standard applied on review of motions to dismiss for failure to state a claim. Under either standard, all facts and inferences that may reasonably be drawn from the evidence must be resolved in favor of the party against whom the ruling is sought (meaning Plaintiffs, here). Compare 294 Kan. at 330 (summary judgment), with *Nungesser*, 283 Kan. at 559 (dismissal for failure to state claim). Nonetheless, any factual disputes must be material to the conclusive issues in the case to avoid summary judgment. *O'Brien*, 294 Kan. at 330. As the parties asserting the affirmative defense of statute of limitations as a ground for dismissal, Defendants bore the burden of pleading and proving its applicability. See *Admire Bank & Trust*, 250 Kan. at 693. If reasonable minds could differ as to the conclusions drawn from undisputed material facts, then summary judgment is inappropriate. 294 Kan. at 330.

The district court erred by drawing inferences against, as opposed to in favor of, Plaintiffs to resolve material disputed facts.

Applying these standards here, we turn to Plaintiffs' second argument in support of reversal of the district court's decision. Plaintiffs complain the district court erroneously drew inferences against them, as opposed to in their favor, to find that their parents mutually failed to execute and exchange wills within 30 days of the divorce decree. They

contend that without the inferences or assumptions drawn by the court to improperly resolve these material disputed facts, the court's legal conclusions necessarily fail.

Defendants respond that Plaintiffs are merely attempting to "manufacture disputed facts." Defendants insist the challenged inferences (discussed below) were not improper because the district court was not bound by Plaintiffs' conclusory allegations about *the legal effect* of their parents' failure to execute and exchange wills within 30 days of the entry of the divorce decree. In support, Defendants cite *Hemphill v. Shore*, 44 Kan. App. 2d 595, Syl. ¶ 1, 239 P.3d 885 (2010), *aff'd in part, rev'd in part* 295 Kan. 1110, 289 P.3d 1173 (2012), which noted that when reviewing a decision granting a motion to dismiss for failure to state a claim, "the appellate court is not required to accept conclusory allegations as to the legal effects of the events if the allegations are not supported or are contradicted by the description of events."

Both parties appear to be at least partially correct. Defendants are correct in pointing out the district court did not have to accept Plaintiffs' position on the *legal effect* of any waiver or partial breach. Plaintiffs, however, correctly respond that the district court did not limit itself to determining the legal effect of undisputed facts.

The district court drew several inferences against Plaintiffs, as opposed to in a light most favorable to them to find that neither parent executed or exchanged wills within 30 days of the divorce decree. For example:

- The court looked to Plaintiffs' parents' divorce case and took judicial notice of the fact that the parents had utilized the divorce court's continuing jurisdiction to enforce other provisions of their property settlement agreement. The court then implied from those circumstances that Plaintiffs' parents "were aware of their ability to enforce their mutual obligation to execute and exchange wills" within 30 days. Viewing these circumstances in a light most favorable to Plaintiffs, however,

the court might have instead implied the converse, *e.g.*, that Plaintiffs' parents had complied with the execute-and-exchange requirements at issue here, rendering it unnecessary for them to file motions to compel in the divorce proceeding. Or the court could have found the parents recognized that they could not enforce the contract until the other died and actually violated it.

- The court inferred from the fact that Silks was an attorney (as Plaintiffs stated in their petition) and Nona was represented by counsel during their divorce proceedings that Plaintiffs' parents "knowingly" and "purposefully" included the 30-day time period for performance in their property settlement agreement. Without drawing these inferences against Plaintiffs, however, there is nothing in the record to conclusively establish Plaintiffs' parents' intent in including this time for execution of a will in the Agreement.

- The district court took judicial notice of the probate proceedings conducted following Nona's death in 1996 to find that Nona's will admitted for probate was executed in December 1992. Neither party disputes this fact. Plaintiffs do, however, dispute the court's inference that this was Nona's *only* will, so she was not in compliance with the Agreement, either. That inference directly contradicts Plaintiffs' allegation that Nona was in full compliance. And it does not necessarily follow that Nona's and Silks' wills ultimately submitted for probate after they died were their *only* wills.

- The court also made several improper negative inferences from what Plaintiffs did not allege in their petition. For example, the court highlighted the fact that Plaintiffs did not allege that either parent executed the contemplated will within 30 days. Looking then to Plaintiffs' allegations in their petition that: (1) Nona was "'in full compliance with the Agreement *at the time of her death*'"; and (2) Silks "'had done nothing to otherwise satisfy the requirements of the Agreement,'" the

court inferred that *neither* parent ever timely exchanged wills. Again, there might have been other wills, and it could instead be implied that Nona had complied with the Agreement all along, all the way up to the time of her death in 1996.

- The court also made several inferences based on Plaintiffs' argument in response to Defendants' motion to dismiss that suggested, if anything, their parents either waived the requirement to exchange wills, or they arguably breached only the nonessential provision requiring them to exchange wills. From this argument—which Plaintiffs now insist was merely a hypothetical legal theory—the court found, "[i]f the parties[] failure to exchange wills demonstrates a waiver of the obligation to exchange wills, their failure to timely execute the required wills is equally indicative of waiver."

Given these inferences, we agree with Plaintiffs and find the district court's decision is procedurally flawed. The court improperly resolved disputed facts concerning both the parties' actual conduct (or lack thereof) in complying with the Agreement, and the intent of Plaintiffs' parents in including the provision for willing the properties to their children. Because those disputed facts were material to the court's legal conclusions, neither dismissal for failure to state a claim nor summary judgment are appropriate. Accord *Brown v. United Methodist Homes for the Aged*, 249 Kan. 124, 134, 815 P.2d 72 (1991) (intent is normally question of fact); *Wichita Clinic v. Louis*, 39 Kan. App. 2d 848, 868, 185 P.3d 946, *rev. denied* 287 Kan. 769 (2008) (whether party breached contract is question of fact); *Lyons v. Holder*, 38 Kan. App. 2d 131, 138, 163 P.3d 343 (2007) (recognizing intent, in the context of waiver of contractual rights, can be inferred from conduct).

Accordingly, we reverse the district court's summary judgment for Defendants and remand for further proceedings. *Cf. Hecht v. First National Bank & Trust Co.*, 208 Kan. 84, 93, 490 P.2d 649 (1971) (recognizing converse notion, *e.g.*, that "[s]ummary

judgment may be proper on the affirmative defense of the statute of limitations where there is no dispute or genuine issue as to the time when the statute commenced to run"); *George v. W-G Fertilizer, Inc.*, 205 Kan. 360, Syl. ¶ 4, 469 P.2d 459 (1970) (recognizing that where there is conflicting evidence as to when cause of action is deemed to have accrued under K.S.A. 60-513 [which includes discovery provision not found here], matter becomes an issue for determination by trier of fact).

Reversed and remanded for further proceedings.