

NOT DESIGNATED FOR PUBLICATION

No. 108,064

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Marriage of:

INGRID A. CAMPBELL,
Appellee,

and

BOYD BURNETT,
Appellant.

MEMORANDUM OPINION

Appeal from Johnson District Court; THOMAS E. FOSTER, judge. Opinion filed March 8, 2013.
Affirmed.

Boyd Burnett, appellant pro se.

Jacquelyn P. Bernhardt, of Short, Borth & Thilges, Attorneys at Law, L.L.C., of Overland Park,
for appellee.

Before ATCHESON, P.J., PIERRON, J., and LARSON, S.J.

Per Curiam: This is Boyd Burnett's appeal from the district court's order denying his motion for accounting of the disbursement of a \$96,000 cash bond he filed to stay execution of judgments pending from prior appeals in this case.

Burnett further challenges the district court's decision to allow postjudgment interest to be paid out of his bond.

The third issue before us is whether Ingrid A. Campbell is entitled to recover all or part of her attorney fees incurred to respond to this appeal by Burnett under the Kansas divorce code and Supreme Court Rule 7.07 (2012 Kan. Ct. R. Annot. 66).

We will first answer the postjudgment interest issue, then the request for further accountings, and finally the attorney fee request.

FACTUAL AND PROCEDURAL BACKGROUND

This is the fourth time issues arising out of the divorce of Campbell and Burnett have appeared before our appellate courts.

We are confident the parties are completely familiar with all of the prior proceedings which we will refer to summarily and by reference to past appeals.

A 2000 marriage between the parties resulted in the birth of one child and an October 2004 divorce filing by Campbell. The divorce proceedings were protracted and highly contentious resulting in a 2006 divorce and a 2008 order regarding the marital residence after Burnett's interest had been assigned to Campbell in order to facilitate the residence's sale.

Burnett appealed from the order making the assignment; that appeal was docketed with this court as No. 101,542. Finding that Burnett's notice of appeal was untimely, we subsequently dismissed that appeal by order dated January 29, 2009. Burnett's petition for review was denied by the Supreme Court (hereinafter *Burnett I*).

Another hearing was held in February 2009 regarding the final distribution of the parties' remaining assets and payment of costs and fees. The court granted Campbell a judgment in excess of \$37,000 to complete the division of assets and liabilities of the

parties. The court also awarded Campbell nearly \$49,000 in costs and attorney fees. In April 2009, Burnett filed a timely notice of appeal, and the case was docketed in this court as No. 102,298 (hereinafter *Burnett II*).

Nearly a year after *Burnett II* was docketed, Campbell served a garnishment order on Burnett's bank seeking to collect the judgment subject to appeal. Burnett filed a motion with this court seeking leave to file a supersedeas bond and to quash the garnishment. Campbell opposed the motion noting Burnett's delay and contended his proposed appeal bond did not meet the standards of K.S.A. 60-2103(d). This court originally denied Burnett's motion. After Burnett filed a motion for reconsideration, we remanded the case for the limited purpose of determining the propriety and amount of a supersedeas bond.

Following the remand, the district court reviewed Burnett's request and found a supersedeas bond of \$96,000, with appropriately qualified corporate surety or sureties, would be required for the court to consider a stay of execution of the outstanding judgments. This journal entry was filed on April 29, 2010. Approximately 6 weeks later, Burnett filed a motion to file a cash bond in lieu of sureties. The court modified its order to allow Burnett to substitute a bond secured by \$96,000 in cash to be paid to the clerk of the court. The bond was conditioned on the standards set forth in K.S.A. 60-2103(d). The court denied ruling on Burnett's request regarding the accrual or computation of postjudgment interest on the underlying awards. The court also awarded Campbell \$750 in litigation expenses related to this motion. Burnett deposited a cashier's check in the amount of \$96,000 with the court in August 2010.

Our court, in a comprehensive 20-page opinion, affirmed the district court's orders regarding the sale of the marital home, the property division, and award of attorney fees. *In re Marriage of Campbell & Burnett (Burnett II)*, No. 102,298, 2010 WL 4393935, at *1 (Kan. App. 2010) (unpublished opinion), *rev. denied* 293 Kan. ____ (November 4,

2011). Our court's opinion acknowledged the district court's proper concerns that Burnett was deliberately prolonging and delaying the sale of the house and division of property. *Burnett II*, 2010 WL 4393935, at *2, *4, *6, *8-10. We also awarded a portion (\$23,483.25) of Campbell's attorney fees incurred in defending the judgment on appeal. *Burnett II*, 2010 WL 4393935, at *12.

Between October and December 2009, while the appeal in *Burnett II* was pending, Burnett filed various pro se motions with the district court. Two of these motions raised issues regarding the case manager's recommendations for parenting time and Burnett's request to change judge. The court denied these motions because (1) Burnett admitted he had received the parenting time requested, and (2) the recusal motion failed to comply with K.S.A. 20-311d. The court also granted Campbell's request for attorney fees in responding to the motions.

In March 2010, Burnett appealed from the district court's denial of his recusal and parenting time motions to this court; the appeal was docketed as No. 104,077 (hereinafter *Burnett III*). This court ultimately affirmed the district court's rulings. *In re Marriage of Campbell & Burnett (Burnett III)*, No. 104,077, 2011 WL 2555645, at *2-3 (Kan. App. 2011) (unpublished opinion), *rev. denied* 293 Kan. ____ (November 4, 2011). This court again granted in part Campbell's request for attorney fees on appeal and awarded her \$5,000. *Burnett III*, 2011 WL 2555645, at *4.

The appellate mandates in both *Burnett II* and *Burnett III* were issued on the same date—November 7, 2011. A week later, Campbell filed a motion for order to disburse funds to pay judgments, interest, and costs on appeal from Burnett's cash deposit. A teleconference hearing was held in December 2011, for which Burnett failed to appear. The court granted Campbell's motion in a December 29, 2011, order. Burnett filed a timely motion to reconsider the order directing payment. The court stayed disbursement and set a hearing on the motion to reconsider.

At a hearing on February 2, 2012, Burnett argued for the stay of distribution because he had filed a petition for writ of certiorari with the United States Supreme Court, which was later denied June 25, 2012. Burnett also objected to the imposition of postjudgment interest on the various awards claiming that because he had filed a cash bond, such interest did not accrue. The district court rejected both assertions and specifically held that Burnett's claims regarding postjudgment interest were "without foundation in Kansas law." The court directed the district court clerk to distribute over \$83,000 to Campbell for her judgments, plus interest, and \$260 in appellate court costs.

Campbell's counsel prepared a journal entry for the court's approval on February 8, 2012. Two days later, Burnett filed a motion for accounting before disbursement of the funds and for reconsideration of interest on judgment. In an order dated February 23, 2012, the district court denied Burnett's motion.

Burnett timely appealed from the order denying his request for an accounting and for reconsideration which forms the basis of the current appeal. Campbell has filed a timely motion for attorney fees and costs under Rule 7.07. Burnett has responded to Campbell's motion.

The filing of a supersedeas bond by the \$96,000 cash payment does not bar the award of postjudgment interest when the judgments appealed from are affirmed on appeal

In this appeal, Burnett challenges the district court's distribution of a portion of the cash he paid into the clerk of the district court as a supersedeas bond to include postjudgment interest on the various judgments awarded against him.

Burnett's issue requires the interpretation of the applicable statute. To the extent the court must interpret a statute, the standard of review on appeal is unlimited. The most

fundamental rule of statutory construction is that the intent of the legislature governs if that intent can be ascertained. *Hall v. Dillon Companies, Inc.*, 286 Kan. 777, 785, 189 P.3d 508 (2008). Our first task is to "ascertain the legislature's intent through the statutory language it employs, giving ordinary words their ordinary meaning." [Citation omitted.] *State v. Gracey*, 288 Kan. 252, 257, 200 P.3d 1275 (2009).

In *Burnett II*, Burnett asked us to remand the pending appeal to permit him to file a supersedeas bond to avoid Campbell's garnishment of his bank account in her efforts to collect her judgments. We denied his motion to quash the garnishment, but remanded the case for the district court determination of the propriety and amount, if any, of a supersedeas bond.

K.S.A. 60-2103(d)(1) specifically states, in relevant part:

"Whenever an appellant entitled thereto desires a stay on appeal, such appellant may present to the district court for its approval a supersedeas bond which shall have such surety or sureties as the court requires. Subject to paragraph (2), the bond *shall be conditioned* for the satisfaction of the judgment in full together with costs, interest, and damages for delay, if for any reason the appeal is dismissed, or if the judgment is affirmed, and to satisfy in full such modification of the judgment such costs, interest, and damages as the appellate court may adjudge and award." (Emphasis added.)

There is a basic problem with Burnett's arguments on appeal. He fails to address the *conditional* language of K.S.A. 60-2103(d)(1), but rather cites to various appellate decisions which involve the *unconditional* payment of a judgment and the effect of such payment on the accrual of postjudgment interest.

The key in the cases relied on by Burnett was that the judgment debtor made an unconditional, nonrefundable payment into the court independent of the supersedeas bond statute. For example, in *Bartlett v. Heersche*, 209 Kan. 369, 496 P.2d 1314 (1972),

the Supreme Court addressed the accrual of interest on a judgment under K.S.A. 16-204 after the defendants *unconditionally* paid the full amount of a jury's verdict into the court. In *Bartlett*, a jury verdict against two defendants was affirmed on a prior appeal; but the dismissal of one defendant's cross-claim against the other was reversed and remanded for trial.

Following remand, the defendants paid their respective shares of the plaintiffs' judgment (including postjudgment interest accrued during the appeal) to the district court; *the court ruled at that time that the plaintiffs could draw on the monies at any time*. Plaintiffs did not seek an immediate withdrawal from this fund. After resolution of the remaining claim, the district court awarded plaintiffs additional interest on the judgment and all parties appealed; the defendants claimed the court erred in ordering postjudgment interest for the time after they paid the judgment into the court. The Supreme Court agreed, noting that plaintiffs could have collected their judgment any time after defendants paid it into the court. Consequently, even though K.S.A. 16-204 required interest to accrue on all judgments, the plaintiffs' delay in withdrawing the payments did not entitle them to collect additional interest from the court. 209 Kan. at 373-74; *cf. Lippert v. Angle*, 215 Kan. 626, 630, 527 P.2d 1016 (1974) (payment of the full judgment into the court, including interest, following appellate remand terminates the accrual of interest on the judgment).

Three other cases relied upon by Burnett present the same key facts (1) that the payment was made to the plaintiff or into the court, and (2) the payment was unconditional. In *McGuire v. Sifers*, 235 Kan. 368, 681 P.2d 1025 (1984), a jury entered a verdict in favor of the plaintiff against a physician and the professional corporation with which he was employed. After the judgment was entered, the Health Care Stabilization Fund—that provided excess insurance to both defendants—made full payment of its share of the judgment into the court; Sifers' insurance company also paid its policy limits into the court. There is no indication these payments were conditioned on the success of

the defendants' appeal. The Supreme Court recognized these payments were a "tender" and that a "tender must be absolute and unconditional to be effectual." 235 Kan. at 383 (quoting *Carpenter v. Riley*, 234 Kan. 758, Syl. ¶ 1, 675 P.2d 900 [1984]); see also *Schaefer & Associates v. Schirmer*, 3 Kan. App. 2d 114, 119, 590 P.2d 1087 (1979) (noting in dicta that to avoid accrual of interest on a judgment while an appeal is pending, the debtor must "tender" the amount of the judgment or pay the amount into the court); *Cf. In re Marriage of Weers*, No. 92,288, 2005 WL 1805166 (Kan. App. 2005) (unpublished opinion) (ex-husband's tender of checks to ex-wife for various judgments did not toll postjudgment interest when ex-wife appealed; when ex-wife rejected check payments, ex-husband should have made payments into court to avoid interest).

Burnett has also pointed to *Peterson v. Midland Nat'l Bank*, 242 Kan. 266, 747 P.2d 159 (1987), as supporting his position that postjudgment interest should not be allowed on the judgments against him. *Peterson* involved agister lien claims, an unjust enrichment claim, and the deposit of money by a bank with a claimed security interest to allow livestock to be sold while the validity and priority of claims against the proceeds could be litigated. Although *Bartlett* and *McGuire* were cited in the *Peterson* opinion, our Supreme Court ultimately allowed *Peterson* postjudgment interest only on his proportionate part of the interest accrued on the funds held by the clerk of the district court. 242 Kan. at 276-77. This appears to be more of an equitable award which recognized that postjudgment interest was proper but not on the entire judgment *Peterson* had received. The facts are clearly different from those before us and *Peterson* does not substantiate Burnett's arguments.

Campbell's reliance on *Long v. Winkelman*, Nos. 94,121, 94,272, 2006 WL 619225 (Kan. App. 2006) (unpublished opinion) is more persuasive. There, like in our case, the appellant made a cash payment into the court for the full amount of the judgment under K.S.A. 60-2103(d) instead of obtaining a bond from a professional surety. As that panel noted:

"The funds deposited by [appellant] were more than enough to satisfy the judgment. Nevertheless, this is not the same as making an unconditional tender into court of the full amount of the judgment. [Appellant] would have been better off by simply tendering the full amount of the judgment into court without filing a supersedeas bond. However, she chose to file the supersedeas bond, which was approved by the district court. Pursuant to K.S.A. 60-2103(d), a supersedeas bond 'shall be conditioned for the satisfaction of the judgment in full together with costs, interest, and damages for delay . . .'" *Long*, 2006 WL 619225, at *5.

In this case, as in *Long*, the district court set the amount for a supersedeas bond and directed Burnett to file the bond through approved sureties. Burnett subsequently requested that he be permitted to make a cash payment into the court for the bond in lieu of using a surety. The court permitted the cash payment to stand *as a supersedeas bond subject to the terms of K.S.A. 60-2103(d)* and specifically declined Burnett's request to toll postjudgment interest. Although Burnett now argues the cash payment was not presented as a supersedeas bond, the district court made quite clear that was how the payment would be accepted and treated; Burnett thereafter willingly posted the funds under those conditions.

Based on the specific terms sent by the court below, Burnett's payment was not an unconditional tender as that made in *Bartlett* and *McGuire*. It is clear that Campbell could not draw down the funds as allowed in *Bartlett*. Burnett posted a supersedeas bond conditioned on the result of his appeal, and postjudgment interest continued to accrue on all of the judgments against him.

Our interpretation of prior precedents and K.S.A. 60-2103(d) in the above manner satisfies the purpose of the statute. A supersedeas bond simply preserves the status quo in a case while an appeal is pending. With a supersedeas bond, the appellant does not unconditionally pay the full judgment and is protected from collection proceedings

during the appellate process. The appellee cannot collect the judgment but is protected from loss during the delay because the bond allows for recovery of postjudgment interest—the loss of use of funds—if the judgment is affirmed.

Campbell's various judgments against Burnett have been affirmed in prior appeals. The district court correctly allowed Campbell to recover postjudgment interest from Burnett's supersedeas bond.

There was substantial competent evidence to support the amount the district court ordered to be distributed to Campbell from the supersedeas bond

In the issue statement of his brief, Burnett poses this question: "Did the trial judge err in awarding postjudgment interest in an amount which was not documented in the court record by the party claiming the interest?"

However, Burnett cites to no standard of review and no legal authority supporting his legal statement. Generally, a point resided incidentally but not argued in a brief is deemed abandoned. *Manhattan Ice & Cold Storage v. City of Manhattan*, 294 Kan. 60, 71, 274 P.3d 609 (2012). Similarly, failing to support a point with pertinent authority or show why it is sound despite the lack of supporting authority is akin to failing to brief the issue. *State v. Berriozabal*, 291 Kan. 568, 594, 243 P.3d 352 (2010).

Notwithstanding his lack of argument, Burnett does assert in the factual statement of his brief that two of the motions filed by Campbell seeking disbursement of the supersedeas bond were each missing a page. He asserts that because of these missing pages, the exact amount of postjudgment interest could not be determined. Postjudgment interest is imposed on all unpaid judgments in Kansas under K.S.A. 16-204 and is not discretionary with the court. Thus, it is appropriate to review the award of postjudgment interest under the substantial competent evidence standard. Substantial competent

evidence is such legal and relevant evidence as a reasonable person might accept as being sufficient to support a conclusion. *Venters v. Sellers*, 293 Kan. 87, 93, 261 P.3d 538 (2011).

While we might hold Burnett failed to preserve this issue below or by failing to initially brief it on appeal, and improperly attempting to raise it for the first time in his reply brief, see *In re Marriage of Powell*, 13 Kan. App. 2d 174, 177, 766 P.2d 827 (1988), *rev. denied* 244 Kan. 737 (1989), out of an abundance of caution, we will consider Burnett's arguments.

The documents in the record provide substantial competent evidence to support the award of postjudgment interest. In the first place it does not appear Burnett made any challenge to Campbell's calculation of postjudgment interest until he filed his reply brief in this appeal.

There is no dispute that in her two motions to approve disbursements from the bond, Campbell omitted a page itemizing part of her calculations. However, Campbell previously had filed complete itemizations of the same judgments assessed against Burnett, including accrued interest to date, in June 2010, and again on November 30, 2010, where the missing page 2 is clearly found.

Burnett did not specifically challenge the adequacy of Campbell's calculations with the district court. Burnett failed to timely respond to Campbell's November 2011 motion for distribution. In his motion for reconsideration, Burnett simply asserted that the distribution should be stayed because he had filed a writ of certiorari. There is no transcript from this hearing to establish Burnett challenged the disbursement other than the effect of writ pending in the United States Supreme Court and his claim that postjudgment interest was tolled. In his subsequent motion for accounting and reconsideration, Burnett only requested additional time to seek an accounting of the

distribution sought by Campbell; however, there is no specific challenge to the calculations themselves.

Additionally, Campbell filed a number of different pleadings throughout the case itemizing the judgments, attorney fee awards, and interest. These itemizations, combined with Campbell's November and December 2011 motions, provide an adequate basis to support her claims and the district court's award. The motions listed the judgments and interest accruing to the dates that garnishments resulted in partial payments of the awards; the motions then calculate postjudgment interest on the reduced amounts after the payments. In his primary brief, Burnett takes no issue with any of these amounts, dates, or calculations.

There is no merit to any of the arguments which Burnett makes concerning the computation of postjudgment interest. As we have said above, there is substantial competent evidence to support the orders of the district court and all of Burnett's arguments to the contrary are rejected.

We grant a portion of Campbell's requested attorney fees for this appeal

After this court issued a letter notifying the parties this case would be assigned to a summary calendar docket, Campbell filed a motion for attorney fees and costs under Rule 7.07 and K.S.A. 2012 Supp. 23-2715. Campbell argues Burnett's appeal is without factual basis, inadequately briefed, and an abuse of the appellate process. As a result, Campbell requests \$11,521.50 in appellate attorney fees and costs in connection with this appeal. Burnett has filed a detailed response objecting to Campbell's request for fees and expenses.

This court has authority to award attorney fees for services on appeal in cases where the district court had authority to award attorney fees. Rule 7.07. Additionally,

K.S.A. 60-1610(b)(4) (now K.S.A. 2012 Supp. 23-2715) grants the trial court authority to award attorney fees to either party as justice and equity require.

After considering the arguments of both parties, we determine that an award of \$5,000 to Campbell would be an adequate award for attorney fees for this appeal.

Affirmed.