NOT DESIGNATED FOR PUBLICATION

No. 107,401

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

JANET S. KAELTER,
Appellee,

v.

STEVEN L. SOKOL,
Appellant,

and

In Re Parentage of
BENJAMIN SARBEY SOKOL,
A Minor Child,
By His Mother JANET S. KAELTER,

v.

STEVEN L. SOKOL.

MEMORANDUM OPINION

Appeal from Johnson District Court; THOMAS KELLY RYAN, judge. Opinion filed May 3, 2013. Affirmed.

Jennifer Benedict, of Jennifer Benedict Law Office, LLC, of Independence, Missouri, for appellant.

Ronald W. Nelson, of Ronald W. Nelson, P.A., of Lenexa, for appellee.

Before MCANANY, P.J., HILL and LEBEN, JJ.

Per Curiam: Claiming procedural improprieties by a special master, Steven L. Sokol seeks reversal of the district court's order adopting the master's findings and conclusions. Sokol filed a motion to reconsider after the district court made its final order deciding the rights and liabilities of the parties. Motions to reconsider are equivalent to motions to alter or amend judgments and, thus, toll the time for taking an appeal. When the first motion to reconsider was resolved by the court, Sokol filed a second motion to reconsider, raising one similar issue and some new ones as well. Because it would be unjust and unreasonable to permit one party to postpone an appeal indefinitely by filing a string of successive motions to reconsider, we hold that a successive motion to reconsider tolls the time for taking an appeal only for issues that are raised in both motions.

One claim raised by Sokol is justiciable because it was raised in both motions to reconsider. The master failed to take the oath of office as the law requires. While he was still working on the case, the master told Sokol that he was not required to take an oath. Sokol never raised the issue until well after the master was discharged and the court had approved the master's findings. We hold this claim is invited error because Sokol knew of the error and did not raise it until well after it could be corrected by the district court. Accordingly, we affirm.

Case history.

Janet S. Kaelter and Sokol lived together from 1994 to 2006. They never married. Their child was born in April 1995. In February 2007, Kaelter filed a petition seeking partition of their jointly owned property, a declaration of paternity, a determination of custody, and an order for Sokol to pay guidelines child support.

A hearing officer established Sokol's monthly child support obligation. After that, the district court ordered joint legal custody of their child on November 6, 2007, with their child residing primarily with Kaelter and reasonable parenting time with Sokol. The

district court also adjusted Sokol's monthly temporary child support payments and calculated the amount of arrearage at that time. Neither party contests the custody rulings.

Over Sokol's objection, the district court appointed a special master according to K.S.A. 60-253. In the order, the court referred all prehearing motions and pretrial hearings on matters properly before the court to the master for fact finding. In September 2008, the court denied Sokol's motion to reconsider appointing a master and appointed Greg Kincaid as master.

In due course, the master mailed his report to the parties on July 15, 2009. The master also submitted a large binder containing the documents and exhibits accumulated during the proceedings. On July 31, 2009, Sokol filed objections to the report, raising four arguments:

- The master failed to prepare a proper record and transcript sufficient for the district court to either accept the master's findings under K.S.A. 60-253(e)(2) or determine whether the report was clearly erroneous in addressing his objections;
- the master's proposed findings and conclusions on the amount of child support were erroneous;
- the master erred in his determination regarding the "lake house" asset; and
- the master lacked jurisdiction over his child's IRA.

The district court addressed these objections at a hearing on October 30, 2009. Noting it had reviewed the master's report as required under K.S.A. 60-253(e)(1) and (2), the court accepted the master's findings of fact and conclusions of law. (There were some exceptions noted in this Order.) The court held the master's findings and conclusions were not clearly erroneous and were reasonable and appropriate.

In response, Sokol filed a motion on November 16, 2009, seeking relief from the court's adoption of the master's report. Sokol wanted:

- A hearing on the master's report under K.S.A. 60-253(e)(2);
- a new trial or to alter or amend under K.S.A. 60-259; and
- relief from judgment under K.S.A. 60-260.

In addition, Sokol alleged the master had never taken his oath as required by law.

That same day, Kaelter filed a pro se motion for the court to reconsider its October 30, 2009 order. The district court heard both motions 8 months later on June 15, 2010.

Ultimately, on September 23, 2010, the district court made oral rulings on the issues raised by both parties' motions. The court:

- Denied all motions "with regard to the appointment of and the handling of the proceedings by the Special Master";
- ordered a child support worksheet be prepared for the period beginning January 1, 2008, showing new income amounts for Sokol and Kaelter;
- revised Sokol's child support order; and
- confirmed the master's proposed division of assets.

The journal entry of these rulings was filed on October 27, 2010.

The court's disposition of the motions prompted two motions from Sokol. On October 7, 2010, Sokol sought to make additions to the record and renewed his request for a hearing on the masters report as permitted under K.S.A. 60-252(e)(2). Then, on October 22, 2010, Sokol filed a motion to dismiss for lack of subject matter jurisdiction.

Going further, on November 10, 2010, Sokol filed a motion to reconsider, asking the district court "to Reconsider the rulings entered . . . for lack of Subject Matter Jurisdiction." Sokol then filed a supplemental motion to reconsider on January 14, 2011, alleging that the initial child support order on March 12, 2007, should be set aside for lack of service.

Several months later, on March 15, 2011, Sokol filed a request to depose the master, arguing that deposing the master would both aid him in presenting his November 10, 2010, motion and help the district court in evaluating its merits. The district court, in its journal entry filed May 2, 2011, denied Sokol's motion to depose. The district court ruled that the only motion properly pending before it was Sokol's October 22, 2010, motion seeking to dismiss for lack of subject matter jurisdiction. On May 13, 2011, Sokol filed a motion to reconsider the order denying his motion to depose the master.

Eventually, the district court denied Sokol's November 10, 2010, motion to reconsider on December 6, 2011. On January 4, 2012, Sokol appealed to this court.

In this appeal of the denial of his successive motions under K.S.A. 60-259(f), Sokol raises three arguments:

- The district court erred in adopting the master's recommendations because the master did not take the required oath under K.S.A. 60-253(a);
- the district court erred under K.S.A. 60-253(e)(2) by not holding a full evidentiary hearing on Sokol's July 31, 2009, objections to the master's report; and
- the master's failure to conduct a formal hearing and refusal to allow Sokol's counsel to participate in the proceedings denied Sokol his due process rights or ability to both hear the evidence against him and to challenge that evidence through cross-examination and the introduction of rebuttal evidence.

What, if anything, can we hear?

Kaelter argues this court lacks jurisdiction because Sokol failed to file a timely appeal after the journal entry denying his first motion to alter or amend. Whether jurisdiction exists is a question of law over which this court's scope of review is unlimited. *Kansas Medical Mut. Ins. Co. v. Svaty*, 291 Kan. 597, 609, 244 P.3d 642 (2010).

It is fundamental under our jurisprudence and laws of procedure that failure to file a notice of appeal according to K.S.A. 2012 Supp. 60-2103 deprives an appellate court of jurisdiction. *Board of Sedgwick County Comm'rs v. City of Park City*, 293 Kan. 107, 119, 260 P.3d 387 (2011). The right to an appeal is purely statutory, and if the record shows that the appellate court does not have jurisdiction, the appeal must be dismissed. *Kansas Medical Mut. Ins. Co.*, 291 Kan. at 609.

In order to resolve the question of the timeliness of Sokol's appeal, we must apply rules from several statutes to the facts of this case:

- K.S.A. 2012 Supp. 60-2103(a) states that the time within which an appeal may be taken shall be 30 days from the entry of the judgment as provided by K.S.A. 60-258.
- K.S.A. 2012 Supp. 60-2103(a) also states this 30-day period may be tolled until the resolution of timely motions for:
    - a renewed motion for judgment as a matter of law or in the alternative a motion for a new trial filed under K.S.A. 60-250(b);
    - a motion to amend findings or make additional findings under K.S.A. 60-252(b);
    - a motion for a new trial allowed by K.S.A. 60-259; and
    - a motion to alter or amend a judgment permitted by K.S.A. 60-259.

- K.S.A. 60-258 provides that subject to K.S.A. 60-254(b), no judgment is effective unless and until a journal entry or judgment form is signed by the judge and filed with the clerk.
- K.S.A. 60-254(b) directs that unless designated as final by the judge, any order that adjudicates fewer than all the claims or rights and liabilities of all of the parties does not end the action and may by modified at any time.

Kansas courts consider motions for reconsideration equivalent to motions to alter or amend judgment under K.S.A. 60-259(f). *Exploration Place, Inc. v. Midwest Drywall Co.*, 277 Kan. 898, 900, 89 P.3d 536 (2004).

As we understand the case chronology, the district court on October 30, 2009, filed its final order accepting the master's findings of fact and conclusions of law and addressing Sokol's July 31, 2009, objections to the master's report. Because Sokol filed a timely motion to alter or amend 17 days later on November 16, 2009, the running of the appeal period was tolled until the district court decided that motion on October 27, 2010. The October 27, 2010, journal entry denying Sokol's motion to alter or amend became final 30 days after it was entered unless Sokol appealed within this period. See K.S.A. 2012 Supp. 60-2103(a). Instead of appealing the October 27, 2010, journal entry, Sokol filed a second motion equivalent to K.S.A. 2012 Supp. 60-259(f) 14 days later. See *Exploration Place, Inc.*, 277 Kan. at 900. Then, on January 4, 2012, Sokol appealed the December 6, 2011, journal entry denying the second consecutive motion.

This means the question before us is whether Sokol's second motion to reconsider tolled the time to appeal the denial of his first motion seeking to alter or amend the district court's October 30, 2009, order. Our review of the Kansas and federal authorities leads us to believe it does toll the appeal time but only for issues raised in both motions.

Two Kansas cases deal with this issue. We look first at *In re Marriage of Hansen*, 18 Kan. App. 2d 712, 714, 858 P.2d 1240 (1993). In *Hansen*, a panel of this court considered whether an appellant could challenge an order increasing his child support obligation by filing a nontimely second motion for rehearing. The second motion raised the identical issue brought in the first motion. After construing both motions as motions to alter or amend under K.S.A. 60-259(f) and finding "no authority . . . that a party is precluded from filing redundant motions," this court granted review because the appellant had filed the redundant motion within the required period under K.S.A. 60-259(f) after the denial of the first motion and had subsequently timely appealed the denial of the redundant motion. 18 Kan. App. 2d at 714-15; see also *L.R. Foy Constr. Co. v. Professional Mechanical Contractors*, 13 Kan. App. 2d 188, 193, 766 P.2d 196 (1988), where the court declined to find a posttrial motion duplicating a motion previously filed creates an exception to the tolling of the time for filing an appeal.

Five years later, a different panel held a different view of the issue. In *State ex rel. Secretary of SRS v. Mayfield*, 25 Kan. App. 2d 452, 966 P.2d 85 (1998), the appellant contended his time to appeal was extended by the filing of two successive motions for a new trial. The appellant filed a second motion for a new trial on a different theory after the district court's decision on his first motion for a new trial. The appellant then filed a notice of appeal within 30 days of the denial of the second motion for a new trial but more than 30 days after the denial of the first motion for a new trial. Distinguishing *Hansen*, this panel noted that the appellant was attempting to resurrect issues on appeal not contained within the second motion for a new trial. The court held:

> "Under those circumstances, we do not believe K.S.A. 60-2103 should be interpreted to permit the tolling of the 30-day period to file a notice of appeal as to the issues raised only in the first motion for new trial. We disagree with the dicta in *Hansen* that suggests a contrary construction." *Mayfield*, 25 Kan. App. 2d at 457.

When we read *Hansen* together with *Mayfield*, the logical extension of K.S.A. 2012 Supp. 60-2103 is that Sokol's second successive motion will only toll the 30-day period to file a notice of appeal on those specific issues raised in both motions.

Federal caselaw bolsters our view. *Ysais v. Richardson*, 603 F.3d 1175, 1178-79 (10th Cir. 2010), considered only issues it held justiciable based on Ysais' filing successive motions for reconsideration. The Plaintiff's second motion for reconsideration tolled time to appeal from the denial of his first motion for reconsideration but did not extend the time for filing a notice of appeal from the underlying final judgment. In *United States v. Marsh*, 700 F.2d 1322, 1326 (10th Cir. 1983), the court pointed out the reason for this ruling is that the opposite interpretation would permit unlimited extensions of time to appeal. One party could theoretically postpone indefinitely the appeal of his or her adversary by filing motions for reconsideration, and the adverse party might die before having to pay off the judgment.

To resolve this issue we must ascertain if Sokol is attempting to resurrect an untimely issue by raising an issue on appeal contained only in his motion to alter or amend and not raised in his second motion. See *Mayfield*, 25 Kan. App. 2d at 457. And obviously, any issue Sokol raises on appeal not contained in both of his motions to alter or amend is not properly before the court. See *In re Care & Treatment of Miller*, 289 Kan. 218, 224-25, 210 P.3d 625 (2009).

Sokol's first argument—the master did not take the required oath—is timely. He raised this argument in both of his motions under K.S.A. 60-259(f). In the motion, Sokol specifically pointed to the fact that the "master was never sworn in" as one of his objections to the master's report filed July 31, 2009, incorporated "by reference" in the motion. In his second motion, Sokol pointed to an alleged conversation with the master regarding his oath and the lack of evidence in the record as to the master having taken his oath as evidence supporting his argument.

It is different for Sokol's second argument on appeal—that the district court did not hold a hearing on his objections to the master's report. The record indicates Sokol is trying to resurrect an untimely argument. Even though Sokol specifically asserted this issue in his motion to alter or amend by stating "a hearing is required on the objections to the master's report," Sokol did not make a similar effort in his second motion. In that motion, Sokol requested "the Court Reconsider the matters referenced above." The only relevant matters Sokol made reference to were his allegations that (1) the master had allegedly engaged in improprieties (never took an oath, had ex parte communications, failed to keep the parties informed, misrepresented his contact with a witness, and refused to issue his ruling); and (2) the district court erred in ruling Sokol had failed to object or make a contemporaneous objection to the lack of a record of the master's proceedings.

We acknowledge that between the September 23, 2010, bench decision denying this motion and before the filing of the corresponding October 27, 2010, journal entry, Sokol filed a renewed motion for a hearing in conjunction with his motion seeking additions to the record. The motion stated: "Steve Sokol renews his request for a hearing on issues previously raised in his objections to the master's report." Sokol, however, does not argue on appeal this specific motion should be construed as a motion to reconsider in conjunction with his second motion. An issue not briefed by the appellant is deemed waived and abandoned. *Superior Boiler Works, Inc. v. Kimball*, 292 Kan. 885, 889, 259 P.3d 676 (2011). Consequently, because Sokol is attempting to resurrect an issue not addressed in his second successive motion, this issue is not timely filed within 30 days from October 27, 2010, the date the journal entry for Sokol's first motion to alter or amend was filed. See *Mayfield*, 25 Kan. App. 2d at 457.

We are similarly convinced about his third argument—that he was prejudiced by the master's failure to conduct a "formal hearing" with Sokol and his counsel present. In Sokol's July 31, 2009, motion objecting to the master's report, Sokol argued the master failed to prepare a proper record. Sokol incorporated this same argument in his motion to

alter or amend. Similarly, the second motion challenged the district court's finding that K.S.A. 60-253(d) did not require a transcript of proceedings, and neither party requested such a record or made a contemporaneous objection during the proceedings. K.S.A. 60-253(c) states that "[w]hen a party requests, the master must make a record of the evidence offered and excluded in the same manner and subject to the same limitations as . . . a court sitting without a jury." Thus, *Hansen* indicates this issue is reviewable. 18 Kan. App. 2d at 714. But Sokol, on appeal, is not challenging the district court's findings regarding his objection that the master allegedly failed to make an adequate record.

Instead, Sokol for the first time has framed his third argument as a constitutional or due process violation. In *Miller v. Bartle*, 283 Kan. 108, 119, 150 P.3d 1282 (2007), the Supreme Court held that constitutional grounds for reversal asserted for the first time on appeal are not properly before the appellate court for review. Moreover, because Sokol does not argue any of the three exceptions to this general rule, he has waived any such argument. See *Superior Boiler Works, Inc.*, 292 Kan. at 889; *In re Estate of Broderick*, 286 Kan. 1071, 1082, 191 P.3d 284 (2008), *cert. denied* 555 U.S. 778 (2009), where the court outlined the exceptions to the general rule that a new legal theory may not be asserted for the first time on appeal.

Therefore, we will examine only Sokol's argument about the lack of a master's oath.

We see no abuse of discretion but we do see invited error.

Because Sokol first made this argument to the district court in his second motion to alter or amend the judgment made according to K.S.A. 60-259(f), we will not disturb the district court's ruling on the motion unless there is an abuse of discretion. According to the Supreme Court in *Fischer v. State*, 296 Kan. ___, Syl. ¶ 8, 295 P. 3d 560 (2013), judicial discretion is abused if the judicial action is:

- arbitrary, fanciful, or unreasonable, *i.e.*, if no reasonable person would have taken the view adopted by the trial court;
- based on an error of law, *i.e.*, if the discretion is guided by an erroneous legal conclusion; or
- based on an error of fact, *i.e.*, if substantial competent evidence does not support a factual finding on which a prerequisite conclusion of law or the exercise of discretion is based.

The law makes the taking of oath or giving an affirmation by the master mandatory. K.S.A. 2012 Supp. 60-253(b) provides: "The master *must swear or affirm* to hear and examine the cause, and to make a just and true report according to the best of the master's understanding. The oath or affirmation may be administered by any person authorized to take depositions." (Emphasis added.)

The trouble we have with this entire claim is not the objection itself but its timing. Sokol unconvincingly argues he "made reasonable efforts to locate the oath" by filing his motion to depose the master on March 15, 2011, almost *18 months* after the October 30, 2009, order. The only evidence Sokol offered to the district court regarding this issue was brought forward approximately *12 months* after the October 30, 2009, ruling. Sokol submitted his own affidavit with his second motion to alter or amend on November 10, 2010. The affidavit describes an alleged conversation between Sokol and the master: "My attorney (Dave Martin) had previously suggested to me that I ask Mr. Kincaid if he had taken the oath to be a special master, which I did at this time. Mr. Kincaid said: 'No, I'm not required to do that.'"

In Sokol's affidavit, he alleges that conversation with the master occurred on October 16, 2008.

If true, that means Sokol clearly had notice of this alleged error approximately 9 months before the master filed his report on July 15, 2009, and knew of this when he filed his own objections to the master's report on July 31, 2009. Despite this knowledge, Sokol elected to do nothing and say nothing regarding this issue until more than a year later, after the October 30, 2009, order denying his objections and accepting the master's findings. "A party may not invite error and then complain of that error on appeal. [Citation omitted.]" *Butler County R.W.D. No. 8 v. Yates*, 275 Kan. 291, 296, 64 P.3d 357 (2003).

A district court properly denies a motion to alter or amend "where the moving party could have, with reasonable diligence, presented the argument prior to the [challenged judgment]." *Wenrich v. Employers Mut. Ins. Co.*, 35 Kan. App. 2d 582, Syl. ¶ 6, 132 P.3d 790 (2006). We see no reasonable diligence by Sokol to raise this objection when he first learned of the master's view on taking an oath.

On June 15, 2010, the district court heard arguments on Sokol's motion to alter and amend, including his claim that the master did not take the oath. During the hearing, Sokol's counsel only argued, "I find no evidence that Greg Kincaid was ever sworn in," and "was never sent a copy." The district court, in denying the motion to alter and amend, ruled (1) K.S.A. 60-253(a) does not require the filing of a "written" oath; (2) *Sokol made no contemporaneous objection regarding the oath while the master considered the matters*; and (3) Sokol presented no evidence the master did not take an oath.

We cannot see how the court abused its discretion under these circumstances where Sokol claims to have known there was no oath taken by the master and he knew this while the master was still working on the case.

We find no error and affirm.