IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 123,023

SIERRA CLUB,
Petitioner/Appellee,

v.

JANET STANEK, in her Official Capacity as Secretary of the Kansas Department of Health and Environment, and the DEPARTMENT OF HEALTH AND ENVIRONMENT, an Agency of the State of Kansas,
Respondents/Appellees,

and

HUSKY HOGS, L.L.C., PRAIRIE DOG PORK L.L.C., ROLLING HILLS PORK, L.L.C., and STILLWATER SWINE, L.L.C.,
Intervenors/Appellants.

SYLLABUS BY THE COURT

A case is moot when the actual controversy has ended and the only judgment that could be entered would be ineffectual for any purpose and would not impact any of the parties' rights.

Review of the judgment of the Court of Appeals in an unpublished opinion filed April 1, 2022. Appeal from Shawnee District Court; RICHARD D. ANDERSON, judge. Opinion filed June 2, 2023. Judgment of the Court of Appeals reversing the district court is reversed, and the appeal is dismissed.

Clayton J. Kaiser, of Foulston Siefkin LLP, of Wichita, argued the cause, and *Gary L. Ayers* and *David M. Traster*, of the same firm, were with him on the briefs for intervenors/appellants.

Timothy J. Laughlin, of Schoonover & Moriarty, LLC, of Olathe, argued the cause, and *Robert V. Eye*, of Robert V. Eye Law Office, LLC, of Lawrence, was with him on the briefs for petitioner/appellee.

Arthur S. Chalmers, assistant attorney general, argued the cause, and *M.J. Willoughby*, assistant attorney general, and *Derek Schmidt*, attorney general, were with him on the briefs for respondents/appellees.

The opinion of the court was delivered by

STEGALL, J.: Sierra Club challenges permits issued by the Kansas Department of Health and Environment in 2017 and 2018 to four different swine confined animal feeding operations, sometimes referred to as CAFOs. Because current circumstances have rendered Sierra Club's legal challenges moot, we dismiss the case.

Husky Hogs, L.L.C. owned a swine facility in Phillips County, Kansas, which burned down in June of 2017. Soon after, Husky Hogs formulated a plan to rebuild and expand the swine operation. An important limit on any CAFO is found in K.S.A. 65-1,180—which establishes minimum setbacks from surface water:

> "(a) The department shall not approve a permit for construction of a new swine facility or expansion of an existing swine facility unless the swine waste management system for the facility:
>
> . . . .
>
> (3) . . . is located: (A) Not less than 500 feet from any surface water if the facility has an animal unit capacity of 3,725 or more; (B) not less than 250 feet from any surface water if the facility has an animal unit capacity of 1,000 to 3,724; or (C) not less than 100 feet from any surface water if the facility has an animal unit capacity of under 1,000."

Because the Husky Hogs' facility, in its pre-fire configuration, was located 250 feet from Prairie Dog Creek, it was limited to a maximum of 3,724 animal units. Given this reality and their desire to carry more animal units, the rebuild planners formed a new

limited liability corporation named Prairie Dog Pork, L.L.C. Husky Hogs and other landowners then executed a quitclaim deed granting Prairie Dog Pork a portion of the Husky Hogs' property. Then, in 2017, each L.L.C., separately and independently, applied for and was ultimately granted a permit from KDHE. These 2017 permits were valid through December 10, 2022.

Sierra Club protested, publicly commented on, and opposed KDHE's decision at every opportunity, arguing that Husky Hogs and Prairie Dog Pork were not legally "separate facilities" and therefore any permits allowing the two facilities to carry an aggregate of more than 3,724 animal units would violate the statutory setback requirements.

At about that time, the same group of landowners had also created two additional L.L.C.s in order to further grow their carrying capacities. They formed C & J Swine L.L.C. (doing business as Rolling Hills Pork, L.L.C.) and Stillwater Swine, L.L.C. These L.L.C.s were created to operate CAFOs in Norton County and—similar to Husky Hogs and Prairie Dog Pork—they were located on adjoining land within 250 feet of surface water. Rolling Hills Pork and Stillwater Swine also applied for and were ultimately given permits from KDHE. These 2018 Permits were valid through April 26, 2023, and May 24, 2023. Sierra Club again protested, publicly commented on, and opposed KDHE's decision at every appropriate administrative step, arguing that the CAFOs were not legally "separate facilities," and therefore the permits would violate the setback requirements for land carrying more than 3,724 animal units.

After the issuance of the 2017 and 2018 permits, Sierra Club filed this lawsuit. Relevant to today's decision, Sierra Club alleged the permits issued by KDHE to the four CAFOs violated the surface water setback requirements of K.S.A. 65-1,180. In 2019, Sierra Club prevailed in the district court. Noticing the obvious gamesmanship the CAFOs had undertaken to avoid the setback requirements, the district court held that because the CAFOs were self-contained in two geographic areas (one in Phillips County and one in Norton County) with contiguous borders, the 2017 and 2018 permits were unlawful. Which is to say that even though the CAFOs were distinct legal entities, they were effectively only one CAFO on each geographic footprint. The district court's ruling was bolstered considerably by one of KDHE's then-existing regulations which stated that CAFO facilities would not be considered separate facilities if they shared a common property line. See K.A.R. 28-18a-4(d) (2008 Supp.). The district court remanded the matter to KDHE and the CAFOs appealed.

While the appeal from the district court's decision was pending, three critical changes occurred. First, the CAFOs deeded small strips of land across each geographic footprint to third-party L.L.C.s. In other words, they removed the shared property line to avoid the legal impact of K.A.R. 28-18a-4(d) (2008 Supp.). In 2021, KDHE also amended K.A.R. 28-18a-4(d) to remove any reference to a "contiguous ownership boundary." Following the amendment, the regulation only required separate CAFOs to have separate waste management systems. And finally, in light of the district court's ruling and the work-arounds described above, the CAFOs sought new permits in lieu of the 2017 and 2018 permits. So, in 2021, KDHE issued to the CAFOs four brand new permits which reflected both the new legal descriptions of the four facilities at issue as well as describing the newly required separate waste management systems.

Nonetheless, Sierra Club continued to defend the appeal on the grounds that the 2017 and 2018 permits were unlawful—while at the same time the CAFOs were arguing that Sierra Club lacked standing to bring its claims in the first place. In this factual and

procedural posture, the case reached the Court of Appeals. The Court of Appeals panel ended up agreeing with the CAFOs on the question of associational standing. As such, the Court of Appeals remanded the case to the district court with directions to dismiss the KJRA petition and "reinstate" the 2017 and 2018 permits (which were no longer operational). *Sierra Club v. Stanek*, No. 123,023, 2022 WL 983563, at *1 (Kan. App. 2022) (unpublished opinion).

Critically, along the way to its standing determination, the Court of Appeals ruled the case was not moot:

> "KDHE has failed to clearly and convincingly show "'the actual controversy has ended, the only judgment that could be entered would be ineffectual for any purpose, and it would not impact any of the parties' rights."' [*State v. Roat*,] 311 Kan. at 592. For these reasons, we find the issues on this appeal are not moot." 2022 WL 983563, at *13.

This was error.

The Kansas case-or-controversy requirement insists that Kansas courts do not consider moot questions. See *Baker v. Hayden*, 313 Kan. 667, 672, 490 P.3d 1164 (2021). A case is considered moot when a court determines that "'it is clearly and convincingly shown the actual controversy has ended, the only judgment that could be entered would be ineffectual for any purpose, and it would not impact any of the parties' rights.'" *State v. Roat*, 311 Kan. 581, 584, 466 P.3d 439 (2020). Mootness can occur when, over the course of litigation, something changes that renders any judicial decision ineffectual to impact the rights and interests of the parties before it. 311 Kan. at 596. Kansas courts do not render advisory opinions. *State v. Cheever*, 306 Kan. 760, 786, 402 P.3d 1126 (2017) ("Because the Kansas Constitution's framework 'limit[s] the judicial power to actual cases and controversies,' Kansas courts do not have the power to give advisory opinions."), *abrogated on other grounds by State v. Boothby*, 310 Kan. 619, 448 P.3d 416 (2019);

NEA-Topeka, Inc. v. U.S.D. No. 501, 227 Kan. 529, 532, 608 P.2d 920 (1980) (A "court is without constitutional authority to render advisory opinions," because "[s]uch an opinion would go beyond the limits of determining an actual case or controversy and would violate the doctrine of separation of powers.").

Here, no party has challenged or disputed the ongoing validity of the 2021 permits. All parties agree that the CAFOs currently operate under the 2021 permits and that the 2017 and 2018 permits are inoperative. And yet, the only issues on appeal concern the 2017 and 2018 permits. Further, at oral argument before this court, the CAFOs clearly took the position that they are not asking us for the symbolic reinstatement of the 2017 and 2018 permits to allow them the option of removing the strips of land inserted between the facilities. The Court of Appeals improperly clouded the doctrine of mootness with its own notions of fundamental fairness when it observed that not addressing the merits of the dispute over the 2017 and 2018 permits would

> "deprive Permittees of their opportunity to seek reinstatement of their original permits. While it is true that Permittees managed to avoid the consequences of the district court's unfavorable interpretation of K.A.R. 28-18a-4(d) by inserting a buffer between their facilities, that solution should not cost Permittees the right to appeal their permits for adjacent facilities. And while Permittees could avoid the district court's interpretation of K.A.R. 28-18a-4(d) by reapplying for a permit now that the new regulation is in effect, they should not have to apply for a new or modified permit if they are already entitled to the permits as originally issued." *Sierra Club*, 2022 WL 983563, at *12.

There may be limited exceptions to our mootness doctrines. For example, we have discussed the possibility of considering the merits of issues capable of repetition or presenting concerns of public importance. *Roat*, 311 Kan. at 585-90. But see *Roat*, 311 Kan. at 603-04 (Stegall, J., concurring) (endorsing a jurisdictional approach to mootness, suggesting that when a case or controversy has ended, a court's jurisdiction and a party's standing, must also end); *State ex rel. Morrison v. Sebelius*, 285 Kan. 875, 888-98, 179

P.3d 366 (2008) (there is no live case or controversy when an issue is moot); *Miller v. Insurance Management Assocs., Inc.*, 249 Kan. 102, 109-10, 815 P.2d 89 (1991) (mootness is a jurisdictional consideration); *Graves v. State Board of Pharmacy*, 188 Kan. 194, 197, 362 P.2d 66 (1961) (A trial court "had no authority to enter any judgment other than a dismissal of the action" when an issue was moot.).

But setting aside thornier questions of jurisdiction and allowing that certain exceptions to the mootness doctrine may exist, we are confident that a sense of unfairness to the prevailing party is not one of them. The CAFOs do not get to have their valid 2021 permits and their advisory opinion too. Courts in Kansas do not have the power to correct abstract or theoretical wrongs, only real ones. And any wrongs Sierra Club may have suffered due to the 2017 and 2018 permits, it will continue to suffer under the 2021 permits regardless of anything we might say in this case.

Instead, the parties may litigate their actual dispute in other cases and administrative forums involving the operational 2021 permits (and potential successor permits). These venues are where the live controversy now resides. Any suggestion to the contrary merely encourages walking-dead arguments which "try to put flesh onto the skeleton of a hypothetical . . . claim." *Roat*, 311 Kan. at 597.

In sum, the only question pending before both the district court and the Court of Appeals was the validity of the 2017 and 2018 permits. But the CAFOs are no longer operating under the 2017 and 2018 permits—and they were not when the case was before the Court of Appeals. By then, the legal boundaries of the CAFOs were not even the same as the boundaries described in the 2017 and 2018 permits. On top of that, the legal grounding of the district court ruling under review had substantively changed. Simply put, there was no longer any actual controversy concerning the 2017 and 2018 permits. There may have been an abstract argument about them, but that is not sufficient to establish an actual controversy affecting the parties' rights. Indeed, regardless of what any

court might say about the 2017 and 2018 permits, the CAFOs would be legally entitled to continue operations under the current status quo pursuant to their legally obtained and, at least in this case, unchallenged 2021 permits.

The judgment of the Court of Appeals is reversed, and the appeal is dismissed as moot.