

NOT DESIGNATED FOR PUBLICATION

No. 124,916

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

JUDITH L. WELLS,
Appellant,

v.

KANSAS CORPORATION COMMISSION,
Appellee.

MEMORANDUM OPINION

Appeal from Shawnee District Court; THOMAS G. LUEDKE, judge. Opinion filed March 24, 2023.
Affirmed.

Judith L. Wells, appellant pro se.

Jonathan R. Myers, assistant general counsel, for appellee Kansas Corporation Commission.

Before ARNOLD-BURGER, C.J., BRUNS and HURST, JJ.

HURST, J.: Judith L. Wells sought judicial review of the Kansas Corporation Commission's (KCC) decision prohibiting Wells from submitting an official protest or making public comment regarding Midstates Energy Operating, LLC's (Midstates) application for an injection permit in Douglas County. The district court dismissed Wells' petition for judicial review pursuant to an innovative interpretation of K.S.A. 77-617(b). Although this court does not join the district court in its interpretation of K.S.A. 77-617(b), it does affirm the district court's dismissal on other grounds because Wells failed

to properly exhaust her administrative remedies before seeking judicial review. While this court does not agree with the grounds relied on by the district court, it affirms the dismissal of Wells' petition for judicial review.

FACTUAL AND PROCEDURAL BACKGROUND

In October 2017, Midstates filed an application with the KCC seeking a permit to inject saltwater into wells on the Hadl Lease located in Douglas County, Kansas. After the KCC determined that Wells did not have standing to file an official protest to the permit application pursuant to K.A.R. 82-3-135a and K.A.R. 82-3-135b, by letter she requested the KCC hold a public hearing. The KCC, in response to several filed protests and hearing requests, scheduled a prehearing conference regarding Midstates' application. However, the KCC granted Midstates' motion to dismiss Wells from the proceedings for failing to follow the service procedures for protests, even though Wells had not filed a protest pursuant to K.A.R. 82-3-135a and K.A.R. 82-3-135b but had instead sought a public hearing.

In May 2018, Wells filed a petition for public comment with the KCC in the permit proceedings for the Hadl docket. In her petition for public comment, Wells argued the "federal regulations require this Commission to permit public comment following a permit application, and regulations of the Commission's sister agency, the [Kansas Department of Health and Environment], permit public comment following a permit application." As a result, she argued, the KCC should interpret its regulations to allow a public notice and comment period in line with regulations promulgated by the Kansas Department of Health and Environment (KDHE) and federal regulations on the same issue.

On June 7, 2018, the KCC denied Wells' petition for public comment and explained that Wells' analysis "did not account for the entirety of the regulation nor

analyze it properly." It further explained that the Environmental Protection Agency's (EPA) approval of the Kansas Underground Injection Control (UIC) program meant that the federal regulations cited by Wells were inapplicable because the Kansas UIC program for the Class II wells at issue were required to comply with the state regulatory scheme, not 40 C.F.R. Parts 124, 144, 145, or 146. And the state regulatory scheme did not require public comment at hearings regarding permit applications. Further, the KCC declined to follow the KDHE's interpretations of that agency's regulations, as the KDHE program is entirely separate with its own EPA approval process and is thus incomparable to the KCC's regulatory scheme. The KCC ultimately found that "having failed to make a valid protest, Ms. Wells has no standing to engage in further participation in this docket, which forecloses her request to make public comment at the evidentiary hearing."

Several years later in September 2021, Wells filed a petition for judicial review of K.A.R. 82-3-135, K.A.R. 82-3-135a, K.A.R. 82-3-135b, K.A.R. 82-3-401, K.A.R. 82-3-402, and K.A.R. 82-1-204 in Shawnee County District Court. Wells asserted that her petition arose from her attempted participation in the Hadl Lease docket, and her dismissal and denial of opportunity to make a public comment as a nonparty. She also argued, in part, that the KCC unconstitutionally exceeded its authority in adopting K.A.R. 82-3-135a and K.A.R. 82-3-135b. The KCC moved to dismiss Wells' petition for judicial review, arguing she had challenged the constitutionality of these regulations in a different case before the same court, and as a result K.S.A. 77-617(b) prohibits her from reasserting the same challenge in this matter. The district court granted the KCC's motion to dismiss based on its broad *res judicata*-type interpretation of K.S.A. 77-617(b), and Wells appeals.

DISCUSSION

On appeal, Wells argues that (1) the district court erred when it interpreted K.S.A. 77-617(b) to prohibit a party from challenging a rule and regulation when they had an

adequate opportunity to raise the issue in other adjudicative proceedings; and (2) the district court erred in applying this interpretation to find that Wells was precluded from raising her present challenges, as she previously had an adequate opportunity to do so in *Wells v. Kansas Corp. Comm'n*, No. 122,575, 2021 WL 137417 (Kan. App. 2021) (unpublished opinion).

This court exercises unlimited review of the district court's dismissal of Wells' petition for judicial review based on the statutory interpretation set forth by the KCC. *Platt v. Kansas State University*, 305 Kan. 122, 126, 379 P.3d 362 (2016); see also *State v. Holman*, 295 Kan. 116, 150-151, 284 P.3d 251 (2012) (appellate courts exercise unlimited review of questions of law and statutory interpretation), *overruled on other grounds by State v. Dunn*, 304 Kan. 773, 375 P.3d 332 (2016). Although this court notes the district court's innovative interpretation and application of K.S.A. 77-617(b) to dismiss Wells' petition for judicial review, it need not address that issue because the district court—and thus this court—lack subject matter jurisdiction to review Wells' petition for judicial review and appeal of the same.

Although the KCC did not raise the issue of subject matter jurisdiction addressed here, an appellate court has a duty to determine its own jurisdiction to hear a case. Subject matter jurisdiction cannot be conferred by consent, through waiver, or failure to object. *Friedman v. Kansas State Bd. of Healing Arts*, 287 Kan. 749, 751-52, 199 P.3d 781 (2009). When the record discloses a lack of subject matter jurisdiction, the appellate court must dismiss the appeal. *Wiechman v. Huddleston*, 304 Kan. 80, 84-85, 370 P.3d 1194 (2016). Moreover, when the district court lacked subject matter jurisdiction to enter an order, an appellate court does not acquire jurisdiction over the subject matter on appeal. *In re Care & Treatment of Emerson*, 306 Kan. 30, 39, 392 P.3d 82 (2017).

The Kansas Judicial Review Act (KJRA) governs all appeals from the KCC's decisions and orders not related to rate hearings. The KJRA generally requires

petitioners, such as Wells, to exhaust administrative remedies prior to seeking judicial review. K.S.A. 77-612; *Luckett v. Kansas Employment Security Bd. of Review*, 56 Kan. App. 2d 1211, 1218, 445 P.3d 753 (2019). However, "the court may relieve a petitioner of the requirement to exhaust any or all administrative remedies to the extent that the administrative remedies are inadequate or would result in irreparable harm." K.S.A. 77-612(d). In her petition for judicial review, Wells briefly noted that it would be futile for her to exhaust her administrative remedies because she "sees no prospect for relief from administrative remedies from the Commission." Wells' conclusory statement is insufficient to support her assertion that she is permitted to seek judicial review without having exhausted her administrative remedies.

An appellate court exercises unlimited review over the question of whether a party is required to exhaust administrative remedies. *Ryser v. Kansas Bd. of Healing Arts*, 295 Kan. 452, 457, 284 P.3d 337 (2012). Under the KJRA, the administrative exhaustion requirements depend on the nature of the plaintiff's challenge to the administrative agency action. A plaintiff must exhaust their administrative remedies before seeking judicial review of their constitutional challenge to the agency's interpretation or implementation of a statute. However, where a plaintiff seeks judicial review of the constitutionality of the statute itself—regardless of the administrative agency's application or use of the statute—the plaintiff is not required to exhaust administrative remedies. See *Dean v. State*, 250 Kan. 417, 826 P.2d 1372 (1992); see also *Friedman*, 287 Kan. at 754 (Rejecting a plaintiff's attempt to "circumvent the KJRA's exhaustion requirement by claiming that an issue of statutory construction may be more authoritatively determined by the district court."). In determining whether a party's challenge is to the interpretation, implementation, or constitutionality of a statute, the court focuses on the nature of the relief sought. *J. Enterprises, Inc. v. Board of Harvey County Comm'rs*, 253 Kan. 552, 555-56, 857 P.2d 666 (1993) (noting the result would be untenable if a party could easily bypass the exhaustion requirement by simply claiming an agency action was illegal). When reviewing the plaintiff's requested relief, "neither

semantics nor how one couches his or her request for relief keys the result." 253 Kan. at 556.

Wells' petition for judicial review stems from the KCC's dismissal of her petition for public comment regarding Midstates' permit application for saltwater injection into the Hadl Lease. The entire basis for her appeal is premised on her request for public comment—not on a purely constitutional challenge. Moreover, her extensive pro se petition for judicial review of the KCC's dismissal sought the following relief from the district court:

- (1) find that the challenged regulations are "not pursuant to statutes K.S.A. 55-601 through 55-609" and should be set aside;
- (2) restore the 1983 version of K.A.R. 82-3-401(i);
- (3) vacate K.A.R. 82-3-135a and K.A.R. 82-3-135b;
- (4) require the KCC and its staff to receive training related to public participation and standing to challenge permits;
- (5) require the KCC and its staff to receive instruction that the public has a constitutional right to petition them;
- (6) require the KCC and its staff to receive instruction on the Kansas Administrative Procedure Act;
- (7) require the KCC to "reserve their use of litigation counsel to enforce its rules and regulations for oil and gas operations" and "not to collude with operators";
- (8) order that "the Commission conduct a proper hearing for public comment and not their show trial evidentiary hearings"; and
- (9) require the KCC to learn that all Kansas residents are stakeholders in natural resources.

Wells challenges more than the mere constitutionality of regulations and statutes under which the KCC operates, instead seeking review of the KCC's interpretation and application of those regulations and rules. Clearly, she wants to participate in the KCC's

process related to applications for saltwater injection and is concerned about the KCC's interpretation of its regulations and rules to prohibit certain persons from participating. Wells makes no cognizable arguments regarding the constitutionality of the regulations to which she objects. Rather, Wells seeks for this court to somehow reinstate prior versions of applicable statutes and regulations in which persons without "a valid interest in the application," as required by the current K.A.R. 82-3-135b, could make a public comment. In addition to requesting judicial reinstatement of a prior regulation, Wells is requesting KCC take actions such as holding public hearings, undertaking educational requirements, and restricting its use of litigation counsel. Wells' petition for judicial review goes far beyond a constitutional challenge to the KCC's governing regulations.

Because Wells challenges more than the constitutionality of the applicable regulations, she was required to exhaust her administrative remedies before seeking judicial review. "Before any action for judicial review may be brought by a person who was a party to the proceeding resulting in the agency action, a petition for reconsideration shall first be filed with the commission." K.S.A. 55-606(b). Wells filed a petition for public comment with the KCC related to Midstates' application for a saltwater injection permit at the Hadl Lease, and the KCC dismissed her petition. Thus, before seeking judicial review, Wells was required to seek the KCC's reconsideration of its decision to dismiss her petition for public comment. Because Wells failed to seek that reconsideration, she failed to exhaust her administrative remedies prior to filing her petition for judicial review.

Because Wells failed to exhaust her administrative remedies, the district court lacked subject matter jurisdiction to address any of Wells' claims in her petition for judicial review. See *Kingsley v. Kansas Dept. of Revenue*, 288 Kan. 390, 410, 204 P.3d 562 (2009) ("The exhaustion requirement of K.S.A. 77-612 is a jurisdictional prerequisite to the entire petition for judicial review."). The appellate courts have "repeatedly held that if a person does not exhaust all available and adequate administrative remedies before

filing a petition for judicial review of an agency action, the district court lacks subject matter jurisdiction to consider the contents of the petition." *Rebel v. Kansas Dept. of Revenue*, 288 Kan. 419, 427, 204 P.3d 551 (2009). Wells did not present a purely constitutional challenge to the district court or to this court on appeal, and thus was required to exhaust her administrative remedies prior to seeking judicial review.

"A party aggrieved by an administrative ruling is not free to pick and choose a procedure in an action in the district court in order to avoid the necessity of pursuing his remedy through administrative channels." *State ex rel. Smith v. Miller*, 239 Kan. 187, 190, 718 P.2d 1298 (1986). Wells is attempting to circumvent the administrative exhaustion requirement by presenting what she superficially asserts is a stand-alone constitutional challenge. However, her primary complaint and requests for relief demonstrate the true nature of Wells' grievance—that the KCC refused to allow her to make a public comment. Wells requests this court to exercise some fictional authority to reinstate older versions of applicable regulations that would allow her to make a public comment and then order the KCC to take specific agency actions. Wells' arguments and requests for relief demonstrate that she is not merely challenging the constitutionality of the applicable regulations, and she was therefore required to exhaust her administrative remedies.

The substance of Wells' briefing on appeal consists of a nearly incomprehensible combination of references to numerous exhibits, arguments regarding various statutes and regulations, and justification of her request to the KCC for a public hearing. None of this verbose briefing demonstrates that she was not required to exhaust her administrative remedies.

"A party in civil litigation cannot expect the trial judge or an attorney for the other party to advise him or her of the law or court rules, or to see that his or her case is properly presented to the court. A pro se litigant in a civil case cannot be given either an advantage

or a disadvantage solely because of proceeding pro se.' [Citation omitted.]" *O'Neill v. Herrington*, 49 Kan. App. 2d 896, 906, 317 P.3d 139 (2014).

Wells' numerous grievances and requests demonstrate that she is not merely making a constitutional objection and is in fact objecting to the KCC's actions.

While this court agrees with the district court's dismissal of Wells' petition for judicial review, it declines to address—or in any way adopt—the reasoning of the district court. This court may affirm the district court when its conclusion is right for the wrong reasons. *Pieren-Abbott v. Kansas Dept. of Revenue*, 279 Kan. 83, 100, 106 P.3d 492 (2005) (upholding the lower court's decision on appeal even though it relied on the wrong ground or assigned erroneous reasons for its decision). The district court failed to first establish its subject matter jurisdiction over Wells' action, which is a prerequisite to any substantive review of her claims.

CONCLUSION

The district court's dismissal of Wells' petition for judicial review is affirmed because Wells failed to exhaust her administrative remedies prior to seeking judicial review, and thus the district court lacked subject matter jurisdiction to review her claims. The district court's decision to dismiss Wells' petition for judicial review was right for the wrong reason and is thus affirmed.

Affirmed.