NOT DESIGNATED FOR PUBLICATION

No. 125,087

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

MARCUS S. VANDERPOOL,
Appellant,

v.

BRYAN K. FISHER,
Appellee.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; JEFFREY E. GOERING, judge. Opinion filed September 29, 2023. Affirmed.

Kevin M. McMaster, of McMaster & McMaster, LLC, of Wichita, for appellant.

Jessica R. Beever, of American Family Mutual Insurance Company, S.I., of Madison, WI, for appellee.

Before HURST, P.J., BRUNS and SCHROEDER, JJ.

HURST, J.: This appeal stems from a minor, non-injury car accident between Marcus Vanderpool and Bryan Fisher in which the parties dispute who bore the fault. Vanderpool sued Fisher seeking to recover for the damage to his car, loss of use of his car while it was being repaired, and related expenses and costs including reasonable attorney fees. A jury ultimately determined that the parties were equally at fault for the accident, but Vanderpool disagrees and now appeals. Although Vanderpool asserts numerous claims on appeal, the majority revolve around his allegation that the evidence was so one-sided that any fault assigned to him must be in error. This court disagrees. Finding no

error, the district court's judgment is affirmed and Vanderpool's motion for appellate attorney fees and costs is denied.

FACTUAL AND PROCEDURAL BACKGROUND

On the afternoon of June 8, 2020, Fisher was sitting in his parked car on the east side of Crestway Street (Crestway) talking on his cell phone. There was another car parked on the opposite (west) side of Crestway and a car traveling south on Crestway that was stopped at a stop sign across a northern intersection. At that same time, Vanderpool was driving north on Crestway and, as he passed Fisher's car, the passenger side of Vanderpool's car came into contact with the driver side of Fisher's car, resulting in damage to both cars.

The following day, Vanderpool went to the Wichita Police Department to report the accident. Vanderpool asserted, and maintains in this appeal, that Fisher opened his front driver-side door into the passenger side of Vanderpool's car as Vanderpool was driving past him. Under Vanderpool's argument, Fisher was exclusively at fault for the accident. Unsurprisingly, Fisher's account differed. He asserted that his front driver-side door was already open when Vanderpool veered into it. After the accident, someone interviewed Fisher over the phone on a recorded call about the accident. The interviewer asked Fisher, "How long had the door been opened before it was hit do you know roughly?" Fisher responded, "Oh, maybe 10 seconds, I don't know." The transcript of this interview was ultimately admitted into evidence.

Vanderpool sued Fisher to recover the damage to his car, loss of use of his car while it was being repaired, and related expenses and costs including reasonable attorney fees. In his answer to Vanderpool's suit, Fisher asserted the affirmative defense of comparative fault under K.S.A. 2022 Supp. 60-258a pursuant to K.S.A. 2022 Supp. 60-208(c)(1)(D).

During trial discovery, Fisher sent Vanderpool interrogatories in which he sought information to use in obtaining a subpoena for Vanderpool's cell phone usage records around the time of the accident from his service provider. In his answer to the interrogatory, Vanderpool admitted to having a cell phone on the date of the accident but objected to disclosing the information necessary for Fisher to issue the subpoena because it was "neither relevant nor tending to lead to the discovery of relevant or admissible information. Additionally, the invasion of privacy and burden of providing the requested information is outweighed by the likely benefit of the discovery and is not proportional to the needs of the case."

The parties were unable to reach an agreement regarding the requested information, and Fisher filed a motion to compel discovery. The district court granted the motion, finding that "the information requested is relevant to both the plaintiff's claim and/or to the defendant's defense and is proportional to the needs of a case filed pursuant to Chapter 61 of the Kansas Statutes Annotated." The district court ordered Vanderpool to provide Fisher with the information necessary to issue the subpoena and ruled that Fisher was "entitled to discover and obtain all records of use of each such phone during the period of two (2) hours before and two (2) hours after the collision."

As required, Fisher filed a notice of intent to issue the subpoena to Verizon for the nonparty business records and attached a copy of the proposed subpoena. Vanderpool filed a written objection to the issuance of the subpoena for six reasons:

> "1. The Notice of Intent To Issue A Subpoena Of Business Records is defective on its face and not in compliance with K.S.A. 60-245a(b)(1).
>
> "2. The subpoena is based upon an erroneously issued order filed March 1, 2021.
>
> - Order is based upon inaccurate information.

- Order was entered without affording the plaintiff an opportunity to be heard (present argument and authorities to support his position).

"3. The subpoena requests information that is beyond the scope of defendant's motion to compel.

"4. The subpoena requests information that is beyond the scope of the court's order.

"5. The subpoena requests information that is private, personal, confidential, and neither relevant nor tending to lead to the discovery of relevant or admissible information.

"6. Defendant has no good faith basis to support the request for the information."

After a hearing on the issue, the district court ultimately overruled Vanderpool's objections and ordered Verizon to produce the records designated in the subpoena. Verizon complied with the subpoena, and Fisher compiled the records as Exhibit 105.

At trial, on cross-examination, Fisher's attorney questioned Vanderpool with the cell phone records marked as Exhibit 105:

"[Fisher's Attorney]: Mr. Vanderpool, were you using your Internet on your cell phone at the time of the accident?

"[Vanderpool]: No.

. . . .

"[Fisher's Attorney]: Sir, I am going to hand you what has been marked as Exhibit [105]. If you would take a few seconds and glance through that.

. . . .

"[Vanderpool]: There is a lot of information in here. I'm not sure I understand what -- I don't understand what most of it means.

"[Fisher's Attorney]: Fair enough. If you turn to the second page of the document, it indicates --

"[Vanderpool's Attorney]: We are going to object to any questions about a document he hasn't seen before and he doesn't understand on the grounds of foundation.

"[Fisher's Attorney]: Your Honor, I am just using this to cross-examine him.

"THE COURT: I'm going to overrule the objection. I supposed to the extent that he doesn't understand the document -- well, he can only answer what he understands.

"[Fisher's Attorney]: Certainly. I will try to iron that out, Your Honor.

"[Fisher's Attorney]: Mr. Vanderpool, on the second page there do you see where it says requested target 316-[xxx-xxx]?

"[Vanderpool]: Yes.

"[Fisher's Attorney]: Is that your phone number?

"[Vanderpool]: Yes.

"[Fisher's Attorney]: All right. And then on the third page it says IPV detail explanation form?

"[Vanderpool]: Yes.

"[Fisher's Attorney]: It gives kind of a guide how you read it?

"[Vanderpool]: Okay.

"[Fisher's Attorney]: Okay. As part of that guide it talks about you can discern the start time and date and the stop time and date?

"[Vanderpool]: Okay.

"[Fisher's Attorney]: All right. And then to the next page, please. Mr. Vanderpool, the very last line -- there are four lines there. Before I ask you this, approximate what time did the incident happen?

"[Vanderpool]: Approximately 2:50 P.M.

"[Fisher's Attorney]: You are familiar with military time; right?

"[Vanderpool]: Yep.

"[Fisher's Attorney]: So what would that be in military time?

"[Vanderpool]: 1450.

"[Fisher's Attorney]: Okay. Do you see the very last line there it says the start date and time is June 8, 2020, at 1450 and 18 seconds, and then the stop time is June 8th of 2020, at 1454 and 22 seconds?

"[Vanderpool]: Yes.

"[Fisher's Attorney]: So it looks like Internet usage of about four minutes.

"[Vanderpool's Attorney]: To which we object on the grounds of foundation.

"THE COURT: Well --

"[Fisher's Attorney]: I will withdraw, Your Honor.

"THE COURT: All right."

On redirect-examination, Vanderpool's attorney also questioned him in detail about Exhibit 105. However, Exhibit 105 was ultimately not offered or admitted into evidence.

Fisher testified at trial on both direct examination and cross-examination that at the time of the collision, his door was already open and his foot was sitting in the doorjamb.

At trial, Fisher's attorney and Vanderpool had the following exchange:

"[Fisher's Attorney:] From your experience, if there is a vehicle parked on both sides of the street can two vehicles pass each other at once?

"[Vanderpool:] It is extremely tight. I would say it is extremely tight and people -- I don't do that. I would pull off to the side of the road or somebody else would pull off to the side of the road to let one vehicle go through. The chances of you clipping a parked vehicle if somebody is coming through or, yeah. You just let one vehicle go through.

"[Fisher's Attorney:] So tight quarters?

"[Vanderpool:] Very tight quarters, yes.

"[Fisher's Attorney:] On the day in question, you testified that there was a vehicle coming your direction headed southbound; correct?

"[Vanderpool:] Yes. But they were stopped at the 1st Street stop sign.

"[Fisher's Attorney:] All right. And you made the decision to proceed past Mr. Fisher's vehicle as opposed to pull behind and wait for the other vehicle to proceed?

"[Vanderpool:] They were presently stopped. So, yes, I made the decision staying close to my half of the street and pass Mr. Fisher's vehicle and then stop. And then the other vehicle -- that's when things, you know, happened. The other vehicle did not come. They did not cross south on 1st Street before I was stopped. Does that make sense?

"[Fisher's Attorney:] Yes. I believe I understand. So there was the -- there wasn't a moving vehicle to the left. Just the parked. So you had the space between both of the parked vehicles to move and go through; right?

"[Vanderpool:] Yes.

. . . .

"[Fisher's Attorney:] In knowing that people get in and out of their cars, they open doors, kids, pedestrians, you didn't move further away from Mr. Fisher's vehicle as you passed it; correct?

"[Vanderpool:] I did not."

. . . .

"[Fisher's Attorney:] You testified earlier that there was no one driving southbound on the roadway; correct?

"[Vanderpool:] Correct.

"[Fisher's Attorney:] And that you had enough room to move further than a couple feet away from Mr. Fisher's vehicle but you decided not to do so?

"[Vanderpool:] As I stated before, I was attempting to stay approximately on my half of the street."

Additionally, Vanderpool's attorney and Fisher had the following exchange about Fisher's previous statement about his car door's position:

"[Vanderpool's Attorney:] [I]sn't it true when you gave that statement approximately two hours after the accident to a person representing your interests you told them you didn't know how long the door had been open; true?"

"[Fisher:] I would have to look through and see it.

"[Vanderpool's Attorney:] I will help you find it.

"[Fisher:] Maybe ten seconds.

"[Vanderpool's Attorney:] But then you said right after that I don't know; correct?"

"[Fisher:] Yeah. I said maybe ten seconds. I don't know.

"[Vanderpool's Attorney:] So maybe ten seconds was a guess; right?

"[Fisher:] If I said I don't know or maybe, yeah."

In his proposed jury instructions and verdict form, Vanderpool included instructions to allow the jury to assign fault to Vanderpool. Consistent with Vanderpool's proposed jury instructions, the district court ultimately instructed the jury that it could assign fault to Vanderpool. Vanderpool also stated on the record that he did not "have any objection to any of the proposed [jury] instructions in the current [and final] packet" and had no objection to the order of the instructions or jury form. The district court further asked Vanderpool, "Any other record the plaintiff wishes to make regarding the verdict form or the jury instructions?" Vanderpool responded, "Not with regard to the verdict form or the jury instructions."

At the close of the evidence, Vanderpool moved for judgment as a matter of law, which the district court denied. The jury ultimately returned a verdict that Vanderpool and Fisher were equally at fault for the accident and assigned 50 % of the fault to each

party. The district court accordingly entered judgment for Fisher; see K.S.A. 2022 Supp. 60-258a (providing that a plaintiff cannot recover damages for negligence if the jury returns a verdict determining that the plaintiff's contributory negligence was equal to or greater than the negligence of the defendant) Vanderpool filed a timely motion for a new trial pursuant to K.S.A. 2022 Supp. 60-259. In his motion, Vanderpool asserted six reasons why the district court should grant him a new trial: (1) misconduct of Fisher's counsel for asking Vanderpool questions related to Exhibit 105; (2) jury misconduct; (3) instructing the jury on the duty to maintain control or keep a look out; (4) the district court's denial of Vanderpool's motion for judgment as a matter of law; (5) the jury's verdict was given under passion or prejudice; and (6) the jury's verdict was contrary to the evidence. Vanderpool requested that the district court either grant him a new trial or amend the judgment "to conform to the evidence finding Defendant 100% at fault for the cause of the accident, damages, and costs." Fisher filed an opposition to Vanderpool's motion for a new trial, and the district court subsequently conducted a hearing at which both parties presented argument. The district court ultimately denied the motion, explaining from the bench:

> "I think the jury concluded that both sides were equally at fault, and I believe there was evidence to support that finding.
>
> "As to the cell phone records, the fact that they weren't admitted doesn't mean that they weren't admissible. Defense counsel did not -- didn't go down the road of establishing foundation for admission because defense counsel elected not to -- not to use them after she got what she needed out of impeachment. And at the end of the day, I don't think that plaintiff's cell phone use played much into the jury's analysis of this case. I think the jury paid more attention to the testimony of both sides and the mechanics of the accident to reach the conclusion that they did.
>
> "So I don't think that there is a basis for granting a motion for new trial, and the motion will be denied.

Vanderpool appealed.

DISCUSSION

Vanderpool asserts that the district court erred by: (1) permitting Fisher's nonparty business records subpoena to Verizon; (2) overruling Vanderpool's first objection to questions related to Exhibit 105; (3) denying Vanderpool's motion for judgment as a matter of law; (4) instructing the jury that it could assign fault to Vanderpool; and (5) denying Vanderpool's motion for a new trial. While most of these claims stem from the same basic allegation—insufficient evidence to support the verdict—this court will address each claim in turn.

I. *The district court did not abuse its discretion in allowing Fisher to issue a nonparty business records subpoena to Verizon.*

Vanderpool argues that the district court abused its discretion in overruling his objection to the issuance of Fisher's nonparty business records subpoena to Verizon because:

> "1) there was not a scintilla of evidence presented to the Court to support a belief that Vanderpool did anything other than drive past Fisher's parked vehicle; 2) issuance of the subpoena would be state action regarding the investigation of a crime; and, 3) it was an invasion of the privacy of Vanderpool and his employer."

Vanderpool asserts that the district court made an error of fact and law because, according to Vanderpool, there were no facts supporting the allegation that he was on his phone at the time of the accident, and the subpoena therefore could not yield relevant information.

The district court has wide discretion to control trials and discovery. See *Zimmerman v. Board of Wabaunsee County Comm'rs*, 289 Kan. 926, 961, 218 P.3d 400 (2009). Thus, "orders concerning discovery will not be disturbed on appeal in the absence of a clear abuse of discretion." *Hill v. Farm Bur. Mut. Ins. Co.*, 263 Kan. 703, Syl. ¶ 1, 952 P.2d 1286 (1998); see *State v. Gonzalez*, 290 Kan. 747, 755, 234 P.3d 1 (2010). This discretionary standard of review also applies to a district court's orders concerning nonparty business records subpoenas, which is the issue here. See *Hill*, 263 Kan. at 704 (applying the abuse of discretion standard to the district court's order quashing a nonparty business records subpoena). The district court abuses its broad discretion regarding discovery orders only when its decision is based on an error of fact or law or is so arbitrary, fanciful, or unreasonable that "'no reasonable person would take the view'" of the district court. *Gannon v. State*, 305 Kan. 850, 868, 390 P.3d 461 (2017) (quoting *State v. Davisson*, 303 Kan. 1062, 1065, 370 P.3d 423 [2016]). Vanderpool, as the party asserting that the district court abused its discretion, bears the burden of demonstrating such abuse occurred. *Gannon*, 305 Kan. at 868.

Generally in a civil dispute, parties "may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case." K.S.A. 2022 Supp. 60-226(b)(1). This discovery could include requests from nonparties for records pursuant to K.S.A. 2022 Supp. 60-245a(b), which provides that "[a]ny party may request production of business records from a nonparty by causing to be issued a nonparty business records subpoena pursuant to this section."

All relevant evidence is admissible unless it is prohibited by statute, constitutional provision, or court decision. K.S.A. 60-407(f); *Nauheim v. City of Topeka*, 309 Kan. 145, 153, 432 P.3d 647 (2019). Evidence is relevant if it has "any tendency in reason to prove any material fact." K.S.A. 60-401(b). See *Nauheim*, 309 Kan. at 153. This court employes a two-prong analysis, evaluating the materiality and probative value of the evidence to

determine whether it has a reasonably tendency to prove a material fact. *State v. Alfaro-Valleda*, 314 Kan. 526, 533, 502 P.3d 66 (2022).

This court's review of the materiality and probative nature of the evidence involves two standards of review. Determining whether evidence is material is a question of law over which this court exercises unlimited review without deference to the district judge's decision. See *Castleberry v. DeBrot*, 308 Kan. 791, 812, 424 P.3d 495 (2018). "A material fact is one that has some real bearing on the decision in the case.[Citation omitted.]" *Alfaro-Valleda*, 314 Kan. at 533. Evidence is probative if it tends to prove a material fact. *Alfaro-Valleda*, 314 Kan. at 533; *Kansas City Power & Light Co. v. Strong*, 302 Kan. 712, 729, 356 P.3d 1064 (2015). Appellate courts review the question of whether evidence is probative under an abuse of discretion standard. *Castleberry*, 308 Kan. at 812.

However, in discovery, the scope of relevancy may be broader than what is determined relevant at trial. *Kansas Medical Mut. Ins. Co. v. Svaty*, 291 Kan. 597, 620, 244 P.3d 642 (2010). "Any evidence is discoverable if it is relevant to the subject matter of the cause of action as long as the evidence is not privileged." *Wallace, Saunders, Austin, Brown & Enochs, Chtd. v. Louisburg Grain Co.*, 250 Kan. 54, 59, 824 P.2d 933 (1992).

Even if this court accepts Vanderpool's assertion that "there was no reasonable belief that Vanderpool was using his phone," that does not eliminate the information's legal relevance to the case. Vanderpool cites no legal authority supporting his argument that Fisher was required to demonstrate a reasonable belief that Vanderpool was using his phone before being entitled to seek discovery on that fact by issuing a nonparty subpoena to Verizon. The purpose of the subpoena, like most discovery requests, was to learn new information—specifically, whether Vanderpool was using his phone at the time of the accident.

Vanderpool's cell phone usage at the time of the accident could be relevant to arguments regarding fault for the accident. It would defeat the purpose of discovery to require parties to show the existence of the very information they are seeking to obtain before permitting discovery on the topic. Of course, that does not mean the parties may engage in a fishing expedition. Discovery requests must seek nonprivileged information that is relevant to the party's claim or defense and must be "proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues and whether the burden or expense of the proposed discovery outweighs its likely benefit." K.S.A. 2022 Supp. 60-226(b)(1). Moreover, a district court has the authority to limit otherwise proper discovery if it determines the requested discovery is unreasonably broad, cumulative, burdensome, or could be obtained in a more convenient manner. See K.S.A. 2022 Supp. 60-226(b)(2).

To the extent Vanderpool's argument is a challenge to the relevancy of the business records designated in the subpoena, it likewise fails. Fisher asserted an affirmative defense of comparative fault that Vanderpool's own negligent driving caused or contributed to the accident and claimed that "[Vanderpool] caused or contributed to cause the accident by failing to keep a proper lookout for other vehicles and objects in his line of vision." Therefore, evidence demonstrating whether Vanderpool could have been distracted by his cell phone when the cars collided was material to a claim at trial, and the requested Verizon records had a tendency to prove or disprove that material fact. The records of Vanderpool's cell phone usage around the time of the accident were therefore relevant.

Vanderpool further argues that he had a privacy expectation in the requested records: "[a]bsent any facts to support a reasonable belief that Vanderpool was using his cell phone or that his vehicle struck anything the privacy of Vanderpool and his employer should have been protected." The only authority upon which Vanderpool relies in

asserting this vague privacy claim is an excerpt from K.S.A. 2022 Supp. 60-226(c)(1), which provides:

> "The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression or undue burden or expense, including one or more of the following:
>
> "(A) Forbidding the disclosure or discovery;
>
> "(B) specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery;
>
> "(C) prescribing a discovery method other than the one selected by the party seeking discovery;
>
> "(D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters."

Vanderpool fails to explain how production of the Verizon business records would have caused him annoyance, embarrassment, oppression, or undue burden or expense sufficient to constitute the good cause necessary to warrant a protective order. In filing this lawsuit, Vanderpool understood that it would subject him to discovery of relevant information and his unsupported and generalized claims of privacy do not shield him from narrowly tailored, relevant discovery requests. Fisher's nonparty business records subpoena did not result in financial expense to Vanderpool, was properly limited in time and scope, did not include a request for the content of data or texts, and is not otherwise burdensome to Vanderpool. As required by the relevant discovery rules, the subpoena sought nonprivileged, relevant information that was proportional to the needs of the case and did not satisfy the circumstances warranting a limitation or protective order.

Finally, Vanderpool asserts a vague constitutional challenge to the subpoena that was not asserted to the district court. He argues that "when a court authorizes the issuance of a business records subpoena to search for violations of the law it is a violation of a person's 4th Amendment rights." Generally, constitutional grounds for reversal asserted for the first time on appeal are not properly before this court for review. See *Bussman v. Safeco Ins. Co. of America*, 298 Kan. 700, 729, 317 P.3d 70 (2014). While the Kansas Supreme Court has recognized three exceptions to this general rule, Vanderpool asserts none of these exceptions here. See *In re Estate of Broderick*, 286 Kan. 1071, 1082, 191 P.3d 284 (2008), *cert. denied* 555 U.S. 1178 (2009). Moreover, Kansas Supreme Court Rule 6.02(a)(5) (2023 Kan. S. Ct. R. at 36) requires that "[i]f the issue was not raised below, there must be an explanation why the issue is properly before the court." See *State v. Johnson*, 309 Kan. 992, 995, 441 P.3d 1036 (2019). Vanderpool has failed to comply with Rule 6.02(a)(5) and his unpreserved constitutional claim is therefore waived or abandoned. See *State v. Daniel*, 307 Kan. 428, 430, 410 P.3d 877 (2018).

The district court did not abuse its discretion in overruling Vanderpool's objection to Fisher's nonparty business records subpoena to Verizon.

II. *The district court did not abuse its discretion in overruling Vanderpool's first foundation objection related to Exhibit 105.*

Vanderpool claims "[t]he District Court erred when it allowed Fisher's counsel to ask Vanderpool questions about a document with no foundation." During trial, Vanderpool denied using his cell phone at the time of the accident, and Fisher's counsel asked Vanderpool about that denial and the records produced from Verizon in Exhibit 105. But before any questions about the contents of the exhibit were asked, Vanderpool's counsel objected to the use of Exhibit 105 for lack of foundation. The district court overruled that first objection, and Fisher's counsel continued. Upon a second objection, Fisher's attorney withdrew the questions asked. Vanderpool claims that "Fisher's counsel

was allowed to ask questions regarding the exhibit without any proper foundation. . .The questions asked clearly provided inadmissible evidence that led the jury to believe Vanderpool was violating the law by using his cell phone at the time of the accident."

The trial judge has broad discretion to determine whether foundation requirements have been met for the admission of evidence. See *City of Overland Park v. Cunningham*, 253 Kan. 765, 772, 861 P.2d 1316 (1993) ("A trial judge has considerable discretion in evidentiary rulings concerning foundation evidence."). This court reviews a district court's evidentiary ruling concerning the foundation of evidence for an abuse of discretion. *State v. Hillard*, 315 Kan. 732, Syl. ¶ 12, 511 P.3d 883 (2022). As explained above, this court will only find an abuse of that discretion if the decision is based on an error of law, an error of fact, or is so unreasonable that no reasonable person would agree with the decision. *Gannon*, 305 Kan. at 868. Once again, Vanderpool bears the burden of showing the district court abused its discretion. 305 Kan. at 868.

The party seeking admission of evidence is required to lay a proper foundation by asking preliminary questions designed to demonstrate its admissibility. *State v. Banks*, 306 Kan. 854, Syl. ¶ 6, 865-66, 397 P.3d 1195 (2017). "Providing an adequate foundation prevents the finder of fact from being exposed to inadmissible evidence." *Banks*, 306 Kan. at 866. To preserve an issue for appeal, a party asserting trial error must make a specific, contemporaneous objection at trial to the admission or exclusion of evidence. K.S.A. 60-404; see also *State v. Great Plains of Kiowa County, Inc.*, 308 Kan. 950, 953, 425 P.3d 290 (2018).

Fisher's attorney sought to introduce evidence from Exhibit 105, and Vanderpool's attorney made two contemporaneous objections to the lack of foundation for Exhibit 105. The district court overruled the first objection, but the second objection successfully elicited a withdrawal from Fisher's attorney. Vanderpool fails to identify the specific evidence that he believes resulted from Fisher’s questions about Exhibit 105. Instead he

argues that the district court erred in permitting any questioning regarding the document because it was used to generally imply his client was negligently using his phone at the time of the accident.

Vanderpool's first objection occurred before Fisher's attorney asked any questions regarding the contents of the document, which the district court overruled. Fisher's attorney then proceeded to ask questions in an apparent attempt to establish proper foundation for the document. She asked Vanderpool to look at parts of the document and then identify information therein and finally whether the document showed "Internet usage of about four minutes." Once again, Vanderpool's attorney objected to foundation and then Fisher's attorney withdrew the question and ceased any questioning about the document. This court cannot speculate as to what evidence Vanderpool believes was erroneously admitted into the record as a result of Fisher's failed attempt to admit Exhibit 105. At the time of Vanderpool's first objection, Fisher's attorney had yet to ask Vanderpool any questions about the content of Exhibit 105, and the questions thereafter could constitute preliminary questions in an attempt to establish the proper foundation. Vanderpool identifies no error of law or fact upon which the court based its decision to overrule his first objection. Moreover, this court cannot say the district court's decision was so arbitrary or fanciful as to make it unreasonable. It was reasonable for the district court to allow Fisher's attorney to attempt to lay a foundation for the admission of Exhibit 105.

To the extent Vanderpool argues that even making the jury aware of the existence of Exhibit 105 constituted error such that the questions were asked in bad faith and for an improper purpose, this argument likewise fails. Vanderpool fails to show that Fisher's attorney did not possess a good-faith belief that the exhibit was relevant and that she could establish its admissibility through questions to Vanderpool, particularly given the district court's prior ruling to compel the discovery of the Verizon records. While there were likely other potential witnesses who could have established proper foundation for

the document, under the circumstances of the case, this court cannot say that Fisher's attorney lacked a good-faith basis for attempting to introduce the document through her examination of Vanderpool.

District courts have "considerable discretion in evidentiary rulings concerning foundation evidence." *Cunningham*, 253 Kan. at 772. Here, the district court merely ruled that Fisher's attorney could ask preliminary questions in an attempt to lay the foundation for the admissibility of Exhibit 105 and never got the chance to rule on its admissibility. This court cannot say that decision was arbitrary—particularly under the circumstances of the case and evidence at issue. District courts must have discretion to determine the ultimate admissibility of evidence. The district court did not abuse its discretion in overruling Vanderpool's first objection to questions related to Exhibit 105 and allowing Fisher's attorney to attempt to lay a foundation for the exhibit's admissibility.

III. *The district court did not err in denying Vanderpool's motion for judgment as a matter of law.*

Vanderpool argues simply that the district court erred by not granting him judgment as a matter of law on the ultimate issue of liability. He claims that the undisputed evidence can only be viewed to support the legal conclusion that Fisher was exclusively at fault for the accident and damage. Specifically, "[t]he fact that the first point of contact between the vehicles was the door of Fisher's vehicle into the side of Vanderpool's vehicle is not in dispute," and because "vehicles do not move sideways… it would be impossible for Vanderpool's vehicle to strike Fisher's door." Vanderpool claims that "[t]he door of Fisher's vehicle had to have been opened into Vanderpool's vehicle."

A district court's denial of a motion for judgment as a matter of law is reviewed de novo, determining "whether evidence existed from which a reasonable jury 'could properly find a verdict for the nonmoving party.'" *Siruta v. Siruta*, 301 Kan. 757, 766,

348 P.3d 549 (2015) (quoting *Smith v. Kansas Gas Service Co.*, 285 Kan. 33, 40, 169 P.3d 1052 [2007]). When reviewing a decision on a motion for judgment as a matter of law, this court resolves all facts and inferences reasonably to be drawn from the evidence in favor of the party against whom the ruling is sought and, where reasonable minds could reach different conclusions based upon the evidence, the motion must be denied. K.S.A. 2022 Supp. 60-250; *Dawson v. BNSF Railway Company*, 309 Kan. 446, 454, 437 P.3d 929 (2019); *Siruta*, 301 Kan. at 766; *Deal v. Bowman*, 286 Kan. 853, 858, 188 P.3d 941 (2008). The matter becomes a question of law for the court's determination when there is no evidence on an issue "or the evidence presented is undisputed and is such that the minds of reasonable persons may not draw differing inferences and arrive at opposing conclusions." *Deal*, 286 Kan. at 858. This court's inquiry is whether the evidence presented a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. *Dawson*, 309 Kan. at 454.

Vanderpool's claim that the evidence only supports one conclusion is unfounded. Contrary to his assertion, vehicles do move sideways. While the wheels spin forward or backward, the steering wheel can be adjusted to make the car move sideways. For example, cars change lanes sideways. Those lane changes can occur abruptly and without warning, which may or may not have been the case here—that question is not before this court but was properly before the jury. Contrary to Vanderpool's assertion, it was physically possible for his car to have veered to the right—for any number of reasons—and struck the allegedly already-open door of Fisher's car.

Moreover, in applying the standard of review on appeal of resolving all facts and inferences reasonably to be drawn from the evidence in favor of Fisher, there was substantial competent evidence presented at trial upon which a reasonable jury could conclude that Vanderpool's own negligent driving caused or contributed to the accident. The jury was instructed that "[n]egligence is a lack of reasonable care. Reasonable care requires all persons who use the streets and highways to obey the rules of the road." "In

cases involving allegations of driver negligence, Kansas employs a 'reasonably prudent driver' standard to determine whether a driver acted negligently in operating a vehicle." *Deal*, 286 Kan. at 859. "Under this standard, courts have explained that it is the driver's duty to drive his or her car as a prudent driver would do." 286 Kan. 853, Syl. ¶ 4. "Kansas law does not presume negligence, nor does it allow negligence to be established by conjecture, surmise, or speculation. Negligence must be proved by substantial competent evidence. [Citations omitted.]" *Yount v. Deibert*, 282 Kan. 619, 624, 147 P.3d 1065 (2006).

Additionally, Fisher asserted the affirmative defense of comparative fault and sought to reduce his percentage of fault by comparing it to Vanderpool's fault. The jury was instructed that they "must decide this case by comparing the fault of the parties." The jury instructions explained that "[a] party is at fault when he or she is negligent and that negligence caused or contributed to the event which brought about the claim of damages." Fisher had the burden of proving Vanderpool's fault by a preponderance of the evidence (i.e., the evidence must show that the other party's fault is more probably true than not true). See *Wooderson v. Ortho Pharmaceutical Corp.*, 235 Kan. 387, 412, 681 P.2d 1038 (1984); *Nauheim*, 309 Kan. 145, Syl. ¶ 5. The court instructed the jury that "[a] party will be able to recover damages only if that party's fault is less than 50 percent of the total fault assigned." However, a party cannot recover any damages "if that party's fault is 50 percent or more." To prevail in a comparative fault claim, a defendant must establish that the other party was both "'negligent and his negligence caused or contributed to the event which brought about the injury or damages for which the claim is made.'" *Sharples v. Roberts*, 249 Kan. 286, 295, 816 P.2d 390 (1991) (quoting *Allman v. Holleman*, 233 Kan. 781, Syl. ¶ 4, 667 P.2d 296 [1983]).

Vanderpool and Fisher offered conflicting accounts of the accident at trial. Vanderpool claimed that Fisher opened his car door into Vanderpool's vehicle as Vanderpool attempted to drive past Fisher's vehicle. On the other hand, Fisher claimed

that his car door was already open when Vanderpool struck it. The jury was presented with evidence of physical damage to both cars. Although Vanderpool repeatedly claims in this appeal that it was impossible for his car to sustain the damage it did if Fisher's door was already open at the time of impact, he cites no undisputed evidence from trial supporting that conclusion. A reasonable jury could conclude that the damage to Vanderpool's front quarter panel does not refute the possibility that Vanderpool veered into Fisher's car.

Likewise, a reasonable jury could have found Fisher's testimony at trial (and his answer in the post-accident interview) that his door had been open for "[m]aybe ten seconds" credible. Fisher testified that, at the time of the collision, his car door was already open and his foot was sitting in the doorjamb. Vanderpool testified at trial that, despite having enough room to move further away from Fisher's car, Vanderpool decided to remain close to Fisher's car as he passed. Given this testimony and the damage evidence, a reasonable jury could have determined that a reasonably prudent driver in Vanderpool's position would have kept a proper lookout, seen Fisher's open car door, and avoided hitting it.

Resolving all facts and inferences reasonably to be drawn from the evidence in favor of Fisher, a reasonable jury could determine—and indeed this jury did determine—that Vanderpool's own negligent driving contributed to the accident. The evidence presented a sufficient disagreement concerning the respective fault of the parties to require submission to a jury and, based on that evidence, reasonable minds could reach different conclusions without resorting to mere conjecture or speculation. The district court therefore did not err in denying Vanderpool's motion for judgment as a matter of law.

IV. *Vanderpool fails to demonstrate clear error in the jury instructions, and his claim is likely barred by the doctrine of invited error.*

Vanderpool argues that the district court "erred when it instructed the jury that they could find Vanderpool at fault for the cause of the accident." Once again, Vanderpool essentially claims there was insufficient evidence upon which the jury could conclude he violated any rule of the road, and, therefore, "the instruction and verdict form allowed the jury to roam the unfenced fields of speculation and conjecture" to assign him fault. This court follows a three-step process when analyzing claims of jury instruction errors: first it determines whether the appellate court has jurisdiction over the issue; second it determines whether error occurred; and finally it assesses whether any error requires reversal. *State v. McLinn*, 307 Kan. 307, 317, 409 P.3d 1 (2018).

Here, the first and third steps of the analysis are intertwined because the standard of reversal depends on the jurisdiction. When, as here, a party fails to object to a jury instruction at trial, the appellate court is limited to determining whether the instruction was clearly erroneous. See *Siruta*, 301 Kan. at 772. To find the instruction was clearly erroneous so as to require reversal, this court must be "firmly convinced that the jury would have reached a different verdict had the instruction error not occurred." *McLinn*, 307 Kan. at 318. Not only did Vanderpool fail to object to the now-derided instructions, he proposed them. In his proposed jury instructions and verdict form, Vanderpool requested that the district court instruct the jury that it could assign fault to Vanderpool. One of Vanderpool's proposed jury instructions specifically stated that the jury could assign fault to Vanderpool or Fisher. Additionally, Vanderpool's proposed verdict form included a line for the jury to assign himself a percentage of fault. Thus, any potential jury instruction error must meet the high standard of clear error to warrant reversal.

As for the second step in the analysis, this court exercises unlimited review over the determination of whether the jury instructions were legally and factually appropriate. *State v. Crosby*, 312 Kan. 630, 639, 479 P.3d 167 (2021); *State v. Holley*, 313 Kan. 249, 254, 485 P.3d 614 (2021). Vanderpool, as the party claiming clear error, has the burden

to show both error and prejudice. 312 Kan. at 639. Vanderpool challenges the instruction as factually inappropriate because, according to Vanderpool, since "there was no evidence for the jury to consider regarding Vanderpool violating any rule of the road the instruction and verdict form allowed the jury to roam the unfenced fields of speculation and conjecture." Whether an instruction is factually appropriate turns on whether there was sufficient evidence, viewed in the most favorable light to the requesting party, to support the instruction. *State v. Hilyard*, 316 Kan. 326, 336, 515 P.3d 267 (2022). As explained herein, there was sufficient evidence presented at trial to support allowing a jury instruction to assign fault to Vanderpool. The instruction was therefore factually appropriate. Likewise, the instruction was legally appropriate and Vanderpool's claim is rejected on the merits. Moreover, Vanderpool's claim is unavailing because he created and invited the error from which he now complains. The doctrine of invited error provides that "a party cannot invite error and then complain of the error on appeal." *Water Dist. No. 1 of Johnson Co. v. Prairie Center Dev.*, 304 Kan. 603, 618, 375 P.3d 304 (2016); see *State v. Slusser*, 317 Kan. 174, 179, 527 P.3d 565 (2023) ("The invited-error doctrine precludes a party who has led the district court into error from complaining of that error on appeal."). This court exercises unlimited review over the legal question of whether the invited-error doctrine applies. 317 Kan. at 179.

"The invited error doctrine prevents this court from reviewing instruction errors—even as clearly erroneous . . . when the defendant requests and agrees to the wording of the instruction." *State v. Willis*, 312 Kan. 127, Syl. ¶ 1, 475 P.3d 324 (2020). "[A] defendant cannot challenge an instruction on appeal when there has been an on-the-record agreement to the wording of the instruction at trial." 312 Kan. at 131. See *State v. Gulley*, 315 Kan. 86, 91, 505 P.3d 354 (2022). However, the Kansas Supreme Court recently explained that, "the invited-error doctrine should not apply when the error in a defendant's proposed instruction does not become apparent until the close of evidence or after trial." *Slusser*, 317 Kan. at 181.

Vanderpool both requested and agreed on the record to a jury instruction in which the district court would instruct the jury that it could assign fault to Vanderpool. Not only did Vanderpool draft and submit the jury instructions to which he now objects, but he also explicitly stated on the record that he did not "have any objection to any of the proposed [jury] instructions in the current [and final] packet." Vanderpool further stated on the record that he did not have any objection to the ordering of the instructions or to the verdict form. The district court further asked Vanderpool, "Any other record the plaintiff wishes to make regarding the verdict form or the jury instructions?" Vanderpool responded, "Not with regard to the verdict form or the jury instructions."

Moreover, the reason for which Vanderpool claims the instruction was given in error was apparent to Vanderpool at the time he requested and agreed to the instruction—it was the very same argument Vanderpool advanced in his motion for judgment as a matter of law. Vanderpool "affirmatively requested the instruction he now challenges on appeal, even though he could have readily ascertained" the alleged error at the time. *Slusser*, 317 Kan. at 182. Therefore, Vanderpool cannot challenge that instruction on appeal.

Even so, this court's review also demonstrates that Vanderpool's claim fails on the merits as the instructions were not clearly erroneous.

V. *The district court did not abuse its discretion in denying Vanderpool's motion for a new trial.*

Vanderpool argues that the district court should have granted his motion for a new trial for five reasons: (1) misconduct by Fisher's attorney; (2) jury misconduct; (3) erroneous rulings or instructions by the district court; (4) the jury's verdict was given under the influence of passion or prejudice; and (5) the verdict was contrary to the

evidence. There are limited circumstances under which a district court may grant a motion for a new trial, which include:

> "(A) Abuse of discretion by the court, misconduct by the jury or an opposing party, accident or surprise that ordinary prudence could not have guarded against, or because the party was not afforded a reasonable opportunity to present its evidence and be heard on the merits of the case;
>
> "(B) erroneous rulings or instructions by the court;
>
> "(C) the verdict, report or decision was given under the influence of passion or prejudice;
>
> "(D) the verdict, report or decision is in whole or in part contrary to the evidence;
>
> "(E) newly discovered evidence that is material for the moving party which it could not, with reasonable diligence, have discovered and produced at the trial; or
>
> "(F) the verdict, report or decision was procured by corruption of the party obtaining it, and in this case, the new trial must be granted as a matter of right, and all costs incurred up to the time of granting the new trial must be charged to the party obtaining the verdict, report or decision." K.S.A. 2022 Supp. 60-259(a)(1).

This court reviews the district court's decision to deny a motion for new trial for an abuse of discretion. The district court's denial of a motion for new trial "will not be disturbed on appeal unless there is a showing of an abuse of that discretion." *City of Mission Hills v. Sexton*, 284 Kan. 414, 421, 160 P.3d 812 (2007). As previously explained in this opinion, the district court abuses its discretion if its decision is "'arbitrary, fanciful, or unreasonable'" or based on an error of law or fact. *Gannon*, 305 Kan. at 868 (quoting *Davisson*, 303 Kan. at 1065). Vanderpool bears the burden of

demonstrating that the district court abused its discretion when it denied his motion. *Gannon*, 305 Kan. at 868.

a. *The district court did not abuse its discretion in determining that Vanderpool failed to show that Fisher's attorney engaged in misconduct warranting a new trial.*

Vanderpool claims Fisher's attorney engaged in misconduct in two ways that requires the court to grant him a new trial: (1) asking Vanderpool questions about his cell phone usage and Exhibit 105; and (2) instructing the jury to disregard the judge's instructions or basing her arguments on misstatements of the law. As previously explained in this opinion, the district court did not abuse its discretion in permitting Fisher's attorney to ask Vanderpool preliminary questions about Exhibit 105. Moreover, Vanderpool has failed to demonstrate that Fisher's attorney lacked a good-faith belief that Exhibit 105 was relevant and admissible, particularly given the district court's prior decision to compel discovery of Exhibit 105 in which it said that "the information requested is relevant to both the plaintiff's claim and/or to the defendant's defense and is proportional to the needs of a case filed pursuant to Chapter 61 of the Kansas Statutes Annotated." Fisher's questions regarding Exhibit 105 were narrow, concise, and clearly preliminary in an attempt to lay a foundation for its admission. Vanderpool has not identified any specific information or evidence admitted into the record or even presented to the jury through the questioning that he argues is objectionable in itself. Vanderpool cites no evidence supporting the conclusion that Fisher's attorney lacked a good-faith basis for attempting to introduce Exhibit 105 through her examination of Vanderpool. The district court therefore did not abuse its broad discretion in concluding that Fisher's attorney's questions relating to Exhibit 105 did not constitute grounds sufficient to order a new trial pursuant to K.S.A. 2022 Supp. 60-259(a)(1). When evaluating the criteria for a new trial under K.S.A. 2022 Supp. 60-259(a)(1), the limited questions Fisher's attorney

asked about Exhibit 105 do not demonstrate misconduct or any other criteria constituting a need for a new trial.

Vanderpool's remaining claims concerning the alleged misconduct of Fisher's attorney regarding instructing the jury to disregard the judge or misstating the law were not presented to the district court in his motion for a new trial and are therefore not preserved for this court's review. See *State v. Zimmerman*, 251 Kan. 54, 67, 833 P.2d 925 (1992); *State v. Ruebke*, 240 Kan. 493, 513, 731 P.2d 842 (1987). K.S.A. 2022 Supp. 60-259(c) provides that "[t]he motion should not follow the general language of subsection (a) in stating reasons for a new trial, but *rather must state specifically the alleged error or other reasons relied on*." (Emphasis added.) Moreover, issues not raised before the district court cannot be raised on appeal, and Vanderpool fails to comply with Rule 6.02(a)(5) because he offers no explanation for why his newly asserted grounds for a new trial are properly before this court, despite his failure to raise them below. *In re Adoption of Baby Girl G.*, 311 Kan. 798, 801, 466 P.3d 1207 (2020); *Johnson*, 309 Kan. at 995. The district court therefore did not abuse its discretion in determining that Vanderpool was not entitled to a new trial based on allegations that Fisher's attorney engaged in misconduct.

b. *The district court did not abuse its discretion in determining that Vanderpool was not entitled to a new trial based on jury misconduct.*

Despite admitting that he has "no direct evidence of jury misconduct," Vanderpool argues there is overwhelming circumstantial evidence that the "jury ignored the instructions of the Court" because it found Vanderpool partially at fault for the accident. Once again, Vanderpool reframes what is essentially a challenge to the sufficiency of the evidence into a jury misconduct allegation. "A new trial will not be granted, however, on mere allegations. There must be evidence that 'the jury consciously conspired to undermine the jury process by ignoring the instructions.'" *Sexton*, 284 Kan. at 422

(quoting *City of Ottawa v. Heathman*, 236 Kan. 417, 426, 690 P.2d 1375 [1984]). Here, Vanderpool concludes that the only way the jury could have found his client bore some responsibility for the accident is if the jury ignored the evidence or disregarded instructions. That is not enough.

As explained before, this case had two witnesses with contradicting statements, and the jury could have found either version of events credible. Vanderpool cites no evidence demonstrating that the jury engaged in any misconduct or ignored any instructions. Given the facts of the case, jury misconduct is not the only possible explanation for the jury's verdict. Therefore, the district court did not abuse its discretion in determining that Vanderpool was not entitled to a new trial based on conclusory, baseless allegations of jury misconduct.

c. *The district court did not abuse its discretion in determining that Vanderpool was not entitled to a new trial based on allegations the district court made erroneous rulings or instructions.*

Vanderpool repackages his prior allegations into an argument that the district court erred by denying his motion for new trial based on allegations of "erroneous rulings and instructions." He argues the district court erred by:

> "[1] issuing the business records subpoena which led to the improper questions regarding Vanderpool's phone records, [2] the failure to grant Vanderpool judgment as a matter of law, and [3] instructing the jury that Vanderpool could be found at fault/negligent for the cause of the accident."

First, in his motion for new trial, Vanderpool did not assert that the district court's issuance of the nonparty business records subpoena constituted an erroneous ruling upon which he was entitled to a new trial. Second, he did not assert that he was entitled to a new trial because the district court erroneously permitted Fisher's attorney to ask

Vanderpool preliminary questions about Exhibit 105. Vanderpool asserts those allegations of erroneous rulings as the basis for a new trial for the first time on appeal. This court, therefore, will not consider them. See K.S.A. 2022 Supp. 60-259(c); *Zimmerman*, 251 Kan. at 67; *Ruebke*, 240 Kan. at 513; *Benning v. Palmer*, No. 120,043, 2020 WL 1897366, at *5 (Kan. App. 2020) (unpublished opinion) (considering only the grounds stated in the motion for a new trial).

Finally, this court has already rejected Vanderpool's two remaining claims of allegedly erroneous rulings or instructions of the district court. Actually, this court has already rejected all four claims on the merits: (1) the district court did not abuse its discretion in overruling Vanderpool's objection to the issuance of Fisher's nonparty business records subpoena to Verizon; (2) the district court did not abuse its discretion in overruling Vanderpool's first foundation objection to Exhibit 105 questions; (3) the district court did not err in denying Vanderpool's motion for judgment as a matter of law; and (4) the district court's instruction that the jury could assign fault to Vanderpool was not clearly erroneous. Vanderpool has failed to demonstrate that the district court abused its discretion in determining that he was not entitled to a new trial based on "erroneous rulings and instructions" by the court.

d. *The district court did not abuse its discretion in determining that Vanderpool was not entitled to a new trial on the basis that the jury's verdict was given under the influence of passion or prejudice.*

Once again, Vanderpool recycles and reframes an allegation that the verdict was unsupported by sufficient evidence into a claim that the jury must have been motivated by improper passion or prejudice. Vanderpool argues that because the jury found against him, it must have "arbitrarily disregarded undisputed evidence" and given its verdict "under passion or prejudice." According to Vanderpool, "[t]he jury verdict can only be explained by jury misconduct due to passion and prejudice which entitles Vanderpool to a new trial."

Similar to his other conclusory allegations, Vanderpool's allegation that "[t]he jury verdict can only be explained by jury misconduct due to passion or prejudice" is unsupported and inaccurate. As previously explained, there was sufficient evidence presented at trial upon which a reasonable jury could rely in determining that Vanderpool's own negligent driving contributed to the accident. This evidence was unrelated to Exhibit 105. Therefore, contrary to Vanderpool's argument, the jury's verdict can be explained by something other than mere passion or prejudice. The district court did not abuse its discretion in determining that Vanderpool was not entitled to a new trial based on the allegation that the jury's verdict was given under the influence of passion or prejudice.

e. *The district court did not abuse its discretion in determining that Vanderpool was not entitled to a new trial on the basis that the jury's verdict was contrary to the evidence.*

Vanderpool again claims the verdict was not supported by the evidence and argues that "[t]he evidence, including witness testimony, presented in this case was not conflicting. No evidence presented supports the jury verdict unless we roam the unfenced fields of speculation and conjecture." "When a verdict is challenged as being contrary to the evidence, an appellate court does not reweigh the evidence or pass on the credibility of the witnesses. If the evidence, when considered in the light most favorable to the prevailing party, supports the verdict, the appellate court should not intervene." *Unruh v. Purina Mills*, 289 Kan. 1185, Syl. ¶ 7, 221 P.3d 1130 (2009); see *Sexton*, 284 Kan. at 422.

As explained previously in this opinion, there was substantial competent evidence presented at trial upon which a reasonable jury could conclude that Vanderpool bore 50% of the fault for the accident because of his own negligent conduct. Therefore, the district court did not abuse its discretion in determining that Vanderpool was not entitled to a new trial based on the allegation that the jury's verdict was contrary to the evidence. For

the same reason, the district court did not abuse its discretion in denying Vanderpool's motion to amend the judgment to conform to the evidence and find Fisher 100% at fault.

VI. *Vanderpool's motion for appellate attorney fees and costs is denied.*

Following oral argument, Vanderpool filed a motion for appellate attorney fees and costs. Fisher did not file a response. Supreme Court Rule 7.07(c) (2023 Kan. S. Ct. R. 52) provides that only an appellee can recover appellate attorney fees, not an appellant. Vanderpool's motion for appellate attorney fees and costs is therefore denied.

CONCLUSION

This case involves a minor, non-injury car accident in which the only two witnesses—who were the parties involved—disagree about what occurred. The trial included evidence of physical damage to both vehicles and contradictory testimony from both drivers. Despite Vanderpool's copious claims of misconduct and error, he repeatedly alleges there was insufficient evidence supporting the verdict. As shown throughout this opinion, and contrary to Vanderpool's allegations, there was substantial competent evidence presented at trial upon which a reasonable jury could have found that he bore some responsibility for the accident. Vanderpool has failed to demonstrate that the district court abused its broad discretion in compelling discovery, overruling an evidentiary objection, or denying his motion for a new trial. Additionally, the district court did not err in denying Vanderpool's motion for judgment as a matter of law, and its instruction that the jury could assign fault to Vanderpool was not clearly erroneous. The verdict is accordingly affirmed.

Affirmed.