No. 125,258

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

WILLIAM LORIN CORBETT,
Appellant,

v.

CITY OF KENSINGTON, KANSAS, and
CUNNINGHAM SANDBLASTING & PAINTING CO., INC.,
Appellees.

SYLLABUS BY THE COURT

1.

Under these facts, the city of Kensington, as the employer of an independent contractor, is not liable for injuries caused by any negligence of an independent contractor.

2.

Expert witness testimony is necessary to show that an independent contractor hired to brush blast and paint a city's water tower should have used different materials or a protective curtain to protect an adjacent landowner from injury. The standard of care for that work is outside the ordinary experience and common knowledge of a juror.

Appeal from Smith District Court; PRESTON A. PRATT, judge. Opinion filed May 12, 2023. Affirmed.

Todd D. Powell, of Glassman Bird Powell, LLP, of Hays, for appellant.

Allen G. Glendenning, of Watkins Calcara, Chtd., of Great Bend, for appellee City of Kensington.

Alan R. Pfaff, of Wallace Saunders, Chtd., of Wichita, for appellee Cunningham Sandblasting & Painting Co., Inc.

Before GARDNER, P.J., MALONE and HILL, JJ.

GARDNER, J.: William Lorin Corbett sued the City of Kensington (City) and Cunningham Sandblasting & Painting Co. Inc. (Cunningham) for personal injury and property damage, which Corbett claimed was caused by work the City contracted Cunningham to do on a water tower next to his property. The district court granted the City's motion for summary judgment because it found the City was immune and because it found the City was an employer of an independent contractor. It granted Cunningham's motion for summary judgment because Corbett failed to present expert testimony to establish the standard of care and causation for its claims. Corbett appeals. Finding no error, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The City owns a water tower that sits on property next to property owned by Corbett and his wife, Jennifer. In June 2018, the City contracted to hire Cunningham to brush blast and paint the City's water tower in accordance with SSPC-SP7. That document required the use of compressed air nozzle blasting, centrifugal wheels, or other specified methods to remove "all visible oil, grease, dirt, dust, mill scale, rust, paint, oxides, corrosion products and other foreign matter." The contract also required Cunningham to apply an epoxy primer coat and finish paint to the tower.

On September 7, 2018, Corbett learned that the City planned to have the water tower painted and sandblasted soon. Corbett told Cunningham's foreman, Nelson Bones, that Cunningham needed to cover his garage and porch before it began work on the tower.

By September 8, someone had covered Corbett's garage with plastic. The next day, Corbett noticed that his garage roof was covered in sand. Corbett told Bones that his garage and patio should be covered with heavy plastic or tarps. Someone later replaced the covering and applied a heavy black plastic cover to Corbett's porch and the length of his garage roof. Corbett apologized to Bones for being difficult and told him this was the type of covering he had expected. Corbett also suggested that had he known about the water tower project sooner, he would have covered his garage with heavy tarps and delayed installation of his $20,000 metal dome roof.

On September 12, Corbett slipped on sand that had accumulated on a small ornamental bridge in his yard and fell. Corbett later found paint chips in his yard and surrounding property, which he believed came from the water tower. After sending the paint chips and some soil samples for testing, he received lab results showing that the lead in one of the paint chips and one of the soil samples exceeded the standard acceptable level for lead contamination in a play area.

Corbett sued the City and Cunningham for negligently causing him personal injury and causing lead contamination to his property. Corbett claimed that he fell and was injured because the water tower project caused sand and debris to cover the bridge in his yard, and that the City and Cunningham were negligent for failing to use reasonable care under the circumstances or to take reasonable measures to protect him from being injured.

Jennifer testified in her deposition that before Corbett fell, she had sometimes noticed that the bridge had dust or sand on it from the water tower project. Corbett's son also stated that before Corbett's fall, the family had been avoiding the bridge because of the sand. Corbett testified that he typically crossed the bridge to take his kids to school every day and that he took his children to school the two days right before he fell. And a day before he fell, he saw sand on "just about everything" and thus assumed that the

bridge was also covered in sand. Corbett had also walked around his yard taking pictures and videos of the sand on his property, including on the bridge.

For his personal injury claim, Corbett designated Brenton Phillips—owner of Cunningham—as his expert on the standard of care for brush blasting and painting a water tower. Corbett summarized Phillips' anticipated testimony:

> "This witness is expected to testify regarding industry standards for brush blasting and sandblasting on water towers in regard to measures to protect health and safety of workers and people and property near the project and how to control the spread of sandblast media, lead paint, and other debris . . . . This witness is expected to testify consistent with his deposition testimony, which has not yet been taken. Anticipated testimony includes a discussion of under what circumstances a curtain or other protective equipment is used in blasting and painting projects on water towers."

But when Phillips was deposed, he testified that he would *not* recommend a protective curtain for the brush blasting process used for the City's water tower project, as there was simply "no reason to use it." He added that Cunningham had never discussed the possibility of using a curtain when going over the details of this project with the City, because it would have been unnecessary. And had the question arisen, Phillips would have asked why the City would want a curtain because it would have been a waste of taxpayers' money, and "for no good reason." Phillips provided uncontroverted testimony that the applicable standard of care for painting a water tower requires no special precautions.

For his lead contamination claim, Corbett designated Steven Northcott as an expert on the testing of the paint and soil samples. Corbett summarized his anticipated testimony:

> "Mr. Northcott is expected to testify as to the results of testing of soil and paint chips located on plaintiff's property . . . . Mr. Northcott is expected to testify to the results of lead testing, including explaining the nature and extent of lead contamination on Plaintiff's property and specifically that one soil sample exceeds the acceptable level for a play area and one paint chip sample exceeds the standard for lead in paint."

Northcott's report included lab reports for the samples Corbett had collected.

The City and Cunningham designated David Folkes, a civil and geological engineer, as their lead contamination expert. Folkes found that Northcott's investigation failed to determine the source of the lead, and the data and evidence collected failed to show that the 2018 water tower project was the source of the lead contamination on Corbett's property. Folkes concluded that a more likely source of the lead was paint from Corbett's house, other older painted structures in the area, historical auto emissions, or lead-containing herbicides or pesticides.

Cunningham moved for summary judgment, arguing that Corbett had failed to provide the expert testimony necessary to establish the standard of care required to complete the water tower project, or breach of that standard. Cunningham maintained that expert testimony was required because the procedure for preparing and painting the water tower—as provided in its contract with the City—was beyond the common knowledge and experience of the typical juror.

The City also moved for summary judgment, arguing it was not liable for negligence because it had not done the work or directed the work but had hired and relinquished full control to Cunningham, an independent contractor. The City also claimed discretionary immunity. Both defendants also argued that they could not be liable for an open and obvious hazard on Corbett's property, they had no duty to warn, and Corbett failed to prove causation or damages.

THE DISTRICT COURT'S DECISION ON CUNNINGHAM'S MOTION

After reviewing the parties' briefs, the district court found that Cunningham owed a duty of reasonable care to Corbett, but Corbett failed to show that Cunningham had breached that duty. The district court also held that Corbett failed to provide necessary expert testimony to establish the standard of care applicable to his personal injury claim. The district court found that Corbett's evidence failed to show, for example:

- What Cunningham should have done differently;
- Whether Cunningham should have used a different blast method or media; and
- Whether Cunningham needed to use some sort of protective cover to contain any debris.

The district court rejected Corbett's claim that no expert was needed because the standard of care was in the jury's common knowledge. In reaching that conclusion, it relied on *Gaumer v. Rossville Truck and Tractor Co.*, 41 Kan. App. 2d 405, 202 P.3d 81 (2009), *aff'd* 292 Kan. 749, 257 P.3d 292 (2011). There, this court determined that the "standard of care of the seller of a used hay baler is outside the ordinary experience and common knowledge of the jury and beyond the capability of a lay person to decide." 41 Kan. App. 2d at 408. The district court agreed with Cunningham that Corbett needed but failed to provide expert testimony to establish the standard of care for the "specialized work" involved in the water tower project. The district court thus granted summary judgment on Corbett's negligence claim because Corbett did not offer expert testimony to establish the standard of care and in turn could not prove that a breach occurred. Similarly, the district court granted summary judgment on Corbett's lead contamination claim because Corbett had no expert testimony showing that the paint or other samples his expert tested had likely come from Cunningham's work on the water tower in 2018.

THE DISTRICT COURT'S DECISION ON THE CITY'S MOTION

As for the City, the district court first applied the independent contractor doctrine, finding that the City was not liable for Corbett's alleged injuries because of its employer-independent contractor relationship with Cunningham. The court recognized, but rejected, Corbett's claims that several exceptions applied to this doctrine.

Finally, the court ruled that the City had discretionary function immunity under K.S.A. 75-6104(e) of the Kansas Tort Claims Act because the City's decision to hire Cunningham to work on the water tower was a policy decision rather than a ministerial function. The district court also found that maintaining a water tower is a proprietary function rather than a legal duty.

Corbett timely appeals.

Cunningham cross-appeals, arguing the district court erred in finding it owed Corbett a duty of reasonable care. The City also filed a notice of conditional cross-appeal, asking that if we reverse the district court's dismissal of Corbett's claims against it, it be allowed to reinstate a cross-claim that it raised against Cunningham.

I. DID THE DISTRICT COURT ERR BY FINDING THE CITY NOT LIABLE BASED ON THE INDEPENDENT CONTRACTOR DOCTRINE?

We first address Corbett's argument that certain exceptions to the independent contractor rule raise a material question of fact about the City's liability.

Basic Legal Principles

Summary judgment is appropriate when "there is no genuine issue as to any material fact" and "the movant is entitled to judgment as a matter of law." K.S.A. 2022 Supp. 60-256(c)(2). A party seeking summary judgment must show there are no disputed questions of material fact—there is nothing that the fact-finder could decide that would change the outcome of the claim. See *Shamberg, Johnson & Bergman, Chtd. v. Oliver*, 289 Kan. 891, 900, 220 P.3d 333 (2009).

When deciding a motion for summary judgment, the district court must view the evidence in the light most favorable to the nonmoving party, giving that party the benefit of every reasonable inference drawn from the evidence. *Shamberg, Johnson & Bergman, Chtd.*, 289 Kan. at 900. Because summary judgment tests the legal viability of a claim, this court applies this same framework on appeal. 289 Kan. at 900; see also *Martin v. Naik*, 297 Kan. 241, 246, 300 P.3d 625 (2013). When, as here, the parties agree that the facts are undisputed, we review a district court's decision to grant summary judgment de novo. And we review issues of statutory interpretation, like other questions of law, de novo. *Roe v. Phillips County Hospital*, 317 Kan. 1, 5, 522 P.3d 277 (2023).

Negligence is "the lack of ordinary care"—that is, "the failure of a person to do something that a reasonably careful person would do, or the act of a person in doing something that a reasonably careful person would not do, measured by all the circumstances then existing." *Johnston v. Ecord*, 196 Kan. 521, 528, 412 P.2d 990 (1966). To succeed on a negligence claim, a plaintiff must prove that the defendant owed the plaintiff a legal duty and breached that duty, and that the plaintiff was injured as a result of the defendant's breach. *Sall v. T's, Inc.*, 281 Kan. 1355, Syl. ¶ 2, 136 P.3d 471 (2006). Generally, "'[w]hether a duty exists is a question of law,'" but "'[w]hether the duty has been breached is a question of fact.'" *Deal v. Bowman*, 286 Kan. 853, 858, 188 P.3d 941 (2008) (quoting *Nero v. Kansas State University*, 253 Kan. 567, Syl. ¶ 1, 861 P.2d

768 [1993]). Summary judgment is seldom considered proper for claims of negligence. *Esquivel v. Watters*, 286 Kan. 292, Syl. ¶ 3, 183 P.3d 847 (2008).

Kansas law does not impose a generalized duty on everyone to prevent all possible harm to others. See *Gragg v. Wichita State University*, 261 Kan. 1037, 1045, 934 P.2d 121 (1997). It, however, imposes a duty of care to safeguard against reasonably foreseeable harms based on the circumstances of a particular case and the parties' relationships. See 261 Kan. at 1045.

Analysis

The parties agree that generally, the employer of an independent contractor is not liable for injuries caused by the negligence of an independent contractor. See Restatement (Second) of Torts § 409 (1964); *Dillard v. Strecker*, 255 Kan. 704, 716, 877 P.2d 371 (1994). "An independent contractor is defined as one who, in exercising an independent employment, contracts to do certain work according to his own methods, without being subject to the control of his employer, except as to the results or product of his work." *Falls v. Scott*, 249 Kan. 54, 64, 815 P.2d 1104 (1991). The district court found that Cunningham acted as an independent contractor and that the City relinquished control of the work to Cunningham. See 249 Kan. at 64. Corbett does not challenge those conclusions, conceding that Cunningham was an independent contractor of the City and recognizing that if the general rule applies, the City is not liable for injuries caused by Cunningham's negligence.

Corbett argues solely that the district court erred by not applying these exceptions to the independent contractor doctrine:

- the City knew that the water tower work was likely to create a nuisance or trespass;

- the work created a peculiar or unreasonable risk of physical harm to others absent special precautions;
- the work involved an inherently dangerous activity; and
- the City failed to exercise reasonable care to hire a competent contractor.

We examine these individually.

Nuisance Exception

Restatement (Second) of Torts § 427B (1965) provides that an employer of an independent contractor may be held liable for harm caused to another when the employer knows or has reason to know that the work is "likely to involve a trespass upon the land of another or the creation of a public or a private nuisance," and the harm results from that trespass or nuisance.

Although Corbett relies on this exception, he fails to show that our appellate courts have ever adopted this rule. Cf. *McDonnell v. The Music Stand, Inc.*, 20 Kan. App. 2d 287, 293, 886 P.2d 895 (1994) (adopting similar exception provided in Restatement [Second] of Torts § 411 [1965]); see *State v. Meggerson*, 312 Kan. 238, 246, 474 P.3d 761 (2020) (point raised incidentally in brief but not argued is considered waived or abandoned; point considered improperly briefed based on failure to cite pertinent authority in support). But cf. *Davis v. City of Kansas City*, 204 Kan. 524, 532-33, 464 P.2d 154 (1970) (applying rule that "where the conduct of the contractor gives rise to a nuisance and the employer retains the right to control the manner and method of the contractor's performance of the contract, the employer is liable for the nuisance"). We assume, without finding, that the Kansas Supreme Court would apply this exception to appropriate facts.

The City also notes that Corbett did not plead nuisance when he filed his initial claims; he claimed only negligence and lead contamination. But the City cites no authority showing that Corbett had to do so to rely on § 427B in its summary judgment motion. We know of no such requirement.

Still, in response to the City's motion for summary judgment, Corbett had to give the district court "something of evidentiary value to establish a disputed material fact." *Kastner v. Blue Cross and Blue Shield of Kansas, Inc.*, 21 Kan. App. 2d 16, Syl. ¶ 6, 894 P.2d 909 (1995). To fall within the nuisance exception to the independent contractor rule, Corbett had to provide probative evidence that the City knew or should have known that the water tower project would likely cause a private or public nuisance on his property. Restatement (Second) of Torts § 427B.

The district court found the nuisance exception inapplicable because the City lacked "expertise or knowledge in how the tower work would be carried out, or what, if any, issues [it] might cause for neighboring landowners, or how significant those issues might be." The City argues that the nuisance exception applies only if the City had "actual knowledge" of a likelihood of a nuisance or trespass. Alternatively, the City also argues that it had no reason to know that a nuisance would result because, as the district court found, it lacked any training or expertise in this area.

Corbett claims that the City knew the proximity of his property to the water tower and knew that the work would cause sand and other debris to fall onto his property, as this evidence shows:

- the bids that the City received from Cunningham stated the following scope of work: "SSPC-SP 6—The removal of all visible oil, grease, dirt, dust, mill scale, rust, paint, oxides, corrosion products and other foreign matter by compressed air nozzle blasting, centrifugal wheels or other specified method";

- Corbett's property is adjacent to the water tower;
- City maintenance worker, Troy Conaway, helped put a protective covering on Corbett's property; and
- Corbett spoke to a Cunningham representative about having a protective curtain or sock put up to contain any debris.

Contrary to the City's claim, the City did not need to direct Cunningham to cause a nuisance or have actual knowledge that a nuisance would occur; its knowledge that a nuisance was likely to occur is enough:

> "This exception applies to work which involves a trespass on the land of another, or either a public or a private nuisance. It applies in particular where the contractor is directed or authorized by the employer to commit such a trespass, or to create such a nuisance, and where the trespass or nuisance is a necessary result of doing the work, as where the construction of a dam will necessarily flood other land. It is not, however, necessary to the application of the rule that the trespass or nuisance be directed or authorized, or that it shall necessarily follow from the work. It is sufficient that the employer has reason to recognize that, in the ordinary course of doing the work in the usual or prescribed manner, the trespass or nuisance is likely to result." Restatement (Second) of Torts § 427B, comment b.

Corbett's evidence, viewed in the light most favorable to him, and together with reasonable inferences, suggests that the City knew or should have known that the work it contracted for Cunningham to do would likely cause dust or debris to fall on Corbett's property.

It does not necessarily follow, however, that the City knew that the work was likely to create a problem rising to the level of a nuisance. And that is what Corbett must show to fall within this exception.

Generally, whether a nuisance exists is a question of fact.

> "'Nuisance means annoyance, and any use of property by one which gives offense to or endangers life or health, violates the laws of decency, unreasonably pollutes the air with foul, noxious, offensive odors or smoke, or obstructs the reasonable and comfortable use and enjoyment of the property of another, may be said to be a nuisance. What may or may not constitute a nuisance in a particular case depends upon many things, such as the type of neighborhood, the nature of the thing or wrong complained of, its proximity to those alleging injury or damage, its frequency or continuity, and the nature and extent of the injury, damage or annoyance resulting. Each case must, of necessity, depend upon particular facts and circumstances.' [Citation omitted.]" *Cherry v. Board of County Commissioners*, 202 Kan. 121, 123-24, 446 P.2d 734 (1968).

Factors we consider in determining whether an offense rises to the level of a nuisance are its frequency, continuity, and duration. *Sly v. Board of Education*, 213 Kan. 415, 419, 516 P.2d 895 (1973).

> "A single offense, or several isolated offenses, may not constitute a nuisance, and may not, for any reason, be enjoined or enjoinable; but when the offense is repeated continuously and persistently, without any immediate prospect of a final termination, the aggregate of such offenses will finally become and will constitute a public nuisance, which may be enjoined by the public unless some other adequate remedy is given for its complete suppression and extirpation." *State ex rel. Vance v. Crawford*, 28 Kan. 726, 736 (1882).

The interference with property must also be both substantial and unreasonable. *Sandifer Motors, Inc. v. City of Roeland Park*, 6 Kan. App. 2d 308, 312, 628 P.2d 239 (1981).

The City argues that any sand or debris the water tower project caused to fall on Corbett's property was merely an inconvenience and not a nuisance, citing *Hofstetter v. Myers, Inc.*, 170 Kan. 564, 228 P.2d 522 (1951). There, our Supreme Court found an occasional but repeated operation of an asphalt plant over several years did not constitute

a nuisance, in part because the dust deposited on the plaintiffs' property was only occasional—when the wind was in the right direction. The *Hofstetter* court distinguished between an "inconvenience" and a nuisance:

> "Now it may be that plaintiffs suffered actual injury and damage to their persons and property as a result of the plant's operation, but the fact remains the lower court did not so find. It merely found they were *inconvenienced*. While it is perhaps true that 'inconvenience,' depending upon its nature, extent and result, might, in some instances, be such as to constitute a nuisance in the eyes of the law, yet under all of the facts and circumstances of the case before us we cannot give the court's findings such interpretation." 170 Kan. at 569.

We assume that the sand or debris on Corbett's property was caused by brush blasting the water tower. But the sand or debris was on his property only a few days, had an immediate prospect of a final termination, and was washed away during the next rainstorm. The evidence, including the photographs of Corbett's property, does not show such a volume of sand as to arguably constitute a nuisance.

Nor does the evidence show the City's knowledge that the work was likely to create a problem rising to the level of a nuisance. Corbett argues that the "Cleanup/Disposal" clause in Cunningham's contract shows the City's knowledge of the likelihood of creating a nuisance. But other terms in the contract suggest that the water tower work would be completed in as short a timeframe as possible, promising the work would be "pursued aggressively" and defining "excessive" delays as "several days or weeks." The City may have taken Cunningham's promise to cleanup and dispose of any leftover material as an assurance that a nuisance would *not* be created. Nothing in the contract tends to show the City's knowledge that the project could create sand or debris on neighboring property in such an amount or for the duration necessary to constitute a nuisance.

So even if we assume that § 427B applies in our jurisdiction and we agree that the City knew that the water tower project would create some sand or debris on neighboring property, Corbett's evidence fails to raise a material question of fact that the City should have known that the sand would be significant enough to cause a nuisance, damaging Corbett or his property. Thus the nuisance exception under § 427B does not apply.

Peculiar Risk Exception

Corbett also invokes the "so-called peculiar risk doctrine" set forth in Restatement (Second) of Torts § 416 (1965). *See Balagna v. Shawnee County*, 233 Kan. 1068, 1082-83, 668 P.2d 157 (1983), *superseded by statute on other grounds*. It provides:

> "One who employs an independent contractor to do work which the employer should recognize as likely to create during its progress a peculiar risk of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the failure of the contractor to exercise reasonable care to take such precautions, even though the employer has provided for such precautions in the contract or otherwise." Restatement (Second) of Torts § 416.

But expert Phillips testified that the applicable standard of care in the industry for a water tower project requires no special precautions. That testimony was uncontradicted.

And Corbett offers no evidence to reasonably support a finding that the water tower project was *likely to create* an unsafe build-up of sand or debris. He presented no evidence that would show, for example, that brush blasting a water tower routinely leaves excessive sand or debris that is unsafe for neighboring property owners. Nor does Corbett show the City should have known the work was likely to create a peculiar risk of physical harm to others.

> "It is that knowledge of risk that creates the exception to the general rule of nonliability of one who hires an independent contractor. Not being involved in the execution of the work or supervising the activities, only owners who have knowledge of the peculiar risk or reasonably should have known of the risks are liable under § 413." *Dumler v. Conway*, 49 Kan. App. 2d 567, 573, 312 P.3d 385 (2013).

Dumler found this exception inapplicable. There, the plaintiff was injured when her car slid on mud on a road next to a field where ensilage was being harvested. She sued the farmer and the harvester, an independent contractor. Her suit against the farmer alleged he should have recognized his harvester was likely to create a peculiar risk of physical harm to others by leaving mud and debris on the roadway next to his field being harvested. Because the farmer did not require the harvester to take precautions, the plaintiff argued he was liable for the physical harm the harvester caused. But the district court granted summary judgment to both the farmer and the harvester. As for the farmer, the court held the "peculiar risk doctrine" did not apply so he was not liable for the negligent acts of his independent contractor. It rejected plaintiff's argument that the existence of mud on a roadway was likely to create a peculiar risk of physical harm, finding that transportation of farming equipment, which could leave mud and debris in a road, is an everyday activity that can be done safely and does not inherently pose a physical risk of harm to others. 49 Kan. App. 2d at 574.

Similarly, brush blasting and painting a water tower can be done safely and does not inherently pose a physical risk of harm to the neighbors of the water tower. Corbett fails to raise a genuine question of material fact that the City should have recognized that Cunningham's work was likely to create a peculiar risk of physical harm to others unless it took special precautions. This exception does not apply.

Inherently Dangerous Activity Exception

Corbett next relies on the inherently dangerous activity doctrine. This exception is much like the peculiar risk exception addressed above.

> "'An exception to the general rule is the inherently dangerous activity doctrine, which provides that one who employs an independent contractor to do work involving a special danger to others which the employer knows or has reason to know to be inherent in or normal to the work, or which he contemplates or has reason to contemplate when making the contract, is subject to liability for physical harm caused to such others by the contractor's failure to take reasonable precautions against such dangers.'" *Dillard v. Strecker*, 18 Kan. App. 2d 899, 906, 861 P.2d 1372 (1993) (quoting *Balagna*, 233 Kan. 1068, Syl. ¶ 4), *aff'd* 255 Kan. 704, 877 P.3d 371 (1994).

See Restatement (Second) of Torts § 427.

"'In determining whether an inherently dangerous activity exists, each case must rest upon its own facts.'" *Wilson v. Daytec Constr. Co.*, 22 Kan. App. 2d 401, 404, 916 P.2d 72 (1996) (quoting *McCubbin v. Walker*, 256 Kan. 276, 290, 886 P.2d 790 [1994]). Still, comparing our facts to others is helpful.

> "The reporter's note under § 427 in the Appendix to the original volume lists a number of situations in which the doctrine has been held applicable. Among those listed are included the following: Crop dusting and spraying insecticides; work involving excavation in or near the highway, where the excavation was left unguarded; work done above the highway or sidewalk, where something fell; work contemplating obstruction of the highway; installing safety doors on an elevator while it is in use; installing defective joists on a steel building frame; turning gas into mains before they were cemented; use of an acetylene torch near inflammable materials in repairing a building; repairing a skylight, with no arrangement for removal of loose iron, which was blown off; red hot rivets dropped into work being done below." *Balagna*, 233 Kan. at 1080.

Whether an activity is inherently dangerous is a question of law when the facts are undisputed. *Falls*, 249 Kan. at 61. Generally, the proper test is whether danger "inheres" in performance of the work; important factors to consider are the contemplated conditions under which the work is to be done and the known circumstances attending it. *Phillips Pipe Line Co. v. Kansas Cold Storage, Inc.*, 192 Kan. 480, 488, 389 P.2d 766 (1964); *Reilly v. Highman*, 185 Kan. 537, 541, 345 P.2d 652 (1959). Stated another way, intrinsic danger in an undertaking is one which inheres in the performance of the contract and results directly from the work to be done—not from the collateral negligence of the contractor. *Balagna*, 233 Kan. at 1081 (finding trenching operations not inherently dangerous, thus the employer was not vicariously liable for independent contractor's failure to shore up the trenching operations).

In *McCubbin*, 256 Kan. at 296-97, the court determined that tree trimming is generally not an inherently dangerous activity under the Restatement (Second) of Torts § 427 (1964). The court reasoned it would not take an expert witness to determine that if branches are cut from a tree, they will fall to the ground and increase the risk to a person below. But an undertaking cannot be found inherently dangerous just because it might produce injury. 256 Kan. at 296-97.

Corbett has the burden to show evidence that reasonably supports a factual finding that the normal work of brush blasting and painting of a water tower is likely to create a special danger to one in his position. Corbett alleges two inherent dangers: the creation of sand and other debris; and the danger associated with the water tower's height. As for sand and debris, the City correctly states that several types of work create sand and debris—its danger is not special. And Corbett shows no facts suggesting that the City knew that Cuningham's activity was likely to create enough sand or debris to create a special danger to nearby landowners.

As for the special danger associated with the tower's height, that danger is the risk that a worker will fall off the tower. Corbett was not injured by that special danger. This exception could perhaps subject the City to liability for physical harm caused to others by the contractor's failure to take reasonable precautions against the special danger of falling that the City knows or has reason to know are inherent in or normal to the work. But Corbett's harm was not caused by Cunningham's failure to take reasonable precautions against that risk, as this exception requires. See *Dillard,* 18 Kan. App. 2d at 906 (employer who should know of special danger inherent in work is subject to liability "for physical harm caused to such others by the contractor's failure to take reasonable precautions against such dangers"). Yet Phillips provided uncontroverted testimony that the applicable standard of care for this water tower project requires no special precautions. So even if the City knew of some special danger that injured Corbett, no facts show that the contractor failed to take reasonable precautions against such dangers.

We find that the brush blasting and painting of a water tower is an activity that can be accomplished safely and does not inherently pose a physical risk of harm to persons not working on that project. The inherently dangerous activity exception does not help Corbett.

Negligent Hiring of Independent Contractor Exception

The last exception Corbett relies on states that an employer may be directly liable for its negligent hiring of an independent contractor. See *Dye v. WMC, Inc.*, 38 Kan. App. 2d 655, 663-64, 172 P.3d 49 (2007). Restatement (Second) of Torts § 411 states:

> "An employer is subject to liability for physical harm to third persons caused by his failure to exercise reasonable care to employ a competent and careful contractor
>
> "(a) to do work which will involve a risk of physical harm unless it is skillfully and carefully done, or

"(b) to perform any duty which the employer owes to third persons."

Kansas has adopted this exception. See *McDonnell*, 20 Kan. App. 2d at 293.

Corbett suggests that the City should have required Cunningham to provide references and a list of its employees before hiring them. He also argues that the City had to include certain contract provisions to show its due diligence in hiring a reputable company to complete the water tower work. But Corbett fails to support these points with facts of record or legal authority. See *Meggerson*, 312 Kan. at 246 (point raised incidentally in a brief but not argued is considered waived or abandoned; point is improperly briefed based on failure to cite pertinent authority in support).

We consider the extent of the employer's knowledge and experience in the field of work to be done. The record does show that when the City hired Cunningham, it knew Cunningham had decades of experience and expertise in maintaining water towers. In fact, Cunningham had inspected and maintained the City's water tower for the last several decades. No evidence shows that Cunningham had provided references or a list of its employees on prior occasions. No facts suggest that any contract provisions required Cunningham to take special precautions on prior occasions. And no evidence shows that Cunningham had ever taken special precautions, such as using a curtain, or that the City had any evidence that Cunningham was not a careful and competent contractor, or that the City knew that other neighbors had been injured by sand or debris falling from a previous water tower project of Cunningham's.

Corbett's petition states a claim of physical injury. But the City convincingly argues that Corbett's evidence does not tend to show that the City acted unreasonably when hiring Cunningham or that Cunningham acted incompetently or dangerously or that the City's failure to employ a competent and careful contractor caused Corbett's injury. Corbett thus fails to prove the elements necessary to meet this exception.

No argued exception to the general rule applies. Thus, the City, as the employer of an independent contractor, is not liable for injuries caused by any negligence of an independent contractor. Summary judgment in its favor is warranted.

We find it unnecessary to reach Corbett's claim that the court erred by finding that his claims against the City were also barred by the City's discretionary immunity.

II. DID THE DISTRICT COURT ERR BY GRANTING CUNNINGHAM SUMMARY JUDGMENT BASED ON CORBETT'S FAILURE TO PROVIDE EXPERT TESTIMONY?

We next address Corbett's claim that the district court erred by granting Cunningham summary judgment on his personal injury and property damage (paint contamination) claims. We address these claims separately.

Corbett's Personal Injury Claim

Corbett challenges the district court's ruling that his negligence claim against Cunningham failed because he did not provide expert testimony to establish the applicable standard of care or its breach. Corbett distinguishes between other claims alleging "malpractice" and his claim involving "ordinary negligence": "While specialized knowledge may be required to evaluate allegations of sandblasting malpractice, this is a case for ordinary negligence and for which Cunningham operated under an ordinary, general standard of care of reasonableness under the circumstances."

But a party's characterization of the claim does not dictate the applicable test for determining whether expert testimony is required. Rather, the question turns on whether the subject matter requires specialized knowledge.

> "Whether expert testimony is necessary to establish the applicable standard of care does not depend upon the classification of a claim as ordinary negligence rather than medical malpractice or another cause of action. *Tudor v. Wheatland Nursing*, 42 Kan. App. 2d 624, 628, 214 P.3d 1217 (2009), *rev. denied* 290 Kan. 1105 (2010). Rather, 'the well-established test for determining whether expert testimony is required is whether the subject matter is too complex to fall within the common knowledge of the jury and is "beyond the capability of a lay person to decide."' *Williamson v. Amrani*, 283 Kan. 227, 245, 152 P.3d 60 (2007), *superseded by statute on other grounds as stated in Kelly v. VinZant*, 287 Kan. 509, 197 P.3d 803 (2008)." *Estate of Doty v. Dorsch*, No. 119,216, 2019 WL 5090387, at *15 (Kan. App. 2019) (unpublished opinion).

Using this standard, Cunningham contends that expert testimony is necessary because a person would need specialized, not common, knowledge to determine whether it followed the proper procedure for brush blasting and painting a 50,000 gallon elevated water tower. Ordinary persons may have common knowledge about painting houses or rooms, but they lack a basis of knowledge about brush blasting or painting water towers, and any risk of injury to neighboring landowners.

Corbett acknowledges the proper standard but maintains that he never claimed that Cunningham negligently performed the work that it was hired to do—instead, his claim stems from what Cunningham failed to do. He argues that Cunningham should have used "different materials or a protective curtain." And this, he asserts, requires no specialized knowledge. See *McKnight v. St. Francis Hosp. & School of Nursing*, 224 Kan. 632, 633, 585 P.2d 984 (1978) (common knowledge exception to requirement of expert testimony); *Webb v. Lungstrum*, 223 Kan. 487, Syl. ¶ 3, 575 P.2d 22 (1978) (same).

But our review of caselaw leads us to agree that an expert witness was necessary here. See *Gaumer*, 41 Kan. App. 2d at 408 (finding that standard of care for seller of used hay baler was outside ordinary experience and common knowledge of the jury and beyond capability of lay person to decide, so expert testimony was necessary); *Tudor v.*

Wheatland Nursing, 42 Kan. App. 2d 624, 632-33, 214 P.3d 1217 (2009) (finding expert testimony necessary to prove standard of care for nursing home employees for patient who needed particularized supervision because of a complex medical condition); *Midwest Iron & Metal, Inc. v. Zenor Elec. Co.*, 28 Kan. App. 2d 353, 354-55, 19 P.3d 181 (2000) (finding customer who sued electrical contractor for causing electrical fire while installing fusing needed expert testimony to establish standard of care for electrical contractors, as profession was technical and complex).

Corbett relies most heavily on *Juhnke v. Evangelical Lutheran Good Samaritan Society*, 6 Kan. App. 2d 744, 748, 634 P.2d 1132 (1981). It used this test: "Whether expert testimony is necessary to prove negligence is dependent on whether, under the facts of a particular case, the trier of fact would be able to understand, absent expert testimony, the nature of the standard of care required of defendant and the alleged deviation therefrom." 6 Kan. App. 2d at 748. There, a patient was pushed by another patient, fell to the floor, and was seriously injured. The panel found that the defendant's "treatment and care of this patient was so obviously lacking in reasonable care and had such serious consequences that the lack of reasonable care would have been apparent to and within the common knowledge and experience of mankind in general." 6 Kan. App. 2d at 748. Thus the trial court erred by requiring expert testimony to establish the standard of care in the community in similar facilities.

But the facts about the defendant's knowledge in *Juhnke* are distinguishable from ours. The defendant in *Juhnke* had notice that the patient who pushed others had been suffering from progressive mental deterioration for over a year, and that her mental condition continued to deteriorate. The defendant in *Juhnke* also knew that her behavior generally was very belligerent, and that she wandered around the nursing home and into the rooms of other patients, pushing, tripping, and hurting others.

A juror's common knowledge includes that one person should not push another so that one falls and sustains serious injuries, and that caregivers should not permit a mentally disturbed patient to roam about freely. Common knowledge may also tell a juror what the caregivers should have done differently, given their knowledge. But as the district court here explained:

> "The proper procedure[] to sandblast and paint a water tower is specialized work. It is not within the common knowledge and expertise of jurors.
>
> . . . .
>
> "Now, without some expert testimony, the jury is not going to be able to understand what the reasonable care is when cleaning and painting a water tower, or what Cunningham should have done differently."

Corbett points to no comparable evidence here. One's common knowledge does not extend to understanding whether a curtain or other protective device exists or should be used to protect adjacent landowners from debris created by brush blasting a City's water tower. The district court properly held that without expert testimony, a jury would be unable to determine the standard of care, or duty. And without this standard, a jury could not determine whether that duty has been breached.

Corbett invites us to focus on the mechanism of the injury and find that a slip and fall caused by surface sand is within the common knowledge of jurors, so his case needs no expert testimony. Corbett contrasts this with *Gaumer*, when the plaintiff was injured by a hay baler and brought a failure to warn claim, requiring specialized knowledge. But our inquiry is not so narrow—we must consider all the circumstances. Corbett alleges Cunningham was negligent by failing to control the spread of sand and debris from the water tower project, suggesting that Cunningham should have used a different material or a protective curtain. But a typical juror has no way to know whether Cunningham should have used a curtain or other material. A person's ordinary knowledge gained from common life experience, such as painting a house or a room, does not include whether a

painter and brush blaster of water towers should, in the exercise of reasonable care, use a protective curtain, or whether a curtain or some other precaution is possible or preferable or effective. So one's common knowledge does not suggest that Cunningham was negligent by failing to control the spread of sand and debris from the water tower project.

Corbett provided no evidence which could show that the exercise of "reasonable care would have prevented any sand from falling on [his] immediately adjacent property." Corbett also failed to show that "such tidy perfection is required by industry standards, or [that it is] even possible." Corbett concedes that the duty of ordinary care requires reasonableness under the circumstances, but he ignores that the chief circumstance that allegedly caused his injury was the brush blasting of a water tower, something outside the common knowledge of a juror.

Because expert testimony was required, Corbett had the burden to provide the necessary expert evidence when Cunningham moved for summary judgment. "He must actively come forward with something of evidentiary value to establish a disputed material fact. Evidentiary value means a document or testimony must be probative of [his] position on a material issue of fact." *Hare v. Wendler*, 263 Kan. 434, 444, 949 P.2d 1141 (1997). Corbett did not do so.

To the contrary, the only expert on this issue (Phillips)—whom Corbett and both defendants endorsed—provided uncontroverted testimony that Cunningham performed its job according to industry standards. Phillips testified that "it's typical industrial practices to do exactly what was done on the tank." The record thus establishes that Cunningham followed industry standards when completing its work. And Corbett fails to show that Cunningham had to do more than industry standards require. Cunningham is thus entitled to summary judgment on his personal injury claim.

Corbett's Lead Contamination Claim

Similarly, the district court granted summary judgment on Corbett's lead contamination claim because Corbett provided no expert testimony showing causation: "There has to be some expert testimony about the causation of the supposed lead contamination to show that whatever lead contamination there was caused by this work done in 2018 by Cunningham on the water tower. There simply isn't enough evidence there to present that to the jury."

Corbett contends that the district court erred, as expert testimony is not always necessary to prove causation, citing *Moore v. Associated Material & Supply Co.*, 263 Kan. 226, 948 P.2d 652 (1997) (regarding cause of flooding to house). True, *Moore* held that "[w]here the causal nature of an action is self-evident, an expert is not required in order to submit a matter for decision to a jury, regardless of the existence of other complicating factors." 263 Kan. at 239. So, for example, as *Moore* recognized, the jury did not need help from an expert to evaluate whether a duty clearly defined in the Manual on Uniform Traffic Control Devices had been breached. 263 Kan. at 235 (citing *Sterba v. Jay*, 249 Kan. 270, 283, 816 P.2d 379 [1991]).

But the district court's ruling was not broad enough to find expert testimony always necessary to prove causation. It made its ruling in the context of the facts of this case and required an expert to show causation between the lead contamination on Corbett's land and Cunningham's 2018 work on the water tower. Nothing about the fact that Corbett found paint chips in his yard makes the causal nature of his lead contamination claim self-evident, so as to fall within *Moore*'s holding. See *Kuxhausen v. Tillman Partners*, 291 Kan. 314, 320, 241 P.3d 75 (2010) (*post hoc ergo propter hoc* reasoning alone shows speculation and does not forge causal link between purported wrongful conduct and claimed harm).

Although Corbett designated an expert on lead contamination, Northcott, his testimony did not establish causation. His testimony was about the results of lead testing. Corbett points to no evidence in Northcott's expert report that tends to show that the samples taken from Corbett's yard and tested were not on Corbett's property before the water tower project began, or that they likely came from that project.

To the contrary, defendants' lead contamination expert, Folkes, found Northcott's investigation insufficient to determine the source of the lead; the data and evidence collected failed to show that the 2018 water tower project was the source of the lead contamination on Corbett's property. Folkes concluded that a more likely source of the lead was paint from Corbett's house or older painted structures in the area, historical auto emissions, or lead-containing herbicides or pesticides.

The only evidence contradicting Folkes is Corbett's conclusory testimony that the paint chips from his yard came off the water tower. Had the paint chips been found on the plastic tarp that was put on Corbett's property right before the water tower project began, one might reasonably infer that the paint chips had come from the water tower. But without more, Corbett's testimony that he got the paint chips from his yard does not support his speculation that they came from the water tower, particularly in the face of expert testimony to the contrary. Corbett thus fails to raise a material question of fact about his lead contamination claim.

Summary judgment is warranted in favor of both defendants.

THE CROSS-APPEALS

The City filed a notice of conditional cross-appeal, asking that if we reverse the district court's dismissal of the claims against it, it be allowed to reinstate a cross-claim

against Cunningham. Cunningham also cross-appeals, arguing the district court erred in finding it owed Corbett a duty of reasonable care.

Because we are ruling in defendants' favor, we decline to address these cross-appeals. See *Rodman v. Matzke*, No. 115,374, 2018 WL 911225, at *9 (Kan. App. 2018) (unpublished opinion) ("if the appellate court denies relief to a losing party on the grounds he or she has raised and, thus, affirms the judgment, it has no reason to address the cross-appeal—that's what makes the cross-appeal conditional"). We would be offering an advisory opinion on the issues in the cross-appeal since those issues would not alter the parties' legal relationship. See *State ex rel. Schmidt v. City of Wichita*, 303 Kan. 650, 659, 367 P.3d 282 (2016) ("Kansas courts do not issue advisory opinions.").

Affirmed.