No. 125,274

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

RODNEY L. ROSS, et al.,
Appellees,

v.

NORMAN TERRY NELSON, STILLWATER SWINE LLC,
HUSKY HOGS, LLC, and NTN, L.P.,
Appellants.

SYLLABUS BY THE COURT

1.

A trespass claim arises when a person intentionally enters another's property without any right, lawful authority, or express or implied invitation or license.

2.

Fee owners of real property containing a public roadway have a possessory right to use, control, and exclude others from the land, as long as they do not interfere with the public's use of the road. In contrast, the public has an easement over the property to use the road for transportation purposes—that is, to use the road *as a road*—but no other rights beyond those purposes. Any further use by members of the public may be authorized through state action, provided the landowner is compensated for the diminished property rights, or through the landowner's consent.

3.

If a private person wants to install a pipeline in the right-of-way of a public highway, that pipeline must serve a public purpose. Without a public purpose, the person must have permission to install the pipeline. Depending on the nature of the installation

and the property, this permission may be granted by the abutting landowners or the legislature.

4.

When calculating damages for a trespass, the general rule is that a plaintiff can recover for any loss sustained. The wrongdoer should compensate for all the injury naturally and fairly resulting from the wrong.

5.

A nuisance is 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 odors or smoke, or obstructs the reasonable and comfortable use and enjoyment of another person's property.

6.

The Kansas Right to Farm Act, K.S.A. 2-3201 et seq., recognizes that agricultural activities conducted on farmland in areas in which nonagricultural uses have moved into agricultural areas are often subjected to nuisance lawsuits and that such suits encourage and even force the premature removal of the lands from agricultural uses. The legislature adopted the Act to protect certain agricultural activities from this type of nuisance action.

7.

Kansas courts have consistently recognized that general references to state "laws" include the Kansas Constitution, statutes, regulations, and caselaw unless the legislature has indicated a contrary intention. K.S.A. 2-3202(b) and (c)(1)'s references to Kansas "laws" include the common law governing torts like trespass, developed through Kansas cases.

8.

The Kansas Right to Farm Act protects agricultural activities conducted on farmland if those activities are undertaken in conformity with federal, state, and local laws and rules and regulations.

9.

Courts do not view agricultural activities under the right-to-farm laws in a vacuum. Rather, courts' review of agricultural activities under the Kansas Right to Farm Act—including whether those agricultural activities conform with state and federal laws—must necessarily consider related farming practices incidental to the challenged agricultural activities that make the challenged activities possible.

10.

Appellate courts review a jury's finding that punitive damages are appropriate by asking whether, based on the evidence presented at trial, the jury could have found it highly probable that the defendant engaged in malicious, vindictive, willful, or wanton conduct.

11.

The United States Supreme Court has explained that punitive damages may violate a party's constitutional right to due process of law in at least two ways. First, the Due Process Clause of the Fourteenth Amendment to the United States Constitution makes the Eighth Amendment's prohibition against excessive fines and cruel and unusual punishments applicable to the States. Second, the Due Process Clause itself prohibits the States from imposing grossly excessive punishments on tortfeasors.

12.

Courts assess three considerations when determining whether a punitive-damage award shocks the conscience and thus violates a party's due-process rights: the

reprehensibility of the defendant's conduct; the ratio of punitive damages to actual damages for the injury; and comparable awards for similar conduct.

Appeal from Phillips District Court; PRESTON PRATT, judge. Opinion filed August 25, 2023. Affirmed.

Patrick B. Hughes, of Adams Jones Law Firm, P.A., of Wichita, for appellants.

Randall K. Rathbun and *Braxton T. Moral*, of Depew Gillen Rathbun & McInteer LC, of Wichita, for appellees.

Aaron M. Popelka, vice president of legal and governmental affairs, and *Jackie Newland*, associate counsel, of the Kansas Livestock Association, and *Terry D. Holdren*, general counsel, and *Wendee D. Grady*, assistant general counsel, of the Kansas Farm Bureau, amici curiae.

Before WARNER, P.J., COBLE and PICKERING, JJ.

WARNER, J.: This case arises at the intersection of property rights, public roadways, and the Kansas Right to Farm Act. Norman Terry Nelson, who owns several farming operations in rural Norton County, installed about two miles of pipeline in the right-of-way next to a public road so he could transport liquified hog waste to fertilize his cropland. He installed the pipes without the consent of the landowners who owned the property and for his own private farming needs. The landowners sued him for trespass, as well as nuisance when the hog waste was sprayed from an irrigation pivot system across the road from their home. The plaintiffs prevailed on both claims after a trial.

Nelson now appeals, challenging the jury's damages findings for both nuisance and trespass, as well as several legal rulings the district court rendered before and after trial. After carefully reviewing the record and the parties' arguments, we affirm the district court's judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Rodney and Tonda Ross have lived in a house in rural Norton County, where Rodney has been a farmer for decades. Laura Field owns nearby property. Nelson is a local farmer and businessperson who owns and operates crop and hog farms, among other ventures.

Rodney Ross and Nelson have known each other since childhood. One of Nelson's entities, NTN, L.P., owned farmland and grew crops directly south of the Rosses' home. The cropland was irrigated by a pivot system. When the north pivot swept across the land, its spray came within 200 feet from the Rosses' home. The issues in this case arose when Nelson sought to transport effluent—liquified hog manure—from one of his hog farms to the NTN pivot to dispose of the waste and fertilize the NTN cropland.

Around 2017, Nelson began developing Stillwater Swine, a new hog operation in the area. Hogs generate significant waste, so Nelson needed a way to dispose of the hog manure. He planned to run water to the facility, liquify and treat the waste, then run the effluent to the NTN pivots for use as fertilizer. This required Nelson to install three underground pipes—two to carry the water and one to carry the effluent—in the right-of-way next to a road that ran along the Rosses' and Field's properties. Nelson planned to install a mile of pipe along each property.

Neither the Rosses nor Field gave permission for Nelson to lay pipes in the right-of-way. Before installation, Nelson contacted Rodney Ross but not Field. Nelson personally told Ross his plans, stating that he had nowhere else to put the hog waste. Ross objected to having pivots spray hog waste across the street from his house, and he asserted that Nelson had other nearby land—where nobody lived—that he could use to get rid of the effluent.

Nelson's permit attempts and pipe installation

According to the Norton County Road and Bridge Supervisor, the County does not typically grant a physical permit for underground roadwork. Rather, someone fills out a permit application, pays a fee, the county clerk signs it, and then the person begins work. The Road and Bridge Supervisor then inspects the work and eventually signs off on the permit. In other words, the County grants permits after the work has been completed and inspected. The signed application then becomes the permit.

Nelson did not follow this permitting practice in installing the pipeline. Nelson's daughter-in-law filled out a permit application and later paid the fee for the roadside pipe installation. But neither the county clerk nor the Road and Bridge Supervisor ever signed the permit application.

Instead, Nelson sought permission directly from the Norton County Board of Commissioners. In August 2017, Nelson began attending commission meetings to discuss his plan to install pipes in the road right-of-way. At the first meeting, Nelson explained his plan, which would require removing the Rosses' fence. According to the minutes from that meeting, the commissioners were under the impression that "[t]he land owner-tenant has been contacted." The commissioners thus approved "construction of the road"—that is, elevating the existing road to create ditches. According to Nelson, he took this to mean he had permission to install the pipes.

A week later, Rodney Ross found a county employee using Nelson's equipment to remove the Rosses' fence as part of the roadwork. Ross called his county commissioner, who arrived shortly after, as did Nelson. The county commissioner asked Nelson if he had a permit to do this work. Nelson replied that he did not need a permit—he had done

this before and would do it again. Nelson apparently then completed the roadwork to prepare for the pipe installation.

At a subsequent commission meeting, the Norton County Counselor advised the commissioners that they needed the landowners' consent to approve Nelson's application. The minutes reflect that Nelson had led the commissioners to believe he had the landowners' permission, but then the commissioners learned that was untrue. That meeting left the issue unresolved—Nelson asserted that he did not need the landowners' permission, while the county counselor asserted that he did. Nelson continued to lobby the commissioners, but there is no evidence that the commission granted his request to install the pipes.

Nelson nevertheless went forward with the pipe installation. In September 2017—as the back-and-forth between Nelson and the county commissioners was ongoing—the county counselor called the sheriff and stated that someone was installing pipes in the disputed right-of-way. The sheriff went to the scene, believing the installation violated local resolutions. See Norton County Resolution 13-1999 (no person may construct an underground pipeline without county inspection). The sheriff also contacted someone at the Kansas Department of Health and Environment, who explained that although KDHE regulates the disposal of hog waste, it does not oversee piping installation between hog operations and disposal sites.

Following the county counselor's instructions, the sheriff told Nelson's team to stop the work until they sorted out the legal issues and determined whether they had the necessary permission. But Nelson's employees apparently resumed and completed the work shortly after. Given these events, the parties dispute whether Nelson ever obtained the County's permission. Regardless, Nelson has maintained that this point is immaterial because he did not need the County's permission.

Nelson's use of the waste as fertilizer at the NTN cropland

In April 2019, Nelson started transporting waste through the pipes and spraying the effluent through the pivots next to the Rosses' property. This created a strong, unpleasant stench at the Rosses' home and in the surrounding area. When Nelson began applying the effluent, the Rosses filed a report with the sheriff. The sheriff came to their house and noted that the odor was just as bad inside the house as outside. The smell would linger for up to 10 days.

Along with the smell, the Rosses stated that the effluent mist sprayed by the pivots would drift onto their property when the wind blew north. One day, it sprayed Tonda Ross. Another time, it drifted onto a local resident as she was passing through the area. The effluent mist would also hit the Rosses' house, which would become covered in flies. The Rosses could not entertain at their house and ultimately began spending most of their time at their second home in Nebraska. At the time of trial, Tonda had not stayed at their Norton County house in a year.

Before Nelson began his operation, the Rosses had planned to sell their land to one of their farming tenants. That potential sale fell through because of the effluent's smell and other effects. The pivots did not spray the cropland with effluent every day; it was applied for a total of 96 hours in 2019. Nelson later testified that when he did spray the effluent, he tried to reduce drift and odor on the Rosses' property, such as tracking the winds to avoid running the pivot nearest their house when the winds blew north.

Nelson had a permit from KDHE for the waste-disposal operation. But KDHE only had authority over the Stillwater Swine site and the disposal site—not how Nelson transported the waste from one site to the other. The parties disputed whether the effluent transport and application violated other legal requirements. Nelson admitted that the pipes he installed did not comply with thickness requirements in a 1999 county

resolution. And the Rosses contended that the pivots sprayed effluent closer to the Rosses than KDHE allowed. They also asserted that Nelson improperly sprayed effluent through the pivot's end gun and that he did not report all the days he applied it. Nelson and his son disputed these allegations.

The lawsuit

In July 2019, the Rosses and Field sued Nelson and his affiliated businesses. (We refer to these defendants collectively as Nelson.) The Rosses and Field brought trespass claims for the underground piping; the Rosses also brought a nuisance claim related to the effluent application.

The case progressed, and both sides moved for summary judgment on the trespass claim—specifically, whether Nelson trespassed when he installed pipelines in the right-of-way abutting the Rosses' and Field's properties. The district court ultimately ruled in favor of the plaintiffs, finding that Nelson did not have free use of road rights-of-way to bury pipes. Nelson had laid the pipes solely for his private hog operation. Without a public purpose or use for installing the pipes, the district court found that Nelson needed permission from either the legislature or the landowners. Nelson had neither, so the court found he trespassed on the Rosses' and Field's properties.

Nelson also sought summary judgment on the Rosses' nuisance claim based on the Kansas Right to Farm Act. Under this Act, Kansas law protects many agricultural activities from nuisance claims if those activities comply with "federal, state, and local laws and rules and regulations." K.S.A. 2-3202(b). The district court found that this protection did not apply here, however, because the alleged nuisance—the application of effluent through the NTN pivot—resulted from Nelson's trespass and thus violated state law. As such, the court found that the Right to Farm Act did not bar the Rosses' claim.

The district court also allowed the Rosses to add a claim for punitive damages on their nuisance claim.

The case went to trial in July 2021. After hearing the evidence, the jury awarded damages for the trespass claims and found in the Rosses' favor on the nuisance claim:

- The jury found that Nelson's trespass on the Rosses' and Field's properties caused $65,000 in damages to each property. The district court later reduced these damages to $63,360 each to conform to the evidence presented.

- The jury found that the Rosses had suffered $2,000 in damages for the nuisance (spraying the hog waste).

The jury also found that Nelson's conduct warranted punitive damages. After trial, Nelson moved for judgment as a matter of law, arguing that the jury disregarded the district court's instructions about punitive damages. The district court denied the motion. Eventually, the court awarded $50,000 in punitive damages against Nelson. Nelson appeals.

DISCUSSION

Nelson challenges several aspects of the district court's summary-judgment rulings on the trespass and nuisance claims, the jury verdicts on each, and the $50,000 punitive-damage award:

- *Trespass.* Nelson argues that the district court erred in granting summary judgment on the trespass claim by misapplying Kansas law governing easements and rights-of-way. And he challenges the damages the jury awarded for the trespass claims.

- *Nuisance.* Nelson claims that the district court erred when it found, also on summary judgment, that the Kansas Right to Farm Act did not insulate his use of the hog waste from a nuisance claim. And he claims that the evidence did not support the jury's verdict on the nuisance.

- *Punitive damages.* Nelson challenges the punitive-damage award on multiple grounds, including the jury's finding that punitive damages were appropriate for the nuisance claim, the verdict form where the jury recorded its finding, and the ultimate amount of damages the district court awarded.

We conclude that Nelson has not shown that the district court or jury erred. We thus affirm the district court's judgment.

1. *The district court properly ruled that Nelson's pipelines trespassed on the Rosses' and Field's properties, and the evidence at trial supported the jury's damages awards on the trespass claims.*

Though Nelson raises several issues on appeal, his central challenge concerns the district court's trespass ruling. Nelson asserts that the district court erred when it found at summary judgment that installing the pipelines in the right-of-way trespassed on the Rosses' and Field's property rights. He also challenges the damages the jury assessed for those claims, arguing the evidence did not support the jury's verdict. We find neither argument persuasive.

1.1. *The court did not err in granting summary judgment on the trespass claims.*

Nelson first challenges the district court's summary-judgment ruling on the plaintiffs' trespass claims. He asserts that the court erred when it found he did not have the right to install pipelines in the public right-of-way to transport water and effluent.

And he argues that the court erred in finding that the installation of those pipelines trespassed on the plaintiffs' properties.

The district court's trespass decision resulted from the parties' competing motions for summary judgment. 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—that there is nothing the fact-finder could decide that would change the outcome. See *Shamberg, Johnson & Bergman, Chtd. v. Oliver*, 289 Kan. 891, 900, 220 P.3d 333 (2009). This requires the district court to 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. See 289 Kan. at 900.

Because summary judgment tests the legal viability of a claim, appellate courts apply this same framework on appeal. *Martin v. Naik*, 297 Kan. 241, 246, 300 P.3d 625 (2013). To the extent that this analysis requires examining, interpreting, and assimilating Kansas statutes, our review is also unlimited. *Nauheim v. City of Topeka*, 309 Kan. 145, 149, 432 P.3d 647 (2019). Applying these principles here, we agree that summary judgment in the plaintiffs' favor was appropriate.

Public roadways and private property rights

As a starting point, a trespass claim arises when a person intentionally enters another's property "without any right, lawful authority, or express or implied invitation or license." *Armstrong v. Bromley Quarry & Asphalt, Inc.*, 305 Kan. 16, 22, 378 P.3d 1090 (2016). The controlling question in the plaintiffs' trespass claims—and the legal question the parties disputed at summary judgment—was whether Nelson had a right to install the pipelines in the right-of-way next to the road without permission. To resolve this

question, we must examine the respective rights of the landowners and the public in property that abuts a public road.

Since the earliest days of Kansas statehood, our state's appellate courts have been called on to resolve the tension between the rights of the public and adjacent landowners in public highways. One of the earliest examples of this conflict arose in *Caulkins v. Mathews*, 5 Kan. 191 (1869), when the Kansas Supreme Court considered the difference between the public's right to travel on a public road and the right to use the abutting property. In *Caulkins*, the plaintiff sued for damages from the loss of his horse after the horse fell into a well on the defendant's property. The plaintiff argued that the defendant's right to exclude others from his property was diminished because a public road crossed the defendant's land. The Kansas Supreme Court roundly discarded this argument: "[H]ow a public road on the defendant's land would give the plaintiff any right to pasture his horse outside of the road, we cannot see." 5 Kan. at 199. The court explained that people "may pass and repass with their stock upon the public highways," but "that is the extent of their right." 5 Kan. at 200.

Four years later, the court again considered the extent of the property rights of landowners whose properties abut public roads. *Comm'rs of Shawnee Co. v. Beckwith*, 10 Kan. 603 (1873). In that case, Shawnee County had exercised its right of eminent domain to create a public road across private property; the issue before the Kansas Supreme Court was the extent of the landowner's damages associated with that taking. The court began its analysis with a recognition that while Kansas statutes allowed for the creation of public roads and highways, nothing in the Kansas Constitution or statutes indicated the extent of the interests that the public obtained in the resulting thoroughfares—that is, Kansas law did not explain "what interest therein, shall pass to the public, and how much of the land, or what interest therein, shall remain with the original proprietor." 10 Kan. at 607.

The *Beckwith* court concluded that, given this silence, "nothing connected with the land passes to the public, except for what is actually necessary to make the road a good and sufficient thoroughfare for the public." 10 Kan. at 607. In other words, the public "obtains a mere easement to the land"—"the right for persons to pass and repass, and to use the road as a public highway only, and nothing more." 10 Kan. at 607. The ownership of the land and "everything connected with the land over which the road is laid out" "never passes to the public, but always continues to belong to the original owner." 10 Kan. at 607-08. Indeed, "the original owner has as complete and absolute dominion over his land, and over everything connected therewith, after the road is laid out upon it as he had before, except only the easement of the public therein." 10 Kan. at 608. That is, the owner still owns and controls the land "so long as he does not interfere with the use of the road as a public highway. No other person has any such rights." 10 Kan. at 608.

These cases established the foundational principle that fee owners of real property containing a public roadway have a possessory right to use, control, and exclude others from the land, as long as they do not interfere with the public's use of the road. In contrast, the public has an easement over the property to use the road for transportation purposes—that is, to use the road *as a road*—but no other rights beyond those purposes. Any further use by members of the public may be authorized through state action, provided the landowner is compensated for the diminished property rights, or through the landowner's consent.

Public-utility providers may use rights-of-way to deliver commodities for a public purpose.

On this foundation, the Kansas Supreme Court has repeatedly evaluated the scope of the public's easement in the roadway (or right-of-way). For example, in one case, the court evaluated whether a telephone company could plant poles in a right-of-way next to a public roadway when they interfered with the landowner's ability to maintain his

property. *McCann v. Telephone Co.*, 69 Kan. 210, 76 P. 870 (1904). The court found the company could, noting that a highway's purpose is "for passage, travel, traffic, transportation, transmission, and communication." 69 Kan. at 213. This purpose is not confined only to uses established when the easement was granted, but "include[s] the newest and best facilities of travel and communication which the genius of man can invent and supply." 69 Kan. at 213. Telephone communication fell under this purpose, so installing telephone lines did not exceed the scope of the easement. 69 Kan. at 218-19.

But one of the fundamental premises of the *McCann* decision was that "[t]he purpose of a telephone—the transmission of intelligence between people and places—*is a public one*, which the public may authorize, regulate, and control." (Emphasis added.) 69 Kan. at 212. On top of that, the legislature had permitted telephone companies to build and maintain their lines in streets and highways. 69 Kan. at 212.

A year later, the court similarly held that a gas company could bury pipes in a public highway. *State v. Natural-gas Co.*, 71 Kan. 508, 510, 80 P. 962 (1905). Like the telephone company in *McCann*, the legislature had acknowledged gas companies as "*quasi* public corporations" that conducted "'business of a public nature.'" 71 Kan. at 509 (quoting *La Harpe v. Gas Co.*, 69 Kan. 97, Syl. ¶ 1, 76 P. 448 [1904]). The court thus rejected the State's attempt to stop the gas company from installing the pipes. The gas company also had the landowners' permission. *Natural-gas Co.*, 71 Kan. at 508; see *Empire Natural Gas Co. v. Stone*, 121 Kan. 119, 120, 245 P. 1059 (1926) (same).

One of the common threads in these cases is that they involved providers of public utilities. But even utility companies' ability to use a public road has limits. Their use must be for "highway purposes"—travel, repairs, and "such other *public uses as will not be injurious to the abutting owner's fee* nor inconsistent with highway purposes." (Emphasis added.) *Mall v. C. & W. Rural Electric Cooperative Ass'n*, 168 Kan. 518, Syl. ¶ 2, 213 P.2d 993 (1950) (ruling against an electric co-op); see also *The State, ex rel., v. Weber*, 88

Kan. 175, Syl. ¶ 2, 127 P. 536 (1912) (finding a person could install an electric line on a highway if "there is no invasion of the rights of the owners of abutting lands").

This court considered a comparable issue more recently in *Stauber v. City of Elwood*, 3 Kan. App. 2d 341, 594 P.2d 1115, *rev. denied* 226 Kan. 793 (1979). In that case, abutting landowners sued to stop private companies from putting advertisements in a road right-of-way, even when the companies had the city's permission. The panel found for the landowners, holding that the defendants—the city and the companies—"failed to make the necessary showing that there is a *primary public purpose* to be served by the erection of the signs in question." (Emphasis added.) 3 Kan. App. 2d at 346. That is, "the primary use of the right-of-way [must] benefit the public and any private use must be incidental to the public purpose." 3 Kan. App. 2d at 346.

Nelson did not have a right to use the right-of-way for private purposes.

Applying these principles here, the district court ruled that Nelson needed—and lacked—a public purpose to install the pipelines in the public highway right-of-way. The court found that without such a purpose, and without the consent of the landowners or some other legislative permission, Nelson had no right to use the Rosses' or Field's property to run pipelines for his company. Thus, installing and maintaining those pipelines trespassed on the plaintiffs' properties. We agree.

The parties acknowledge that the roads at issue are public highways. See L. 1874, ch. 111, § 1 (declaring all section lines in Norton County public highways). But Nelson had no public purpose to lay pipes in (or adjacent to) the roads. He installed them for a purely private farming operation. Nelson does not run a quasi-public corporation or conduct a "business of a public nature"—one that is "almost, if not quite, a public necessity." *La Harpe*, 69 Kan. 97, Syl. ¶ 1, 100. Kansas law provides no support for

Nelson's claim that any person can permanently install pipes on a public highway, for any reason, as long as they do not interfere with public travel.

Nelson argues that even if a public purpose were required, he had one because he was raising pigs that would eventually be available to the public as pork products. He cites a Texas eminent-domain case in which a court found an electric line serving one customer was a "public use" because the customer produced oil. *Dyer v. Texas Elec. Service Co.*, 680 S.W.2d 883, 885 (Tex. App. 1984). The Kansas Supreme Court approvingly cited this case when finding that installing a fiber-optic telephone cable in a right-of-way was a public use in the eminent-domain context. *Williams Telecommunications Co. v. Gragg*, 242 Kan. 675, 681, 750 P.2d 398 (1988).

But this is not an eminent-domain case, and unlike the companies in those cases, Nelson had no eminent-domain power. He was a private citizen who took and used a public right-of-way for his private gain. And those cases, like the others, involved utility providers—electric and telecommunications companies. Indeed, under Nelson's theory of "public purpose," there would be no limit to who could use a right-of-way and why—as long as, somewhere down the line, there is a product available to the public. This argument invites absurd results and finds no support in Kansas law.

Nelson did not have permission to install the pipelines.

Without a public purpose, Nelson needed some other source of authority to install the pipelines. But the Rosses and Field never consented, and the legislature never sanctioned his actions. See *McCann*, 69 Kan. at 212 (noting the legislature had authorized telephone companies to build lines in state highways); *La Harpe*, 69 Kan. at 100-01 (same for gas companies); see also, e.g., K.S.A. 17-618; K.S.A. 17-4604(i); K.S.A. 17-1901–K.S.A. 17-1903 (all granting various utilities the right to use public roads and rights-of-way).

Nelson argues that he did not need the abutting landowners' permission to install the pipelines in the right-of-way. He points to *Natural-gas Co.*, when the court stated that a landowner "has no power to transfer to another any right to occupy the highway for any purpose." 71 Kan. at 509. The court observed that the landowners could not give the gas company permission "as against the state" to install its gas lines. 71 Kan. at 509. But that case involved a utility company with statutory authority to use public highways. It was the State that was trying to stop the pipelines, not the landowners; the court merely recognized that landowner permission cannot defeat a contrary state directive. 71 Kan. at 509. Contrary to Nelson's assertions, *Natural-gas Co.* does not negate the need for landowners' consent to use their land for private purposes.

Nelson also asserts that Kansas law does not require legislative permission to use a public roadway for transportation purposes. He points to the Kansas Supreme Court's decision in *Weber*, when the court found that "[a] natural person needs no special license or grant of authority in order to use a highway for any of the purposes for which it was established." 88 Kan. at 178. That case involved an electric company's installation of an electric line, and the court observed that the legislature could have "prescribed the conditions on which persons might transmit and transport light, heat, and power along a highway" but had not done so. 88 Kan. at 178-79. The court concluded that "the absence of a statutory regulation" did not prevent electricity from being "transmitted and transported over the highway." 88 Kan. at 179.

But *Weber* is distinguishable from this case in several ways. The company installing the electric line in *Weber* had the abutting landowners' permission, while Nelson did not. 88 Kan. at 180. *Weber* also had public utilities in mind; it speaks of permission to transport "light, heat, and power"— the disputed electric line in that case was to supply a city's "electric light plant." 88 Kan. at 176. In contrast, Nelson's actions benefited his private company. Finally, *Weber* qualified the ability to build a line on a

highway by stating that it could not invade "the rights of the owners of abutting lands." 88 Kan. 175, Syl. ¶ 2. Thus, while *Weber* recognized that members of the public do not need legislative approval to travel on public roadways, that decision does not support Nelson's claim that members of the public have a right to use roads for all transportation purposes—including burying pipelines to transport materials for private farming operations.

Nelson argues that it is the role of the legislature—not the courts—to restrict people's rights to install pipes in a public highway on a first-come, first-served basis. But while the legislature certainly has the authority to establish and revise public policy, Nelson is mistaken in his premise. He did not have a superior right to use the right-of-way without the landowners' permission. Rather, the property owners had the right to consent to or deny his request to use the right-of-way.

Nelson further asserts that the County's permission to install the pipelines was sufficient to support his actions. We note that the question of the County's consent was disputed and inappropriate for resolution at summary judgment. The evidence presented at trial showed that while the county commission approved initial work for the installation, it did so thinking that Nelson had the landowners' permission—that was what the county counselor advised was required. When the commission learned there was no permission, it reconsidered the proposal over several meetings, and there is no evidence it ever granted a permit. The county sheriff also went to the scene and explicitly told Nelson's team to cease installation of the pipeline.

Caselaw suggests that the authority to grant permission lies with the legislature, not counties. See *Weber*, 88 Kan. at 178 ("The state has sole control of its highways, and the Legislature has full power, within constitutional limitations, to regulate the use of them."); see also *Stauber*, 3 Kan. App. 2d at 346 (finding city could not authorize nontravel use of right-of-way unless it was for a public purpose). And even if the County

could have permitted Nelson to install the pipelines for his private business, this installation would have changed the nature of the plaintiffs' property rights. Thus, Nelson's actions still would have required either the landowners' consent (which he did not have) or compensation from the County to the landowners for taking their property rights (which did not occur).

Nelson cites two cases in which companies laid oil and gas pipelines for seemingly private purposes. See *Thompson v. Traction Co.*, 103 Kan. 104, 172 P. 990 (1918); *Murphy v. Gas & Oil Co.*, 96 Kan. 321, 150 P. 581 (1915). But those cases specified that the right to lay such lines applied to "oil for fuel and other purposes" and "'a natural gas company . . . for the purpose of transporting and distributing natural gas for fuel, light, and power.'" *Thompson*, 103 Kan. at 106; *Murphy*, 96 Kan. at 329 (quoting *Natural-gas Co.*, 71 Kan. 508, Syl.). It does not follow that Nelson can unilaterally take rights-of-way to dispose of hog waste more efficiently. And both were negligence cases in which the court had no occasion to consider whether the companies had obtained permission from the landowners or the State.

As fee owners of the property, the plaintiffs could sue to protect their property rights.

In his final arguments relating to the district court's trespass ruling, Nelson asserts that the plaintiffs did not have a strong enough possessory interest in the public right-of-way to sue for trespass. He cites *Ruthstrom v. Peterson*, 72 Kan. 679, 680, 83 P. 825 (1905), when the Kansas Supreme Court observed that "[t]he only special right which an abutting owner has in a public highway is that of access to his premises." But Nelson ignores the context of this observation—made while discussing the landowner's use of the road itself. The court went on to explain that a landowner's "right to travel [on the road] is not different from the right enjoyed by other members of the community." 72 Kan. at 680. Traveling on the road is different from owning and controlling the property adjacent to the roadway.

The Kansas Supreme Court has recognized *Ruthstrom* as holding that "an injunction will not lie at the suit of a private person to protect the public interests." *Weinlood v. Simmons*, 262 Kan. 259, 267, 936 P.2d 238 (1997). Rather, a plaintiff "must have a special private interest distinct from that of the public at large in order to bring an actionable claim." 262 Kan. at 267. This principle does not apply to the plaintiffs here, who are suing for damages to protect their own property interests—not the interests of the public at large. And Kansas law recognizes that while the Rosses and Field may have the same right to travel on the road as anyone else, as abutting landowners they have a distinct property interest that other members of the public do not. See *Beckwith*, 10 Kan. at 607-08.

Nelson also cites *Hefley v. Baker*, 19 Kan. 9, 11 (1877), in which the court found that a plaintiff who possessed land but did not own it could not recover for damage to the land—only the owner could. 19 Kan. at 11. Here, however, the Rosses and Field own the right-of-way, and the public only possesses it under an easement for travel purposes. Because the Rosses and Field are the owners, *Hefley* does not bar recovery.

The district court's decision accurately and ably synthesized the caselaw on trespass. If a private person wants to install a pipeline in the right-of-way of a public highway, that pipeline must serve a public purpose—like providing a utility to the community. Without a public purpose, the person must have permission to install the pipeline. Depending on the nature of the installation and the property, this permission may be granted by the abutting landowners or the legislature. Nelson installed pipes for a private purpose and had no permission from the landowners or the legislature. The district court did not err in granting the plaintiffs summary judgment on their trespass claims.

1.2. *There was evidence to support the damages for the trespass claims.*

Nelson challenges the damages the jury awarded (and the district court confirmed, subject to a slight reduction to conform to the evidence) for the trespass claims. He argues that these damages—which were based on the cost to remove the pipelines from the plaintiffs' properties—were inappropriate and unsupported by the evidence. In particular, Nelson notes that the plaintiffs agreed not to remove the pipes until this case concluded; he asserts that this inaction effectively undermined their damages claims. And he argues that the plaintiffs suffered no real injury from having pipes in the ground.

Appellate courts examine the correct measure of damages de novo, viewing the record in the light most favorable to the prevailing party. *Peterson v. Ferrell*, 302 Kan. 99, 106-07, 349 P.3d 1269 (2015).

"When calculating damages for a trespass, the general rule is that a plaintiff can recover for any loss sustained." *Armstrong*, 305 Kan. at 35. The "'wrongdoer should compensate for all the injury naturally and fairly resulting from [the] wrong.'" 305 Kan. at 35 (quoting *Mackey v. Board of County Commissioners*, 185 Kan. 139, 147, 341 P.2d 1050 [1959]). "From every direct invasion of the person or property of another, the law infers some damage, without proof of actual injury." *Longenecker v. Zimmerman*, 175 Kan. 719, 721, 267 P.2d 543 (1954).

The district court found that Nelson trespassed on the plaintiffs' land by installing pipes in the right-of-way. The plaintiffs did not consent to the pipes' presence, so paying for removal would "'compensate for all the injury naturally and fairly resulting from'" the installation. *Armstrong*, 305 Kan. at 35. And the cost of removal was the only evidence of damages presented at trial; the parties never presented evidence of any other measure the jury could have used. The evidence supports the compensatory-damage awards after the district court remitted them slightly to reflect the evidence.

That the plaintiffs agreed before trial not to remove the lines without the court's approval says nothing about the damages they incurred. It simply maintained the status quo until the case is resolved by the courts. Nor do Nelson's cited sources require another damages measure. See 87 C.J.S., Trespass § 116 ("The measure of damages in trespass actions is the sum that will compensate the person injured for the loss sustained."); Restatement (Second) of Torts § 929 (1979) (available damages include loss in value "or at [the plaintiff's] election in an appropriate case, the cost of restoration"). There was no evidence presented showing what the loss in value was or that the cost of removal was disproportionately higher. See Restatement (Second) of Torts § 929, comment b.

Nelson has not shown any error in the damages assessed for the trespass claims.

2. *The district court did not err in submitting the Rosses' nuisance claim to the jury, and the evidence supported the damages the jury awarded for that claim.*

At its heart, a nuisance is "an annoyance." *Sandifer Motors, Inc. v. City of Roeland Park*, 6 Kan. App. 2d 308, Syl. ¶ 1, 628 P.2d 239, *rev. denied* 230 Kan. 819 (1981). This court has described a nuisance as "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 odors or smoke, or obstructs the reasonable and comfortable use and enjoyment" of another person's property. 6 Kan. App. 2d 308, Syl. ¶ 1. The Rosses claimed that spraying the effluent near their property—and the attendant odor and pests that resulted from that action—constituted a nuisance.

Although Nelson's appeal focuses on the district court's ruling on his trespass claim, he also challenges the court's rulings on the Rosses' nuisance claim. First, Nelson argues the district court erred when it allowed that claim to be presented to the jury, asserting that the Kansas Right to Farm Act protected his fertilization practices from

nuisance claims. He also claims that there was no evidence submitted at trial to support the jury's finding that spraying the effluent as fertilizer was a nuisance. Again, we are not persuaded by these arguments.

2.1. *The district court properly concluded that the Right to Farm Act did not protect Nelson's farming activities against the Rosses' nuisance claim.*

Nelson asserts that the defendants were entitled to judgment as a matter of law on the Rosses' nuisance claim because the Kansas Right to Farm Act protected his fertilization and irrigation of the NTN cropland from nuisance actions. We agree with the district court's ruling.

The Kansas Legislature enacted the Kansas Right to Farm Act in 1982, motivated by urban and suburban populations encroaching upon traditionally agricultural areas. See K.S.A. 2-3201; *Finlay v. Finlay*, 18 Kan. App. 2d 479, 482-83, 856 P.2d 183, *rev. denied* 253 Kan. 857 (1993). The Act recognized that "agricultural activities conducted on farmland in areas in which nonagricultural uses have moved into agricultural areas are often subjected to nuisance lawsuits" and that "such suits encourage and even force the premature removal of the lands from agricultural uses." K.S.A. 2-3201. The legislature adopted the Act to protect certain agricultural activities from this type of nuisance action. See K.S.A. 2-3201.

To accomplish this goal, K.S.A. 2-3202 immunizes some farming practices from nuisance claims. K.S.A. 2-3202(a) states that "[a]gricultural activities conducted on farmland, if consistent with good agricultural practices and established prior to surrounding agricultural or nonagricultural activities, are presumed to be reasonable and do not constitute a nuisance." And K.S.A. 2-3202(b) provides that an activity is presumed to be a "good agricultural practice"—and thus not a nuisance—if it "is undertaken in conformity with federal, state, and local laws and rules and regulations." In 2013, the

legislature added a third provision to clarify that someone conducting an agricultural activity "[m]ay reasonably expand the scope of such agricultural activity . . . without losing such protection so long as such agricultural activity complies with all applicable local, state, and federal environmental codes, resolutions, laws and rules and regulations." K.S.A. 2-3202(c)(1); see L. 2013, ch. 93, § 2.

The district court found that the protections in K.S.A. 2-3202(a) did not apply to Nelson's actions. In particular, the court found that because Nelson transported the effluent that he used to fertilize the NTN cropland by trespassing on the plaintiffs' properties, his activities did not conform to state law. Nelson challenges this ruling in two ways:

- He asserts that K.S.A. 2-3202(b)'s reference to "laws and rules and regulations" does not include common-law torts like trespass. He argues that this phrase only includes positive legislative enactments or regulations, not caselaw.

- He asserts that K.S.A. 2-3202's reference to "agricultural activity" must be read narrowly and limited to the activity that caused the alleged nuisance—here, the fertilization of the NTN cropland with the effluent—not all of Nelson's farming practices. In other words, the manner of transporting the effluent to the pivot was not relevant to whether the fertilization itself was lawful.

Before turning to these claims, we note that it is unclear from the record whether these protections apply at all. The Right to Farm Act only immunizes agricultural activities that are "established prior to surrounding agricultural or nonagricultural activities." K.S.A. 2-3202(a). The parties do not dispute that the Rosses lived in their house for decades before this lawsuit; nor does the record indicate whether the NTN farmland predated the Rosses' home, or vice versa. Other courts have refused to apply their states' right-to-farm protections in such situations, requiring the farmers seeking

those protections to show that this precondition was met. See, e.g., *Buchanan v. Simplot Feeders, Ltd. Partnership*, 134 Wash. 2d 673, 680-84, 952 P.2d 610 (1998) (reasoning that this timing requirement under Washington's right-to-farm law creates a condition precedent to protection). This rule is consistent with the longstanding principle that "one who comes to the nuisance may not sue to abate it." *Bice v. City of Rexford*, No. 97,227, 2007 WL 2915611, at *1 (Kan. App. 2007) (unpublished opinion).

The district court did not address this question in its decision, however. And the parties do not raise it on appeal. Thus, we presume—without deciding—that the Act *could* apply to Nelson's activities. But we do not find Nelson's arguments persuasive and agree with the district court that the Act does not protect Nelson against the Rosses' nuisance claim.

Undertaken in conformity with state law

We first look to the meaning of "laws" in K.S.A. 2-3202(b). Nelson points to nothing in the text of K.S.A. 2-3202—or in Kansas law generally—to suggest that the legislature intended to exclude the common-law prohibition against trespassing from the "state laws" with which agricultural activities must comply. He merely points out that the legislature logically excluded compliance with *one* common-law principle—nuisance—because the statute's purpose is to immunize farming practices against those claims. But the fact that the legislature carved out an immunization for one tort does not mean that an agricultural activity can violate other provisions of Kansas tort law while still receiving the protection of the Act.

Indeed, under Nelson's theory, the statute would protect him if he placed a pivot directly on the Rosses' land to fertilize his crops. This reading would lead to unreasonable, if not absurd, results. Accord *State v. Arnett*, 307 Kan. 648, 654, 413 P.3d 787 (2018) (courts "must construe a statute to avoid unreasonable or absurd results").

Kansas courts have consistently recognized that general references to state law include the Kansas Constitution, statutes, regulations, and caselaw unless the legislature has indicated a contrary intention. See, e.g., *State v. Dunn*, 304 Kan. 773, 788, 375 P.3d 332 (2016) (state law includes "the Kansas Constitution, Kansas statute, *or* Kansas common law") (emphasis added). Nelson points to no such exclusion here. But the Kansas Livestock Association and Kansas Farm Bureau have submitted a brief as amici curiae, arguing that K.S.A. 2-3202(c)(1) contains this exclusion. Under this provision, a reasonable expansion of agricultural activities will be protected against nuisance suits when the expanded activities comply "with all applicable local, state, and federal environmental codes, resolutions, laws and rules and regulations." K.S.A. 2-3202(c)(1). The amici argue that this language focused on environmental laws and did not refer to Kansas caselaw.

This argument was not raised to the district court and is not included in the parties' briefing. Accord *Hensley v. Board of Education of Unified School District*, 210 Kan. 858, 864, 504 P.2d 184 (1972) (an amicus brief generally may not raise an issue not raised by the parties); *Citifinancial Auto, Inc. v. Mike's Wrecker Service, Inc.*, 41 Kan. App. 2d 914, 919, 206 P.3d 63 (2009) (issues not raised to the district court generally cannot be raised for the first time on appeal). And we are unpersuaded by the amici's interpretation for at least two additional reasons.

- First, the amici's reasoning would grant expansions of "agricultural activity" greater protection than the preexisting farming practices that warranted protection in the first place. Under the amici's rationale, expansions need only comply with environmental laws to receive protections from nuisance suits, while other agricultural activities must comply with any "federal, state, and local laws and rules and regulations" before receiving protection. K.S.A. 2-3202(b). This reading cannot be reconciled with the legislature's express purpose in adopting the Act—

protecting longstanding agricultural activities from suburban sprawl. Accord *Miller v. Board of Wabaunsee County Comm'rs*, 305 Kan. 1056, 1066, 390 P.3d 504 (2017) (courts should read statutory provisions *in pari materia* with a view of reconciling and bringing the provisions into workable harmony if possible).

- Second, K.S.A. 2-3202(c)(1) generally references "laws." Both the Kansas and United States Supreme Courts have long recognized that a reference to state law "includes the common-law as well as statutes and regulations." *Jenkins v. Amchem Products, Inc.*, 256 Kan. 602, 610, 886 P.2d 869 (1994) (citing *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 522, 112 S. Ct. 2608, 120 L. Ed. 2d 407 [1992] [plurality opinion]). And phrases like "'all other law'" do not distinguish "between positive enactments and common-law rules of liability." *Norfolk & Western R. Co. v. Train Dispatchers*, 499 U.S. 117, 128, 111 S. Ct. 1156, 113 L. Ed. 2d 95 (1991).

We conclude that K.S.A. 2-3202(b) and (c)(1)'s references to Kansas "laws" include the common law governing torts like trespass, developed through Kansas cases.

Scope of agricultural activities

Because the Act's references to "laws" include trespass law, we must consider whether the district court erred when it included Nelson's trespass in its assessment of whether the Act protected Nelson against the Rosses' nuisance claim. Again, this question requires interpretation of the statutes defining this protection.

Subject to its other requirements, the Act protects "[a]gricultural activities conducted on farmland" if those activities are "undertaken in conformity with federal, state, and local laws and rules and regulations." K.S.A. 2-3202(a), (b). The legislature broadly defined an *agricultural activity* as "the growing or raising of horticultural and agricultural crops, hay, poultry and livestock, and livestock, poultry and dairy products

for commercial purposes." K.S.A. 2-3203(a). Agricultural activities include "activities related to the handling, storage and transportation of agricultural commodities." K.S.A. 2-3203(a).

Nelson does not dispute that transporting the effluent from the Stillwater Swine hog farm to the NTN pivot is an agricultural activity within this definition. But he claims that activity—transporting liquified hog waste—was not itself a nuisance. Rather, the nuisance arose from spraying the effluent on the NTN farmland. Nelson points out that the Rosses would have a nuisance claim even if the effluent had been transported to the pivot system in a different, lawful manner. Thus, he asserts, the two activities are separate for purposes of the Act's protections, and the district court erred when its analysis of the trespass claim influenced its conclusion on whether Nelson's fertilization practices should receive protection against the Rosses' nuisance claim.

We recognize that, unlike the right-to-farm statutes of several other states, Kansas' Act immunizes agricultural *activities*, not broader agricultural operations. Compare K.S.A. 2-3202 ("agricultural activity") with 3 Pa. Stat. § 954(a) ("agricultural operation"); see also *Burlingame v. Dagostin*, 183 A.3d 462, 470 (Pa. Super. Ct. 2018) (interpreting "agricultural operation" under the Pennsylvania right-to-farm law to mean "the farm, not the farming process"). Thus, we agree with Nelson that an agricultural activity would not be exempted from the Act's protections because of a regulatory dispute involving some different, unrelated aspect of Nelson's farming operation.

But that is not the case here. Nelson's spraying of the effluent on the NTN land was made possible by the infrastructure he installed to transport that effluent from the hog farm. For purposes of the Right to Farm Act, the application and infrastructure that enabled it are logically indistinguishable. And that infrastructure trespassed on the Rosses' and Field's properties.

Only a few Kansas cases have discussed the Right to Farm Act since its adoption in 1982. But our review of the limited discussion in those cases underscores that courts do not view agricultural activities under the right-to-farm laws in a vacuum. Rather, courts' review of agricultural activities under the Act—including whether those agricultural activities conform with state and federal laws—must necessarily consider related farming practices incidental to the challenged agricultural activities that make the challenged activities possible. For example, in *Finlay*, the plaintiffs brought a nuisance claim challenging the smell of the defendant's feedlot. Though this smell likely arose from other activities incidental to the feedlot, this court noted that the defendant's feedlot activities had violated KDHE instructions to annually clean the feeding pens. 18 Kan. App. 2d at 484. While this violation may not have been the leading cause of the ongoing odors the plaintiffs challenged, the pens made the other feedlot activities possible.

Returning to this case, Nelson could have transported that effluent in a lawful manner and then used the waste to fertilize his property. If he had, then he would not have trespassed on the plaintiffs' properties, and thus our analysis under the Act would be different. But he did not. And transporting the effluent made the fertilization possible. As such, we agree with the district court that Nelson's agricultural activity—fertilizing the NTN cropland—was not "undertaken in conformity with" state law. K.S.A. 2-3202(b).

The district court correctly found that the Kansas Right to Farm Act did not prevent the Rosses from bringing a nuisance claim against Nelson.

2.2. *There was evidence presented at trial to support the jury's nuisance finding.*

Nelson also argues that the evidence presented at trial was insufficient to support the jury's finding that spraying the effluent near the Rosses' home was a nuisance. Appellate courts will not disturb a jury verdict "if there is substantial competent evidence in the record to support it." *Kleibrink v. Missouri-Kansas-Texas Railroad Co.*, 224 Kan.

437, 440, 581 P.2d 372 (1978). Nor will appellate courts weigh evidence or pass on witness credibility; "it is of no consequence that there may have been evidence which, if believed, would have supported a different verdict." 224 Kan. at 440-41.

During the several-day trial, the jury heard evidence that Nelson's activities made life "pure hell" for the Rosses. At the time of trial, Tonda Ross had not stayed at their house for a year because of Nelson's activities. They could not host company at home, and their house became coated with flies when Nelson applied the effluent. Multiple witnesses testified about the stench, and the spray drifted onto Tonda. The local sheriff confirmed that the smell was just as bad inside the Rosses' home as outside.

Nelson was free to present his contrary view of the situation at trial, and he did. The jury, however, found that the evidence supported the Rosses' claim. Substantial competent evidence supports the jury's nuisance verdict.

3. *The district court did not err in awarding punitive damages.*

In his final collection of arguments, Nelson challenges several aspects of the $50,000 in punitive damages awarded for the Rosses' nuisance claim. He asserts that there was insufficient evidence to warrant punitive damages, that the jury disregarded the instructions on when punitive damages were appropriate, and that the district court's award of $50,000 was too high.

3.1. *There was evidence to support the jury's finding that Nelson acted willfully or wantonly when spraying the hog waste near the Rosses' home.*

Punitive damages punish and deter "malicious, vindictive, or willful and wanton behavior." *Adamson v. Bicknell*, 295 Kan. 879, Syl. ¶ 3, 287 P.3d 274 (2012). "To warrant an award of punitive damages, a party must establish by clear and convincing

evidence that the party against whom the damages are sought acted with willful or wanton conduct, fraud, or malice." 295 Kan. 879, Syl. ¶ 3; see K.S.A. 60-3702(c).

On appeal, this court reviews a jury's finding that punitive damages are appropriate by asking whether, based on the evidence presented at trial, the jury "could have found it highly probable" that the defendant engaged in malicious, vindictive, willful, or wanton conduct. *In re B.D.-Y.*, 286 Kan. 686, 705, 187 P.3d 594 (2008); *York v. InTrust Bank, N.A.*, 265 Kan. 271, 306-07, 962 P.2d 405 (1998). In making this determination, we view the evidence in the light most favorable to the prevailing party, without reweighing the evidence or evaluating witness credibility. *Hawkinson v. Bennett*, 265 Kan. 564, 583, 962 P.2d 445 (1998).

Before trial, the district court ruled that the Rosses could only pursue punitive damages for their nuisance claim against Nelson himself. And the court further limited the jury's consideration of punitive damages to whether Nelson acted willfully when spraying the effluent near the Rosses' house. Willful conduct involves an intent or purpose "to do wrong or to cause an injury to another." *Anderson, Administrator v. White*, 210 Kan. 18, 19, 499 P.2d 1056 (1972); see PIK Civ. 4th 103.04.

Our review of the trial record shows there was evidence to support the jury's finding that Nelson used the effluent on the NTN property in a manner that intended to wrong or injure the Rosses. There is no question that Nelson purposefully ran effluent through the pivot—that was the planned waste-disposal method. But there was also evidence presented suggesting that Nelson knew how the effluent was impacting the Rosses and their property. Before Nelson began installing the pipelines to transfer the effluent to the pivot system, Rodney Ross personally expressed concern to Nelson about having hog waste sprayed onto his property. Nelson decided to apply the waste anyway, including on the pivot just across the road from the Rosses' house. In the year after the Rosses filed suit, the evidence showed that Nelson sprayed the fertilizer about twice as

many hours as he had the previous year. Based on this evidence, the jury could have found that Nelson engaged in willful conduct.

Nelson points out that he offered evidence at trial showing that he tried to reduce odor and spray problems for the Rosses, such as by not spraying effluent when the wind would carry it towards their house. He also notes that he had a KDHE permit for the waste-disposal operation. But this was all evidence that the jury heard and weighed. See *Hawkinson*, 265 Kan. at 583 (appellate courts do not reweigh evidence). Based on the evidence presented, a rational juror could have found by clear and convincing evidence that Nelson acted willfully, rendering punitive damages appropriate.

3.2. *Nelson has not shown that the instructions regarding punitive damages were unclear, confusing, or incorrect.*

Nelson next asserts that even if the jury could have found he acted willfully, the punitive damages should nevertheless be set aside due to instructional error. He argues that the verdict form was unclear, making it impossible to know whether the jury awarded punitive damages for nuisance or for trespass, which would have been an improper basis. Put differently, Nelson asserts it is unclear that the jury awarded punitive damages for nuisance.

Nelson never objected to the verdict form. Appellate courts reviewing challenges to jury instructions raised for the first time on appeal will only disrupt the jury's verdict if the party challenging the instructions demonstrates they were clearly erroneous. See K.S.A. 2022 Supp. 60-251(d)(2). "While a verdict form is not technically a jury instruction, it is part of the packet sent with the jury which includes the instructions and assists the jury in reaching its verdict." *Unruh v. Purina Mills*, 289 Kan. 1185, 1197-98, 221 P.3d 1130 (2009). Courts therefore analyze verdict forms under the same standard. 289 Kan. at 1198.

Applying these principles here, we must determine whether the verdict form misstated the law as it applied to this case, and if so, whether we are firmly convinced the jury would have reached a different verdict if a different form were used. See *Siruta v. Siruta*, 301 Kan. 757, 771, 348 P.3d 549 (2015). Question 5 on the verdict form addressed punitive damages. That question, in context with the preceding questions, provided:

> "3. Do you find it more probably true than not true that Defendants created a nuisance across the road from Plaintiffs Rodney and Tonda Ross's property?
>
> ___✓___ Yes _____ No
>
> ***[If you answered YES to Question No. 3, then Proceed to Question No. 4. If you answered NO to Question 3, then Skip to Question 6]***
>
> "4. If you answered yes to Question 3, what amount of damages were sustained by Plaintiffs Rodney and Tonda Ross as a result of such nuisance?
>
> $__2000__
>
> "5. If you answered yes to Question 3 and awarded damages in question 4, do you find by clear and convincing evidence that punitive damages should be awarded against Defendant Terry Nelson in favor of Plaintiffs Rodney and Tonda Ross?
>
> ___✓___ Yes _____ No"

After the trial, Nelson sought to set aside the verdict, arguing that the jury disregarded the district court's instructions about punitive damages. He attached affidavits to his motion from three jurors who claimed to be confused about the punitive-damage instruction and felt compelled to award them based on the preceding instructions. The district court denied the motion.

Nelson speculates that because Question 5 did not explicitly state that punitive damages could only be awarded for the nuisance claim, the jurors could have been confused and awarded punitive damages based on the plaintiffs' trespass claims. But this argument invites us to inquire into the jurors' thought processes, which is improper. Courts are loath to delve into the thought processes of individual jurors. *Williams v. Lawton*, 288 Kan. 768, Syl. ¶ 13, 207 P.3d 1027 (2009); see K.S.A. 60-441. "[T]here is a need for confidentiality of deliberation and verdict finality," so public policy forbids inquiring into how jurors reached a verdict. 288 Kan. at 797. We thus prohibit jurors from impeaching their own verdict unless, for example, "a jury intentionally disregards a court's instructions." 288 Kan. at 798. The district court properly declined Nelson's efforts to allow jurors in this case to impeach their verdict after it had been rendered.

Turning to the language of the verdict form itself, Nelson is correct that the language of Question 5 does not explicitly limit punitive damages to the nuisance claim. But when viewed in context, these questions reasonably informed the jury that any punitive damages would be for nuisance, not trespass. The jury could only reach the punitive-damage question if it "answered yes to Question 3 [was there a nuisance?] and awarded damages in question 4 [if there was a nuisance, what were the damages?]." Given this qualifier, it would make no sense to award punitive damages for trespass. Though the verdict form could have been clearer, it did not misstate or misapply the law.

3.3. *The $50,000 in punitive damages was not inappropriate or excessive.*

In his final argument on appeal, Nelson asserts that the district court's punitive-damage award of $50,000 was excessive. This court reviews the amount of a district court's punitive-damage award for an abuse of discretion. *Smith v. Printup*, 262 Kan. 587, Syl. ¶ 3, 938 P.2d 1261 (1997). A district court abuses its discretion when its decision is unreasonable or based on an error of law or fact. *Adamson*, 295 Kan. 879, Syl. ¶ 2.

In challenging the award, Nelson points to mitigating measures he took to minimize odor problems for the Rosses, such as monitoring the wind and adding drop nozzles to the pivot to minimize spray. He also points to Kansas courts' recognition that people living in agricultural areas should expect to experience things like unpleasant odors. See *Dill v. Excel Packing Co.*, 183 Kan. 513, 525-26, 331 P.2d 539 (1958). But these are all considerations the district court made in determining the award; appellate courts do not reweigh evidence. *Hawkinson*, 265 Kan. at 583.

And not all the evidence the district court considered portrayed Nelson's actions in a favorable light. For example, the evidence at trial showed that Nelson sprayed the effluent almost twice as often after the Rosses filed suit than in 2019. The district court also heard new evidence that after the trial, Nelson piled truckloads of manure across from the Rosses' home for several days straight.

In determining the appropriate amount of damages, the district court conducted a nuanced analysis of the statutory considerations for punitive damages. See K.S.A. 60-3702(b). It found that some factors weighed in Nelson's favor—such as the fact that he was operating a legitimate business and that the Rosses had a second home to go to. It found that some factors—like the fact that Nelson's conduct was profitable—could be interpreted multiple ways. And it found that some factors favored a larger award. The court ultimately awarded $50,000—less than what the Rosses wanted, but more than what Nelson deemed appropriate. Given the evidence, a reasonable person could agree with this award. The district court did not abuse its discretion.

Nelson also argues that the $50,000 award violated his due-process rights, as the award was disproportionately large compared to the damages the jury awarded for the nuisance claim. The United States Supreme Court has explained that punitive damages may violate a party's constitutional right to due process of law in at least two ways. First, the Due Process Clause of the Fourteenth Amendment to the United States Constitution

"makes the Eighth Amendment's prohibition against excessive fines and cruel and unusual punishments applicable to the States." *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 433-34, 121 S. Ct. 1678, 149 L. Ed. 2d 674 (2001). Second, the Due Process Clause itself "prohibits the States from imposing 'grossly excessive' punishments on tortfeasors." 532 U.S. at 434.

Courts assess three considerations when determining whether a punitive-damage award shocks the conscience and thus violates a party's due-process rights: the reprehensibility of the defendant's conduct; the ratio of punitive damages to actual damages for the injury; and comparable awards for similar conduct. See 532 U.S. at 435; *Hayes Sight & Sound, Inc. v. ONEOK, Inc.*, 281 Kan. 1287, 1307, 136 P.3d 428 (2006). This court has unlimited review over the constitutionality of a punitive-damage award. 281 Kan. at 1307.

In rendering its award, the district court relied on *Ostroski v. Lynn Revocable Trust*, No. 109,112, 2014 WL 2747571 (Kan. App. 2014) (unpublished opinion), in which the defendant harassed his neighbors in various ways, like shining a floodlight into their house overnight. The panel found that the defendant's conduct was sufficiently reprehensible because it "inflicted a personal, rather than an economic, harm" on the plaintiffs. 2014 WL 2747571, at *8. The panel also recognized that "[t]he law gives special protection to homes and to people in their homes," so targeting the plaintiffs in their homes added to the reprehensibility. 2014 WL 2747571, at *8.

As to the ratio consideration, the panel resisted a bright-line ratio, finding it would be "unreflectively formulaic." 2014 WL 2747571, at *10; see *State Farm Mutual Auto Insurance Co. v. Campbell*, 538 U.S. 408, 425, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (2003) (noting "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages . . . will satisfy due process"). The panel also noted that K.S.A. 60-3702 caps punitive-damage awards based on the defendant's income, serving "much

the same purpose as the ratio review." *Ostroski*, 2014 WL 2747571, at *11. And while the panel found little help when looking to comparable awards, it ultimately found a $27,500 award—compared to just $100 in actual damages—satisfied due process, even suggesting that the district court could award more on remand if it wanted to. 2014 WL 2747571, at *18.

Applying these principles here, the district court's punitive-damage award did not violate Nelson's right to due process of law. Nelson, like the defendant in *Ostroski*, inflicted a personal harm on the Rosses in their home—"'the ultimate sanctuary.'" 2014 WL 2747571, at *7. His activities caused a lasting stench and a mist that sprayed their house, cars, and Tonda Ross. They could not host company at home, their house became covered in flies, and Tonda had to stay elsewhere for at least a year. And after losing at trial, Nelson piled truckloads of manure directly across from the Rosses' home. Nelson's conduct was reprehensible enough to warrant punitive damages.

That the award here exceeded a single-digit ratio—25 to 1—does not make it unconstitutional. The award was meant to punish and deter Nelson. After reviewing his financial information—which is not in the record because Nelson obtained a protective order preventing its disclosure—the district court determined that $50,000 would "sting" without being "grossly excessive." After all, the jury awarded only $2,000 in compensatory damages, so the district court apparently concluded that a single-digit ratio would not meaningfully punish or deter Nelson. The ratio here is also modest compared to the 275 to 1 ratio approved in *Ostroski*.

As in *Ostroski*, looking to comparable awards sheds little light on the analysis. See 2014 WL 2747571, at *13; *Martin v. Johnston*, No. 70,426, 1994 WL 17120421, at *3 (Kan. App. 1994) (unpublished opinion) ($12,500 punitive-damage award for a nuisance judgment in a boundary-line dispute). Nor do related criminal sanctions provide particularly useful guidance, though they would suggest that $50,000 is high. See

Ostroski, 2014 WL 2747571, at *13; see also K.S.A. 2022 Supp. 21-6204. But even assuming this factor favored Nelson, it would not be strong enough on its own to render the punitive-damage award unconstitutional.

Finally, the amici brief argues that Kansas law prohibits punitive-damage awards in agricultural nuisance cases. For support, the brief points to K.S.A. 2-3205(a), which defines "[t]he exclusive compensatory damages that may be awarded to a claimant where the alleged nuisance originates from farmland primarily used for agricultural activity." But the statute's plain language establishes the exclusive methods for calculating *compensatory*—not punitive—damages in agricultural nuisance cases; it does not say compensatory damages are the *only* damages available in those cases.

Kansas courts have long recognized that punitive damages are available for nuisance claims that resulted from willful conduct. See *Ostroski*, 2014 WL 2747571, at *2-3. While the legislature is free to indicate that punitive damages are not available for some categories of claims, the Kansas Right to Farm Act contains no such exemption. K.S.A. 2-3205(a) merely defines the "exclusive compensatory damages" for nuisance claims originating from agricultural activity on farmland. It does not address punitive damages at all.

Kansas courts will not categorically exempt claims from punitive damages if the legislature has not specifically done so. As the Kansas Supreme Court explained in rejecting a similar argument under the Uniform Trust Code:

> "We find it significant the Kansas Legislature created some exceptions to the availability of punitive damages in K.S.A. 60-3702. . . . [To exclude the claim for punitive damages requested,] we would have to graft another exception onto the statute. The same is true with K.S.A. 58a-1002, which allows punitive damages without exception. In this context, the question is not whether to allow punitive damages but whether to extinguish damages the Legislature has authorized. And it is not an appropriate role for a court to add those

> words to any of the Kansas statutes without an indication of legislative intent, especially when doing so would limit a remedy the Kansas Legislature has allowed." *Alain Ellis Living Trust v. Harvey D. Ellis Living Trust*, 308 Kan. 1040, 1060, 427 P.3d 9 (2018).

In short, the plain language of K.S.A. 2-3205(a) does not preclude a claim of punitive damages in agricultural nuisances when such a claim is otherwise available under Kansas law. And the district court's assessment of $50,000 in punitive damages against Nelson for the Rosses' nuisance claim was not inappropriate or constitutionally excessive.

After carefully reviewing the record and the parties' arguments, we find that Nelson has not shown any error in the proceedings before the district court. We thus affirm the judgment against the defendants.

Affirmed.