

NOT DESIGNATED FOR PUBLICATION

No. 125,299

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

SHELBY DEVELOPMENT, LLC,  
*Appellant,*

v.

SHAWNEE COUNTY, KANSAS, SHAWNEE COUNTY,  
KANSAS, APPRAISER'S OFFICE, STEVE BAUMAN,  
in His Official Capacity as Shawnee County,  
Kansas, Appraiser and Individual Capacity,  
and STACY BERRY, in Her Official Capacity as  
Shawnee County, Kansas, Assistant Appraiser,  
and Individual Capacity,  
*Appellees.*

MEMORANDUM OPINION

Appeal from Shawnee District Court; THOMAS G. LUEDKE, judge. Opinion filed July 28, 2023.  
Affirmed.

*Wesley J. Carrillo* and *Christopher M. Napolitano*, of Ensz & Jester, P.C., of Kansas City,  
Missouri, for appellant.

*David R. Cooper* and *Blake K. Porter*, of Fisher, Patterson, Sayler & Smith, LLP, of Topeka, for  
appellees.

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

PER CURIAM: Shelby Development, LLC, appeals a district court's grant of summary judgment to the Shawnee County Appraiser and two other appraisers in a lawsuit it had filed. Raising several theories of liability, Shelby had sued for damages

because it believed that the two appraisers had coerced a third appraiser into improperly raising the valuation of its racetrack in Shawnee County. The district court granted summary judgment to all defendants because Shelby had agreed to a valuation of its property in an administrative proceeding before the Board of Tax Appeals and wanted that value preserved in this lawsuit. In the view of the district court, Shelby's stipulation to the valuation meant that it could not now prove any damages no matter what theory of liability it presented. Our review of the record leads us to conclude that the district court was correct.

*Tax appraisals lead to tax appeals.*

This lawsuit is a controversy about a tax appraisal of a racetrack arising between the owner of that racetrack and Shawnee County. The owner contends the appraisal was too high. Shelby Development, LLC, owns Heartland Park, a motor raceway. Chris Payne controls Shelby Development. Steve Bauman is the Shawnee County Appraiser. Stacy Berry, also an appraiser, works in the appraiser's office and oversees the commercial appraisal department.

For the tax year 2016, Berry valued Heartland Park at \$8,944,330. Shelby appealed the valuation to the Board of Tax Appeals. But Shelby and the County resolved the 2016 appeal by stipulation, agreeing that the appraised value for 2016 was \$5,712,000.

After Shelby disputed the 2016 appraisal of Heartland Park done by the Shawnee County Appraiser's Office, the County engaged an outside appraiser, Chris Williams, to

conduct the racetrack appraisal for tax year 2017. Williams worked for CBRE, Inc. In February 2017, Williams conducted an on-site inspection of Heartland Park.

A few days later, on March 2, 2017, Williams' draft appraisal was e-mailed to Bauman, the County Appraiser. The draft appraisal of Heartland Park was \$7,500,000. Later, Williams, Bauman, and Berry discussed the draft appraisal in a telephone conference. Williams completed his final appraisal on March 29, 2017. For tax year 2017, Williams ultimately valued Heartland Park at \$10,400,000, about \$3 million more than the draft value sent by email.

Shelby appealed the valuation to the Board of Tax Appeals. While that appeal was pending, Shelby learned that Williams had prepared an earlier draft appraisal that was lower than the final appraisal. But Shelby was not told of the amount of the earlier appraisal.

The County did not release a copy of the draft appraisal to Shelby, claiming an exemption under the Kansas Open Records Act and under K.S.A. 2017 Supp. 60-226. Berry disclosed, in her deposition, that the draft appraisal was lower than the final appraisal. She stated the value went up after the County officials initiated discussions between county personnel and CBRE, Inc., personnel. Shelby tried to get the prior appraisal documents, but Shelby did not depose Williams during the tax appeal case.

The tax appeal case was resolved in May 2018 by a stipulation and settlement agreement. Shelby and the County stipulated the value of Heartland Park was \$7,500,000 for the 2017 tax year. They also agreed Heartland Park would be valued at \$8,900,000 for

the 2018 tax year and would not increase in 2019, provided there were no new improvements to the property.

Finally, in March 2019, the County disclosed Williams' draft appraisal dated March 2, 2017, to Shelby in response to an open records act request.

A few months later, Shelby filed this lawsuit, claiming Bauman and Berry had pressured Williams to come up with a higher appraisal value. In his lawsuit, Shelby claimed breach of contract, breach of the duty of good faith and fair dealing, fraud in the inducement, fraud, negligent misrepresentation, violation of various statutes and negligence per se, violations of the Kansas Constitution, civil conspiracy, violations of the United States Constitution, conspiracy, and damage to property.

During discovery in this lawsuit, Williams testified that his conclusions were not influenced by the County. He did not remember specific conversations. Nor did Williams remember what changed between the reports. He explained a difference between his draft appraisal and final appraisal was his use of the "building residual technique" in the final report. The building residual appraisal technique takes out the value of the land before valuing the improvements on the land.

In further discovery, the plaintiff, Payne, in his deposition, testified that he had talked to Williams on the day of the on-site inspection of Heartland Park. At that time, Williams told Payne the County was "reaching for a higher value on the property than [Williams] thought it was worth." After Payne received the notice of value from the County, Payne spoke with Williams on the phone. Williams said he did not value the property at the price reflected on the County's valuation notice.

Williams said he had appraised the property at around \$5,500,000, but that number was immediately rejected by Bauman, the Shawnee County appraiser. Bauman then ordered him to raise the appraisal higher. Bauman said, "I need a higher appraisal." Williams gave him values over the phone, and they were shot down. It went back and forth. Williams told Payne he had submitted an appraisal "in the seven and half range." Williams made clear to Payne that the result was not his value. Bauman had coached him. The record is unclear when this conversation took place.

In due course, the defendants moved for summary judgment arguing that Shelby had the opportunity to litigate the substance of its claims during the tax appeal proceeding but chose to settle. In response, Shelby stated it was "not asking this Court to revisit the valuation of the Property at issue in this litigation."

The court granted summary judgment to all of the defendants.

*We review the law of summary judgment.*

The rules on summary judgment are well established. Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, admissions on file, and supporting affidavits show that no genuine issue exists as to any material fact and the moving party is entitled to judgment as a matter of law.

When considering the facts before granting summary judgment, a district court must resolve all facts and reasonable inferences drawn from the evidence in favor of the party against whom the ruling is sought. When opposing summary judgment, a party

must produce evidence to establish a dispute about a material fact. And those disputed facts must be material to the conclusive issue in the case to preclude summary judgment.

Appellate courts will apply these same rules and, if we find reasonable minds could differ on the conclusions drawn from the evidence, then we will hold summary judgment to be inappropriate. The standard for appellate review of the legal effect of undisputed facts is de novo. See *GFTLenexa, LLC v. City of Lenexa*, 310 Kan. 976, 981-82, 453 P.3d 304 (2019).

*Did Shelby gut his damage claim by insisting on using the stipulated value of the property?*

This case proves an ancient adage: choices have consequences. In its order granting summary judgment, the district court jumped on the damage claim. The court decided Shelby sustained no damages because it asked that the stipulated appraised value of the property remain intact. The consequence of this choice is obvious: if the stipulated valuation remains the same, then so do the taxes. If the taxes remain the same, then where are the damages?

Shelby's position on damages has been fluid here. In its petition, Shelby claimed it had been damaged by a reduction in the value of its property, lost profitability of the premises, increased tax liabilities, decreased net income, and other damages. It specifically asked for money damages and rescission of the settlement agreement:

"[I]n an amount in excess of Seventy-Five Thousand and 00/100 Dollars (\$75,000.00), for all of Plaintiff's actual, consequential and special damages in an amount that is fair and reasonable, for its costs incurred herein, pre- and post-judgment interest, and for such other and further relief as the Court deems just, proper, and equitable under the circumstances, to include finding the Settlement Agreement void, ordering an appraisal by an independent third-party appraiser to determine the actual fair market value of the Property, and that a new tax appraisal be issued pursuant to that appraisal, that all tax payments Plaintiff has made to date be credited toward the new tax liability and that it be refunded any excess, and that Plaintiff be relieved of any and all penalties or late fees associated with its tax liability to date."

But then, in response to the appellees' summary judgment motion, Shelby stated, "Absolutely none of [its] claims challenged the 'stipulated value,' they challenge the 'stipulation' itself and the wrongful acts taken by the Defendants to get to that particular point in the process. The challenge is for the damage caused—not the value assigned." Shelby, ignoring its request in the petition to void the settlement agreement, asked for something vague:

"What Defendants fail to understand is that Plaintiff is not asking this Court to revisit the valuation of the Property at issue in this litigation. It is asking this Court to look not at the actions of the Defendants and determine a number of things wholly unrelated to determining a 'proper value,' but rather to show that the Defendants committed wrongs in the form of torts and breaches of contracts."

Now, on appeal, Shelby's position continues to shift. In its brief, Shelby focuses on the disputed facts on whether the \$10.4 million valuation was correct and argues it does not have the burden at the summary judgment stage to prove damages. Then in its reply brief, Shelby argues that the stipulated value was improper because it was based off the appellees' intentional inflation of the appraised value. "If the Appellees had not forced an

increase in valuation nor hid the initial valuations until after the stipulation had been reached and the nefarious conduct discovered, the stipulation would have never been entered." So Shelby has gone from not wanting the district court to touch the stipulated value to arguing to us that it came from nefarious conduct.

Despite this fluidity, we can analyze claims. And damages are an essential element of all of Shelby's claims. If a moving party shows the lack of facts to support an essential element of the nonmoving party's claim, the nonmoving party must come forward with facts to support its claim, although it is not required to prove its case at the summary judgment stage. *Drouhard-Nordhus v. Rosenquist*, 301 Kan. 618, 623, 345 P.3d 281 (2015). There are clear lines of responsibility here.

"The burden is not on the party moving for summary judgment to produce evidence showing the absence of a genuine issue of material fact. The moving party may discharge its obligation by pointing out to the district court that there is an absence of evidence to support the nonmoving party's case. The nonmoving party then has the affirmative duty to come forward with facts to support its claim, although it is not required to prove its case." *U.S.D. No. 232 v. CWD Investments*, 288 Kan. 536, Syl. ¶ 1, 205 P.3d 1245 (2009).

Once the appellees argued that Shelby could not prove any damages in arguing for summary judgment, Shelby needed to reveal something in the record to support its claim—not just rely on a general statement of not having to prove all damages at this point in the lawsuit.

After all, generalizations are not enough to support the element of damages. *Osage Cap., LLC v. Bentley Invs. of Nevada III, LLC*, No. 109,786, 2014 WL 902189, at \*8 (Kan. App. 2014) (unpublished opinion).

The *U.S.D. No. 232* case is instructive. In that case, the court held summary judgment was appropriate in an eminent domain case when the landowners failed to come forward with evidence to support their damage claims. Their response contained no facts linking their claimed loss of profits to the property's fair market value. The landowners believed that the burden was on the school district, as the moving party, to show absence of linkage, and not theirs, as the nonmoving party, to show its presence. The landowners only made general allegations and arguments. The court ruled the defendants were "required to present some specific evidence in their response" supporting their damage claim. 288 Kan. at 556-60.

We hold that Shelby's position in this appeal is similar to the landowners' position in *U.S.D. No. 232*. Assuming Shelby is not challenging the stipulated value as it stated in its response to the summary judgment motion, Shelby has never explained how it sustained a reduction in the value of its property, lost profitability of the premises, increased tax liabilities, decreased net income, or other damages caused by the County appraisers' actions. Shelby had the burden to present some specific evidence supporting its damage claims. It has simply failed to do so.

Realistically, Shelby is asking us and the district court to assess its property by overturning the stipulated value set by the Board of Tax Appeals. This request is out of order. Values of real estate for tax purposes are to be set by the Board and then reviewed by the court. Property tax values are not set in tort actions filed in district court.

We see no error in the district court's order granting summary judgment on this point.

*Did Shelby fail to exhaust its administrative remedies, and is it thus barred from attacking the assessed valuation of its property in this tort action?*

Shelby contends its administrative remedy of seeking review by the Board of Tax Appeals was inadequate. Shelby also contends County officials hid Williams' draft appraisal from Shelby during that proceeding. Shelby also argues that the County waived the defense of failure to exhaust administrative remedies because the County did not assert such affirmative defense in its answer to Shelby's petition.

In its summary judgment order, the district court found that Shelby's valuation issues could have been presented in the administrative tax appeal proceeding and thus Shelby failed to exhaust administrative remedies before coming to court. The court also found that the County officials had provided sufficient notice to put Shelby on notice of its failure to exhaust administrative remedies defense.

*We put the issue of notice of this defense to rest.*

The rules of civil procedure require a party responding to a pleading to affirmatively state any affirmative defense. K.S.A. 2022 Supp. 60-208(c). The failure to exhaust administrative remedies is an affirmative defense that must be pled to give "fair notice of the nature of the defense" by this court. *Platt v. Kansas State Univ.*, No. 110,179, 2014 WL 6090403, at \*5 (Kan. App. 2014) (unpublished opinion), *aff'd on other grounds* 305 Kan. 122, 379 P.3d 362 (2016). The question becomes, did the defendants here give Shelby fair notice of this defense.

It is true that in their answer, the defendants did not use the words "exhaustion of administrative remedies," but they listed as affirmative defenses that Shelby knew about the appraisal when it signed the settlement agreement, res judicata, and waiver. That is fair notice. We will look further into the issue.

*Did Shelby fail to exhaust its administrative remedies?*

The heart of Shelby's claim for damages is his contention that the \$10.4 million valuation assessment on its racetrack was erroneous. We hold that claim, by its nature, must be decided by the Board of Tax Appeals.

The statutes create an order to the world of property taxes. Matters of tax assessment, exemption, equalization, and valuation are administrative in character. *J. Enterprises, Inc. v. Bd. of County Comm'rs of Harvey County*, 253 Kan. 552, Syl. ¶ 2, 857 P.2d 666 (1993). Administrative remedies must be exhausted before you can come to court. If the valuation is improper, then that question should have been submitted to the Board of Tax Appeals. After that question is decided by the appropriate administrative agency, then a plaintiff can seek equitable remedies in the district court for any claim that suggests an administrative official acted fraudulently. See K.S.A. 60-907.

The law mandates an administrative procedure for a taxpayer to protest payment of the taxpayer's taxes on the grounds "that the valuation or assessment of the property upon which the taxes are levied is illegal or void." The procedure involves an informal meeting with the county appraiser. K.S.A. 79-2005(a). If still aggrieved, the taxpayer can appeal the results to the Board of Tax Appeals. K.S.A. 79-2005(g). The taxpayer is entitled to a hearing where "it shall be the duty of the county appraiser to initiate the

production of evidence to demonstrate, by a preponderance of the evidence, the validity and correctness of such determination." K.S.A. 79-2005(i).

Then, any action of the Board of Tax Appeals is subject to review in accordance with the Kansas Judicial Review Act. K.S.A. 2022 Supp. 74-2426(c). An aggrieved party may petition for review of the Board's final order in the Court of Appeals. K.S.A. 2022 Supp. 74-2426(c)(4)(A). There is an order to this system, and it begins with determinations of an administrative agency, the Board of Tax Appeals.

When reviewing the work of administrative agencies, there is a well-recognized rule in this state. Where a full and adequate administrative remedy is provided in tax matters by statute, such remedy must be exhausted before a litigant may resort to the courts. See *Zarda v. State*, 250 Kan. 364, Syl. ¶ 1, 826 P.2d 1365 (1992). For plaintiffs seeking tax relief, K.S.A. 79-2005 and K.S.A. 2022 Supp. 74-2426 provide full, adequate, and complete relief. See 250 Kan. at 374.

The obvious legislative objective here is to channel all tax matters through the Board of Tax Appeals, the paramount taxing authority in the state. *Tri-County Pub. Airport Auth. v. Morris County Bd. of County Comm'rs*, 233 Kan. 960, 964, 666 P.2d 698 (1983).

We do note that there can be exceptions. When there are no issues raised which lend themselves to administrative determination and all issues require judicial determination, plaintiffs can seek court relief without exhausting administrative remedies. 250 Kan. at 368-69. But matters of tax assessment, exemption, equalization, and valuation are administrative in character. *J. Enterprises*, 253 Kan. 552, Syl. ¶ 2.

When the plaintiff complains that the assessed valuation of its real property is too high, the plaintiff must exhaust administrative remedies before resorting to the courts. Where the plaintiff also makes claims not suited for administrative decision, such claims can be resolved by the district court on appeal. *Zarda*, 250 Kan. at 372-74.

We are guided by the reasoning in *U.S.D. No. 232*, where the court held summary judgment was appropriate in an eminent domain case in which the landowners failed to come forward with evidence to support their damage claims. Their response contained no facts linking their claimed loss of profits to the property's fair market value. The landowners believed that the burden was on the school district, as the moving party, to show absence of linkage, and not theirs, as the nonmoving party, to show its presence. The landowners only made general allegations and arguments. The court ruled the defendants were "required to present some specific evidence in their response" supporting their damage claim. 288 Kan. at 556-60.

In our view, Shelby's position in this appeal is similar to the landowners' position in *U.S.D. No. 232*. If we assume that Shelby is not challenging the stipulated value as it stated in its response to the summary judgment motion, we also see that Shelby has never explained how it sustained a reduction in the value of its property, lost profitability of the premises, increased tax liabilities, decreased net income, or other damages caused by the County appraisers' actions. Shelby had the burden to present some specific evidence supporting its damage claims in responding to summary judgment motions. It failed to do so.

We add that torts are generally outside the purview of the Judicial Review Act, the law allowing judicial review of the Board of Tax Appeals decisions. See *Platt v. Kansas State Univ.*, 305 Kan. 122, 132, 379 P.3d 362 (2016). This means we rarely see the two claims together. This brings us to the question of remedy.

This court has held that, in K.S.A. 79-2005, the Legislature provided a full and adequate remedy for taxpayers who claim the valuation or assessment of their property is illegal or void. Therefore, the taxpayer must exhaust administrative remedies and may not raise allegations of constructive fraud in the valuation or assessment of the property for the first time in a tax foreclosure action. *Bd. of County Comm'rs of Osage County v. Schmidt*, 12 Kan. App. 2d 812, 814-15, 758 P.2d 254 (1988).

With no statutory provision for judicial review, courts are limited to a few equitable remedies. As an illustration we note that taxpayers can pursue a claim of an illegal tax under K.S.A. 60-907 if the claim is judicial in nature, not administrative, to avoid the requirement of exhaustion of administrative remedies on tax matters. A claim is judicial in nature "if it alleges an administrative official or board acted without authority or took action that was permeated with fraud, corruption, or conduct so oppressive, arbitrary, or capricious as to amount to fraud in connection with the levy of any tax, charge, or assessment." The taxpayer must not only allege an illegal tax but must also make certain the alleged illegality is not administrative because that would require exhaustion of administrative remedies before court review. *Barnes v. Bd. of County Comm'rs of Cowley County*, 293 Kan. 11, Syl. ¶¶ 1, 6-7, 25, 259 P.3d 725 (2011).

While Shelby did allege fraud, its chief complaint is that the assessed valuation of its property was too high. That fundamental complaint permeates all of Shelby's claims

and its requested relief. And that question is administrative. Shelby needed to exhaust administrative remedies before resorting to the courts.

Shelby failed to exhaust its administrative remedies.

*Res judicata does not bar Shelby's claims.*

The district court ruled this lawsuit was barred by the doctrine of res judicata, sometimes called claim preclusion. In the lower court's view, all the requirements to satisfy the doctrine are satisfied here. The claims in this suit all arise out of the issue resolved by stipulation in the Board of Tax Appeals proceeding; the cases involved the same parties because Bauman and Berry were performing their appraisal duties as employees of the County; Shelby could have raised the substance of its claims to the Board; and finally, the stipulation was a judgment on the merits.

Shelby contends its claims could not have been raised before the Board because they were not known to Shelby during that proceeding and it lacks authority to hear contract and tort claims. The defendants argue Shelby knew the draft appraisal existed during the appeal proceeding but did not pursue the valuation. Bauman and Berry were performing their statutory duties to assign values to the property and issue valuation notices.

Whether the doctrine of res judicata applies in a certain case is an issue of law over which appellate courts exercise unlimited review. *State v. Salary*, 309 Kan. 479, 481, 437 P.3d 953 (2019). Courts will invoke res judicata to bar a successive suit where these

requirements are met: (1) same claim; (2) same parties; (3) claims were or could have been raised; and (4) a final judgment on the merits. *Cain v. Jacox*, 302 Kan. 431, 434, 354 P.3d 1196 (2015). Stated another way, res judicata prevents relitigation when these four conditions coincide: "(1) identity in the thing sued for, (2) identity of the cause of action, (3) identity of persons and parties to the action, and (4) identity in the quality of persons for or against whom claim is made." [Citation omitted.]" *In re Care & Treatment of Sigler*, 310 Kan. 688, 699, 448 P.3d 368 (2019).

The doctrine of res judicata applies to administrative determinations "when the first administrative proceeding provides the procedural protections similar to court proceedings when an agency is acting in a judicial capacity." [Citation omitted.]" *In re Tax Appeal of Fleet*, 293 Kan. 768, 779, 272 P.3d 583 (2012) (BOTA was acting in a judicial capacity when it approved tax exemptions).

A stipulation made by "a fully executed order of stipulation and dismissal" can "finally and conclusively settle[] an appeal involving the valuation of county-assessed property." See K.A.R. 94-5-18(c).

We hold that the doctrine of res judicata, or claim preclusion, does not bar this lawsuit. The Board of Tax appeals proceeding did not involve the same claims. In the appeal proceeding, the parties settled the value of Heartland Park for taxation purposes after the County assessed the property's value based on Williams' appraisal. In this case, Shelby brings tort and contract claims based on its contention that Bauman and Berry unlawfully pressured Williams to increase his appraisal of Heartland Park and then hid evidence of their misdeeds from Shelby during the administrative proceeding.

The district court erred on this point.

*Shelby's settlement agreement is not a waiver of all claims.*

The district court held that Shelby's claims had been waived "as a practical result of the Settlement Agreement." We do not agree.

The court relied on the fact that two months before the stipulation was made, Ashley Biegert disclosed in her deposition that there was a draft valuation that was lower than the final assessment. Shelby chose neither to depose Williams nor seek a competing professional appraisal.

We find the County's argument that Shelby could have discovered the precise amount of the initial appraisal if it had just tried harder is disingenuous. The County refused to provide the amount of the draft appraisal to Shelby during the appeal proceeding, claiming an exception to Kansas Open Records Act and that Williams was an expert witness.

We are dealing with a well-established legal doctrine. Waiver in contract law implies that a party has voluntarily and intentionally renounced or given up *a known right*, or has caused or done some positive act or positive inaction which is inconsistent with the contractual right. Once it has been established that a right has been waived, the party possessing the contractual right is precluded from asserting it in a court of law. See *Steckline Communications, Inc. v. J. Broadcast Group of KS, Inc.*, 305 Kan. 761, 769, 388 P.3d 84 (2017).

We are not prepared to hold as a matter of law that Shelby knowingly waived this right. Shelby claims it did not timely know that the County officials coerced Williams to increase its valuation from an initial \$5.5 million. But Shelby could have deposed Williams before making the stipulation. The facts are disputed on whether there was a waiver as a matter of contract law. There is not enough certainty in this record showing what Shelby knew for us to uphold a waiver ruling.

*Did the court err in granting summary judgment of Shelby's breach of contract claim?*

The district court granted summary judgment on Shelby's breach of contract claim for four reasons. Shelby did not rely on the \$10.4 million valuation as accurate. There was no evidence that the \$10.4 million appraisal was inaccurate. Shelby suffered no damages from the \$10.4 million assessment because its tax liability was determined based on the \$7.5 million stipulated value. And Shelby had asserted only general allegations of damages.

The elements of a breach of contract claim are: (1) the existence of a contract; (2) sufficient consideration; (3) the plaintiff's performance or willingness to perform; (4) the defendant's breach of the contract; and (5) damages to the plaintiff caused by the breach. See *Stechschulte v. Jennings*, 297 Kan. 2, 23, 298 P.3d 1083 (2013). Typically, the question of whether a party breached a contractual obligation is one of fact. When the facts are disputed, summary judgment is improper. See *Waste Connections of Kansas, Inc. v. Ritchie Corp.*, 296 Kan. 943, 965, 298 P.3d 250 (2013); *Simpson v. City of Topeka*, 53 Kan. App. 2d 61, 68, 383 P.3d 165 (2016).

The trouble we have with Shelby's argument on this point is causation. Shelby alleged through Payne that Williams admitted the \$10.4 million valuation was not his number and resulted from pressure by Bauman. It follows then that summary judgment was proper on causation of damages. No matter if Shelby had a right to rely on the \$10.4 million valuation, the undisputed facts show it did not. It is true that Shelby had contested the \$10.4 million valuation, after all that was the basis for the tax appeal proceeding and settlement. But settlement closed the door. Simply put, Shelby did not show it was damaged by any possible breach of contract and summary judgment on the claim was proper.

*We reject Shelby's claim on breach of duty of good faith and fair dealing.*

The duty of good faith and fair dealing is part of all Kansas contracts. It is implied. Whether the duty has been violated is a question of fact, generally inappropriate for summary judgment. *Waste Connections of Kansas, Inc.*, 296 Kan. at 965, 974.

But there is no separate cause of action for breach of the duty of good faith and fair dealing; it is merely a legal argument related to a breach of contract claim. The plaintiff must plead a cause of action for breach of contract and point to a term in the contract which the defendant allegedly violated. *Classico, LLC v. United Fire & Cas. Co.*, No. 114,833, 2016 WL 7324451, at \* 5 (Kan. App. 2016) (unpublished opinion). This means this claim is not a separate tort.

In its petition, Shelby contended the defendants' acts of concealing Williams' appraisals and representing Williams was a retained expert constituted breaches of the

duty of good faith and fair dealing. Shelby could not make a separate claim for breach of the duty of good faith and fair dealing.

The trial court properly granted summary judgment on the breach of contract claim for lack of other essential elements. There was no error in granting summary judgment on this point.

*Granting summary judgment on Shelby's various fraud claims was proper.*

The district court found Shelby's allegations of fraud were not supported by the evidence and Shelby was not damaged because it agreed \$7.5 million was a reasonable valuation.

Shelby contends there were genuine issues of material fact precluding summary judgment and that the trial court improperly weighed evidence. The defendants argue there was no evidence the \$10.4 million valuation was false, Shelby did not rely on the \$10.4 million valuation, and Shelby failed to show damages.

The elements of fraud and fraudulent inducement are: (1) false statement of existing and material fact; (2) known to be false or made recklessly; (3) intentionally made for the purpose of inducing another's action; (4) reasonable reliance and action upon the representation; (5) and damage because of the reliance. *Stechschulte*, 297 Kan. at 19-20; *Nelson v. Nelson*, 288 Kan. 570, 583, 205 P.3d 715 (2009); PIK Civ. 4th 127.40.

The elements of negligent misrepresentation are: (1) failure to exercise reasonable care or competence in obtaining or communicating false information; (2) reasonable reliance on the false information; (3) the person relying on the false information is a person or one of a group of persons for whose benefit the information is supplied or a person or one of a group of persons to whom the person supplying the information knew the information would be communicated by another; and (4) damages. *Rinehart v. Morton Bldgs., Inc.*, 297 Kan. 926, 937, 305 P.3d 622 (2013); PIK Civ. 4th 127.43.

In its petition, Shelby alleged that defendants represented the value of \$10.4 million "was the only value determined by Williams" and Williams had been retained as an expert. Shelby alleged that if the other valuations created by Williams had been known to it, it would not have entered into the settlement agreement.

We view these claims with Shelby's prior claims. It was undisputed Shelby learned before the settlement that there was a draft appraisal by Williams that was lower than the final appraisal. All three of Shelby's causes of action require reasonable reliance and damages. As we stated before, the district court did not err in granting summary judgment because Shelby did not come forward with any evidence on these elements. Summary judgment was proper.

*Shelby has presented nothing to support its civil conspiracy claim.*

The court ruled Shelby presented no proof of damages that any alleged conspiracy caused. Shelby asserts no new arguments to us.

The elements of conspiracy are: (1) two or more persons; (2) an object to be accomplished; (3) a meeting of minds in the object or course of action; (4) one or more unlawful overt acts; and (5) damages proximately caused by those acts. *York v. InTrust Bank, N.A.*, 265 Kan. 271, 293, 962 P.2d 405 (1998).

In its petition, Shelby alleged Bauman and Berry concocted a plan to create an unlawful tax burden on Shelby and coerced Williams to drive up the appraised value. Shelby has offered no evidence of damages proximately caused by the alleged conspiracy.

The district court correctly granted judgment to the defendants on this point.

*The district court correctly denied relief on Shelby's constitutional violation claims.*

The district court ruled that the two county appraisers, Bauman and Berry, were entitled to qualified immunity because Shelby did not meet its burden to show a violation of clearly established rights.

Shelby now contends it was deprived of adequate due process because Shelby could not adequately challenge Williams' appraisal because the defendants had hidden information. Shelby also argues that Berry and Bauman acted intentionally and wantonly. They had pushed Williams for a higher value and then covered up their actions.

During the Board of Tax Appeals discovery, Berry and Bauman had no recollection of conversations with Williams or of the values stated in prior valuations. Shelby interprets their actions as "rig[ging] the process" and thus leaving Shelby with no recourse to recover damages from Shawnee County.

The defendants argue Shelby received constitutionally adequate due process. Through the administrative proceeding before the Board, Shelby took depositions. Shelby could have moved to compel the draft appraisal and could have had a hearing to decide the value. The defendants contend the adequacy of the process is evidenced by Shelby's satisfaction with the stipulated value. The defendants argue Shelby only provides conclusory claims on the issue of qualified immunity on appeal.

"The constitutional requirements of due process are satisfied where avenues for relief are open to the taxpayer at some stage of the assessment procedures providing him an opportunity to appear and contest the assessment." *Shields Oil Producers, Inc. v. Russell County*, 229 Kan. 579, Syl. ¶ 3, 629 P.2d 152 (1981).

If the defendants manipulated the Board of Tax Appeals proceeding as alleged by Shelby, there could be a question whether Shelby received due process on its tax assessment. But since Shelby is satisfied with the result of the proceeding and does not want to revisit the stipulated value, Shelby has failed to show evidence of damages. Shelby has not explained how the court could otherwise grant Shelby relief for any alleged due process violation.

There is no reversible error here.

*Shelby has waived its property damage claim.*

Shelby's petition claimed defendants' unlawful acts caused it "to suffer damage to its Property in the form of an increased tax burden, a reduction in property value, and reduced profitability." The district court ruled Shelby's claim was unintelligible, contradictory, and was missing evidence on the element of damages.

Shelby makes no new arguments.

Shelby does nothing to defend this claim on appeal. A matter not sufficiently briefed is waived. *In re Marriage of Williams*, 307 Kan. 960, 977, 417 P.3d 1033 (2018). We hold this claim to be waived by Shelby.

Affirmed.