THE COLLEGE OF WORKERS' COMPENSATION LAWYERS

NEWSLETTER – SPRING 2021

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## PRESIDENT KIP KUBIN'S MESSAGE

*Jacque:*

Traditionally, presidents leave a letter to their successors, or at least that has been the tradition for the last century or so with changes in the American presidency. I think it is a good tradition and I am writing you a letter in that spirit. However, I am not going to leave it in the desk drawer, I am going to share it with the entire College.

I have left you a few things, and I wanted you to know what they are and where they are. First, I am leaving you an organization which contains the finest collection of lawyers that I have ever encountered. In many ways, the College runs counter to the recent trends of extremism in society. The College is one of the most collegial groups with which I have ever associated. Employee counsel, employer counsel, mediators and judges regularly check their egos at the door when they enter the College. We have all benefited richly from the workers' compensation system and at the heart of the College is the desire from all of its members to sustain, promote and improve the system. There are few organizations where you can have intellectual dialogue about anything. The College is one of those places where ideas and advocacy for those ideas is welcome. I have developed deep and abiding friendships with many of my colleagues in the College. Who would have imagined

# THE ILLINOIS SUPREME COURT SCRUTINIZES THE "ARISING OUT OF" REQUIREMENT: DOES AN INJURY TO A SOUS CHEF IN THE KITCHEN CONSTITUTE AN EMPLOYMENT RISK OR NEUTRAL RISK*

**By Arnold G. Rubin, Fellow, Chicago, IL and Catherine Krenz Doan**

## I. Introduction

In the recent case of *McAllister v. Illinois Workers' Compensation Commission*, 2020 IL 124848, 2020 WL 5668970 (2020), the Illinois Supreme Court held that an injury to a sous-chef constituted an injury arising out of the employment. The decision is significant since it resolved the conflict between two different "schools of thought" in Illinois as it related to analyzing accidents involving everyday activities/common bodily movements, such as bending, stooping, kneeling or reaching, in the context of the "arising out of" requirement.

The purpose of this article is to provide an overview of the "arising out of" requirement under Illinois law and to analyze the underlying basis as to how the court arrived at its conclusion. The court clarified that the neutral risk analysis is not the first step in risk analysis for accidents involving common bodily movements. In arriving at its decision, the Illinois Supreme Court also resolved the conflict between two appellate court cases: *Young v. Illinois Workers' Compensation Commission*, 2014 Il App (4th) 130392WC, 13 N.E.3d 1252 (4th Dist. 2014) and *Adcock v. Illinois Workers' Compensation Commission*, 2015 Il App (2d) 130884WC, 38 N.E.3d 587 (2d Dist. 2015). The ruling in *McAllister* effectively overruled the rationale that provided the basis for the appellate court decision in *Adcock*. Furthermore, this article will show that Illinois did not adopt positional risk in neutral risk cases.

## II. Overview of the "Arising Out Of" Requirement

Before starting the journey that our sous-chef took through the Workers' Compensation system in Illinois, our analysis should begin with a discussion of terms that are used by the courts in deciding cases involving the issue, "arising out of" the employment. For those who practice in the Workers' Compensation Bar, we are familiar with the terms: risk, causal connection, and employment. Indeed, risk, causal connection and employment are terms used in cases that discuss the "arising out of" requirement.

The court in *McAllister* pointed out that "to satisfy this requirement it must be shown that the injury had its origin in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury." 2020 IL 124848. Although not explicitly set forth in the opinion, it is clear that this particular use of the term "causal connection" must be distinguished from medical causal connection. It can be argued that the arising out of term may also be interpreted to include medical causal connection. This article will not focus on medical causal causation or the "in the course of" requirement.

The key to analyzing the "arising out of requirement" begins with understanding that there are three types of risks. Matt Hlinak, in his article titled "In Defense of the Increased-Risk Doctrine in Workers' Compensation," succinctly summarizes the risks that are analyzed under "the arising out of" requirement. Matt Hlinak, In Defense of the Increased-Risk Doctrine in Workers' Compensation, 7 Journal of Business and Economic Research 4 (2009). The three types of risks are employment risks, personal risks and neutral risks.

Employment risks concern "all of the obvious kinds of injury that one thinks of at once as industrial injury," such as injuries caused by "machinery breaking, objects falling, explosives exploding, tractors tipping, fingers getting

caught in gears, excavations caving in and so on." *Id.* Injuries caused by employment risks are compensable in all jurisdictions. *Id.* In determining if the injuries arose out of an employment related risk, under the analysis in Illinois, it is necessary to determine if the risk is "distinctly associated with the claimant's employment." *Steak 'n Shake v. Illinois Workers' Compensation Commission*, 2016 Il App (3d) 150500WC, 359 N.E. 3d 571 (3d Dist. 2016) (claimant sustained injury while drying tables in restaurant). A risk is distinctly associated with the employment if the employee was "performing (1) acts he or she was instructed to perform by the employer, (2) acts that he or she had a common law or statutory duty to perform, or (3) acts that the employee might reasonably be expected to perform incident to his or her assigned duties." *Caterpillar Tractor v. Industrial Commission*, 129 Ill 2d 52, 541 N.E.2d 665 (1989)

The second category involves risks personal to the employee. These injuries have origins that are so clearly personal that even if they take effect while the employee is on the job, they could not possibly be attributed to the employment. Matt Hlinak, In Defense of the Increased-Risk Doctrine in Workers' Compensation, 7 Journal of Business and Economic Research 4 (2009). These risks would include medical disorders that coincidentally manifest themselves at work. Injuries from purely personal risks are generally not compensable absent some connection to the employment. *Illinois Institute of Technology Research Institute*, 314 Ill. App. 3d 149 at 162-63, 731 N.E. 2d 795 (1st Dist. 2000).

The third category is a neutral risk. A neutral risk is neither distinctly employment related nor distinctly of a personal character. As Mr. Hlinak points out, "this gray area between employment and personal risks is, not surprisingly, the subject of much litigation." Matt Hlinak, In Defense of the Increased-Risk Doctrine in Workers' Compensation, 7 Journal of Business and Economic Research 4 (2009). Mr. Hlinak quotes Professor Larson in stating that "there are …three categories of risks; but unfortunately, there are only two places where the loss may fall-on the industry or on the employee." *Id.*

Justice Thomas posed three questions to the attorneys during oral arguments in *McAllister*. These three questions were not specifically addressed in the decision, but provided a road map for the ultimate holding of the court. The three hypotheticals illuminate the distinctions of the risks set forth above.

The three hypotheticals were as follows:

1) Justice Thomas asked whether an employee who blinks out a contact lens, kneels down to pick it up and injures his knee after picking it up was subjected to an employment risk, neutral risk or personal risk. Oral Arguments *McAllister v. Illinois Workers' Compensation Commission*, docket no. 124848, heard Jan. 15, 2020. Based on the definitions set forth above, this would clearly be a personal risk.

2) The second hypothetical was that an employee hears a sound like a gunshot going off and drops to his knees injuring his knee when he stands up. *Id.* The noise was a child setting off firecrackers in the parking lot. *Id.* This instance would most likely be characterized as a neutral risk. In order to be compensable, the claimant needs to establish an increased quantitative or qualitative risk greater than the general public.

3) The third hypothetical was that a kitchen employee kneeled to pick up a tray of carrots in a walk-in cooler and injures his knee when he stood up. *Id.* Based on the definitions set forth above, this action would constitute an employment risk.

Justice Thomas retired from the Supreme Court before it rendered its decision. His name is not listed as one of the Justices who concurred in that decision. The Justices that participated in the decision were Justices Burke, Kilbride, Garman, Karmeier and Theis. Justice Michael Burke took no part in the decision.

## III. *Young* vs. *Adcock* Conflict

The Workers' Compensation Division of the Illinois Appellate Court created a conflict in the law with respect to how the "arising out of requirement" should be analyzed when the injury resulted from activities that could be characterized as everyday activities/common bodily movements. The two cases that demonstrated the conflict were *Young* and *Adcock*. In both cases, the court found that the claimant sustained a compensable accident. However, the majority, in each case, relied upon a different rationale to justify its holding that the accidental injuries satisfied the "arising out of" requirement.

In *Young*, the claimant was awarded benefits for an injury to his shoulder sustained when he reached into a narrow box. 2014 Il App (4th) 130392WC. Although the act of reaching was an everyday activity, the Appellate Court explained that the analysis should begin with determining if the risk was employment related. *Id.* The court in *Young* found that the act of reaching into the box was a risk distinctly associated with the employment. *Id.* Therefore, an analysis under neutral risk was not necessary. *Id.* The court stated the act of reaching is one performed by the general public. *Id.* However, under a risk analysis, the evidence established the risk to which the claimant was exposed was necessary to perform his job duties at the time of injury. *Id.* The court stated that the claimant's "action in reaching and stretching his arm into a deep, narrow box to retrieve a part for inspection was distinctly associated with his employment." *Id.* at 8.

In *Adcock,* the Appellate Court determined that the claimant sustained an accidental injury arising out of his employment based on a neutral risk analysis. 2015 Il App (2d) 130884WC. The claimant sustained an injury to his knee while turning in a swivel chair to perform welding for his employment. *Id.* The claimant's work activity, according to the majority opinion in *Adcock*, should be analyzed under neutral risk since the bodily movements at issue could be characterized as everyday activities. *Id.* Although the court determined that the case should be analyzed as a neutral risk case, the court held that the claimant established that his accidental injuries arose out of his employment by establishing that he was subjected to an increased risk quantitatively and qualitatively. *Id.* The work performed in the swivel chair required that the claimant move and turn the chair repeatedly. *Id.* Further, his work of welding locks was also performed under time constraints. *Id.*

## IV. The Facts of *McAllister*

*McAllister* involved an injury to the claimant, a sous-chef, who worked for The North Pond Restaurant, a local restaurant in Lincoln Park, Chicago, Illinois. 2020 IL 124848. The claimant testified that his job duties included checking on orders, arranging the restaurant's walk-in cooler, making sauces and preparing and cooking food. *Id.*

On the date of accident, the claimant was working at the restaurant, setting up his station, when another cook stated that he may have misplaced a pan of carrots. *Id.* Specifically, the other cook mentioned that the pan of carrots might be in the walk-in cooler. *Id.* There was no testimony that the cook specifically asked the sous-chef to go to the walk-in cooler to locate the pan of carrots. *Id.* However, the claimant went to the walk-in cooler to locate the pan of carrots. *Id.* While kneeling on both knees, the claimant checked the walk-in cooler to see if he could find the carrots. *Id.* The claimant testified that sometimes food items got knocked under the bottom shelves. *Id.* When the sous-chef attempted to stand up from his kneeling position, he felt his right knee "pop" and lock up. *Id.* He could not straighten his right leg. *Id.* The claimant hopped over to a table, stood there for a minute, and then hopped into the boss's office to report the accident. *Id.*

The claimant sustained an injury to his right knee resulting in the need for surgery. *Id.* The diagnosis was a re-tear of the medial meniscus, which required surgery. *Id.* He eventually returned to work on a full duty basis. *Id.*

At the arbitration hearing, despite the fact that the claimant had a pre-existing knee condition, medical causation was not placed into dispute by the employer. *Id.* The issue in dispute at arbitration was whether the accident "arose out of the employment." *Id.*

## V. Decision of the Arbitrator

The Arbitrator found that the act of looking for the misplaced pan of carrots in the walk-in cooler was an act that the employer could reasonably have expected the claimant to perform in connection with his job duties as a sous-chef. *McAllister,* 2020 IL 124848. It should be emphasized that the Arbitrator performed the risk analysis as set forth above in the Overview section of the instant article. *Id.* The Arbitrator determined that the accident arose out of an employment risk. *Id.* She explained that it was a risk distinctly associated with the employment since it was reasonable that the employee would be expected to perform this job duty even though he was not specifically ordered to search for the tray of carrots. *Id.* As a result, the Arbitrator concluded that the claimant's knee injury arose out of and in the course of his employment with the restaurant and the accident was compensable under the Act. *Id.* As part of the award, the Arbitrator ordered payment of temporary total disability benefits, permanent partial disability benefits, medical expenses and penalties for the unreasonable delay in payment of those benefits. *Id.*

## VI. Decision of the Illinois Workers' Compensation Commission

The employer sought review of the arbitration decision before the Illinois Workers' Compensation Commission. *McAllister v. North Pond,* 14 WC 28777, 16 IWCC 0029 (IWCC Jan. 8, 2016). The Commission, in a two to one decision, found that the claimant failed to establish that the knee injury "arose out of" his employment. *Id.* The Commission reasoned that the claimant was subjected to a neutral risk, which had no particular employment or personal characteristics. *Id.* The Commission found that the claimant's knee injury did not result from an employment related risk, but rather resulted from a neutral risk, which had no peculiar employment characteristics. *Id.* Specifically, the Commission determined that the act of standing up from the kneeling position did not constitute an employment risk. *Id.* As a result, the Commission determined that the claimant had not met his burden of proof to establish that there was an increased risk either quantitively or qualitatively under a neutral risk analysis. *Id.*

The Commission distinguished this case from *Young*. *Id.* The Commission did not cite *Adcock*. *Id.* However, its analysis was consistent with *Adcock*. *Id.* The Commission focused on what the activity was that the claimant was performing, rather than determining whether the accidental injury resulted from a risk distinctly associated with the employment.

## VII. Decision of the Circuit Court

The Circuit Court affirmed the decision of the Illinois Workers' Compensation Commission. *McAllister,* 2020 IL 124848. The Circuit court stated that the act of standing up from the kneeling position was a neutral risk, which did not expose the claimant to a risk greater than that of the general public. *Id.* The evidence in the case did not establish that there was an increased qualitative or quantitative risk. *Id.*

## VIII. Decision of the Illinois Appellate Court

The Illinois Appellate Court affirmed the decision of the Illinois Workers' Compensation Commission. *McAllister v. Illinois Workers' Compensation Commission,* 2019 Il App (1st) 162747WC, 126 N.E.3d 522 (1st Dist. 2019). However, the Justices did not agree on the rationale for affirming the decision of the Commission. *Id.* Three of the Justices stated that the decision of the Commission should be affirmed since the finding that the claimant did not sustain an injury due to an employment risk was not against the manifest weight of the evidence. *Id.* Two of the Justices set forth that a claimant, who was injured while performing an everyday activity, could only obtain compensation if he established that his job duties required him to engage in an activity to a greater

degree than the general public or be subjected to a risk greater than that of the general public. *Id.* They would have required a claimant to establish that he was subjected to a risk greater than the general public even in situations where the activity is directly related to the job duties. *Id.* Accordingly, any case involving normal everyday activities or common bodily motion would require a neutral risk analysis. *Id.* Justice Holdridge and Justice Hoffman, in a concurring opinion, set forth that the claimant failed to establish any increased risk either quantitively or qualitatively in connection with the accidental injury. *Id.*

The court noted that there was no testimony in the record as to how many times per day the claimant was required to enter the walk-in cooler. *Id.* If the claimant was required to enter and exit the walk-in cooler a significant amount of times during the course of the average work day, then he may have established that he was subjected to an increased risk under the neutral risk analysis. *Id.* Further, there was no testimony that the claimant was subjected to a qualitatively increased risk. *Id.* The claimant could have established a quantitative risk through testimony that there were particular hazards related to the kneeling in front of the walk-in cooler. Further, the claimant could have established a quantitative risk if he was required to kneel excessively to locate the carrots. However, there was no evidence of either a quantitative or qualitative risk in the record. In fact, the claimant testified on cross-examination that looking for the carrots in the walk-in cooler was similar to looking for a pair of shoes under his bed. *Id.*

The majority opinion of the Appellate Court held that the Commission's finding that looking for the carrots was not distinctly associated with his employment was not against the manifest weight of the evidence. *Id.* Accordingly, the court refused to reverse the decision of the Commission. *Id.* The Commission used the term "particular" rather than "distinctly associated" in connection with analyzing whether the claimant was subjected to an employment risk. *Id.* The Commission did not explain why it used the term "particular" rather than "distinctly associated with" in its decision.

The concurring Justices analyzed the case using the neutral risk analysis. *Id.* They found that the claimant had not established an increased quantitative or qualitative risk. *Id.* Accordingly, the Appellate Court unanimously affirmed the decision of the Commission. *Id.* However, the rationale for affirming the decision was different. *Id.* The court was split on whether to apply a *Young* or an *Adcock* analysis to the facts of the case. *Id.* As a result, the decision was appealed to the Illinois Supreme Court. The Supreme court accepted the appeal. *McAllister,* 2020 IL 124848.

**IX. Decision of the Illinois Supreme Court**

The Illinois Supreme Court reversed the Appellate Court decision and held that the accidental injury arose out of the employment. *McAllister,* 2020 IL 124848. The Supreme Court held that the Commission's finding that the accidental injury was not distinctly associated with the employment was against the manifest weight of the evidence. *Id.* Specifically, the Illinois Supreme Court found that the claimant established that his job duties required him to arrange food within the walk-in cooler. *Id.* Since Petitioner was assisting a coworker with work in the walk-in cooler, he was fulfilling his duties of arranging food in the cooler. *Id.* The claimant was engaged in work that the employer could reasonably expect him to perform. *Id.*

The Illinois Supreme Court went further in its analysis of the case. The court rejected the analysis of the concurring Justices in the Appellate Court decision. *Id.* The court stated that it did not need to address the neutral risk analysis argument since it had found that the claimant's injury arose out of an employment related risk. *Id.* The court concluded that the knee injury was employment related because it was caused by kneeling and standing while assisting a coworker's search for carrots in a walk-in cooler. *Id.* The court stated it would not hold that injuries attributable to common bodily movements or routine everyday activities, such as bending, twisting, reaching or standing up from a kneeling position, are not compensable unless a claimant establishes that he was exposed to a risk of injury to a greater extent than the general public. *Id.*

Accordingly, the court overruled the rationale relied upon by the Appellate Court in *Adcock. Id.* Specifically, the court stated that it was overruling *Adcock* and its progeny to the extent that those decisions found that "injuries attributable to common bodily movements or routine daily activities, such as bending, twisting, reaching, or standing up from a kneeling position, are not compensable unless a claimant can prove that he or she ince the cases were subjected to risks to a greater degree than the general public." *Id.* Rather, the court followed the rationales set forth in previous Supreme Court holdings, such as *Caterpillar Tractor Company v. Industrial Commission,* 129 Ill.2d 52, 541 N.E.2d 665 (1989), which was cited in the *Young* case. *Id.*

The court held that the proper test for analyzing whether an injury arose out of a claimant's employment for injuries resulting from common bodily movements was set forth in *Caterpillar Tractor Company. Id.* The court noted that *Caterpillar Tractor Company* clearly stated that accidental injuries resulting from commonly bodily movements and everyday activities are compensable and employment related if the common bodily movements had its origin in some risks connected with, or incidental to employment, so as to create a causal connection between the employment and the accidental injury. *Id.* The court emphasized that *Caterpillar Tractor Company* did not require a claimant to provide additional evidence establishing that he was exposed to a risk of injury to a greater degree than the general public. *Id.* The claimant only had to present evidence that he was involved in an accident arising out of an employment risk. *Id.*

**X. Positional Risk Doctrine Analyzed**

The Illinois Supreme Court stated that it was not necessary to analyze the facts of the *McAllister* case under a neutral risk analysis. *Id.* Therefore, it need not address the employer's argument relating to the positional risk doctrine. *Id.* Professor Larson stated that the positional risk doctrine provides that "an injury 'arises out of' the employment if it would not have occurred but for the fact that the conditions or obligations of the employment placed the claimant in the position where he was injured by a neutral force." Arthur Larson, The Positional-Risk Doctrine in Workmen's Compensation, 1973 Duke Law Journal 4 (1973). Professor Larson stated that "neutral" means a risk that is neither personal to the claimant nor distinctly associated with the employment. *Id.*

It is the authors' opinion that the holding in *McAllister* did not change the standard of analysis in accident cases to make Illinois a "positional risk" state. Some members of the Illinois Workers' Compensation Bar have questioned whether *McAllister* established that the positional risk doctrine now applies to Illinois Workers' Compensation Cases. It is the authors' opinion, respectfully, that this would be an incorrect interpretation of the case. The Illinois Supreme Court clearly stated that it was not addressing the positional risk doctrine in its decision. *McAllister,* 2020 IL 124848. Specifically, the court held that the accident arose out of a risk distinctly associated with the claimant's employment; therefore, the accident was not associated with a neutral risk. *Id.* Accordingly, the Court held that the positional risk doctrine would not be applicable to the case. *Id.* The positional risk analysis is only applicable to neutral risk cases. *Id.* Therefore, Illinois is not a positional risk state since the general rule in Illinois is that neutral risk cases are not compensable unless there is proof of an increased qualitative or quantitative risk to the claimant greater than to the general public.

For a further understanding of the positional risk doctrine, we recommend reading Professor Larson's seminal article in the Duke Law Journal, "The Positional Risk Doctrine in Workers' Compensation." Arthur Larson, The Positional-Risk Doctrine in Workmen's Compensation, 1973 Duke Law Journal 4 (1973). Mr. Hlinak disagreed with Professor Larson's opinion that the positional risk doctrine should be adopted for neutral risk cases. Matt Hlinak, In Defense of the Increased-Risk Doctrine in Workers' Compensation, 7 Journal of Business and Economic Research 4 (2009). Mr. Hlinak stated that that under a neutral risk analysis, positional risk should not be followed since it "inefficiently allocates liability." *Id.* It was his opinion that the increased risk doctrine should be applied to accidents arising out of a neutral risk. *Id.* Mr. Hlinak's opinion is the current rule in Illinois.

## XI. Conclusion

The claimant in *McAllister* was successful before the Illinois Supreme Court because he established that he met the "arising out of" requirement. Specifically, he proved that his risk was distinctly associated with his employment. He was able to argue that the decision of the Commission was against the manifest weight of the evidence. This was a significant challenge for the claimant. Based on the holding in *McAllister,* the compensability of an accident in Illinois is now based on the precedent set forth in *Young* and consistent with the previous holding of the Illinois Supreme Court outlines in *Caterpillar Tractor Company*. 2020 IL 124848. Specifically, the court held that if the injuries were employment related, and therefore distinctly associated with the employment, then the accidental injury arises out of the employment. *Id.* The key was whether the accidental injury had its origin in a risk causally connected with the work activity. The claimant in McAllister established that causal connection between the risk of the employment and the accidental injury. *McAllister*, 2020 IL 124848. Specifically, the court found that standing up from kneeling to find lost carrots was distinctly associated with the employment since it was reasonably foreseeable based on the type of work that the employee performed. *Id.*

Therefore, it was not necessary to analyze the case under a neutral risk analysis, even if the accident involved everyday activities/common bodily movements, such as kneeling, bending, reaching, standing up or twisting. It should be noted that if that *Adcock* rationale had been applied to *McAllister*, then the decision of the Commission would likely have been affirmed and the Appellate Court decision would not have been reversed. The evidence presented in the case did not establish that the claimant had an increased qualitative or quantitative risk, which would have established an exception to the neutral risk rule.

It is the authors' opinion that had Illinois adopted an *Adcock*-based neutral risk analysis for injuries involving everyday activities/common bodily functions, then there would have been a significant increase in litigation at the Illinois Workers' Compensation Commission. The result would have been problematic and perhaps catastrophic for claimants. There would be a delay in payment of benefits since more cases would be denied by employers based on an "arising out of" defense. More claimants would be forced to proceed to hearing in cases where the accident arose out of an everyday activity/common bodily movement since it would be necessary to establish that the accidental injury was caused by a quantitative or qualitative risk greater than the general public.

The holding of *McAllister* will be cited by practitioners for many years to come in cases involving the issue of "arising out of" the employment. The holding of the court resolved the conflict in the two rationales applied previously in *Young* and *Adcock* to "arising out of" cases. Since the Illinois Supreme Court adopted the *Young* rationale, it became unnecessary to decide *McAllister* under the neutral risk rule and address the positional risk doctrine. The applicability of positional risk to neutral risk cases in Illinois is an issue left for a future case or for the state legislature.

** The authors also wish to thank Phillip A. Bareck for his contribution in reviewing and providing input for this article. Phil is a shareholder with Katz Friedman, Chicago, Illinois. He is also an Adjunct Professor at IIT Chicago-Kent College of Law.*

## KANSAS SUPREME COURT: *AMA GUIDES*, 6TH EDITION, ARE JUST THE "STARTING POINT" FOR MEASURING IMPAIRMENT

**By Hon. Bruce E. Moore, Fellow, Salina, KS**

On Friday, January 8, 2021, the Kansas Supreme Court issued its long-awaited decision in *Howard Johnson, III vs. U.S. Food Service and American Zurich Insurance Co.,* 478 P.3d 776, 2021 WL 70145 (Kansas 2021).