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United States Court of Appeals
Tenth Circuit

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Christopher M. Wolpert
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PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

DAMIAN BUTLER, individually, as administrator of the Estate of Teresa Butler and on behalf of the heirs-at-law of Teresa Butler, deceased; ALEXANDER P. COHEN, individually and on behalf of the heirs-at-law of Sheldon H. Cohen, deceased, and Virginia Cohen, deceased; GERALD Y. COHEN, individually and on behalf of the heirs-at-law of Sheldon H. Cohen, deceased, and Virginia Cohen, deceased; WILLIAM E. COHEN, individually and on behalf of the heirs-at-law of Sheldon H. Cohen, deceased, and Virginia Cohen, deceased; NICOLE GATES, as next friend of M.G., minor, and heir-at-law of Ricardo Mireles, deceased; ALISHA MIRELES, individually and as next friend of T.M., minor, as heirs-at-law of Ricardo Mireles, deceased; TERRIE MYERS, as next friend of L.M., minor, and heir-at-law of Ricardo Mireles, deceased; DIANE M. SANFORD, individually, as the administrator of the Estate of Karen Kennedy and on behalf of the heirs-at-law of Karen L. Kennedy, deceased,

Plaintiffs - Appellants,

v.

DAIMLER TRUCKS NORTH AMERICA, LLC,

Defendant - Appellee.

No. 22-3134

CENTER FOR AUTO SAFETY; ATTORNEYS INFORMATION EXCHANGE GROUP,

Amici Curiae.

Appeal from the United States District Court for the District of Kansas (D.C. No. 2:19-CV-02377-JAR-ADM)

Randall L. Rhodes (Daniel A. Kopp with him on the briefs), Rouse Frets White Goss Gentile Rhodes, P.C., Leawood, Kansas, for Plaintiffs - Appellants.

Michael J. Kleffner (Robert T. Adams, Sarah Lynn Baltzell, and Taylor B. Markway with him on the brief), Shook, Hardy & Bacon L.L.P., Kansas City, Missouri, for Defendant - Appellee.

Larry E. Coben, Anapol Weiss, Scottsdale, Arizona, and Michael Brooks, Center for Auto Safety, Washington, D.C., for amici curiae Center for Auto Safety and Attorneys Information Exchange Group in support of Plaintiffs - Appellants.

Before **HOLMES**, Chief Judge, **HARTZ**, and **CARSON**, Circuit Judges.

HARTZ, Circuit Judge.

Five people were killed when a commercial truck rear-ended a line of traffic on an interstate highway. The truck driver was prosecuted and sentenced to prison for his misconduct. The issue on this appeal is the liability, if any, of the manufacturer of the truck. Plaintiffs, suing on behalf of the heirs and estates of the decedents, contend that the manufacturer, Daimler Trucks North America, should be held liable in tort under design-defect and warning-defect theories of products liability because it failed to

equip the truck with two collision-mitigation systems—forward-collision warning and automatic emergency braking—and did not warn of the dangers caused by that failure. The United States District Court for the District of Kansas granted summary judgment to Daimler. *See Butler v. Daimler Trucks N. Am., LLC*, No. 19-CV-2377-JAR, 2022 WL 2191755, at *1 (D. Kan. June 16, 2022). Exercising jurisdiction under 28 U.S.C. § 1291, we affirm. Many of the arguments made by Plaintiffs on appeal have been inadequately preserved for appellate review, and the remaining arguments lack merit.

I. BACKGROUND

In the afternoon of July 11, 2017, Kenny Ford was driving a Daimler-made Freightliner truck (the Freightliner) westbound on Interstate Highway 70. Mr. Ford, who had a commercial driver's license (CDL), was driving the Freightliner as an employee of Indian Creek Express, LLC, a Colorado-based company specializing in long-haul shipping of refrigerated foods. Indian Creek, which had been owned by Donne Jefferson and his wife since 1998, purchased the truck in 2014. Mr. Jefferson had been a CDL-licensed truck driver since 1993. He was in charge of buying trucks for Indian Creek, including the Freightliner involved here.

Mr. Ford encountered slowing and stopped traffic in a highway-construction zone in Leavenworth County, Kansas. He knew from prior trips along the same route that he was approaching a construction zone, and he saw signs that day alerting him to the zone. Nevertheless, he failed to brake in time, and the Freightliner crashed into several vehicles. As a result of the collision, five people died at the scene. Mr. Ford

entered a nolo contendere plea in Kansas state court on five counts of vehicular homicide, and he was sentenced to five years' imprisonment.

Plaintiffs sued Daimler on July 10, 2019.[1] "Kansas law recognizes three ways in which a product may be defective: (1) a manufacturing defect; (2) a warning defect; and (3) a design defect." *Delaney v. Deere & Co.*, 999 P.2d 930, 936 (Kan. 2000). Plaintiffs initially claimed that the Freightliner involved in the accident was defective in all three ways, but they later withdrew their manufacturing-defect claim. Both their design-defect and warning-defect claims are predicated on the failure to include either of two possible add-on systems as standard equipment at the time of the Freightliner's purchase: the Meritor WABCO OnGuard Collision Mitigation System (OnGuard) and the Bendix VORAD VS-400 Collision Warning System (VORAD). OnGuard included two collision-mitigation technologies: forward-collision warning (FCW) and automatic emergency braking (AEB). VORAD had FCW but not AEB. As OnGuard's maintenance manual explained, FCW would "generate an audible and visible alert when the vehicle's following distance [might] result in a collision." Aplts. App., Vol. VI at 1242. (*Following distance* is the distance between a vehicle and a vehicle ahead of it on the road.) FCW "also generate[d] an audible and visible alert when a

[1] Plaintiffs also named Daimler's then parent company as a defendant, but the district court granted the parent company's motion to dismiss for lack of personal jurisdiction. *See Butler v. Daimler Trucks N. Am., LLC*, No. 2:19-CV-2377-JAR-JPO, 2020 WL 4785190, at *1 (D. Kan. Aug. 18, 2020). Daimler also sought dismissal on several grounds, but the district court denied that motion. *See Butler v. Daimler Trucks N. Am., LLC*, 433 F. Supp. 3d 1216, 1225 (D. Kan. 2020). Neither of those decisions is before us on this appeal.

threatening stationary object [was] detected." *Id.* FCW could not be turned off and was "always active at speeds above 15 mph." *Id.* VORAD's FCW technology functioned largely the same way. As for OnGuard's AEB, it "assist[ed] the driver in recognizing and responding to potentially dangerous driving scenarios that could lead to a rear end collision" with a vehicle ahead of the truck. *Id.* "If a potential rear-end collision [was] developing and the driver [did] not take action to decelerate the vehicle, [AEB] issue[d] a haptic warning (short brake pulse) and automatically de-throttle[d] the engine. If a potential rear-end collision still exist[ed], and the driver ha[d] not taken the appropriate action, [AEB] appl[ied] the foundation brakes to provide up to 50% of available braking power . . . [and] the brake lights [turned] on." *Id.*

As previously noted, Mr. Jefferson bought the Freightliner driven by Mr. Ford. In making this purchase he relied on information about Freightliner-brand trucks that he had gleaned not only from his experiences as a truck driver and business owner, but also from attending Daimler-run training, tours of Daimler plants, and meetings with Daimler representatives, and from reading industry publications. Mr. Jefferson ultimately made hundreds of choices about possible specifications for the Freightliner; his selections included Michelin tires, a 65-miles-per-hour maximum road speed, and a standard front-air-brake system.

When he ordered the Freightliner, Mr. Jefferson knew what OnGuard and VORAD were and that he could purchase them for his trucks. He testified, however, that there were three reasons why he chose not to purchase either system. First, both OnGuard and VORAD were made by "third part[ies]," and Mr. Jefferson "like[d] to

keep everything under the umbrella" of Daimler. Aplts. App., Vol. II at 274–75 (Mr. Jefferson's deposition). Because the systems were made by other companies, Mr. Jefferson "felt [that they] weren't compatible with [Daimler's] Freightliner product completely." *Id.* at 275. Second, Mr. Jefferson was concerned—based on what he had read in transportation publications, as well as his own experience test-driving a VORAD-equipped truck—about the systems' "failure rate[s]," and he believed that neither system was sufficiently "tested" or "proven." *Id.* He was "[m]ost definitely" worried about "false alerts" or "nuisance alerts," which happened when the truck erroneously treated something innocuous—such as "a grove of trees coming down a hill" or a "car [that] was just sitting there waiting to enter the highway"—as an imminent danger. *Id.* at 275–76. AEB would respond by "apply[ing] extreme braking power," thus "catch[ing] the driver really off-guard." *Id.* at 275. The results could be dangerous for a truck loaded with as much as 80,000 pounds of freight. A truck without an anti-lock braking system "would immediately jackknife," and a truck with an anti-lock braking system, like the Freightliner, would also be at risk of doing so. *Id.* at 276. The danger was even greater for trucks driving in snowy conditions: If the truck's anti-lock braking system "malfunction[ed] or [was] not completely good," there would be an "immediate[] collision . . . it's going to wreck." *Id.* Third, there was the possible risk of technology-induced inattentiveness—of truck drivers being less focused than they should be due to overreliance on (and misplaced confidence in) the technology. In sum, Mr. Jefferson saw "more of the failure than the benefit" of FCW and AEB given the state of the technology at the time, so he elected not to buy them. *Id.*

On December 8, 2021, the parties filed a joint motion requesting that the district court "stay all remaining deadlines in the Second Amended Scheduling Order"—including discovery deadlines—in anticipation of Daimler's filing a motion for summary judgment. *Id.*, Vol. I at 197. The joint motion identified "three bases for summary judgment" that Daimler would raise: (1) "lack of defect as a matter of law"; (2) "lack of causation as a matter of law"; and (3) "preemption." *Id.* It then stated: "None of these issues require expert testimony." *Id.* The joint motion also said that "Plaintiffs agree a stay is appropriate under the circumstances, with the limited caveat that discovery relevant to the summary judgment issues may be needed after the motion for summary judgment is filed," although Daimler "reserves the right to oppose any such discovery on any basis under the law." *Id.* at 198. It further stated: "As the Court is aware, this is a complicated product liability lawsuit involving advanced driver assistance systems. The expert discovery phase will be time-consuming and expensive. That being the case, it serves all Parties' interests to have the Court address [Daimler's] motion for summary judgment prior to conducting expert discovery." *Id.* The district court granted the joint motion later that same day, thereby "stay[ing] proceedings pending a ruling on a motion for summary judgment." *Id.* at 16 (docket order).

The district court granted Daimler's motion for summary judgment. *See Butler*, 2022 WL 2191755, at *1. After rejecting Daimler's preemption argument, *see id.* at *7–9, the court turned to Plaintiffs' warning-defect theory, which was "based on [Daimler's] failure to adequately warn of the risks associated with failing to equip the Freightliner with FCW and AEB systems," *id.* at *11 (internal quotation marks

omitted). The court stated that under Kansas law a manufacturer is not liable for failing to warn of a risk if (1) the risk would have been apparent to the ordinary user of the product, or (2) the user of the product actually knew of the risk. *See id.* And it said that our decision in *Hiner v. Deere & Co., Inc.*, 340 F.3d 1190 (10th Cir. 2003), "squarely addressed Plaintiffs' warning-defect theory under Kansas law." *Butler*, 2022 WL 2191755, at *11. It explained:

> Like the plaintiff in *Hiner* [who purchased and operated a tractor and a front-end loader], it is uncontroverted that Jefferson (the purchaser of the Freightliner) was familiar with [both the] collision mitigation systems and their purpose, but decided not to purchase those systems, despite knowing they both were available options for the Freightliner.
>
> Further, it is uncontroverted that both Jefferson and Ford (the operator of the Freightliner) knew the risks associated with inattentive driving and/or failing to brake or stop a heavy commercial truck for slowed or stopped traffic in a construction zone. . . . Given that there is no duty to warn of dangers *actually known* to the user of a product, the Court concludes that [Daimler] had no duty to warn Jefferson of the risks associated with failing to equip the Freightliner with FCW or AEB technology. [Daimler] is entitled to summary judgment with respect to [Plaintiffs'] warning-defect claim.

Id. (original brackets, footnote, and internal quotation marks omitted).

The court next addressed Plaintiffs' design-defect claim, which was based on the theory that the "Freightliner was defective because its design did not include FCW and AEB technology as standard equipment." *Id.* at *12. It noted that in *Lester v. Magic Chef, Inc.*, 641 P.2d 353 (Kan. 1982), the Kansas Supreme Court "ruled that design-defect claims should be assessed using the so-called consumer expectations test described in Comment i to the Restatement (Second) of Torts § 402A," that this test remains the law in Kansas, and that "[t]he relevant time for assessing a product's

alleged dangerousness is when it leaves the seller's hands—here, 2014," *Butler*, 2022 WL 2191755, at *12 (internal quotation marks omitted). The court then stated:

> [H]eavy trucks like the Freightliner utilize air brake systems to slow and stop the truck. *Plaintiffs have not shown that the ordinary consumer of a heavy truck—a CDL-licensed driver—would have contemplated that a vehicle that was not equipped with nascent FCW or AE[B] systems was unreasonably dangerous*. On the contrary, as acknowledged by Jefferson and Ford—both CDL-licensed drivers—to avoid hitting forward traffic, the driver must remain attentive, maintain a proper speed and following distance, and depress the brake pedal sufficiently in advance of forward traffic. Both the OnGuard System and VORAD System available in 2014 were merely aids to a driver accomplishing a timely stop, not the means upon which a driver could rely to do so. It is undisputed that the Freightliner's air brakes were fully operational at the time of the accident. Thus, under the consumer expectation test, a heavy truck with an air brake system is no more dangerous than an ordinary consumer in 2014 would consider it to be and the absence of a collision mitigation system did not render the Freightliner unreasonably dangerous or defective.

Id. (emphasis added). Thus, the district court granted summary judgment to Daimler on Plaintiffs' design-defect claims. *See id.*[2]

Plaintiffs timely appealed.

II. DISCUSSION

"In a diversity case like this, the *Erie* doctrine requires federal courts to apply federal procedural law and state substantive law." *Banner Bank v. Smith*, 30 F.4th 1232, 1238 (10th Cir. 2022); *see Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). We review de novo the district court's grant of summary judgment, applying the same

[2] Given this disposition of Plaintiffs' warning-defect and design-defect claims, the district court declined to consider Daimler's two other asserted bases for summary judgment: (1) "the so-called optional equipment doctrine"; and (2) "lack of causation." *Butler*, 2022 WL 2191755, at *13 (internal quotation marks omitted). We express no views on these issues or on Daimler's preemption argument.

legal standards that the district court should have applied. *See Hickey v. Brennan*, 969 F.3d 1113, 1118 (10th Cir. 2020). Summary judgment is warranted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In making this determination, we view the evidence and draw all reasonable inferences in favor of the nonmoving party. *See Wright v. Portercare Adventist Health Sys.*, 52 F.4th 1243, 1254 (10th Cir. 2022). The parties agree that Kansas substantive law applies. "We review de novo a district court's interpretation of state law." *Genzer v. James River Ins. Co.*, 934 F.3d 1156, 1164 (10th Cir. 2019).

We note at the outset that Plaintiffs' briefs wholly failed to comply with this circuit's requirement that "[f]or each issue raised on appeal, all briefs must cite the precise references in the record where the issue was raised and ruled on." 10th Cir. R. 28.1(A). This failure, standing alone, would justify our declining to consider Plaintiffs' arguments. "[W]hen [an] appellant fails to provide record cites showing where [an] argument was raised below, we may assume [that] the appellant did not preserve the issue for appeal and refuse to review the alleged error." *BonBeck Parker, LLC v. Travelers Indem. Co. of Am.*, 14 F.4th 1169, 1177 n.4 (10th Cir. 2021) (internal quotation marks omitted). We need not rest our decision here on such grounds, although if our independent review of the district-court pleadings shows that an argument was not raised, we will consider it forfeited.

A. Design-Defect Claims

Plaintiffs first argue that the district court erred in granting summary judgment to Daimler on Plaintiffs' design-defect claims. As the parties recognize, Kansas uses the consumer-expectations test to determine whether a design defect exists. *See Delaney*, 999 P.2d at 946. Under this test, a "plaintiff must show that the product is both in a defective condition and dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchased it, with the ordinary knowledge common to the community as to its characteristics." *Id.* The parties also agree that in light of its focus on the ordinary consumer (as opposed to the actual consumer in a particular case), Kansas's consumer-expectations test is an objective test.

Plaintiffs contend that the district court committed several errors in its design-defect analysis. We address them in turn.

1. Application of the Consumer-Expectations Test

Plaintiffs begin by claiming that "[t]he district court erroneously applied a subjective standard" to their design-defect claims. Aplts. Br. at 21. We disagree with this characterization. The district court held that "Plaintiffs have not shown that *the ordinary consumer of a heavy truck*—a CDL-licensed driver—would have contemplated that a vehicle that was not equipped with nascent FCW or AE[B] systems was unreasonably dangerous." *Butler*, 2022 WL 2191755, at *12 (emphasis added). Granted, the district court cited the testimony of Mr. Jefferson and Mr. Ford, "both CDL-licensed drivers," in support of the proposition that "to avoid hitting forward traffic, the driver must remain attentive, maintain a proper speed and following

distance, and depress the brake pedal sufficiently in advance of forward traffic." *Id.* But the court did not do so to support the conclusion that *Mr. Jefferson and Mr. Ford*'s expectations were satisfied by the existing design of the Freightliner. Rather, their testimony provided general background information about commercial trucks and commercial-truck driving that the court used to support a conclusion about the *ordinary consumer*'s expectations—that is, the expectations of a CDL-licensed driver. Thus, the district court applied the proper legal standard, contrary to Plaintiffs' protestations on appeal. Plaintiffs also contend that Mr. Jefferson was not an ordinary consumer; but this is beside the point because the district court's decision did not rest on the assumption that Mr. Jefferson was an ordinary consumer.

Three other arguments by Plaintiffs about the proper application of the ordinary-consumer standard have not been preserved for review. First, Plaintiffs contend that the ordinary consumer in this case may include people other than commercial-truck drivers (such as purchasing agents or company executives who lack experience driving heavy trucks). But Plaintiffs utterly failed to raise this argument in district court, thus forfeiting it. *See Anderson v. Sprint Aerosystems Holdings, Inc.*, 827 F.3d 1229, 1238 (10th Cir. 2016) (a litigant forfeits an argument by not raising it in district court).

Second, Plaintiffs argue that under *Kinser v. Gehl Co.*, 184 F.3d 1259 (10th Cir. 1999), *abrogated on other grounds by Weisgram v. Marley Co.*, 528 U.S. 440, 453 (2000), "testimony that a product is not more dangerous than expected when used safely" is "insufficient to determine, as a matter of law, that [a product such as] the Freightliner [i]s not defective," Aplts. Br. at 22 (internal quotation marks omitted); *see*

Kinser, 184 F.3d at 1268 ("In evaluating whether a defective condition is unreasonably dangerous, the relevant inquiry focuses on the danger of the product when used in the way it is ordinarily used, not merely when used safely." (internal quotation marks omitted)). But Plaintiffs' response to Daimler's summary-judgment motion never cited *Kinser*, nor did Plaintiffs otherwise make a safe-use argument. Thus, they forfeited this contention as well. *See Anderson*, 827 F.3d at 1238.[3]

Third, Plaintiffs tell us that the ordinary consumer's expectations include not only the safety of the product's direct user but also the safety of bystanders. This argument, too, was unpreserved. To be sure, in the counterstatement of facts included in their response to Daimler's summary-judgment motion, Plaintiffs asserted that "Mr. Jefferson did not consider the benefit to both his truck drivers and public safety associated with equipping the Freightliner with FCW and AEB systems," and that "Mr. Jefferson did not consider the risk of harm to his truck drivers and the public by not installing FCW and AEB systems on the Freightliner." Aplts. App., Vol. VII at 1534. But these alleged facts were never invoked as part of an argument concerning the appropriate scope of consumer expectations. They were cited only in response to Daimler's contention that it could not be held liable because of the optional-equipment doctrine applied in some jurisdictions, which frees manufacturers from liability when

[3] In addition, Plaintiffs' opening brief on appeal provides only a conclusory assertion of how *Kinser* relates to the district court's rejection of their design-defect claim. Thus, Plaintiffs' safe-use argument was not adequately developed on appeal to require our review. *See Murrell v. Shalala*, 43 F.3d 1388, 1389 n.2 (10th Cir. 1994) ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived." (internal quotation marks omitted)).

the purchaser knowingly declines optional safety features. In the section of the response entitled "[Daimler] has failed to establish each factor of *Scarangella*," *id.* at 1551, Plaintiffs argued that even if the doctrine were adopted in Kansas, it would not apply in this case, because of the failure to satisfy the conditions required for application of the optional-equipment doctrine that had been identified in *Scarangella v. Thomas Built Buses, Inc.*, 717 N.E.2d 679, 683 (N.Y. 1999). They cited the above-quoted factual allegations to support the claim that one of the *Scarangella* factors was not satisfied. That discussion did not preserve the argument that the consumer-expectations test itself should account for the well-being of bystanders. To avoid forfeiture, a legal theory must have been "actually articulated" in district court, rather than "merely insinuated." *Tele-Commc'ns, Inc. v. CIR*, 104 F.3d 1229, 1233 (10th Cir. 1997) (internal quotation marks omitted). And "we have consistently rejected the argument that raising a related theory below is sufficient to preserve an issue for appeal." *Hiner*, 340 F.3d at 1196 (brackets and internal quotation marks omitted); *see Perez v. El Tequila, LLC*, 847 F.3d 1247, 1255 (10th Cir. 2017) ("The district court is not required to integrate a non-movant's statement of disputed facts with the law, and counter the propositions advanced by the movant. Were it that way, the district court would act as an advocate, rather than a neutral arbiter."). Moreover, ordinarily an argument is inadequately preserved where, as here, the undeveloped argument "is misleadingly placed under a heading for a different issue." *Nixon v. City & County of Denver*, 784 F.3d 1364, 1370 (10th Cir. 2015) (appellate briefs); *accord DiTucci v. First Am. Title Ins.*, No. 21-4120, 2023 WL 382923, at *4 (10th Cir. Jan. 25, 2023)

(unpublished) (district-court briefs). Having failed to "fairly present the district court with the substance of" their argument that the ordinary consumer's expectations include the well-being of bystanders, Plaintiffs forfeited it. *Stender v. Archstone-Smith Operating Tr.*, 910 F.3d 1107, 1112 (10th Cir. 2018).

True, even when an issue was not preserved in district court, we can review for plain error. *See Somerlott v. Cherokee Nation Distribs., Inc.*, 686 F.3d 1144, 1151 (10th Cir. 2012). But we undertake such review only if the appellant argues for plain error and explains why the elements of plain error have been satisfied. *See id.* ("Plain error is (1) error, (2) which is plain, (3) which affects substantial rights, (4) and which seriously affects the fairness, integrity, or public reputation of judicial proceedings. The burden of establishing plain error lies with the appellant." (citation omitted)). Plaintiffs failed to do so. After Daimler raised lack of preservation in its appellate brief, Plaintiffs responded with the following footnote in their reply brief:

> To be certain, to any extent [Plaintiffs] need to invoke plain-error review, the standard is clearly established here as failing to reverse the district court will entrench a plainly erroneous result. *See Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1128 (10th Cir. 2011). (1) The district court erred in granting summary judgment based on incorrectly interpreting and applying Kansas law, (2) these errors are plain, which (3) substantially impair [Plaintiffs'] rights to a jury trial, redress, and due process, and which (4) seriously affects the fairness, integrity, and public reputation of the judicial proceedings by depriving [Plaintiffs] of their day in court without being fully heard on issues with significant jurisprudential implications. *See id.*

Aplts. Reply Br. at 16 n.9. Such a belated and perfunctory effort is insufficient. *See Platt v. Winnebago Indus., Inc.*, 960 F.3d 1264, 1273 (10th Cir. 2020) ("a conclusory assertion in [a party's] reply brief that the [plain-error] standard should apply," with

"no effort to explain how the district court plainly erred," results in waiver of plain-error review). Plaintiffs' opening brief cited cases for the proposition that the district court got the law wrong, but that is not enough. Plaintiffs made no effort to show that any error was clear or obvious, *see Utah Physicians for a Healthy Env't v. Diesel Power Gear, LLC*, 21 F.4th 1229, 1252 (10th Cir. 2021) ("An error is plain if it is clear or obvious under current, well-settled law." (internal quotation marks omitted)); they failed to provide any specifics about how they were prejudiced, *see Morales-Fernandez v. INS*, 418 F.3d 1116, 1124 (10th Cir. 2005) ("In order to satisfy the third prong of plain error review," the proponent of plain error "bears the burden of showing a reasonable probability that, but for the error claimed, the result of the proceeding would have been different." (brackets and internal quotation marks omitted)); and they entirely failed to explain why this is one of those rare civil cases—such as *Morales*, where the plaintiff-alien would have "remain[ed] indefinitely detained in a federal prison in the face of Supreme Court precedent clearly requiring otherwise" had we not granted relief, *id.* at 1125—in which the failure of the court to consider an issue forfeited by a party "seriously affects the fairness, integrity, or public reputation of judicial proceedings," *Somerlott*, 686 F.3d at 1151 (noting the "extraordinary and nearly insurmountable" burden of establishing entitlement to plain-error relief in a civil case (brackets, ellipsis, and internal quotation marks omitted)). Indeed, we have

generally refrained, particularly in this century, from reversing for plain error when physical liberty is not at stake.[4]

2. *Delaney*

Plaintiffs also insist that the Kansas Supreme Court's decision in *Delaney* "show[s]" that their design-defect claims "are cognizable." Aplts. Br. at 33. The plaintiff in *Delaney* sought "recovery of damages for personal injuries he sustained when a large hay bale fell on him while he was operating a tractor with a front-end loader designed and manufactured by [the defendant]." *Delaney v. Deere & Co.*, No. 97-3321, 1999 WL 458626, at *1 (10th Cir. Jan. 19, 1999) (unpublished). The plaintiff asserted design-defect and warning-defect theories of liability. *See id.* The district court granted summary judgment to the defendant on both theories. *See Delaney v. Deere & Co.*, 985 F. Supp. 1009, 1017 (D. Kan. 1997). Notably, the district court held

[4] An amicus brief filed in support of Plaintiffs by the Center for Auto Safety and the Attorneys Information Exchange Group makes similar arguments regarding the ordinary-consumer test. "But [an] amicus is not a party, and we ordinarily decline to consider arguments raised only by an amicus." *Sierra Club v. U.S. EPA*, 964 F.3d 882, 897 n.15 (10th Cir. 2020). Likewise, we ordinarily will not consider an argument made by an amicus on behalf of a party when that party forfeited the argument in district court and neglected to argue plain error in its opening brief on appeal. *See Dutcher v. Matheson*, 840 F.3d 1183, 1204 (10th Cir. 2016) ("We do not discern any exceptional circumstances here that would cause us to exercise our discretion to stray from the parties' properly-preserved arguments, and the [amicus] has not identified any." (internal quotation marks omitted)); *accord Dalombo Fontes v. Gonzales*, 498 F.3d 1, 2 (1st Cir. 2007) ("[W]e will not address an issue raised by an amicus that was not seasonably raised by a party to the case."); *Christopher M. ex rel. Laveta McA. v. Corpus Christi Indep. Sch. Dist.*, 933 F.2d 1285, 1293 (5th Cir. 1991) ("Absent exceptional circumstances, an issue waived by [an] appellant cannot be raised by [an] amicus curiae."). Therefore, although we grant the motion to file an amicus brief, we decline to consider these arguments.

that Kan. Stat. Ann. § 60-3305(c) applied to design-defect claims and not just warning-defect claims. *See id.* at 1015.[5] The court thus granted summary judgment to the defendant on both claims because it was "undisputed that [the plaintiff] had seen the warning attached to the front loader," so "the plaintiff had actual knowledge of the danger of a bale rolldown." *Id.* On appeal we certified to the Kansas Supreme Court the question whether § 60-3305(c) "appl[ied] to a manufacturer's duty to warn or protect against hazards on a multiple use product, or only to the duty to warn." *Delaney*, 1999 WL 458626, at *1.[6] In answering our question, the Kansas Supreme Court disagreed with the district court and held that § 60-3305(c) "appl[ies] to warnings only," not to design defects. *Delaney*, 999 P.2d at 937. When the case returned to our court, we briefly recounted *Delaney*'s history and holdings and then stated: "In light of the foregoing, the district court's grant of summary judgment in favor of [the

[5] Kan. Stat. Ann. § 60-3305(c) stated that "[i]n any product liability claim[,] any duty on the part of the manufacturer or seller of the product to warn or protect against a danger or hazard which could or did arise in the use or misuse of such product, and any duty to have properly instructed in the use of such product[,] shall not extend . . . to warnings, protecting against or instructing with regard to dangers, hazards or risks which are patent, open or obvious and which should have been realized by a reasonable user or consumer of the product."

[6] We also certified the following question: "Does Kansas follow the portion of comment *j* of the Restatement (Second) of Torts § 402A, which provides that a product bearing an adequate warning is not in defective condition, or instead, would Kansas now adopt comment *l,* which provides that an adequate warning does not foreclose a finding that a product is defectively designed?" *Delaney*, 1999 WL 458626, at *1. The Kansas Supreme Court declined to adopt the portion of comment *j* and rejected comment *l*. *See Delaney*, 999 P.2d at 942–43 (declining to follow portion of comment *j*); *id.* at 946 (rejecting comment *l*).

defendant] must be reversed." *Delaney v. Deere & Co.*, 219 F.3d 1195, 1196 (10th Cir. 2000).

Plaintiffs never explain how *Delaney* supports their design-defect claim or how the district court erred in applying it. Their *Delaney* argument is:

> In short, . . . [*Delaney* and its progeny] recognized the validity of [Plaintiffs'] claims under Kansas law by preserving for the jury to decide: (1) whether a product's design is defective because equipment that would have prevented or mitigated a plaintiff's harm was offered as optional rather than standard equipment; and (2) whether it was a warning defect to fail to warn of the dangers of not equipping the product with the safety features offered as optional equipment. Therefore, the district court erred in its interpretation of *Delaney* holding that [Plaintiffs'] defect claims were not cognizable under Kansas law. This Court and the Kansas Supreme Court recognized [Plaintiffs'] claims as cognizable defect claims in *Delaney*.

Aplts. Br. at 38–39.

Delaney did not, however, purport to state that every Kansas-law design-defect claim (no matter the amount of evidence in support) must proceed to a jury trial. As far as we can tell, its only holding relevant to this appeal is that the failure of a defective-warning claim does not foreclose a defective-design claim. And Plaintiffs concede, as they must, that an issue will not go to trial if no reasonable juror could find that the evidence supports the nonmovant on that issue. *See Brown Mackie Coll. v. Graham*, 981 F.2d 1149, 1151 (10th Cir. 1992). Further, other than bald assertions of "validity" and "cognizab[ility]," Plaintiffs say nothing about how the district court might have incorrectly applied *Delaney*. Indeed, the district court expressly declined to consider the optional-equipment doctrine, *see Butler*, 2022 WL 2191755, at *13, which is the apparent focus of Plaintiffs' *Delaney*-related arguments. This general

failure "to explain to us why the district court's decision was wrong" means that Plaintiffs have waived their *Delaney* argument (whatever they think it may be) through inadequate appellate briefing. *Nixon*, 784 F.3d at 1366; *see Feinberg v. CIR*, 916 F.3d 1330, 1336 n.1 (10th Cir. 2019) ("Arguments inadequately briefed in the opening brief are waived." (internal quotation marks omitted)).

3. Risk-Utility Analysis

Plaintiffs further argue in their reply brief that "the district court should have considered the risk/utility of collision mitigation systems because this is a complex case involving a complex product. The district court made no mention of the risk/utility test." Aplts. Reply Br. at 8 (citations omitted); *see Delaney*, 999 P.2d at 944 ("The consumer expectations test is th[e] standard in Kansas for determining whether a design defect exists. However, we also recognize the validity of risk/utility analysis as a guide in determining the expectations of consumers in complex cases."). But this issue was not adequately raised in their opening brief on appeal. *See Reedy v. Werholtz*, 660 F.3d 1270, 1274 (10th Cir. 2011) ("The general rule in this circuit is that a party waives issues and arguments raised for the first time in a reply brief." (brackets and internal quotation marks omitted)). Although Plaintiffs mentioned risk-utility analysis several times in that brief, only once did Plaintiffs suggest that the district court should have conducted that analysis—and they did so in a single sentence not directly alleging error: "The court did not consider the availability and feasibility of FCW or AEB as standard safety equipment or a risk-utility analysis based on the complexity of the Freightliner." Aplts. Br. at 22. Moreover, even assuming that a court applying Kansas

tort law *must* (as opposed to *may*) conduct a risk-utility analysis in a design-defect case such as this, Plaintiffs never tell us how they would have benefitted from the risk-utility test's application here. *Cf.* Fed. R. Civ. P. 61 (a court "must disregard all errors and defects that do not affect any party's substantial rights"). Having been given no reason to reverse on this point, we will not do so. *See Const. Party of Kan. v. Kobach*, 695 F.3d 1140, 1144 (10th Cir. 2012) (we avoid making arguments on behalf of parties); *Hernandez v. Starbuck*, 69 F.3d 1089, 1093 (10th Cir. 1995) ("Because the appellant comes to the court of appeals as the challenger, [the appellant] bears the burden of demonstrating the alleged error and the precise relief sought.").

4. Expert Testimony

Plaintiffs' last design-defect-related claim is that the district court improperly deprived them "of the right to present expert testimony to satisfy the objective consumer expectations test," Aplts. Br. at 52, and that "it was premature to pass judgment on [their] ability to prove the defective design of the Freightliner while expert discovery was stayed," *id.* at 49. They correctly state that expert testimony may be used to support a products-liability claim under Kansas law. *See, e.g.*, *Wheeler v. John Deere Co.*, 935 F.2d 1090, 1100–01 (10th Cir. 1991) (design defect), *questioned on other grounds by Ralston v. Smith & Nephew Richards, Inc.*, 275 F.3d 965, 970 (10th Cir. 2001); *Long v. Deere & Co.*, 715 P.2d 1023, 1031 (Kan. 1986) (warning defect). The question is why they did not present such evidence. They explain that they did not offer any expert testimony in response to the motion for summary judgment because "[t]he parties agreed and understood [that Daimler] would raise narrowly tailored

issues" that would not "require expert witness testimony," and "[e]xpert discovery was stayed accordingly." Aplts. Br. at 50. They say that the parties complied with the agreement, "limiting their briefing to the narrow boundaries of the issues raised," but then "the district court went off into uncharted waters." *Id.*

We see no error by the district court. Recall that in the joint motion to stay discovery, the parties jointly stipulated that none of the issues raised in Daimler's summary-judgment brief would "require expert testimony." Aplts. App., Vol. I at 197. An issue thus identified was the "lack of a defect as a matter of law." *Id.* Appropriately, the first heading in the argument section of Daimler's summary-judgment brief (after the introduction to the section) was titled "Plaintiffs Cannot Prove a Defect." *Id.*, Vol. II at 223. One of the arguments in that section was that the Freightliner was not defectively designed under the ordinary-consumer standard because "a heavy truck with an air brake system is safe and no more dangerous than an ordinary consumer would consider it to be . . . even in the absence of a collision mitigation system." *Id.* at 228 (emphasis and internal quotation marks omitted). As previously noted, Plaintiffs do not argue that this contention fell outside the scope of the joint motion. *See* Aplts. Br. at 50; Oral Arg. at 1:34–1:37 (Plaintiffs' counsel says that "the parties scrupulously adhered" to the joint motion's limits).[7]

[7] The joint motion included a caveat "that discovery relevant to the summary judgment issues may be needed after the motion for summary judgment is filed." Aplts. App., Vol. I at 198. Thus, if Plaintiffs had decided—upon reading Daimler's summary-judgment brief—that they needed expert testimony, they could have filed a motion seeking additional discovery. Even without this caveat, Plaintiffs could have filed a motion under Fed. R. Civ. P. 56(d) arguing that they could not yet "present facts

For its part, the district court's design-defect analysis did not go beyond the issues and arguments raised by the parties. The court held that "heavy trucks like the Freightliner utilize air brake systems to slow and stop the truck. Plaintiffs have not shown that the ordinary consumer of a heavy truck—a CDL-licensed driver—would have contemplated that a vehicle that was not equipped with nascent FCW or AE[B] systems was unreasonably dangerous." *Butler*, 2022 WL 2191755, at *12. In other words, the court accepted Daimler's argument that the Freightliner was not defectively designed under the consumer-expectations test.

Given this context, we cannot see how "it was premature and unfair [for the district court] to grant summary judgment while expert discovery was stayed." Aplts. Br. at 50. If Daimler "limit[ed] [its] briefing to the narrow boundaries of the issues" identified in the joint motion, and if the district court's design-defect analysis merely accepted an argument made by Daimler, then it necessarily follows that the district court *also* limited itself "to the narrow boundaries of the issues" listed in the joint motion. *Id.* And given the stipulation that these issues did not require expert testimony, Plaintiffs can hardly now complain that "the district court improperly deprived [them] of the right to present expert testimony." *Id.* at 52; *see Los Alamos Study Grp. v. U.S. Dep't of Energy*, 692 F.3d 1057, 1064 (10th Cir. 2012) ("A party cannot ask the district

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essential to justify [their] opposition" to summary judgment; in turn, the district court could have "allow[ed] time to obtain affidavits or declarations or to take discovery," or "issue[d] any other appropriate order." Plaintiffs, however, filed no such motion under either avenue.

court to do something and then complain on appeal that the court complied with the request.").

In addition, Plaintiffs have never explained what expert testimony they would have provided. In district court they simply stated a handful of times that particular issues "would be ripe for expert consideration," Aplts. App., Vol. VII at 1519, or that certain facts would be "addressed by expert testimony," *id.* at 1532 n.1. And they are no more specific on appeal. Thus, even if the district court somehow improperly prevented them from presenting expert evidence in response to the summary-judgment motion, they have not shown any prejudice from such error. We therefore reject Plaintiffs' argument that they were improperly denied the right to present expert testimony.

B. Warning-Defect Claims

Plaintiffs also advance a warning-defect theory: Daimler "failed to warn [Mr. Jefferson and Mr. Ford] of the specific latent risks associated with failing to equip the Freightliner with FCW and AEB systems." Aplts. Br. at 42 (emphasis omitted). Addressing this claim requires us to review some aspects of Kansas law on the duty to warn.

"Under Kansas law, the standard for determining whether a warning is adequate is whether it is reasonable under the circumstances." *Ralston*, 275 F.3d at 975 (internal quotation marks omitted). The Kansas Products Liability Act also specifies three "categories which exclude a duty to warn": (1) "warnings related to precautionary conduct that a reasonable user or consumer would take for protection"; (2) "precautions

that a reasonable user or consumer would have taken"; and (3) "obvious hazards which a reasonable user or consumer should have known." *Patton v. Hutchinson Wil-Rich Mfg. Co.*, 861 P.2d 1299, 1311 (Kan. 1993) (paraphrasing Kan. Stat. Ann. § 60-3305). Consequently, "the Kansas courts have stressed that manufacturers should not be held liable for failing to warn about risks that would be apparent to ordinary users." *Hiner*, 340 F.3d at 1194; *see Delaney*, 999 P.2d at 939 (A "manufacturer should be able to assume that the ordinary product user is familiar with obvious hazards—that knives cut, that alcohol burns, that it is dangerous to drive automobiles at high speed." (internal quotation marks omitted)). "Moreover, regardless of the ordinary user's knowledge of the danger, there is no duty to warn of dangers *actually known* to the user of a product." *Hiner*, 340 F.3d at 1194 (brackets and internal quotation marks omitted). In short, if the reasonable consumer would be aware of the relevant danger (an objective test) *or* if the actual consumer is aware of the relevant danger (a subjective test), then the manufacturer is under no duty to warn about that danger.

Plaintiffs give two reasons for us to reverse the summary judgment against them on their failure-to-warn claim. We reject them both.

1. Procedural Unfairness

Plaintiffs contend that neither they nor Daimler raised or addressed whether Daimler had a duty to warn, yet "the [district] court's ultimate decision was [that] there was no duty to warn." Aplts. Br. at 50. They point out that the word *duty* does not appear in Daimler's motion for summary judgment; that it "only appears twice in the memorandum in support [of the motion], both in reference to a manufacturer's design

duties"; and that Daimler's summary-judgment reply brief likewise does not refer to a "duty" to warn. *Id.* at 50 n.19. As a result, say Plaintiffs, Daimler's summary-judgment briefing did not suggest that Plaintiffs needed to address the existence of a duty to warn. They complain that the issue did not arise until the district court's decision, at which point it was too late for Plaintiffs to address it.

We agree that a district court should not grant a motion for summary judgment on a ground not raised by the movant without at least providing notice and an opportunity to respond. *See Oldham v. O.K. Farms, Inc.*, 871 F.3d 1147, 1150–52 (10th Cir. 2017) (reversing where "the district court gave no notice that it intended to grant [the defendant's] summary judgment motion on a basis that was not raised by [the defendant]," the plaintiff had no "time to respond to this decision," and the record showed that the plaintiff "was prejudiced by this lack of notice and opportunity to respond"). But that is not what happened in *this* case.

Despite the failure to use the word *duty*, we think that Daimler's brief in support of its motion for summary judgment sufficiently raised the duty-to-warn issue. Daimler argued that "[u]nder Kansas law, a manufacturer need not warn about known risks, nor must it 'advise of the availability of a new safety feature when the danger alleviated by the feature is apparent.' *Hiner v. Deere & Co., Inc.*, 340 F.3d 1190, 1197 (10th Cir. 2003)." Aplts. App., Vol. II at 226. Daimler said that Mr. Jefferson was familiar with the FCW and AEB upgrade options for the Freightliner but decided not to purchase them, and that "Mr. Jefferson and Mr. Ford . . . knew the risks associated with not braking or stopping a heavy truck for slowed or stopped traffic in a construction zone."

Id. at 226–27. Thus, Daimler set forth the legal test and the evidence establishing that the test was satisfied. When it said that a "manufacturer *need not* warn about known risks," *id.* at 226 (emphasis added), it was saying in essence that the manufacturer had no duty to warn of known risks. This follows from the meaning of the word *duty*. *See Duty*, Black's Law Dictionary (11th ed. 2019) ("A legal *obligation* that is owed or due to another and that needs to be satisfied; that which one is *bound* to do, and for which somebody else has a corresponding right" (emphases added)); *Duty*, New Oxford American Dictionary (2d ed. 2005) ("a moral or legal *obligation*; a *responsibility*"; "a task or action that someone is *required* to perform" (emphases added)). Perhaps more importantly, the quotation from and citation to *Hiner* in Daimler's brief removed any ambiguity because the quoted page not only uses the term *duty to warn* but then paraphrases the concept in language similar to what appears in that brief. Plaintiffs were on fair notice of what was at issue. *Cf. United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1581–82 (2020) ("a court is not hidebound by the precise arguments of counsel," although, of course, the decision must "bear[] a fair resemblance to the case shaped by the parties").

2. Failure to Warn

Plaintiffs argue that Daimler is liable for failure to give Mr. Jefferson and Mr. Ford adequate warnings about the danger of not equipping the Freightliner with FCW and AEB. We disagree. Because the subjective test for defeating the duty to warn is satisfied here, we need not address whether the objective test would also be met.

Hiner is instructive. That case arose when the plaintiff "suffered injuries in a farming accident involving a tractor and front-end loader manufactured by [the defendant]." 340 F.3d at 1191. We recounted:

> At the time of the accident, [the plaintiff] was using the loader to carry a large round hay bale. Intending to transport the bale across his pasture to a cattle feeder, he began driving with the bale about one-and-a-half feet off the ground. As he drove, he looked off to the side at some cattle walking toward him. While his attention was diverted, the front-end loader began rising upward. The hay bale, which had been resting unrestrained on the front-end loader, rolled backward onto [the plaintiff].

Id. at 1192. We added:

> Although [the plaintiff] knew about the hazards of roll-down accidents and was familiar with the available safety devices, he believed that he could avoid the falling-object danger by carrying his load at a low level. At the time of his accident, however, the front-end loader elevated on its own—it rose without conscious operator input. . . . [The plaintiff] did not know that such self-raising was possible.

Id. (internal quotation marks omitted).

The plaintiff argued that the defendant should have warned him about the self-raising risk. *See id.* at 1194. We agreed, emphasizing the plaintiff's unchallenged contention that "he thought he was avoiding the roll-down hazard by keeping the bale low, because he did not know that the front-end loader might elevate on its own." *Id.* at 1195. Although the plaintiff was aware of "the general danger of unrestrained objects falling from the front-end loader," he was unaware of "the self-raising danger," and knowledge of the former did not preclude a warning-defect claim involving the latter. *Id.*

On the other hand, we rejected the plaintiff's four other warning-defect claims. One of those claims was that the defendant "failed to warn of the need for self-leveling on the front end loader." *Id.* at 1197 (internal quotation marks omitted). We rejected this contention, stating that the plaintiff "understood that the loader bucket should be kept level as the loader is raised, in order to prevent the load from becoming unstable and falling. The loader was no more dangerous in this respect than [the plaintiff] thought it was, so there was no duty to warn him." *Id.* The other "[t]hree claims relate[d] to the absence of safety structures which, according to [the plaintiff], would prevent unrestrained objects from falling off loaders onto tractor operators." *Id.* We agreed with the defendant that there was "a fundamental shortcoming in these claims—[the plaintiff] understood the dangers associated with using a front-end loader to transport unrestrained objects." *Id.* "Given that there is no duty to warn of dangers *actually known* to the user of a product," the defendant "had no duty to warn [the plaintiff] of the need for protection against falling objects." *Id.* (original brackets and internal quotation marks omitted). *Hiner* thus stands for the proposition that although a manufacturer generally must warn about risks of which a purchaser or user is unaware, "Kansas law does not require a manufacturer to advise of the availability of a new safety feature when the danger alleviated by the feature is apparent." *Id.*

Here, the danger alleviated by FCW and AEB—namely, a serious accident resulting from negligent truck driving in a highway-construction zone—was apparent to both Mr. Jefferson and Mr. Ford. As previously mentioned, both men were CDL-licensed drivers. Plaintiffs have not challenged the district court's finding that both

men "knew the risks associated with inattentive driving and/or failing to brake or stop a heavy commercial truck for slowed or stopped traffic in a construction zone. Neither [Mr.] Jefferson nor [Mr.] Ford needed [Daimler] to warn them of the dangers of failing to do so because both men would have readily known such dangers to exist without any warning based on their experience and training as CDL drivers." *Butler*, 2022 WL 2191755, at *11. Because the Freightliner "was no more dangerous in this respect than [Mr. Jefferson or Mr. Ford] thought it was, . . . there was no duty to warn [them]." *Hiner*, 340 F.3d at 1197.

Seeking to avoid this conclusion, Plaintiffs argue that Mr. Jefferson's and Mr. Ford's "knowledge of the risks associated with not braking or stopping the Freightliner . . . is irrelevant to [Plaintiffs'] warnings claims." Aplts. Br. at 42. They list "specific latent risks" about which Daimler supposedly failed to warn. *Id.* (emphasis omitted).

> In particular: (1) there was no warning given that opting out of FCW and AEB left drivers and the public with no safety net in the event of negligent driving; (2) no warning that the Freightliner was pre-wired for FCW and AEB, so incorporating them was simply a matter of plugging in the components; (3) no warning that the federal government had been urging heavy truck manufacturers to make FCW and AEB standard equipment for several years; (4) no warning that FCW and AEB available for the Freightliner were effective and would help eliminate and reduce the severity of wrecks involving crashing into traffic ahead; and (5) no warning that [Daimler's then parent company] had been equipping similar trucks sold in Europe with similar technology as standard equipment since 2012.

Id. at 42–43 (footnote omitted).

Hiner answers the first item: Because "the danger alleviated by [FCW and AEB was] apparent" to Mr. Jefferson and Mr. Ford, Daimler was under no duty to "advise

of the availability of" those "new safety feature[s]." 340 F.3d at 1197. And the other items are pieces of information that perhaps could have changed Mr. Jefferson's mind about whether to purchase FCW and AEB before the accident—but they were not *risks*, so Daimler was under no duty to warn of them.

Plaintiffs also assert on appeal that Mr. Jefferson lacks credibility (or at least that his credibility is a disputed question of fact requiring jury determination), and therefore the district court should not have relied on his testimony about his prior knowledge to grant summary judgment. *See Roberts v. Winder*, 16 F.4th 1367, 1382 (10th Cir. 2021) ("[W]eighing the witnesses' credibility . . . is impermissible on summary judgment."). Plaintiffs give three reasons for doubting Mr. Jefferson's credibility: (1) "his clear bias for the Freightliner brand," Aplts. Br. at 47; (2) "his conflicting testimony that he would follow any recommendation made by [Daimler], and that he would accept any safety equipment [that Daimler] forced him to accept," *id.* (internal quotation marks omitted); and (3) the fact that he "now elects to equip trucks he buys with collision mitigation systems to avoid this" kind of accident, *id.* at 48 (internal quotation marks omitted).

Not once, however, did Plaintiffs in district court challenge an asserted undisputed fact on the ground that Mr. Jefferson lacked credibility. "If a party . . . fails to properly address another party's assertion of fact as required by Rule 56(c), the court may . . . consider the fact undisputed for purposes of the motion [for summary judgment]." Fed. R. Civ. P. 56(e)(2). In conducting its analysis, a court need only consider the grounds *actually stated* by a party as reasons for concluding that another

party's assertion of fact is disputed. *See Pasternak v. Lear Petroleum Expl., Inc.*, 790 F.2d 828, 834 (10th Cir. 1986) ("[G]eneral denials . . . cannot be utilized to avoid summary judgment."). In other words, a party may be deemed to have admitted a fact on summary judgment except to the extent (and for the reasons) that the party gives for denying that fact. Thus, the failure to object to an asserted fact on a particular ground forfeits the argument that summary judgment should be denied on that ground. That is what happened here. Although Plaintiffs challenged some of Daimler's proffered facts on various grounds, they do not repeat any of those specific challenges on appeal, thus waiving them. *See Headrick v. Rockwell Int'l Corp.*, 24 F.3d 1272, 1277–78 (10th Cir. 1994) (White, J., sitting by designation) (argument raised in district court but not reiterated in appellant's opening brief is waived). Further, Plaintiffs never raised a credibility argument in district court; indeed, they often relied on Mr. Jefferson's credibility when citing his testimony in support of their own arguments. Thus, Plaintiffs forfeited their present credibility argument. *See Anderson*, 827 F.3d at 1238. And they waived it on appeal by failing to argue plain error in their opening brief. *See Platt*, 960 F.3d at 1273.

III. CONCLUSION

We **AFFIRM** the district court's judgment. We **DENY** Plaintiffs' request to certify questions to the Kansas Supreme Court because the relevant state law is sufficiently clear that certification would be unwarranted. *See BonBeck*, 14 F.4th at 1176 n.3 (declining to certify issue "because we see a reasonably clear and principled course for resolving the issue on our own" (internal quotation marks omitted)). We

GRANT the parties' joint motion to file Volume X of the Appendix under seal. And we **GRANT** the motions by the Center for Auto Safety and the Attorneys Information Exchange Group to file an amicus brief, and reply to opposition.