
ADAMS JONES

LAW FIRM, P.A.

Prepared by the Real Estate Group



Recent Changes in Real Estate Law in Kansas

2013 Kansas Legislation and Recent Case Law

June 2013

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Recognitions

Top Tier in Kansas Real Estate. The current Chambers USA directory again awarded Adams Jones its highest rating in the first tier of leading firms for real estate in Kansas. Those attorneys selected from the firm in the area of real estate include **Mert Buckley**, **Roger Hughey**, **Sabrina Standifer** and **Bradley Stout**. **Bradley Stout** and **Monte Vines** were selected for general commercial litigation in Kansas. The rankings were compiled from interviews with clients and attorneys by a team of full-time researchers.



Best Lawyers in America. **Mert Buckley**, **Patrick Hughes**, **Roger Hughey** and **Sabrina Standifer** were selected for the 2013 Edition of The Best Lawyers in America in the area of Real Estate; **Bradley Stout** was selected for Eminent Domain and Condemnation Law; **Patrick Hughes** was selected for Commercial Litigation and Land Use & Zoning Law; **Monte Vines** was selected for Commercial Litigation, Ethics and Professional Responsibility Law, Legal Malpractice Law, Litigation—Banking & Finance and Litigation—Real Estate; and **Dixie Madden** for Corporate Law and Health Care Law. The Best Lawyers lists, representing 80 specialties in all 50 states and Washington, DC, are compiled through an exhaustive peer-review survey in which thousands of the top lawyers in the U.S. confidentially evaluate their professional peers. *The Best Lawyers in America*® 2013. Copyright 2012 by Woodward/White, Inc., Aiken, SC

Super Lawyers. Selection to the 2012 Missouri & Kansas Super Lawyers included **Mert Buckley** and **Roger Hughey** in the area of Real Estate and **Monte Vines** in the area of Business Litigation.

Overview

This summary of recent changes in Kansas Real Estate Law was prepared by the Real Estate Group at Adams Jones. Our real estate attorneys continually monitor Kansas case decisions and legislation so we remain current on developments in real estate law in Kansas. We feel this up-to-date knowledge prepares us to address client needs more quickly and efficiently because our “research” is often already done when a question arises.

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Legislation

Home Inspectors – SB 37

The Kansas Home Inspectors Professional Competence and Financial Responsibility Act, enacted in 2008, expires July 1, 2013. There was an attempt, this legislative session, to repeal the sunset of the Act (SB 37), but it was vetoed by Governor Brownback.

Interest Rate – First Mortgage and Contract for Deed – SB 52

The maximum annual interest rate for first real estate mortgage loans and contracts for deeds will increase from 1.5 percentage points to 3.5 percentage points above a specified monthly floating cap by the Federal Home Loan Mortgage Corporation (Freddie Mac).

The specified monthly floating index rate is the yield of 30-year fixed-rate conventional home mortgages committed for delivery within 61 to 90 days accepted under the Federal Home Loan Mortgage Corporation's daily offerings for sale on the last day on which commitments for such mortgages were received in the preceding month.

Mortgage Interest and Property Tax Deductions – HB 2059

In 2013 a taxpayer will be limited to deducting 70% of his or her mortgage interest and property taxes as itemized deductions for Kansas income tax purposes. The deductions continue to be reduced each of the next four years by an additional 5%, with tax year 2018 and all subsequent years remaining at 50%.

Nuisance Actions Against Agricultural Property Owners – SB 168

This new law, effective July 1, 2013, limits the amount of compensatory damages that a property owner can receive for a nuisance action against the owner of property that is being used for agricultural purposes. Agricultural purposes includes growing crops, raising poultry and livestock, the wholesale handling, storage and transportation of agricultural commodities and the retail sale of agricultural products grown or processed on the land.

If the nuisance is permanent, then the maximum the damaged property owner can receive is the reduction in fair market value. If the nuisance is temporary, the damaged property owner is entitled to the lesser of: (A) the diminution in fair rental value, (B) the value of the loss of the use and enjoyment of the property, or (C) the reasonable cost to repair or mitigate any injury.

Agricultural purposes that are in existence prior to surrounding development are presumed to be reasonable and do not constitute a nuisance if in compliance with federal, state and local laws, rules and regulations.

Property Tax Appeals – House Sub. For SB 83

If a property owner of leased commercial or industrial property appeals the results of a tax appeal determination made by the county, values determined by the county appraiser will be given a presumption of validity and correctness unless the property owner has provided the county with complete income and expense statements for the previous three tax years within 30 days after the informal hearing with the county.

Roofer Registration Act – Sub. HB 2024

This Act takes effect July 1, 2013 and establishes a new registration requirement for roofing contractors which will be administered by the Kansas Attorney General. If you offer or engage in roofing-related services, including construction, installation, renovation, repair, maintenance, alteration or waterproofing for a fee, then you will need to register. If every project that a person works on in a year is less than \$2,000, then he or she is exempt from registration as long as such person doesn't advertise or state on any card or sign that such person is a roofing contractor. Additional exemptions from registration include an owner working on his or her own property. There are civil penalties for failing to register and violations of the Act are automatically considered a deceptive or unconscionable act or practice under the Kansas Consumer Protection Act. Readers subject to the Act are encouraged to contact the Kansas Attorney General's office at 785-296-2215 or visit the website www.kag.org since the Attorney General will be preparing the forms to be used and adopting the rules and regulations necessary to implement the Act.

Uniform Commercial Code Amendments – HB 2621 (2012)

HB 2621 amends the Uniform Commercial Code concerning secured transactions as recommended by the Uniform Law Commissioners. The only testimony was from the Kansas Bankers Association in support. Of particular interest:

- Requires financing statement of an individual debtor to name the debtor as he or she is named on their driver's license or state-issued identification card. Not required for mortgages filed as financing statements if the mortgage provides the individual name of the debtor or the debtor's surname and first personal name.
- Creates a new term of "public organic record" which means a record available for public inspection that has

been filed with a governmental entity, such as a secretary of state or city and filed to form an organization. It also includes an organic record of business trusts filed with a state, and a record created by legislative action and act of Congress which forms or organizes an organization.

- Amends the procedure for filing information of record by a debtor and secured party to correct inaccurate statements of the other.
- Allows for electronic signatures in the definition of "authenticate."

Effective date: July 1, 2013.

Cases

Ad Valorem Taxation

County need not comply with USPAP Standards 1 and 2 during appeal from a valuation determined by mass appraisal.

In re Equalization Appeal of Johnson County Appraiser/Privitera Realty Holdings, 47 Kan. App. 2d 1074, 283 P.3d 823 (2012). Privitera Realty Holdings owns a "KenTacoHut" restaurant in Overland Park housing Kentucky Fried Chicken, Taco Bell and Pizza Hut under one roof. For 2008, the County assigned a value of \$1,774,450 to the property for ad valorem tax purposes using the County's mass-appraisal system. Privitera appealed to the small claims and expedited hearings division of the Court of Tax Appeals (COTA), which concluded that Privitera's recommended value of \$1,393,200 better reflected fair market value. The County appealed to the regular division of COTA and presented testimony concerning its appraisal of the property, which relied on the cost approach. The County also presented evidence of the results of the income approach using the mass-appraisal system and data for rental expense and capitalization rates for restaurants, but not using data specific to this restaurant. The County's witness also testified that she considered sales data but did not value the property by the sale approach because the County did not have the sales-comparison approach for mass appraisals that is approved by the Department of Revenue. Privitera did not present any evidence at the hearing before COTA. COTA issued an order reinstating the County's value. Privitera appealed to the Kansas Court of Appeals.

Burden of Proof. Privitera argued that the County had the burden of proof before COTA and had not met its burden. The appellate court rejected the claim that the burden of

proof rested on the County because Privitera failed to demonstrate that it had provided the County with "a complete income and expense statement for the property for the 3 years next preceding the year of appeal" which it would need to do to shift the burden to the County.

USPAP Standards. Uniform Standards of Professional Appraisal Practice (USPAP) standards are embodied in the statutory scheme of property valuation, and a failure by COTA to follow those standards may constitute an error of law. USPAP Standard 1 governs the substantive aspects of developing a competent, single-real-property appraisal. Standard 2 governs the form and content of an appraisal report that communicates the result of a single-real-property appraisal performed under Standard 1. Similarly, a highest and best-use analysis is required for a single-property appraisal. In contrast, Standard 6 establishes the guidelines which should be observed when performing and reporting a mass appraisal. Privitera



contended the appraisal method used by the County to produce the report presented to COTA did not comply with USPAP Standards 1 and 2. Privitera argued that although the County's initial valuation was based on the mass appraisal process and needed to comply with Standard 6, once the County examined the property and adjusted the initial valuation (which it did to correct a discrepancy in the size of the building), the process became an appraisal of one individual property and needed to comply with Standards 1 and 2 and include a highest-and-best-use analysis. The Court of Appeals rejected the argument because there was no evidence that the County, in compiling the report presented to COTA, used any individual site-specific data that was not utilized in the initial mass appraisal process. In short, there was no evidence the County performed an appraisal for the property itself. Therefore, the County did not need to comply with Standards 1 and 2 or complete a highest-and-best-use analysis.

Annexation – Timeliness of Decision; Due Process

Pishny v. Board of Johnson County Comm'rs, 47 Kan. App. 2d 547, 277 P.3d 1170 (2012), *as modified* (July 27, 2012). The plaintiffs in *Pishny* challenged the decision of the County to grant part of an annexation petition filed by the City of Overland Park under K.S.A. 12-521(c) seeking to annex about 15 square miles of land. The landowners challenged the annexation process: whether the County Board

lost jurisdiction because its decision was not timely rendered, whether the City complied with a requirement to disclose the costs of annexation, and whether their procedural due process rights were violated.

The County held a hearing on the proposed annexation on October 30, 2007. K.S.A. 12-521(d) states the Board “shall render” its annexation decision within seven days after the public hearing is adjourned “*sine die*.” The Board rendered its decision on February 21, 2008. However, in the interim between the October 30 hearing and February 14 of the next year, the Board took additional evidence, consistent with a resolution it passed to leave the record open. The landowners argued that the Board lost jurisdiction because it failed to reach a decision within seven days of the public hearing. The Court of Appeals held that the Board adjourns *sine die* when it will no longer take evidence on the annexation matter and that the Board did not adjourn the public hearing on the City's annexation petition *sine die*, and thus was not required to issue a decision within seven days, until it closed the record on February 14, 2008. It also held that even if the Board had failed to timely reach a decision, the statute requiring a decision within seven days was not the type that would make the proceeding void if it were not followed. As a result, the landowners’ challenge to the timeliness of the decision was rejected.

The Court of Appeals also held that the annexation process needed only to substantially comply with requirements of annexation statutes and be supported by substantial evidence. The procedure in this case met those requirements even though the City provided cost data for the entire area proposed for annexation, but not for the area within the larger area which was eventually annexed.

Finally, landowners argued that the annexation was void because their due process rights were violated by: (a) the City making modifications to its original plan with no subsequent public hearings at which landowners could address the City's new information; and (b) the Board, City, and Fire District having *ex parte* communications about the annexation. The Court of Appeals held that the full rights of due process present in a court do not attach to a quasi-judicial annexation proceeding, but that the basic elements of notice of the proceeding and an opportunity to be heard at a meaningful time and in a meaningful manner do apply. As to the landowners’ first due-process claim, the Court of Appeals found that the landowners not only made no claim that they lacked notice of the City’s post-hearing submissions, but actually responded to those submissions. The landowners did not show they were entitled to more than one public hearing. As to the landowners’ second due-process claim, the court found that the alleged communications between the Board and City were not shown to have deprived the landowners of

notice or the opportunity to be heard.

Bankruptcy – Assignment of Rents

Debtor allowed to use rents in bankruptcy as part of the bankruptcy estate.

In re HD Gerlach Co., Inc., Ch. 11 Case No. 12-40685, 2013 WL _____ (Bankr. D. Kan. 2013). A bankruptcy debtor sought use of rents from an apartment complex and lender objected. The lender had exercised its rights under two assignments of rents by sending letters to tenants prior to debtor filing bankruptcy, directing tenants to send rental payments to the lender. Lender also filed foreclosure the same day the letters were sent. An agreed order was entered in the foreclosure action appointing a property manager for the apartments, but no receiver was appointed. Debtor then filed for Chapter 11 bankruptcy.

The Bankruptcy Code says that the bankruptcy estate includes all rents “of or from property of the estate.” Section 541(a)(6). Lender argued that it had exercised its rights to the rents before the bankruptcy and the debtor no longer had any interest, thus the rents could not be part of the bankruptcy estate. Judge Karlin ruled that federal bankruptcy law controls, and rents arising during the bankruptcy are property of the estate, regardless of conflicting state law (following *In re Bryant Manor, LLC*, 422 B.R. 278 (Bankr. D. Kan. 2010)).

Bankruptcy – Homestead

Bankruptcy debtor lawfully claimed homestead exemption and motion to revoke debtor’s discharge was denied.

Hamilton v. Fisher (In re Fisher), 486 B.R. 200 (Bankr. D. Kan. 2013). A man who filed bankruptcy was able to convince the bankruptcy judge that he lived on land in a pull-behind trailer that did not have electricity or a water supply even though his wife lived in a house in town. He testified he bathed at a neighbor’s house, in a stock tank or in a creek, and went to the bathroom either at a convenience store or outdoors in the woods. The bankruptcy judge found the man’s bankruptcy dis-



charge should not be revoked and he had lawfully claimed the land as his homestead. Homestead determinations are fact specific and the homestead exemption is liberally construed by courts. To establish a homestead, the debtor "must intend to occupy" the residence "as a homestead and must actually occupy it as a homestead."

Bankruptcy – Homestead

Bankruptcy debtor who acquired legal title to his residence from his trust did not acquire his interest within 1,215 days of filing bankruptcy and therefore his homestead exemption was not subject to statutory cap.

In re Peake, 480 B.R. 367 (Bankr. D. Kan. 2012). Section 522(p) of the Bankruptcy Code provides that if a debtor acquires an interest in his or her homestead within 1,215 days of filing bankruptcy, then the maximum amount that can be claimed as a homestead exemption is \$146,450. Husband and wife bought their house in 2004 and later transferred ownership to their living trust. Several years later, the trust deeded the property back to the husband so that he could obtain a reverse mortgage on the property; his wife was not included because she did not meet the minimum age requirement for the reverse mortgage. Two months later they filed bankruptcy and claimed the residence was exempt as their homestead.

The Bankruptcy Trustee argued that the husband's homestead exemption was subject to the \$146,450 cap because the trust deeded the property to the husband only two months prior to the bankruptcy filing. The bankruptcy judge disagreed, finding the husband was not subject to the homestead exemption cap. Husband already had equitable title to the property which can be claimed as a homestead exemption under Kansas law. When the trust conveyed legal title to the property to the husband, it did not increase the husband's "amount of interest" in the homestead.

Bankruptcy – Rejection of Unexpired Lease

Bankruptcy debtor could not reject one location out of four when all four were subject to one master lease.

In re Dickinson Theatres, Inc., Ch. 11 Case No. 12-22602, 2012 WL 4867220 (Bankr. D. Kan. 2012). Under Section 365(a) of the Bankruptcy Code, an unexpired lease or executory contract can be assumed or rejected in its entirety by a debtor in possession. However, if the contract can be divided "into several different agreements," a debtor can elect to assume or reject part of the agreement. In this case the bankruptcy debtor sold multiple locations over several years to the same lender and the lender then leased the loca-

tions back to the debtor pursuant to one master lease. The debtor wanted to continue operating three locations and reject only one of the four locations subject to the master lease.



The bankruptcy judge found that under Kansas law, the master lease was not divisible for multiple reasons and denied the debtor's motion. The primary reason was because the master lease "expressly and unambiguously state[d] the master lease [was] not divis-

ible." Another reason was the terms of the master lease supported the argument that it was not divisible -- all of the locations were leased for the same length of time, the rent was to be paid in a lump sum which was not allocated among the properties, and a default allowed the landlord to terminate the lease for all of the locations. Finally, the actions of the parties indicated that the lender was interested in the entire portfolio of properties rather than any one individually, since the master lease was executed in conjunction with the sale-leaseback transactions and the lender served as the landlord for all of the locations.

Broker Commissions

Attorney cannot share in commission for performing primarily brokerage services without being a licensed real estate broker.

Stewart Title v. Reece and Nichols Realtors, Inc., 294 Kan. 553, 276 P.3d 188 (2012). This case raises the question of whether the Kansas Real Estate Brokers' and Salespersons' Licensing Act (KREBSLA) permits a licensed broker to split a commission with an attorney for activities that would require a license under KREBSLA. A listing broker refused to split the brokerage commission with an attorney who was not licensed under KREBSLA and who acted as the buyer's agent. The title company handling the transaction filed a lawsuit to have the court determine who had rights to the commission.

KREBSLA generally prohibits a licensee from paying a commission to any unlicensed person for any activity that requires a license under KREBSLA. However, it permits commission splitting with anyone who performs activities that are exempt. The attorney exemption in KREBSLA allows an attorney to perform some of the activities a real estate broker would perform. To be exempt, those activities must be encompassed within and incidental to the practice of law,

within the context of an attorney-client relationship and consistent with the attorney's professional duties. However, the Kansas Supreme Court held that being a licensed attorney does not exempt a person from KREBSLA, and that an attorney cannot split a commission for producing a ready, willing and able buyer and for activities that are not primarily the practice of law.

Broker Commissions – Transfer Fees

Real estate purchase contract requiring commissions on future sales in a new residential development were prohibited transfer fees.

CoreFirst Bank & Trust v. JHawker Capital, LLC, 47 Kan. App. 2d. 755, 282 P.3d 618 (2012).

The Deal. Outwest Investments, LLC sold undeveloped land to JHawker Capital. The contract required the deed to recite that as each lot was developed with a home, the buyers would use the principals of Outwest, the Alexanders, as exclusive agents and either pay a commission to them or pay Outwest \$2,500 if the buyer did not use them as brokers. The title company attached an Affidavit of Equitable Interest to the deed which recited the restriction about the commission, but did not include the restriction in the deed, as required by the contract.

The Lawsuit. The first mortgage holder foreclosed and the Alexanders and Outwest joined the suit to assert their claim to commissions and sought damages against the title company for not preparing the deed in accordance with the contract. The district court granted the foreclosure and extinguished the commission rights of the Alexanders and Outwest as violating the Kansas statute against transfer fees (K.S.A. 2011 Supp. 58-3822). The trial court also denied damages against the title company for failing to follow the terms of the contract in preparing the deed as being too speculative and remote. The Court of Appeals affirmed.

Transfer Fees. K.S.A. 2011 Supp. 58-3821 and 58-3822 were passed in 2009 to prohibit certain transfer fee covenants from being imposed on real estate. Here, there was no issue whether the restrictive language was a "transfer fee" under the statute. The Alexanders and Outwest argued their arrangement met two of the exceptions allowed. One exception is for any commission payable to a licensed real estate salesperson or broker for the transfer of property, "pursuant to an agreement between the grantor or grantee and the real estate salesperson or broker, including any subsequent additional commission payable by the grantor or grantee." But the Court disagreed, finding this exception did not apply because Outwest wasn't a licensed real estate agent. An-

other exception is for any consideration to be paid by the buyer to the seller including "subsequent additional consideration" based upon a subsequent sale. The Court found this exception didn't apply because Outwest and the Alexanders were not the sole grantors of the property and the payments due them could not be considered "subsequent additional consideration."

Damages. Alexander and Outwest claimed damages from lost commissions resulting from the title company failing to include the commission terms in the deed. The district court ruled these damages were too speculative or remote, and the Court of Appeals affirmed, finding "future lost profits depend [ed] upon future developments that [were] contingent, conjectural, and improbable...."

Broker Lien – Mortgage Registration Fee

Attorney General says mortgage registration fee must be paid to file a broker's lien.

2012 Op. Att'y Gen. 34 (2012). The Commercial Real Estate Broker Lien Act (CREBLA) provides for a lien for unpaid commercial real estate commissions and allows a broker to file notice of the lien with the Register of Deeds. But CREBLA does not describe the amount of the filing fee. The Attorney General opined that the broker lien is a "mortgage" as defined by the Mortgage Registration Act (K.S.A. 79-3101) because the Act defines a mortgage to include "every instrument by which a lien is created or imposed upon real property." The AG said the Notice of Lien "imposed" a lien on the property, thus meeting the definition of a mortgage under the Mortgage Registration Act and requiring a broker to pay the mortgage registration fee in order to file the lien.

Cities – Collection of Demolition Costs

Cities can collect cost of demolition of dangerous property by special assessment and a collection suit.

2013 Op. Att'y Gen. 2 (2013). The City of Blue Rapids condemned and razed a residential structure and then sought to recover the costs from the owner. The Attorney General opined that the City could pursue a civil action against the owner. However, K.S.A. 12-1,115 requires that the City first levy a special assessment against the property and that the special assessment remain unpaid for one year before a civil suit can be brought. All collection efforts must cease when the debt is collected.

The A.G. also advised that the funds collected could be retained by the City and did not have to be remitted to the County.

Construction Contract – Binding Arbitration

Attempt to overturn or modify arbitrator’s decision failed.

Neighbors Constr. Co., Inc. v. Woodland Park At Soldier Creek, LLC, 48 Kan. App. 2d 33, 284 P.3d 1057 (2012). A construction company (Construction Company) entered into a construction contract with a property owner (Owner) to build an apartment complex. The contract incorporated the provisions contained in the American Institute of Architects (AIA) Document A201, General Conditions to the contract for construction, which included binding arbitration provisions. Owner failed to pay, Construction Company demanded arbitration and the arbitrator awarded Construction Company the unpaid amount, interest, costs and its attorney’s fees. When Construction Company filed an action in district court to enforce the award, Owner attempted to vacate or modify the arbitration award.



Courts will not overturn an arbitrator’s decision if the arbitrator acted within his or her authority and any “errors are not in bad faith or so gross as to amount to affirmative misconduct.” The Kansas Uniform Arbitration Act (the Act) provides five situations where the arbitration award shall be vacated:

- (1) The award was procured by corruption, fraud, or other undue means;
- (2) there was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;
- (3) the arbitrators exceeded their powers;
- (4) the arbitrators refused to postpone the hearing upon sufficient cause being shown therefore or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of K.S.A. 5-405, as to prejudice substantially the rights of a party; or
- (5) there was no arbitration agreement and the issue was not adversely determined in proceedings under K.S.A. 5-402 and the party did not participate in the arbitration hearing without raising the objection.

In addition to the Act, Kansas courts have also overturned arbitration awards if “there is a ‘manifest disregard’ of Kansas law by the arbitrator.” This requires proof that the arbitrator knew there was a governing legal principle but refused to apply the legal principle. In this case, the Court rejected all of Owner’s arguments and upheld the arbitrator’s decision.

An arbitrator’s award will also not be modified “unless such award is tainted or based on an irrational interpretation of the contract.” This requires extraordinary circumstances which did not exist in this case.

Damages – Trees – Correct Measure

Damages for destruction of trees and outbuildings by negligent fire is difference in value of real estate before and after the fire.

Evenson v. Lilley, 295 Kan. 43, 282 P.3d 610 (2012). The general rule in calculating damages for the destruction of



trees is the difference in the value of the property before and after the destruction. However, this general rule is flexible and a different measure of damages may be justified depending on the

specific facts involved. If the trees have “a special, inherent value or are essential to the value of the property as a whole” such as “when they screen out wind and noise, produce income, or have ornamental value,” then the replacement cost could be an appropriate measure of damages.

In this case, a neighbor’s negligence in burning pastureland destroyed over 200 trees and three outbuildings on landowner’s property. Landowner argued he was entitled to the replacement costs, over \$300,000, but the trial court, Kansas Court of Appeals and Kansas Supreme Court all ruled that landowner’s damages were approximately \$5,000, the difference in the value of the real estate before the fire (\$137,187) and after the fire (\$132,500).

Deeds – Joint Tenants

If there are two joint tenants, one can destroy the joint tenancy by deeding the property to himself as tenant in common.

Reicherter v. McCauley, 47 Kan. App. 2d 968, 283 P.3d 219 (2012). Two cousins, Richard and Douglas, purchased a farm in 1990 as joint tenants with rights of survivorship.

This meant that when one cousin died, the other would own 100% of the farm. Richard died in 2009. Imagine Douglas's surprise when Douglas found out that ten days before Richard's death,



Richard executed a quitclaim deed conveying his 50% interest in the farm from himself as a joint tenant to himself as a tenant in common and gave the deed to his attorney to record. The deed was recorded one day after Richard's death. When Douglas discovered he only owned 50% of the farm and Richard's heirs now owned the other 50%, he filed a quiet title action.

In a case of first impression, the Court held that if there are two joint tenants, one of them can destroy the joint tenancy by deeding the property to himself or herself as a tenant in common. The Court limited its decision to situations involving only two joint tenants.

Easement

Prescriptive easement requires exclusive use.



Koch v. Packard, 48 Kan. App. 2d 281, 294 P.3d 338 (2012). Joseph Koch used a roadway across Packard's land for more than 18 years for farming, recreational and hunting purposes. He brought a petition for declaratory judgment for a prescriptive easement after a dispute arose over access for hunting. The district court found in favor of a prescriptive easement. The Court of Appeals reversed.

Kansas courts look to the law of adverse possession when determining whether a prescriptive easement is established. K.S.A. 60-503 requires a showing of "open, exclusive and continuous possession of such real property, either under a claim knowingly adverse or under a belief of ownership, for a period of fifteen (15) years."

The evidence showed that other people also used the roadway. Because of this, Koch did not have exclusive use of the

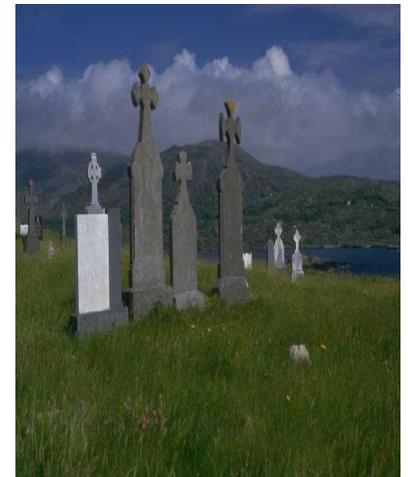
roadway and thus failed to meet the requirements of the statute to establish a prescriptive easement.

Easement – Implied Easement by Necessity

Abandonment of implied easement requires more than mere nonuse.

McCoy v. Barr, 47 Kan. App. 2d 285, 275 P.3d 914 (2012). A two-acre family cemetery (Cemetery) became landlocked in 1888 when the owner conveyed the surrounding property (Property). An abandoned railroad right-of-way was adjacent to one side of the Cemetery.

Multiple issues regarding the Cemetery arose in 2005. The County sold the Cemetery at a tax foreclosure sale and the buyer then sued the Property owner for an access easement to the Cemetery. The trial court determined the County did not have the right to sell the Cemetery for unpaid taxes and the sale was void. State law provides private cemeteries are controlled by the county where the ground is located and requires the county to protect the grounds from damage, but does not give the county all rights that a property owner would have.



Although the tax sale was void, a dispute still remained whether the County or anyone else had an access easement to the Cemetery. The Property owner argued the easement had been abandoned since there wasn't any evidence that any family member had visited the Cemetery in the past 100 years. The Court rejected this argument since abandonment of an easement must be shown by more than mere nonuse; it requires a showing of "actual relinquishment accompanied by [an] intention to abandon." The Court then instructed the trial court to determine the extent of the easement that would be necessary for the County to comply with its maintenance requirements and whether the abandoned railroad right-of-way could provide access to the Cemetery, but noted that an "implied easement for access to a private cemetery should be narrow in scope, and the burden on the landowner must be taken into account in granting the easement." The trial court was also instructed to determine the extent, if any, that the Cemetery should be accessible to the general public.

Eminent Domain

Billboard is personal property and advertising income it generated is not material to determining just compensation.

City of Wichita v. Denton, 296 Kan. 244, 294 P.3d 207 (2013), involves an appeal from a valuation phase of an eminent domain action. The property taken by the City of Wichita, at the corner of Rock Road and Kellogg in Wichita, included a 500 square-foot area that contained a two-sided tri-vision billboard mounted on a monopole. Clear Channel leased the area from Denton, the owner of the property. In an eminent domain action, the tract taken is valued as a whole. The appraisers determined the value of the tract as a whole to be \$1,075,600. Clear Channel appealed, seeking a jury trial to determine damages for the condemned property. The question in the case was whether a valuation of the property could be based on the income Clear Channel realized through its advertising business conducted on the property. The Court said no.

To be compensable in an eminent domain action, Clear Channel's interest in the billboard would need to be real property rather than personal property. The Supreme Court held, like the district court, that even though the billboard structure was affixed to the real estate, the intent of the parties was that it remain the personal property of Clear Channel -- Clear Channel had the right under the lease to remove it at the end of the lease. In addition, the evidence was that Clear Channel salvaged and intended to reuse the tri-vision panels.



The Court found that excluding evidence of advertising income was consistent with the conclusion that the billboard was personal property. Profits from a business conducted on a particular piece of property are not compensable in a condemnation action, although rents and other income generated by the land itself are compensable. Thus, the Court recognized a difference between the rents Clear Channel paid to a landowner which are generated by the property itself,

and rents paid to Clear Channel which are generated by the advertising signs and Clear Channel's management of its advertising business.

Eminent Domain

Doctrine of assemblage does not require unity of title.

Miller v. Preisser, 295 Kan. 356, 284 P.3d 290 (2012), is an eminent domain case dealing with the doctrine of assemblage which allows compensation for the loss of an opportunity that would have existed from combining the condemned tract with another tract as a single economic unit. The district court ruled that the doctrine of assemblage could not apply when the two properties were not owned by the same owner at the time of the taking. The Kansas Supreme Court reversed and held that unity of ownership is not required and that it is only necessary that the property owner show the reasonable probability of the joinder of the properties.

The case also established an important new principle: that the court lacks jurisdiction in a condemnation case to determine whether the imposition of access control is reasonable. The unreasonable exercise of police power is not a taking, but is void, and therefore does not create a right to compensation.

Eminent Domain

Limited jurisdiction under the Kansas Eminent Domain Procedure Act.

In *Woods v. Unified Gov't of WYCO/KCK*, 294 Kan. 292, 275 P.3d 46 (2012), a landowner, Woods, filed a notice of appeal to the district court from an appraisers' award in an eminent domain action within 30 days of receiving notice that his award had been paid into court. However, he filed the appeal 48 days after the filing of the appraisers' report on which the payment was based. A statute requires that a notice of appeal be filed within 30 days of the filing of the appraisers' report. After the district court dismissed his appeal as untimely, Woods appealed to the Kansas Supreme Court.

Woods argued that the Unified Government did not comply with the provision of the Eminent Domain Procedures Act requiring it to mail him written notice that the appraisers' report had been filed. The Unified Government asserted that it had substantially complied with the Act, but that in any event the district court never acquired jurisdiction. The Kansas Supreme Court held that a timely filing of a notice of appeal is required in order for court to have jurisdiction and consequently, even if the Unified Government had not fol-

lowed the notice statute, the district court lacked jurisdiction over an appeal. The Court said Woods' remedy, if any, would need to come from a separate civil suit challenging whether the Unified Government's exercise of its power of eminent domain was improper or whether it had violated Woods' due process rights.

Environmental Liability

Statutory environmental liability standards are not the same as tort strict liability standards.

Eastman v. Coffeyville Res. Refining & Mktg. LLC, 295 Kan. 470, 284 P.3d 1049 (2012). Owners of a pecan grove sued for damages caused by an accidental release of about 90,000 gallons of crude oil into a nearby river. The Kansas Supreme Court determined K.S.A. 65-6203 which requires

"any person responsible for an accidental release or discharge of material detrimental to the quality of the waters or soil" to pay the property owner for actual damages, provided the property owner is



not in any way responsible for the contamination was different from a strict liability claim in tort under Kansas common law which imposes liability for damages to real estate, property or people if caused by an activity that is "abnormally dangerous."

The Court also found that a three-year statute of limitations period applied to the owners' claim.

Foreclosure – Sheriff's Sale Purchasers

Purchasers at sheriff's sale had standing in another lawsuit that affected the properties purchased.

Turner v. Steele, 47 Kan. Ct. App. 2d 976, 282 P.3d 632 (2012). The facts in this case are complex and lengthy. In October 1999, a lender filed a mortgage foreclosure action in federal court against properties in Greeley County, Kansas owned by the Steeles. In April 1999, the Steeles were also sued in Shawnee County District Court for failing to pay their attorneys (for work on matters unrelated to the foreclosure action), and in 2000 the attorneys obtained a default judgment against the Steeles for over \$600,000. The attorneys then entered their judgment in Greeley County in June 2000. The lender obtained judgment in the foreclosure action in April, 2001 and transcribed it to Greeley County in

June, 2001. The lender's foreclosure action resulted in a sheriff's sale of the properties in 2002. The sheriff's sale was confirmed and sheriff's deeds issued to the two parties that purchased the foreclosed properties (Landowners).

The attorneys continued to file affidavits renewing their judgment against the Steeles. Finally, in 2010, the attorneys obtained a writ of special execution from the Shawnee County District Court directing the Greeley County Sheriff to attach the properties purchased by the Landowners. Landowners filed a quiet title action against the attorneys in Greeley County, Kansas. In addition, Landowners filed multiple motions in the attorneys' Shawnee County case, which were all denied by the Shawnee County District Court – motion to set aside the special execution writ, motion to stay the sheriff's sale (pending the outcome of the quiet title action), motion objecting to confirmation of the sheriff's sale, improper venue, motion to alter or amend judgment and motion to intervene. As a result, the Landowners' properties were sold at a sheriff's sale to third parties and the sheriff's sale was confirmed. In addition, Shawnee County found Landowners did not have standing. Landowners appealed.

The Court of Appeals found even though the Landowners were not parties to the dispute between the Steeles and the attorneys, they had standing to file the motions because they purchased the properties at the first sheriff's sale. As the current owners of the properties, they were "entitled to due process of law before their property [was] taken" and "they have a protectable interest in being heard before a judicial ruling, including a confirmation of a sheriff's sale" since it "could result in a cloud on their title or otherwise negatively affect their title to the real property." The Court also found the Shawnee County District Court abused its discretion in refusing to stay the sheriff's sale until the quiet title action was resolved and vacated confirmation of the second sheriff's sale.

Landlord/Tenant – Liability

Landlord not liable for dog bite injuries caused by tenant's dog.

Carr v. Vannoster, 48 Kan. App. 2d 19, 281 P.3d 1136 (2012). Woman injured by dog bite sued the dog owner's/tenant's landlord for negligence. If a landlord is not in possession of a property then he or she does not owe any duty of care to third parties on the property, subject to the following exceptions:

- (1) The landlord knows of dangerous conditions which are unknown to the tenant;

- (2) "there are conditions dangerous to persons outside of the [property];"
- (3) the property is leased for admission by the public;
- (4) the landlord retains control of part of the leased property;
- (5) the landlord contracts to repair the leased property; or
- (6) the landlord is negligent in making repairs.

The woman argued exceptions 3 and 4 applied. With regard to exception 3, while the dog owner/tenant (who was also landlord's son) operated a lawnmower repair business at the residence, the Court found the evidence did not establish that the purpose of the landlord renting the residence to his son was so that his son could operate a business open to the public.

With regard to exception 4, there was no evidence to support the woman's allegation that the landlord had retained control over the driveway leading to the residence.



In addition, she argued unsuccessfully that since the landlord/father did not charge his tenant/son any rent, landlord/father retained control of the leased property, but did not present any other evidence to support this allegation. Her argument also didn't work because a landlord/tenant relationship between the father and son

had to exist in order for exception 4 to apply, and under a landlord/tenant relationship, the tenant is in control of the leased property. The woman also argued the exceptions should be expanded to find the landlord liable in this case, which the Court refused to do.

The woman's argument that even if the father was not his son's landlord, he was still strictly liable for harboring a vicious dog also failed. Making an animal part of a household by allowing it in the house or on the property occupied by the family constitutes harboring the animal. The father/

landlord lived a mile away in a separate house from his son/tenant and thus did not harbor the son's/tenant's dog. The Court found the landlord was entitled to summary judgment.

Lender Liability – Tort of Outrage

Bank's errors in applying payments received did not support claim for tort of outrage.

Oliver v. CitiMortgage, Inc. (In re Oliver), Ch. 11 Case No. 05-40504, Adv. No. 11-07038, 2012 WL 1252955 (Bankr. D. Kan. 2012). Borrowers filed bankruptcy and as part of their bankruptcy plan, the bank was to apply any payments received from either the borrowers or the bankruptcy trustee pursuant to the requirements in the plan. Borrowers argued the bank failed to comply with the plan requirements, which resulted in borrowers claiming incorrect interest deductions on their tax returns, damaged their credit and caused one of the borrowers to suffer multiple strokes and heart damage.

A claim for the tort of outrage, or intentional infliction of emotional distress, required the borrowers to prove the bank's conduct was "so extreme and outrageous that recovery must be permitted" and that the "emotional distress suffered by them [was] so extreme that the law must intervene because no reasonable person should be expected to endure the distress." If borrowers satisfied these requirements, they would then have to also prove the bank's conduct was "intentional or in reckless disregard" of the borrowers and that there was a "causal connection" between the bank's conduct and the borrowers' mental distress.

To establish extreme and outrageous behavior, the "conduct must go 'beyond the bounds of decency and [is] to be regarded as atrocious and utterly intolerable in a civilized society'" such that if the borrowers provided the facts to "an average member of the community" it would arouse his or her resentment against the bank and lead him or her "to exclaim, 'Outrageous!'" The Court found the bank's actions in this case did not rise to this level of conduct and denied the borrowers' claim.

Loan – Acceleration of Loan

Bank could accelerate \$10,000,000 commercial real estate loan after borrower's failure to make a \$9,349 payment.

First Nat'l Bank of Omaha v. Centennial Park, LLC, ___ Kan. App. 2d ___, ___ P.3d ___, 2013 WL 1173914 (2013). Borrower and guarantors challenged a Bank's right to accelerate an approximately \$10,000,000 commercial

Mechanics' Liens – Priority with Successive Owners

Lien claimant cannot tack work onto two successive owners to establish priority date of lien.

In re Corbin Park, 470 B.R. 573 (Bankr. D. Kan. 2012) resolved a dispute between a group of mortgagees and a group of mechanics' lien claimants about whether mechanics' liens had priority over the mortgage on the uncompleted Corbin Park retail shopping center project in Overland Park. Bank of America, as an administrative agent for itself and a group of other lenders, provided a refinancing and construction loan in connection with the transfer of the retail center project from one development entity to a related one. The transfer brought in a substantial new equity partner and invigorated the project after a period of delay caused by a lack of available funds.

Construction had been ongoing for several years and much of the project's infrastructure had been installed before the date of the lending group's loan and mortgage. At the closing of the transfer and loan, contractors who had performed work on the project prior to closing were paid, but not fully. Nor did the contractors provide lien waivers or subordination agreements for the closing, despite the fact that the loan documents allowed BOA to require such protections before funding the loan.



The same contractors who worked on the project before the closing continued work for the new owner after the closing. The general contractor claimed to have performed some of that work after the closing but before the mortgage recording.

Several months and millions of dollars later, the lending group refused to advance more funds under the construction loan, leaving contractors and subcontractors unpaid for several million dollars of work performed before the lending group announced it would not advance more funds. The contractors and subcontractors filed mechanics' liens on the property. The owner filed bankruptcy.

The contractors claimed their liens had priority over the mortgage because one or more unsatisfied lien claimant contractors had started work before the loan closing and mortgage recording, providing a lien priority date before the mortgage date for all lien claimants on the project.

real estate loan after Borrower's default. A dispute arose between Borrower and Bank regarding the amount of a principal payment due under the promissory note. Bank claimed \$1,350,000 was due, but Borrower claimed only \$176,880 was due. Two weeks after the due date, Borrower paid an additional \$167,531 in principal, leaving \$9,349 still due. Bank sent Borrower a default letter and warned it would accelerate the loan. Bank accelerated the loan and then sued and obtained summary judgment to foreclose its mortgage and monetary judgments against Borrower and guarantors. In the time period between filing of the lawsuit and obtaining summary judgment, Borrower paid and Bank accepted a payment of \$9,349. Borrower and guarantors appealed, arguing: (1) equity should prevent the Bank from accelerating the loan, (2) there was no material breach of the loan because they substantially performed their loan obligations, (3) by accepting the \$9,349 payment, Bank waived its acceleration right, and (4) Bank "breached the implied covenant of good faith and fair dealing" when it demanded the \$1,350,000 principal payment. The Court of Appeals rejected all of defendants' arguments.

The Court noted that its equitable powers to prevent acceleration of a note should be exercised "sparingly" and depend on the following factors: "(1) the conduct of the parties; (2) the amount paid in reduction of the debt; and (3) the improvements made on the property by the [borrower]." In addition, the Court considers "whether the default resulted from accident, mistake, or inequitable conduct of the [lender]." Equity was not justified in this case because: (1) defendants acknowledged that even under their interpretation of the note, they owed additional money to the Bank and failed to pay it by the due date, and (2) this was a commercial loan and defendants could have negotiated different loan terms.

Defendants' substantial performance defense failed because it is not available if, as in this case, there has been a willful breach. Even though the amount to be paid was disputed, the defendants knew additional money was owed to the Bank by a specific date and failed to pay.

The Court found the Bank's acceptance of the late payments from Borrower did not waive Bank's right to accelerate the loan, due to express anti-waiver language in the note. The duty of good faith and fair dealing "requires that contractual parties refrain from intentionally doing anything to prevent the other party from carrying out his or her part of the agreement, or from doing anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." The Court found the Bank did not breach this duty because it did nothing to hinder defendants from complying with their loan obligations.

The bankruptcy court resolved the dispute in favor of the lenders. Because the post-closing construction work was performed for *a different owner* than the pre-closing work, the date of the pre-closing work was immaterial to the priority date of the post-closing work. The court also found that the pre-recording work was not clearly shown to have been performed on the portion of the overall project site covered by the mortgage and, in any case, would not have been pursuant to a contract with the owner because the owner had not given a notice to proceed until the day before the mortgage was filed and the contract required written notice to proceed at least five days in advance of commencing any work.

Comment: This case exhibits that for mechanic's lien purposes, contractors cannot tack work onto the same project for two successive owners to establish their lien priority date.

Mortgages – Assignment and Foreclosure

Holder of note and assignee of mortgage entitled to foreclose.

Bank of America, N.A. v. Inda, ___ Kan. App. 2d ___, ___ P.3d ___, 2013 WL 856468 (2013). Borrower lost its challenge to the right of Bank of America to foreclose a note it acquired and mortgage it had assumed.

The Note was endorsed several times to various lenders and finally "in blank," but was in possession of Bank of America, the Bank having sold the beneficial interest to Freddie Mac. The Mortgage was granted to the Mortgage Electronic Registration Systems, Inc. (MERS), acting "solely as nominee" for the original lender and its successors and assigns. The Mortgage was later assigned to an entity which eventually merged into Bank of America, so the Bank was the successor to the Mortgagee.

The Court of Appeals held that the Bank was the holder of the note and entitled to enforce it under the Uniform Commercial Code even though it had sold the beneficial interest in the note to Freddie Mac. The Bank was permitted to foreclose the mortgage because under Kansas mortgage law, the mortgage follows the note. "Therefore, a perfected claim to the note is equally perfected as to the mortgage."

Mortgages – Nominee

Assignment of mortgage not required for note holder to foreclose.

MetLife Home Loans v. Hansen, 48 Kan. App. 2d 213, 286 P.3d 1150 (2012). The Court of Appeals affirmed the right of MetLife to foreclose a mortgage originally held by Mort-

gage Electronic Registration Systems, Inc. (MERS) as nominee for the Lender, which MERS assigned to MetLife shortly before the foreclosure petition was filed.

The original note was given to Sunflower as Lender. The residential mortgage was given to MERS "solely as nominee" for Sunflower and Sunflower's successors and assigns. The note was assigned several times until MetLife acquired it, but the mortgage was never assigned until just before foreclosure, with MERS assigning it to MetLife. So at the time of foreclosure, the note and mortgage were both in the name of MetLife. The debtors argued that the note and mortgage were separated at the first assignment, rendering the mortgage unenforceable, and MetLife did not have standing to foreclose.



Kansas law holds that a mortgage may become unenforceable when ownership is separated from the note, but an exception exists if there is an agency relationship between the note holder and the mortgagee. The Court of Appeals held the language of the note and mortgage established an agency relationship between MERS, Sunflower and its assigns. The Court also noted its interpretation was consistent with Kansas law that transfer of a debt which is secured by a mortgage also transfers the mortgage without the necessity of filing an assignment of the mortgage.

Mortgages – Nominee/Agent

Mortgage to MERS as agent of bank did not sever promissory note and mortgage.

U.S. Bank, N.A. v. Howie, 47 Kan. App. 2d 690, 280 P.3d 225 (2012). A mortgage is generally unenforceable if not held by the same entity that also holds the note. An exception occurs where an agency relationship exists between the holder of the note and the holder of the mortgage. Here, the note was given to U.S. Bank and a residential mortgage given to Mortgage Electronic Registration Systems, Inc. (MERS) as nominee for U.S. Bank, the lender. MERS assigned the mortgage to U.S. Bank prior to U.S. Bank's foreclosure action. Borrower claimed the note and mortgage were irreparably severed when U.S. Bank held the note and MERS held the mortgage as nominee.

The Court of Appeals recognized Kansas law will not allow foreclosure of a mortgage when the note and mortgage have been separated. But it found U.S. Bank was entitled to proceed with foreclosure because the mortgage "provided sufficient and undisputed evidence that MERS was acting as an agent of U.S. Bank."

Comment: These three cases from the Kansas Court of Appeals (*Bank of America*, *MetLife Home Loans*, and *U.S. Bank*) seem to collectively hold as follows:

A note is not severed from a mortgage simply because the lender who is named in the note has a nominee for that lender named in a mortgage, as long as the agency of the nominee is shown in the mortgage.

If the note is assigned, the mortgage will follow the debt without the necessity of assigning the mortgage.

Nuisance – Migrating Natural Gas

Owner of underground natural gas storage facility was entitled to preliminary injunction against well operators to prevent continued withdrawal of stored gas.

Northern Natural Gas Co. v. L.D. Drilling, Inc., 697 F.3d 1259 (10th Cir. 2012). Northern has had an underground natural gas storage facility in south-central Kansas since 1979 (the Field). In 1994, multiple wells four to seven miles north of the Field began extracting natural gas and water. Northern realized its stored gas was decreasing and discovered that one side of the Field was not sealed by rock formations as previously believed. Instead, the gas was being contained on that side by water pressure and as the wells lowered the water pressure, it caused the natural gas to migrate north. Northern sued on multiple theories, including nuisance, and obtained a preliminary injunction preventing defendants from continuing to operate their wells. Defendants appealed the district court's finding of Northern's substantial likelihood of success in its nuisance claim.

For its nuisance claim, which was governed by Kansas law, Northern had to prove:

- (1) Defendants acted with the intent to interfere with Northern's use and enjoyment of the storage field;
- (2) there was some interference with the use and enjoyment of the Field of the kind Defendants intended;
- (3) that interference was substantial; and
- (4) the interference was of a [sic] such a nature, duration or amount as to constitute unreasonable interference with the use and enjoyment of the Field.

The Tenth Circuit upheld the preliminary injunction, finding that Northern had proven all four elements. The evidence established that substantial amounts of natural gas had

migrated out of the Field, thus interfering with Northern's use of the Field. The Defendants were on notice due to prior administrative proceedings that the wells were producing natural gas that was coming from the Field, yet they continued to operate the wells which the District Court found "an *intentional* and substantial interference with Northern's use of the Cunningham Storage Field." Finding unreasonable interference requires an examination of the facts, weighing numerous factors and considering the social value of the parties' competing interests. The Tenth Circuit affirmed, finding that Defendants' actions unreasonably interfered with Northern's use of the Field.

Partition – Adverse Possession

Challenges to property description must be brought in partition action -- not afterwards.

Hansford v. Silver Lake Heights, LLC, 294 Kan. 707, 280 P.3d 756 (2012). Property was partitioned and sold. The purchaser conducted a survey after the sale which showed an apparent boundary fence encroached onto the purchased land. The adjoining landowner was also a co-tenant in the partition action and was named and served, but never responded. In this action, the co-tenant tried to claim he had title to the land up to the fence by adverse possession and boundary by agreement. All courts rejected his claims.



Adverse possession is an affirmative defense to a partition action under K.S.A. 60-1003(b). Therefore, the co-tenant was barred from raising it at this point. That statute requires defendants in a partition case to respond with all "allegations of the nature and extent of their respective interests." Likewise, the Court said K.S.A. 60-1003(b) required the co-tenant to raise the boundary by agreement claim in the partition case and he was now barred from doing so.

The court concluded "failure of a party to take a direct appeal challenging the description of the property in a partition action precludes that party from making a collateral attack on the partition orders."

Comment: Partition cases may seem routine, but observe fence and boundary issues that may be lurking and be prepared to address them in the partition case or else rights may be lost.

Real Property Subject to a Trust

As a member of an international church body, a local congregation could not gain control of real property by deeding it to a new corporation.



Church of God in Christ, Inc. v. Board of Tr. of Emmanuel Church of God in Christ, Wichita, Kansas, 47 Kan. App. 2d 674, 280 P.3d 795 (2012). A local congregation

(Emmanuel Church) unsuccessfully tried to transfer title to its real estate to a new entity formed by church members after a dispute arose between the local congregation and its affiliated international church (Church of God in Christ, Inc. (COGIC)) over the selection of a new minister. Emmanuel Church had been a member of COGIC since 1945 and had owned the disputed real property since 1972.

The Court ruled COGIC should be awarded control of the property pursuant to two equitable remedies, the "trust pursuit rule" and a constructive trust. Under the "trust pursuit rule," if property is conveyed in breach of a trust and the transferee has notice of the trust, then the transferee takes title to the property subject to the trust. A constructive trust is imposed where trust property is improperly transferred and allows recovery of the property. The Court's decision was based on COGIC's constitution which provided that all real property owned by local congregations was held in trust for COGIC's benefit and any deed conveying real property to a local congregation was required to contain language stating the property "[was] held in trust for the use and benefit of the members of" COGIC. Emmanuel Church had attempted to transfer title to the property without the required language in the deed.

Recording Instruments

Re-recording a mortgage to correct legal description without grantors re-signing and without a new notarization is valid.

Meis v. Fowler State Bank (In re Meis), Ch. 11 Case No. 10-13207, Adv. No. 11-5011, 2012 WL 4486916 (Bankr. D. Kan. 2012). Chapter 11 bankruptcy debtor sought to avoid a lien on his homestead as a hypothetical bona fide purchaser.

He and his former wife had given a mortgage to Bank of America seven years prior which contained the wrong legal description to his homestead. The defect was corrected months afterward by the bank attaching a copy of the proper legal description to the mortgage and re-filing it as a corrected mortgage. The husband and wife did not sign the corrected mortgage and it was not notarized.

The Bankruptcy Judge followed existing Kansas law to find that a mortgage which was re-filed to correct a legal description, without the grantors re-signing it and without a new notarization, was still valid because it corrected an "obvious mistake," "accurately reflect[ed] the intention of the parties" and did not affect the rights of intervening third parties. The corrected mortgage was properly recorded and therefore imparted constructive notice of the mortgage's lien under K.S.A. 58-2222, thus defeating the claim of any hypothetical bona fide purchaser.

The court also found that the corrected mortgage would have been visible to anyone conducting a search of the public records, thus putting any hypothetical bona fide purchaser on notice.

Comment: This is comforting news to closers, lawyers and title companies, offering some judicial direction and practical advice.

Reservation of Royalty Interest – Rule Against Perpetuities

Reservation of royalty interest in a deed does not violate rule against perpetuities.

Rucker v. Delay, 295 Kan. 826, 289 P.3d 1166 (2012). The Rule Against Perpetuities is a public policy consideration that prohibits restrictions on real property future interests that are contingent upon events and "isolate the property and exclude it from commerce." The common law rule "precludes the creation of any future interest in property which does not necessarily vest within twenty-one [21] years after a life or lives presently in being, plus the period of gestation, where gestation is, in fact, taking place."

Here, the Court found that a 1924 deed which reserved a portion of the landowner's one-eighth royalty interest did not violate the Rule Against Perpetuities because Kansas law recognizes that reservations of future interests by a grantor are not subject to the rule against perpetuities. The Court distinguished reservation of a property right (the royalty interest) from creation of a remainder interest, which would be subject to the rule.

Residential Real Estate Sale – Defects

Sellers not entitled to summary judgment for undisclosed defects in residential real estate sale.

Kincaid v. Dess, ___ Kan. App. 2d ___, 298 P.3d 358 (2013). Homeowners entered into a contract with Sirva Relocation LLC (“Sirva”), listing their house for sale and giving Sirva an option to purchase their house. In conjunction with the contract, Homeowners completed two property disclosure statements, one statement was Sirva’s form, the other statement was the form used by local real estate agents. In conjunction with a sales contract between Sirva and Buyers, Buyers signed a document agreeing that Homeowners had



completed the property disclosure statements and that Sirva was not making any representations or warranties regarding the condition of the house. Buyers obtained an inspection of the house, and requested repairs based on the inspection, which Homeowners paid for and had performed. A month after closing, Buyers discovered defects undisclosed by Homeowners and sued Homeowners and their realtor for civil conspiracy, breach of contract, fraud, negligent misrepresentation and rescission of the sales contract. The trial court granted summary judgment to Homeowners on all claims and Buyers appealed.

The trial court found that because the sales contract was between Sirva and Buyers, there was no privity of contract between Homeowners and Buyers, thus Buyers did not have standing to sue for breach of contract. The Court of Appeals disagreed, finding intended third-party beneficiaries of a contract have standing and do not have to be named individually as long as they belong to the designated class. In this case, Homeowners agreed in the contract between Homeowners and Sirva that prospective buyers could rely on the property disclosure statements, that Homeowners were to disclose all information regarding the property and that Homeowners would indemnify Sirva for any liability related to the property condition. In addition, the property disclosure statements were incorporated into the sales contract between Sirva and Buyers. The Court found these facts established privity between Homeowners and Buyers.

The Court also found summary judgment should not have been granted to Homeowners on Buyers’ fraud and negligent misrepresentation claims. A claim for fraud or negligent misrepresentation requires proof that a buyer relied on the statements of the seller. The sales contract contained a clause in which Buyers agreed to rely only on their own in-

spectations in evaluating the property condition and Sirva disclaimed any warranties or representations regarding the property. However, the Supreme Court has recently ruled that sellers could still be liable for false representations if a “reasonable inspection” was performed prior to closing and the inspection did not discover the defects. *See Osterhaus v. Toth*, 291 Kan. 759, 249 P.3d 888 (2011). Summary judgment was not appropriate because a judge or jury must determine if the Buyers’ inspection was reasonable and if their inspection should have discovered the defects.

Buyers executed a sales contract amendment to document the repairs they wanted performed prior to closing. The amendment stated “Buyer now agrees to accept the Property ‘as is’ without correction of, or other action by the Seller.” Homeowners argued Buyers waived any claims under this language, but the Court rejected this argument, finding it was related only to the agreed upon repairs made prior to closing, not to undisclosed defects.

The Court agreed summary judgment should be granted to Homeowners with regard to Buyers’ civil conspiracy and rescission claims. Buyers lacked evidence proving Homeowners and their realtor had an agreement to defraud Buyers, one of the elements required to prove civil conspiracy. Buyers’ rescission claim failed because they failed to give Homeowners “prompt notice of their intent to rescind the contract.”

Residential Real Estate Sale – Defects

Sellers not entitled to summary judgment for undisclosed defects in residential real estate sale.

Stechschulte v. Jennings, ___ Kan. ___, 298 P.3d 1083 (2013). The purchase contract for a house in Johnson County included a Seller’s Property Disclosure form, in which the seller denied any water leakage or attempts to control water leakage and denied awareness of any water stains, except for this statement: “Several windows leaked after construction; full warranty repairs were performed, and correction is complete.” It was later discovered that the seller, who had bought the house when newly constructed, had experienced

persistent water leakage problems around the windows starting four years after construction. The window subcontractor hired a company to inspect and make repairs to the windows, and



they made eight attempts over a two-year period to do that. They advised the owner they could either remove all the window trim to find the source of the water leaks or caulk all the windows as a temporary “Band-Aid” solution. The owner had them caulk all the windows, which he paid for as “a maintenance issue,” and he hired a painter to paint over the stains. The owner later told the window repair company that all the windows were defective and needed to be replaced. Another round of repairs was performed.

The house was put on the market a year later with the assistance of a real estate agent, who was the seller’s fiancée. She had been in the home often in the months leading up to the sale, and did not notice any water leaks or stains. When the seller completed the property disclosure form, he went over it with his agent, and told her about the leaking, staining and window repairs, which he stated were complete.

Shortly after the buyers closed on the purchase, they discovered substantial water leakage in several places in the house. An infrared scan of the home revealed extensive water damage and another test found elevated mold levels. Their demand to rescind the purchase was denied by the seller. Buyers then sued seller and seller’s real estate agent and agency asserting three types of claims. They asserted the tort claims of fraud and negligent misrepresentation, claiming that the property disclosure form contained false statements and a failure to disclose information that should have been disclosed. They asserted a breach of contract claim, as the purchase contract called for the seller to attach any repair documents to the property disclosure form. They also asserted a claim for violation of the Kansas Consumer Protection Act (KCPA). The KCPA prohibits a variety of deceptive or unconscionable acts by a “supplier” in a consumer transaction. The purchase of a residence by an individual is a consumer transaction, and a real estate agent and broker are considered “suppliers.”

The District Court granted summary judgment in favor of the seller and his agent and agency, because of prior case law that provided that by signing the Buyer’s Acknowledgment on the property disclosure statement, buyer waived any reliance on seller’s disclosures in that form. That prior law had been changed by the Kansas Supreme Court in 2011 in the case of *Osterhaus v. Toth*, which held that a seller could still be liable for false representations if a “reasonable inspection” was performed prior to closing and the inspection did not discover the defects. The Supreme Court applied the new rule to the parties in this case, which was the basis for the court to reverse the summary judgment granted to the seller and his agent and agency. The court ruled that there was a question of fact for trial whether the buyers reasonably relied on the statements in

the property disclosure form in light of their own inspection that they had performed.

As to the claims against the real estate agent and agency, the court analyzed whether the Brokerage Relationships in Real Estate Transactions Act (BRRETA) insulated them from any responsibility for negligent misrepresentation. The court ruled that under BRRETA, a real estate agent has no duty to investigate the condition of the property to confirm whether the seller’s disclosure statements are correct, but BRRETA does not take away the agent’s common law duty to exercise reasonable care to communicate to the buyer any information they actually know about the condition of the property that is not already stated in an inspection report. So the claim here that the agent was negligent by not informing the buyers of what the seller had told her about the leaks, stains and repairs could be a valid claim and should go to trial.

The court also held that the real estate agent and agency could be liable under these facts for a violation of the KCPA, and that claim should go to trial as well.

Comments: The Kansas Supreme Court ruled that with the particular disclosure statement used by Seller, the Buyers did not waive their right to rely on the seller’s representations in the disclosure statement as to property defects that a reasonable inspection would not have found.

Right of First Refusal – Duty of Good Faith and Fair Dealing

Third-party offer on multiple tracts does not bar right to exercise a right of first refusal on only one of the tracts. Dispute regarding purchase price and good faith and fair dealing could not be resolved by summary judgment.

Waste Connections of Kansas, Inc. v Ritchie Corp., ___ Kan. ___, 298 P.3d 250 (2013).

The Contract. Waste Connections had a right of first refusal from Ritchie to purchase a waste transfer station (ROFR). Ritchie entered into a contract with Cornejo to sell the transfer station and an adjoining landfill with some alternative pricing. The contract said the total price for both properties was \$4,950,000, of which \$2,000,000 was allocated to the waste transfer station (ROFR Property). But the contract also said that if Waste Connections exercised its right of first refusal for the ROFR Property, the price for the landfill was



\$3,500,000. Ritchie claimed that the ROFR price to Waste Connections was \$2,000,000 -- the price stated in the contract for the ROFR Property. Waste Connections claimed it was only \$1,450,000 (the \$4,950,000 total price less \$3,500,000 for the landfill = \$1,450,000).

Lower Courts. Waste Connections sued Ritchie and Ritchie counterclaimed. Waste Connections tendered \$2,000,000 and the parties entered into an agreement in which they mutually reserved their rights to pursue their respective claims. The trial court entered declaratory judgment in favor of Ritchie. The Court of Appeals reversed, finding that Ritchie had acted in bad faith by constructing the alternative pricing, and entered summary judgment for Waste Connections in the amount of \$550,000 -- the difference between the \$2,000,000 alternate price in the Ritchie contract and the \$1,450,000 price reached after deducting the value of the landfill from the total purchase price.

Right of First Refusal. The Supreme Court reversed. It first acknowledged that a third-party offer on multiple tracts does not bar an existing right to exercise a right of first refusal on only one of those tracts. "Kansas has not previously treated package status as a barrier to activation of a right of first refusal on a portion of the package." Here, the issue centered on whether the price for the ROFR Property was \$2,000,000 or \$1,450,000. The Supreme Court remanded on this issue because it found that the evidence was insufficient to determine what Cornejo would pay for the ROFR Property if it were not included in the package with the landfill.

Duty of Good Faith. The law implies into every contract a duty of good faith and fair dealing between the parties. The Court of Appeals found that Ritchie had breached this duty of good faith and fair dealing, but the Supreme Court reversed, saying that the question of good or bad faith is a fact question "peculiarly inappropriate for summary judgment," remanding this issue to the trial court to decide if Ritchie acted in bad faith.

Tax Foreclosure

Property owner still owns property not sold at foreclosure sale, but county may still sell it later.

2012 Op. Att'y Gen. 28 (2012). What happens when a property doesn't sell at a tax foreclosure sale? Who owns it? The Attorney General first noted that state law does not require the county to bid at the sale. He then opined that the taxpayer still owns the property if no one bids at the sale, but state law provides that the county may attempt to sell the property again. K.S.A. 79-2803a. The opinion contains an

excellent recitation of the taxation and tax foreclosure processes.

Taxation – Minerals

Severed minerals may be taxed differently than minerals owned by the surface owner.

2012 Op. Att'y Gen. 18 (2012). Agricultural land is assessed for taxation purposes based upon agricultural income or productivity. This is true even if the land includes producing minerals. But if ownership of the minerals is severed from the surface, then the minerals are assessed at fair market value. The attorney general was asked if this separate taxing method violated Article 11, Section 1 of the Kansas Constitution, which provides for a "uniform and equal basis of valuation and rate of taxation." The AG said no. The Kansas Supreme Court had previously ruled in 1905 that a predecessor statute did not violate the Kansas Constitution and that decision has been reaffirmed. The attorney general opinion also observed that the legislature may treat taxation classes differently if there is no fundamental right (such as freedom of speech) or suspect classification (such as race) involved and there is a "rational basis for the classification." The purpose of the legislation was to put the severed minerals on the tax rolls, which was recognized as a valid legislative purpose.



Title Company – Liability (see Broker Commissions – *CoreFirst Bank & Trust v. JHawker Capital, LLC*)

Damages for lost profits for failure of title company to include restrictions on a deed were too remote and unenforceable.

Warranty of Title

Claim for breach of warranty of title requires showing of a "lawful adverse claim," not just someone claiming an adverse interest.

RAMA Operating Co., Inc. v. Barker, 47 Kan. App. 2d 1020, 286 P.3d 1138 (2012). This involves a claim for breach of warranty of title. RAMA took assignment of an oil and gas lease which contained a warranty of title and covenant to defend "against all persons whomsoever lawfully claiming or to claim the same."

RAMA started drilling and then stopped when questions arose about whether a prior lease was still in effect. A prior lease holder claimed that a release of its lease on file was a mistake. RAMA sued the assignor of its lease, a different lease, for breach of its warranty and covenant to defend.

Kansas law will not allow a claim of breach of covenant of title unless the third party's claim is superior to the rights of the person claiming the breach. Based on this established law, the Court of Appeals rejected RAMA's claim, finding that the claim that the prior lease was released by mistake,



and failure to controvert evidence of non-production under the prior lease, were not sufficient to rise to a "lawful adverse claim" and thus did not result in a breach of the covenant of warranty of title, or trigger a duty to defend.

interest of the person appealing. The plaintiffs met this standard.

The Court held that the requirement for granting a variance – unnecessary hardship – requires the complete loss of an existing business to the applicant, not just loss of increased profitable use of the land. Furthermore, the hardship created by business growth was ruled to be self-created and therefore could not support a variance.

Zoning

Variations: Who has standing to challenge a grant of a variance and what type of unnecessary hardship is required to grant a variance?

Hacker v. Sedgwick County, 48 Kan. App. 2d 164, 286 P.3d 222 (2012). For over 30 years, Norma and Leatha Hein operated a lawn care business from their rural home. Prior to this case, they were allowed to have up to four employees on their property at any given time. In this case they asked to increase that number to 20 (although they would rarely all be at the property simultaneously, and instead would be picking up equipment stored at the property), to use an existing outbuilding for business purposes, and to place composting material closer to the street than generally permitted for outdoor storage. They sought permission for these changes, which resulted from the growth of the business and changes in the way it operated, by variance.

The Board of Zoning Appeals granted the variances. The neighboring property owner and his tenant, who operated a sandpit appealed to the district court. Variances are granted upon showing of, among other things, an unnecessary hardship on the applicant unless the applicant created the hardship. The district court overturned the variances, rejecting Hein's argument that growth of an existing business was not a self-created hardship. The Board appealed.

The Board argued that the plaintiffs could not challenge the variances because they were not sufficiently impacted by the Board's decision. The Kansas Court of Appeals ruled any person "aggrieved by" the decision could appeal; a standard that requires that the decision impact some pecuniary

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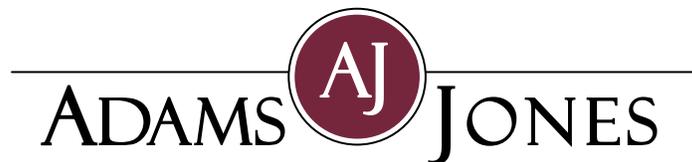
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