

ADAMS JONES

LAW FIRM, P.A.

Recent Changes in Real Estate Law in Kansas

2014 Kansas Legislation and Recent Case Law

June 2014


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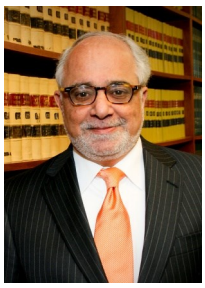
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"Preeminent in Central Kansas"

Top Tier in Kansas Real Estate. Chambers USA again awarded Adams Jones its highest rating in the first tier of leading firms for real estate in Kansas saying Adams Jones' Real Estate Group is "regarded as preeminent in central Kansas." Those attorneys selected from the firm in the area of real estate include **Mert Buckley, Roger Hughey** and **Brad Stout**. **Brad Stout, Monte Vines** and **Pat Hughes** 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, Pat Hughes, and Roger Hughey were selected for the 2014 Edition of The Best Lawyers in America in the area of Real Estate; **Brad Stout** was selected for Eminent Domain and Condemnation Law; **Pat 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*® 2014. Copyright 2013 by Woodward/White, Inc., Aiken, SC.

Super Lawyers. Selection to the 2013 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

Adult Care Homes -- HB 2418
Creates the Operator Registration Act, requiring the registration of operators of adult care homes, and establishes competency requirements. The bill defines an operator as an individual registered pursuant to the Act who may be appointed by someone licensed under the Adult Care Home Licensure Act to oversee an adult care home. An "adult care home" means an assisted living facility or residential health care facility licensed for less than 61 residents, or home plus or adult day care.

Effective: July 1, 2014.

Business Entity Standard Treatment Act -- Sub HB 2721
Current laws requires similar documents to be filed for corporations, limited liability companies, limited partnerships, and limited liability partnerships, but these laws are scattered throughout the statutes. The Business Entity Standard Treatment (BEST) Act centralizes and simplifies the various filing requirements for these entities.

The four types of entities are defined as a "covered entity" and a "foreign covered entity." The Act centralizes numerous filing requirements for a covered entity, replacing the current procedure of wading through various laws in different parts of the statutes. It also standardizes filing procedures and requirements for all four entities. Similar unifying changes were made for a foreign covered entity, including the definition of what constitutes doing business in Kansas that requires a foreign covered entity to become registered in this state. The following constitutes doing business in Kansas and requires a foreign covered entity to register: "The ownership in this state of income producing real property or tangible personal property [other than certain excluded property]."

Effective: January 1, 2015.

Casino–Southeast Kansas -- HB 2272
HB 2272 lowers the investment requirements to establish a casino in the southeast Kansas gaming zone (Cherokee and Crawford counties). The Kansas Expanded Lottery Act was amended to reduce the minimum requirement for infrastructure for a facility in the southeast Kansas lottery gaming zone from $225M to $50M. The amendment also reduced the privilege fee for the lottery gaming manager in the zone from $25M to $5.5M.

Effective: July 1, 2014.

Insurance Deposit Requirements—Real Estate and Mortgages -- SB 267
Amends the Insurance Code to exclude real estate and mortgages as collateral assets to be deposited with the Insurance Commissioner.

Effective: July 1, 2014.

Landowner's Right to Illegally-Killed Wildlife -- SB 357
Under Kansas law, wild game such as deer belongs to the public and is not property of the landowner where the deer happen to be. This bill addressed the question of who is entitled to the wildlife (and the value of its antlers) if illegally killed on a landowner's property. The legislature wanted to avoid creating ownership of the animal in the landowner and compromised by giving authority to the Department of Wildlife and Parks to either give the animal to the landowner or destroy it.

Effective: July 1, 2014.

Limited Liability Companies -- HB 2398
Various amendments to the Kansas Revised Limited Liability Company Act, including:

Gives a limited liability company the “power and authority to grant, hold or exercise a power of attorney” unless otherwise provided in the company operating agreement.

Comment: This authority is often given to execute contracts, loan documents and conduct closings in the form of a resolution. These powers as well as others can now be included in a power of attorney.

Effective: July 1, 2014.

Mortgage Registration Tax and More -- HB 2643
Phases out the mortgage registration fee (the bill renames it a tax) in declining amounts beginning in 2015 until the tax disappears in 2019. The mortgage tax is replaced with increasing filing fees for deeds, mortgages and "other instruments of writing" that peak in 2018 at $17 for the first page and $13 for each additional page. Each document recorded will also pay another $2 per page, increasing to $3 in 2015 that goes to technology funds for the register of deeds, county clerk, and county treasurer. And another dollar is collected for each of those same documents for the state heritage fund.

After January 1, 2015, the maximum fee permitted for recording a single family mortgage on a principal residence shall not exceed $125 where the principal debt or obligation secured by the mortgage is $75,000 or less.

~~Appraisal of complex industrial properties~~. Creates a process for a taxpayer or the county appraiser to request the director of property valuation to contract with an independent appraiser to classify and appraise certain complex properties: natural gas and helium processing facilities, ethanol facilities, crude oil refineries, fertilizer manufacturing facilities, cement manufacturing facilities "and such other complex industrial properties as otherwise requested by the county appraiser or the taxpayer." The independent appraiser's determination is admissible in court and appealable. The county is responsible for the cost of the appraiser.

~~Determination of fixtures~~. Establishes a three-part test to determine if property is personality or real estate -- gener-

ally, annexation, adaptation and intention. All three have to be satisfied in order for the property to be classified as real estate. Retroactive to 2006.

Industrial Revenue Bonds. Requires owners of property constructed with industrial revenue bonds and exempt from ad valorem taxation to notify county appraisers within 30 days of completion of the improvements. The county appraiser classifies the property within 180 days thereafter. Once classified, the property cannot be reclassified within two years after expiration of the tax exemption period.

Rural opportunity zones. Cherokee, Labette, Montgomery and Sumner counties added to the list of rural opportunity zones. Allows for income tax waivers and student loan repayments up to $15,000 for eligible persons.

Effective: July 1, 2014.

Peer Review of Architects, Landscape Architects, Land Surveyors, Geologists and Engineers -- HB 2246
This new law creates a method for establishing a peer review committee or peer reviewer for each of these "Design Professions."

The peer review committee or peer reviewer is appointed by the state, county or local society of design professionals, or by a business (or certain named officers of that business) which is licensed in one of these professions. The purposes of the peer review are to:

"a) evaluate and improve the design, drawings specifications or quality of services rendered by a design professional;
b) evaluate the design, construction, procedures and results of improvements to real property based upon services rendered by a design professional during or after completion of such improvements; or
c) prepare an internal lessons learned review of any project or services rendered for the purposes of improving the quality of services rendered by a design professional."

All reports, statements, memoranda, proceedings, findings and other records of the peer review are privileged and not subject to discovery, subpoena or other legal compulsion, except the privilege is not applicable to proceedings in which the design professional contests certain disciplinary action. Peer review members are given immunity from civil liability as long as their acts are performed in good faith, free from malice and reasonably related to the scope of the inquiry. Immunity does not extend to employees of a peer reviewer.

The bill was supported by the American Council of Engineering Companies and the Kansas Chapter of the American Institute of Architects.

Effective: July 1, 2014.

Premises Liability -- HB 2447
HB 2447 provides that "a possessor of any fee, reversionary or easement interest in real property, including an owner, lessee or other lawful occupant, owes a trespasser only the duty of care that existed at common law or in statute as of July 1, 2014." The law does not affect immunities from, or defenses to, civil liability established elsewhere in the Kansas statutes, or available at common law to the possessor of the property.

Effective: July 1, 2014.

Property Taxation–Restrictions on Increases in Budgets -- HB 2047
HB 2047 prevents a governing body from increasing its budget or any appropriation above the previous year, adjusted for inflation, without a majority vote of approval and publication of the vote in the official county newspaper. The governing body is also required to lower the amount of ad valorem tax to the extent that property valuations have increased over the previous year, adjusted for inflation. This may also be overridden by a majority vote of the governing body and publication of the vote. The statute lists certain exceptions from the determination of value, such as new improvements to real property. It applies to all municipalities which receive more than $1,000 of revenue in property taxes in the current year.

Effective: July 1, 2014.

Tax Abatements for Property Destroyed by Disaster -- HB 2057

Allows counties to grant property tax abatements or credits to property owners of homesteads destroyed or substantially damaged by earthquake, flood, tornado, fire or storm. Revises a program that sunset in 2013.

Effective: July 1, 2014.

Tax Appeals—Significant changes to tax appeal process -- House Sub. for SB 231
The legislature made numerous changes to the tax appeal process, including the following:

Changed the name of the State Court of Tax Appeals (COTA) to the State Board of Tax Appeals (BOTA).

One member of BOTA must be a licensed and certified general real property appraiser.

A written summary decision of BOTA shall be rendered and served within 14 days after the matter is fully submitted to the Board unless extended by agreement of the parties or for good cause shown (previously 120 days). An aggrieved party can request a full and complete opinion from the Board within 14 days after receiving its decision, and the Board must issue that full opinion within 90 days. If not, the taxpayer's filing fees are refunded.

Currently only decisions "of sufficient importance" are published by the Board. The bill now requires BOTA to publish all appeals on the body's website within 30 days.

Appeals from BOTA decisions are currently made to the Kansas Court of Appeals. This amendment allows a taxpayer to appeal to either the district court or the Kansas Court of Appeals. And appeals to the district court are *de novo*, meaning the district court will try the matter and decide on the facts presented, instead of being limited to determining whether BOTA's decision was arbitrary or capricious.

Appeal bonds of 125% of the taxes assessed are no longer required.

The legislature also inserted its specific intent that proceedings before BOTA "be conducted in a fair and impartial manner and that all taxpayers are entitled to a neutral interpretation of the tax laws of the state of Kansas…and the tax laws of this state shall be applied impartially to both taxpayers and taxing districts in cases before the board. Cases before the board shall not be decided upon arguments concerning shifting of the tax burden or upon any revenue loss or gain which may be experienced by the taxing district."

The maximum valuation for small claims and expedited hearings is increased from $2,000,000 to $3,000,000. Additional language also makes clear that the notice of tax appeal to the small claims divisions can be signed by the taxpayer or the taxpayer's authorized representative.

The burden of proof for valuation is born by taxpayers with regard to leased commercial and industrial property, unless the taxpayer provides the appraiser with complete income and expense statements for the past three years within 30 calendar days following the taxpayer's informal meeting, except that appraisals for single-property leased commercial and industrial property are deemed to shift the burden back to the county appraiser if the appraisal is effective as of January 1.

The bill prohibits BOTA from determining who may sign appeals forms, determining who may represent taxpayers before the board (i.e. non-lawyers may now represent taxpayers), deciding what constitutes the unauthorized practice of law, and deciding whether a contingent fee arrangement violates public policy.

For cases involving residential, commercial, and industrial real estate, appraisals made by counties are now required to be released through the discovery process. In such cases, taxpayers submitting single-property appraisals with an effective date of January 1, that were conducted by a certified general real property appraiser, are entitled to have their appraisals accepted into evidence if the valuation is less than that assigned by the county.

Tax Increment Financing/Community Improvement Districts -- HB 2086
Amends laws governing Tax Increment Financing Districts and Community Improvement Districts to allow funds from within the districts to be used for infrastructure outside the districts if contiguous to any portion of the districts. For a TIF, the infrastructure must be necessary for implementation of the redevelopment plan. For a CID project, the infrastructure must be "related to a project within the district or substantially for the benefit of the district."

The bill also allows cities and counties to pledge a portion of revenue received from transient guest taxes, local sales and use taxes from within the district to repay special obligation bonds. Current law requires them to pledge all of such taxes toward repayment of the bonds.

Effective: July 1, 2014.

Uniform Land Sales Practices Act -- HB 2152
The Kansas Uniform Land Sales Practices Act was repealed. Testimony from the office of the Securities Commissioner indicated that the Act was outdated, had only one active registration on file, and it was easier for land developers to register land sales under federal law.

Effective: July 1, 2014.

Legislation – 2013
Historic Preservation Act – HB 2249
Home Inspectors – SB 37
Interest Rates – First Mortgage Loans and Contracts for Deeds – SB 129

Historic Preservation Act–Environs Restrictions Deleted -- HB 2249, K.S.A. 75-2724
Prior law permitted projects within 500 feet of a registered historic property in a city or within 1,000 feet in an unincorporated portion of a county in which there is governmental involvement to proceed only if conditions set forth in the Kansas Historic Preservation Act are found to be met after an investigation. This amendment removed the radius provisions and limits the application of the Act to proposed projects "directly involving" a historic property, or that will "damage or destroy" any historic property on the National Register of Historic Places or the State Register of Historic Places. Effective July 1, 2013.

Comment: Eliminating the 500-foot radius requirement and limiting application to projects "directly involving" a historic property should ease some of the developer's compliance requirements.

Home Inspectors -- SB 37
The Kansas Home Inspectors Professional Competence and Financial Responsibility Act (the Act), enacted in 2008, expired July 1, 2013. SB 37 repealed the sunset, but was vetoed by Governor Brownback. In his press release regarding the veto, the Governor indicated he was not willing to extend the Act indefinitely, but would consider continuing it for another two years to study whether the benefits of the Act outweigh the burdens on home inspectors.

Interest Rates–First Mortgage Loans and Contract for Deeds -- SB 129, K.S.A. 16-207
The interest rate limitation for first real estate mortgage loans and contracts for deeds was previously tied to 1.5 percentage points above a specified monthly floating rate set by the Federal Home Loan Mortgage Corporation (Freddie Mac). This has been repealed, apparently leaving the maximum rate at the general usury rate of 15% under K.S.A. 16-207 unless the parties elect to be governed by the Uniform Consumer Credit Code. The bill also repealed SB 52, passed earlier in the 2013 session, which had increased the spread above the Freddie Mac rate from 1.5 percentage points to 3.5 percentage points.

Comment: Amending the usury rate to 15% seems more realistic than the previous rate of 1.5 percentage points above the Freddie Mac rate.

Cases

Boundary by Agreement—Reformation of Deed

Deed reformed to match boundary by agreement made by prior owners.

Baraban v. Hammonds, 49 Kan. App. 2d 530, 312 P.3d 373 (2013). Hammonds owned Lot 52 and an adjoining lot. They sold Lot 52 to the Piccirillos and at the time of the sale, Hammonds' house on the adjoining lot overlapped the lot line onto Lot 52. Hammonds and Piccirillos entered into an agreement to exclude the overlapping property from the sale, but did not record the agreement. The Piccirillos built a house on Lot 52, then sold Lot 52 to the Barabans. The deed described all of Lot 52 and did not exclude the overlapping property which contained part of the existing house. Barabans later discovered the overlap and sued both Hammonds and Piccirillos (the original parties to the unrecorded boundary agreement) for quiet title or establishment of ownership, ejectment, trespass, fraud and nuisance.

The district court first held that Hammonds and Piccirillos had changed the boundary by agreement, and the Court of Appeals agreed:

> Where parties agree to fix a boundary line between their properties and then acquiesce to follow the agreed-upon line, it is considered the true boundary line between the properties.

The Barabans argued they should not be bound by this unrecorded agreement because they had no notice. This is consistent with Kansas law which protects a *bona fide* purchaser from the effects of unrecorded instruments. A deed may be reformed to reflect a boundary line agreement, but not to the detriment of a *bona fide* purchaser without notice:

> A deed may be reformed to reflect a boundary-line agreement even after the property has been sold to a third party so long as the party against which the agreement is enforced is not a bona fide purchaser without actual or constructive notice of the agreed boundary line.

But wouldn't a survey have shown the problem? The Court of Appeals noted that a survey and an appraisal would have "raised red flags," but it is not settled in Kansas whether paying for a survey and appraisal are necessary to establish a "reasonably-diligent investigation." Here, the Court found the Barabans were on notice because the proximity of the house to the property line was enough to "at least trigger a reasonably diligent investigation." Therefore, the Barabans could not be *bona fide* purchasers and the deed could be reformed to reflect the boundary line agreement made by the prior owners.

Comment: Buyers cannot rely only upon a title examination to uncover boundary agreements. They must conduct a reasonably-diligent investigation of the property, and perhaps a survey.

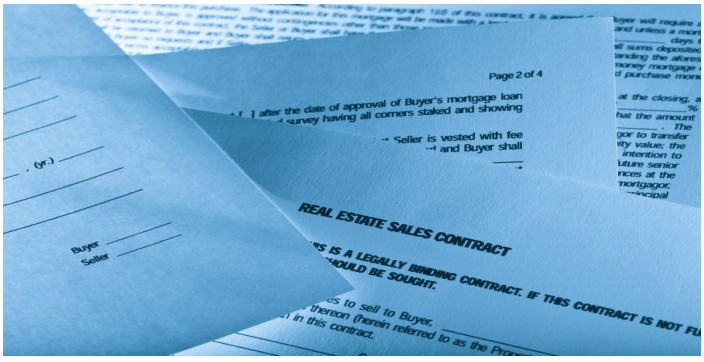
Broker

Claim by real estate agent against another real estate agent for tortious interference with contract arose at the same time as first agent's breach of contract claim against the landowner.

Hayden Outdoors, Inc. v. Niebur, 2014 WL 298778 (D. Kan. 2014). In Hayden Outdoors, a real estate sales company (Listing Broker) agreed to sell 22,720 acres of an Owner's farm land under an "Exclusive Right to Sell Listing Agreement." The Owner told the Listing Broker that he would extend the listing agreement if the property had not sold by the end of its term.

Two real estate agents contacted the Owner about potential buyers. When the Listing Broker learned of this, it gave the agents the listing information, but told the company they worked for that they should contact the Listing Broker instead of contacting the Owner directly. Nevertheless, the agents continued to contact the Owner. When the Listing Broker's original listing agreement expired, the Owner refused to sign an extension. Then Stratman, one of the agents, bought the property and sold off portions of it for a total of over $8.2 million. The Listing Broker's listing agreement included a provision to compensate it if the property was sold to anyone it had shown the property to or negotiated with. At the time of the sale, that clause was still valid and enforceable. The Listing Broker sued the Owner for breach of contract and got a judgment of $437,649, "based on a 7% commission of the sale by Stratman less the commission due to [the other agents]" and the company for which they worked. That judgment was affirmed on appeal. Then, four years after suing Owner, the Listing Broker filed this suit against the other real estate agents for tortious interference with contract.

The Court held that the Listing Broker's claim for tortious interference with contract against the two agents should have been brought when the injury was "reasonably ascertainable," and that the Listing Broker did not have to wait until resolution of its claim against the Owner before suing the agents. As a result, the two-year statute of limitations ran and barred its claim.



Comment: Only the statute of limitations barred this claim against the agents. This case is a good example of the ramifications of interfering with a listing agreement. It also demonstrates the successful enforcement of a listing agreement against an owner.

City Ordinances

City's noise ordinance held unconstitutionally void for vagueness, but nuisance ordinance upheld.

City of Lincoln Center v. Farmway Co-Op, Inc., 298 Kan. 540, 316 P.3d 707 (2013). Farmway Co-Op, Inc. operated a grain elevator inside the city limits of the City of Lincoln Center. Farmway applied for a building permit to expand operations, which the City granted. After Farmway expanded its operations, nearby residents complained of excessive noise and clouds of dust. Farmway attempted to remedy the issues, but could not completely satisfy the residents who complained to the City. The City cited Farmway for violating municipal noise and nuisance ordinances. The municipal court convicted Farmway on both counts and Farmway appealed, claiming that both ordinances were constitutionally void for vagueness.

The district court reversed both convictions, holding the ordinances to be "unconstitutionally vague because they do not warn potential violators of what conduct is prohibited and also fail to adequately guard against the risk of arbitrary enforcement." The City appealed to the Kansas Supreme Court, which concluded that the noise ordinance was unconstitutionally vague because it lacked objective standards. The Court held that words such as "excessive," "unnecessary," and "unusually" did not "convey sufficient definite warning . . . as to the prohibited conduct in light of common understanding and practice."

However, the Court held that the City's nuisance ordinance was not unconstitutionally vague because it employed "words commonly used, previously judicially defined, or having a settled meaning in the law." The Court held that previous case law and the commonality of the words used in the statute were such that "Farmway clearly was on notice that its facility was injuring or endangering the public's health, safety, or welfare" in violation of the ordinance.

Economic Loss Doctrine–Negligent Misrepresentation

Economic loss doctrine does not bar claim of negligent misrepresentation. Building manufacturer liable for negligent statements about performance of its building and timing for completion of construction.

Rinehart v. Morton Buildings, Inc., 297 Kan. 926, 305 P.3d 622 (2013). On an issue of first impression, the Kansas Supreme Court held that the economic loss doctrine does not bar claims of negligent misrepresentation. The economic loss doctrine is a judicial creation that prohibits a party from recovering in tort when the only damages suffered are economic losses. It originates from products liability cases, prohibiting persons with damaged goods from suing for negligence or strict liability.

Here, Morton Buildings sold a pre-engineered building to the Rineharts for use as their residence and for their business, Midwest Slitting, LLC. Disputes arose over the quality of the building.

Midwest Slitting asserted Morton Buildings negligently misrepresented that the building would be completed in a timely manner, would accommodate Midwest Slitting's need to relocate its operations, and would meet or exceed all industry standards. Midwest Slitting sought "economic damages for shop rent at an alternate facility, lost production, relocation costs and interest expenses." The jury awarded damages of $149,824, but did not itemize how it calculated the award.

Morton Buildings argued that the economic loss doctrine should prevent Midwest Slitting from recovering on a claim for negligent representation.

The Supreme Court held that negligent misrepresentation claims are not subject to the economic loss doctrine because the negligence claim arose from a legal duty separate and independent from the contract claim. The Court reasoned that the doctrine's purposes of preserving "distinctions between tort and contract law" and "restricting potential extensive liability to a commercial user 'downstream' from the manufacturer" would not be served by denying Midwest Slitting's claims.

Comment: This is a change in the law. Contractors and builders are already liable for breaches under their contracts. This decision adds liability for negligent statements made about their work, their product, their time for performance, or other matters.

Eminent Domain

In a condemnation action, landowner testimony about value of his or her property limited.

Unified School District No. 365 v. Diebolt, ____ Kan. ____, ____ P.3d ____, 2014 WL 1133418 (2014) is an eminent domain action in which a school district acquired 36.2 acres of unimproved land held by the property owners for a future lumberyard business location. The only question in the case was the fair market value of the land. It is well-established case law that a landowner is competent to testify to the value of that owner's property. Diebolt, the owner, sought to testify about his opinion of value and the basis of that opinion: his compilation of all expenses he had incurred with respect to the property including such things as closing costs, loan processing fees, interest, property taxes, and the expenses of building plans and surveys. The district court permitted Diebolt to testify to his opinion of value but refused to permit him to provide the jury with the lists of costs he added to his purchase price to reach that opinion.

The Kansas Supreme Court agreed with the district court's exclusion of the basis for the landowner's opinion. It found that only evidence relating to fair market value, "viewed through the lens of an arms-length transaction," is relevant in an eminent domain action. The Kansas Supreme Court concluded that many of the costs Diebolt included were not relevant to the property's fair market value, and even if any of them would have been relevant under the cost appraisal method, a property owner cannot testify "to an appraisal method for which he or she has not been established as an expert." The landowner's opinion of value, the court noted, should be founded on knowledge the landowner has developed from buying and selling real estate or the landowner's familiarity with neighborhood land values.

Environmental Liability

Punitive damages are available in an action under K.S.A. 65–6203 (accidental release or discharge to waters or soil).

Eastman v. Coffeyville Res. Ref. & Mktg., LLC, 2013 WL 3991803 (D. Kan. 2013). The Coffeyville Resources refinery is about two miles upstream from the plaintiffs' property. The refinery accidentally released approximately 80,000 gallons of crude oil, 5,000 gallons of diesel oil, and 4,000 gallons of crude oil fractions in a flood of the Verdigris River that caused an emergency shutdown of the refinery. Plaintiffs filed this lawsuit pursuant to K.S.A. 65-6203 alleging that oil damaged their pecan grove and that oil remained on their property and continued to damage their pecan harvests. Plaintiffs sought both actual and punitive damages. Defendant sought summary judgment on plaintiffs' punitive damages claim, arguing that the statute providing the cause of action does not allow punitive damages.

K.S.A. 65-6203 imposes a duty on a "person responsible for an accidental release or discharge of materials detrimental to the quality of the waters or soil of the state to. . . [c]ompensate the owner of the property where the release or discharge occurred for actual damages incurred . . . ." Defendant argued that punitive damages are not available in actions brought pursuant to a statute which does not explicitly provide for punitive damages, citing a case under the wrongful death statute. The district court rejected that argument and denied defendant's motion for summary judgment, finding there is no categorical rule denying punitive damages in all actions under statutes which do not expressly provide for punitive damages.

Comment: Punitive damages were allowed for violating the statute, even though the statute did not explicitly provide for punitive damages.

Comment: Of interest to title insurers and lenders.

Historic Preservation

Governing body authorizing a project damaging or destroying historic property must investigate and determine whether the Historic Preservation Act's preconditions are met; burden of proof is not on the project's proponent.

Friends of Bethany Place, Inc. v. City of Topeka, 297 Kan. 1112, 307 P.3d 1255 (2013). Grace Cathedral and The Episcopal Diocese of Kansas, Inc. own Bethany Place, a registered state historic site. The Topeka City Council granted a building permit for a parking lot on the property. If a project encroached upon, damaged or destroyed historic property, the Historic Preservation Act, as in effect at the time of the challenged decision, required the governing body to determine that: (1) there be no feasible and prudent alternatives to the project, and (2) the project include all possible planning to minimize harm to the historic property. Opponents claimed that the construction would adversely impact the historic site and challenged the City's decision.

This case raised the first-impression issue of who is obligated under the Historic Preservation Act to establish that the Act's preconditions are met. The Court held that the governing body, in this case the Topeka City Council, must make that determination and that it had a duty to investigate and evaluate the facts. The Court said the City Council must take a "hard look" at all relevant factors and could not necessarily rely on interested parties to present all relevant information. The Court determined that the City Council failed to obtain the information necessary to discharge its duties. The case was reversed and remanded. The Court further overruled a prior Court of Appeals decision, *Allen Realty, Inc. v. City of Lawrence,* 14 Kan. App. 2d 361, 790 P.2d 948 (1990), which placed the initial burden of proof with respect to the Historic Preservation Act's preconditions on the project's proponent, then shifted the burden to the opponents and then back to the proponents.

Comment: The Kansas Historic Preservation Act was amended in 2013 to remove the 500-foot radius provisions and to limit the application of the Act to proposed projects "directly involving" a historic property, or that will "damage or destroy" any historic property on the National Register of Historic Places or the State Register of Historic Places.

Home Warranty

Statute of limitations for breach of home warranty to repair or replace construction defects begins to run when builder fails or refuses to repair.

Hewitt v. Kirk's Remodeling and Custom Homes, Inc., 49 Kan. App. 2d 506, 310 P.3d 436 (2013). Builder provided a one-year warranty on a new house. The Homeowner filed its claim for defective work one day before the end of the one-year warranty but the Builder did not correct the work, claiming it was the responsibility of another contractor on the job. The Homeowner sued, filing suit more than five years after the date of completion of the home, but less than five years from the date that the Homeowner first filed a claim on the warranty.

Builder argued that the statute of limitations had run because if a defect existed, it existed at the time the house was delivered and that's when the warranty began, more than five years ago. The Court of Appeals disagreed. It found the Homeowner could not bring an action for breach of warranty to repair or replace construction defects until the Builder had breached the warranty by refusing or failing to correct the defects.

"[F]or purposes of K.S.A. 60-511(1), a cause of action based upon a builder's express warranty to repair or replace construction defects in a newly built house must be brought within 5 years of the date the builder breached the warranty by refusing or failing to repair or replace the defects."

Comment: The five-year period for the statute of limitations on a written agreement (the warranty) begins to run from the date that the builder first refuses to perform the warranty work, not the date the project is finished.

Mortgage Foreclosure—Procedure

Court of Appeals did not have jurisdiction because trial court's judgment failed to declare a final judgment and state no just reason for delay as required by K.S.A. 60-254.

Prime Lending II, LLC v. Trolley's Real Estate Holdings, LLC, 48 Kan. App. 2d 847, 304 P.3d 683 (2013). This foreclosure case involves the requirements for taking judgment on one or more, but fewer than all claims in the case under K.S.A. 60-254(b).

Facts. Lender foreclosed a commercial loan and obtained summary judgment with a counterclaim and claims against a party who had a filed bankruptcy still outstanding. The court's memorandum decision and subsequent journal entry of foreclosure did not comply with K.S.A. 60-254(b) which requires that "[t]he court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties *only if the court expressly determines that there is no just reason for delay*." The sheriff's sale was held without objection and the property sold.

Eight months after obtaining judgment, the lender filed a motion to certify the earlier decision as a final judgment, seeking to then comply with K.S.A. 60-254(b). The debtor objected and filed a motion for leave to amend its answer. The trial court then retroactively certified its earlier decision as a final judgment pursuant to K.S.A. 60-254.

Issues and Holdings. The debtor appealed and there were two issues on appeal: (1) Was the original decision or foreclosure judgment a final judgment under K.S.A. 60-254(b)? The Court of Appeals said no. Neither contained the language specified by the statute: that the court expressly determines that there is no just reason for delay and makes an express direction for entry of judgment. Therefore, it was an interlocutory appeal and the Court did not have jurisdiction to hear the case.

(2) What effect, if any, did the trial court's order have certifying its actions as a final judgment after the fact? The Court of Appeals said that the trial court could not retroactively make the earlier decision its final judgment. "The judgment lacked the determination required by K.S.A. 60-254(b), 'and it is not possible to now amend the order so to include the required findings within the order.'" (quoting *State ex. rel. Board of Healing Arts v. Beyrle,* 262 Kan. 507, 510, 941 P.2d 371 (1997)). While the trial court sought to certify the current proceedings to its original ruling date, the Court of Appeals expressed "no determination" whether the jurisdiction problem would have been resolved if the court had recertified the judgment to the date the motion was filed eight months later.

Result. The Court of Appeals had no jurisdiction to hear this case because the trial court did not follow K.S.A. 60-254(b) by not specifically entering final judgment and by not finding there was "no just reason for delay," thus making the appeal interlocutory.

Comment: This case is of interest to lawyers filing foreclosure actions and perhaps title insurers.

Mortgage Foreclosure and Quiet Title

Court cannot grant quiet title in a foreclosure action and quiet title action cannot remove junior liens from real property.
Bank of Blue Valley v. Duggan Homes, Inc., 48 Kan. App. 2d 828, 303 P.3d 1272 (2013). Duggan Homes defaulted on mortgage loans to Bank of Blue Valley, and the Bank filed foreclosure. During litigation the matter was settled, and Duggan agreed to deed a number of homes to the Bank. The Bank took the homes subject to mechanics' liens filed by a number of subcontractors who had not been paid.

The Bank amended its foreclosure petition to include the subcontractors, and then sought summary judgment. Although the action was for foreclosure, the trial court determined that the Bank "simply desire[d] to quiet title to the property," and the court held in favor of the Bank, quieting title to the property, but not entering judgment of foreclosure.

The subcontractors appealed. The appellate court held that the trial court could not quiet title when the Bank only pled foreclosure. Furthermore, the appellate court noted that a foreclosure action is the only proper procedure for a senior lienholder to strip real property of known junior liens.

Mortgages-Assignment and Foreclosure-Homestead

Holder of note has standing to foreclose mortgage. Homestead waived by spouse.

U.S. Bank Nat'l. Assoc. v. McConnell, 48 Kan. App. 2d 892, 305 P.3d 1 (2013). This is a residential foreclosure. Several topics were addressed.

Standing. Borrowers claimed the Lender did not have standing to sue on the note it held because the mortgage was in the name of another entity -- Mortgage Electronic Registration Systems (MERS). MERS assigned the mortgage to the Lender after the case was filed. The Court recited several Kansas cases which recognize that a mortgage follows assignment of the note whether or not the mortgage has been assigned. "The transfer of an obligation or debt secured by a mortgage also transfers the mortgage unless the parties to the transfer agree otherwise." (quoting *MetLife Home Loans v. Hansen,* 48 Kan. App. 2d 213, Syl. ¶ 5, 286 P.3d 1150 (2012)). Therefore, the Lender had standing.

Mortgage Not Severed from Note. Borrowers also argued that the note was severed from the mortgage when the note was held by the Lender and the mortgage held by MERS, and that the severance was not cured when MERS subsequently assigned the mortgage to the Lender. This argument was based on an earlier decision of the Kansas Supreme Court that held a mortgage which is separated from a note and held by some independent entity thereby becomes unenforceable. But here, the Court of Appeals again recognized the general rule that assignment of a note carries the mortgage securing it. Moreover, even if the interests were separable, the infraction was cured when the mortgage was transferred to the Lender. The Court said this transfer could occur during pendency of the suit so long as it occurred before the Lender moved for summary judgment.

Homestead Rights. Borrowers claimed the wife had not consented to impairment of her homestead rights because she did not sign the promissory note, even though

she signed the mortgage. The Court rejected this, because she "clearly consented to the mortgage lien." The Court noted that homestead rights under K.S.A. 60-2301 "do not apply when both spouses have consented to a lien on the property."

Comment: This case is of interest to lenders and title companies, giving comfort to some lenders.

Mortgages—Equitable Mortgage

Confirmed bankruptcy reorganization plan replaced contract for deed with equitable mortgage that required foreclosure and redemption rights.

Smith v. Oliver Heights, LLC, 49 Kan. App. 2d 384, 311 P.3d 1139 (2013). Oliver Heights, LLC entered into an installment contract for deed, as purchaser, with James and Sharon Smith. Less than two years later, Oliver Heights filed for chapter 11 bankruptcy, and a reorganization plan was confirmed by the bankruptcy court.

Subsequently, the Smiths filed foreclosure in state court claiming that Oliver Heights defaulted on both the original contract for deed and the reorganization plan. The trial court held that Oliver Heights was in default, adequate notice had been given by the Smiths, and the Smiths had not waived their rights by accepting an untimely payment. The trial court entered a judgment for the Smiths under the original contract for deed, and granted Smiths possession of the underlying property and a judgment of $3,000.

Oliver Heights appealed. The appellate court held that the reorganization plan created a new and binding contract on both parties. The appellate court affirmed the trial court's ruling regarding default, notice, and waiver, but reversed and remanded the case on the issues of possession and damages. The appellate court held that the reorganization agreement gave Oliver Heights an equitable mortgage that was subject to foreclosure laws and rights of redemption. Therefore, the trial court wrongly entered judgment on the original contract for deed.

Payment Bonds—Mechanic's Liens

Sub-sub-subcontractor did not qualify as a "claimant" under the bond because federal law did not permit liens.

In *Dun-Par Engineered Form Co. v. Vanum Constr. Co., Inc.*, 49 Kan. App. 2d 347, 310 P.3d 1072 (2013), a sub-sub-subcontractor (Dun-Par) who claimed not to be fully paid under its contract with a sub-subcontractor sued the sub-subcontractor, subcontractor, and the insurance company which had issued a subcontract payment bond. Under the language of the subcontract payment bond, an entity that had a direct contract with the principal would qualify as a "claimant," but Dun-Par had no such direct contract. The payment bond also allowed an entity having valid lien rights which could be asserted in the jurisdiction where the project was located to be a claimant. The district court interpreted this to mean that if Dun-Par could claim a lien under Kansas's mechanic's lien law, it could be a "claimant" under the bond.

The Court of Appeals reversed, holding that since the project was located within the Fort Riley Military Reservation, federal law controlled. Federal law prohibits mechanic's lien rights for contractors and subcontractors who work on federal land or buildings. Therefore, the plaintiff did not have valid lien rights in the relevant jurisdiction and could not meet the definition of a "claimant" under the bond.

Comment: This was not necessarily a predictable outcome. The lesson is that contractors should look seriously at their rights regarding bond claims and mechanics' liens, especially on federal jobs.

Planning Commissions

Mayor of city cannot also serve on county planning commission.

Op. Att'y Gen. No. 2014-03. The Attorney General opined that a mayor of a city under a mayor-council form of government cannot simultaneously serve on the planning commission of the same county where the city lies. Serving in the dual capacities would violate the common law doctrine of incompatibility of offices.

The doctrine prohibits someone from holding more than one public office when "the performance of the duties of one in some way interferes with the performance of the duties of the other." Here, the Attorney General noted that the city had authority to create a planning commission with authority over a three-mile radius outside the city limits, in the county. The city council also had authority to establish an improvement district under state law. The mayor's responsibilities on the council for this three-mile area may become adverse to the county's interests. Likewise, serving as a member of the planning commission requires that member to be involved in establishing a comprehensive development plan and subdivision regulations that benefit the county, including the three-mile radius surrounding the city.

Premises Liability

Using a flimsy door mat is not a "mode of operation" of a retail store.

Wagoner v. Dollar General Corp., 955 F. Supp. 2d 1220 (D. Kan. 2013). Just inside the entrance of a Dollar General store in Park City, the plaintiff tripped on a folded-

over corner of a mat and broke her arm. The corner of the mat had been kicked over by a customer about five minutes before. She sued DG Retail, LLC (DG Retail), who owned and operated the store, and Dollar General Corporation, the parent company of DG Retail.

The owner or operator of a place of business open to the public owes business visitors a duty to use "reasonable care" in keeping the place safe and is required to warn visitors of dangerous conditions that the owner or operator knows or should know about. Generally, to be liable for an injury resulting from a dangerous condition, the defendant must have actual or constructive notice of the condition. Constructive knowledge arises when a condition has existed so long that in the exercise of reasonable care, the owner or operator should have known about it.

The plaintiff asserted, however, that she did not have to show actual or constructive knowledge of the dangerous mat because the "mode of operation rule." The rule generally allows a plaintiff in a slip-and-fall case to "recover without a proprietor's actual or constructive knowledge of a dangerous condition" if "the proprietor adopted a mode of operation where a patron's carelessness should be anticipated," but failed to use reasonable measures to discover the potential danger. The plaintiff argued that the floor mat was flimsy and thus easily flipped up, and therefore it was foreseeable that a dangerous condition would regularly occur and that the defendants failed to take reasonable measures to deal with the risk. The court rejected the use of the mode of operation rule because, it concluded, the use of a mat is not a specific method by which the business conducts itself. Therefore, the plaintiff needed to establish actual or constructive knowledge of the danger.

Dollar General Corporation argued that since it was not the owner, occupier, or possessor of the store, it could not be held liable for the plaintiff's injuries. The plaintiff presented no evidence that the parent company controlled the premises; therefore, the court held that only DG Retail was potentially liable.

Comment: The landlord escaped liability because the plaintiff could not show that the landlord controlled the premises.

Premises Liability—Landowner—Duty of Care

A landowner's duty to uninvited persons entering his or her land to prevent serious harm to persons or property is the same duty owed to those who enter with explicit permission -- a duty of reasonable care.

Wrinkle v. Norman, 297 Kan. 420, 391 P.3d 312 (2013). Rodney Wrinkle was injured on his neighbors' property while voluntarily returning stray cows to their property. While herding the animals, Wrinkle became entangled in a clothesline, fell down, and broke his back. When the neighbors (Normans) refused to submit a claim to their insurer for his medical bills, Wrinkle sued for negligence. The district court held that the Normans owed no duty to Wrinkle because he was a trespasser on their land. Wrinkle appealed to the Kansas Supreme Court, which reversed and remanded, holding that the district court applied the wrong standard of care.

The Kansas Supreme Court recognized individuals have a privilege to enter onto or remain on the land of another if it is, or reasonably appears to be, necessary to prevent serious harm or injury to people or property. The Court also recognized that the duty of care owed to a person entering land under a privilege is the same as the duty of care owed to a licensee or invitee on the property with permission from the owner—i.e. a duty of reasonable care.

The Court held that "the effect of these two provisions, when read together, is to create a presumption of implicit permission for one party to enter the property of another in order to prevent certain kinds of serious harm, and the possessor of the property has a duty of reasonable care to protect the wellbeing of the person exercising that privilege."

Comment: This helps standardize the duty of care owed by a landowner to the public. An owner owes "reasonable care" to those persons on the property with his or her permission (licensees and invitees), and to those persons entering the property without explicit permission but who are doing so because it is or reasonably appears necessary to prevent serious harm or injury to people or property.

Promissory Estoppel

Statute of frauds did not bar a claim based on promissory estoppel in dispute involving the sale of real estate, even though there was no written contract.

Bouton v. Byers, ____ Kan. App. 2d ____, ____ P.3d ____, 2014 WL 983133 (2014). Walter Byers owned and operated substantial tracts of ranchland in Kansas valued at over one million dollars. Byers' daughter, Ellen Bouton, was a law school professor at Washburn who had helped Byers investigate his son (Bouton's brother) for mismanaging and embezzling from the ranching operations. After the brother was removed from managing the ranch, Bouton continued to help Byers with the ranching operations.

The dispute centers on Bouton's claim that Byers told her that if she quit her job as a tenure-track law school professor (making over $100K/year) and managed the ranching operations full time, she would inherit the ranch land worth over one million dollars.

Bouton quit her job and moved her family to the ranch. Unfortunately, however, Bouton and Byers had a falling out over ranching operations, and Byers said he no longer needed Bouton's help. Byers ultimately removed Bouton from his will, and later contracted to sell the ranching operations that Bouton claimed she was promised.

Bouton sued Byers under a theory of promissory estoppel, claiming that she had relied on Byers' promise to leave the land to her when she left her well-paying job to manage the ranch for very little pay. Promissory estoppel applies when: "(1) a promisor reasonably expects a promisee to act in reliance on the promise; (2) the promisee, in turn, reasonably so acts; and (3) a court's refusal to enforce the promise would countenance a substantial injustice." Bouton sought damages of the amount of money she would have made had she continued as a law school professor.

The trial court granted Byers summary judgment, determining that Bouton's reliance on the promise she attributed to Byers was unreasonable given her education and the circumstances. The appellate court reversed, holding that a reasonable person could have concluded based on the facts that a promise had been made, that the promisor (Byers) expected the promisee (Bouton) to rely on the promise, that the promisee did in fact rely on the promise, and that the promisee was harmed by the promisor's broken promise.

In addition to denying making the promise, Byers claimed that the statute of frauds should preclude any recovery by Bouton because the transaction involved real estate, and there was no written agreement in place. The appellate court held that Bouton's claim for restitution (rather than specific performance granting her the land) was not barred despite the lack of a written agreement. The case was remanded back to the trial court for trial.

Comment: This scenario has existed for years in real estate law. An oral promise is made to leave land to someone if they work the property or perform some other service. The cases are difficult to prove, but can be successful.

Railroad Crossing

Surface Transportation Board has exclusive jurisdiction regarding railroad transportation, including removal and relocation of railroad crossing.

Wichita Terminal Ass'n v. F.Y.G. Inv., Inc., 48 Kan. App. 2d 1071, 305 P.3d 13 (2013). The Wichita Terminal Association (WTA) was granted rights under a 1926 city ordinance to "construct, operate, and maintain railroad tracks along 25th Street in Wichita." In 1996, F.Y.G. Investments (FYG) purchased 27 acres directly to the south of WTA's existing tracks. In 2002, WTA repaired its tracks and FYG claimed trespass. Soon thereafter, WTA filed suit, seeking to enjoin FYG from interfering with its maintenance rights.

The district court granted summary judgment in favor of WTA in 2004, "finding that FYG had no legal right to ingress and egress across the WTA's railroad right-of-way." FYG appealed and the Court of Appeals reversed and remanded the case back to the district court "to determine if an injunction to provide ingress and egress [was] appropriate."

Eventually, the district court ruled that 25th Street was a public street and that a city ordinance required the WTA to provide ingress and egress over its railroad tracks to FYG's property. Due to federal requirements regarding railroad crossings, the district court's order would require either removal or relocation of one of WTA's rail lines. WTA again appealed.

The Kansas Court of Appeals held that the federal Interstate Commerce Commission Termination Act (ICCTA), enacted in 2006, was meant by Congress to supersede "state laws that may reasonably be said to have the effect of managing or governing rail transportation;" however, states and municipalities "may exercise traditional police powers . . . to the extent that the regulations protect public health and safety, are settled and defined, can be obeyed with reasonable certainty, entail no extended or open-ended delays, and can be approved (or rejected) without the exercise of discretion on subjective questions."

The Court of Appeals then reversed the district court's ruling insofar as it would require removal or replacement of the rails, but upheld FYG's right to access its property. The Court further required WTA to apply to the Surface Transportation Board (the federal agency with jurisdiction) for a determination of the proper procedure for placing a rail crossing to allow FYG access.

Reformation

Changes in natural gas industry which substantially increased market rental rates not "undue hardship" justifying reformation of leases.

Frederick v. Southern Star Cent. Gas Pipeline, Inc., 944 F. Supp. 2d 1083 (D. Kan. 2013). In 1959, the plaintiffs or their predecessors in interest leased land to the defendant's predecessor in interest for gas storage for one dollar

per acre per year. The leases ran for initial 50-year terms and had options to extend and continue each lease for additional one-year terms. The market for gas storage leases changed dramatically in subsequent years due to factors unforeseeable at the time the leases were entered into. As a result, the rent payable each year to extend the leases was well below current fair market rent. The lessors filed suit against the lessee seeking to reform the gas storage leases to require that the lease rate "be fair and reasonable at current market value rates for underground natural gas storage." That rate would have been between $17.57 and $44.80 per acre in the past ten years.

Generally, when competent parties freely and voluntarily make contracts that are neither illegal nor contrary to public policy, they are bound by those contracts, even if the terms were unwise or disadvantageous to one of the parties. Nevertheless, the plaintiffs asserted that the leases were unconscionable (providing an exception to the general rule) and that because of changes unforeseeable in 1959, enforcement of the leases as written would be inequitable. The court noted that unconscionability in this context would require "undue hardship" (something more than a loss of value over time) to the plaintiffs from the enforcement of the leases. Although industry changes allowed Southern Star to make more money, the court held that the changes had not caused an undue hardship on plaintiffs. Instead, the current circumstances were the result of the parties' decisions about how to allocate risks. In addition, the court supported its finding that the leases were not unconscionable by noting that the leases allowed lessors to receive free and reduced-price gas from lessee during the term of the leases, a benefit that has grown more valuable over time.

Comment: Kansas courts traditionally uphold validly-contracted agreements, even if they turn into bad deals over time. Of interest to realtors, title companies, contractors and lenders.

Residential Construction

Plumber personally liable in tort action for faulty work when plumber's company, and not plumber personally, had a contract to perform the work.

Coker v. Siler, 48 Kan. App. 2d 910, 304 P.3d 689 (2013). A homeowner, Coker, filed a lawsuit for breach of express warranty against a construction company and for negligence against the company's president, Chaney, who personally installed the main water line into the residence with a defective coupling which leaked and damaged the house. The district court found that the economic loss doctrine would bar strict liability, negligence and breach of implied warranty claims against the construction company and would require that any claim against the company be limited to a breach of contract claim. The district court further found that Chaney, as president of the company, was sufficiently a party to the construction contract since he was acting on the company's behalf, and that he was in privity of contract with the owner and therefore also protected from tort claims by the economic loss doctrine. The economic loss doctrine, at the time, prevented recovery of a tort claim seeking purely economic loss or injury to the contractor's work itself under circumstances governed by contract. However, after the district court's decision, the law changed when the Kansas Supreme Court decided that the economic loss doctrine did not prevent a homeowner from asserting claims against residential contractors in tort or contract, or both, depending on the nature of the duty giving rise to each claim. Therefore the question for the Kansas Court of Appeals to decide was whether Coker could establish that Chaney owed him a duty imposed by law, independent of the underlying construction contract.

Coker claimed that Chaney had a legal duty to perform the plumbing services without negligence independent of the underlying construction contract because a construction contractor implicitly warrants that the work will be done in a workmanlike manner. However, an implied warranty would require a contract between Coker and Chaney in which the warranty would be implied. Chaney was not a party to the construction contract in Chaney's capacity as an individual plumber, only as president of the construction company. Coker and Chaney had no other contract. Without an underlying agreement between Coker and Chaney to provide the plumbing services, Coker's claim of an implied duty within such a contract failed as a matter of law.

Because a construction contractor is liable for any injury to a third party from work negligently performed when such injury is reasonably certain to occur if the work is negligently done, the Court held Chaney owed Coker a legal duty independent of Coker's contract with the construction company, and that Coker's claim of negligence against Chaney in his individual capacity as a plumber had to be reinstated.

Comment: Contractors need to be aware of this case. It holds they can be personally liable for injury caused by their negligent work, even if the work was performed as an employee or officer of a corporation.

Residential Real Estate Sale–Defects

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

Stechschulte v. Jennings, 297 Kan. 2, 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 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 seller. Buyers then sued seller and seller's real estate agent and agency asserting three types of claims:

(1) 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;

(2) 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; and

(3) 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 seller and his agent and agency, because of prior case law that provided that a statement in the Buyer's Acknowledgement on the property disclosure statement effectively waived any reliance by buyer 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 by signing the Buyer's Acknowledgement, buyers waived reliance only on any oral statements about the property, but did not waive reliance on seller's disclosures in the form. 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 seller and his agent and agency. The court ruled there was a question of fact for trial whether 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 statement is correct, but BRRETA does not take away the agent's common law duty to exercise reasonable care to communicate to the buyer any information he or she actually knows about the condition of the property that is not already stated in an inspection report. BRRETA also requires an agent to disclose "all adverse material facts" including "any material defects in the property." So the claim here that the agent was negligent by not informing buyers of what seller had told her about the leaks, stains and repairs could be a valid claim and should go to trial. So the question of the agent's negligence was sent back for the jury to decide.

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:

(1) The Kansas Supreme Court ruled that with the particular disclosure statement used by seller, buyers did not waive their right to rely on seller's representations in the disclosure statement as to property defects that a reasonable inspection would not have found.

(2) Note that the language in the Buyer's Acknowledgement of the property disclosure form in this case was from a form in use in Johnson County. Forms in common use in other counties may use somewhat different language in this regard.

Reversion of Mineral Interests

A determinable fee mineral interest (defined below) is extended by constructive production when the mineral deed is made subject to the terms of the lease and lessee pays shut-in royalties.

In *Netahla v. Netahla,* 49 Kan. App. 2d 396, 307 P.3d 269 (2013), the plaintiffs owned the surface and one-half of the underlying minerals. They brought an action to establish that they also owned the other one-half mineral interest which had been severed in 1970 by a deed providing that the severed mineral interest would continue for 15 years (which expired in 1985), or as long thereafter as oil and/or gas was produced from the land or the land was being developed or operated. In 1985, there was no actual production, although shut-in royalties were continuously paid under an oil and gas lease.

A determinable fee mineral deed is a deed or other instrument which conveys oil and gas in place for a fixed term and as long thereafter as oil and gas is produced from the property or the property is being developed or operated. A previous Kansas case established that land is not "being developed or operated" for the purposes of a determinable mineral deed merely because shut-in royalties were being paid under an oil and gas lease. However, that previous case involved a lease that was entered into after conveyance of the determinable fee interest and the holder of the reversionary interest wasn't a party to the lease. Here, the mineral deed in *Netahla* incorporated a preexisting oil and gas lease and was "made subject to the terms of said lease." In addition, the oil and gas lease and the determinable mineral deed were both executed by the same grantor. The oil and gas lease continued beyond the primary term without actual oil and gas production by the payment of shut-in royalties, which functioned as constructive production. The Kansas Court of Appeals held that the mineral deed provided for the perpetuation of severed mineral interests by incorporating the terms of the lease, which defined "production" to include the payment of shut-in royalties.

Comment: Of interest to landowners, title companies and those in the oil and gas industry.

Tax Increment Financing

The "tax increment" under the Kansas Downtown Redevelopment Act includes all additional real property taxes attributable to the increase in value of the improved property, not just the additional taxes paid to the city.

Op. Att'y Gen. No. 2013-08. Under the Kansas Downtown Redevelopment Act, the property owner in a designated downtown redevelopment area may receive tax rebates for improvements "the value of which is equivalent to or exceeds 25% of the appraised value of the property." The Attorney General was asked if the rebates should be paid for the full amount of the increased taxes generated by the improvements, or just the portion that would have been paid to the city (excluding the portions attributable to the county and school district). The Attorney General opined that the legislature clearly intended that the entire amount of the tax increment should be rebated to the property owner in the percentages specified in the statute.

Trespass by Subsidence

Cause of action accrues when the falling of the land's surface is reasonably ascertainable.

Kowalsky v. S & J Operating Co., 539 Fed. Appx. 908 (10th Cir. 2013). In 2005, while the Kowalskys were renting land from Mr. Kowalsky's mother, Mr. Kowalsky asked the Kansas Corporation Commission to evaluate changes he saw to the land near a saltwater disposal well. That evaluation showed subsidence, but the KCC reported that it was unlikely to get worse. Nevertheless, a hole continued to deepen. The plaintiffs acquired the land in 2007. By 2008, the hole reached into the water table and the plaintiffs' water became so salty that it was toxic for cattle.

The plaintiffs brought this action against S & J in 2010, alleging that the sinkhole was the result of deficient plugging of a saltwater disposal well in 1989. The plaintiffs' nuisance claim was barred by the statute of limitations and they asserted an additional claim for trespass by subsidence. The district court found that, as a tort claim, trespass was not assignable and that the trespass had occurred before the plaintiffs acquired the property. The appellate court agreed, holding that a subsidence claim exists when the surface of the plaintiff's land falls and accrues for statute of limitations purposes when the subsidence is reasonably ascertainable.

In this case, subsidence was reasonably ascertainable starting in 2005 and at least by late 2006.

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