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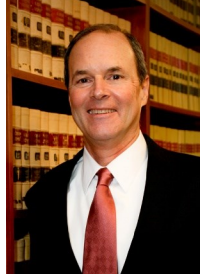
LAW FIRM, P.A.

RECENT CHANGES IN KANSAS
REAL ESTATE LAW 2017

Adams Jones Attorneys



Mike Andrusak



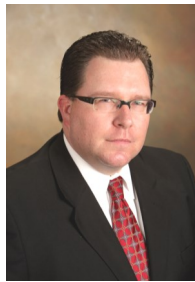
Mert Buckley



Pat Hughes



Dixie Madden



Jason Reed



Brad Stout



Monte Vines

Preeminent Presence in Kansas Real Estate

Top Band in Kansas Real Estate. Chambers USA again awarded Adams Jones its highest rating in the first band of leading firms for real estate in Kansas. Chambers cited sources as saying about Adams Jones: “excellent services,” “quality representation” and “a very strong real estate practice which is considered the finest in Wichita.” Those attorneys selected from the firm in the area of real estate include **Mert Buckley, Brad Stout and Pat Hughes**. Selected for general commercial litigation were **Brad Stout, Monte Vines and Pat Hughes**. The rankings were compiled from interviews with clients and attorneys by a team of full-time researchers.



Selections for 2017 Best Lawyers in America:

Real Estate
Mert Buckley
Pat Hughes

Commercial Litigation
Pat Hughes
Monte Vines

Corporate Law
Dixie Madden

Health Care
Dixie Madden

Land Use and Zoning
Pat Hughes

Eminent Domain
& Condemnation
Brad Stout

Litigation—Banking
and Finance
Monte Vines

Ethics of Professional
Responsibility
Monte Vines

Litigation-Real Estate
Brad Stout
Monte Vines

Legal Malpractice
-Defendants
Monte Vines

Wichita Best Lawyers - Lawyer of the Year 2017

Real Estate Litigation: **Brad Stout**

Real Estate: **Mert Buckley**

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

Current for legislation enacted through May 25, 2017.

Alcoholic Liquors – 2017 Sen. Bill 65

Disposition of Alcoholic Liquors Pledged as Collateral. Current laws governing possession and sale of alcohol make it difficult for a creditor to dispose of alcohol that has been seized from its borrower. This amendment now establishes a procedure for a creditor with a lien on alcohol to seize and sell alcohol.

Effective Date: July 1, 2017.

Alcohol Sales in Grocery Stores and Elsewhere – 2017 House Sub. Sen. Bill 13

Changes in beer sales. Beginning April 1, 2019, convenience stores, grocery stores and drug stores licensed to sell Cereal Malt Beverage (CMB or 3.2 beer) may also sell 6.0 beer. Retail liquor stores (licensed to sell 6.0 beer, wine, and distilled spirits) may also begin selling 3.2 beer and non-alcoholic goods and services as long as their non-alcohol revenue does not exceed 20% of gross sales.

The Director of Alcoholic Beverage Control will conduct a study of the effects of these changes after ten years, and report those findings to the 2029 Kansas Legislature.

Effective Date: July 1, 2017.



Fences – 2017 House Bill 2387

Exemption from sales tax. 2017 House Bill 2387 exempts from sales tax all property and services purchased in 2017 and 2018 to reconstruct, repair, or replace fence which encloses agricultural land that was damaged or destroyed by wildfires in 2016 or 2017. Sales taxes already paid will be refunded upon submittal of a proper claim form to the State. The Bill also sets out a procedure to obtain a sales tax exemption certificate from the State.

Effective date: March 23, 2017.

Construction – 2017 Sen. Bill 55

Fairness in Public Construction Contract Act. Amends the Act to require a contractor involved in a public-private partnership with a public entity to furnish performance and payment bonds equal to the contract amount. Only applies to contracts valued at greater than \$100,000.

Effective date: July 1, 2017.

Water Rights – 2017 Sen. Bill 46

Impairment of Water Rights. Numerous amendments to laws involving water impairment and water conservation. These include options available to the holder of water rights for remedy in the event of water impairment and the administrative remedies available.

Effective date: July 1, 2017.

Mortgage Brokers – 2017 Sen. Bill 20

Kansas Mortgage Business Act. Several procedural amendments but the bill also clarifies that if someone has a Kansas Mortgage Business license, no other license is required to conduct mortgage business in Kansas.

Effective date: July 1, 2017.

Consumer Protection – 2017 House Bill 2397

Kansas Consumer Protection Act. Amended to add the unauthorized practice of law as an unconscionable act or practice under the Kansas CPA. Arose from a recent situation in which an out-of-state law firm sent a demand letter to Kansas banks that also included an offer to represent the banks against certain legal claims.

REGULATIONS – KAR

Regulations – Kansas Real Estate Commission

The Commission made several modifications to its regulations.

Disclosure of interest in property. K.A.R. 86-3-19. The existing regulation said a licensee shall not “buy, sell, lease or exchange” real estate in which the licensee or an immediate family member of the licensee has an “interest” without making certain disclosures in the contract or lease. The amendment clarifies that the disclosure is required when the licensee’s immediate family member is a party to the transaction. Other non-substantive changes were made. The regulation now reads as follows:

86-3-19. Disclosure of interest in property purchased, sold, leased or exchanged.

Disclosure of interest in property purchased, sold, or leased. (a) Each licensee shall disclose in the real estate contract or lease any interest that the licensee or the licensee’s immediate family member has or will have in the following, as applicable:

- (1) The real estate being sold or leased by the seller or lessor; and
- (2) The real estate being purchased or leased by the buyer or lessee.

(b) For purposes of this regulation, “interest” shall have the meaning specified in K.S.A. 58-3035,[*] and amendments thereto, and “immediate family member” shall mean spouse, parent, child, or sibling. (Amended November 14, 2016.)

*“Interest” means: (1) Having any type of ownership in the real estate involved in the transaction; or (2) an officer, member, partner or shareholder of any entity that owns such real estate excluding an ownership interest of less than 5% in a publicly traded entity. K.S.A. 58-3035(i).

Real estate brokerage relationship brochure. K.A.R. 86-3-26a(c). Current law requires a licensee to provide a customer with certain disclosure about the agency relationship. (K.S.A. 58-30,110(c)). This amendment clarifies that the disclosure has to be accurate and complete.

- (c) Each licensee involved in a transaction as a statutory agent or a transaction broker shall ensure the completeness and accuracy of the disclosure required by K.S.A. 58-30,110(c), and amendments thereto. (Amended November 14, 2016.)

Broker supervision. K.A.R. 86-3-31. This is a new regulation listing specific responsibilities for supervising brokers of a primary or branch office. The regulation defines certain standards and identifies mitigating and aggravating conditions which the Commission may consider when reviewing an alleged violation. (November 14, 2016.)

Regulations revoked. The following regulations were revoked November 14, 2016:

K.A.R. 86-1-2. Examinations.

K.A.R. 86-1-4. Renewal of license.

K.A.R. 86-2-8. Examination of records.

K.A.R. 86-3-30. Advertising.

Fees. Several fees were eliminated in K.A.R. 86-1-5. (Amended March 17, 2017.)

CASES & ATTORNEY GENERAL OPINIONS

Abstractor Liability

Claims against abstractor for incorrectly preparing a deed were not barred when brought after six years.

LCL, LLC v. Falen, ____ Kan. App. 2d ____, 390 P.3d 571 (2017). In 2008, an abstractor was supposed to prepare a deed which reserved minerals to the grantor. But the deed mistakenly conveyed the minerals to the grantee. Over the next six years the grantor’s interest was transferred three times, all with mistaken deeds that included the minerals. During this time, the original grantor still received royalty payments from production on the property (as if the deed had been correctly prepared). The grantor later conveyed the mineral interests it believed that it had to another group of owners.



Eventually, the successor to the original mistaken deed, which erroneously conveyed the minerals, sued the grantees of the minerals claiming it was the true owner of the minerals. The grantees of the mineral owner sued the abstractor, claiming that the abstractor was negligent in preparing the 2008 deed and in preparing the later deeds which also failed to exclude the minerals.

The abstractor argued that the claims were barred by the statute of limitations – which requires a suit for negligence to be filed within two years after the negligent act first causes substantial injury that is "reasonably ascertainable." The Court of Appeals disagreed. Even though the alleged act of negligence occurred when the deed was improperly prepared in 2008, the injury was not reasonably ascertainable until the royalty runs were stopped in 2014. So the claim against the abstractor could proceed for negligence in drafting the 2008 deed. The Court made a similar finding on a claim for breach of fiduciary duty – the cause of action did not accrue until the mineral owners were damaged by the stoppage of royalty payments.

Appraisal of Property

Value of hotel in bankruptcy best determined by reference to historical performance rather than projections.

In *re Tiat Corp.*, 2017 WL 161675 (Bankr. D. Kan. 2017), is a bankruptcy court decision that discusses and determines the appropriate method to value a hotel for the purposes of determining the secured amount of a creditor's claim. The Inn at Tallgrass is an unflagged mid-price extended-stay hotel with no visibility from major streets. The debtor introduced evidence of a value of \$1,298,364 and the secured creditor proposed a value of over \$5 million. The creditor's expert reached an opinion of value based on capitalizing stabilized income using yield capitalization, basically relying on projections. The debtor's expert reached an opinion of value based on historical income and expenses from the preceding 12 months and direct capitalization, basically relying on historical performance.



The bankruptcy court noted that it was not bound by the opinion of either expert, and that a direct capitalization approach has been called the default method, and yield capitalization is better suited to circumstances where there are unstable markets or new construction. The court found that the yield capitalization approach relied on many assumptions that were not in evidence as facts and that did not reflect "today's hotel market in this community." Therefore, the court adopted the direct capitalization approach. The court then determined what projected income to capitalize. The court was not persuaded by the

assumptions underlying the creditor's expert's projection of operating costs and therefore used historical operating expenses ratios of the property over what it determined to have been a stable three-year time period. The court applied a 10.8% capitalization rate based on the risk posed by the age of the property, its location, its lack of a flag, and increasing competition. This capitalization rate was applied to the stabilized net operating income for the trailing 12 months to reach a value conclusion of \$1,956,000.

Church Property

Church property belongs to faction continuing affiliation with national governing body.

Heartland Presbytery v. Presbyterian Church of Stanley, Inc., ___ Kan. App. 2d ___, 390 P.3d 581 (2017). Who owns church property after an internal dispute in which one group votes to disaffiliate from its national governing body? Here, a local Presbyterian church voted to withdraw from the Presbyterian Church (U.S.A.) ("PCUSA").



The local church members voted by 348 to 94 to withdraw from PCUSA over disagreements with church policy and theology. The PCUSA's governing documents included a procedure for determining ownership of church property if a schism developed within a congregation. So the dispute traveled through the church appeal process in accordance with church policy. The PCUSA determined that the disaffiliation vote was not properly conducted and therefore had no effect. Pursuant to PCUSA's governing documents, it determined that the members of the congregation wishing to remain affiliated with PCUSA were the "true church" and entitled to the property. PCUSA filed suit, arguing the property was held by the local church in trust for the PCUSA, and that the departing members could not reverse that policy by their majority vote. The district court and the court of appeals agreed with PCUSA's decision in accordance with the hierarchical deference approach. The Court of Appeals concluded:

In 1983, the [congregation] voluntarily joined the PCUSA, which is a hierarchical organization. By doing so, the [congregation] consented to be bound by the Constitution of the PCUSA.

The *Book of Order* – which is an integral part of the PCUSA’s constitution – expressly provides a procedure for the internal resolution of church property disputes arising out of a schism within the membership of one of the PCUSA’s congregations. Here, it is undisputed that the highest ecclesiastical tribunal to which the issue was presented determined that the members of the staying faction who desire for the [congregation] to continue its longstanding affiliation with the PCUSA are entitled to the disputed property. Accordingly, although we respect the right of the members of the leaving faction to freely exercise their religious beliefs, we conclude that it was appropriate for the district court to defer to the tribunal’s decision regarding the church property.

Concealed Handguns in Public Buildings

Once the exemption periods expire, state and municipal medical care facilities and state universities must generally allow concealed handguns, but can create rules governing the manner of carrying such weapons.

Op. Att’y Gen. No. 2016-9 and -15 deal with concealed carry in state and municipal-owned or leased medical facilities and state universities, respectively. The Personal and Family Protection Act generally allows the carrying of a concealed handgun in state or municipal buildings unless there are adequate security measures at each entrance to protect against weapons being carried in and there is signage saying that concealed carry is not permitted. Both medical facilities and universities are empowered to prohibit concealed carry by signage until July 1, 2017.

The Kansas Attorney General has opined that once the exemption periods expire, state-owned or leased medical care facilities and state universities that do not have adequate security measures must allow concealed handguns but may nevertheless regulate the manner in which concealed handguns may be carried while inside the facility, but municipal-owned or leased medical care facilities may not. However, even in municipal medical care facilities,



medical personnel, in their individual capacities based on individualized medical concerns, may refuse to allow a patient to carry a concealed handgun while receiving medical services. The Attorney General also concluded that a university could not designate an entire building as “restricted access” as opposed to being readily open to the public in order to avoid allowing concealed carry.

Condemnation

Value determined at time of taking; sales from Illinois and Indiana were not comparable; and lost profits not considered.

Doug Garber Constr., Inc. v. King, ____ Kan. ____, 388 P.3d 78 (2017). This involves some basic principles of condemnation law that arose in condemnation of land for the South Lawrence Trafficway (SLT) and relocation of 31st Street as part of construction on the SLT.



Value determined at time of taking. KDOT condemned the owner’s entire tract of land, consisting of one-half acre with a residence. The court-appointed appraiser awarded the owner \$105,000 for the fair market value. The owner appealed to the district court and wanted to present the report of an independent real estate advisor which showed the “highest and best use” of the property as between \$1,795,600 to \$3,352,825. Kansas law does not allow a court to consider the “enhancement” of value to a property caused by the condemnation. The value of property is determined “at the time of the taking.” The trial court concluded that the SLT and relocation of 135th Street were one project; the 31st Street relocation would not have happened without the SLT. The future value of the property resulting from construction of the project could not be considered.

Comparable properties must be “comparable.” The trial court also did not allow the owner to testify that the value of the land was worth \$40,000,000, based upon values of highway properties in Illinois and Indiana. An owner is usually allowed to testify about the fair market value of their property “based on familiarity with his or her property and values in the neighborhood.” But the owner’s testimony must also follow recognized appraisal methods, and the out-of-state properties were not comparable values and therefore excluded.

Future profits not recoverable. The owner also claimed that she would create the “Garber Golden Gateway,” charge \$2 per car gate fee, and generate \$22,000,000 a year income, which capitalized into future profits of \$347 million. This testimony was also not allowed. “It has long been the rule in this state that the profits from a business conducted on a particular piece of property are not compensable in a condemnation action.”

The Kansas Supreme Court affirmed the trial court on all issues.

Condemnation

Diminishment in property value was correct measure of damages in partial condemnation.



Pener v. King, ____ Kan. ____, ____ P.3d ____ (2017). The Kansas Department of Transportation condemned part of Pener's property for a highway project. The taking took part of an existing fence and Pener was awarded \$11,000, which was the reduction in the property's value resulting from the loss of that part of the fence. The landowner appealed, arguing that this amount was too low since the Department of Transportation's own estimate showed it would cost more than \$65,000 to replace the fence. The Kansas Supreme Court agreed that the \$11,000 reduction in the property's value was the correct measure of damages notwithstanding the fact that it would cost more than \$65,000 to replace the fencing.

Condemnation

Owners of an easement that was not identified as a property interest being taken in condemnation petition were not entitled to have their easement rights included in the proceeding. Interference with their easement would support separate action for inverse condemnation.

Water District No. 1 v. Prairie Center Dev., L.L.C., 304 Kan. 603, 375 P.3d 304 (2016). The Bonhams owned an easement for a private roadway over one of the 10 tracts that Water District No. 1 of Johnson County sought to condemn for part of a project including a pump station, a reservoir and system of transmission and distribution mains. The water district's eminent domain petition sought to acquire the tracts “[s]ubject to existing ease-

ments of record.” The Bonhams were not named by the water district as parties to the condemnation action, but argued that their easement was necessarily required for the project as the condemnation petition on its face claimed that the water district sought the ability to “temporarily excavate or cut through any road.”

The Bonhams appealed to the district court from the condemnation award and filed a motion to void the condemnation. Their theory was that they were not named as parties even though their property rights were necessary for the project, and that they were not provided with proper notice as required under the Eminent Domain Procedure Act (EDPA). The district court denied the motion to void the condemnation and the Bonhams appealed.

The water district argued that the district court did not have jurisdiction to consider the Bonhams' claims. Eminent domain proceedings concern only two questions: the “authority to take” and “just compensation for the taking.” Collateral issues must be litigated in another civil action. Nevertheless, the Kansas Supreme Court held that as a procedural matter, the Bonhams could file a motion to raise the claim of a statutory defect in the condemnation proceeding. Alternatively, the Kansas Supreme Court also implied that the district court had jurisdiction to consider the Bonhams' motion to void the proceeding as a motion to intervene.

As to the merits of the Bonhams' argument, the Court accepted the water district's position that it did not include, and did not intend to include, the Bonham's property interest in its petition because it took the land “subject to existing easements.” As a result, the water district did not acquire the Bonham's easement and could not, using the rights it acquired, “temporarily excavate or cut through any road” if that included interfering with the Bonhams' easement. It thus owed the Bonhams no notice under the EDPA. The Court noted that if the water district interferes with the Bonham's easement when building the project, then it exceeds its legal authority by such interference. The Bonham's remedy in such a case would be to file a separate action for inverse condemnation.

Condemnation – Displaced Persons

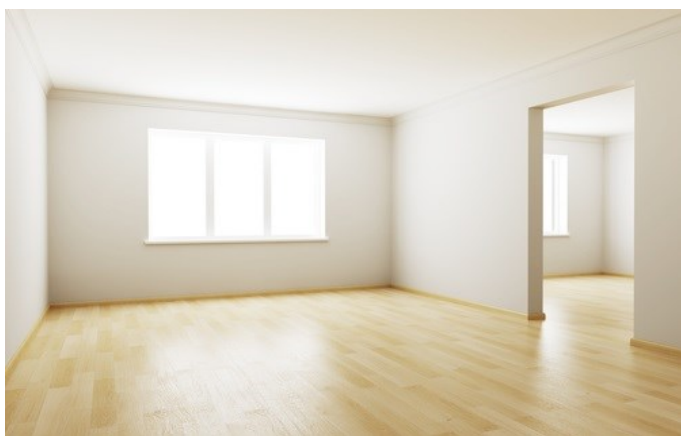
Tenants were “displaced persons” when landlord's contract with City required them to vacate prior to closing.

Nauheim v. City of Topeka, 52 Kan. App. 2d 969, 381 P.3d 508 (2016). Retail tenants brought this case against the City of Topeka to recover relocation expenses as “displaced persons” under K.S.A. 2015 Supp. 26-518. The long-term tenants had to move because the landlord had negotiated a sale of the leased property to the City that included the City's requirement that the property be vacant at closing. The City's position was that the tenants had vacated the property before its acquisition, thus they were not “displaced persons” under the statute.

In order to qualify for relocation expenses, the tenants had to show: (1) they were “displaced persons” in the relocation; and (2) the acquisition was “in advance of a condemnation action.” The district court found against the tenants on both questions and the Court of Appeals reversed.

Were the tenants displaced persons? This was a question of first impression -- whether the tenants were “displaced persons” in that their relocations were a ‘direct result’ of the City acquiring” the property. The Court of Appeals said yes. The only reason the tenants were relocated was because the City required the property to be vacant as a contingency under the contract. “There was no other reason for the landlord to force the tenants to relocate”

Was the acquisition in advance of a condemnation action? Even if a tenant is displaced, it is not entitled to recovery unless the landlord’s property is acquired “through negotiation in advance of a condemnation action.” K.S.A. 2015 Supp. 26-518. A tenant must show that condemnation was threatened or some affirmative action was taken in that direction. The City had sent an email to the landlord saying “I don’t want the City to have to exercise its eminent domain power . . . should [the tenant] refuse to move to its new location.” The district court found this and other emails exchanged between the landlord and the City did not show a threat to exercise eminent domain. The Court of Appeals disagreed, finding that the City clearly intended for the landlord to be aware of its right to condemn, but said the trier of fact should decide if the City’s actions reached the level of a threat of condemnation, and remanded for this determination.



Condemnation – Inverse Condemnation – Breach of Covenants

Violation of residential covenants by KDOT is compensable taking as inverse condemnation.

Creegan v. State, ____ Kan. ____, ____ P.3d ____ (2017). The Kansas Supreme Court ruled that a violation of restrictive covenants by a party with condemning authority could be compensable as a taking under the Fifth Amendment of the United States Constitution.

What happened. A Declaration of Restrictions was filed in 1978 against land in a subdivision in Johnson County,

restricting use to single-family residence purposes. KDOT purchased a sizable portion of land in the subdivision in 1999. It put trailers on the property in 2005 and used the land for various construction purposes in subsequent years, eventually building permanent bridges and pavements on a number of the lots. Homeowners in the subdivision filed suit in 2012 claiming inverse condemnation.

Decisions in the lower courts. The District Court granted summary judgment in favor of KDOT, finding that violation of restrictive covenants was not a physical “taking” that is compensable as inverse condemnation. The Court of Appeals reversed, holding that restrictive covenants are real property interests and that the homeowners were entitled to compensation for damages to those property interests.

Supreme Court. The Kansas Supreme Court held that it doesn’t matter if the restrictive covenant was a real property interest or a contractual right – “For purposes of eminent domain – and, by extension, inverse condemnation – each is ‘property’ requiring just compensation under the Fifth Amendment if taken by the State.” (The State has given KDOT authority to condemn property for public purposes.)

KDOT argued that the homeowners needed to show physical damage which resulted from the violation in order to receive compensation under the Kansas Eminent Domain Procedures Act. The Supreme Court disagreed, noting that the EDPA is read to include intangible rights, including interests in land.

The Court remanded the case to the District Court to determine the amount of “just compensation” that was due the homeowners. The Supreme Court said this determination of damages will include two possible components: (1) compensating homeowners for damage caused to their land by KDOT’s nonconforming use; and (2) damages for the “taking of their rights to control or the use of KDOT’s parcel” which is the difference between the fair market value of the homeowners’ land if KDOT had complied with the restriction, compared to the fair market value of their land with KDOT’s nonconforming use.

Contract

Waiver of title objection; breach of implied duty of good faith and fair dealing; straw buyer.

Cude v. Tubular & Equipment Service, LLC, ____ Kan. App. 2d ____, 388 P.3d 170 (2016). A purchase contract to sell property for \$80,000 contained a common requirement for the Buyer to deliver the property free from encumbrances except those of record. Buyer objected to the encroachment of a neighbor’s mobile home onto the contract property, but the Buyer’s attorney later wrote that the Buyer and neighbor had reached an agreement to have it removed. After that, the Buyer attempted to renegotiate the price, but eventually notified the Seller the day before closing that it would not close because of the encroaching trailer.

Seller then listed the property and sold it to a straw buyer for \$45,000. Four days after the closing, the straw buyer contracted to sell the property to the original Buyer for \$50,000 and closed five days later. Seller then sued the original Buyer and obtained a judgment for breach of contract.

The Court of Appeals found that the letter saying the Buyer and neighbor had reached an agreement regarding the mobile home encroachment was a waiver of this encumbrance on the title. Moreover, Seller may have been able to remove this objection if Buyer had not written that the neighbor had agreed to remove it.

The Court also noted that under Kansas law, every contract (except employment contracts) has an implied duty of good faith and fair dealing. In light of this, the court concluded that to allow the Buyer to terminate the first contract under these circumstances and then purchase the property through a straw buyer for \$35,000 less would allow the Buyer to “skirt the implied duty of good faith and fair dealing.” Judgment was affirmed against the Buyer for breach of contract by failing to close the original contract.

Fraudulent Concealment

Buyer stated against Seller a claim for fraudulent concealment of an easement of record not listed in the title commitment Seller provided.

Gardner Group, LLC v. Commonwealth Land Title Insurance Company, ____ Kan. App. 2d ____, ____ P.3d ____ (2017). Gardner Group, LLC (Gardner) purchased a tract of land on May 29, 2007 from SMS Ventures, Inc. (SMS) to develop for commercial use. Under the contract, SMS was to provide merchantable fee title and title insurance. Commonwealth Land Title Insurance Company (Commonwealth) issued a title insurance policy to Gardner. In 2014 Gardner learned of an ordinance passed in 2005 imposing an avigation easement and limiting the height of buildings that could be built on the property. The ordinance was enacted after Randall Sparks, an officer of SMS, applied to rezone the land. The easement had not been disclosed in the title commitment or by the sellers in 2007.

Gardner sued Commonwealth under the title insurance policy and sued SMS and Sparks for, among other claims, fraudulent concealment, because they had not disclosed the existence of the easement at the time of the sale. The issue at this stage of the case was whether Gardner’s complaint of fraudulent concealment stated a cause of action against SMS and Sparks.

A viable claim of fraudulent concealment required, among other elements, that the defendants were under duty to communicate to Gardner material facts that they knew about, but that Gardner could not discover in the exercise of reasonable diligence, and that Gardner justifiably relied on the defendants to communicate the material facts to Gardner.

SMS and Sparks argued that they had no duty to disclose the existence of the easement and so there could be no claim for fraudulent concealment. Gardner argued that a duty arose because SMS and Sparks had actual knowledge of the easement and either knew or should have known that Gardner did not. The court noted that under the purchase contract, SMS had a duty to provide merchantable fee simple title if possible, and to provide Gardner with a title commitment and title insurance. **The court accepted the argument that when SMS received the title commitment which failed to identify the easement about which it knew, the fact that it did nothing to disclose the easement’s existence was sufficient to support a fraudulent concealment claim.**



SMS and Sparks also argued it was not possible to fraudulently conceal the ordinance giving rise to the easement because it was a matter of public record and therefore, Gardner was charged with constructive notice of it under K.S.A. 58-2222. The court disagreed, noting that recording acts are not intended to protect those who commit fraud, and can accomplish their purposes without protecting those who make misrepresentations against liability.

SMS and Sparks argued further that they were protected from liability by contract clauses specifying the land was sold “as is” with a waiver of any disclosure requirements on the seller. However, Sparks had signed an Affidavit of Seller on behalf of SMS which stated he had “no knowledge of other discrepancies . . . nor other facts by reason of which title to or possession of the real estate might be questioned.” The court noted that **when a buyer’s reasonable pre-purchase inspection does not reveal a seller’s false representation, a contractual waiver does not bar a claim of fraudulent misrepresentation.** Since the reasonableness of a buyer’s inspection is a question of fact, the court found that Gardner could be entitled to relief and that “plaintiff has stated a plausible claim that it justifiably relied on SMS’s affidavit Spark’s silence, and the absence of any note of the avigation easement in the title opinion, and then changed its position in reliance upon these facts.”

Finally, the court rejected SMS and Spark’s argument that the fraudulent concealment claim was time barred because Kansas law imputes constructive knowledge of the

contents of the public records and the fraud could have been discovered by a search of the public records. The court found that Gardner's actual awareness of the fraud controlled.

Homestead – Judgment Liens

Homestead exemption protects property from judgment for repairs.

In re Fakhari, 554 B.R. 250 (Bankr. D. Kan. 2016). A roofing contractor/ creditor filed a motion to reconsider a Bankruptcy Court decision which we reported last year as follows:

Original Decision

In re Fakhari, 545 B.R. 303 (Bankr. D. Kan. 2016). Roofing company repaired a homeowner's roof but wasn't paid for the work. It did not file a mechanic's lien, but instead sued and obtained a money judgment against the homeowner for the unpaid work. The homeowner later filed bankruptcy and the roofing company did not file a claim or object to the homeowner's Chapter 13 plan. After confirmation of homeowner's plan, the roofing company sought relief from stay to foreclose its judgment in state court.

The Bankruptcy Court denied relief from stay because the roofing company did not have a judgment which attached as a lien against the homestead. Kansas homestead laws exempt a homestead from "forced sale under any process of law" with exceptions, one exception being "for the erection of improvements thereon." K.S.A. 60-2301 and Kan. Const. Art. 15, § 9.

The court noted that "repairs" are not considered "improvements" to property and thus do not meet the exception from the homestead law protections. (The same distinction exists under the mechanics' lien statutes.) The evidence from the state court case showed roofing company's work was for repairs, and not improvements to homeowner's property, so its judgment didn't attach to the homestead. The motion for relief was denied because the roofing company had no lien to foreclose.



Decision on Motion to Reconsider

Judge Berger denied the roofing contractor's motion to reconsider this decision because there was "(a) no change in the controlling law; (b) no new evidence; and (c) no need to correct clear error or manifest injustice." The Court noted that the roofer failed to file a mechanic's lien, failed to file a proof of claim, and failed to object to dischargeability of its debt. Under Kansas exemption laws, the roofer did not have a lien that attached to the homestead.

Insurance – Cancellation of Coverage

Loss not covered where insurance company had previously mailed notice of cancellation but homeowner never received notice.

Arnold v. Foremost Insurance Company, 53 Kan. App. 2d, 379 P.3d 391 (2016). Arnold applied for insurance coverage for a house in October 2012. He received the policy by mail and paid the annual premium in full. For reasons not given in the opinion, the insurance company later sent notice of cancellation in December 2012, effective January 14, 2013, and enclosed a check for a refund for the unused portion of the premium. The house was damaged by hail in May 2013. Arnold filed a claim and the insurance company responded that it had previously cancelled the policy.

Arnold sued, claiming the company gave improper notice of cancellation, and that it had a duty to inquire why he had not cashed the refund check. The Court of Appeals rejected both claims.

The insurance company had followed the requirements stated in the contract: notice of cancellation was sent to the address in the policy and "proof of mailing will be sufficient proof of notice." The court said the law did not require actual notice of cancellation, just compliance with the notice requirements of the insurance contract.

The court also found that Kansas law did not require the company to inquire why its insured had not cashed a refund check.

Landlord and Tenant

Three-day notice to quit was proper. Collection of attorneys' fees permitted in a commercial lease.

CBK Properties II, LLC v. La Tinajera, LLC, 2016 WL 1746846 (D. Kan. 2016) (unpublished opinion). In an eviction case, tenant claimed that the landlord had not given proper three-day notice to quit as required by Kansas statutes. The District Court found that the notice requirements under the Kansas Residential Landlord Tenant Act (KRLTA) were inapplicable because this was a commercial lease, and that the landlord had complied with the three-day notice requirements of K.S.A. 61-3803. That statute applies to "lawsuits brought to evict a person from possession of real property or of an interest in real property."

The Court also recognized that the Kansas Court of Appeals has held that in the absence of a statutory prohibition, a commercial lease clause for collection of reasonable attorneys' fees is enforceable in Kansas. The KRLTA prohibits collection of attorneys' fees, but again, this does not apply to a commercial lease.

Landowner Liability

Landowner not required to cut trees at a rural intersection.

Manley v. Hallbauer, ____ Kan. App. 2d ____, 387 P.3d 185 (2016). A man was killed in a car accident at the intersection of a rural gravel road. His family sued the landowner of the property adjoining the intersection, claiming the landowner should have trimmed trees which blocked the view of the intersection.



The Kansas Court of Appeals found the landowner was not liable. "Under the common law and Kansas precedent, a rural landowner is not required to cut down the trees on his or her property to maintain or improve visibility at an adjacent intersection."

Lender Liability

Debtors' claims against mortgage lender for breach of contract, violating Fair Debt Collection Practices Act and Kansas Consumer Protection Act dismissed.

Larkin v. Bank of America, N.A. (In re Larkin), 553 B.R. 428 (Bankr. D. Kan. 2016). Debtors filed suit in federal court alleging breach of contract and violations of the Fair Debt Collection Practices Act ("FDCPA") and the Kansas Consumer Protection Act ("KCPA") against their mortgage lender. Lender was successful in having the case transferred to the bankruptcy court since the claims were related to debtors' bankruptcy case. The bankruptcy judge granted lender's motion to dismiss debtors' claims.

Debtors' breach of contract claim failed because it was related to a 2010 loan modification agreement that was subsequently replaced by a different loan modification agreement in 2015. The bankruptcy judge found the 2015 loan modification agreement extinguished the 2010 loan modification agreement.

Debtors' claim that lender violated the FDCPA failed because lender was not a "debt collector" as defined by the FDCPA. Lender originally loaned the money to debtors in 2007, debtors listed lender as their mortgage lender in their bankruptcy filing and lender had been the mortgage servicer since at least 2011. A lender collecting its own debt, as in this case, is excluded from the definition of a "debt collector" under the FDCPA.

Finally, debtors' claim that lender violated the KCPA also failed because the bankruptcy judge found lender was not a "supplier" as defined by the KCPA. The KCPA's definition of a "supplier" specifically excludes "any bank. . . which is subject to state or federal regulation with regard to disposition of repossessed collateral by such bank. . . ." K.S.A. 50-624. The bankruptcy judge rejected debtors' argument that the exclusion in the definition did not apply in this case since their lender was not disposing of repossessed collateral. In addition, even if debtors' lender was a "supplier" under the KCPA, debtors had remedies against lender under the Bankruptcy Code and the Bankruptcy Code preempted the KCPA.

Lender Liability

Bankruptcy trustee's claims against lender fail.

Parks v. Wells Fargo Bank, N.A. (In re Segraves), ____ F. Supp. 2d ____ (D. Kan. 2017). A lender foreclosed a residential mortgage and told the debtor by phone to vacate the property before the sheriff's sale scheduled for mid-September. The debtor complied by moving out, but the sale didn't take place until sometime the following year. After the debtor filed bankruptcy, the bankruptcy trustee brought several claims against the lender on behalf of the debtor. All failed.

Kansas Consumer Protection Act. The trustee claimed that the bank's actions violated the KCPA as deceptive acts and practices, and unconscionable actions. The Court found that the KCPA did not apply because the alleged acts occurred after the lender had obtained a judgment. At that point, the note and mortgage merged into the judgment and the consumer relationship no longer existed; the lender was only seeking to enforce that judgment.

Also, the KCPA only authorizes consumers (and the attorney general) to bring claims; it does not permit a trustee acting on behalf of the consumer to enforce the Act.

Misrepresentation and Fraud. The trustee also claimed that the statements made to the debtor as to the timing of the sheriff's sale were negligent misrepresentations and fraudulent. The court disagreed, saying that the lender owed no duty to the debtor because an adversarial relationship existed between them after entry of the judgment.

Conversion. Finally, the trustee claimed that the telephone call telling the debtor to vacate the residence amounted to conversion of their personal property. Conversion is the "unauthorized assumption and exercise of a

right of ownership” over someone else’s property. The court said the phone call alone did not show “any acts of physical interference with possession.”

Mechanic’s Lien

When a bond is filed to secure payment for a mechanic’s lien, technical defects in the lien that might have invalidated the lien are moot and an action on the bond can proceed on the merits of the claim.

Wagner Interior Supply of Wichita, Inc. v. Dynamic Drywall, Inc., ____ Kan. ____, 389 P.3d 205 (2017). Dynamic Drywall, a subcontractor on a hotel construction project, obtained materials for the job from Wagner Interior Supply of Wichita, but failed to pay for them. Wagner filed a mechanic’s lien statement. The general contractor then filed a bond to discharge the lien under K.S.A. 60-1110 so the owner of the property could obtain refinancing. The general contractor argued that Wagner’s lien had been defective and that the defects could be raised as defenses on the bond claim. The district court granted summary judgment to the general contractor. Wagner appealed.



The Kansas Supreme Court affirmed the Kansas Court of Appeals’ reversal of the district court decision. The Court ruled that K.S.A. 60-1110 is unambiguous. When a mechanic’s lien is discharged by the filing of a bond, the perfection of the lien becomes moot. The issue is not whether the now-discharged lien was valid, but whether the claimant has a valid claim for payment. Because Wagner provided materials used in the project but was not paid for them, Wagner was entitled to make a claim on the bond.

Mineral Interests – Lapse

To file a claim under the mineral lapse statute, K.S.A. 55-1604, a person claiming ownership by intestate succession need only claim to be an owner of the minerals; no determination of ownership needs to be made before the claim is filed.

Nickelson v. Bell, 53 Kan. App. 2d 8, 382 P.3d 471 (2016). Ronald and Betty Nickelson filed an action to quiet title to the unused mineral rights in the land in which they were surface owners in Graham County, and published notice of the potential lapse of the outstanding mineral interest under the Kansas mineral lapse statutes, K.S.A. 55-1601 *et seq.* Under the statutes, unused mineral interests will generally lapse and revert to the surface owner of the property if not used for a period of 20 years. The owner of the mineral interest can prevent the mineral interest from lapsing by filing a claim under K.S.A. 55-1604 prior to expiration of the 20-year period or within 60 days after the surface owner’s publication of notice of a potential lapse.



People who claimed ownership in the mineral interests responded to the quiet title action by filing such claims and filing answers in the quiet title action. Among those people was a group who claimed to have inherited mineral interests in the property through intestate succession. They had never filed a determination of descent proceeding or otherwise definitively established that the mineral interests had passed to them. The Nickelsons asked for summary judgment against these defendants, arguing they had not proved they owned the mineral rights in the absence of a judicial decree of descent or a probate proceeding. Therefore, according to the Nickelsons, these defendants were not owners of mineral rights.

The district court rejected that argument, held a hearing on ownership issues, and concluded that the defendants indeed owned the mineral interests by intestate succession. The Nickelsons appealed, raising a single question: whether intestate descendants who have not obtained a decree of descent “constitute owners capable of filing a claim under our Kansas mineral lapse statute.” Their theory was that in order to be “owners” under the mineral lapse statute, there needed to have been a decree of descent from a court either before they filed a claim, or before the end of the 60-day limit for filing their claim. Otherwise, the defendants were only “*potential* owners.” The Court of Appeals disagreed, under established Kansas law, in cases of intestate succession property passes immediately at the decedent’s death,

and a decree of descent does not transfer title but only declares who acquired the property.

Partition

Share of remainder interest granted in a divorce decree was subject to partition.

Einsel v. Einsel, 304 Kan. 567, 374 P.3d 612 (2016). A disagreement over the terms of a 1994 divorce decree resulted in the Supreme Court concluding that partition of the disputed interest was proper. The decree awarded to the wife (Carol) "[F]orty percent (40%) of the remainder interest of the inheritance received by [Randy, the husband] during the marriage, on the condition that [Randy] may opt to pay [Carol] the sum of \$22,500.00 within six (6) months of the date of hearing, in which case [Randy] shall receive all of the remainder interest."

Randy did not pay the \$22,500. Carol filed a partition action in 2010, asking the court to grant her a 40% interest in all land and minerals owned by Randy.

Randy argued that Carol only had an interest in the land and minerals valued at \$22,500. Carol argued that she had a 40% interest in all of Randy's land and minerals. The Supreme Court found that the decree gave Carol an interest in Randy's remainder interest in land and minerals, and not just a monetary judgment. The case was remanded to the district court to determine the extent of the 40% interest.

Premises Liability

Snow removal ordinance defined standard of care.



Kaminski v. United States, ____ F. Supp. 3d ____, 2016 WL 6524017 (D. Kan. 2016). Charles Kaminski slipped and fell on an icy sidewalk outside of the post office in Bonner Springs early on a Monday morning. He sued the United States of America for negligence in causing his injuries. The government sought dismissal or summary judgment, arguing that an adjoining landowner owes no duty to remove naturally-occurring ice and snow from an abutting public sidewalk.

Although a Kansas property owner does not have a common law duty to clear abutting public sidewalks of natural ice and snow accumulations, the Bonner Springs Municipal Code required that abutting landowners remove snow and ice accumulations within 48 hours of the end of a snow and ice event. The district court concluded that the ordinance established a standard of care that, if violated, could give rise to liability for negligence because the injury the plaintiff suffered was of the character that the city ordinance was intended to prevent. The court found that there were triable issues of fact precluding the entry of judgment in favor of the defendant.

Right of First Refusal

Owner wrongfully denied Buyer ability to exercise Right of First Refusal.

Trear v. Chamberlain, ____ Kan. App. 2d ____, 388 P.3d 607 (2017). This case involves the interpretation and enforcement of a right of first refusal (ROFR). In 1986, Trear purchased land from the Chamberlains. The purchase contract also gave Trear a ROFR to purchase the adjoining land. It read:

6. The parties mutually agree that in the event the real estate presently owned by SELLERS [the Chamberlains] which is adjoining the real estate which is the subject of this Contract, is offered for sale by SELLERS, SELLERS shall extend unto PURCHASER [Trear] the first right of refusal to purchase said adjoining real estate at a price and upon terms mutually agreed upon by the parties. If the parties cannot agree, this right of first refusal shall lapse and thereafter be considered null and void.

The contract was also "binding upon the heirs, legal representatives, and assigns of the parties hereto."

One of the sellers died and the survivor, Susan Chamberlain, offered the property (73 acres with a house) to Trear for a set price, specifying a response date. Trear did not respond nor make a counter offer. Chamberlain later sold a portion of the tract (64 acres without the house) to her daughter for one-third of her original offer to Trear. Trear sued Chamberlain and her daughter to enforce his ROFR and to transfer the property to him instead. The district court ruled in summary judgment that the ROFR language violated the rule against perpetuities; the description of the land as the "adjoining property" satisfied the Statute of Frauds; and Trear did not forfeit his ROFR by failing to respond to Chamberlain's offer. Both parties appealed.

The Court of Appeals ruled in favor of Trear (the Buyer). It found the language did not violate the rule against perpetuities, did not violate the Statute of Frauds, and Trear did not forfeit his ROFR.

Rule Against Perpetuities. The common law rule against perpetuities voids any interest which does not vest within 21 years after a life in being. (The 1986 contract was

before Kansas enacted the Uniform Statutory Rule Against Perpetuities. See K.S.A. 59-3405(a).) Kansas law has evolved where “[A] document should be interpreted where feasible to avoid the conclusion that it violates the rule against perpetuities.” The Supreme Court has also said that the purpose of the rule “is to avoid land being wasted by ancient encumbrances. Land is more valuable if you can sell it.” In an effort to find these documents enforceable, Kansas courts seek to find the ROFR personal to the grantee, and not running with the land. That was the result here. The Court said the ROFR was “binding upon heirs” of the Seller, but was personal to the Buyer “as long as [the Buyer] is alive.”

Statute of Frauds. A ROFR is an interest in real estate and subject to the statute of frauds. K.S.A. 33-106 requires a contract for sale of land to be in writing and signed by the parties to be charged. In addition, the written document must contain the material terms and describe the real estate with reasonable certainty.

The Court found that the description of the property as the land owned by the sellers and “adjoining the real estate which is the subject of this Contract” complied with the statute of frauds, because there was no other land owned by the Chamberlains (grantors) which could have adjoined the Trear tract.

Exercising the ROFR. Did Trear lose his ROFR by not responding to the original offer to sell at a fixed price? No. The Court said that an offer by the owner to sell land at a certain price does not trigger the ROFR. A ROFR means that the owner must present a third-party offer to the holder of the ROFR and allow the holder of the right to purchase the property on the same terms as the offer. “[Chamberlain] must extend a chance to Trear to purchase the property at the price that the third party is offered.” Chamberlain did not do this, denying Trear his right of refusal.

STAR Bonds

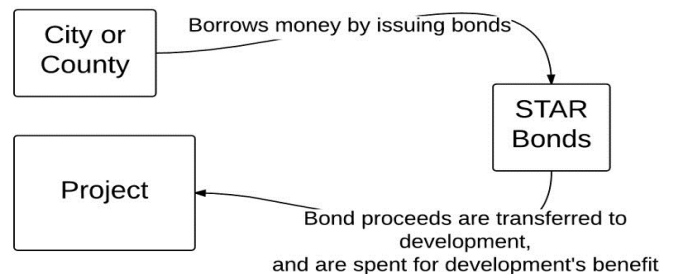
A “museum facility” that shares common walls with an adjacent building can qualify as both a “separate” structure and “newly-constructed” for the purposes of K.S.A. 2016 Supp. 12-17,162(p).

Op. Att’y Gen. No. 2017-3 considered whether a building can meet the definition of a “museum facility” for the purposes of the STAR Bonds Financing Act if it shares common walls with an existing structure. K.S.A. 2016 Supp. 12-17,162(p) defines “museum facility,” the costs for which may be “project costs” for the purposes of a STAR bond project plan, such that it must be a “separate newly-constructed museum building . . . not [] located within any retail or commercial building.”

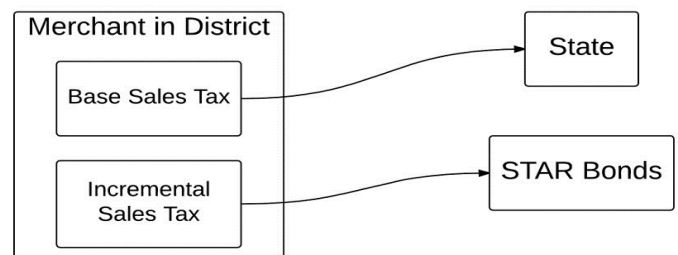
The Kansas Attorney General determined that because the Legislature prohibited a museum facility from being

within a retail or commercial building, it recognized that in other cases, such a facility could be within another building. Therefore, “separate” does not mean that the facility needs to be “physically separated by air on all sides.” Instead, the museum facility must merely be “housed in a museum building that is distinct and surrounded by clearly identifiable and substantial boundaries,” which is not inconsistent with the building sharing common walls with other buildings.

Formation of a STAR Bonds District



After Formation



Similarly, in the Attorney General’s view, “newly-constructed” requires only that “the museum building when viewed overall is newly constructed” and that not every facet of it needs to be new. Therefore, incorporating structural components of existing structures does not prevent the museum building from being “newly constructed.”

Tax Foreclosure

Debtor too late to redeem property from tax foreclosure.

In re Cooper, Inc., ____ B.R. ____, 2017 WL 571480 (D. Kan. 2017). This case illustrates the Kansas tax foreclosure process and the requirements for a taxpayer to redeem its property from a tax foreclosure.

Sedgwick County filed a tax foreclosure against real estate owned by Cooper, Inc. The Kansas tax foreclosure process works like this: taxes become delinquent if not paid by May 10. The County Treasurer publishes a list of delinquent properties in July, stating that the properties will be “sold” to the county for the amount of the delinquent taxes on or after the first Tuesday in September after the notice. The county is the only party allowed to bid at the September “sale.” The purpose of the sale is to

perfect the county's tax lien and start the redemption period for the taxpayer.

After the September sale, the county sells the property to the public at a tax foreclosure sale, but must first allow the taxpayer time to redeem the property by paying the delinquent taxes and costs. The length of the redemption period depends on the type of property: abandoned property, one year; homestead, three years; and all other property, two years. The taxpayer's last day to redeem is the day before the tax foreclosure sale to the public.

Here, the Cooper property had been through the process, Cooper had not redeemed the property before the sale, and the property was sold at a tax foreclosure sale to a third party. Cooper filed bankruptcy after the tax foreclosure sale, but before the sale had been confirmed and a sheriff's deed issued to the buyer.

The bankruptcy court granted the county relief from stay so it could complete the tax foreclosure and issue the sheriff's deed. The court found that Cooper's time to redeem the property had expired before the bankruptcy filing, and it only held "bare legal title and possession subject to the rights of the purchaser at the foreclosure sale."

Taxation – Evidence of Value

Taxpayer prevails based on County's uncontested valuation showing decrease in value.

In re Equalization Appeal of Wagner, 304 Kan. 587, 372 P.3d 1226 (2016). A taxpayer appealed the valuation of her Johnson County residence for 2011 and 2012, and these appeals are intertwined in this decision.

The County appraised the property in 2012 at a value 2.94% less than the 2011 appraised value determined by the Court of Tax Appeals ("COTA") based on a "good+quality rating." In the meantime, the 2011 valuation went to the Kansas Court of Appeals. The result was a decrease in the 2011 valuation to \$494,200.



COTA later issued an order that the 2012 valuation was the same as 2011 -- \$494,200. The taxpayer claimed the 2012 value should reflect the 2.94% decrease in value that the County established in its original 2012 appraisal.

The Supreme Court noted that principles of *res judicata* and collateral estoppel did not apply in matters of taxation because taxes are levied annually and this appeal was for a different tax year. K.S.A. 2012 Supp. 79-1460(a)(2) prohibits a county from raising a valuation the taxable year after the value has been reduced unless it provides "documented substantial and compelling reasons." The County conceded that it did not have substantial and compelling reasons to increase the 2012 valuation, and argued that the 2012 value should remain the same as 2011 unless the taxpayer could prove her home had decreased in value. The taxpayer argued that the County's original 2012 appraisal showed a decline in value of 2.94% from 2011, albeit at the higher values claimed before they were declined in the appeal process. The Supreme Court agreed that the "uncontested evidence which the County produced" showed the home's value declined 2.94% from 2011 to 2012. Reversed and remanded with instructions to value the home at \$479,600 for tax year 2012.

Transfer on Death Deed

Grantee's signature of grantor's name to a deed valid under amanuensis rule.

In re Estate of Moore, ____ Kan. App. 2d ____, 390 P.3d 551 (2017). Roxie Moore owned 360 acres outside of Cambridge, Kansas. She had one child, Harvey, who married Maureen. They had two sons. In 1991, Roxie suffered a stroke which significantly impaired her ability to communicate. In 1992, Harvey and Maureen divorced and Harvey moved in with Roxie. In 2003, Roxie moved into an assisted living facility; Maureen was there several times each week but Harvey never visited his mother. In 2004, Roxie made Maureen her attorney-in-fact under a durable power of attorney. Shortly thereafter at Roxie's request to Maureen, an attorney drafted a transfer-on-death (TOD) deed transferring the 360 acres to Maureen upon Roxie's death. Roxie wanted Maureen to eventually convey the property to Maureen's sons (Roxie's grandsons). Maureen signed Roxie's name to that deed.

In 2009, Roxie died without a will. Under the law of intestate succession, the property would have gone to Harvey but instead, under the TOD deed, the property became Maureen's. Maureen then deeded the property to the sons she had with Harvey via her own TOD deed and then via a warranty deed a few years later. Litigation ensued over whether Maureen had legal authority to sign Roxie's name to the deed and transfer Roxie's property to herself at Roxie's death. The trial court concluded in summary judgment that, as a matter of law, Maureen did not have authority under the durable power of attorney to sign the deed as attorney-in-fact. However, after a trial, the trial court concluded that the signature was nevertheless valid because Roxie had intended to use Maureen as an instrumentality to sign her name – applying the amanuensis rule that a party may attach a signature to an instrument by the hand of another. The testimony at trial was that Roxie had been in bed in pain and had told Maureen "I want you to sign it."

Harvey appealed to the Kansas Court of Appeals, which found that Kansas law recognizes the use of an amanuensis and that it is consistent with Kansas public policy. The Court of Appeals recognized the potential for fraud or self-dealing and concluded that risk could be addressed by adopting a rule shifting the burden of proof of validity to an interested amanuensis. Following a California case, the Kansas rule is now that the signature of another's name by an amanuensis who benefits from the instrument is presumptively invalid. The presumption of invalidity can be overcome by a preponderance of evidence showing that the act of signing the instrument was "merely a mechanical act." Such a showing in this case necessarily involved the court examining the circumstances surrounding the signature and whether the transaction was "free from fraud and undue influence."

Harvey contested whether the TOD deed met the requirements in the Kansas transfer-on-death statutes that the signature be acknowledged and that the signature be the signature of the record owner. Both arguments were based on the premise that Maureen had signed the deed in a representative capacity and Roxie had not herself signed it. The Court of Appeals rejected Harvey's arguments, noting that as an amanuensis, Maureen was not an agent signing in a representative capacity – "the signature is considered Roxie's own."



Trespass – Conversion

Commencement of the limitations period for an underground mining trespass depended on what investigation a reasonable landowner would have done and what it would have shown; plaintiff entitled to enhanced damages for bad-faith trespassing.

Armstrong v. Bromley Quarry & Asphalt, Inc., 305 Kan. 16, 378 P.3d 1090 (2016). Bromley Quarry engaged in sub-surface limestone quarrying. It crossed over the boundary of the property it was leasing and extracted and sold the rock. Adjoining landowner (Armstrong) sued on

the hybrid theory of trespass on the property and conversion of the rock. The trial court limited Armstrong's recovery to damages arising from rock extracted in the two years prior to the commencement of the action and computed the damages by deducting Bromley's costs of extracting the rock from the value of that rock. Armstrong appealed and the case ultimately reached the Kansas Supreme Court – principally on the issues of whether damages could go back farther than two years and whether the plaintiff was entitled to the full retail price of the extracted rock.

The Kansas Supreme Court applied the two-year statute of limitations period of K.S.A. 60-513, subject to the provision in K.S.A. 60-513(b) that it did not commence until "the fact of injury [become] reasonably ascertainable." Armstrong had been suspicious that Bromley had been removing rock from the Armstrong property based on past dealings with Bromley, and in the 3-5 years before filing the lawsuit, Armstrong had heard and felt blasting. Although Armstrong examined the maps Bromley had filed with the Kansas Geological Survey, which inaccurately showed that Bromley was doing no extraction from the Armstrong property, and had unsuccessfully tried to gain access to the mine to investigate through an injunction in 1996, Armstrong did not have any boring done on the property or assert any other legal rights to determine the extent of the mining until filing the lawsuit. The Supreme Court reasoned that the house shaking and suspicions of unauthorized mining triggered Armstrong's obligation to investigate whether Bromley was trespassing and extracting rock, but the statute of limitations issue had been on summary judgment, and the record did not show whether a reasonably-prudent landowner would have investigated further, nor whether the other means of investigation that may have been available "would have revealed the trespass and conversion." Therefore, the Kansas Supreme Court reversed the summary judgment limiting damages to the previous two years and remanded the case.

As to the measure of damages, the Kansas Supreme Court noted that for a hybrid trespass-conversion claim, the question of whether the defendant's expenses of extraction can be deducted in calculating damages depends on whether the defendant trespassed in good faith. The trespasser has the burden to show the trespass was done in good faith in order to be entitled to deduct its expenses of extraction. The Supreme Court held that the trial court erred in assessing Bromley's good faith by looking at Bromley's subjective intent. The question was whether Bromley had "an honest and reasonable belief in the superiority of [its] title" to the property it was mining. Whether a trespasser has made a good-faith mistake about whose property is being mined is not enough – the trespasser must also show a reasonable basis for that mistaken belief. The Court concluded that there was no substantial evidence that Bromley had an honest and reasonable belief that Bromley had the right to be on, and extract limestone from, the Armstrong property. There-

fore, Armstrong was entitled to “enhanced value damages” that do not take into account Bromley’s costs in producing the limestone that Bromley converted.

Zoning

Counties may not apply zoning codes to beef cattle feedyards or dairies, nor impose construction standards on structures used solely for such agricultural purposes, but can impose a pre-construction permit process to determine whether a proposed structure is exempt.

Op. Att’y Gen. No. 2016-10 considered the application of state statutes which exempt land and buildings used for agricultural purposes from zoning regulations. The question presented was the extent to which counties may apply zoning rules and building codes to cattle feedyards and dairies, and structures on those properties such as feed mills, scale houses, offices and machine shops. The Kansas Attorney General opined that other than floodplain regulations, land used for “agricultural purposes” is exempt from zoning, and that if the structures were used solely for agricultural purposes, counties may not impose building codes on them. However, in order to assess whether a particular structure is or is not exempt, counties may establish pre-construction permit processes as long as the purpose is to determine whether a proposed structure is exempt.

Zoning

Denial of zoning approval for a cell phone tower was permissible notwithstanding that city violated the Federal Telecommunications Act of 1996 by failing to issue a written decision contemporaneously with the denial.

Stout & Company, LLC v. City of Bel Aire, Kansas, 2016 WL 3759440. Stout & Company applied for a special use permit from the City of Bel Aire (the “City”) to permit the construction and operation of a cell phone tower on a site within the City. The City denied the application. Stout & Company then filed an action in federal court challenging that denial under the Federal Telecommunications Act of 1996. That Act limits the authority of local governments to regulate the placement of wireless communication facilities by limiting what factors they can consider in zoning decisions, banning regulations that have the effect of prohibiting the provision of personal wireless services, and imposing procedural requirements that decisions denying requests to construct wireless communications facilities “be in writing and supported by substantial evidence contained in a written record.”

Stout & Company’s specific claims were that: “1) Bel Aire failed to provide written reasons for the denial essentially contemporaneously with its decision; 2) Bel Aire’s denial was not supported by substantial evidence; and 3) the denial effectively prohibits the provision of personal wireless services.”

As to whether the City had complied with the requirement that its denial be in writing, the district court found that the City had failed to timely provide its reasons for denial in writing because its written decision, in the form of approved minutes, was not contemporaneous with the denial. In fact, the minutes were not approved until after the litigation had commenced. However, the court found that this violation did not entitle Stout & Company to any remedy because Stout had preserved its right to judicial review of the decision notwithstanding the delay of the City in approving its minutes.



The court then turned to the question of whether the denial was based on substantial evidence. The court reviewed the record and determined that the considerations the City relied on were proper factors to be considered, and that there was substantial evidence to support the conclusions the City reached on those factors as a basis to deny the application. That analysis included the conclusion that Stout & Company failed to affirmatively show that the proposed antenna could not be located on an existing structure (a water tower). City zoning regulations required an applicant to provide an affidavit showing it had made diligent efforts to co-locate on an existing structure, but that the cost of doing so was unreasonable or that other factors made an alternate site unsuitable. But the court found that Stout simply made conclusions about the unsuitability of alternate sources without adequate explanations. This supported a finding that “the availability of an existing structure for colocation weighed against approval of the special use permit.”

Finally, the court found that Stout & Company had failed to show that the City’s denial of the permit prevented T-Mobile from “closing a significant gap in its existing services” as it claimed; and also failed to show that the facility it was proposing was “the least intrusive means” of closing such a gap. Therefore, the court rejected the argument that “the denial effectively prohibits the provision of personal wireless services.” The court entered judgment in favor of the City.

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1635 N. Waterfront Parkway, Suite 200
Wichita, KS 67206-6623
(316) 265-8591
Fax (316) 265-9719
www.adamsjones.com