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**RECENT CHANGES IN
KANSAS REAL ESTATE LAW — 2019**

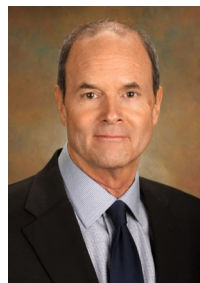
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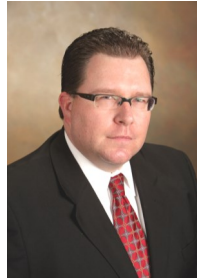
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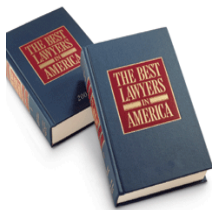
Brad Stout



Monte Vines

Preeminent Presence in Kansas Real Estate

Leading Firm in Kansas Real Estate. Adams Jones continues to receive high rankings from Chambers USA. 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 2019 *The Best Lawyers in America*®:

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Pat Hughes
Brad Stout

Commercial Litigation
Pat Hughes
Monte Vines

Land Use and Zoning
Pat Hughes

Eminent Domain
& Condemnation
Brad Stout

Litigation-Banking
& Finance
Monte Vines

Ethics & Professional
Responsibility
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Litigation-Real Estate
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Legal Malpractice
-Defendants
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Legal Malpractice-Defendants: **Monte Vines**
Eminent Domain & Condemnation Law: **Brad Stout**

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. 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 1, 2019.

Divorce – Rights of Ex-Spouse Terminate upon Divorce – 2019 House Bill 2038. Amends the Kansas Probate Code to provide for the automatic revocation of certain rights of former spouses upon divorce. Several areas affect real estate in particular.

Except as provided in the governing document, a court order or a contract relating to division of the marital property, a divorce or annulment of a marriage automatically:

- revokes any revocable disposition or appointment of property from one spouse to the other in a governing document
- revokes the nomination of a former spouse in a governing instrument to serve in a fiduciary or representative capacity
- severs the interests of former spouses in property held in joint tenancy, transforming their interests to tenants in common.

Effective date: July 1, 2019.

Economic Development Reporting – Evaluation of Economic Development Programs – 2019 House 2223. Requires the Legislative Post Audit Committee and the Department of Commerce to analyze and report on certain economic development incentive programs. These include certain income tax credits, locally granted property tax exemptions, programs under the Job Creation Program Fund and the Economic Development Initiatives Fund, and other various programs administered by the Department of Commerce.

The bill also extends the maximum maturity on bonds issued for projects under the Kansas Rural Housing Incentive District from 15 years to 25 years.

Effective date: July 1, 2019.

Public Right of Way-Wireless Services/Infrastructure – 2019 Senate Bill 68. Amends existing law to prohibit cities from requiring wireless service providers and wireless infrastructure providers to enter into franchise agreements. One of the amendments allows a city to govern the use of a public right-of-way by requiring a “small cell facility deployment agreement” or master license agreement through permitting requirements, municipal ordinances or a combination of the two. It also permits cities to charge fixed right-of-way access fees for the use of public right-of-ways.

Effective Date: July 1, 2019.

Real Estate Licensure – 2019 Senate Bill 60* — Amends statutes related to licensing of real estate brokers and the Kansas Real Estate Commission (Commission).

For real estate broker’s licenses, changes include:

- Reducing the time from five years to three years preceding the date of application for the license for which an applicant for a broker’s license may satisfy the requirement of two years’ experience as a resident salesperson or a licensee in another state
- Increasing the pre-license education course from 24 hours to 30 hours, and no more than 45 hours, and renaming the course the “Kansas Real Estate Fundamentals Course”
- Creating a new course titled “Kansas Real Estate Management Course,” which is 30 hours to 45 hours in length and is required for original broker’s license applicants beginning January 1, 2020
- Eliminating alternative licensing criteria for any applicant living in a county with a population of less than 20,000 people
- Eliminating the \$50 late fee for licenses renewed after the renewal date, but before the license expiration date;
- Increasing the late fee from \$50 to \$100 for a license renewed after the expiration date, but before the six-month grace period ends
- Eliminating outdated references to temporary licenses and certain fees that are no longer assessed by the Commission.

For the Commission, changes include:

- Clarifying statutory requirements for deactivated real estate licenses that have not been suspended or revoked for which reinstatement is being sought
- Removing a requirement the Commission maintain all files, records, and property at its Topeka office

- Updating and eliminating certain outdated terms
- Consolidating provisions from various statutes and regulations
- Adding technical clarifying language related to fees, name changes, office locations, approved real estate courses of instruction, and Commission leadership elections.

Effective Date: July 1, 2019.

***The above summary was prepared by the Kansas Legislative Research Department.**

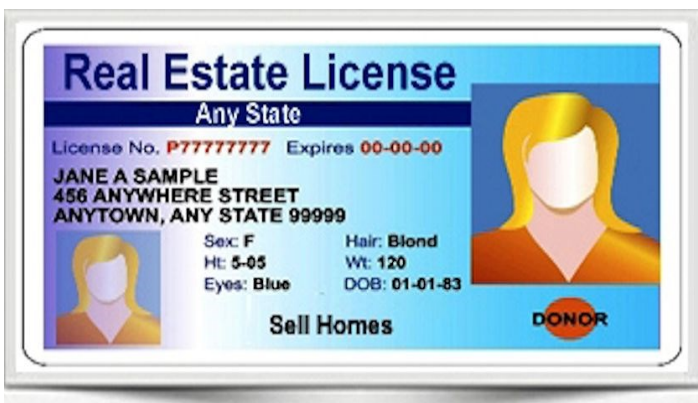
Rural Water Districts – 2019 House Bill 2085. Amends current law to require the board of a water district to reinstate any benefit unit which has been forfeited, “as long as the capacity of the district’s facilities permits” by paying back fees and a reinstatement fee.

Effective Date: July 1, 2019.

REGULATIONS

Regulations – Kansas Real Estate Commission

The Commission made several modifications to its regulations at its meeting on November 19, 2018:



- Revised the expiration date for new licenses to be the first day of the month of issuance two years after the date of issuance
- Change of last name no longer affects the expiration date of a license
- Fees increased for broker application and to open a primary or branch office
- Modified the requirements for reporting litigation and criminal charges.

K.A.R. §§ 86-1-3, 86-1-5, 86-1-19, 86-3-15. See *also* January 2019 Commission News, Kansas Real Estate Commission Newsletter.

CASES & ATTORNEY GENERAL OPINIONS

Condemnation

In order to receive relocation benefits arising following the purchase of property by an entity with the power of eminent domain, tenants must prove by a preponderance of evidence that the condemning authority would have condemned absent successful negotiations to purchase.

Nauheim v. City of Topeka, 309 Kan. 145, 432 P.3d 647 (2019). In 2011, the City authorized a public works project to replace a deficient drainage system to alleviate potential flooding within City limits. In 2013, after negotiations with the owner, the City purchased real property where commercial tenants operated their businesses. After relocating their respective businesses, the commercial tenants brought suit against the City for relocation costs.

Municipalities can acquire real property for municipal purposes either through condemnation under the Kansas Eminent Domain Procedure Act, or without resorting to condemnation. Pursuant to K.S.A. § 26-518, “whenever federal funding is not involved, and real property is acquired by any condemning authority through negotiation in advance of a condemnation action or through a condemnation action, and which acquisition will result in the displacement of any person,” the condemning authority shall provide a displaced person fair and reasonable relocation payments.

The City argued the statute did not apply because the City never intended to condemn the property had negotiations failed. The commercial tenants argued that since their property was acquired by a condemning authority through negotiations, this necessarily means the condemning authority acquired it “in advance of” condemnation.

The Kansas Supreme Court determined that in order for a displaced person to be entitled to relocation benefits when property is acquired through negotiation, such displaced person must show: (1) a negotiation resulted in the property’s acquisition before any eminent domain proceedings commenced; and (2) a condemnation would have followed had the negotiations failed. Whether a negotiation is in advance of condemnation is a question of fact that a claimant needs to prove by a preponderance of evidence.

Ultimately, the Court remanded the case back to the district court to determine where the City’s negotiations were in advance of condemnation under K.S.A. § 26-518.

Deeds

Joint tenancy deed enforced when evidence did not establish parties’ intention that the property be partnership property.

Stephens v. Ainsworth, 56 Kan. App. 2d 668, 437 P.3d 51 (2019). Stephens and Lewis purchased a cabin and 120 acres of land in Elk County. They took title through a joint-tenancy deed when they were partners in a general contracting business operating as an oral partnership. The relationship between the two became acrimonious and the partnership was dissolved, with its liabilities being settled and its assets being distributed to the partners. Stephens resided at the Elk County property and died about ten years after the partnership ended. In a contest over ownership of the property, Lewis argued that the property had passed to Lewis as the surviving joint tenant. Stephens' executor argued that the property was partnership property which Stephens obtained at the dissolution of the partnership. The district court sided with Lewis, finding that the property had never been partnership property. Stephens' executor appealed.

The Kansas Court of Appeals held that K.S.A. 56a-204(c) and (d) controlled whether the property was partnership property. Subsection (c) creates a presumption that property is partnership property when the property is purchased with partnership assets without respect to how the property is titled. Subsection (d), on the other hand, creates a presumption that property acquired in the name of one or more of the partners without reference to the partnership or to the person as a partner and without use of partnership assets is presumed to be separate, not partnership, property. Because the property in this case was acquired in the name of one or more partners, without an indication in the title of their capacity as partners or the existence of a partnership, the question of whether it was presumptively partnership property turned on whether the property was purchased with partnership assets.

The evidence was conflicting on the question of whether the property was purchased with partnership funds. As a result, the district court could have found in favor of either Lewis or Stephens, and the Court of Appeals concluded that substantial competent evidence supported the district court's findings that the property was purchased with Lewis' and Stephens' personal funds; therefore, the property was presumptively separate property and passed to Lewis as the surviving joint tenant. Although this presumption is rebuttable by evidence of the partners' objective manifestations of an intention that the property belonged to the partnership, the Court of Appeals held the district court's decision was supported by substantial competent evidence.

Lessons Learned. This litigation would most likely have been avoided if the partners had begun with a written partnership agreement and dissolved with a written dissolution agreement.

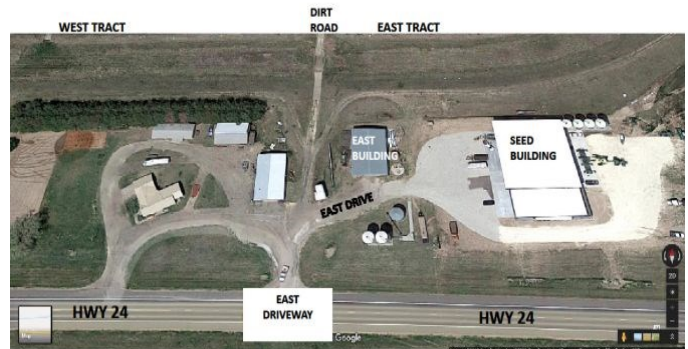
Easements

Buyer of land entitled to easements for same uses enjoyed by the seller.

DeBey v Schlaefli, ___ Kan. App. 2d ___, 437 P.3d 1011

(2019). This case involves three types of easement issues: an **implied easement**; **overburdening of an easement**, and **easement by estoppel**.

The following picture shows the property involved, generally described as the East Tract and the West Tract.



The Schlaefli Family originally owned the East Tract and the West Tract, located in Osborne County. They built and used buildings on both tracts, including a building on the East Tract called the East Building. They also used a driveway and road to access the East Building which was called the East Driveway. That's the road at issue.

Schlaefli later rented the East Building on the East Tract to DeBey, who used it for his seed business, and Schlaefli let DeBey use the East Driveway to access Highway 24. DeBey then purchased the East Tract and later purchased some more land to the East, and built a building for his seed business, still using the East Drive for access to Highway 24.

All this time, Schlaefli and DeBey thought that the dirt road that ran north and south and connected to Highway 24 was the dividing line between the East Tract and West Tract.

But ten years after DeBey purchased the East Tract, Schlaefli obtained a survey of the property line which showed that the boundary was 30 feet further into the East Tract than they had thought. This meant that part of the East Drive being used by DeBey was actually located on Schlaefli's property, the West Tract, and some of DeBey's equipment had been installed on Schlaefli's property. Schlaefli then tried to build a fence on the surveyed boundary line which would cut off DeBey's access to the driveway. DeBey sued for an injunction.

Implied Easement by Reservation or Grant. This results when a landowner uses its property in a way that "part of his or her land gives a benefit of a 'continuous, permanent, and apparent nature' to another part of his or her land," also called a "quasi-easement." This quasi-easement becomes an "implied easement" when the owner sells the land but only if the easement is "necessary for the reasonable enjoyment of the sold property."

That's what happened here. Schlaefli had created a quasi-easement by using the East Drive to access the East Tract from Highway 24. While Schlaefli owned both tracts, his use of the East Driveway gave a benefit of a 'continuous, permanent, and apparent nature' to the East Tract. DeBey obtained this access right as an implied easement when he purchased the East Tract from Schlaefli because the East driveway was reasonably necessary to use the East Tract and a new driveway was not feasible.

Easement Overburdening. An implied easement can be lost by "overburdened activity" when used for purposes beyond its intended use.

Schlaefli claimed that DeBey exceeded the purpose of the easement when he built the Seed Building and ran large trucks over the East Drive to access Highway 24. The Court of Appeals noted that there were no Kansas cases cited which discussed "overburdening of an easement."

The Court said that the test is whether the use is reasonably necessary for the enjoyment of the land "and development is reasonably ascertained by circumstances existing at the time of the conveyance." The court rejected Schlaefli's claim and concluded that DeBey's expansion of his seed business was "normal development" of the East Drive easement.

Easement by Estoppel. Schlaefli waited over 10 years before objecting to DeBey's use of the East Drive and to DeBey's equipment being located on property that was thought to be part of the East Tract before the survey was obtained. The court said this was too long and he was estopped from objecting to the easement uses.

Recap. The Court of Appeals found that DeBey had an **implied easement** to continue using the East Drive which the seller had used when it owned the property; the implied easement was not lost by **overburdening** because the expanded use of the East Drive to the Seed Building was reasonably ascertained at the time, and DeBey also had an **easement by estoppel** because Schlaefli allowed the use for over 10 years without objecting.

Comments:

Get a survey. Especially when buying a portion of land with multiple improvements on it. Look at the access. For the Seller, what is your expectation of the Buyer's access across your retained land? For the Buyer, how will you access your land? Is there an easement in place?

If there's an implied easement, or informal agreement, get it recited in a written easement and recorded before closing. Have the easement listed as an insured interest in the Buyer's title policy.

Land Use Regulation

City's refusal to permit use of single-family home for a church meeting house in light of statutes and constitutional protections of religious activities could not be resolved by summary judgment.

Roman Catholic Archdiocese of Kansas City in Kansas v. City of Mission Woods, 337 F. Supp. 3d 1122 (D. Kan. 2018). The City of Mission Woods refused to approve a request by the Catholic archdiocese and church to use a single-family home adjacent to the church as a meeting house. The archdiocese and the church brought an action against the City, contending that the City's action improperly imposed a substantial burden on a religious institution with respect to land use regulations, treated a religious institution on less than equal terms with a secular entity, completely excluded or unreasonably limited all religious assemblies, and effectively barred all religious activity in violation of the Religious Land Use and Institutionalized Persons Act (RLUIPA). They also contended that the City's action violated the First Amendment's protection for free exercise of religion and the analogous provision of the Kansas Constitution. The parties filed cross motions for summary judgment.



RLUIPA prohibits placing a substantial burden on a religious institution with respect to land use regulations. A government places a substantial burden on a religious institution when it denies "a reasonable opportunity to engage in religious activity." Mere inconvenience is insufficient. The basic question is "whether the government 'directly coerce[d]' a religious institution to continue using inadequate facilities." The burden to prove a substantial burden can be met by demonstrating the plaintiff's need to expand or relocate and that the defendant inhibited the ability to do so. However, the existence of reasonable alternatives for a religious institution to the prohibited land use renders the burden on the religious organization insubstantial. Questions of economic feasibility, delay, and

uncertainty with respect to potential alternatives and disingenuousness of regulatory conditions are also material to the existence of a substantial burden. If a RLUIPA plaintiff demonstrates a substantial burden, a defendant's zoning decision is subject to strict scrutiny – it must serve a compelling governmental interest and be the least restrictive means to achieve that interest.

The district court found that there were genuine issues of material fact about whether the church had outgrown its facility, whether the plaintiffs had a reasonable expectation of using the single-family home as a meeting house, whether the City prevented the plaintiffs from expanding their religious services, and whether the City's refusal to allow the single-family home to be used as a meeting house was the least restrictive means to achieve a compelling governmental interest. Therefore, the City's and the church's motions for summary judgment were denied.

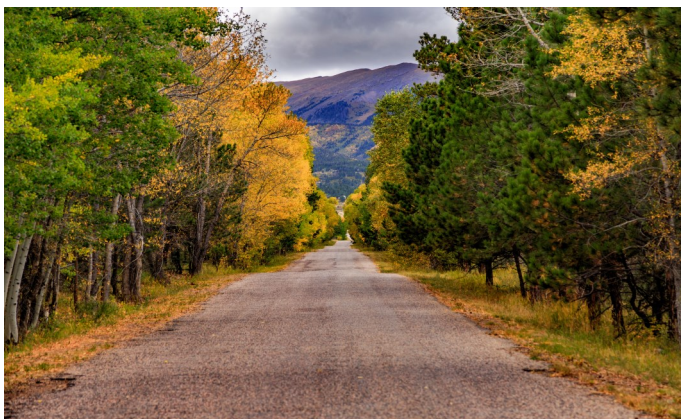
As to the plaintiffs' claims of a violation of the RLUIPA provision prohibiting treating a religious institution on less than equal terms than a secular entity, the church had to prove that "similarly situated" nonreligious entities had been given preferential treatment. The court found that the state university hospital authority which was allowed to operate a parking lot across the street from its clinic was not similarly situated to the plaintiffs since different zoning districts were involved; the Clinic's parking lot, but not the single-family home the plaintiffs sought to use for a meeting house, had direct access to a major thoroughfare; and a Kansas statute provided an exemption to the hospital authority from having to obtain a permit before construction. However, the court denied the City's and the church's summary judgment motions with regard to the church's claim of a RLUIPA violation related to the City's approval of several permits over the years to a private school. The City had approved the school's permit to convert a vacant field into a soccer practice field, rezoned the school's property and permitted the construction of tennis courts and also granted a permit allowing the school to build restrooms, a storage facility and expand the soccer field. The court found that a jury could find in favor of either party with regard to whether or not the school was similarly situated to the church.

As to the claim that the City unlawfully and unreasonably limited religious assemblies, the court held that the plaintiffs would need to show that the City actually or effectively barred all religious activity. The plaintiffs' evidence was insufficient to do so and the court granted the City summary judgment. As to the First Amendment claims, the court found that there were genuine issues of material fact concerning whether the City was discriminatory in enforcing its facially-neutral zoning laws, and if so, whether the City used the least restrictive means to achieve a compelling governmental interest. Therefore, the City's motion for summary judgment on that claim was denied. Similarly, the court found genuine issues of fact preventing summary judgment as to the plaintiffs' claims under the Kansas Constitution's prohibition of state action burdening the exercise of sincerely-held religious beliefs (in the absence of a compelling state interest accomplished

by the least restrictive means); and, as to the plaintiffs' claim for violations of the Kansas Preservation of Religious Freedom Act (KPRFA).

Landowner Liability

"A landowner whose property abuts a rural intersection owes no duty to passing drivers to trim or remove trees or other vegetation on the property."



Manley v. Hallbauer, 308 Kan. 723, 423 P.3d 480 (2018). Mr. Manley was killed in a traffic accident on a gravel road in rural Labette County. The traffic report said: there were no signs that either vehicle had braked; there were no stop signs or traffic signals at the intersection; and trees growing on adjoining property owned by the Hallbauers caused a blind spot coming into the intersection.

Mr. Manley's estate sued the other driver, Labette County, and the Hallbauers. The estate settled with the other driver and the county. The claim against the Hallbauers was dismissed with the court finding that they owed no duty to Mr. Manley to trim trees on their property.

The Court also noted some public policy reasons to not create a duty on the property owner:

- The ruling is consistent with the general rule that a property owner owes no duty to disclose open and obvious dangers to others.
- Drivers should have a heightened responsibility when driving in areas where the view is obstructed.
- Kansas rural areas contain tall crops and natural conditions throughout the state, in some cases running miles along roads.

Comments: The Court said that a landowner owes no duty to passing drivers to trim trees at an intersection, but also warned that the case was limited to vegetation growing on the property. A different rule may be appropriate when natural growth extends outside the property boundary. And the Court also said that a different rule may be appropriate for an urban setting with more traffic.



Mortgages – Reverse Mortgage

Sheriff's sale upheld when property sold for 86% of judgment. Redemption period is three months for a reverse mortgage.

Reverse Mortgage Solutions, Inc. v. Goldwyn, 56 Kan. App. 2d 129, 425 P.3d 617 (2018).

First, a review of how a reverse mortgage works. The Borrower gives Lender a Mortgage, and in return, the Borrower has the ability to take loans up to the amount of the Mortgage. No payments are due until the death of the owner/borrower. At that time, the Lender has the option to call the full amount due. The Borrower's estate can borrow elsewhere to pay off the reverse mortgage, or sell the property to pay it off.

Here, the Borrower obtained a reverse mortgage on her house. After she died, Lender declared the full amount due, and the Borrower's daughter did not pay off the balance. The Lender foreclosed and purchased the property at a foreclosure sale for 86% of the total judgment. The court made three key findings:

1. A district court can refuse to confirm a foreclosure sale if the bid is found to be "substantially inadequate." The court found that the sale price of 86% of the total judgment was "not substantially inadequate," noting a previous Kansas case which approved a sale that varied from market value by 15%. Also, the daughter did not produce any evidence on value.

The court also said that in any event, the daughter was not harmed by the sale price. A reverse mortgage debt is non-recourse. If the bid was too low, there still would be no deficiency judgment. So the price had no effect on her. She also had the right to redeem. But the court noted that a low purchase price at the foreclosure sale is to her benefit because the lower the foreclosure price, the less she has to pay to redeem the property.

2. The district court was wrong to rule on the motion to confirm the sale on the same day it was filed, but the Court of Appeals concluded it was a harmless error in part because the district court later heard a motion to reconsider its order approving the sale.

3. The period of redemption was set at 3 months. Kansas law requires a one-year period of redemption which can be reduced to 3 months if less than 1/3rd of the original indebtedness has been paid. No payments are made under a reverse mortgage structure, so the court allowed the 3-month redemption period. The Court of Appeals noted that the redemption laws predate the advent of reverse mortgages, and that the Legislature or Kansas Judicial Council may want to review this question.

Municipalities – Validity of Contracts

If a contract entered into by a city's governing body involves the exercise of the city's business or proprietary powers, the contract may extend beyond the elected term of the contracting governing body's members and is binding on their successors if the contract was fair and reasonable, and necessary or advantageous to the municipality.

Jayhawk Racing Properties, LLC v. City of Topeka, 56 Kan. App. 2d 479, 432 P.3d 678 (2018). In 2006, the City issued STAR bonds to fund improvements to Heartland Park, a multi-purpose motorsports facility. At issuance, the City owned Heartland Park in fee simple for a term of years, subject to Jayhawk Racing's reversionary interest. After sales tax revenue collected in the STAR bond district failed to satisfy the associated debt, the City planned to expand the STAR bond district and acquire Jayhawk Racing's reversionary interest.

In 2014, the City, Jayhawk Racing, Visit Topeka Inc., and the Kansas Department of Commerce entered into a Memorandum of Understanding in which the City agreed to purchase Jayhawk Racing's reversionary interest. The agreement was contingent on increasing the size of the STAR bond district, the Secretary of Commerce approving the redevelopment project plan for Heartland Park, and authorization by the City for issuance of STAR bonds in an amount equal to the financial obligations set forth in the Memorandum.

The City Council adopted an ordinance approving the plan, the Secretary of Commerce conditionally approved issuing STAR bonds, and the City Council passed a resolution to sell STAR bonds. On April 7, 2015, four new members were elected to the City Council. Soon thereafter, the City Council voted 6-4 against a resolution that would have authorized the City to proceed with the amended STAR bond project plan. Without new STAR bonds, there would be no funding for the purchase of the reversionary interest in Heartland Park.

Jayhawk Racing sued the City, alleging breach of contract. The district court held that the City's promise to issue STAR bonds could not be enforced because issuing STAR bonds was a governmental, rather than a proprietary function, and the City's governing body lacked the power to bind its successors to issue STAR bonds to finance the purchase of the reversionary interest in Heartland Park.

The Court of Appeals noted municipal corporations have dual capacities, governmental and proprietary. In governmental capacity, “they serve as an arm of the state and partake of sovereignty.”



In proprietary capacity, “they exercise power as an individual corporation.” Details of financing public projects, including issuing bonds, may, at times, be proprietary and not governmental.

The Court found Kansas courts often uphold proprietary contracts that extend beyond the term of the governing body’s members when the contract was in the interest of the public health and welfare, and the courts have held such contracts invalid only when the contract interfered with the governing body’s ability to protect the public health, safety, and welfare.

The Court of Appeals determined that the Memorandum was a purchase agreement for the City to acquire a race-track, which is a proprietary function, rather than governmental. The portion of the Memorandum relating to STAR bonds did not transform the agreement into a governmental function. Because the Memorandum did not interfere with the City’s ability to protect health, safety and welfare, it was binding on the newly-elected city council and was breached by the City.

Personal and Family Protection Act

Building Requirements for Prohibiting Concealed Handguns



Op. Att’y Gen. 2019-2. The Personal and Family Protection Act permits persons to carry concealed handguns in a building unless signs forbidding handguns are posted at “all exterior entrances.” K.S.A. 2018 Supp. 75-7c10. The building in question was a one-story dormitory-type structure with separate doors for each unit which provided direct access from an outdoor courtyard. The Attorney General opined that the structure was a “building” under the Act and that signage was required for each exterior door. This opinion was distinguished from an earlier opinion in which “an interior office suite or individual floor within a multi-office or multi-story structure” was not a “building” under the Act.

Premises Liability

Whether a danger is open and obvious such that no duty of care is owing is a question of fact.

Gregory v. Creekstone Farms Premium Beef, LLC, 728 Fed. Appx, 824 (2018). Richard Gates was a truck driver who delivered cattle to Creekstone Farms’ processing plant. Gates helped a Creekstone employee clear receiving pens so that he could deliver his cattle. Gates entered one of the pens. An animal turned around, ran into Gates, and killed him. Gates’ personal representative brought this action against Creekstone on the theory that it had been negligent in its design of the pen (which did not allow the cattle to see the exit) and in not establishing safe practices or providing adequate staffing. The district court granted Creekstone summary judgment, holding that the danger from the cattle was open and obvious and therefore Creekstone owed Gates no duty to exercise reasonable care. Under Kansas law, one in possession of land is not under any duty to remove open and obvious dangers. This is an exception to the general principle that everyone has a duty to exercise reasonable care to avoid injuring others.

The Tenth Circuit Court of Appeals reversed the district court. It concluded that the exception with respect to open and obvious dangers does not apply only to the physical condition of the premises, but also to all of Creekstone’s activities on the premises, and would therefore apply to all of plaintiff’s claims. The Court also ruled as a matter of first impression that the question of whether a danger is open and obvious would be a question of fact under Kansas law. The court found that for a danger to be open and obvious, the plaintiff/invitee must both know about the condition or activity and also appreciate the gravity of the danger. Even if the danger of unloading and moving cattle was open and obvious to Gates, the uncontroverted facts did not show that Gates knew of and appreciated the danger caused by the fact that the cattle could not see the exit from the pen, resulting in the increased risk that cattle would balk.



Real Property – Statute of Limitations

Whether a substantial injury is “reasonably ascertainable” under K.S.A. § 60-513(b) is a question of fact, not resolvable as a matter of law under the constructive notice provision in K.S.A. § 58-2222.

LCL, LLC v. Falen, 308 Kan. 573, 422 P.3d 1166 (2018). In 2007, the Mary Louis Falen-Olsen Trust contracted to convey surface rights only to approximately 200 acres to Sammy Dean. The Trust owed all of the surface rights and an undivided one-half of the mineral interest in the land. Rice County Abstract and Title Co. (“RCAT”) was the closing agent and title insurer on the transaction. RCAT failed to include any reference to the mineral reservation in the deed, although it had a copy of the contract. Although RCAT claimed it provided the deed to the trustees of the Trust for “review and signature,” the trustees claimed the deed was sent to them for signature only. The deed was recorded on January 18, 2008.

After the transaction, the Trust transferred what all concerned believed was still its mineral interest to the Trust’s beneficiaries (the “Falens”), who, in turn, made several additional transfers among themselves, executing and recording mineral deeds and quitclaim deeds. In March 2008, Dean conveyed his interest in the property to SDM Properties2, LLC (“SDM2”), an entity owned in part by Dean. From January 2008 until August 2014, the Trust and the Falens continued to be paid royalties for mineral production from the land and continued to pay all property taxes associated with the production.

In April 2014, LCL, LLC agreed to purchase the property from SDM2. RCAT again acted as the closing agent and title insurer for the 2014 transaction, and again the deed prepared by RCAT did not note the Trust’s 2008 mineral reservation. After the 2014 sale closed, RCAT began receiving questions about the mineral rights from LCL, which prompted RCAT to conduct a title search and discover the 2008 deed issue. RCAT did not contact the Trust or the Falens, but asked LCL to sign a corrected deed, and LCL refused. Royalty payments to the Falens were suspended on August 21, 2014.

LCL filed a petition to quiet title on the mineral interest, naming the Falens as defendants. The Falens counter-claimed to quiet title in their favor and filed a third-party petition against RCAT, alleging negligence and breach of an implied contract by failing to include the mineral reservation in the 2008 deed. RCAT moved for summary judgment, arguing that any injury to the Trust and the Falens occurred in January 2008, and thus the applicable two-year statute of limitations (K.S.A. § 60-513(a)(4)) had expired. RCAT argued the trustees knew or could have known of the error in the deed in January 2008, and, alternatively, that K.S.A. § 58-2222 charged the Trust and the Falens with constructive notice of the 2008 deed. A few days later, the Falens moved to amend their third-party petition, seeking to add allegations regarding the 2014 transaction and a claim for breach of fiduciary duty by RCAT. Although the motion was never ruled on, the district court treated the amended petition as the controlling pleadings for the third-party claims. Eventually, LCL and the Falens settled the quiet title action.

The district court granted summary judgment to RCAT on all of the Falens’ claims, finding the statute of limitations had run on both contract and tort causes of action. With respect to the contract claims, the event giving rise to a cause of action occurred no later than the recording of the defective deed on January 18, 2008. With respect to the negligence claim, the district court held, as a matter of law, that the injury was reasonably ascertainable based upon the undisputed facts on January 18, 2008 simply by reviewing the recorded deed. With respect to the breach of fiduciary duty claim, the district court found that cause of action was nothing more than an extension or a continuing of the harm created in the original act, the recording of the deed in 2008. The Falens appealed only their negligence and breach of fiduciary duty claims.

The Kansas Court of Appeals reversed the summary judgment ruling because, in its view, the Falens did not sustain damages, an essential element of both the negligence and breach of fiduciary duty claims, until August 2014 when they stopped receiving royalties.

With respect to the negligence claim, the Kansas Supreme Court noted the phrase “substantial injury” in K.S.A. § 60-513(b) means “actionable injury.” The Court found the Falens suffered a substantial injury on January 18, 2018 because on that date, at a minimum, a cloud on their title to the mineral interest arose. However, there was a genuine issue of material fact regarding when that injury became reasonably ascertainable to the Falens which prevented RCAT’s argument that the Falens had actual notice when the deed was provided to them for signature. In addition, the constructive notice of K.S.A. § 58-2222 is only part of the story and is not, as a matter of law, outcome-determinative on what remains a question of fact as to when the injury became reasonably ascertainable. Thus, although the recording of the 2008 deed caused the Falens substantial injury, the Kansas Supreme Court remanded the matter for a determination of whether the injury was reasonably ascertainable by the Trust or the Falens before December 1, 2012.

With respect to the breach of fiduciary duty claim, the Court determined the claim was not only based on allegations about RCAT's behavior in 2008, but also 2014. Since the Falens moved to add the breach of fiduciary duty claims on October 5, 2015, and the district judge treated the amended pleading as controlling, the claim was timely.

Rescission of Contract for Sale of Property – Undue Influence

Undue influence is presumed in a contract between parties in a confidential relationship.

Moore v. Moore, 56 Kan. App. 2d 301, 429 P.3d 607 (2018). Joyce Moore and a trust she and her husband had established brought an action, tried to a jury, against her son Steven Moore and his son, claiming that Steven had manipulated his father, John, and Joyce into selling their homestead and other land to Steven's son. Apparently, the property would have otherwise been left to all four of John and Joyce's children. The contracts enabled Steven's son to acquire real estate worth \$1.4 million for \$402,000, a down payment of only \$25,000, and payments over 20 to 30 years at 2% interest. At the time, John was 80 and Joyce was 80. Joyce and the trust sought to set aside the two contracts.

The plaintiffs claimed that Joyce and John lacked the capacity to enter into the respective contracts for the homestead and other land and, in the alternative, that Steven exerted undue influence over John and Joyce. The jury returned verdicts in favor of the defendants. The plaintiffs appealed.

The Court of Appeals upheld the jury verdicts in favor of Steven and his son on the question of Joyce's and John's capacity.

As to the claim of undue influence, plaintiffs had requested that the jury be instructed that when a party to a contract has placed confidence or trust in the other party, the trusted party bears the burden to prove the contract was not the product of undue influence, reversing the usual burden of proof on the plaintiff. The instructions the district court gave did not give this direction to the jury. The Court of Appeals held that such an instruction would have been a proper statement of Kansas law and that "[i]n effect, the courts presume undue influence in contracts between parties occupying a confidential relationship." In cases involving contracts, the court noted, there is no requirement that suspicious circumstances exist before a court presumes undue influence from a confidential or fiduciary relationship, as is the rule with wills and other testamentary instruments. The Court of Appeals also found that the facts of the case supported giving the requested instruction and that the failure to give the instruction was not shown to be harmless. As a result, the judgment finding on undue influence was reversed and the case was remanded. However, because the requested relief was equitable in nature, no new jury trial was re-

quired and the district court was to make findings of fact and conclusions of law needed to resolve the undue influence claims based on the testimony and other evidence admitted at trial.



Right to Negotiate

Seller's offer to sell property at fixed price fulfilled the first right to negotiate.

Trear v. Chamberlain, 308 Kan. 932, 425 P.3d 297 (2018). This case involves the interpretation and enforcement of a first right to negotiate that was referred to in a contract as a right of first refusal. In 1986, Trear purchased land from the Chamberlains. The purchase contract also gave Trear a "right of first refusal" to purchase the adjoining land. It read:

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."

Chamberlain offered the property (73 acres with a house) to Trear for a set price, specifying a response date. Trear did not respond or make a counteroffer. Chamberlain then listed the property. Her attorney told Trear of the listing and that he should contact Chamberlain's broker if he wanted to purchase the property. The listing expired and Trear made no attempt to negotiate or purchase the property.

Chamberlain later sold a portion of the tract (64 acres without the house) to her daughter for approximately one-

third of her original offer to Trear. Trear sued Chamberlain and her daughter, claiming he had the right to purchase the property on the same terms as the daughter.

The Kansas Supreme Court said no. It found Trear had a first right to negotiate, not a first right of refusal, regardless of what the parties called it. Chamberlain had complied with the terms of the agreement when she notified Trear of her intent to sell and her price. Trear's right expired when he failed to respond, and Chamberlain was then free to sell the property to her daughter.

Comments. Be sure that all parties to the contract know the difference between a first right of refusal and the first right to negotiate. And then follow the steps set out in the contract.

Water Rights

Senior water right holder entitled to permanent injunction preventing junior water right holder from utilizing two wells.

Garetson Bros. v. Am. Warrior, Inc., 56 Kan. App. 2d 623, 435 P.3d 1153 (2019). This dispute arises out of irrigation wells in Haskell County. A senior water rights holder, Garetson, sought an injunction to prevent the nearest junior water rights holder, American Warrior, from impairing Garetson's water rights. After a trial, the district court issued a permanent injunction prohibiting American Warrior from exercising its junior water rights.

On appeal to the Kansas Court of Appeals, American Warrior argued that amendments made to the Kansas Water Appropriations Act ("KWAA") in 2017 should apply retroactively and as a result, Garetson needed to exhaust administrative remedies before going to court.

The Court determined the 2017 KWAA amendments did not apply retroactively to this matter so as to require Garetson to exhaust administrative remedies prior to going to court.

In addition, American Warrior asserted various arguments that Garetson was not entitled to a permanent injunction, including: (1) the district court incorrectly defined Garetson's water right; (2) the district court used the incorrect definition of "impairment under the KWAA; (3) the district court erred in granting the permanent injunction when Garetson "grossly over-appropriated" its water right and therefore had unclean hands.

The Court determined that the district court had properly defined Garetson's water right and held that a senior water right is still impaired even if the water right holder has permission to pull water from a third party.

The Court determined there is no requirement that economic conditions be considered when determining whether a senior rights holder's usage is impaired.

Finally, the Court determined there was no evidence that Garetson had unclean hands in its prior water usage, as the evidence demonstrated over-appropriation had occurred only two times between 1955 and 2015, and since the wells were not metered on those two occasions, it was possible the readings may not have been accurate.



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