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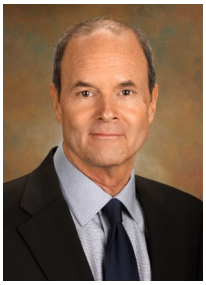
RECENT CHANGES IN KANSAS REAL ESTATE LAW 2022

Adams Jones Attorneys


Cody Branham


Mert Buckley


Ian Hughes


Pat Hughes


Susan Locke


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 as a first band of leading firms for real estate in Kansas. Chambers USA says Adams Jones has: "excellent experience in property transactions, zoning issues and finance work" and "a strong reputation in all manner of real estate litigation, including zoning and easement disputes...and possesses additional expertise in general commercial cases" and "maintains a noteworthy strength in professional liability, estates and trusts and municipal government disputes." 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 Best Lawyers in America:

Real Estate	Commercial Litigation	Land Use and Zoning	Eminent Domain & Condemnation
Mert Buckley Pat Hughes	Monte Vines Pat Hughes	Pat Hughes	Brad Stout

Litigation–Banking and Finance	Ethics & Professional Responsibility	Litigation-Real Estate	Legal Malpractice — Defendants
Monte Vines	Monte Vines	Brad Stout Monte Vines	Monte Vines

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

2021 Legislation

Creation of the First-time Home Buyer Savings Account Act and modifications to the Kansas adjusted gross income of an individual for contributions to a first-time home buyer savings account.

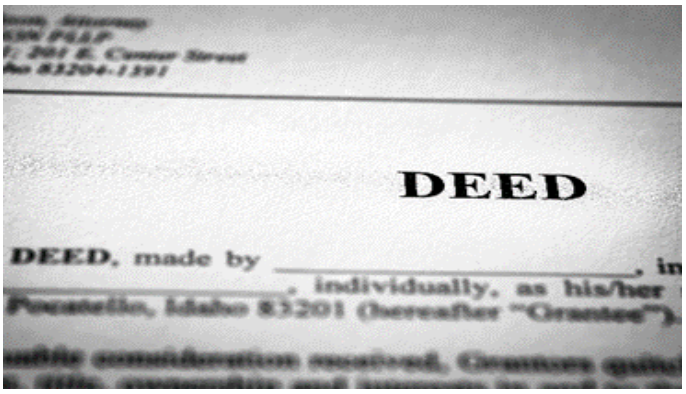
In 2021, the Kansas legislature enacted the First-time Home Buyer Savings Account Act ("the Act"). Under the Act, starting July 1, 2022, an individual may open an account with a financial institution and designate the entirety of the account to pay for or reimburse eligible expenses for the purchase or construction of a primary residence in Kansas. If accomplished in compliance with the Act, the individual is eligible for income tax modifications designed to reduce income tax liability.

The bill caps the amount of contributions to an account and the total amount in the account, but permits moneys to remain in an account for an unlimited duration without the interest or income being subject to recapture or penalty. Moneys in an account may be used for eligible expenses related to a purchase or construction of a primary residence located in Kansas; the purchase or construction of a primary residence located outside of Kansas if the designated beneficiary is active-duty military and was stationed in Kansas for any time after the creation of the account; and service fees assessed by the financial institution. The account cannot be used to purchase a manufactured or mobile home that is not taxed as real property.

The bill subtracts from an individual's federal adjusted gross income for all taxable years beginning after December 31, 2021: the amount contributed to an account in an amount not to exceed $3,000 for an individual or $6,000 for a married couple filing a joint return; or amounts received as income earned from assets in an account.

Kansas Real Estate Commission Regulations—2021

The Kansas Real Estate Commission ("KREC") adopted and amended several regulations in April 2021.



The proposed regulations amended: 1) requirements related to broker records, trust accounts and transaction identification numbering set forth in K.A.R. 86-3-10; 2) requirements for records to be retained by Kansas licensed brokers under K.A.R 86-3-18; and 3) requirements for trust account records, which included a section related to closing a trust account previously under K.A.R. 86-3-21 (K.A.R. 86-3-21 was revoked due to obsolete language related to documentation requirements and a subsection was moved to K.A.R. 86-3-18 for consistency); and transaction identification numbering procedures related to broker records under K.A.R. 86-3-22.

CASES & ATTORNEY GENERAL OPINIONS

Deeds – Transfer-on-Death Deeds

A transfer-on-death deed is valid if it substantially complies with Kansas statute.

McGregor v. McGregor, No. 123,657, 2021 WL 6140398 (Kan. App. Dec. 30, 2021). Jo Anne

Edwards owned a property in Yates Center. In 2016, Jo Anne executed a transfer-on-death deed (TODD) conveying the property to Scott McGregor upon Jo Anne's death. This TODD did not include the language "as grantee beneficiary" next to Scott's name as suggested in the example template provided by Kansas statute (K.S.A. 59-3502).

Jo Anne passed away four years later. Lori McGregor, who had been the beneficiary of a prior transfer-on-death deed Jo Anne had filed as to the same property, sued to invalidate the 2016 TODD, arguing that K.S.A. 59-3502 required the TODD to include the specific language "as grantee beneficiary" because that language appears in the template set out in that statute, and that the failure to include such language rendered it invalid.

The Court of Appeals found the 2016 TODD to be valid, noting a history of Kansas cases applying the principle of substantial compliance to deeds, and that Kansas courts decline to void deeds when there are minor discrepancies between a statutorily-outlined template and the deed's language.

Foreclosure

A borrower cannot circumvent ongoing foreclosure action by sham transfer of title to the property.

Bank of New York Mellon v. Luna, No. 123,524, 2021 WL 5409672 (Kan. App. Nov. 19, 2021). The Lunas failed to make their mortgage payments and the lender filed a foreclosure action. While a motion for summary judgment was pending in the foreclosure action, the Lunas conveyed the property by quitclaim deed to an entity in which the Lunas were involved, Las Cumbres, for ten dollars. The Lunas subsequently told the court that they were seeking refinancing and did not report that they had sold the property. After the court granted the lender's motion for summary judgment, the Lunas asked the court for relief from that judgment on the grounds that the Lunas no longer held title to the property.

The Court of Appeals rejected the argument that the transfer of the property prevented the foreclosure because the Lunas had not shown that the underlying debt, for which they were personally liable, had been discharged. Further, the Court of Appeals found the lender did not need to add Las Cumbres to the foreclosure case because the Las Cumbres transaction was a sham and was void.

Landlord-Tenant

The prohibition against a tenant or landlord agreeing to pay either party's attorneys' fees in residential leases only applies to "rental agreements" as defined by Kansas Statute, and is inapplicable to a settlement agreement arising out of an eviction action.

Wheeler v. Rental Mgmt. Sols., No. 122,115, 2021 WL 1228127 (Kan. App. Apr. 2, 2021). In 2017, Brett Wheeler entered into a lease agreement with Rental Management Solutions ("RMS") to rent an apartment in Topeka. Several months later, RMS filed an eviction proceeding for non-payment of rent.

The parties reached a settlement agreement in which Wheeler paid $495 to RMS in exchange for dismissing the eviction action. The settlement figure was based on past due rent owed by Wheeler in the amount of $195, plus an additional $300 to cover expenses incurred by RMS in retaining an attorney to file the eviction action.

A year later, Wheeler sued RMS, claiming the settlement agreement violated the Kansas Residential Landlord-Tenant Act (the "Act") because part of the amount paid in settlement was based on attorney fees incurred by RMS.

Wheeler's claim was dismissed after the Court of Appeals found the Act to be inapplicable to the settlement agreement. The Court of Appeals noted the Act provides that a rental agreement may not require a landlord or tenant to "waive or forego rights or remedies" set forth in the Act, and further provides that "no rental agreement may provide that the tenant or landlord … agrees to pay either party's attorneys' fees." However, the prohibition against attorneys' fees provisions applied only to "rental agreements," which are defined under the Act to mean "all agreements, written or oral, and valid rules and regulations adopted under K.S.A. 58-2556 and amendments thereto, embodying the terms and conditions concerning the use and occupancy of a dwelling unit and premise." The Court of Appeals found that the agreement entered into between Wheeler and RMS to settle the eviction action fell outside the definition of a rental agreement as defined by the Act.

Landlord – Tenant

Motel guest does not become entitled to protection of the Kansas Residential Landlord and Tenant Act by staying for an extended period.

Williamson v. MJB Hotel, No. 122,647, 2021 WL 4805241 (Kan. App. Oct. 15, 2021). This case raises the question of whether someone who stays at a motel on an extended basis becomes a tenant for the purposes of the Kansas Residential Landlord and Tenant Act (the "Act"), entitled to its protections. Andy Williamson checked into the American Motel in May 2017. He lived there until he was evicted in March 2018 for failing to follow the motel's policies. He sued, arguing the Act applied and that the Motel had violated the Act.

Ultimately, the Court of Appeals determined a motel guest does not become entitled to the protections of the Act merely by staying for an extended period of time.

Mechanics' Liens

Contractor must establish it has a relationship with the property owner to claim lien rights, and with no relationship with the owner, cannot claim unjust enrichment when the owner has paid someone else for the work.

Approved Paving v. Paul Heinen and Associates, No. 123,222, 2021 WL 5865130 (Kan. App. Dec. 10, 2021). Approved Paving ("Approved") brought an action to foreclose a mechanic's lien for resurfacing a parking lot on property belonging to Paul Heinen and Associates, Inc. ("Heinen") or, in the alternative, for unjust enrichment for the value of the work provided to Heinen for the improvement of the property. In 2017, Omni Property Services ("Omni") had submitted a proposal to Heinen for paving work and Heinen provided a deposit to Omni.

However, no work was done. The next year, Arcadia Realty Corporation ("Arcadia") entered into an agreement with Approved for resurfacing the lot. Approved performed the work and Heinen, the owner, paid Omni the remaining amount due under Omni's proposal. The district court record contained no information about any communications or agreements between Omni and Arcadia.

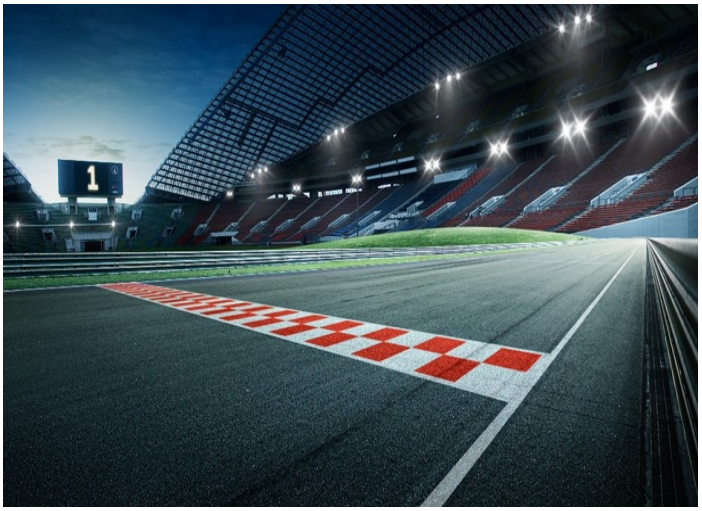
The court found that Approved was a subcontractor rather than a contractor because it had a contract with Arcadia rather than directly with Heinen, the owner. Therefore, Approved had three months from the date of its last work in which to file a lien or an extension. Approved filed an extension only after three months had passed.

As to the unjust enrichment claim, the Court of Appeals denied that claim as well, noting that such claims are not appropriate in cases in which a mechanic's lien would have been available but was not timely filed unless the owner misled the subcontractor. However, in this case the evidence did not even establish that Approved was a subcontractor of the owner, because there was no evidence of Arcadia's relationship to the owner.

Municipalities – Validity of Contracts

If a contract entered into by a city's governing body involves exercise of the city's governmental or legislative powers, the contract is not binding on successors to the contracting governing body's members.

Jayhawk Racing Properties, LLC v. City of Topeka, 313 Kan. 149, 484 P.3d 250 (2021). In 2006, the City issued STAR bonds to fund improvements to Heartland Park, a multi-purpose motorsports facility. In 2014, the City, Jayhawk Racing, Visit Topeka Inc., and the Kansas Department of Commerce entered into a Memorandum of Understanding (the "MOU") regarding the project. 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 set forth in the MOU. 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 MOU.



Jayhawk Racing sued the City, alleging breach of contract. The Kansas Supreme Court noted that city revenue projects may be divided into those that serve a "governmental" or "legislative" function on one hand, and those that serve a "proprietary" or "administrative" function on the other hand. In a general sense, governmental or legislative powers are exercised for administering the affairs of the political jurisdiction and to promote the public welfare at large, whereas proprietary or administrative powers are exercised to carry out private corporate purposes in which the public is only indirectly concerned and where the municipality may be considered a legal individual. A governmental function is not binding on successors to the City Council, whereas proprietary functions are.

Ultimately, the Supreme Court and found the MOU to be a governmental function, stating the "decision to invest in a race track, expand the area around the track, encourage commercial development in the proximity of the track, and improve the facilities, all with a purpose of making the City more attractive to visitors and increasing both tax revenues and the economic

viability of businesses in the City, represents the epitome of governmental policy making." Accordingly, the newly-elected city council was not bound by the MOU.

Premises Liability

Protection provided by the winter storm doctrine is not eliminated by the proprietor's voluntary efforts to clear snow and ice during a storm rather than waiting until after the storm is over.

LaCost v. Boot Hill Casino, No. 123,873, 2021 WL 5409684 (Kan. App. Nov. 19, 2021). The "winter storm" doctrine provides that under usual circumstances, a business owner may wait until a reasonable time after a winter storm has ended to remove ice and snow on which invitees might slip and fall. Darlene LaCost was in the parking lot of the Boot Hill Casino and Resort in Dodge City when she slipped and fell while there was a severe snow and ice storm in the area. She sued the casino and its snow removal contractor who had been clearing the lot during the storm.

LaCost argued that because the contractor had been removing ice and snow during the storm, the winter storm doctrine did not apply and instead, the defendants were liable for injuries suffered as a result of their lack of reasonable care. The Kansas Court of Appeals denied LaCost's claim, stating the winter storm doctrine applies during the storm even if the defendants had started efforts to remove the ice and snow. A contrary result would, the court noted, discourage any effort to clear ice and snow during bad weather.

Trusts – Fiduciary Duty of Trustee

Distribution of trust settlor's home to beneficiary is not implicitly required to occur only after death of settlor.

Mead v. Small, Tr. of Herlinda Small Revocable Living Tr., No. 122,511, 2021 WL 2021199 (Kan. App. May 21, 2021). Herlinda Small created the Herlinda Small Trust (the "Trust") and transferred her home located in Garden City into the Trust. Herlinda designated herself as the trustee, her daughter Shirley William as the successor trustee, and her son Bob Joe Small as the next successor trustee. The Trust contained a provision gifting Herlinda's home to Shirley.

Herlinda eventually became ill and Shirley became the acting trustee. Several years after Shirley assumed the trustee duties, she became ill. Before she passed away, Shirley conveyed the house to herself and her daughters. After Shirley's death, Bob Joe became the acting trustee. Bob Joe argued Shirley breached her fiduciary duty as trustee when she conveyed the home to herself and her daughters in violation of the terms of the Trust and Kansas law. He asserted the conveyance deprived the Trust of a principal asset that was to be held, managed, and used exclusively for the benefit of Herlinda.

The Court of Appeals found that even though Herlinda was still alive at the time of the conveyance to Shirley and her daughters, the convey-

ance of the home by Shirley was specifically allowed by the language of the Trust even if it seemed to contradict the express purpose of the Trust.

Specifically, although the trustee's responsibilities related to distribution of the trust estate and were mostly triggered "on" or "upon the death of" Herlinda, there was an exception. The lone exception provided that the trustee distribute gifts of trust property to beneficiaries as follows: "Shirley William: Grantor's Residence." The provision explicitly left off the death of Herlinda as a prerequisite. By executing the conveyance herself, Shirley was simply seeking to administer the Trust consistent with its terms.

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