No. 13-109576-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

Animal Care, Inc., by and through
Debra K. Anderson, D.V.M., d/b/a
Westport Animal Clinic,

Plaintiff – Appellant

v.

Roger Shumaker and Shumaker
Development Company, L.L.C.

Defendants – Appellees

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
HONORABLE FRANKLIN R. THEIS
DISTRICT COURT CASE NO. 10-C-844

William L. Anderson; Supreme Court #11600
4124 SW Eagle Point Road
Topeka, Kansas 66610
785-608-9008
Attorney for Plaintiff – Appellant

Oral Argument: 20 minutes

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NATURE OF THE CASE

The original petition was filed as a request by Plaintiff for a finding of adverse possession, or in the alternative, prescriptive easement in favor of Plaintiff of a strip of grass directly east of Plaintiff's Veterinary Clinic in Topeka, Kansas. ROA, Vol 1, pg 8.

The petition was amended to include tortious interference with a business because of Defendants' actions. ROA, Vol 1, pg 12.

Plaintiff filed a Motion for Summary Judgment after discovery on May 13, 2011, ROA, Vol 1, pg 95.

The District Court filed a Memorandum and Order on January 30, 2012, partially resolving the case, and ruling on the Motion for Summary Judgment for the Adverse Possession claim, but not the tortious interference claim or harassment claim. ROA. Vol 1, pg 370.

The District Court file his Supplemental Opinion and Entry of Final Judgment on Plaintiff's Motion for summary Judgment and Defendant's Motion to Dismiss on February 7, 2013, incorporating the earlier opinion of February 7, 2013 into the final judgment. ROA, Vol 1, pg

ISSUES

The District Court, Honorable Franklin R. Theis presiding, utilized the wrong standards in analyzing Plaintiff's claim of adverse possession of the real estate. This error by the Court included using opinions and statements of attorneys for the Defendant as justification for his decision, with no factual evidence to support said attorney opinions. The error also included making assumptions about the facts of the case which were not supported by the properly admitted evidence.

The District Court, Honorable Franklin R. Theis presiding, ignored evidence, wrongly interpreted laws and ordinances, and held against existing case law, in ruling against Plaintiff on the issue of harassment of Plaintiff by Defendants.

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STATEMENT OF FACTS

1. Debra K. Anderson has been a licensed veterinarian since 1977. On December 5, 1988, a contract was entered into with Westport Plaza Partnership for purchase of real estate located at 2800 SW Wanamaker Rd., Topeka, Kansas. The real estate purchased was Units 120 and 120B of 2800 Wanamaker Office and Commercial Complex Condominium Declaration for Lot 8 and Lot 7, except the South 150 feet thereof, in Block B of Westport Plaza Subdivision in the city of Topeka, Shawnee County, Kansas. ROA, Vol. 2, Pg 108-117; Pg 118.

2. The part of the building that Plaintiff's veterinary medical clinic is located was chosen deliberately so that the dogs of clients that are house trained could be taken to the strip of property on the east side of the building, which is in contention at the present time. ROA, Vol. 2, Pg 118

3. From the time of purchase of Plaintiff's property until Defendant tore it down, a chain link fence was located on the strip of property which defined the boundaries of

the property. This fence appeared to be approximately 10 feet from the curb of the driveway. This fence remained in place until after present Defendant purchased the property to the east of Plaintiff's clinic. ROA, Vol. 2, Pg 121, 138-162

4. From the time of the purchase of the property by Plaintiff through the present day, Westport Plaza Partnership was responsible for and contracted individuals to perform common area maintenance for the center Plaintiff was an owner in. This common area maintenance included taking care of any landscaping on the outside of the center, including the strip of property in contention. Plaintiff and the partnership discussed running the water sprinkler system over to the east strip, but it was determined to be too expensive. ROA, Vol. 2, Pg 118

5. Plaintiff was required to pay common area maintenance to Westport Plaza Partnership each month, which included mowing and upkeep of all grassy areas, including the property in contention. This payment for CAM including mowing of the strip in contention continued from summer of 1988 until at least 2006. ROA, Vol. 2, Pg 118, 122-131

6. From the date of purchase until March 2010, Plaintiff believed that the property in contention belonged to Plaintiff and Westport Plaza Partnership. Plaintiff was not told anything to the contrary by Westport Plaza Partnership members or any other individual. ROA, Vol. 2, Pg 119

7. From the date of purchase until at least March 2010 or later, Plaintiff, Plaintiff's employees, and Plaintiff's clients used the strip of property in contention to walk patients of the animal clinic, and to allow the animals to defecate and urinate on said property. ROA, Vol. 2, Pg 132-162

8. All clients of plaintiff's veterinary clinic considered the grass strip to belong to the clinic and a large number of the clients used the strip to walk their dogs and to allow their dogs to relieve themselves. The plaintiff solicited voluntary statements from clients concerning the use of the strip and at least 22 clients signed affidavits voluntarily of their own free will supporting the fact that plaintiff used the grass strip exclusively for her business and that there were no other individuals using the grass strip. Defendant did not present any evidence controverting these statements of open, exclusive use by plaintiff of the real estate in question. ROA, Vol. 2, Pg 132-162

9. The following individuals are neutral, third party witnesses to the continued and exclusive use of the real estate in question by plaintiff herein. They observed this use of the real estate by plaintiff for a period of time of at least 20 years for many of them. ROA, Vol 2, pg 132-162; Sheila McGivern pg 132, Linda Ketter, pg 133, Laura Bell. Pg 134, Scott Rogers, pg 135, Ryan Flesher, pg 136, Ginger Birtell, pg 138, Lori Durkes, pg 140, Vicky Jacobs, pg 141, Sandra Hazlett, pg 142, Lesa Roberts, pg 144, Katie Barrett, pg 145, Nancy Welch, pg 146, Ginger Barr, pg 147, Kathy Dudley, pg 148, Mary Jane Cook, pg 150, Thomas Cook, pg 152, Michael Goering, pg 154, Maggie Mahood, pg 156, Sharon Wenger, pg 158, Margaret Wittmer, pg 159, Rosemary Foreman, pg 162, Jean Copeland, pg 162

10. The grass strip in question was located between two office buildings, that of plaintiff's building and that of defendant's building. Because of its location, it was also visible to all the visitors to the parking lots of both buildings and the businesses across the street, one of which was Michael Goering, Doctor of Optometry. ROA, Vol. 2, Pg 118, 119, 154

11. There was no other individual in existence that made use of the property from 1988 until Defendant took the previously described chain link fence down, except Plaintiff in her business as a Veterinary Animal Clinic and Hospital. ROA, Vol. 2, Pg 118-119

12. During the time from 1988 until Kindercare moved out of the building to the east of the strip, currently owned by Defendant, the owner Kindercare was able to daily observe the actions of Plaintiff, Plaintiff's employees, and Plaintiff's clients using the strip in contention, but did not at any time complain to Plaintiff nor did Kindercare demand that Plaintiff cease use of the strip. ROA, Vol 2, pg 118-119.

13. Defendant turned in a complaint of zoning violation against Plaintiff to the city of Topeka. Defendant has not disputed this and supplied Plaintiff with notes confirming the occurrence of this complaint. ROA, Vol. 2, Pg 166-167

14. Defendant called in a complaint about noise to the city of Topeka police department against Plaintiff on three separate occasions: October 13, 2010; October 18, 2010 and October 19, 2010. Defendant has not disputed that fact and supplied Plaintiff with written documentation of each of the calls. ROA, Vol. 2, Pg 168-173

15. Defendant called in a complaint to the city of Topeka police department against Plaintiff of criminal vandalism on March 11, 2011. Defendant has not disputed this. ROA, Vol. 2, Pg 174

16. Plaintiff's business, Westport Animal Clinic, is located on real estate zoned as "C-4." ROA, Vol. 2, Pg 177

17. At all times the strip of real estate in contention was the grassy strip between the buildings owned by Plaintiff and Defendant, respectively from the driveway of

Plaintiff's building up to the location of the chain link fence previously described. At the time of the pleading, the chain link fence had been removed by Defendant and it appeared that the property was 10 feet in width. Plaintiff requested the professional surveyor therefore to write a land description outlining 10 extra feet east from the survey line. A different measurement ordered by Defendant determined the actual measure of the property in contention. Plaintiff and Defendant are in agreement on the measurement of the property in contention. ROA, Vol. 2, Pg 163

18. Defendant did not submit any factual evidence with his Response to the Motion for Summary Judgment by Plaintiff to controvert Plaintiff's properly submitted exhibits supporting her Motion for Summary Judgment. ROA, entire Vol. 2

19. The first date that any Defendant or representative of Defendant demanded that Plaintiff vacate the property in question was May 12, 2010. ROA, Vol. 1, Pg 50.

ARGUMENTS AND AUTHORITIES

I. The District Court, Honorable Franklin R. Theis presiding, utilized the wrong standards in analyzing Plaintiff's claim of adverse possession of the real estate. This error by the Court included using opinions and statements of attorneys for the Defendant as justification for his decision, with no factual evidence to support said attorney opinions. The error also included making assumptions about the facts of the case which were not supported by the properly admitted evidence.

A. STANDARD OF REVIEW

The use of adverse possession of real estate authorized by statute has been supported by case precedent for many years. The action and authority for the taking of adverse possession is established by statutory law:

KSA 60-503. Adverse possession. No action shall be maintained against any person for the recovery of real property who has been in open, exclusive and continuous possession of such real property, either under a claim knowingly adverse or under a belief of ownership, for a period of fifteen (15) years. This section shall not

apply to any action commenced within one (1) year after the effective date of this act. **History**: L. 1963, ch 303, 60-503; Jan. 1, 1964.

KSA 58-3404. Validity of certain interests. A marketable record title shall be subject to: (c) the rights of any person arising from a period of adverse possession or user, which was in whole or in part subsequent to the effective date of the root of title.

There is also well settled case precedent for the use of summary judgment to decide cases of adverse possession of real estate.

The statute, K.S.A. 60-503, lines out two alternate pathways to demonstrate adverse possession:

"**Adverse possession.** *No action shall be maintained against any person for the recovery of real property who has been in open, exclusive and continuous possession of such real property, either under a claim knowingly adverse or under a belief of ownership, for a period of fifteen (15) years. This section shall not apply to any action commenced within one (1) year after the effective date of this act.* **History:** L. 1963, ch. 303, 60-503; Jan. 1, 1964."

It is very important to notice that the statute does <u>not</u> require a belief of ownership in every circumstance. It requires possession in an open, exclusive and continuous way, <u>either</u> knowingly adverse <u>or</u> under a belief of ownership. (Emphasis added)" Wright v. Sourk. Kansas Court of Appeals, Docket No. 102,627.

In *Akers v. Allaire, 17 Kan App.2d 556 (1992), 840 P. 2d 547, ((Petition for Rev. denied October 30, 1992),* a chicken wire fence separated adjoining properties but was 10 feet west of the boundary line. Defendant Allaire testified that she had acted as though the 10 feet was hers, and maintained the grass on her side of the fence. A later survey of the property that established that the fence was not the boundary line did not impeach her good faith belief of ownership. *Akers, p. 558.* The court upheld Allaire's adverse possession of the disputed real estate.

In the case at hand, Plaintiff Debra Anderson had a good faith belief of

ownership for 20 years. Any later survey or declaration by the Defendant would not impeach her good faith belief of ownership.

The Supreme Court of Kansas has no hesitation in concluding that under the new belief of ownership concept the legislature had in mind an element of good faith, that is, the belief must be in good faith and reasonable under all the facts and circumstances. The intention is not to punish one who neglects to assert his rights, but to protect those who have maintained the possession of land for the time specified by the statute under claim of right or color of title. *Armstrong v. Cities Service Gas Co., 210 Kan 298.* The Kansas Supreme Court has held that the "good faith belief" is not impeachable because of constructive notice from title records or laws. In *Armstrong v. Cities Service Gas Co.,* 210 Kansas at 311, the court recognized the "well established rule that constructive notice of a defect in the title is not sufficient to impeach the good faith of claimant since he is under no duty to examine the conveyance records imparting such notice." *Buchanan v. Rediger, 26 Kan. App. 2d 59, 975 P.2d. 1235 (1999)*

If a claimant was required to conduct a title search before the claimant could have a "good faith" belief that provision of the statute would be rendered meaningless. The courts will construe statutes to avoid unreasonable results. We presume that the legislature does not intend to enact meaningless legislation. *KPERS v. Reimer & Koger Assocs.,* 262 Kan. 635, 643, 941 P.2d 1321. (1997) Plaintiff Debra Anderson was not required to search the public record for record holders, utility easements or restraints against the property.

If the record holder knows of the adverse possessor's activities on the property

in question, yet takes no action, the adverse possession is complete. "*The Barretts knew of the fence line in 1963 and knew Meyer had been in possession of the land north of the fence since 1953. Yet they did not dispute the location of the true boundary until after Meyer's death in 1980. The trial court found most, if not all, the Barretts' activities north of the fence occurred after 1976 and did not act to dispossess Meyer or his successors. The record supports this finding.*" *Barrett v. Ninnescah Bowhunter's Ass'n, 15 K.A.2d 241, 805 P.2d 485 (1991).*

"The true (record holder) owner of property, who fails to protect rights of ownership against one holding in adverse possession and manifesting the same as required by statute and for the length of time fixed thereby, is considered as having acquiesced in the transfer of ownership." 3 Am. Jur.2d, Adverse Possession §4, p. 96. Buchanan v. Rediger, 26 Kan. App. 2D 59, 62; 975 P.2d. 1235 (1999)

In adverse possession cases, the particular land, its condition, character, locality and appropriate use are considered. *Schaake v. McGrew, et al.,* 211 Kan, 842, 846, 508 P.2d 930 (1973). The acts of dominion necessary to establish possession must be adapted depending on the particular land, and neither cultivation nor residence, is necessary to establish actual possession. *Buchanan v. Rediger, 26 Kan. App. 2d 59, 975 P.2d. 1235 (1999)*

ANALYSIS

The District Court herein, fused the two separate parts of KSA 60-503, thereby requiring both a belief of ownership and demonstration of adverse possession to complete adverse possession.

The District Court opined that it would be impossible for the Plaintiff to hold

adversely to the other owners of the condominium of the common area property. However, since condominium ownership ownership is a form of co-ownership, there is no reason that Plaintiff could not adversely possess common areas against the other co-owners.

In the case of *Glover v. Union Pacific R. Co.,* 187 S.W.3d 201 (Tex.App.--Texarkana 2006), the court held that ouster can be shown by long continuous possession or a change in the use or character of possession. In *Williams v. Screven Wood Company, Inc.,* 619 S.E.2d 641 (Ga. 2005), the court stated the co-tenant claiming adverse possession must show acts inconsistent with, and exclusive of, the rights of the co-tenant not in possession, and the non-possessory co-tenant must have actual *or constructive* notice of those acts. In *Williams v. Screven Wood Company, Inc.,* 619 S.E.2d 641 (Ga. 2005), the court stated the co-tenant claiming adverse possession must show acts inconsistent with, and exclusive of, the rights of the co-tenant not in possession, and the non-possessory co-tenant must have actual *or constructive* notice of those acts.

Plaintiff herein could hold adversely as to the other cotenant, since the cotenant would have knowledge or notice of the fact of the adverse possession. *Farmer's State Bank v. Lanning 162 Kan 95, 174 P. 2d 69.* Besides the obvious and adverse actions of toileting the Plaintiff's client's animals daily in an open manner across the street from the WPP office, WPP monthly sent Plaintiff invoices for the mowing of the property in contention. ROA, Vol 2, pg 122-131

"*Lanning* was not the first Kansas case to find that a cotenant held the property adverse to unknown cotenants. See *Vonfeldt v. Schneidewind*, 109 Kan. 265, 198 Pac.

958 (1921). See also *Sparks v. Bodensick*, 72 Kan. 5, 82 Pac. 463 (1905) (recognizing the possibility that a cotenant who is granted what appears to be the entire interest in property may hold it adverse to undisclosed cotenants). These cases are consistent with K.S.A. 60-503, which allows adverse possession based upon a good faith belief of ownership of the disputed property." Buchanan v. Rediger, 26 Kan App 64.

"Undoubtedly, one cotenant can hold a sufficiently defined portion of the common tract adversely to the others." *Adam v. Adam, 38 SW 2d 671.* 82 ALR 2d 32, §4 "Adverse Possession – Cotenants"

"Title will vest to a tenant in common in possession against other cotenants if possession was exclusive and adverse to all tenants in common." *Schoonover v. Tyner*, 72 Kan 477, 82 ALR 2d 32, §5.

a. Open possession

There can be no argument that plaintiff's possession of the property was open. The grass strip in contention was between the buildings owned by plaintiff and defendant's predecessor. The activity occurred immediately next to a city street and on the side of a shopping center set up which contained more from 7-8 businesses. It was within eyesight of the business owned by a partner of Westport Plaza Partnership, Robert J. Munk. The activities of walking animals to relieve themselves occurred during daily hours 7 days a week, 52 weeks a year for 20 years. Clients of plaintiff's veterinary clinic were well aware of the practice, knowing that they were also allowed to use the grass strip, as clients of plaintiff. The title owners of the property were well aware of the plaintiff's activities, often being outside with the day care children when plaintiff's employees were walking the animals.

"To constitute adverse possession of land, it is not absolutely necessary that there be enclosures, buildings, or cultivation on the disputed property, but the acts done must be such as to give unequivocal notice of the claim to the land, adverse to the claims of all others, and must be of such a character and so openly done that the real owner will be presumed to know that a possession adverse to his title has been taken." Wright v. Sourk, Kansas Court of Appeals, DOCKET NUMBER: No. 102,627, Syl 9.

b. Exclusive Use. The exclusive possession is one which demonstrates to the world that the plaintiff is treating this property as her own. Walking her patients, allowing her clients to walk their animals, paying a contractor via Westport Plaza Partnership to mow the property, demonstrates that plaintiff is treating this property as hers. (Plaintiff's Exhibit B). What other use is demonstrated to show possession? No other persons have been demonstrated by defendant to have done anything other than occasionally walked across the grass, most likely in less than 10 seconds.

c. Continuous Use. As stated by multiple witnesses and by plaintiff, the patients of plaintiff needed to be and were walked on the strip in contention 7 days a week, 52 weeks per year, for 20 years. This was necessary for the health of house trained animals. This went on with no interruption until the events of March 2010. ROA, Vol 2, pg 118-pg 162. Defendant has presented no evidence whatsoever to controvert this fact.

The District Court herein erred by requiring Plaintiff to prove both elements of KSA 60-503, belief in ownership and adverse possession, in order to prevail.

"Of course, based on the foregoing discussion, Plaintiff's activities/use of the

property in question from its perspective, could not be characterized as 'knowingly adverse' to the neighboring property based on its own perception of ownership since any belief was founded on the view this grassy strip at issue was a common area derivative of her condominium ownership." ROA, Vol. 4, pg 349

This is in direct opposition to the clear intent and wording of the statute. "*No action shall be maintained against any person for the recovery of real property who has been in open, exclusive and continuous possession of such real property, either under a claim knowingly adverse or under a belief of ownership, for a period of fifteen (15) years." (Emphasis added) KSA 60-503*

The District Court also held that the belief in ownership of the property by Plaintiff would be based on the fact that presumably it would be impossible for the actual title to be held in the manner Plaintiff thought. In other words, the Court required and placed upon Plaintiff, the burden of knowing what the legal status of the ownership was to form a good faith belief in ownership. ROA, Vol 4. pg 347-349.

This finding by the District Court goes against the finding by the Kansas Supreme Court: "The intention is not to punish one who neglects to assert his rights, but to protect those who have maintained the possession of land for the time specified by the statute under claim of right or color of title." *Armstrong v. Cities Service Gas Co., 210 Kan 298.* The Kansas Supreme Court has held that the "good faith belief" is not impeachable because of constructive notice from title records or laws. In *Armstrong v. Cities Service Gas Co.,* 210 Kansas at 311, the court recognized the "well established rule that constructive notice of a defect in the title is not sufficient to impeach the good faith of claimant since he is under no duty to examine the

conveyance records imparting such notice." *Buchanan, at 62*

The District Court reached back to previous law, which he acknowledges has been changed, and held that since the prior law required a claim of ownership which was based on claimant's intention, therefore Plaintiff must demonstrate an intent to possess which is tied to the acts of adverse possession and must demonstrate that she knew exactly where the legal property line was. This further required Plaintiff to perform adverse activities demonstrating exact knowledge of all laws, property lines and titles, in order to satisfy the District Court as to adverse possession. ROA, Vol 4, pg 349-351

The District Court did recognize that Plaintiff herein did demonstrate use of the real estate in question, without objection by the legal owner, for the requisite 15 years. ROA, Vol 4, pg 352. "*What this means in this case is that the facts that demonstrate Plaintiff's use here, if unobjected to previously through the fifteen year period required, which is how this record stands...*"

In error, the District Court focused on several possibilities for the reason why the fence, situated on the east edge of the disputed property was built, and made the reason for the fence a disqualifying factor in obtaining adverse possession. ROA, Vol 4, pg 353-354

The District Court also mistakenly claimed that since Defendant's predecessors were "presumably" businesses, and would "presumably" not know of Plaintiff's activities on the disputed property, Plaintiff's claim of use would not be proven, in spite of the fact that Plaintiff had presented over 20 neutral witnesses who testified as to Plaintiff's use of the property throughout the week over a period of more than 20

years. There has been no controvertion of the fact that the property was out in the open in an area of Topeka, Kansas, for all to see, at all times what happened there. There has been no controvertion of Plaintiff's facts demonstrating clearly, the use of the property constantly for over 20 years, on a daily basis.

It is apparent, that the District Court ignored all factual evidence which was presented by the Plaintiff uncontroverted, in spite of the fact that Defendant could present no evidence whatsoever to controvert Plaintiff's evidence. It is incomprehensible that a neutral Court would view the properly admitted evidence in this case and conclude, as the District Court herein, did that "....*Plaintiff's of this land, otherwise fenced off and unused by Mr. Shumaker or his predecessors, is not so inconsistent with mere neighborliness nor, by Plaintiff's description, of such consequence to the owner or owner's use as to reasonably raise an alarm. The burden would be on Plaintiff to come forward with evidence that its use of this property was "knowingly adverse", not merely consensual, incidental, or mildly obtrusive, if such evidence, in fact, existed."* ROA, Vol 4, pg 354-355

As stated before, the evidence which the Court accepted, of the use of the property, was of the use of the property by a veterinary clinic for every day of the week, including the weekends, to allow patient animals of the clinic to urinate and defecate, and to exercise. ROA, Vol 2, pg 118-120. It must be remembered that this property is in the middle of the city of Topeka, Kansas, in the western suburbs, with business and residences surrounding the area. In adverse possession cases, the particular land, its condition, character, locality and appropriate use are considered. *Schaake v. McGrew, et al.,* 211 Kan, 842, 846, 508 P.2d 930 (1973). The acts of

dominion necessary to establish possession must be adapted depending on the particular land, and neither cultivation nor residence, is necessary to establish actual possession. *Buchanan v. Rediger, 26 Kan. App. 2d 59, 975 P.2d. 1235 (1999)*

Clients of the Plaintiff's veterinary clinic, while visiting the clinic with their pets, also used this real estate, because it was commonly thought to belong to the veterinary clinic. "*I have walked my dog since 1998 in the grassed area east of Westport Animal Clinic to the kindercare parking lot. It was always an open area unobstructed by fencing.*" Affidavit of Laura Bell, ROA, Vol. 2, pg 41

"I have been an employee of Animal Care, Inc. owned and operated by Debra K. Anderson, DVM, as Westport Animal Clinic, for 22 years. I was working for Dr. Anderson when she moved the clinic from Barrington Village to its present location. Childcare facilities occupied the building just to the east of the clinic for most of my years of employment. There was a chain link fence dividing the properties. We used the land on our side to collect urine and fecal samples, walk patients and boarding animals, and occasionally assess lameness or neurological problems when we wanted to see how the pet did on a natural surface. I don't recall any complaints from previous owners. I didn't expect any. I was on my side of the fence. I believed I was on clinic property and used it accordingly." Affidavit of Dr. Virginia Birtell, D.V.M. ROA, Vol; 2, pg 138

"I have been a client of Animal Care, Inc. owned and operated by Debra K. Anderson, DVM as Westport Animal Clinic, for 21 years. During the entire time I observed Dr. Anderson and her employees utilize the lawn (or ground) to the east of Westport Animal Clinic, to walk clinic patients (animals) for exercise and to relieve

bowels and bladders. The area of lawn was a strip up to a chain link fence which ran the length of that area when there was a childcare facility in the building just east of the clinic. I myself used this area for my animals when visiting the clinic because I observed the clinic staff doing so. This use of the property has occurred throughout the more than 20 years of my patronage to Westport Clinic." Affidavit of Lesa F. Roberts, ROA, Vol 2, pg 144

The testimony of individuals on behalf of Plaintiff all support the open, continuous and exclusive use of the property in question without any controverting evidence proffered by Defendant.

The District Court herein, has apparently taken the lack of action or objection by Defendant's predecessor as to Plaintiff's use of the property, as some type of proof that Plaintiff's use of the property is "inconsequential." If this standard, proposed by the District Court in direct opposition to the existing case precedent, were allowed to stand, it would effectively nullify and destroy the use of the adverse possession law. It would reverse the case precedent, such as *Barrett v, Ninnescah Bowhunter's Ass'n, 15 KA 2d 241, 805 P. 2d 485 (1991)* which held that if the record holder knows of the adverse possession activities on the property in question, yet takes no action, the adverse possession is complete. The Court's decision would reverse the standing in Buchanan v. Rediger, which held that "The true (record holder) owner of property, who fails to protect rights of ownership against one holding in adverse possession and manifesting the same as required by statute and for the length of time fixed, is considered as having acquiesced in the transfer of ownership." *3 Am. Jur.2d, Adverse Possession §4, p. 96. Buchanan v. Rediger, 26 Kan. App. 2d 59, 975 P.2d. 1235 (1999)*

The District Court claimed that Plaintiff's use of the property was inconsequential in spite of evidence submitted by Plaintiff, and admitted to and submitted by Defendant, that Defendant engaged in a constant campaign of hostility against Plaintiff because of her use of the property.

This hostility against Plaintiff included harassing Plaintiff's clients, ROA, Vol 2, pg 119, pg 132-133, writing defamatory letters to Plaintiff's co-owners, ROA, Vol 2, pg 119, pg 179, writing accusatory, false complaints to the Topeka zoning office, ROA, Vol 2, pg. 166, making complaints to the Topeka city police department three separate times in 6 days. The action of Defendant falsely making claims to the Topeka zoning office resulted in a zoning inspector trying to start a zoning claim against Plaintiff which was stopped as soon as the Topeka city attorney found out about the harassment both by Defendant and by the zoning staff.

In August 16, 2010, Roger Shumaker filed a false complaint with the city of Topeka, claiming that I was violating the zoning ordinances. This caused an investigator with the city zoning office to come out, inspect and issue a complaint against me. She also threatened to fine me each time a patient was taken outside, an action which was clearly allowed by our zoning. She refused to review the zoning ordinances and the only option she gave me was to go through an expensive appeal with her office. The situation was only resolved when Braxton Copley, attorney for the city of Topeka, intervened and made the zoning office back off, because my business and actions were all legal under our current zoning. Affidavit of Plaintiff, ROA, Vol. 2, pg 119-120; pg 167

It defies logic and all case precedent for the District Court herein to claim that

Plaintiff's actions of allowing multiple animals and clients to allow animals to urinate and defecate on the disputed property, and to pay to take care of the property, in other words to utilize the disputed property on a daily basis, seven days per week, fifty two weeks per year, for twenty years was "inconsequential."

If Plaintiff's actions against the property were so inconsequential, then why did the Defendant engage in such a strong campaign against Plaintiff, continually making complaints against her, harassing her clients and Plaintiff herself, presumably, (as stated by the Court) to "defend" the disputed strip of property? The evidence submitted by Plaintiff and Defendant herein support the conclusion that the use of the property by Plaintiff was of great and horrible concern and hostility to Defendant, apparently causing him such concern of losing the property that he continually made one complaint after another about Plaintiff. The Court clearly ignored all credible and properly admitted evidence from both parties in mistakenly ruling against adverse possession by the Plaintiff.

II. The District Court, Honorable Franklin R. Theis presiding, ignored evidence, wrongly interpreted laws and ordinances, and held against existing case law, in ruling against Plaintiff on the issue of harassment of Plaintiff by Defendants.

STANDARD OF REVIEW

KSA 60-31a02(b) defines "harassment" to "*mean a knowing and intentional course of conduct directed at a specific person that seriously alarms, annoys, torments or terrorizes the person, and that serves no legitimate purpose.*"

KSA 21-3818 *states that (a) falsely reporting a crime is informing a law enforcement officer or state investigative agency that a crime has been committed,*

knowing that such information is false and intending that the officer or agency shall act in reliance upon such information."

During the course of the litigation herein, Defendant complained to the city of Topeka zoning office on August 16, 2010, and filed a false complaint with the city of Topeka, claiming that Plaintiff was violating the zoning ordinances. This caused an investigator with the city zoning office to come out, inspect and issue a complaint against her. She also threatened to fine Plaintiff each time a patient was taken outside, an action which was clearly allowed by Topeka city zoning. She refused to review the zoning ordinances and the only option she gave Plaintiff was to go through an expensive appeal with her office. The situation was only resolved when Braxton Copley, attorney for the city of Topeka, intervened and made the zoning office back off, because Plaintiff's business and actions were all legal under the current zoning of Westport Animal Clinic. It should be noted that the record reflects that Defendant was represented by Lucas Thompson, attorney at law, during this activity, and Defendant is presumed to know the correct law, through his attorney.

Westport Animal Clinic was, at all relevant times herein, zoned C-4 by the city of Topeka. The C-4 zoning in Topeka, Kansas is reprinted below, to demonstrate that Plaintiff was at all times in compliance with said zoning.

C-4 COMMERCIAL DISTRICT; @ http://www.codepublishing.com/KS/Topeka/
Sections:

18.155.010 Purpose – Intent.
18.155.020 Regulations generally.
18.155.030 Use regulations.
18.155.040 Dimensional requirements.
18.155.050 General provisions.
18.155.060 Development alternatives.

18.155.010 Purpose – Intent.

This district is established to provide for commercial uses and activities which are intended to serve as community or regional service areas. Uses and activities permitted are typically characterized by outdoor display, storage and/or sale of merchandise, by repair of motor vehicles, by outdoor commercial amusement and recreational activities, or by activities or operations conducted in buildings and structures not completely enclosed. The extent and range of activities permitted are highly intensive and therefore special attention must be directed toward buffering the negative aspects of these uses upon any residential use. (Code 1995 § 48-18.00.)

18.155.020 Regulations generally.

The regulations set forth in this chapter or set forth elsewhere in this division when referred to in this chapter are the district regulations for the C-4 commercial district. (Code 1995 § 48-18.01.)

18.155.030 Use regulations.

(a) Permitted Uses.

(1) Permitted uses in the C-3 commercial district; and store, shop or facility for the conduct of a retail business or service similar in use and nature to the types of uses listed herein and specifically excepting those types of activities provided for in less restricted districts.

(2) Agricultural machinery and equipment sales area and service facility.

(3) Amusement indoor establishments, including dance, pool, and billiard halls; archery ranges, shooting galleries, pinball, electronic and video game arcades; taverns and similar establishments licensed by the city to sell and dispense cereal malt beverages for drink on premises.

(4) Animal hospitals, either large or small, veterinary clinics and enclosed kennels.

18.155.010 definitions

"Animal hospital" means premises where small and large animals are admitted principally for examination, treatment, board, or care, by a doctor of veterinary medicine.

It is important to notice that the Topeka, Kansas zoning area of C-4, does not contain any statement of paragraph discussing or requiring "Provisional Uses." In the area of zoning, C-4,which is not controverted, where Plaintiff's business is located, it is legal under the C-4 zoning code to even have what are commonly and legally referred to as "large animals," without containment inside a building. The Topeka City zoning ordinances do contain the Provisional Use requirement in other zones, such as C-5.

The C-5 zoning ordinances are printed below for the convenience of the Court.

C-5 COMMERCIAL DISTRICT; @ http://www.codepublishing.com/KS/Topeka/

Sections:

18.160.010 Purpose – Intent.

This district is established to provide for a wide range of commercial activities which are contained in the central business or core area of the community. The extent and range of uses permitted are to provide for high efficiency of land use and to encourage a broad mix of commercial, office and residential uses. (Code 1995 § 48-19.00.)

18.160.020 Regulations generally.

The regulations set forth in this chapter or set forth elsewhere in this division when referred to in this chapter are the district regulations for the C-5 commercial district. (Code 1995 § 48-19.01.)

18.160.030 Use regulations.

(a) Permitted Uses.

(1) Permitted uses in the C-3 commercial district.

(2) Parking lot and/or multistory garage.

(3) Television, radio and microwave transmission towers; telecommunication equipment; and accessory facilities other than those provided for elsewhere in this division as accessory to a permitted use or exempt as set forth by definition.

(4) Auction house.

(5) Studio for photography of commercial and industrial products in which photographing of people is clearly accessory to the photographing of products.

(6) Newspaper and magazine distribution agencies.

(7) Publishing establishments.

(8) Billboards and panel posters not exceeding 300 square feet per single face area and which do not exceed a height of 55 feet above grade.

(9) Commercial laundry, dry cleaning and dyeing facility.

(10) Building, construction, and mechanical contractor office, showroom, shop and sales area, including plumbing, heating and air conditioning, electrical, mechanical and sheet metal work; provided, that on the premises there is no unenclosed storage of material, machinery, vehicles, or equipment; and no storage of any vehicle, machinery, or equipment with a net weight exceeding three tons.

(11) Bus terminal or station.

(b) Provisional Uses.

(1) Automotive service stations, types I and II, subject to the requirements of Chapter 18.225 TMC.

(2) Automotive or vehicle car wash facility, subject to the requirements of Chapter 18.225 TMC.

(3) Small animal hospital and veterinary clinic for small domestic animals, subject to the requirements of Chapter 18.225 TMC.

18.225.010 Use and requirements.

The following principal uses are listed as provisional uses or conditional use permits in various districts in this division. These uses are required to meet the regulations indicated, in addition to the regulations of the district in which the uses are allowed, only when this chapter is referenced to in the requirements for each use. In case of any conflict between the regulations of the district in which the use is allowed as a provisional use or conditional and the additional regulations of this chapter, the most restrictive regulations shall govern:

(o) Small Animal Hospital or Veterinary Clinic for Small Domestic Animals.

(1) That medical treatment or care of large animals such as horses, cattle, sheep, goats, swine, etc., shall not be permitted on the premises.

(2) That medical treatment or care shall be practiced only within the confines of an enclosed building or structure.

(3) Kennel or boarding operations incidental to the principal use shall be permitted only within the confines of an enclosed building or structure.

(4) The building or structure shall be constructed in such a manner as to prevent the extension of audible noise and/or odor from the animals to the adjoining properties.

(5) The governing body shall have the authority to order the discontinuance of this use upon the proper showing that such use constitutes a nuisance or has violated the above-listed provisions.

It is important to note that the C-5 zoning of Topeka, does contain language making veterinary clinics subject to Provisional Use: "(3) Small animal hospital and veterinary clinic for small domestic animals, subject to the requirements of Chapter 18.225 TMC." This language is notably absent from the C-4 zoning ordinance which Plaintiff operates under. In reality, the city of Topeka Provisional Use ordinance specifically states that:

18.225.010 Use and requirements. "*These uses are required to meet the regulations indicated, in addition to the regulations of the district in which the uses are allowed, only when this chapter is referenced to in the requirements for each use.*" (Emphasis added)

During the course of litigation, represented by a licensed attorney, Defendant would be presumed to know the contents and effects of the ordinances and yet he lied to the Topeka city zoning office in making a complaint about Plaintiff, for purposes which could only be to harass Plaintiff during the course of litigation. ROA, Vol 2, pg 166

Similarly, when Defendant called the police department of Topeka, Kansas three separate times in a period of six days to complain about Plaintiff's patients making too much noise even though they were inside a building, it can only be presumed that Defendant did so also for the purposes of harassment. If the zoning ordinances of Topeka, specifically C-4, are such that a large animal clinic could legally be located within Zone C-4, how could it possibly be unlawful for dogs to bark in the middle of the day inside a legally zoned and existing veterinary clinic in that same C-4 district? By the laws of the city of Topeka, it is lawful to have a large animal facility in a C-4 zoning. Wikipedia defines "large animal practice" as:

"Large animal practice - Usually referring to veterinarians that work with, variously, livestock and other large farm animals, as well as equine species and large reptiles." @ http://en.wikipedia.org/wiki/Veterinary_physician#Focus_of_practice

ANALYSIS

The District Court herein reviewed the facts submitted above, with no controvertion by Defendant and concluded that the Defendant had some bizarre sort of

privilege to do whatever Defendant desired to defendant the disputed real estate.

The District Court held that the "*...Defendants had a privilege in regard to the property to take reasonable means to preserve the property and to terminate Plaintiff's, or its patrons, use of this property as a locus for Plaintiff's veterinary clinic's animal patients use a place to urinate or defecate.*" ROA, Vol 4, pg 372.

This ruling by the Court would require a twisted logic, in some way finding that turning in multiple noise complaints against Plaintiff when there is no city ordinance against occasional animal noise inside a veterinary building, when no animals were outside, was a defense of the property. How does turning in multiple noise complaints, against animal patients inside the Plaintiff's building, after the police informed Defendant that they were not going to cite Plaintiff, amount to the defense of the strip of property outside? How can scaring Plaintiff's clients when they are visiting Plaintiff, amount to a reasonable, or legal defense of the property?

The District Court based this granting of this special "privilege" on a complete reversal and mistake laden interpretation of the Topeka City zoning ordinance.

"*Additionally, it appears that the use of Defendant's property by Plaintiff for its animal patients was inconsistent with existing zoning laws, such that such practices which Plaintiff sought protection for actually represented prohibited conduct." ROA, Vol 4, pg 374.*

The District Court could not have reviewed the zoning code of the city of Topeka and come to the conclusion that he did. The only source of that holding by the District Court would have been false, prejudicial, non- evidentiary statements made by Defendant's attorney during a court hearing.

"As the City argues, because the facts relating to the driveways are not disputed, a question of law is presented as to whether there was a City Code violation. See City of Wichita v. Hackett, 275 Kan. 848, 850, 69 P.3d 621 (2003) (interpretation of municipal ordinance is question of law over which appellate courts exercise unlimited review). Further, because there is solely a question of law raised by the application of the relevant City ordinances, it can be raised for the first time on appeal." See *Pierce v. Board of County Commissioners*, 200 Kan. 74, 80-81, 434 P.2d 858 (1967).

The zoning code of the city of Topeka is clear and unambiguous. When a business such as Plaintiff's, a veterinary hospital, is in Zone C-4, there is no requirement for the business to adhere to the Provisional Use at TPC 18.225.010. As a matter of fact, that Provisional Use ordinance specifically excludes all zones that it is not specifically a part of.

The result of this is that Plaintiff, as she has done for the past twenty four years, was operating her veterinary practice completely legal, and the District Court has, through his ruling on the harassment claim in the present case, granted Defendants a privilege to continue to file false claims against Plaintiff with the city police, or city zoning office, or any other office Defendants choose next for their continued harassment against Plaintiff.

III. The District Court herein erred by applying the wrong standard and granting summary judgment for Defendant and against Plaintiff on the adverse possession and harassment claims.

STANDARD OF REVIEW

"when the pleadings, depositions, answers to interrogatories, and admissions

on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The trial court is required to resolve all facts and inferences which may reasonably be drawn from the evidence in favor of the party against whom the ruling is sought. When opposing a motion for summary judgment, an adverse party must come forward with evidence to establish a dispute as to a material fact. In order to preclude summary judgment, the facts subject to the dispute must be material to the conclusive issues in the case. On appeal, we apply the same rule and where we find reasonable minds could differ as to the conclusions drawn from the evidence, summary judgment must be denied. [Citation omitted.]" Bracken v. Dixon Industries, Inc., 272 Kan. 1272, 1274-75, 38 P.3d 679 (2002).

The Court of Appeals concluded that because the district court heard no oral testimony and the controlling facts were based on written or documentary evidence appellate review was plenary. We agree. Where the controlling facts are based solely on written or documentary evidence, an appellate court may determine de novo what the facts establish. *Giblin v. Giblin,* 253 Kan. 240, 253, 854 P.2d 816 (1993). Moreover, our review of questions of law is unlimited. *Dougan v. Rossville Drainage Dist.,* 270 Kan. 468, 472, 15 P.3d 338 (2000).

"Accordingly, the district court's ruling should be reversed. Based upon the statute's clear language and the exception recognized in *Lanning*, *Vonfeldt*, and *Sparks*, the stipulated facts establish that plaintiffs met this requirement for adverse possession." *Buchanan v. Rediger, 26 Kan. App. 2d 59, 975 P.2d. 1235 (1999)*

ANALYSIS

The District Court ignored the testimony of Plaintiff and over 20 neutral, uninterested witnesses that Plaintiff had openly, exclusively, and continuously possessed and used the real estate in dispute for at least twenty years. This factual evidence was not controverted by Defendant. In litigation that has seen Defendant, during the course of the litigation, continually, falsely accuse Plaintiff of crimes, zoning violations and noise violations, none of which were true, which saw Defendant stand outside and harass Plaintiff and her clients, the District Court has held that Plaintiff's actions in adversely possessing the real estate were, in some way inconsequential to Defendant or his predecessor property owners. The Defendant herein did not controvert any of Plaintiff's material facts clearly establishing adverse possession of the property in dispute, and the District Court ruling should be reversed.

At one point in time the District recognized that the Defendant had not presented any evidence to controvert the Plaintiff:

"THE COURT: *Mr. Thompson, I looked at your reply here, none of your – you don't come forward with any affidavits or anything like that, so you really --" Transcript of proceedings before the honorable Franklin R. Theis on the 24th of June, 2011), pg 35, line 23 to pg 38, line 1.,* ROA, Vol. 4, pg 270.

KSA 60-256. Summary judgment. *(a) By a claiming party. A party claiming relief may move, with or without supporting affidavits or supporting declarations pursuant to K.S.A. 53-601, and amendments thereto, for summary judgment on all or part of the claim.*

(c)(2) The judgment sought should be rendered if the pleadings, the discovery

and disclosure materials on file, and any affidavits or declarations show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.

"Summary judgment is appropriate when the pleading[s], depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The trial court is required to resolve all facts and inferences which may reasonably be drawn from the evidence in favor of the party against whom the ruling is sought. When opposing a motion for summary judgment, an adverse party must come forward with evidence to establish a dispute as to a material fact. In order to preclude summary judgment, the facts subject to the dispute must be material to the conclusive issues in the case. On appeal, we apply the same rules and where we find reasonable minds could differ as to the conclusions drawn from the evidence, summary judgment must be denied.' [Citation omitted.]" *Mitchell v. City of Wichita, 270 Kan. 56, 59, 12 P.3d 402 (2000) (quoting Bergstrom v. Noah, 266 Kan. 847, 871-72, 974 P.2d 531 (1999).*

With all material evidence submitted by Plaintiff supporting her claim for adverse possession, with no evidence at all controverting Plaintiff, it was error for the District Court to deny Plaintiff's Motion for Summary Judgment.

IV. The Plaintiff has not claimed or admitted that the predecessor to Defendant "granted permission" to Plaintiff to use the disputed real estate.

STANDARD OF REVIEW

Defendant's lawyer has raised an issue in Defendant's Docketing statement

about a letter written by Plaintiff's attorney on April 29, 2010 which Defendant contends "proves" that there was permission for Plaintiff to use the property. This groundless argument was ignored by the District Court and not used for the Court's decision.

Contrary to statements by Defendant's lawyer, the letter is not an admission by any party. The letter was simply a statement by Plaintiff's attorney paraphrasing 3 Am. Jur.2d, Adverse Possession §4, p. 96. which explains that if a record owner of property (Kindercare, in this instance) stood by and did not complain to the adverse possession by another (Plaintiff, in this instance) the record owner is said to "acquiesce" or "consent" to the adverse possession and the record owner cannot complain of the adverse possession, nor can any successors to the record owner. The "documentation" mentioned were merely aerial surveys showing the fence and use of the property by Plaintiff.

The Defendant did not introduce any evidence as to the intent of the letter writer as to the meaning of the letter, instead preferring to make spurious arguments about the letter, even though the writer, this attorney herein, was available.

ANALYSIS

The letter that Defendant tries to claim was an "admission" was simply a paraphrase of the following cases:

If the record holder knows of the adverse possessor's activities on the property in question, yet takes no action, the adverse possession is complete. "*The Barretts knew of the fence line in 1963 and knew Meyer had been in possession of the land north of the fence since 1953. Yet they did not dispute the location of the true boundary*

until after Meyer's death in 1980. The trial court found most, if not all, the Barretts' activities north of the fence occurred after 1976 and did not act to dispossess Meyer or his successors. The record supports this finding." Barrett v. Ninnescah Bowhunter's Ass'n, 15 K.A.2d 241, 805 P.2d 485 (1991).

"The true (record holder) owner of property, who fails to protect rights of ownership against one holding in adverse possession and manifesting the same as required by statute and for the length of time fixed thereby, is considered as having acquiesced in the transfer of ownership." 3 Am. Jur.2d, Adverse Possession §4, p. 96. Buchanan v. Rediger, 26 Kan. App. 2D 59, 62; 975 P.2d. 1235 (1999)

"When a motion for summary judgment is made and supported as provided by K.S.A. 60-256, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this section, must set forth specific facts showing that there is a genuine issue for trial. *RAMA Operating Company, Inc., v. David A. Barker*, Kansas Court of Appeals, Case No.105,589.

Here, RAMA merely stated that production was not as represented by Barker, but it provided no specific facts beyond this conclusory statement. Case law in both Kansas state and federal courts have found that conclusory affidavits are insufficient to establish contested facts for summary judgment purposes. See *Korytkowski v. City of Ottawa*, 283 Kan. 122, 132, 152 P.3d 53 (2007) (finding that summary judgment for defendants was appropriate in inverse condemnation case when "the defendants presented ample evidence to support the reasonableness of the projects, and plaintiffs presented no evidence to rebut it, beyond their own unsupported and conclusory

affidavits"); *Estate of Belden v. Brown County*, 46 Kan. App. 2d 247, 84-285, 261 P.3d 943 (2011)

Defendant's unsupported allegations cannot be used to support any issue herein, without supporting evidence which has not been offered, and this issue is not appropriate on appeal.

SUMMARY

Plaintiff Animal Care Clinic, by and through Debra K. Anderson, D.V.M., d/b/a Westport Animal Clinic presented overwhelming and uncontroverted evidence that she had maintained adverse possession in an open, continuous, exclusive manner for a minimum of 20 years. This adverse possession by Plaintiff was both knowingly adverse and was upon a good faith belief by Plaintiff that she owned the property. Defendant did not present evidence to controvert any of Plaintiff's facts. The District Court should be directed to issue an order granting Plaintiff the sole legal ownership of the property in dispute.

All of Plaintiff's activities at all times were done pursuant to the laws of Kansas and the city of Topeka, including the Topeka zoning orders. However, Defendant maintained a campaign of harassment against Plaintiff in an attempt to interfere with Plaintiff's business and intimidate Plaintiff during the course of the litigation herein. The District Court should be directed to issue a Order restraining Defendant from further harassing Plaintiff and making groundless claims against Plaintiff to various governmental agencies.

Since Defendant did not come forth with any evidence controverting Plaintiff's allegations and material facts in her Motion for Summary Judgment, the case

precedent requires a finding of Summary Judgment for Plaintiff on all issues herein.

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CERTIFICATE OF SERVICE

I hereby certify that the original and sixteen (16) copies of the Appellant's Brief were delivered to the Clerk of the Court of Appeals for the State of Kansas on the 30th day of May, 2013, and that two (2) true and correct copies were deposited in the United States Mail, postage prepaid, on the 31st day of May, 2013, addressed to the following:

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William L Anderson
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