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NO. 14-111418-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

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JORDAN PATTERSON AMERICAN LEGION POST #319  
(DAN E. TURNER AND PHILLIP L. TURNER)  
Plaintiff/Appellant,

CHARLES YUNKER, ADJUTANT, AMERICAN LEGION KANSAS DEPARTMENT  
Intervenor/Appellee,

vs.

QUALITY CONTRACTORS, LLC; JERRY PRITCHARD;  
JAMES R. ANDERSON; VERDELL BUGG;  
CAPITAL TITLE INSURANCE COMPANY, LC; DEANNA M. ZIMMERMAN  
15TH STREET INVESTMENTS, LLC; and COMMERCE BANK & TRUST COMPANY  
n/k/a COREFIRST BANK & TRUST  
Defendants/Appellees.

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**BRIEF OF APPELLEES**  
**15TH STREET INVESTMENTS, LLC and**  
**COMMERCE BANK & TRUST COMPANY n/k/a COREFIRST BANK & TRUST**

---

Appeal from the District Court of Shawnee County, Kansas  
The Honorable Franklin J. Theis, Judge  
District Court Case No. 07 C 919

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DEFENDANTS/APPELLEES



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JAMES R. ANDERSON; VERDELL BUGG;  
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15TH STREET INVESTMENTS, LLC; and COMMERCE BANK & TRUST COMPANY  
n/k/a COREFIRST BANK & TRUST  
Defendants/Appellees.

**NATURE OF THE CASE**

This matter involved the sale of real property by Jordan Patterson American Legion Post #319 ("Post # 319") to Quality Contractors, LLC. Sometime after executing the real estate contract, a few minority members of Post #319 thought they could get rich off of the sale of Post #319's real property and therefore, organized a scheme to oust the current Commander from his leadership position in Post #319 in the hope of renegotiating the Real Estate Contract for the huge payday. Nonetheless, on August 11, 2006, the closing on the sale of the real property occurred at Capital Title Insurance Company, LC, at which time Quality Contractors, LLC became owner of the real property. Subsequently, 15th Street Investments, LLC purchased the real property from Quality Contractors. CoreFirst Bank & Trust Company holds a mortgage on the real property, and pursuant to an order of the District Court, is holding the funds from the

subject real estate transaction in an account established by attorneys Dan and Phillip Turner (the "Turners").

Post #319 filed this lawsuit against Quality Contractors, Jerry Pritchard, James R. Anderson, Verdell Bugg, Capital Title, Deanna M. Zimmerman, 15th Street Investments, and CoreFirst Bank & Trust, challenging the sale of real property. A number of counterclaims and cross-claims were asserted by the Defendants.

Concluding the validity of the real estate contract and the closing transaction may be conclusive to all issues in this matter, the District Court determined the matter should be bifurcated to address whether the individuals signing the real estate contract on behalf of Post #319 had authority to execute the real estate contract and execute the Corporation Warranty Deed at closing.

At the close of discovery, all Defendants filed their respective Motions for Summary Judgment. After reviewing the pleadings and hearing arguments from counsel, the District Court granted summary judgment for Quality Contractors, LLC, Jerry Pritchard, James R. Anderson, Verdell Bugg, Capital Title Insurance Company, LC, Deanna M. Zimmerman, 15th Street Investments, LLC and Commerce Bank & Trust Company n/k/a CoreFirst Bank & Trust, and against the Plaintiff Jordan Patterson American Legion Post #319 on Plaintiff's claims. However, the District Court deferred a final entry of judgment until the Court resolved all pending cross-claims and counterclaims not mooted by its decision, and determined the proper distribution of the sale proceeds, which was being held under the Court's order.

Subsequently, on February 4, 2011, the Court entered a Journal Entry of Judgment ordering all counterclaims and cross-claims alleged by Jerry Pritchard, Quality Contractors, LLC, Capital Title Insurance Company, LC and Deanna M. Zimmerman dismissed

as moot; and Verdell Bugg and James R. Anderson's counterclaims for tortious interference with contract were dismissed as Bugg and Anderson abandoned their respective counterclaims. In addition, Bugg and Anderson's indemnification claim against Post #319 was dismissed without prejudice. The Court further dismissed 15th Street Investments, LLC's counterclaim for misrepresentation against Post #319 as the claim was moot in light of the Court's Memorandum Opinion and Order; and the Court further quieted title of the real property in favor of 15th Street Investments, LLC subject only to CoreFirst Bank & Trust's mortgage lien. The Court reserved the issues regarding the disposition of the sale proceeds for further determination.

The Turners, on behalf of Post #319, then filed the first Notice of Appeal. Shortly thereafter, the American Legion Kansas Department was allowed to intervene, due to the dissolution of Post #319 into the American Legion Kansas Department.

In the first appeal, the Court of Appeals dismissed the appeal, because the District Court's decision was not final as to all issues, as the District Court had reserved the issue regarding the disposition of the sale proceeds for further determination. Additionally, in its decision on the first appeal, the Court of Appeals pointed out that the intervention filed by the American Legion Kansas Department raised questions as to whether Post #319 was the real party in interest. The Court of Appeals directed the District Court on remand to determine whether Post # 319 was ever properly a Plaintiff or, even if it was a proper Plaintiff at one time, whether it ceased to be a proper Plaintiff when the Kansas Department suspended its charter.

On remand, the District Court reiterated its prior opinion that Defendants Anderson and Bugg were duly authorized representatives and agents of Post #319, that the real estate contract at issue was duly authorized by Post #319, and the closing was authorized. As to whether Post #319 ever had proper standing in this case as a result of its dissolution and

absorption into the American Legion Kansas Department, the District Court found that no facts were proffered post-appeal to suggest that Post #319 had proper standing or, in the alternative, to impeach its standing at any point afterwards, except the facts relating to Post #319's dissolution. Consequently, the District Court concluded that standing now resides with the American Legion Kansas Department, which clearly has assumed ownership of the proceeds from the sale of the property at issue in this case.

Also on remand, the District Court held that the attorneys for Post #319, the Turners, did not have any attorney fee lien or claim to the \$120,000.00 escrow funds from the sale of the property. However, the District Court did award attorney's fees to the Estate of Defendant Anderson, and to Defendant Bugg.

In response to those orders, the Turners filed a Notice of Appeal on their own behalf, bringing the case back before the Court of Appeals.

#### **STATEMENT OF ISSUES**

- I. The Turners Lack Standing To Appeal.**
- II. The Kansas Ultra Vires Statute (K.S.A. 17-6104) Bars Post #319's Claims Against 15th Street Investments, LLC And Commerce Bank & Trust Company n/k/a CoreFirst Bank & Trust.**
- III. 15th Street Investments, LLC And Commerce Bank & Trust Company n/k/a CoreFirst Bank & Trust Are Innocent Purchasers Of The Subject Property.**
- IV. The Real Estate Contract Was Valid.**
- V. Commander Anderson Had Authority To Enter Into The Real Estate Contract And Execute The Corporation Warranty Deed.**
- VI. There Are No Material Facts To Suggest Commander Anderson Was Incapacitated During The Time of Signing The Real Estate Contract Or The Corporation Warranty Deed.**

- VII. There Was Insufficient Material Facts To Support A Finding Of Duress.**
- VIII. The District Court Did Not Rely On The Affidavit Of James R. Anderson In Making Its Decision.**
- IX. The Turners Do Not Have A Valid Attorney's Lien, And Are Not Entitled To Their Attorney's Fees and Expenses.**

### STATEMENT OF FACTS

As the District Court noted, the issues raised in this matter can be resolved by establishing the material facts in regards to the following six occurrences:

"First, on November 12, 2005, a meeting and election by the members of Post # 319 of James R. Anderson as Post Commander;

Second, a meeting on December 6, 2005, and vote by members of American Legion Post #319 there present 17 to 0 to authorize the sale of the Post property;

Third, the execution of a Contract of Sale by James R. Anderson, acting as the Post Commander, and three members of the Post's Executive Committee on January 5, 2006;

Fourth, a meeting of the Post on February 18, 2006, where mail ballots in favor or opposed to the sale of the Post were tallied evidencing a 20 to 9 vote to validate and authorize the sale;

Fifth, a meeting of Post #319 and purported election held on May 9, 2006, wherein, Kenneth Hill was elected Post Commander; and

Sixth, the attendance at the closing and execution of the deed transferring the property on August 11, 2006, by James R. Anderson, purportedly attending and acting as Commander of Post #319."(R. XVIII, p. 2339-2340.)

As noted by the District Court in its June 16, 2010 Memorandum Opinion and Order, there are a number of provisions from the Constitution of the American Legion Kansas Department and the Constitution and Bylaws of Post #319 that are relevant to the determination

of the issues in this case. Notably, neither the Constitution of the American Legion Kansas Department, nor the Constitution or Bylaws of Post #319, suggest any limitation on Post #319's authority to sell its real estate. (R. XII, pp. 1080-1143, and R. XVI, pp. 2226-2238).

The Bylaws of the American Legion Kansas Department, as relevant to this case, provide:

"Article VIII . . .

\* \* \* \* \*

Section 5. The officers of each Post shall be: A Post Commander; one or more Post Vice Commanders; a Post Adjutant; and such other members as the Post shall determine. The Post Commander and Vice Commander or Vice Commanders, shall be elected by secret ballot, and shall hold office for a period of one year, or until their successors have been elected and qualified. Other Post Officers may be selected or appointed as each Post may determine. Annual Post elections shall be held at a regular meeting not more than sixty days nor less than fifteen days prior to the Department Officers insofar as is practicable. Post delegates to the annual Department Convention shall be elected at least fifteen days prior to such convention, and the Post Adjutant shall immediately thereafter notify the Department Adjutant, giving the names of such delegates.

Section 7. Any officer of any Post may be removed from office for just cause by three-fourths vote of the membership of the Post present and voting: *Provided*, written charges against any such officer are first made under oath in writing by five members and filed with the adjutant or Commander, and thirty days' notice thereof in writing is first given to said officer before such vote for removal from office shall be taken; and *provided further* that fifteen days' notice of such hearing shall be given to each member in good standing in said post. The accused shall be given the right to appear at said hearing in person and by counsel and present his defense to said accusation.

\* \* \* \* \*

Section 10. Each Post shall adopt a Constitution and Bylaws which are not inconsistent with the National and Department Constitution and Bylaws. . . ." (R. XII, pp. 1117-1118).



The Constitution of Post #319, as relevant to this case, provides:

"ARTICLE V - OFFICERS

Section 1. The administrative affairs of this post of The American Legion shall, except as may be otherwise provided by the by-laws, be under the supervision of an executive committee which shall consist of six members in addition to the officers (sic) of the post. The terms of office of the elective members of the executive committee shall be, respectively: two members for one year; two members for two years; two members for three years. This post, by its by-laws, may provide for such other standing committees as the business of the organization may require.

Section 2. The officers of this post shall be a commander, first vice commander, second vice commander, an adjutant, a finance officer, a post historian, a post chaplain and a sergeant-at-arms, and such other officers as may be deemed necessary by this organization, who shall be nominated from the floor at the meeting preceding (sic) annual election. There shall be a post judge advocate who shall be appointed by the commander at the commencement of his term.

Section 3. All officers, with the exception of the post judge advocate, shall be elected annually and the six members to the executive committee shall be elected as provided in Article V, Section 1 of this constitution, and they shall hold office until their successors are duly installed or as otherwise provided. Any officer or executive committeeman may be removed for inefficiency by the executive committee, a two-thirds vote of the members present at any regular meeting of said committee, being necessary to effect such removal.

Section 4. Every member of this post in good standing shall be eligible to hold office in this post.

Section 5. The duties of officers and the executive committeemen shall be those usually appertaining to such officers or committeemen and as further provided in the by-laws." (R. XVI, pp. 2227-2228).

The By-Laws of Post #319, as relevant to this case, provide:

"ARTICLE II - MANAGEMENT

Section 1. The government and management of this post is entrusted to an executive committee of fourteen members to be known as the executive committee.

Section 2. The executive committee shall consist of six elective members at large, in addition to the elective officer of the post and together with the past commanders, whose membership is current, without vote. The officers, as described below, shall be elected annually, together with the elected members of the committee as their terms expire, as provided here-in, on the first meeting in August of each year and take office at the meeting, next following that of the election. All elections of officers and executive committeemen shall be by ballot and the candidate, or candidates receiving the highest number of votes shall be elected to the office, or offices, for which they are candidates. The term of the executive members shall be as follows: Two members elected for one year, two year, and three years, respectively.

Section 3. All vacancies existing in the executive committee, or in any office of the post, from any cause, other than the expiration of the term, shall be filled by a majority vote of the remaining members of the committee and a person, or persons, so appointed shall hold office for the unexpired term of the member, or members, of the committee or officer, or officers, whom he, or they succeed. Absence, without justifiable cause, from two consecutive, regularly called meetings of the post executive committee shall be deemed sufficient cause for the removal from office of such member of the post executive committee.

### ARTICLE III - POST EXECUTIVE COMMITTEE

Section 1. The post executive committee shall meet for organization and such other business as may come before it, at the call of the post commander within ten days after the installation of new officers. Thereafter, the post executive committee shall meet at least once every week and as often as said commander may deem necessary. The commander may call a meeting of request of three or more members of said post executive committee. Six members of the committee shall constitute a quorum, thereof.

Section 2. The post executive committee shall hire (sic) such employees as may be necessary excepting those that are not otherwise delegated to the house committee, as provided herein; shall authorize and approve all expenditures; shall require adequate bonds from all persons having the custody of post funds; shall be responsible for the audit of the adjutant and finance officer's books or any other person that is deemed necessary who has custody of post funds, at least once a year; shall confirm appointments made by the commander; shall hear the reports of post committee chairmen; shall hear and approve reports from the house committee, weekly, on house activities and concessions, and generally, shall have

charge of and be responsible for the management of and affairs of this post.

#### ARTICLE IV - DUTIES OF OFFICERS

Section 1. DUTIES OF THE POST COMMANDER. It shall be the duty of the post commander to be chairman of the post executive committee, to preside at all meetings, thereof, and of the post meetings. He shall be an exofficio member of all committees. It shall be his duty to approve and counter-sign all checks and vouchers upon the post finance officer drawn by the adjutant for appropriations allowed by the post. With the confirmation of the executive committee, as herein provided, he shall have the authority to appoint committees and their chairmen, as provided in this constitution and by-laws, or designate the chairman of their respective committee to select members, there of. He shall make an annual report, covering the business of the post for the year and recommendations for the ensuing year, which shall be read at the annual meeting and a copy thereof, immediately, forwarded to the department adjutant, and in general, to perform all duties as custom and parliamentary laws and any other duties as directed by the post or the executive committee.

\* \* \* \* \*

Section 4. DUTIES OF THE POST ADJUTANT. The adjutant shall have charge and keep a fully and correct record of all proceedings of all post and executive committee meetings, keep such records as the department and national organizations require, render reports of membership, annually, or when called upon at a meeting and, under the direction of the post, the executive committee, or the commander, handle all correspondence of the post. By virtue of his office, he shall be a permanent member of the post house committee and be responsible for the recording of all proceedings of said committee and the preservation thereof. With the confirmation of the post executive committee, he may appoint an assistant adjutant with compensation, as directed by the post executive committee and any other personnel, as directed by the post executive committee; for the furtherance of his duties, a prescribed herein. The adjutant may receive compensation for the faithful performances of his duties, as provided (sic) herein, as directed by the post executive committee.

\* \* \* \* \*

#### ARTICLE VIII - MEETINGS.

Section 1. The regular meetings of the post shall be held at the Post Home on the second and fourth Tuesdays of each month, at which time may be

transacted such business as may properly be brought up for action. Such meetings may be converted into entertainment as may be deemed advisable by the executive committee.

Section 2. The post commander or a majority present at any executive committee meeting shall have the authority to call asspecial (sic) meeting of the post, at any time.

Section 3. Upon the written request of fifteen members of the post, filed with the adjutant at least one week prior to the proposed meeting may call a special meeting of the post.

Section 4. Fifteen members shall constitute a quorum of any regular or call meeting of the post. Six members shall constitute a quorum of any regular or called meeting of the post executive committee meeting.

#### ARTICLE IX - NOTICES.

Section 1. Every member shall furnish the post adjutant with his, or her, address for mailing purposes.

Section 2. The post adjutant shall cause notice to be forwarded or published of each of the regular or called meetings of the post at least three days in advance, thereof; (sic) The post Adjutant shall cause notice, in writing, to be forwarded to each member of the annual election to be given at least one week prior thereto.

\* \* \* \* \*

#### ARTICLE XI - MISCELLANEOUS.

Section 1. Nomination of officers shall commence at the meeting prior to the date of election for which notice of same shall be published or forwarded by the adjutant to the members.

#### ARTICLE XII - AMENDMENTS.

\* \* \* \* \*

Section 3. These by-laws are adopted subject to the provisions of the national constitution and by-laws of the department of Kansas, The American Legion. Any amendment to said national constitution and by-laws or department constitution and by-laws which is in conflict with any provisions hereof, shall be regarded as automatically repealing or modifying the provisions of these by-laws to the extent of such conflict." (R. XVI, pp. 2230-2238).

Post #319 owned real property with a cinderblock building and pitched roof located at 811 S.E. 15th Street ("Subject Property"). (R. XI, p. 959-60) The building was very old and could not be used without making substantial repairs. (R. XI, p. 961.) The real property surrounding the building was covered in trash. (R. XI, p. 974.) Post #319 closed the building in early 2005 due to lack of utilities, water, and gas. (R. XI, p. 971.) The members of Post #319 held their meetings at Verdell Bugg's place of business because the building located on the Subject Property was in a dilapidated state and did not have water, sewer, or electricity. (R. XI, pp. 988-89.)

James R. Anderson was elected as Commander of Post #319 in November of 2005. (R. XI, pp. 962, 991.) Simultaneously, Robert Taylor, Ulysses Wright a/k/a Wayne Wright, and Ervin L. Jones were also elected to the Executive Board of Post #319. (R. XI, pp. 962, 982-83, 996, 1003.) Several officers from the State American Legion attended the election, including the District Commander, A.C. Byrd. (R. XI, pp. 979.)

During the November 2005 election, the membership of Post #319 also elected Verdell Bugg to be the liaison and assist with the transaction for the sale of the Subject Property, and to be a spokesman for Post #319. (R. XI, pp. 967; 987; 1000; 1004.) Bugg had previous experience in the real estate business as he has previously owned property at various locations throughout Topeka. (R. XI, p. 975.) Acting as the liaison, Bugg obtained copies of the platted area and a photo shot of the area. (R. XI, p. 980.) Bugg also obtained the Shawnee County appraisal from the County Assessor's Office, which appraised the Subject Property of Post #319 at \$115,000.00. (R. XI, p. 973.) Bugg never received any compensation or fees for his role as liaison for any part of his participation in the sale of the Subject Property. (R. XI, p. 974.)

On December 6, 2005, Post #319 held a meeting in which the members of the Post voted 17-0 in favor of selling the Subject Property for \$115,000.00. (R. XI, pp. 965-66, 992, 1007, 1008.) On January 5, 2006, Post #319 entered into a real estate contract to sell the Subject Property to Quality Contractors, LLC for \$120,000.00 ("Real Estate Contract"). (R. XI, pp. 1015-19.) The price increase to \$120,000.00 was pursuant to an agreement between Post #319 and Defendants Pritchard and Quality Contractors, LLC to sell the Subject Property for the county appraised value. (R. XI, p. 966.) At the time of the contract, the county appraised value had increased from \$115,000.00 to \$120,000.00. (R. XI, p. 966.) Commander James R. Anderson and Executive Committee members Wayne Wright, Robert E. Taylor, and Ervin L. Jones signed the Real Estate Contract on behalf of Post #319. (R. XI, pp. 998; 1015-19.)

Jerry Pritchard of Quality Contractors was present when Taylor, Wright, Jones and Commander Anderson signed the Real Estate Contract. (R. XI, p. 972.) Pritchard did not do anything to coerce or intimidate any of the individuals who signed the Real Estate Contract. (R. XI, p. 972.) Neither Pritchard nor Quality Contractors intimidated or caused duress upon Post #319 during the sale of the Subject Property. (R. XI, p. 968.) Further, neither Pritchard nor Quality Contractors ever lied to the members of Post #319 regarding the contract price or any other terms of the Real Estate Contract. (R. XI, pp. 989-90.)

Verdell Bugg has known Commander Anderson for over 30 years. (R. XI, p. 969.) Commander Anderson was in good physical condition when he signed the Real Estate Contract. (R. XI, p. 986, 976.) Commander Anderson also appeared competent to Bugg and able to make decisions on behalf of Post #319. (R. XI, pp. 964, 969-70.) Commander Anderson did not receive any gifts, money or any other benefit from any individual or entity for signing the Real Estate Contract for the sale of Post #319. (R. XI, p. 993.) Commander Anderson was not



threatened by any individual or entity at the time he signed the Real Estate Contract. (R. XI, p. 995.)

Wayne Wright signed the Real Estate Contract on behalf of Post #319. (R. XI, p. 984.) Wright did not sign the Real Estate Contract in his individual capacity as he did not have any ownership of Post #319. (R. XI, p. 984.) Wright signed the Real Estate Contract because the membership of Post #319 gave him the authority to enter into the contract for the sale of Post #319. (R. XI, p. 989.) Wright was not coerced or intimidated by anyone to sign the Real Estate Contract. (R. XI, p. 984.) When Wright signed the Real Estate Contract, he knew he was signing a contract for the sale of Post #319. (R. XI, p. 984.) Wright believed he had authority to sell Post #319 as the membership of Post #319 voted to sell the property. (R. XI, p. 984.) Wright never made any representation to the buyer that he did not have authority to sell the Post on behalf of Post #319. (R. XI, p. 984.) Wright never personally received any form of payment from any individual or entity for signing the Real Estate Contract. (R. XI, p. 985.)

Ervin L. Jones signed the Real Estate Contract on behalf of Post #319. (R. XI, p. 1005.) Prior to signing the Real Estate Contract, the membership of Post #319 voted to sell Post #319, and therefore, Jones believed he had authority to sell Post #319. (R. XI, p. 1005.) When Jones signed the Real Estate Contract, he was aware he was signing a contract for the sale of Post #319. (R. XI, p. 1005.) Jones was neither threatened nor coerced by anybody to sign the Real Estate Contract. (R. XI, pp. 1005, 1006.) Jones did not receive any money or any form of payment as a result of his participation in signing the Real Estate Contract. (R. XI, p. 1006.)

Robert Taylor signed the Real Estate Contract for the sale of Post #319 in his capacity as the Executive Committee Chairman of Post #319; not in his individual capacity. (R. XI, p. 999.) Taylor does not have any ownership in Post #319. (R. XI, p. 997.) Taylor

understood that by signing the Real Estate Contract on January 5, 2006, he was selling the Subject Property on behalf of Post #319. (R. XI, pp. 997-98.) Taylor knew there would be no sale of the Subject Property if the Executive Board did not sign the Real Estate Contract. (R. XI, p. 1001.) Taylor was not threatened in any way by any individual to sign the Real Estate Contract. (R. XI, p. 997.) Taylor never received any personal payments for signing the Real Estate Contract. (R. XI, p. 1002.) Taylor believed he was pressured into signing the Real Estate Contract because Pritchard was going to withdraw the offer if the Real Estate Contract was not signed on January 5, 2006. (R. XI, pp. 1001, 1002.)

On January 15, 2006, several members of Post #319, including Commander Anderson and Executive Officers Wright, Jones, and Taylor met with the State Adjutant Charles M. Yunker and State Judge Advocate Dan Wiley. (R. XI, p. 966; XVI, p. 2155-56.) During this meeting, the State officers suggested the Post #319 members they should send ballots to all paid members of Post #319 to decide whether to sell the real estate of Post #319. (R. XI, p. 966; XVI, p. 2155-56.) Thereafter, on January 27, 2006 Commander Anderson sent notification to all paid members of Post #319 discussing the actions taken by the Post to sell Post #319 and the subsequent dissention amongst a few members of Post #319. (R. XVI, pp. 2167-68.) The letter also enclosed ballots for every member to encourage all members to vote on the sale of the Post #319, even if the member could not attend the regular meeting on February 18, 2006, at 2:00 p.m. (R. XVI, pp. 2167-68.) During the February 18, 2006 vote, the membership voted for a second time to sell the Subject Property by a vote of 20-9. (R. XI, pp. 965, 998, 1020-59.)

On May 9, 2006, Kenneth Hill held an invalid election to become Commander of Post #319. The election was invalid because it was in violation of the Post's Bylaws. (R. XIII, p. 1573-74.) Pursuant to the Rules and Regulations for Post #319, Article IX of the Bylaws,

written notice of the annual election must be given to each member at least one week prior to the annual election. (R. XIII, p. 1573-74; XVI, p. 2237.) The election in which Hill was allegedly elected as Commander of Post #319 was held two days after the notice for the election was sent to Post #319 members. (R. XVI p. 2211, 2213.) Prior to closing, Post #319 did not vote to repudiate, rescind or withdraw from the Real Estate Contract. (R. XI, pp. 965, 968.)

On August 11, 2006, Commander Anderson attended the closing at Capital Title and executed a Corporation Warranty Deed transferring the real estate to Quality Contractors, L.L.C. (R. XVI pp. 2215-22.) In return, Capital Title issued from an Escrow Account a check payable to the "Jordan Patterson Post 319 American Legion, Inc., aka Jordan Patterson Post #319 American Legion" in the amount of \$120,000.00. (R. XI, p. 1060.) Verdell Bugg attended the closing with Commander Anderson and Bugg believed Commander Anderson was awake, aware and able to make decisions at closing. (R. XIII, p. 1570.)

Via a letter from the American Legion Kansas Department dated January 5, 2011, the charter of Post #319 was suspended for failure to function as an American Legion post. (R. XVIII, pp. 2429-2431.) Ultimately, Post #319 was canceled by the American Legion Kansas Department, and this cancellation was approved by the National American Legion. (R. XXIII, p. 36, and pp. 40-41.)

## **ARGUMENT AND AUTHORITIES**

### **I. The Turners Lack Standing to Appeal.**

#### **A. Standard Of Review**

The existence of standing and jurisdiction are both questions of law over which appellate courts exercise *de novo* review. *Bd. of Sumner County Comm'rs v. Bremby*, 286 Kan. 745, 751, 198 P.3d 494 (2008); *Mid Continent Specialists, Inc. v. Capital Homes, L.C.*, 279 Kan.

178, 185, 106 P.3d 483 (2005). To the extent that review of these issues require statutory interpretation, appellate review is also unlimited. *Double M Construction, Inc. v. Kansas Corporation Commission*, 288 Kan. 268, 271, 202 P.3d 7 (2009).

**B. Arguments And Authorities**

**1. The Turners Have No Standing To Bring This Appeal.**

This appeal arises out of a Notice of Appeal that was filed with the Shawnee County, Kansas District Court on February 26, 2014. (R. XIX, pp. 2507-08.) The Notice of Appeal states: "Comes now, Dan E. Turner and Philip L. Turner of Turner & Turner and files this Notice of Appeal . . ." Additionally, the signature of the Turners on the Notice of Appeal is not done in a representative capacity of any party. The signature block does not identify the Turners as lawyers for any of the parties. Accordingly, the Turners signed the Notice of Appeal on their own behalf individually, and not on the behalf of any party to the lawsuit. The Turners admitted in their Response and Objection for Involuntary Dismissal that they filed in this second appeal that they have submitted this second appeal on their own behalf, and not in representation of Post #319. (*See*, the Turners' Response and Objection for Involuntary Dismissal, Kansas Appellate Case No. 14-111418-A, ¶¶ 11 and 13).

K.S.A. 60-2103(a) requires a Notice of Appeal to be filed to properly perfect an appeal to this Court. *See*, K.S.A. 60-2103. If a Notice of Appeal is defective under K.S.A. 60-2103, the appeal must be dismissed. *See, Gates v. Goodyear*, 37 Kan.App.2d 623, 626-28, 155 P.3d 1196, 1198-99 (2007). K.S.A. 60-2103(a) provides the following: "A *party* may appeal from a judgment by filing with the clerk of the district court a notice of appeal." K.S.A. 60-2103(a) (emphasis added). Additionally, K.S.A. 60-2103(b) provides that a "notice of appeal shall specify the *parties* taking the appeal." K.S.A. 60-2103(b) (emphasis added).

Here, the Notice of Appeal that was filed to trigger this appeal was not filed by a "party." Rather, the Notice of Appeal was filed on behalf of Dan E. Turner and Philip L. Turner, individually. However, the Turners are not parties to this lawsuit, and have no standing to appeal. While, at one time, the Turners represented the Plaintiff in this case, Post #319, the Notice of Appeal does not state that the appeal is being brought on behalf of Post #319. Rather, the Notice of Appeal is clear that it is being brought on behalf of Dan E. Turner and Philip L. Turner, individually.

The fact that the Turners submitted the present Notice of Appeal on their own behalf, rather than on behalf of any party, is bolstered by an examination of the Notice of Appeal they filed for the previous appeal in this lawsuit. In that previous Notice of Appeal, the Notice of Appeal specifically stated that it was being brought on behalf of "Jordan Patterson American Legion Post #319," and the signature block for the Turners stated that they were "attorneys for Plaintiff." (R. XVIII, p. 2443). If it was the intent of the Turners to submit the present Notice of Appeal on behalf of Post #319, they would have expressly indicated as such in the Notice of Appeal, as they did previously. Additionally, the Brief of Appellants in this matter states that it is the "Brief of Appellants Dan E. Turner and Philip L. Turner." Furthermore, in the same manner as the Notice of Appeal, the Brief of Appellants is signed by the Turners on behalf of themselves, and does not state that it is submitted in a representative capacity. This further confirms that the Turners are not representing a party in bringing this appeal.

Finally, it is important to note that the Turners no longer have a party to represent in this matter. On the first appeal of this matter, the Court noted that the American Legion Kansas Department had filed a Motion to Intervene in the lawsuit, and that the Kansas Department has suspended the charter of Post #319. As a result, this Court asked the District

Court on remand to determine whether Post #319 was ever properly a Plaintiff or, even if it was a proper Plaintiff at one time, whether it ceased to be a proper Plaintiff when the Kansas Department suspended its charter." *Jordan Patterson American Legion Post #319 v. Quality Contractors, L.L.C.*, 2012 WL 145049, \* 3, No. 105,886 (Kan. Ct. App. April 20, 2012). Subsequent to that decision of this Court, neither Post #319 nor the Turners have provided any additional information or evidence to show that they had authority to file the present lawsuit on behalf of the Post. Additionally, on remand, the District Court held that no facts were proffered post-appeal to suggest that Post #319 had proper standing, or for that matter, to impeach its standing at any point afterwards, except for the evidence relating to the fact that the Post had dissolved and been absorbed by the American Legion Kansas Department. Accordingly, the District Court concluded that standing now resides with the American Legion Kansas Department, which has clearly assumed ownership of the proceeds from the sale of the Subject Property. (R. XVII, p. 2505.) The "Brief of Appellants Dan E. Turner and Philip L. Turner" filed by the Turners in the present appeal does not dispute those findings by the District Court, and provides no additional information or evidence to reverse the District Court's decision in that regard. Thus, the Turners have waived that issue, and the District Court's holding that standing now resides with the American Legion Kansas Department must stand as final. *See, Bd. of Lincoln County Comm'rs v. Nielander*, 275 Kan. 257, 268, 62 P.3d 247 (2003).

The Notice of Appeal filed by the Turners was defective, as it was not filed by a party as required by K.S.A. 60-2103(a), and this appeal should be dismissed. Furthermore, the Turners have no standing in this case, as the District Court found that the American Legion Kansas Department stepped into the shoes of Post #319, replacing any standing Post #319 had in this case.



**2. If The Turners Have Standing, The Issues Before This Court Are Limited.**

If the Court concludes that the Turners do have any standing in this appeal, that standing should be very limited. The District Court concluded on remand that standing now resides with the American Legion Kansas Department. The Turners have not appealed that issue. Accordingly, any standing that the Turners have on this appeal should be limited to whether or not they have a valid attorney's fee lien or claim to the \$120,000.00 proceeds from the sale of the Subject Property. The Turners have no standing to appeal any other issue, including whether or not the sale of the Subject Property was valid. Accordingly, whether or not the Real Estate Contract and closing of the sale of the Subject Property was valid or authorized, for purposes of quieting title in favor of Post #319 or invalidating that sale, is not properly before the Court on this appeal.

**II. The Kansas Ultra Vires Statute (K.S.A. 17-6104) Bars Post #319's Claims Against 15th Street Investments, LLC And Commerce Bank & Trust Company n/k/a CoreFirst Bank & Trust.**

**A. Standard Of Review**

The question of statutory interpretation is a question of law that is subject to unlimited review. *143rd Street Investors, L.L.C. v. Bd. of County Comm'rs*, 292 Kan. 690, 698, 259 P.3d 644 (2011). Well known principles of statutory interpretation apply. When reviewing courts are called upon to interpret a statute, they first attempt to give effect to the intent of the Legislature as expressed through the language enacted. *Id.* When a statute is plain and unambiguous, they do not speculate as to the legislative intent behind it and will not read the statute to add something not readily found in it. *Id.* They need not resort to statutory construction. *Id.* It is only if the statute's language or text is unclear or ambiguous that they

move to the next analytical step, applying canons of construction or relying on legislative history construing the statute to effect the legislature's intent. *Id.*

## **B. Arguments And Authorities**

The Kansas ultra vires statute, found at K.S.A. 17-6104, provides the following: "No act of a corporation and no conveyance or transfer of real . . . property . . . by a corporation shall be invalid by reason of the fact that the corporation was without capacity or power to do such act or to make or receive such conveyance or transfer . . ." K.S.A. 17-6104 provides that claims alleging an invalid transfer of real property by a corporation without capacity or power to do so can only be brought in a proceeding by a stockholder against the corporation, in a proceeding by the corporation against an incumbent or former officer, or in a proceeding brought by the Attorney General. *See*, K.S.A. 17-6104(a)-(c). In this lawsuit, Post #319 has alleged that the sale of the Subject Property through the Real Estate Contract was invalid due to lack of capacity or power by the Post #319 officials involved. However, under K.S.A. 17-6104, such claims cannot be brought against third parties like 15th Street Investments, LLC and Commerce Bank & Trust Company n/k/a CoreFirst Bank & Trust ("CoreFirst"). Accordingly, 15th Street Investments, LLC and CoreFirst are not appropriate parties to this lawsuit, and the District Court's holding in favor of those Defendants in this case should be affirmed.

## **III. 15th Street Investments, LLC And Commerce Bank & Trust Company n/k/a CoreFirst Bank & Trust Are Innocent Purchasers Of The Subject Property.**

### **A. Standard of Review**

"When determining a question of law, this Court may exercise unlimited *de novo* standard of review." *Wilson v. Williams*, 261 Kan. 703, 705, 933 P.2d. 757 (1997).

## B. Arguments and Authorities

15th Street Investments, LLC and CoreFirst are innocent purchasers of the Subject Property and therefore, are entitled to protection as innocent purchasers regardless of whether the Real Estate Contract was properly authorized. *See, Bicknell v. Jones*, 203 Kan. 196, 453 P.2d 127 (1969); and *Jordan v. McNeil*, 25 Kan. 459 (1881). In *Bicknell*, the purchaser of the real estate at issue in that case fraudulently induced the owner to deed the real property to him. *Bicknell*, 203 Kan. at 197-98. Subsequently, the purchaser mortgaged the property to National Bank and executed a lease of the premises to Burger Chef Systems, Inc. *Id.* at 198-99. Neither National Bank nor Burger Chef had any knowledge of the fraudulent representations. *Id.* at 199. Upon learning of the fraudulent representations, the original owner filed an action seeking, among other claims, rescission of the real estate contract. *Id.* at 198. However, the Kansas Supreme Court held that National Bank and Burger Chef purchased interests in the property for value without knowledge of the alleged fraud, and therefore, the respective mortgage and lease were valid regardless of the outcome of the lawsuit. *Id.* at 203-04. In *Bicknell*, the court relied on the long established rules stated in the *Jordan* case:

"This doctrine, that a deed obtained through fraud and deceit is only voidable, and that a bona fide purchaser, for value, without notice, will hold the property, is supported by a large number of authorities . . . . It is a general principle of law, that wherever one of two innocent persons must suffer loss on account of the wrongful acts of a third, he who has enabled the third person to occasion the loss must be the person who shall suffer." *Bicknell*, 203 Kan. at 204-205 (quoting *Jordan*, 25 Kan. at 465) (citations omitted).

Here, 15th Street Investments and CoreFirst purchased and mortgaged the property, respectively, without knowledge of the alleged unauthorized Real Estate Contract and closing. As innocent purchasers, 15th Street Investments and CoreFirst should not be required to

suffer the loss of alleged fraudulent action of the Post #319 officers. Rather, consistent with the rule articulated in *Bicknell* and *McNeil*, Post #319, as the one who trusted the third party actors, Commander Anderson and his counterparts, and placed the means in the hands to commit the wrong, must bear the loss, not the innocent purchasers, 15th Street Investments and CoreFirst. As a result, 15th Street Investments and CoreFirst are not proper parties to the current lawsuit, and the District Court's holding in favor of those Defendants should be affirmed.

#### **IV. The Real Estate Contract Was Valid.**

##### **A. Standard Of Review**

The District Court granted summary judgment in favor of the Defendants on Post #319's claim that the subject Real Estate Contract was not valid. Accordingly, the standard of review on this issue is as follows:

"Summary judgment is appropriate 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 rules and where we find reasonable minds could differ as to the conclusions drawn from the evidence, summary judgment must be denied. [Citations omitted.]" *State, ex rel. Stovall v. Reliance Ins. Co.*, 278 Kan. 777, 788, 107 P.3d 1219 (2005).

Where there is no factual dispute, appellate review of an order regarding summary judgment is *de novo*. *Roy v. Young*, 278 Kan. 244, 247, 93 P.3d 712 (2004).

## **B. Arguments And Authorities**

### **1. The Real Estate Contract Did Not Expire.**

The Turners attempt to argue the Real Estate Contract was invalid because the closing of the contract did not take place prior to the date set in the contract. However, as noted by the District Court, the Real Estate Contract did not terminate, *ipso facto*, as a result of the late closing. (R. XVIII, pp. 2375-76.) Kansas law is clear that enforcement of the Real Estate Contract must be promptly sought upon default.

" 'Though the time for the payment of the purchase money is made of the essence of the contract, a default does not ipso facto terminate the contract, but it may still be enforced against the purchaser, and therefore the vendor may himself waive the default and render the contract enforceable by the purchaser. Also if the vendor by his acts or statements leads the purchaser to believe that he will insist upon the strict terms of the contract, he will not be permitted in equity to insist that a forfeiture has occurred by reason of the payments not being made at the time agreed upon.' 27 R. C .L. 452, 453.

Counsel for appellants urge that nothing by an agreement to modify the written contract could affect the rights of the plaintiffs thereunder, and, as the court only found that negotiations were pending between them, such was not sufficient to deprive the plaintiffs of the right of forfeiture allowed by the contract. Such is not the real meaning of the rule quoted above nor of the holdings of this court. A party desiring to retain his existing right of forfeiture under a contract and not waive it must assert it promptly, and his acts and conduct in relation thereto must be unequivocal and consistent with the continuance of the contract rather than a modification thereof." *Gustason v. DeHaven*, 134 Kan. 324, 327, 5 P.2d 1095 (1931).

In this case, the facts firmly establish the delays in closing were not the result of the purchaser. Instead, Commander Anderson's illness and the unauthorized actions of a few minority members of Post #319 to oust Commander Anderson from his leadership position and challenge the sale of the Post #319 property were clearly responsible for the "delay" of the scheduled closing. More importantly, Commander Anderson appeared at the closing on behalf

of Post #319 and executed a Corporation Warranty Deed thereby, waiving any right to forfeiture under the Real Estate Contract. Accordingly, the delayed closing did not invalidate the Real Estate Contract

**2. The Real Estate Contract Was Properly Authorized and Approved.**

At the outset, it is important to note that Post #319 was a Kansas corporation. (R. XII, pp. 1078-1079). As a corporation, Post #319 was governed by Kansas statutes, and had the power and authority of a corporation to own and sell real estate. *See*, K.S.A. 17-1703; K.S.A. 17-6102(4); and *Long v. Mead*, 162 Kan. 129, 131-32, 174 P.2d 114 (1946).

The Turners suggest the Real Estate Contract was never properly approved by the members of Post #319. First, the Turners attempt to discredit the December 6, 2005 vote to sell the Post #319 property with an isolated statement by Commander Anderson during his deposition. However, a thorough reading of Commander Anderson's deposition transcript reveals that Commander Anderson acknowledged the motion to sell the Subject Property for the sum of \$115,000.00 was passed by a majority of the members present at the December 6, 2005 meeting. (R. XIII, p. 1397.) In addition, the overwhelming testimony by the members present at the December 6, 2005 meeting reveals the members of Post #319 voted 17-0 in favor of selling the property. (R. XI, pp. 942-43; 965-66; 992; 1007.) Likewise, the meeting minutes for the December 6, 2005 meeting memorialized Post #319's actions. (R. XI, p. 1008.) Generally, corporate minutes unchallenged and uncorrected stand as record of the matter. *Great Western Mfg. Co. v. Porter*, 103 Kan. 84, 172 P.2d 1018 (1918).

The Real Estate Contract was then executed by Commander Anderson and four other Executive Committee members on January 5, 2006, and subsequently ratified and validated by the members of Post #319 by a ballot vote of 20-9 on February 18, 2006. (R. XI, pp. 947;



965; 998; 1020-59.) Ratification has been defined as "the adoption or confirmation by a principal of an act performed on his behalf by an agent, which act was performed without authority." *Schraft v. Leis*, 236 Kan. 28, Syl. P 9, 686 P.2d 865 (1984), *Theis v. duPont, Glore Forgan Inc.*, 212 Kan. 301, 304-05, 510 P.2d 1212 (1973). For purposes of ratification, affirmance of a transaction can be established by any conduct of the purported principal manifesting that he consents to be a party to the transaction, or by conduct justifiable only if there is ratification. Restatement, Second, Agency § 93(1). Interestingly, the Turners acknowledge the February vote occurred and offers zero evidence to contradict the fact the members voted 20-9 in favor of selling the property. (R. XI, p. 947 ¶ 58; XIII, p. 1300 ¶ 58.)

Nevertheless, in an attempt to discredit the February 18, 2006 ballot vote which ratified and validated Post #319's decision to sell the Subject Property and subsequent execution of the Real Estate Contract, the Turners maintain Post #319 was required to submit a resolution authorizing the sale of its property to the Adjunct, Henry Holley, who would then provide notice of the sale and a request for the ballot vote to be held. To support this contention, the Turners rely on the State Adjunct, Charles Yunker's letter to Henry Holley, wherein Yunker suggests a procedure for selling Post #319's real property. However, as noted by the District Court, Yunker's letter was merely the opinion of the State American Legion officials. (R. XVIII, p. 2356). Yunker never cited any portion of the national, state, or local Rules and Regulations or Bylaws requiring Post #310 to follow the procedure he outlined. (R. XIII, p. 1675-77.) Indeed, neither the Constitutions nor the Bylaws of the State American Legion or Post #319 suggests any limitation on Post #319's authority to buy or sell realty. (R. XII, p. 1080-1143.)

The Turners further attempt to challenge the validity of the ballot vote by suggesting the notice and ballots were prepared by Commander Anderson contrary to Post #319's

Bylaws. Again, neither the Constitution nor the Bylaws require the Post Adjunct's signature on documents nor prohibit the procedure used by Commander Anderson. (R. XII, pp. 1080-1143.) As mentioned above, the Turners acknowledge the February vote occurred, and the uncontroverted evidence reveals Post #319's members voted 20-9 in favor of selling the property. Nonetheless, the Turners suggest that three individuals reportedly did not receive a ballot and timely notice of the February 18, 2006 meeting. The Turners offer absolutely no evidence to suggest any of these three individuals were eligible to receive a ballot, or that any of the three individuals would have voted against the sale. In accordance with the Bylaws of Post #319, Commander Anderson sent ballots to only those members on the active roster. (R. XV, p. 2009.) Hill does not appear on Post #319's 2006 membership register. (R. XI, pp. 1013-14.) In fact, Hill didn't purchase a membership to Post #319 until May 2006 – nearly 3 months after the ballot vote was conducted. (R. XI, p. 943 and R. XIII, p. 1285.) Accordingly, Hill would not have been eligible to receive a ballot. More importantly, even if the three individuals voted against the sale, it would not change the result of the vote as the majority of those voting would still have voted in favor of the sale of Post #319's property.

Finally, the Turners suggest Post #319 voted to rescind the Real Estate Contract sometime after May 9, 2006, when it purportedly elected new officers. However, the Turners offer absolutely no facts or evidence to show that the purported May 9, 2006 election was conducted in accordance with Post #319's Bylaws. While the Bylaws required written notice of the election forwarded to each member at least one week prior to the annual election, the Turners admit the notice of the May 9, 2006 election was provided to the members merely two days prior to the election. (R. XVI, pp. 2211, 2213, 2237, 2242.) Not only does this procedure violate Post #319's Bylaws, but it also violates Kansas statutes governing elections. *See*, K.S.A. 17-6512(b)

(requiring not less than 10 days notice). Accordingly, the purported election on May 9, 2006 was invalid and ineffective.

Because the May 9, 2006 election of Kenneth Hill and its officers was invalid, the purported actions by those individuals are likewise void. More importantly, the Turners failed to offer any written evidence supporting its contention the Real Estate Contract was rescinded. If the contract was indeed rescinded, the Turners undoubtedly would have produced meeting minutes or other documentation, such as ballots, to show the purported action was taken.

Not only have the Turners failed to offer sufficient evidence to show Commander Anderson was not authorized to execute the Real Estate Contract, they have also failed to establish that Post #319 indeed attempted to rescind the Real Estate Contract. Post #319 has the burden of establishing and identifying any material irregularities which would invalidate Post 319's ratification of the Real Estate Contract during the February 18, 2006 ballot vote.

*Thomason v. Stout*, 267 Kan. 234, 237, 978 P.2d 918 (1999). An opinion letter from the State Adjunct is not sufficient for the Turners to meet this burden. Likewise, the Turners have not shown the actions of the Post #319 officials pertaining to the ballot vote violated Post #319's Constitution, Bylaws or the applicable Kansas statutes. *See*, K.S.A. 17-6009, K.S.A. 17-6505(c), K.S.A. 17-6512(b), K.S.A. 17-6519. Lastly, the purported May 9, 2006 election was unquestionably conducted in violation of Post #319's Bylaws and Kansas statutes, and therefore the purported actions of Kenneth Hill as "Commander" of Post #319 were invalid. The bottom line is that the conduct of the Post #319 officials who signed the Real Estate Contract and signed off on the closing of the Subject Property did not violate American Legion Constitutions or Bylaws, nor did it violate Kansas statutes, and the record contains no material facts which would support a finding that the Real Estate Contract was not properly authorized or approved.

### 3. The Real Estate Contract Was Supported By Sufficient Consideration.

The Turners allege the Subject Property was worth substantially more than the \$120,000.00 paid for the property, but the Turners offer nothing more than the unsupported opinions of a few Post members to support this allegation. The uncontroverted facts firmly established Post #319's building was covered in trash and did not have utilities, water or gas for three (3) years prior to the sale. The building was in such bad condition that the members of Post #319 were unable to hold its meetings on the property. In light of the dilapidated condition of property, the unsupported opinions of a few individuals stating the value of the Post #319 property was as much as \$2,000,000.00 is not only outlandish, but it is also insufficient to create a genuine issue of a material fact. (R. XI, p 1012; XIII, p. 1558.)

The Turners fail to cite any facts to support the Turners' outlandish opinions regarding the value of the property. While the value of a parcel of land can be proved by opinion evidence, the individual must base his opinion by reason of his skill, learning or technical training, or his familiarization with land values based upon residing or doing business in the vicinity. *See, Mai v. Garden City*, 177 Kan. 179, 182-83, 277 P.2d 636 (1954). Here, Verdell Bugg was the only individual who had previous experience in the real estate business as he has previously owned property at various locations throughout Topeka, including a business in the general vicinity of the Subject Property. (R. XI, p. 975.) Prior to the sale of the property, Bugg also obtained the Shawnee County appraisal from the County Assessor's Office, which appraised the property of Post #319 at \$115,000.00. (R. XI, p. 973.) In the end, there is absolutely no basis to establish the value of the property at \$2,000,000.

The Turners further maintain the amount of \$1.00 listed in the Real Estate Contract was insufficient consideration. Unbelievably, the Turners attempt to ignore the

uncontroverted fact that at closing, Capital Title issued from an Escrow Account a check payable to the "Jordan Patterson Post 319 American Legion, Inc., aka Jordan Patterson Post #319 American Legion" in the amount of \$120,000.00. (R. XI, p. 1060.) More importantly, the proceeds from the sale of Post #319 were subsequently deposited in an account created by the Turners at CoreFirst Bank by the order of the District Court. (R. X, pp. 884-85; XIX, pp. 2465-67; XX, pp. 1-9). The Turners conveniently ignore the check, except when the District Court has to determine who is entitled to the proceeds, in which case the Turners vigorously acknowledges the check and vigorously argues it is entitled to the proceeds.

The record contains absolutely no evidence to suggest \$120,000 was not paid to Post #319, or to suggest the amount was insufficient. On the contrary, all the testimony and evidence reveals payment of \$120,000 was more than fair to purchase such a dilapidated property. Accordingly, the Real Estate Contract was supported by sufficient consideration.

**V. Commander Anderson Had Authority To Enter Into The Real Estate Contract And Execute The Corporation Warranty Deed.**

**A. Standard Of Review**

See Section IV.A. above.

**B. Arguments And Authorities**

The Turners argue that Commander Anderson did not have authority to execute the Corporation Warranty Deed at closing because Kenneth Hill was the Commander at the time of closing on August 11, 2006. As discussed above, the purported election in May of 2006 was not done in accordance with Post #319's Bylaws or in accordance with Kansas corporate law and was not therefor valid. Thus, Commander Anderson was still the Commander of Post #319

when he executed the Corporation Warranty Deed on behalf of Post #319 on August 11, 2006.

Commander Anderson was an authorized officer to execute the Corporation Warranty Deed.

The Turners argue the election in May of 2006 was conducted in the same manner as Commander Anderson's election in the previous November of 2005 and was a valid election. The Turners fail to realize, however, that elections generally carry presumptions of regularity and the burden of establishing material irregularities is placed upon the challenger of such election. *Thomason v. Stout*, 267 Kan. 234, 237, 978 P.2d 918 (1999). There is no evidence provided by the Turners to meet this burden. In fact, the Turners admit Commander Anderson's election as Post #319's Commander in November of 2005 and further, never contested the validity of that election. (R. XI, pp. 941-42; R. XIII, p. 1282). Issues not raised before the trial court cannot be raised on appeal. *Bd. of Lincoln County Comm'rs v. Nielander*, 275 Kan. at 268. The Turners cannot acknowledge the validity of Commander Anderson's election at the District Court level, and then subsequently contest its validity on appeal merely because it would not be beneficial to their argument.

Next, in regards to the Turners' allegation that Commander Anderson did not have authority to execute the Real Estate Contract, the Turners resubmit verbatim their arguments that the contract was not authorized. (Turners' Brief of Appellees, pp. 10-14). As discussed above in Section IV.B.2., Commander Anderson was authorized to execute the Real Estate Contract by the membership of Post #319 during the December 6, 2005 meeting. In addition, after Commander Anderson executed the Real Estate Contract on January 5, 2006, the membership of Post #319 ratified and validated his actions by a ballot vote of 20-9 on February 18, 2006. As the May 9, 2006 election was not done in accordance with Post #319's Bylaws or in accordance with Kansas statutes governing such elections, any alleged attempt to rescind the Real Estate

Contract by the "officers" elected at that invalid election was invalid. More importantly, there is no evidence to show that Post #319 did indeed attempt to rescind the Real Estate Contract.

Finally, the Turners argue that a letter from Post #319's attorney on June 22, 2006 suggesting the sale of the contract was not authorized is somehow sufficient in proving Commander Anderson did not have authority to attend the closing. Again, any action taken by Hill and its officers after the purported May 2006 election was invalid and therefore, Commander Anderson had authority to attend the closing regardless of the Kenneth Hill's repeated attempts to oust Commander Anderson as the Commander and obstruct the real estate transaction. Not only does this letter not revoke the authority bestowed upon Commander Anderson, but it is also unclear as to whether Hill and the other officers even had authority to retain the attorney for Post #319 in the first place. At most, the letter merely notified the purchaser of the real estate to pursue it at his own risk.

There is no question Commander Anderson was authorized to execute the Real Estate Contract on January 5, 2006. If there was any question as to his authority, it was subsequently ratified and validated by the February 18, 2006 ballot vote approving the sale of the property. Informal or irregular action of a Board of Directors of a corporation, which was within the corporate power, may be cured by ratification. *Morisette v. Howard*, 62 Kan. 463, 466-467, 63 P. 756 (1901). Based on the membership's authorization and instruction to execute the Real Estate Contract and Commander Anderson's execution of the Real Estate Contract, Commander Anderson had a duty to appear at closing to execute the Corporation Warranty Deed. Accordingly, on August 11, 2006 Commander Anderson properly appeared at closing as the Commander of Post #319 and executed the Corporation Warranty Deed in accordance with the

contract signed on January 5, 2006, and as authorized and ratified by the membership of Post #319.

**VI. There Are No Material Facts To Suggest Commander Anderson Was Incapacitated During The Time of Signing The Real Estate Contract Or The Corporation Warranty Deed.**

**A. Standard Of Review**

See Section IV.A. above.

**B. Arguments And Authorities**

The Turners contend there is a factual issue pertaining to Commander Anderson's competency at the time of his execution of the Real Estate Contract and the execution of a Corporation Warranty Deed at closing. To support this contention, the Turners attack Commander Anderson's ability to comprehend the Turners' questioning during his deposition and the quality Commander Anderson's responses thereto in 2008, after suffering several strokes. (R. XV, p. 2006; XIV, p. 1795.) As noted by the District Court, Post #319 has the burden of showing a lack of capacity to execute a deed or to set it aside for undue influence. *Linn v. Blanton*, 111 Kan. 743, 750, 208 P. 616 (1922). Nonetheless, the Turners fail to cite any facts pertaining to Commander Anderson's competency at the time he executed the Real Estate Contract or the Corporation Warranty Deed.

Mental competency must be determined at the time of execution of a contract. *DeBauge Bros., Inc. v. Whitsitt*, 212 Kan. 758, 761, 512 P.2d 487 (1973) ("The test of mental capacity to contract is whether the person possesses sufficient mind to understand in a reasonable manner the nature and effect of the act in which he is engaged."); *see also Mills v. Shepherd*, 159 Kan. 668, 157 P.2d 533 (1945) (cancelling a deed and bill of sale due to lack of mental capacity at execution); *Crawford v. Crawford*, 176 Kan. 537, 271 P.2d 240 (1954) (holding deed valid



despite grantor's apparent intoxication following the deed's execution); *In re Estate of Farr*, 274 Kan. 51, 64, 49 P.3d 415 (2002) (finding the time a will is made is the time of primary importance in considering that the testator possessed testamentary capacity). In *Whitsitt*, the court addressed lack of capacity to enter a contract due to age and infirmity. *Id.* The court examined all the depositions and concluded the individual understood the contract at the time of its execution. *Id.*

Indeed, those who knew Commander Anderson believed he was in good physical condition and mentally competent to make decisions on behalf of Post #319 at the time he signed the Real Estate Contract. Specifically, Bugg has known Commander Anderson for over 30 years and was present at the time the contract was executed. Bugg stated Commander Anderson was competent to make decisions at the time he executed the Real Estate Contract. More importantly, Commander Anderson did not enter the Real Estate Contract alone. Other Executive Officers of Post #319 also signed the Real Estate Contract. Again, there is absolutely no evidence any these Executive Officers were not mentally competent. Likewise, Bugg attended the closing with Commander Anderson and testified Commander Anderson was aware and able to make decisions at closing. Thus, there is no factual issue regarding Commander Anderson's competency at the time he signed the Real Estate Contract or his competency at the time he signed the Corporation Warranty Deed.

**VII. There Was Insufficient Material Facts To Support A Finding Of Duress.**

**A. Standard Of Review**

See Section IV.A. above.

## B. Arguments And Authorities

The Turners further assert there are factual issues regarding whether any of the individuals who executed the Real Estate Contract were under duress. Post #319 has the burden of proof to establish duress. *Libel v. Libel*, 5 Kan. App. 2d 367, 368, 616 P.2d 306 (1980). Duress is a degree of constraint or danger which is sufficient in severity or in apprehension to overcome the mind and will of a person of ordinary firmness. *Evans v. Aylward*, 166 Kan. 306, 315, 201 P.2d 1044 (1949). The degree of constraint or danger can either be actually inflicted or threatened and impending. *Id.*

"To constitute duress by threats the actor's manifestation must be made for the purpose of coercing the other; must have for its object the securing of undue advantage with respect to the other; must be of such a character that it is adapted to overpower the will of the other and is reasonably adequate for the purpose; must in fact deprive the other of free exercise of will; and must cause the other to act to his detriment. (citation omitted.)" *Libel*, 5 Kan. App. 2d at 368.

The Turners have not met the burden of establishing duress as the allegations of duress are too vague and insufficient to raise a triable issue as a matter of law to nullify the acts of Post #319 officials.

As a preliminary matter, it must be noted that a majority of the items the Turners suggest constituted duress occurred after the closing of the Real Estate Contract. Specifically, the day Kenneth Hill was arrested for trespassing occurred after August 11, 2006. (R. XIII, p. 1522.) Likewise, the alleged threat on Robert Taylor's life allegedly occurred when he attempted to remove personal property from the building at the time it was being demolished by the purchaser of the property – which would have occurred sometime after closing. (R. XIII, p. 1557.) Finally, the completely unsubstantiated and unsupported allegation that the death of Henry Holley's son somehow had caused duress is impossible, as Henry Holley's son was shot

only a few weeks before Hill's deposition which was held on March 23, 2008 – nearly 2 years after the closing of the transaction. (R. XIII, p. 1527-28.)

The other allegations raised by the Turners included Robert Taylor's testimony that he was pressured to sign the contract and Kenneth Hill's testimony that Pritchard stated he could get anything he wanted from any court or judge. Even if these alleged actions took place, they did not invalidate the Real Estate Contract that was subsequently ratified and validated by the ballot vote on February 18, 2006. The Turners have failed to bring forth any evidence to suggest these alleged actions in any way impacted the February 18, 2006 ballot vote.

Taylor testified he believed he was pressured into signing the Real Estate Contract because Pritchard was going to withdraw the offer if the contract was not signed on January 5, 2006. The ability of Quality Contractors to withdraw its offer cannot be seriously argued as an undue advantage so to overpower Taylor's will. Parties negotiate contracts all the time and place deadlines on the respective offers and counter-offers. More importantly, the execution of the Real Estate Contract was ratified in the subsequent February 18, 2006 ballot vote and therefore, any allegation of duress on January 5, 2006 when the Real Estate Contract was executed is irrelevant.

Finally, the Turners allege Commander Anderson threatened the members of Post #319 by sending a letter pertaining to the ballot vote stating the purchaser of the property had the right to file legal action against its members personally. However, as noted by the District Court, this letter was merely Commander Anderson's opinion, which relates to the law in the state of Kansas. Furthermore, the members had sufficient time between the time the letter was sent and the subsequent February 19, 2006 vote in which any proffered opinion by Commander Anderson could have been investigated and evaluated. *See, State ex rel v. Staley*, 90 Kan. 624, 628, 135 P.

602 (1913). Perhaps the most significant flaw in the Turners' argument is that they have failed to come forward with any evidence of a Post #319 member who would have changed his vote but for the opinion stated by Commander Anderson. Reliance is an essential element for an action on misrepresentation. *Nichols v. Kansas Political Action Comm.*, 270 Kan. 37, 53, 11 P.3d 1134 (2000); *Wood v. Staudenmayer*, 56 Kan. 399, 43 P. 760 (1896). The uncontroverted evidence is that the valid vote on February 18, 2006 resulted in a 20-9 vote in favor of selling the real estate, invalidating the Real Estate Contract previously executed. Clearly, the majority of the members were in favor of the sale.

**VIII. The District Court Did Not Rely On The Affidavit Of James R. Anderson In Making Its Decision.**

**A. Standard Of Review**

See Section IV.A. above.

**B. Arguments And Authorities**

The Turners argue reversible error had occurred because they believe the District Court relied upon an affidavit of James Anderson dated August 13, 2008. However, the objection to the affidavit is merely a red herring and ultimately has no bearing on the resolution of this case, as there is absolutely no indication the District Court relied upon the affidavit. In fact, there is not one reference to the affidavit in the entire 44-page June 16, 2010 Memorandum Opinion and Order by the District Court. (R. XVII, pp. 2337-2380). Absent a showing the District Court relied upon the affidavit testimony, the affidavit is irrelevant in determining whether summary judgment was appropriate.

Not only was the affidavit irrelevant in the District Court's decision to grant Summary Judgment, the District Court was also very clear that Post #319 failed to meet its burden of establishing material facts which would create a triable issue as a matter of law. It was

incumbent upon Post #319 to come forward with evidence to dispute any material fact. If the affidavit was inconsistent with any material fact provided through Commander Anderson's testimony as suggested by the Turners, Post #319 merely had to cite the contradicting deposition testimony to create a genuine issue of the material fact. On the contrary, the Turners have not cited any material fact in the affidavit which was inconsistent with Commander Anderson's testimony.

The Turners' objection to the affidavit of Commander Anderson is a mere attempt at distraction, which ultimately has no bearing on the District Court's decision to grant summary judgment. It does not overcome the Turners' inability to set forth the facts which would establish genuine issues of the material fact.

**IX. The Turners Do Not Have A Valid Attorney's Lien, And Are Not Entitled To Their Attorney's Fees and Expenses.**

**A. Standard Of Review**

The question of statutory interpretation is a question of law that is subject to unlimited review. *143rd Street Investors, L.L.C. v. Bd. of County Comm'rs*, 292 Kan. 690, 698, 259 P.3d 644 (2011). When reviewing courts are called upon to interpret a statute, they first attempt to give effect to the intent of the Legislature as expressed through the language enacted. *Id.* When a statute is plain and unambiguous, they do not speculate as to the legislative intent behind it and will not read the statute to add something not readily found in it. *Id.* They need not resort to statutory construction. *Id.* It is only if the statute's language or text is unclear or ambiguous that they move to the next analytical step, applying canons of construction or relying on legislative history construing the statute to effect the legislature's intent. *Id.*

## **B. Arguments And Authorities**

The Turners argue that they are entitled to have their attorney's fees and expenses paid out of the \$120,000.00 proceeds from the sale of the Subject Property, pursuant to a contingency fee agreement they allegedly had with Post #319.

Although the Turners have not set forth the statutory authority for their entitlement to an attorney's lien on the sale proceeds, it can be presumed that they are asserting the lien under K.S.A. 7-108. K.S.A. 7-108 provides that an "attorney has a lien for a general balance of compensation . . . upon money in the attorney's hands belonging to the client, and upon money due to the client and in the hands of the adverse party, in any matter, action or proceeding in which the attorney was employed . . ." An attorney's lien "is special in its character, and, being statutory, can only attach to the things and upon the conditions prescribed by the statute." *Holmes v. Waymire*, 73 Kan. 104, 84 P. 558, 559 (1906).

In this case, the sale proceeds are not in the Turners' hands as a result of the efforts of the Turners. Rather, the Turners were ordered by the District Court to place the sale proceeds into an interest-bearing account at CoreFirst as the result of a motion that was filed by 15th Street Investments, LLC. (R. X, pp. 893-900). For that reason, the sale proceeds are not in the hands of an adverse party as the result of the Turners' representation of Post #319.

Defendant Bugg had possession of the check prior to its deposit into the account where the check presently sits at CoreFirst. However, as the Court determined, Defendant Bugg was acting on behalf of Post #319, and therefore, was not an adverse party to Post #319.

Although the sale proceeds are currently being held in an account with CoreFirst Bank & Trust, which is a Defendant in this lawsuit, it is there by order of the Court, not because CoreFirst Bank

& Trust is asserting any right to possession thereof. Accordingly, it cannot be said that the sale proceeds are in the hands of an adverse party, or ever was.

Additionally, it cannot be said that the Turners recovered any money for Post #319 as a result of their representation of Post #319 in this case. The claim asserted by the Turners in this lawsuit on behalf of Post #319 is for quiet title. Success by the Turners on that claim would have required Post #319 to return the \$120,000.00 check to Defendant Quality Contractors, LLC. For the Turners to now allege that they have "recovered" for their client because they lost on the quiet title claim, and Post #319 does not have to return the \$120,000.00 check, is disingenuous at best.

Finally, the District Court held on remand that the proceeds of the sale belong to the American Legion Kansas Department, not Post #319. The Turners have not appealed that issue. The Turners have not represented the American Legion Kansas Department at any point. The subject funds do not belong to the Turners' client, but belong to the American Legion Kansas Department. Accordingly, the Turners are not holding any money that belonged to their client, or former client, Post #319.


The Turners' claim for attorney's fees and expenses does not meet the requirements of K.S.A. 7-108, nor does it meet the spirit clearly intended by that statute, *i.e.*, that an attorney has a lien against funds it recovers for his or her client, that the client did not already have, as a result of that attorney's representation of the client.

Therefore, the District Court's decision refusing an award of attorney's fees and expenses to the Turners should be affirmed.

**CONCLUSION**

For the reasons statement above, the District Court properly granted summary judgment in favor of these 15th Street Investments, Inc. and Commerce Bank and Trust Company n/k/a CoreFirst Bank & Trust. Accordingly, the District Court's decision should be affirmed.

CAVANAUGH & LEMON, P.A.

By  \_\_\_\_\_

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the 2nd day of December, 2014, he served a true and correct copy of the above and foregoing document by:

- United States mail, first class postage prepaid
- Facsimile transmission in accordance with Kansas Supreme Court Rule 119 to the fax number listed below
- E-Mail transmission in accordance with Kansas Supreme Court Rule 122 to the e-mail address listed below
- Hand delivery

addressed as follows:

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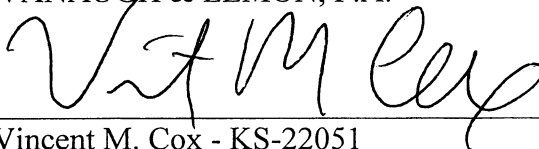
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