

## Home/Land Owners Experience Bumpy Legal Road Since 2009

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Since 2009, appellate decisions involving Missouri home owners and land owners have exploded. The cases cover equitable liens, bonds, punitive damages, dismissal of lawsuit, trespass, and statute of limitations.

These decisions have refined, redefined, and reshaped the law on construction and real estate. This article examines these important cases, almost all of which have gone against the home/land owner.

### Homeowners Denied Equitable Lien on their Property

Purchasers of a new home learned the hard way the risk of putting money into a residence that they did not yet legally own. The Western District of Missouri affirmed a trial court's decision to deny Ivan and Marie Johnson of recovery of \$102,000 for money they spent and advanced for construction of their new residence. The case is First Banc Real Estate, Inc. v. Johnson, 321 S.W.3d 322 (Mo. Ct. App. W.D. 2010).

As the Western District noted, this "case is illustrative of the pitfalls and landmines inherent in residential construction when financial risks are perilously undertaken by purchasers who lack an appreciation of the complexities of real estate law." Id. at 325.

The Johnsons had entered into a residential new construction sale contract with Sanctum, LLC, developer of the Longview Subdivision. To

acquire the property, Sanctum obtained three construction loans totaling more than \$2,790,750, securing each loan with a deed of trust on all the properties.

The construction contract required Sanctum to construct a residence for the Johnsons and sell it to them for \$317,600. Thus, Sanctum was both the seller of the property as the owner of the legal title and the builder obligated to construct the residence.

Sanctum and the Johnsons agreed that the Johnsons could purchase some of the materials needed to construct the residence and hire third parties to perform some of the work with the cost for materials and labor credited against the purchase price. This arrangement was not put in writing.

During construction, the Johnsons purchased materials and paid for labor in the amount of \$57,517.86. They also paid Sanctum an earnest money deposit in the amount of \$62,720, as an advance payment to be applied toward the total purchase price.

Sanctum obtained a loan from First Bank of Medicine Lodge (FBML) in the amount of \$525,000. A deed of trust secured the loan. Gold Bank did not release any of its original deeds of trust.

The Johnsons began moving personal items into the residence in anticipation of the closing, but the closing did not occur. Title to the property was never transferred to the Johnsons.

Gold Bank foreclosed on its deed of trust. Immediately prior to the foreclosure, the Johnsons filed a notice of equitable lien in the amount of \$102,000 against their property.

Gold Bank was the only bidder at the foreclosure sale and through an assignment First Banc Real Estate, Inc. (FBRE) became the owner. The Johnsons sent a notice of mechanic's lien for \$121,237.68.

The Western District concluded that the Johnsons were not eligible to be lien claimants for they were neither an original contractor nor a subcontractor. The Johnsons had a valid equitable lien against the property in the total amount of \$121,237.86 as the property owners. However, the Johnsons' equitable lien arose after Gold Bank's deed of trust, and thus, it was wiped out by the foreclosure.

This left FBRE with a "windfall." *Id.* at 337. "That is not a result that sits well with the Court, but it is a result that is required by the law as the Court interprets the law." *Id.* While recognizing the "unfairness of the outcome," the Western District concluded that the law left it with no alternative.

#### Failing Concrete Streets Vex Homeowners' Association

Improperly poured concrete streets triggered a series of claims and counterclaims between Jefferson County, a developer, subcontractors, a surety and a homeowner association. The case is Essex Contracting, Inc. v. Jefferson County, 277 S.W.3d 647 (Mo. 2009).

The saga began when Jefferson County required developer Essex to post bonds totaling \$3,598,249 for development of the Winter Valley subdivision. When Essex could not complete the streets on time, Jefferson County and Essex agreed to a one-year extension in exchange for a guarantee from Essex

and a pledge that the guarantee would be backed by the bonds already in place. The guarantee provided that if Essex did not complete the project within one year, including any necessary repairs to the work, the county would do so and use the bonds to reimburse for the costs to complete. In essence, this made the previous bonds into performance bonds, whereby the county was assured the money necessary to complete the job if Essex failed to perform.

Some of the streets began to split and crack. Core testing revealed that there were 218 slabs of concrete that were deficient in thickness.

Essex made additional repairs and filed a declaratory judgment lawsuit seeking the release of the bonds. The county released part of the bond money, but counter sued for faulty work. Members of the Winter Valley Homeowners' Association intervened in the lawsuit and filed claims against Essex for injunctive relief and damages, alleging negligence, breach of contract and zoning enforcement.

The trial court concluded that Essex failed to meet the standards of the subdivision regulations and the requirements of the guarantee. The court ordered Essex to pay the remainder of the bonds to the county to fund completion and to pay an additional \$102,174 in civil penalties.

The trial court awarded \$35,875 in costs against Essex for the intervenors' costs to repair the improperly poured streets. Intervenors also recovered their attorney fees in the amounts of \$219,277 from Essex, as well as \$7,088 and \$17,013 from the subcontractors.

The Supreme Court affirmed the trial court's decision with the exception of Essex' claim for indemnity against Boling (one of the subcontractors) and the assessment of attorney fees against the subcontractors. There was no contract between the intervenors and the subcontractors that would entitle the intervenors to recover attorney fees.

#### Jury to Consider Punitive Damages Against Landowner

Missouri's Western District recently decided that the trial court should have allowed a jury to consider whether to award punitive damages against an adjacent homeowner who constructed a berm to divert water onto his neighbor's property. The case is Atkinson v. Corson, 289 S.W.3d 269 (Mo. Ct. App. W.D. 2009).

The dispute began over a fence that Tim Atkinson started to construct on the property line of his twenty acres in Cass County. He had enjoyed a cordial relationship with his neighbor, Greg Corson, for several years.

Thereafter, their relationship deteriorated. One day Atkinson saw his neighbor walking on Atkinson's side of the property line. He then posted no trespassing signs and later found one of them to be "riddled with shotgun splatter and bullet holes."

The parties shared a ditch, which became the center piece of their dispute. In 2005, Atkinson began building a second pond on his property. Atkinson's contractor removed trees and "smoothed out" the ditch, but left a low spot six inches deep for water to continue to flow through Atkinson's property.

Corson then constructed a berm on his property line. He argued the berm was necessary to direct water back onto Atkinson's property. The berm was 380 feet long, or seven times the length of the smoothed-out ditch.

Atkinson claimed this caused water to pool on his property, creating a marshy area of 1.5 acres that did not previously exist. He also testified at trial that he could not complete his fence due to the ponding water.

Atkinson sued for actual and punitive damages under Missouri's doctrine of "reasonable use of surface water." The jury awarded \$7,500 in actual damages on this claim and \$1 in actual damages and \$500 in punitive damages on the claim of trespass for shooting Atkinson's "No Trespassing" sign. The trial court would not let the jury consider whether to award punitive damages on the reasonable use claim. Both sides appealed the jury verdict and the trial court decisions.

The doctrine of reasonable use imposes a duty on any landowner not to "needlessly or negligently injure by surface water adjoining lands owned by others." The doctrine has no precise definition and allows for equities to be considered.

The trial evidence showed that Atkinson's contractors smoothed the ditch in a way that did not disrupt the flow of surface water. Evidence also suggested that Corson constructed the berm even though he experienced no actual water problems.

While Corson contended that his construction of the berm was not unreasonable, the appellate court noted that the jury was "free to disbelieve all

of Mr. Corson's testimony." The trial court erred by not allowing the jury to consider assessing punitive damages.

To make a submissible case for punitive damages, Atkinson had to show by clear and convincing evidence (a very high standard) that Corson's conduct was "wanton, willful or outrageous" or there was "reckless disregard" for its consequences.

The appellate court determined there was enough for a jury to consider punitive damages. The "jury could have found that there was no legitimate need for Mr. Corson to construct the berm, and that his decision to do so was spawned by vindictiveness toward his neighbor, and to interfere with Atkinson's ongoing efforts to improve and fence his property." *Id.* at 282.

#### Property Owners Assessed Punitive Damages for Fraud

A jury in Jackson County, Missouri found against property owners Eugene and Charlene Ruiz and in favor of a subdivision developer and a real estate broker for breach of contract, negligent and fraudulent misrepresentation and punitive damages totaling \$255,000. The Western District affirmed these awards. The case is Saddle Ridge Estates, Inc. v. Ruiz, 323 S.W.3d 427 (Mo. Ct. App. W.D. 2010).

The Ruizs had contacted the broker to purchase a lot for \$95,000 and build a home in Saddle Ridge subdivision. The purchase price was less than the original price of \$150,000 because the land contained rocks that needed to be excavated. The contract provided that the Ruizs would begin construction

on the lot within six months or the Ruiz had to list the property with McClain at a six percent (6%) commission until the property was sold.

Thereafter, the Ruiz sold their home, but did not tell the broker or Saddle Ridge. A couple years later, the broker discovered that the Ruiz had sold their home within six months of purchasing the lot. The real estate broker faxed the Ruiz a listing agreement and, per the Ruiz request, agreed to list the lot for an asking price of \$190,000. The Ruiz did not sign the listing agreement. The real estate agent faxed the Ruiz an offer that it had received from a couple to purchase the lot for \$140,000. The Ruiz did not accept the offer or make a counteroffer.

Saddle Ridge and the broker sued the Ruiz, and the jury found against the Ruiz. The Western District determined that there was sufficient evidence to support jury verdicts for punitive damages and a finding that the Ruiz engaged in reckless disregard of the rights of Saddle Ridge to sell the property and the broker to obtain a commission after the Ruiz failed to build on the property as promised in the contract.

#### Homeowners' Lawsuit Dismissed Against Sunset Manor Developer

The Eastern District affirmed the dismissal of a lawsuit by various Sunset Manor homeowners against the developer after the developer terminated the project. The decision left the homeowners with no compensation for a neighborhood that contained partially abandoned homes and alleged diminished property values. The case is Stein v. Novus Equities Company, 284 S.W.3d 597 (Mo. Ct. App. E.D. 2009).

The dispute captured national attention and fueled a growing controversy in recent years over a city's sponsorship of private development by use of tax increment financing to subsidize the cost of the project and the power of eminent domain.

The project started in 2004 when the City of Sunset Hills requested proposals for the redevelopment of the Sunset Hills Manor, an established neighborhood consisting of several blocks of homes adjacent to Interstate 44 and Lindbergh Boulevard. Novus Equities Company ("Novus") submitted a proposal and a request for financial assistance through tax increment financing ("TIF").

The City required that Novus submit a financial feasibility and a cost benefit analysis. Novus proposed that the Manor be redeveloped as a life-style shopping center with the anchor tenant to be Bass Pro Shops.

The City passed an ordinance designating Novus as the developer and authorized a TIF. Novus entered into written option contracts directly with numerous property owners to purchase their homes. The plaintiffs in this lawsuit, however, were property owners with whom Novus did not have contracts to purchase their properties. Novus planned to acquire their properties through the power of eminent domain authorized by the City.

After Novus stated that it was going to exercise its options to purchase the properties, many of those property owners began "stripping and salvaging materials from their homes." *Id.* at 601. Plaintiffs alleged that this caused all properties in the neighborhood to depreciate in value.

Shortly thereafter, Novus notified everyone that the bank had “pulled the financing” for the purchase of the properties. The development never proceeded.

Plaintiffs sued Novus for the alleged diminished value of their homes and neighborhood. They sued for fraudulent misrepresentation, negligent misrepresentation and negligence.

Plaintiffs’ claims for fraudulent misrepresentation and negligent misrepresentation had one fatal missing element. Plaintiffs did not sufficiently allege that they relied on any misleading statements from Novus that caused their property values to decrease.

Plaintiffs also sued for negligence. The Eastern District concluded that plaintiffs did not provide any legal authority supporting the proposition that a defendant in a negligence cause of action has a legal duty to disclose information because of its superior knowledge even if such knowledge is not within the fair and reasonable reach of the plaintiffs. Accordingly, plaintiffs could not maintain this cause of action either.

#### Homeowner Trespasses by Building Fence on Neighbor’s Property

The Western District found that a homeowner trespassed by building a fence on the neighbor’s property. The case is Grossman v. St. Johns, 323 S.W.3d 831 (Mo. Ct. App. W.D. 2010).

The Grossmans built a six-foot privacy fence around a portion of their backyard but left nine feet of their property in the rear excluded from the fence. Thereafter, the St. Johns moved into a house behind the Grossmans’ and

began maintaining the nine-foot area of property. A few years later the St. Johns built a fence around their backyard and included the nine-foot area that they had been maintaining.

At trial, the St. Johns maintained that when they were taking care of the property and when they built the fence, they were not aware that the property belonged to the Grossmans. A property survey at trial showed that the area in question belonged to the Grossmans.

The Grossmans filed a petition for an injunction and damages and contended that the St. Johns trespassed on their property. The Western District found that even though there was an implied consent by the Grossmans for the St. Johns to use and maintain the property, there was no inferred or implied consent to the construction of the St. Johns' fence.

Thus, the court concluded that once the St. Johns began erecting the fence, the previous implied consent was exceeded in scope. This constituted a trespass and entitled the Grossmans to an injunction and damages. As far as actual damages, the court noted that the law presumes that damages have resulted; and if there is no actual present loss of any measurable sort, nominal damages are recoverable. Id. at 834.

### Homeowner Easement Dispute Results in a New Jury Instruction for Trespass

A homeowner sued Kansas City Power and Light ("KCP&L") for permanent trespass given KCP&L's erection of a high voltage line over property

owned by the Sterbenzes. The case is Sterbenz v. Kansas City Power and Light Co., 2010 WL 3851991 (Mo. Ct. App. W.D. 2010).

KCP&L did not have permission to build the line or an easement over the property. The Western District raised, on its own, a concern that the jury was not properly instructed on the issue of damages. It noted that there is no Missouri Approved Instruction (MAI) for trespass to land. The court concluded that while MAI 4.02 will have to be modified in all permanent trespass actions, “it is nevertheless the proper damage instruction with which to begin.” Id.

The Western District also stated that in a routine trespass case the measure of damage would need to be the difference in value of the property before and after the trespass or the cost to repair, whichever is less. In any trespass action, the ability to enter an award of nominal actual damages should be instructed.” Id. at \*8. In appropriate cases, the modified instruction also could permit the recovery of consequential damages.

#### Early Water Damage Precludes Later Lawsuit by Condominium Association

The Eastern District has held that early knowledge by owners of a Condominium Association of water damage to their wooden decks and balconies was sufficient to trigger Missouri’s five-year statute of limitations (Section 516.120 R.S.Mo.) and preclude a lawsuit seven years later due to alleged improper flashing that would have prevented the water damage. The Eastern District reinforced that mere knowledge of a fact of damage such that a reasonable person in the plaintiff’s position would be alerted to a potentially actionable injury is sufficient to start the statute of limitations. The case is

Ashford Condominium, Inc. v. Horner & Shifrin, Inc. and Lamb Construction Co., 2010 WL 4622543 (Mo. Ct. App. E.D.).

Ashford is an incorporated association of condominium owners. Ashford had hired Horner, an engineering firm, to analyze the development's wooden decks and balconies for deterioration and recommend any necessary remedial work. Horner determined that the decks suffered from weathering and moisture damage. Ashford also hired Lamb, a contractor, to make repairs and replace items such as columns in accordance with the recommendations of Horner.

During the repair work, Ashford sent a letter to Horner stating that it had "serious concerns" regarding the quality of Lamb's work and was "extremely dissatisfied" with Horner's ability to inspect Lamb's work and provide proper flashing. Id. at \*2.

Ashford filed a petition against Horner and Lamb claiming negligent engineering services and breach of contract, respectively. Horner and Lamb both filed motions for summary judgment on the basis of the five-year statute of limitations. In particular, the defendants focused on the allegation that the repair to the decks "failed to specify flashing required to protect wood components against excessive deterioration." The Eastern District noted that Missouri's statute of limitation is not triggered by discovery of damage, but by commencement of the right to sue. Id. at \*3.

The Eastern District explained in some detail many of the appellate cases generated over the past several years in Missouri which have dealt with

whether the five-year statute has been triggered by knowledge of certain types of damage compared to what seemingly becomes more substantial damage at a later point in time. The court's discussion provides a good summary of case law in this area and highlights the thorny analysis sometimes required by the court and by litigants to determine whether a lawsuit is timely.

In the end, the court emphasized that the lawsuit stated that the flashing had been improper, it did not prevent water infiltration, and thus, caused damage, and that this fact was known by Ashford more than five years before the lawsuit was filed. The Eastern District emphasized that knowledge of the extent of damage is not necessary in Missouri to trigger the running of the statute of limitations.