No. 13-109576-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

ANIMAL CARE, INC.
Plaintiff - Appellant

v.

ROGER SHUMAKER
and
SHUMAKER DEVELOPMENT COMPANY, L.L.C.
Defendants - Appellees

BRIEF OF APPELLEES

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

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NATURE OF THE CASE

The Defendant-Appellees (hereafter "Defendants") disagree with the Plaintiff-Appellant's (hereafter "Plaintiff") recitation of the nature of the case.

By using only the Plaintiff's own:

[a] pleadings;

[b] attachments to its Motion for Summary Judgment (hereafter, throughout this brief: "Motion"); and

[c] reply to the Defendants' memorandum opposing the Motion (captioned "Plaintiff's Response"),

the nature of this case will be recognized as vastly different than presented.

As disclosed by the Plaintiff's own documents, in 1988, Debra Anderson, and her husband, the attorney representing the Plaintiff-Appellant in this case, elected to utilize the structure of a partnership (hereafter the "Anderson Partnership") to acquire a commercial condominium in a shopping center. As a partner, Debra Anderson then held a fractional interest in the partnership, which by law, was an independent entity from Debra Anderson and her attorney husband.

While Debra Anderson had a fractional interest in the partnership, the partnership, in turn, had an undivided, shared, fractional use interest in the common areas of the shopping center. Title to the common areas remained in the name of the shopping center developer, including that portion of the grassy strip in question situated on shopping center land.

A second entity structure, a corporation, was then utilized by Debra Anderson for operation of a veterinary clinic. Debra Anderson became the sole shareholder of that corporation, which by law, was an independent entity from Debra Anderson.

The Anderson Partnership thereafter leased, or otherwise granted permission to the corporation to use its condominium.

Although the corporation was only a tenant of the Anderson Partnership, which retained its ownership interest in the condominium, it was that corporation, Animal Care, Inc., which filed this action, claiming it held a belief, for more than 15 years, that it – the corporation – was the owner of the grassy strip in question.

With the Anderson Partnership as owner of the condominium, and Animal Care, Inc. a tenant, an adverse possession claim could not be filed by the partnership since it did not have exclusive possession of the grassy strip (i.e. Animal Care, Inc. and others used the property), and could not be filed by Animal Care, Inc. since it did not have any claim to an ownership interest.

There was, however, an exploitable commonality between the partnership and corporation. The Anderson Partnership's name was "Westport Animal Clinic." The corporation, Animal Care, Inc., at some juncture, also adopted that same name, identifying itself as Animal Care, Inc. d/b/a Westport Animal Clinic. There was never, however, a suggestion of any buy-out by the corporation of partnership assets or property, and it was never suggested that the partnership changed names.

The common use of names, and an ability to deftly identify Debra Anderson with each of the entities, empowered the Plaintiff to obfuscate entities and users of the grassy strip. The Anderson Partnership's condominium, when addressed by Debra Anderson in the affidavit she filed to support the Motion, became "my property." The Motion referred to the corporation's employees as "her" employees, and directly identified Debra Anderson as the Plaintiff in such phrases as: "...Plaintiff, her employees, and clients ...", "...Plaintiff Debra

Anderson, DVM, remained in open, exclusive possession of the property, ..." and "... the grassy strip between the buildings owned by Plaintiff and Defendant". The brief submitted to this Court followed the same pattern.

The Plaintiff further clouded entities and persons when it captioned the case. Although a corporation properly files suit in its own name, the Plaintiff in the case was named in a way which may only otherwise be seen in a shareholder's derivative suit: "Animal Care, Inc. by and through Debra Anderson, D.V.M. d/b/a Westport Animal Clinic".

Since the shopping center developer was the title owner of all common areas, and continually maintained them, when suit was filed, the Plaintiff joined the developer as a "necessary plaintiff." The developer, however, immediately filed a motion to "drop a party" stating it had no claim against the Defendants' property.

It was the developer which planted grass, fertilized, trimmed, watered, mowed and maintained, not just the common area of the grassy strip, but the Defendants' portion of the strip. Therefore, once the developer was dropped from the case, the Plaintiff's approach changed to paint the developer's control over the strip as if it were a mere contractor engaged to care for the property. As stated in Debra Anderson's affidavit supporting the Motion: "... I paid for [the strip's] upkeep, and routinely required the strip to be cleaned up."

The interlacing of persons and entities successfully obscured recognition of the true entities by the District Court. Yet, the Court did recognize that the Plaintiff (even if the Plaintiff was Debra Anderson) could not have reasonably believed, in good faith, that it owned any portion of the grassy strip, and did not have exclusive use of the property. The Court also found that Debra Anderson's professed belief in ownership of the grassy strip was not "knowingly adverse." She could not, at one and the same time, believe she owned

property while simultaneously knowing that she possessed property adversely (i.e. in a "hostile" manner) to the owner.

Since the Plaintiff's core argument was a belief in ownership of the strip, supported by such statements as "I sincerely believed that the grass strip as described was part of my property" (per the affidavit of Debra Anderson); there was no affidavit, document or evidence proffered to support any belief or intent that the grassy strip was held in a hostile manner, knowingly adverse to the true owner. Yet, the burden to provide such evidence is always on the party seeking adverse possession.

Beyond the claim for adverse possession, the Amended Petition alleged the tort of intentional interference with business relationships. However, without facts to support such an action, the Plaintiff sought leave to amend its Amended Petition to add some other type of tort claim. Leave was granted, but the Plaintiff thereafter decided not to amend, and so advised the Court. Instead, it relied upon theoretic harassment, by Defendant Roger Shumaker, to recover under its intentional interference theory. Yet, there was no loss of any business relationship, and the acts dubbed as harassment were privileged, self-help actions which Mr. Shumaker employed to protect the Defendants' interest.

Turning to the procedural aspect of the case, the Plaintiff's appellate brief only addressed its Motion for Summary Judgment, not the Defendant's cross-motion, which culminated with a dismissal of the Plaintiff's claims.

Finally, when articulating issues on this appeal, rather than limit the issues to two: adverse possession; and intentional interference with business relationships, the Plaintiff expanded the adverse possession issue into three separate issues. The first addressed adverse possession, but the next two, which are properly subsumed by a discussion of adverse

possession, were: consent to possession; and the standard which applies to summary judgments. Consequently, this brief will address these three issues as one.

ISSUES ON APPEAL

The Defendants disagree with the issues presented by the Plaintiff. Rather, the Defendants consider the following issues necessary to disposition of the appeal:

[1] Did the District Court properly dismiss the Plaintiff's claim of adverse possession, when: the Plaintiff did not have a good faith, reasonable belief that it owned the subject property; did not possess the property in a knowingly adverse manner to the true owner; and did not have exclusive possession of the property?

[2] Did the District Court properly dismiss the Plaintiff's claim of intentional interference with business relationships when evidence of necessary elements for such tort were not proffered, and the record showed that the Defendants engaged only in privileged, self-help measures to protect their property from trespass?

STATEMENT OF FACTS

The recitation of facts by the Plaintiff greatly vary from those supported by evidence in the record. Therefore, the Defendants submit the following:

A. DISTILLING AND SORTING PERSONS AND ENTITIES WHICH WERE BLENDED AS ONE TO SUPPORT A CLAIM

[1] On December 5, 1988, Debra Anderson, and her husband, William L. Anderson, entered into an agreement to purchase a commercial condominium unit in a strip mall on the corner of Wanamaker Road and 28th Street in Topeka. (See, generally, Exhibit A to Plaintiff's Motion for Summary Judgement, ROA v.2 pg.108-117.)

[2] The purchase agreement specified that the purchaser was a partnership: the Andersons "doing business as" Westport Animal Clinic. (ROA v.2 pg.108)

[3] Specifically, the agreement identified the purchaser as "William L. Anderson and Debra Anderson, husband and wife, d/b/a Westport Animal Clinic" in: the opening paragraph of the agreement; the signature lines ; and the notarized verification. (See Exhibit A to Plaintiff's Motion. ROA v.2 pgs. 108, 116 and 117 respectively.)

[4] The condominium was purchased from the developer, Westport Plaza Partnership, a partnership consisting of four individuals, none of whom were the Andersons. (See referenced Agreement to Purchase Real Estate. ROA v.2 pg.108 and 116.)

[5] Under the agreement, the Andersons purchased units 120 and 120B (see page 1 of the Agreement to Purchase Real Estate, *supra*) which was limited, under the "Declaration of Condominium" (attached to "Plaintiffs' Response," ROA v.4 pgs. 285-309 cf. ROA v.4 pg. 324 para.2) by specifying that "the boundaries of each unit is that part of the building that lies within the interior unfinished surface of its perimeter walls, floor, and ceiling" with everything else beyond the interior perimeter walls, and extending to the grounds surrounding the buildings, considered "common areas". (See "Declaration of Condominium" attached as Exhibit P to Plaintiff's Response, ROA v.4 pg. 285-309 cf. ROA v.4 pg.286, paragraph 2b pg.286 and with regard to the lands surrounding the building, paragraph 4, ROA v.4 pg. 288.)

[6] The common areas outside the condominium purchased by the Anderson Partnership, including the land adjacent to the Defendants' property, remained titled to Westport Plaza Partnership. (See paragraph 2 of the Amended Petition, ROA v.1 pg. 13.)

[7] Operation and control of common areas was governed by "2800 Wanamaker Office

and Commercial Complex Owners' Association" (see paragraph 6 of said Declaration, ROA v.4 pgs. 288-289 cf. ROA v.4 pg. 324 para 2) with management control of that corporation given to the developer, Westport Plaza Partnership. (See Declaration paragraph 6c, ROA v.4 pg. 289.)

[8] Each condominium unit owner became a member of the association, obligated to pay its share of common area expenses based upon the number of square feet in that owner's particular unit compared to the total square feet of all units (Declaration paragraph 6.1, 6.2a and 6.2b, ROA v.4 pgs. 289-290). Although Westport Plaza Partnership retained ownership of the common areas (Amended Petition, paragraph 2, ROA v.1 pg. 13), each unit had a use/access interest described as an "undivided interest in the common areas" in proportion to its share of the expenses. (Declaration paragraph 6.2c, ROA v.4 pg.290)

[9] Debra Anderson acknowledged in her affidavit supporting the Plaintiff's Motion, that the "Westport Animal Clinic was and is responsible for 21.2% of common area maintenance". (See third paragraph of Exhibit B to the Motion, ROA v.2 pg. 118.)

[10] The condominium units purchased by the Anderson Partnership were only two of the thirteen total units (Declaration paragraph 3 identifying each of the units, ROA v.4 pg. 287). The Anderson Partnership units were not adjacent; rather, unit 120 was a ground floor unit, and 120B its basement. (See Declaration paragraph number 3, *id.*)

[11] Four years after signing the purchase agreement, and as the result of disputes between the Anderson Partnership and Westport Plaza Partnership, a "Mutual Release and Compromise" was signed by both Andersons. (See Exhibit R to "Plaintiff's Response," ROA v.4 pgs. 318-323 cf. pg. 324 para.2.) The Andersons acknowledged

the continuing existence of their partnership by identifying the party in interest when signing the new document as: "Westport Animal Clinic." (ROA v.4 pg.323)

[12] At some unidentified point in time, the Plaintiff in this case, Animal Care, Inc., was incorporated. Plaintiff has asserted that Debra Anderson is the sole shareholder of Animal Care, Inc. (See Amended Petition, paragraph 1, ROA v.1 pg. 12; also see affidavit to Plaintiff's Motion, Exhibit B, page 1, ROA v.2 pg. 118.)

[13] As documents submitted by the Plaintiff reveal that the Anderson Partnership was doing business as Westport Animal Clinic, the Amended Petition, (in paragraph 1, ROA v.1 pg. 12) and the Plaintiff's Motion (Exhibit B, page 1, ROA v.2 pg. 118), claim that Animal Care, Inc. also adopted that same fictitious name.

[14] There has been no evidence or suggestion that the partnership named Westport Animal Clinic and the corporation doing business as Westport Animal Clinic have merged or are in any manner the same entity.

[15] As recited by the documents referenced above, Animal Care, Inc., never was, and never suggested: it was a purchaser of the condominium; a member of the Condominium Association; a party to the referenced "Mutual Release and Compromise;" or a record owner of any condominium and/or common area property. Neither was it ever suggested that, at any time after the acquisition of the condominium units by the Anderson Partnership, the partnership transferred ownership of the units to Animal Care, Inc.

[16] Similarly, there has been no evidence or suggestion that:

[a] Animal Care, Inc. acquired any ownership interest in the Anderson Partnership before or after the Partnership (or Andersons) acquired the condominium; or

[b] that the Anderson Partnership is no longer the condominium owner; or

[c] Animal Care, Inc. acquired any real estate of the Anderson Partnership or Andersons.

Rather, the only evidence is that the corporation, at some unknown point in time, and in parallel with the Anderson Partnership, began to use the name of "Westport Animal Clinic". (See e.g. Amended Petition, para. 1, ROA v.1 pg.12.)

[17] Plaintiff, Animal Care, Inc., claims a "belief in ownership" of the strip of land in question, yet every acquisition document provided by the Plaintiff demonstrates that the Anderson Partnership, not Animal Care, Inc., owned the condominium; and that Debra Anderson, who is the sole shareholder of Animal Care, Inc., signed those condominium acquisition documents in her capacity as a partner with William L. Anderson, not as an agent (President, etc.) of Animal Care, Inc.

[18] Although Plaintiff Animal Care, Inc. is not an owner of the condominium, it is Animal Care, Inc. which runs the veterinary practice from the condominium. (See, generally, the numerous customer affidavits Plaintiff attached to its Motion for Summary judgment which begin "I have been a client of Animal Care, Inc. . . ." ROA v.2 pgs.132,133,134,136,140,141,142,144,145,146,147,148,150,152,154,156,158, 159,161 and 162 and the employee affidavits, which begin "I have been an employee of Animal Care, Inc. . . ." ROA v.2 p.135, 138 and 139.)

[19] The interest of Plaintiff, Animal Care, Inc., in the condominium and surrounding common areas is only a permissive use. That is, based upon the continued condominium ownership by the Anderson Partnership, and the Anderson Partnership's shared right to common areas, the use of such property by Animal Care,

Inc., either under lease or mere consent, has necessarily been by permission granted by the Anderson Partnership.

[20] The Plaintiff admitted against its own interest: "Westport Plaza Partnership is the owner of the real estate adjacent to the real estate that is the subject of this adverse possession action"; that is, it owned the grass common area adjoining the Defendants' property. (Amended Petition, para. 2, ROA v.1 pg.13.)

[21] According to the Plaintiff, it was Westport Plaza Partnership, not the Andersons, the Anderson Partnership, Animal Care, Inc. or Westport Animal Clinic, which "maintained [the strip in question] by planting grass, mowing, trimming and otherwise keeping up said [strip] in excess of twenty (20) years." (See Amended Petition, para. 8, ROA v.1 pg.14) To this list, Debra Anderson added that Westport Plaza Partnership also watered and fertilized the strip. (See the fifth paragraph of the Affidavit of Debra Anderson B to the Plaintiff's Motion, ROA v.2 pg.118.)

[22] When the instant litigation was filed, the Plaintiff joined Westport Plaza Partnership as an involuntary Plaintiff. (See Amended Petition, ROA v.1 pgs. 12-16.)

[23] Westport Plaza Partnership promptly filed a "Motion to Drop a Party" (ROA v.1 pgs. 20-26) claiming "it does not allege, nor can it in good faith allege that [it] has any claims against the Defendants that it either intends to assert itself or has authorized [the Plaintiff] to assert on its behalf." (See paragraph 2 of the "Motion to Drop a Party Under K.S.A. 60-221 and Memorandum in Support," ROA v.1 pg.21.) This motion was granted.

[24] When the Amended Petition was filed, then again when the Plaintiff filed its Motion for Summary Judgment, and once again when the Plaintiff filed its brief on this

appeal, the fact that Animal Care, Inc. was a legal entity distinct from the Andersons and the Anderson Partnership, was obscured by treating Debra Anderson, the Anderson Partnership and Animal Care, Inc. (the true Plaintiff) as one and the same. There was a collapsing of all persons and entities into one, and a portrayal of Debra Anderson as possessing all rights, which were then treated as rights of the "Plaintiff." This began by denominating the Plaintiff in the Amended Petition as "Animal Care, Inc., by and through Debra Anderson, D.V.M., d/b/a Westport Animal Clinic". (See Amended Petition, ROA v.1 pg.12) Thereafter:

[a] the Motion for Summary Judgment continually intermixed parties stating, for example:

[i] "From the time of the purchase of the property by Plaintiff ..." Yet the plaintiff, Animal Care, Inc. did not purchase the property, the Anderson Partnership made the purchase. (See page 2, paragraph number 4 of the Motion, ROA v.2 pg. 96.);

[ii] "... the grassy strip between the buildings owned by Plaintiff and Defendant" Yet, the Plaintiff, Animal Care, Inc. never owned a building. (See page 3, paragraph number 10 of the Motion, ROA v.2 pg. 97.);

[iii] "Defendant complained to the partners of Plaintiff, Westport Plaza Partnership ..." Yet, Westport Plaza Partnership was never a partner to Andersons or the Anderson Partnership, much less Animal Care, Inc. which was situated in the shopping center only as a tenant of the Anderson Partnership. (See Motion page 5, para. 5, ROA v.2 pg. 97.);

[iv] "...Plaintiff, her employees, and clients ..." Yet, the Plaintiff is not a

"her" – that is, not Debra Anderson, the Plaintiff is a corporation; (See page 9, first full paragraph, ROA v.2 pg.103.);

[v] "...Plaintiff Debra Anderson, DVM, remained in open, exclusive possession of the property, ..." (see page 12, third full paragraph, ROA v.2 pg. 106) Yet, Debra Anderson is not claiming either adverse possession, or (as a sub-set) exclusive possession. Animal Care, Inc. is making these claims. In addition to uses discussed later, Debra Anderson's use was non-exclusive in that: William Anderson was a joint partnership owner (see above); the partnership, as an independent entity from the Andersons, had use and access; Animal Care, Inc. used the property as a tenant; (see below); and the public routinely used the property (see below);

[b] In the affidavit by Debra Anderson attached to the Plaintiff's Motion for Summary Judgment, she continually used the expressions "I" or 'my," in place of a reference to the Plaintiff corporation. For example:

[i] "I and all employees of my veterinary practice have taken animals to the grass strip ..." (disregarding the corporation as an entity, thereby treating herself and Animal Care, Inc. as one) (ROA v.2 pg 118, last para.); and

[ii] "I sincerely believed that the grass strip as described was part of my property" (inferring that the property she purchased, together with her husband, under the structure of a partnership, was the property of Animal Care, Inc.) (ROA v.2 pg. 119, second full para.);

[c] Examples from the brief submitted to this Court are:

[i] "purchase of the property by Plaintiff" (Statement of Fact no. 4)

[ii] "Plaintiff believed that the property . . . belonged to the Plaintiff" (Statement of Fact no. 6)

[iii] "In the case at hand, Plaintiff Debra Anderson had a good faith belief..." (last para. of second page of Issue I Argument); and

[iv] "no reason that Plaintiff could not adversely possess common areas against the other co-owners" (top of second page of Issue I "Analysis").

[25] Obscuring the parties worked so successfully, that the District Court treated all entities as one. (See, generally, Memorandum Opinion, ROA v.4 pgs. 337-357)

[26] To the extent any suggestion is made that both Debra Anderson and Animal Care, Inc. are Plaintiffs, the notice of appeal, which provides jurisdiction for this Court, specified only one appellant. (See Notice of Appeal, ROA v.4 pg. 376)

B. IDENTIFICATION OF THE GRASSY STRIP AT ISSUE

[27] The grassy strip in question is situated between the Defendants' building and the parking lot adjacent to condominium occupied by the Plaintiff. (See, generally, the detailed survey attached to Defendants' Amended Response to Plaintiff's Motion, ROA v.3 pgs. 232-259. Also see attestation to ownership, ROA v.3 pg. 217.)

[28] On the grassy strip, moving east toward the Defendants' building from the shopping center parking lot, there are approximately two feet of common area to the true property line. The next eight feet, located within a utility easement, is the Defendants' property. (See survey attached to Plaintiff's Motion, ROA v.2 pg. 163; pg. 1 of the affidavit by Roger Shumaker in response to the Plaintiff's Motion, ROA v.3 pg. 217, and the above referenced detailed survey, ROA v.3 pgs. 232-259)

[29] The chain link fence, which the Plaintiff desires to treat as the property line, was located approximately on that edge of the utility easement which is closest to the Defendants' building. (See paragraph 10 of the Motion, including the referenced survey diagram attached as Exhibit F, ROA v.2 pgs. 97 and 163, respectively. Also see page 1 of affidavit by Roger Shumaker in opposition to the Plaintiff's Motion, ROA v.3 pg. 217.)

C. BELIEF IN OWNERSHIP

[30] As detailed above, Animal Care, Inc. was a tenant (by lease or permission) in the Anderson Partnership's condominium.

[31] As a corporation, Animal Care, Inc. never held an ownership interest in the Anderson Partnership's condominium units or associated common areas, as detailed above.

[32] Since the sole shareholder of Animal Care, Inc. was Debra Anderson, and the corporation, as an entity, cannot ignore knowledge of the sole shareholder who signed the original purchase documents on behalf of another entity, the corporation did not have a "good faith" belief or a "reasonable" belief that it owned any portion of the condominium units, the common area or the Defendants' property.

[33] For these reasons, Animal Care, Inc. only reasonably "believed" it had permissive use, subordinate to the use available to the Anderson partnership.

[34] Again, for these reasons, Animal Care, Inc. only reasonably "believed" its use of the property was limited to the duration of its tenancy with the Anderson Partnership.

[35] To the extent the Anderson Partnership is deemed distinct from its partners, Deborah Anderson's own personal right to use the condominium and surrounding common areas was permissive use, and not as an owner of the property.

[36] To the extent ownership of the condominium is deemed personal to the Andersons, and not those of a partnership, then any use by Debra Anderson was non-exclusive, and was shared with William L. Anderson; therefore Debra Anderson could not believe that "she" alone owned any property, yet William Anderson has not joined this action as a party demanding adverse possession based upon belief in ownership.

[37] Regardless of who believed he/she/it/they owned the condominium, the only authorized use of common areas in the shopping center was a 21.2 percent, undivided, non-exclusive use; and no claimed condominium owner had a "reasonable," "good faith" belief that he/she/it/they owned anything more than a non-exclusive, shared interest in any common areas.

[38] Although interlacing the various entities, the Plaintiff completely failed to provide any affidavit or documentary support that it – the corporation itself – Animal Care, Inc., "believed" it owned the condominium or an interest in the common areas. Rather, the affidavit filed by Debra Anderson was carefully worded to blend and juxtapose parties, but never state that Animal Care, Inc. held a belief that corporation owned any property. (See, generally, Debra Anderson's affidavit to Plaintiff's Motion for Summary Judgment, ROA v.2 pgs. 118-120.)

[39] William L. Anderson, the co-partner with Debra Anderson in the Anderson Partnership, has said much in his allegations and motions, but has not offered any affidavit testimony, in support of the Plaintiff's Motion, to the effect that: the Anderson Partnership had a belief it owned the grassy strip; that Animal Care, Inc., as a tenant of the Anderson Partnership had any reason to believe it owned any property; or that Animal Care, Inc., as a tenant of the Anderson Partnership, had any

greater authority to use any property than by permission as a tenant.

[40] Although not contained within the Plaintiff's documents, the affidavit by Roger Shumaker, opposing the Plaintiff's Motion, explained that after the Defendants moved into their property, he had a conversation with Debra Anderson, who acknowledged that the fence was not on the property line, and actually pointed to the approximate true property line location in the exact position where the parties now agree it is located. (Affidavit pgs. 3-4, ROA v.3 pgs. 219-220.)

D. PERMISSIVE USE OF THE PROPERTY AND ABSENCE OF HOSTILE USE

[41] In response to a letter by Defendant, Roger Shumaker, directed to Wesport Plaza Partnership, William L. Anderson wrote a letter to Mr. Shumaker, concluding with a statement admitting that, throughout the years, the property was being used by the animal clinic with permission: "We have openly used this property as ours, with the documented consent of your predecessors." (Letter attached as Exhibit G to Motion, ROA v.2 pgs. 164-165; quoted text in first full para. of page 2.)

[42] The referenced letter, which the Plaintiff chose to attach to its own Motion, was not just written by Mr. Anderson, and signed as the "representative" of Debra Anderson, but written by a documented partner of the Anderson Partnership which owns the condominium. (See signature on pg. 2, ROA v.2 pg. 165.)

[43] Although the Plaintiff argued both to the District Court and this Court, that William Anderson did not mean what he said, Mr. Anderson declined to offer an affidavit to state that, or explain any reason, the letter did not mean actual consent was truly given for use of the property.

[44] To the extent the Plaintiff utilized the grassy strip, then as cited above, it did so under

a belief that the strip was part of the common area of the shopping center. Specifically, Debra Anderson stated in her affidavit in support of the Motion for summary judgment (on pg. 2 of the affidavit, fifth full para., ROA v.2 pg. 119):

> "I did not request permission from anyone ... and was under the belief that, as a fractional owner of the partnership, owned the grass strip to the east of the building ... to the [Kindercare - the Defendants' predecessor] fence, east side of the utility easement."

Notwithstanding the attempt to portray herself as partner and one with Westport Plaza Partnership (the partnership which Debra Anderson referenced, not the Anderson Partnership), she admitted by this statement that, to the extent:

[a] she, Debra Anderson;

[b] Animal Care, Inc.; or

[c] the Anderson Partnership

used the Defendants' portion of the grassy strip, it was not knowingly adverse or hostile to the true owner. Rather, Animal Care, Inc. used it with presumed permission from the Anderson Partnership, and not knowingly adverse to anyone.

E. NON-EXCLUSIVE USE OF THE PROPERTY

[45] The interests of those who had use of the common areas in the shopping center, including the grassy strip, were as follows:

[a] The Anderson Partnership, to the extent of a 21.2% use interest (see above);

[b] Westport Plaza Partnership since it both: retained title to the grassy strip; and held an 88.8% use interest in the common area (affidavit of Debra Anderson under "Plaintiff's Response" stating all other shopping center condominiums were retained by Westport Plaza Partnership, ROA v. 4. pg. 324, para. 2);

[c] Animal Care, Inc., the Plaintiff, had permission to use the property as a tenant of the Anderson Partnership;

[d] As part of the shopping center, the common areas were completely open to the public and customers of all businesses in the shopping center;

[e] Specifically with regard to the grassy strip, Debra Anderson admitted in her affidavit, and various customers of Animal Care, Inc. added affidavit statements to Plaintiff's Motion for Summary Judgment, affirming that they freely and routinely walked their dogs on the grassy strip. (See affidavit of Deborah K. Anderson attached as Exhibit B to the Motion, ROA v.2 pg. 119 para. 1) together with affidavits by Laura Bell; Lori Durkes; Vickie Jacobs; Lesa Roberts; Mary Jane Cook; Thomas Cook; Sharon Wenger; and Linda Ketter attached as Exhibit E to the Motion, ROA v.2 pgs. 134, 139, 141, 144, 150, 152, 158 and 133, respectively.)

[46] No evidence or suggestion was made that the Plaintiff took any action to preclude (by signs or otherwise) use of the grassy strip by anyone or any group itemized in the previous numbered paragraph.

[47] With regard to use of the grassy strip by Animal Care, Inc. customers:

[a] use by customers of Animal Care, Inc. was never stated to be invited or directed by Animal Care, Inc. or anyone else;

[b] it was never suggested that Animal Care, Inc. customers used the grassy strip as guests or business invitees of Animal Care, Inc.. That is, customers walked their dogs on the strip as visitors of the shopping center, not as employees, business invitees or guests of Animal Care, Inc.;

[c] there was no suggestion that any signs were posted on the property – or anywhere in the condominium or shopping center – directing or inviting Animal Care, Inc. customers to use the grassy strip.

[48] As a consequence of the facts recited in the preceding numbered paragraph, use by Animal Care, Inc. customers was never under the control, direction or "use" by Animal Care, Inc. Instead, the property was open and available for use by anyone, including: those who visited any stores in the center with dogs in their car; shop owners who had pets on their premises; and those who lived or worked on the block.

[49] Beyond use of the grassy strip by those mentioned above, Westport Plaza Partnership exercised control over the property by: "planting grass, mowing, trimming and otherwise keeping up the [grassy strip]" in addition to watering and fertilizing the area. (See Amended Petition, paragraph 8, ROA v.1 pg. 14, also see page 1, fifth paragraph of Deborah K. Anderson's affidavit in support of the Plaintiff's Motion, ROA v.2 pg. 118.)

[50] Although not the Plaintiff's evidence, Roger Shumaker, by affidavit, stated that he observed people use the strip as a short-cut to and from the store behind the shopping center. This statement was never contradicted (affidavit pg. 3, ROA v.3 pg. 219).

F. INTENTIONAL INTERFERENCE WITH BUSINESS RELATIONSHIPS

[51] Although claiming that Defendant Roger Shumaker intentionally interfered with existing prospective business relationships, the Plaintiff offered no evidence or affidavit statement that a single customer or potential customer was lost.

[52] It was claimed that the Defendant harassed the Plaintiff by calling the police five times. Yet those incidents did not involve customers. Moreover:

[a] Complaints about three of the incidents, concerning distressing noise emanating from the Plaintiff's facility, were shown to be true. (See Exhibits I to Plaintiff's Motion and commentary below, ROA v.2 pgs. 169-173)

[b] Two reports involved a claim of vandalism by someone who removed fence posts which had been erected by the Defendant; and Debra Anderson admitted she was the one who did it. (See Exhibits J1 and J2 attached to the Plaintiff's Motion, ROA v.2 pgs. 174-176)

[53] It was further claimed that the Defendant, Roger Shumaker, harassed Animal Care, Inc. by sending a letter to the City of Topeka concerning a potential violation of City ordinances as the result of its action in walking dogs on the grassy strip. (See Exhibit H1 attached to the Plaintiff's Motion, ROA v.2 pg. 166) The letter, however, merely cited to an ordinance which the City had already determined was violated and so advised the Plaintiff. (See Exhibit H2 to the Motion, ROA v.2 pg.167). Again this did not involve customers of the Plaintiff.

ARGUMENTS AND AUTHORITIES

ISSUE I. Plaintiff Neither: Believed it Owned the Property; Possessed Property in a Knowingly Adverse Manner; Nor Had Exclusive Possession

STANDARD OF REVIEW

The Defendant disagrees with the standard for appellate review recited by the Plaintiff. The standard is not based upon substantive property law, but summary judgment.

Summary judgment is appropriate when pleadings, affidavits and other documents of record demonstrate there is no genuine issue of material fact. Further, once material facts

supporting the motion are submitted, the party opposing the motion has the burden to produce facts which dispute a material fact. *State ex rel. Stovall v. Reliance Ins. Co.*, 278 Kan. 777, 788, 107 P.3d 1219, 1228 (2005). An appellate court then applies those same standards when reviewing the entry of a summary judgement, and its "review is unlimited". *Golden v. Den-Mat Corp.*, 276 P.3d 773, 784, 47 Kan.App.2d 450, 460 (Kan.App. 2012)

ANALYSIS

Prior to presenting specific analysis, which must necessarily be presented sub-topic by sub-topic, each time narrowing focus from the broader issues, it is important to provide an overarching picture for this issue:

The true Plaintiff is a corporation which never did and never could, in good faith, reasonably believe it owned the grassy strip in question. It did, however use the strip, but use was by permission as a tenant, and not under a claim knowingly adverse to the owner. Moreover, the strip was not possessed exclusively by the Plaintiff corporation.

The burden is upon the Plaintiff, therefore, to come forward with affirmative proof of two independent facts. That is:

[1] either a good faith, reasonable belief that it owned the property, or a showing that it possessed the property in a knowingly adverse manner; *and in addition*

[2] that it had exclusive possession of the property.

A failure by the Plaintiff to meet its burden in either category, requires that the judgment below be affirmed. In reality, it failed in both.

[A] THE TRUE PLAINTIFF AND ITS RELATIONSHIP TO THE PROPERTY

[1] THE ANDERSON PARTNERSHIP

As cited in the foregoing statement of facts, when the condominium was purchased,

the stated purchaser was "William L. Anderson and Debra Anderson, husband and wife, d/b/a Westport Animal Clinic," (ROA v.2 pgs. 108, 116) with the document signed by the purchaser as:

WESTPORT ANIMAL CLINIC

By: *[signature]*
William L. Anderson

By: *[signature]*
Debra K. Anderson

Confirmation of the actual purchaser was affirmed four years later when, a "Mutual Release" document was again signed in the exact same format shown immediately above (ROA v.4 pg. 323).

At a minimum, and notwithstanding protests to the contrary, Debra Anderson was not "the" purchaser, and the property was not "her" property. She was, at most, a co-tenant with her husband who never offered an affidavit expressing his belief as to property ownership.

Yet, the Andersons decided not to purchase the property as co-tenants (either joint or as tenants in common). Instead, they chose to structure the purchase agreement and the Mutual Release as a sale by the developer to a distinctly named entity, through which they were "doing business". They held themselves out and acquired the property as a partnership.

The principles of partnership law provide that:

[a] "the association of two or more persons to carry on as co-owners a business for profit forms a partnership, whether or not the persons intend to form a partnership" (K.S.A. 56a-202(a));

[b] a "partnership is an entity distinct from its partners" (K.S.A. 56a-201(a));

[c] "Property acquired by a partnership is property of the partnership and not of the partners individually" (K.S.A. 56a-203); and

[d] "Property is partnership property if acquired in the name of:
(1) the partnership; or
(2) one or more partners with an indication in the instrument transferring title to the property of the person's capacity as a partner or of the existence of a partnership but without an indication of the name of the partnership." (K.S.A. 56a-204(a))

(Note that the Kansas Uniform Partnership Act was revised in 1998, but the revisions, as set forth above, apply to all previously existing partnerships. See K.S.A. 56a-1304(b).)

Lest there be any misinterpretation, the purchase documents, provided by the Plaintiff, represented the purchase of condominium units for housing a veterinary practice, which is a business for profit. Moreover, concerning an intent to "carry on a business," the same purchase contract made it clear that the Andersons were operating under a fictitious business name and were "d/b/a" – doing business as – Westport Animal Clinic.

In effect, the condominium: [1] was purchased by a partnership; [2] was partnership property; and [3] was not Debra Anderson's property. Further, the partnership was a distinct entity from both Debra Anderson and William Anderson.

[2] THE CORPORATION

As set forth in paragraph 1 of the Amended Petition (Amended Petition, ROA v.1 pg. 12) and affidavit of Debra Anderson (ROA v.2 pg.118), Animal Care, Inc. is a corporation doing business at 2800 Wanamaker, Topeka, KS, the location of the condominiums. The sole stockholder (recited as "owner") was specified as Debra Anderson (ROA v.1 pg. 12).

A corporation is presumed separate and distinct from its stockholders. See e.g. *Speer v. Dighton Grain, Inc.*, 624 P.2d 952, 958, 229 Kan. 272, 281 (Kan. 1981), and this principle applies whether a corporation has many stockholders or, as the case here, only a single stockholder. *Amoco Chemicals Corp. v. Bach*, 567 P.2d 1337, 1340, 222 Kan. 589, 593

(Kan. 1977) Moreover, a corporation is not a person, and cannot be described by its stockholder as "I." Instead, "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law." *Dean Operations, Inc. v. One Seventy Associates*, 896 P.2d 1012, 1016, 257 Kan. 676, 680 (Kan. 1995). Simply stated, Debra Anderson and Animal Care, Inc. were distinct.

Ironically, most cases in which a claim is made that a corporation and its stockholder are "one," are made when a creditor seeks to reach a stockholder's personal assets by piercing the corporate veil. In this case, however, Debra Anderson is essentially asking the reverse. She wants the Court to disregard corporate separateness, not to protect creditors, but for personal utility and gain. Yet even if this were an available option, she would still be required to prove all conditions necessary to disregard the corporate existence. (See, for example, *Amoco Chemicals Corp. v. Bach*, supra) However, she has neither offered proof that any such conditions exist, nor made a request for some form of reverse veil piercing.

While Animal Care, Inc. operates under the same pseudonym as the Anderson Partnership, "Westport Animal Clinic," it was never proposed that Animal Care, Inc. and the Anderson Partnership were one entity. No affidavit or documentation has been provided to suggest any form of merger between the entities or buy-out of the condominium; and no reason exists to draw any presumption other than the common name was for the convenience of the Andersons, which the law does not prohibit, absent an objection.

[3] MERGING OF PERSONS AND ENTITIES

Without any documentation, affidavit, proof or other evidence, Debra Anderson has repeatedly equated herself as one and the same with the Anderson Partnership, and one and the same with Animal Care, Inc.

The merging of identities began by naming the Plaintiff as: "Animal Care, Inc. by and through Debra K. Anderson, D.V.M., d/b/a Westport Animal Clinic".

Since a corporation can "sue and be sued in all courts ... in its corporate name" (K.S.A. 17-6102(2)); and suit is never brought by a stockholder for a corporation, except in a shareholder derivative action (see K.S.A. 60-223a), the approach here allows an opening for misinterpretation.

In addition to the case caption, portrayal of both the partnership and corporation as subsisting in the person of Debra Anderson is found in the Plaintiff's Motion for Summary Judgment, Debra Anderson's supporting affidavit, and the appellate brief submitted to this Court. Numerous examples of this positioning were set forth in the Statement of Facts (number 24) above, and the Court will not be burdened with their repetition.

[4] WHO BELIEVED WHAT

The purpose of detailing the identity of the true Plaintiff has been to narrow the focus when determining: who has the burden to prove a belief that he/she/it/they owned the Defendants' property; who has the burden to prove he/she/it/they had an intent to possess property adversely; and who has the burden to prove he/she/it/they had exclusive use. In each case, the "who" in question is: Animal Care, Inc., which is an entity entirely separate and distinct from Debra Anderson, William Anderson, and the Anderson Partnership.

[B] BELIEF IN OWNERSHIP

[1] MANDATORY ELEMENTS REQUIRED FOR ADVERSE POSSESSION BASED UPON BELIEF

K.S.A. 60-503, as the governing statute, requires either a belief in ownership of property, or that possession of the property is under a claim knowingly adverse:

> "No action shall be maintained against any person for the recovery of real property who has been in open, exclusive and continuous possession of such real property, either under a claim knowingly adverse or under a belief of ownership, for a period of fifteen (15) years. This section shall not apply to any action commenced within one (1) year after the effective date of this act."

The Plaintiff's principal argument, and Debra Anderson's affidavit testimony, has revolved around a "belief" in ownership. To be accepted, however, such a belief must have two characteristics: [1] it must be in good faith; and [2] it must be reasonable:

> "Further, the party's belief of ownership must not only be made in good faith, but it must also be reasonable. *Akers v. Allaire,* 17 Kan.App.2d 556, 558, 840 P.2d 547, *rev. denied* 252 Kan. 1091 (1992)."

Wright v. Sourk, 258 P.3d 981, 987, 45 Kan.App.2d 860, 865-6 (Kan.App. 2011). To this the Court added the requirement of:

> "'a state of mind which must be based on good faith under circumstances which justify such belief.'" [Citing to *Wallace v. Magie*, 522 P.2d 989, 994, 214 Kan. 481, 487 (Kan. 1974)]

Wright v. Sourk at P.3d 989, Kan.App.2d 870. Also see *Chesbro v. Board of County Com'rs of Douglas County*, 186 P.3d 829, 835, 39 Kan.App.2d 954, 961 (Kan.App. 2008).

The burden of proof to meet the reasonable, good faith and justified belief requirements is considerable. Every presumption is in favor of the legal title holder and against the claimant (*Wright* at P.3d 987, Kan.App.2d 866; *Chesbro v. Board of County Com'rs of Douglas County* at P.3d 834, Kan.App.2d 961; *Stith v. Williams,* 227 Kan. 32, 36, 605 P.2d 86 (1980)) and every requisite element of K.S.A. 60-503 must be proven by clear and convincing evidence. (*Wright v. Sourk* at P.3d 987, Kan.App.2d 866; *Boese v. Crane,* 182 Kan. 777, 782, 324 P.2d 188, 194 (1958); *Crone v. Nuss*, 263 P.3d 809, 815, 46 Kan.App.2d 436, 442 (Kan.App. 2011))

Although the Courts have articulated reasonableness, good faith and justified belief

as qualifying factors for belief of ownership, this case demonstrates an additional, obvious factor: the belief must be held by the party who seeks adverse possession.

[2] FAILURE TO SATISFY MANDATORY ELEMENTS

As applied here, Animal Care, Inc. has the burden to prove, by clear and convincing evidence, that there were circumstances which justified a belief that it owned the Defendants' property, that such belief was reasonable, and that such belief was held in good faith.

The Plaintiff's own Motion and supporting documents, however, reveal:

[a] The only basis for anyone to believe they owned Defendants' property was their thought it was part of the common area of the shopping center;

[b] The title owner of the common area was Westport Plaza Partnership (see para. 2 of the Amended Petition, ROA v.1 pg. 13); therefore, no condominium owner or tenant could reasonably believe it "owned" any common area;

[c] But to the extent a condominium unit owner interpreted their right to use the common area as "ownership," then, under the circumstances, an owner would be justified only in believing in a fractional, shared ownership. (See e.g., pg. 2 of Debra Anderson's affidavit, fifth full para., ROA v.2 pg. 119.);

[d] The exclusive evidence presented by the Plaintiff was that the Anderson Partnership owned condominium units in the shopping center, not Animal Care, Inc.;

[e] Even if all presumptions are not accorded to the Defendants, and even if the condominium units are not owned by a partnership entity, but personally by the Andersons, Animal Care, Inc. still remained an outsider to all ownership interests, including fractional interests;

[f] With the condominium units owned by the Anderson Partnership (or the Andersons), then Animal Care, Inc. only occupied the units as a tenant. The formal arrangement for Animal Care, Inc.'s tenancy under a lease or mere grant of permission, was not stated, and does not matter. The important matter is that Animal Care, Inc. occupied the condominium by permission, not by ownership;

[g] Animal Care, Inc.'s ability to use common areas of the shopping center was, consequently, derivative of and subordinate to any right by the Anderson Partnership, and again, permissive, not based upon ownership;

[h] There was no reasonable, good faith basis, justifiable under the circumstances, for Animal Care, Inc. to claim it believed it held any ownership interest (even fractional) in the condominium, common areas, or the Defendants' property;

[i] Notwithstanding Debra Anderson's affidavit focused upon "my" beliefs about what "I" owned, there was no affidavit or document to assert any belief by Animal Care, Inc. that it, as a corporation, owned any property whatsoever;

[j] Since the Plaintiff merged persons and entities, it may be helpful to address the theoretic merged claimant by adding:

[i] The Anderson Partnership failed to offer anything more than a belief that it held a fractional, shared, use interest in the common area, and not outright and exclusive ownership. Note, the Plaintiff's argument that it can claim adverse possession against another fractional owner was not based upon a claimed belief in ownership, but a claim of holding property "knowingly adverse" to the owner. This will be discussed below; and

[ii] Debra Anderson, who signed all the purchase documents, did not, under

the circumstances, have justification to reasonably believe, in good faith: that she alone owned anything; that she owned anything more than a fractional interest in the Anderson Partnership; that the partnership had more than a fractional use interest in the common areas; or that "her" interest in common areas was the same as Animal Care, Inc.'s interest.

To conclude this sub-section, it is sufficient to note that, when opposing Defendants' cross-motion for summary judgment, Animal Care, Inc. did not offer any evidence to satisfy its burden to prove a good faith or a reasonable belief that it – the corporation – owned the Defendants' property. Therefore, dismissal by the District Court was correct.

[C] CLAIM KNOWINGLY ADVERSE

[1] GOOD FAITH v. BAD FAITH and MUTUAL EXCLUSIVITY

Prior to an update in the statutory rule governing adverse possession in 1964, to include claims based upon a belief in ownership, a claimant was required to demonstrate possession which was hostile. See, e.g. *Stark v. Stanhope*, 480 P.2d 72, 75, 206 Kan. 428, 432 (Kan. 1971). The 1964 change thereafter allowed claims based upon either: [1] a belief in ownership; or [2] "a claim knowingly adverse." (K.S.A. 60-503)

As explained by the Court in *Stark*, "where possession has been 'under a claim knowingly adverse' hostility remains an essential element" at P.2d 76, Kan. 432.

While belief involves a state of mind, hostility involves intent. (*id.*) Consequently, the two approaches are diametrically opposed to each other: a claim based upon belief requires good faith; whereas, a claim based upon hostility requires " ... a matter of bad faith intent to acquire something one does not own, by the process of claiming it." *Armstrong v. Cities Service Gas Co.*, 502 P.2d 672, 680, 210 Kan. 298, 308 (Kan. 1972).

Just as a party cannot simultaneously claim good faith and bad faith, the Plaintiff cannot claim possession based upon a good faith belief in ownership, yet also claim possession of the Defendants' property in a manner which was knowingly adverse – that possession was held with a "bad faith intent to acquire something [it] does not own."

The District Court recognized the Plaintiff's claims were mutually exclusive; and the only affidavit testimony offered by the Plaintiff was a belief in ownership by Debra Anderson. Animal Care, Inc. never offered evidence that it occupied the property with a bad faith intent to acquire it adversely to rights of the true owner.

[2] POSSESSION UP TO FENCE ALONE IS NOT SUFFICIENT

The Plaintiff nevertheless argues that it acquired the property by possession which was knowingly adverse. The theory is that it continually used the grassy strip up to the fence line, and since the Defendants' predecessors would have known of its use, and took no action, possession was adverse.

In fact, the law does not allow mere possession, even to a fence beyond the true property line, to be converted into possession in a hostile manner, knowingly adversely to the true owner. As explained in *Martin v. Hinnen*, 590 P.2d 589, 591, 3 Kan.App.2d 106, 108 (Kan.App. 1979):

> " As to (1)(a), adverse possession by hostile holding, the cases uniformly hold that the possession of land up to a dividing fence or other boundary under the mistaken belief that it is the true line does not constitute a hostile holding. *Edwards v. Fleming,* 83 Kan. 653, 112 P. 836 (1911); *Kinne v. Waggoner,* 108 Kan. 814, 197 P. 195 (1921); *Wiburg v. Stevenson,* 134 Kan. 530, 7 P.2d 512 (1932); *Steinbruck v. Babb,* 148 Kan. 668, 84 P.2d 907 (1938); *Simpson v. Goering,* 161 Kan. 558, 170 P.2d 831 (1946); *Craig v. Paulk,* 162 Kan. 280, 176 P.2d 529 (1947). Under those and similar cases, only where there is an intent to possess to the fence regardless of where the true boundary is may the possession be said to be hostile. No evidence of such intent was presented here. Since there was no hostility shown the [party

seeking adverse possession] could have acquired no title to the strip [of the party owning the property] by adverse possession requiring hostility."

Similarly, there was no evidence in this case of a "bad faith intent to acquire something [the Plaintiff] does not own." *Armstrong v. Cities Service Gas Co., supra.*

[3] FOCUS TURNS TO PROPERTY OWNER'S KNOWLEDGE

In its analysis, the District Court, when allowing presumptions to be in favor of the Defendant, opined that the fence, placed eight feet east of the property line by the Defendants' predecessors, may have been placed outside the utility easement area on purpose for any number of reasons. If that were the case, then use by the Plaintiff would not have been hostile, from the owners' perspective. Rather, it would have been expected.

In fact, while the element of hostility requires focus upon the claimant's intent, an additional element, focused upon the property owner's knowledge, must be proven: use of the property must give "unequivocal notice" that someone is claiming title to the land. *Thompson v. Hilltop Lodge, Inc.*,126P.3d 441,444, 34 Kan.App.2d 908,910 (Kan.App.2006). Also see *Wright v. Sourk*, 258 P.3d 981,990, 45 Kan.App.2d 860,871(Kan.App. 2011).

By allowing the presumption that a fence was not accidently placed on the edge of a utility easement, eight feet from the true property line (see ROA v.3 pg. 217, and the survey at ROA v.3 pgs. 232-259), a second presumption follows: use by a neighbor, up to the fence, was anticipated. Such anticipated use cannot then be interpreted as giving "unequivocal notice" that the neighbor was laying claim to the property; and mere use by that neighbor did not infer hostile possession with the intent to gain ownership. *Martin v. Hinnen, supra.*

[4] USE BY PERMISSION

Once it is recognized that the Plaintiff's evidence is based upon a belief in ownership,

and no evidence exists that Animal Care, Inc. had the intent to possess the grassy strip adversely to the true owner, further argument should not be required. Yet, an additional factor exists which defeats a "knowingly adverse" claim. Just as good faith cannot co-exist with bad faith, permissive use cannot co-exist with a hostile holding.

[a] PERMISSION GIVEN TO ANIMAL CARE, INC. AS TENANT

As previously discussed, Animal Care, Inc. was a tenant in the shopping center. Whether it was under a lease or a simple grant of permission is irrelevant. Moreover, whether it was a tenant of the Anderson Partnership, the Andersons, or some third party is irrelevant. The relevant fact is that all its use of common areas in the shopping center was by a grant of permission, not ownership. Consequently, no usage of any common area – or land which it believed was in the common area – can be considered as hostile ("knowingly adverse") since permissive use cannot be hostile to the true owner.

[b] CONFESSION THAT CONSENT WAS PROVIDED

As part of its own case, the Plaintiff provided two letters with its Motion for Summary Judgment which became the subject of the Plaintiff's fourth issue on this appeal. But the issue is properly categorized as a sub-issue to knowingly adverse possession.

The first letter, written after the old fence had been removed, was from Defendant Roger Shumaker to two partners of Westport Plaza Associates, the title holders of the common areas in the shopping center. (ROA v.2 pg. 179) It asked that they "work out something to keep the waste on the proper side of the property line."

The second letter, responsive to the first, was sent to Roger Shumaker, on a typed Westport Animal Clinic letterhead, and signed by William Anderson as "Representative for 'the veterinarian,' Debra K. Anderson, DVM, owner and operator of the Westport Animal

Clinic." (ROA v.2 pgs.164-165) Of course, Mr. Anderson was also a partner in the Anderson partnership which owned the condominium.

This response by William Anderson, before litigation was filed, was a scathing letter with all manner of accusations. Then, focusing upon himself and Debra Anderson, in contrast with Mr. Shumaker's claimed evil ways, he said: "We have openly used this property as ours, with documented consent of your predecessors." (ROA v.2 pg.165) "Consent," of course, means that the property was not used in a hostile manner.

By the time the Motion for Summary Judgment was filed, it was necessary to circumvent this admission to avoid an immediate dismissal since such "consent" not only precluded a hostile holding, but was an admission that there had been no belief in ownership.

The Plaintiff argued the statement really only meant that previous owners legally acquiesced to a transfer of ownership (quoting Am.Jur.2d), and the referenced documentation consisted of satellite photos showing a fence (i.e. since a fence existed, predecessor owners, ipso facto, "consented" to a transfer of ownership of the grassy strip).

These arguments do not provide plausible explanations. Yet their true failure is that no affidavit or testimony was provided which stated, in effect: "I did not really mean 'documented consent of your predecessors' was something other than actual consent."

The Plaintiff's argument that the letter did not mean what it stated, is worthless because this matter came before the Court on cross-motions for summary judgment. The Plaintiff cannot remain silent when confronted with its written admission of consent. Rather, in opposing the Defendant's motion, it had the burden to produce evidence which disputes the admission (i.e. a material fact). *State ex rel. Stovall v. Reliance Ins. Co.*, 278 Kan. 777, 788, 107 P.3d 1219, 1228 (2005). Yet the Plaintiff chose not to submit an affidavit, but only

offer unsworn "lawyer-speak" to oppose the Defendants' motion. And since: every presumption is in favor of the legal title holder and against the claimant (*Wright, Chesbro, Stith, supra);* and every requisite element of K.S.A. 60-503 must be proven by clear and convincing evidence (*Wright, Boese, Crone, supra),* the clear statement of consent should be accepted as unopposed, and one more reason the Plaintiff failed to meet its burden.

[c] ADMISSION BY DEBRA ANDERSON

In addition to the confession of consent by William L. Anderson, the affidavit of Roger Shumaker (at ROA v.3 pg. 219-220) reports an admission by Debra Anderson which negates any claimed belief in ownership and then negates any hostile intent by inferring permission consistent with Mr. Anderson's statement of consent:

> "Debra Anderson approached the fence, mid to late morning . . . and we exchanged pleasantries. She asked me if it was ok for the [shopping] center's lawn mowing service to continue to mow the west side of the fence (my 8ft of property), so that it would stay uniform with the rest of the center's property from a maintenance stand point. She said, 'It would keep things looking uniform for the center.' She simultaneously pointed south toward the utility pole located by the curbing and almost directly on the actual property line, and said 'The property line between is located over there somewhere.'"

This statement is offered for two reasons. First, the Defendants feel compelled to demonstrate material facts exist which would preclude the Plaintiff's request that judgment be entered in its favor. Second, since every presumption must be in favor of the Defendants, then given this clear statement on the record, which supports consensual use of the strip, the failure of any affidavit or testimony by William L. Anderson to say his claim to have "documented consent" did not mean actual documented consent, allows the presumptions that: consent was given; that there was no belief in ownership; and that the property was not held in a hostile manner.

[5] ULTIMATE FAILURE OF ARGUMENT

In addition to a failure to meet the previously discussed requisites for a hostile, knowingly adverse claim, there is an ironic twist applicable to this case alone.

According to Debra Anderson, she believed that she owned the grassy strip. Therefore, for Animal Care, Inc. to claim a bad faith intent to acquire property from the owner, the Court must accept the proposition that the corporation's intent, for more than fifteen years, was to acquire the property in a knowingly adversely manner against the one owner it claims it knew: Debra Anderson, or more expansively, its landlord: a partnership made up of its owner and the attorney representing it in this case.

Wrestling with such an extreme position is not necessary, however, since an affidavit concerning Animal Care, Inc.'s intent was never offered, and the Plaintiff failed to provide any other evidence of intent.

[D] EXCLUSIVE POSSESSION

As a necessary element to adverse possession, the Plaintiff's own evidence defeats the argument that it had exclusive possession of the grassy strip:

In *Crone v. Nuss*, 263 P.3d 809, 815, 46 Kan.App.2d 436, 442 (Kan.App. 2011), this Court explained:

> "K.S.A. 60-503 requires that the adverse holder's possession of the property be exclusive. '[T]he requisite of exclusive possession for acquisition of title by adverse possession is not satisfied if occupancy is shared by the owner or with agents or tenants of the owner.' 3 Am.Jur.2d, Adverse Possession § 71, p. 146."

Applying *Crone v. Nuss* to this case, neither Debra Anderson nor the Anderson Partnership can claim exclusive possession since possession "is shared" with a tenant, Animal Care, Inc. More important, however, is that Animal Care, Inc., the tenant, is the

Plaintiff; and as a tenant, it cannot claim exclusive possession when its occupancy is subordinate, in the use of all property believed to be common area, to the rights of its landlord, and the will of its landlord to extend its lease (or grant of permission).

In addition, all common area was shared with: every other tenant of the shopping center; Westport Plaza Partnership which held title to the common areas; and the public which visited the shopping center.

Even if the Anderson Partnership held a shared *ownership interest* in the common areas, and not simply a shared *use interest*, then under the "Apartment Ownership Act" (K.S.A. 58-3101 et. seq.) which governs condominiums, common areas can never be treated as exclusive to one owner, either in usage or legal division. As stated in K.S.A. 58-3106:

> (c) The common areas and facilities shall remain undivided and no apartment owner or any other person shall bring any action for partition or division of any part thereof . . .. Any covenant to the contrary shall be null and void.
>
> (d) Each apartment owner may use the common areas and facilities in accordance with the purpose for which they were intended without hindering or encroaching upon the lawful rights of the other apartment owners.

Beyond statutory mandates, and with respect to the grassy strip up to the fence (i.e. the Defendant's property), the Plaintiff admitted that Westport Plaza Partnership continually mowed, watered, fertilized, trimmed, planted grass, and maintained the entire strip. (Amended Petition, para. 8, ROA v.1 pg. 14, also see page 1, fifth paragraph of Debra Anderson's affidavit, ROA v.2 pg. 118)

The public also used the grassy strip as a cut-through to a store behind the shopping center. (Affidavit of Roger Shumaker, pg. 3, ROA v.3 pg. 219) In this regard, despite the Defendant's observations, Debra Anderson asserted that the Plaintiff alone used the property.

Since this assertion, however, would require continual surveillance, and affirmative evidence of facts which support the conclusion, neither of which has been provided, the statement is unsupported conjecture. As stated in *Estate of Belden v. Brown County*, 261 P.3d 943, 46 Kan.App.2d 247 (Kan.App. 2011), it is both "contrary to K.S.A. 60-256(e) and nonsensical" to rely upon an affidavit to defeat a motion for summary judgment by relying upon opinion evidence which would be inadmissible at trial.

Perhaps more significant than use by the public and control by Westport Plaza Partnership, was the continual intervening use by customers of Animal Care, Inc. who routinely walked their dogs on the strip either before or after visiting the Plaintiff's facility. This was attested by both Debra Anderson in the affidavit she provided with the Plaintiff's Motion for Summary Judgment, plus eight separate affidavits the Plaintiff provided from its customers. (See paragraph 45(e) of the Statement of Facts above, and specifically ROA v.2 pg. 119 para. 1; and ROA v.2 pgs. 134, 139, 144, 150, 152, 158 and 133)

Had customers walked their dogs: at the direction of Animal Care, Inc.; as its business invitees or guests; or even at the prompting of a sign on the strip erected by Animal Care, Inc. offering the strip as a walk for its customers, then it may be argued that use by such people was use by the Plaintiff. But no affidavit suggested any of these conditions existed. Instead, the reasonable presumption, without any contrary evidence, was that these numerous customers noticed a strip of grass and simply brought their dogs to it. The Plaintiff's fractional use rights, customers, plus availability for use by the public and other tenants and Westport Plaza Associates, nullifies any claim of exclusivity.

At this point, Plaintiff's argument that it can gain adverse possession against co-owners may be addressed. The argument is important since the Plaintiff cannot otherwise

claim exclusive possession with only a 21.2% shared use interest in common areas. The argument fails, however, for multiple reasons: [1] the Apartment Owners Act, as cited above, precludes one condominium co-owner from such claims against another; [2] in each case quoted by the Plaintiff, the co-owner was required to show acts inconsistent with, and exclusive of the rights of the other co-tenants, which was not done here; [3] Animal Care, Inc. had neither exclusive possession nor control as against other condominium owners, including Westport Plaza Partnership which maintained control and care over the property as earlier reviewed; [4] whosoever may be categorized as the Plaintiff, interest in the common areas was a use interest, not a co-ownership interest; and [5] key to the argument: Animal Care, Inc. was not a co-owner, it was only a permissive user.

Now returning to the consensual use of the property discussed under previous sections, it is next important to note the obvious: a party with consent to use property, cannot possess it exclusively, since its possession is subordinate to the owner granting consent.

Ultimately, even if Animal Care, Inc. had exclusive possession of the property, it would not matter since Debra Anderson was the one who claimed a belief in ownership of the property. That is, one person/entity claimed ownership and another claimed possession. This dichotomy appears to be the reason the Plaintiff treated itself and Debra Anderson as one. The same party must both believe in ownership (or hold the property knowingly adverse to the owner) and in addition, have exclusive possession, which was not the case here.

[E] EMPHASIS ON DIFFERENT FACTS, NOT NEW ISSUES

It is anticipated the Plaintiff will assert that, in the District Court, the Defendants did not argue: the Plaintiff was Animal Care, Inc., not Debra Anderson, not the Anderson Partnership; or that the three should not be depicted as one. Now treating Animal Care, Inc.

as a distinct entity from the others, the Plaintiff will say, is a new legal theory, and new legal theories are not allowed on appeal.

The Plaintiff is accurate that its pattern of interweaving players, as detailed in Statement of Fact 24 above, sufficiently managed to evade isolation of Animal Care, Inc. by both the attorney representing the Defendants at that time, and the Honorable Franklin R. Theis. But it is not accurate to say either: the matter was not before the Court; or it involved a new legal theory.

Arguing a new legal theory is different from the case here: arguing facts in the record, which were not previously highlighted, but which support the judgment. This is particularly true when all those facts were provided by the Plaintiff as evidence to support its motion.

The validity of citing facts not previously highlighted may be recognized with a simple hypothetical: The Plaintiff places five documents into a Judge's hands with the request that they be accepted to prove it is entitled to summary judgment on the issue of belief in ownership of land. The Defendants then point to the first two of those documents as proof the Defendants, not the Plaintiff, are entitled to summary judgment. The Judge agrees with the Defendants. On appeal, the Defendants explain that, in reality, each of the five documents handed to the Judge by the Plaintiff prove the Plaintiff did not have a reasonable belief in ownership. No new legal theories are presented; the same theory of belief in ownership is consistent. The Defendants simply pointed to all the evidence, not just some evidence handed to the Judge by the Plaintiff, and this Court's "review is unlimited" *(Golden v. Den-Mat Corp.*, 276 P.3d 773, 784, 47 Kan.App.2d 450, 460 (Kan.App. 2012)).

Specifically in this case, as reviewed above, the Plaintiff announced that it is a corporation "owned" by Debra Anderson. The Defendants now simply point out that the

Animal Care, Inc., not its owner-shareholder, is the Plaintiff and the two are distinct. This is neither new evidence nor a new legal theory.

The Plaintiff further submitted documents showing that the condominium was purchased by Debra Anderson and William L. Anderson as co-owners or partners. The Defendants now simply point out that the condominium owner is not Animal Care, Inc. Again, there is no new legal theory.

As to legal theories, no new theories have been introduced. In the District Court, the Defendants argued that the Plaintiff had the burden to prove all elements of adverse possession, but did not prove a good faith belief in ownership, did not prove knowingly adverse possession (including by reason of admitted consent to use), and did not prove exclusive possession. These were the legal theories presented to and reviewed by the District Court, and the same theories presented here. Yet even if this brief is construed as raising new legal theories there are applicable exceptions to the general rule:

> "Generally, parties may not raise a new legal theory for the first time on appeal. *Jarboe v. Board of Sedgwick County Comm'rs,* 262 Kan. 615, 622, 938 P.2d 1293 (1997). In *Jarboe,* this court recognized three exceptions to the general rule:
>
> > "'(1) Cases where the newly asserted theory involves only a question of law arising on proved or admitted facts and which is finally determinative of the case;
> > "'(2) Questions raised for the first time on appeal if consideration of the same is necessary to serve the ends of justice or to prevent denial of fundamental rights; and
> > "'(3) That a judgment of a trial court may be upheld on appeal even though that court may have relied on the wrong ground or assigned a wrong reason for its decision." [Citation omitted.]' ' 262 Kan. at 622-23, 938 P.2d 1293"

Cole v. Mayans, 80 P.3d 384, 391, 276 Kan. 866, 873 (Kan. 2003). Also see *Iron Horse Auto, Inc. v. Lititz Mut. Ins. Co.*, 156 P.3d 1221, 1229, 283 Kan. 834, 845 (Kan. 2007)

Each of the above exceptions apply in this case, and can easily be demonstrated. When the Plaintiff spoke of: the property purchased "by Plaintiff;" the building owned by the Plaintiff; that "Plaintiff Debra Anderson" was in exclusive possession; "my property;" and "Plaintiff believed," all as cited in Statement of Fact number 24 above, then the Plaintiff was either being deceptive to the Court or speaking in expansive tones, really meaning: the building was owned by Debra Anderson's partnership; she, not Animal Care, Inc., had a belief in ownership; and Animal Care, Inc. occupied the property as a tenant by permission.

If the Plaintiff was being deceptive, then allowing a new theory will: "serve the ends of justice;" meet the other criteria for exceptions; support the grant of legal fees for this appeal under Supreme Court Rule 7.07(c); and be treated as a lack of candor to the Court and deceit under KRPC 303, 226(c) and 226(d), respectively. On the other hand, if the Plaintiff was just speaking expansively, and really meant that the building was owned by one entity, occupied by another, and a belief in ownership was by a partner, not a tenant, then the Plaintiff cannot complain of new theories, for this is what the Plaintiff was trying to express.

ISSUE II. The Claim of Intentional Interference with Business Relationships, Unsupported by Evidence of Necessary Elements for Such Tort

STANDARD OF REVIEW

Since summary judgment was granted to the Defendant in District Court on all issues, the standard of review is the same as recited under the first issue reviewed above.

ANALYSIS

Count III of the Amended Petition (at ROA v.1 pgs. 12-16), captioned "Tortious Interference With a Business Relationship," set forth the Plaintiffs tort claim as:

13. The Defendant, Roger Shumaker has engaged in intentional acts meant to interfere with the prospective and on going business relationships of the Plaintiff by harassing and terrorizing the clients of the Plaintiff.
14. Among the conduct of the Defendant Roger Shumaker has engaged in, on or about June 24, 2010 the Defendant Roger Shumaker took a photograph of one of the clients of the Plaintiff while that client was entering the Plaintiff's place of business and yelled to the client to "smile" while he was taking the photograph.

Thereafter, the Plaintiff filed a motion to amend its Amended Petition to add a nebulous harassment claim based upon actions after suit was filed. (ROA v.1 pgs. 77-79) Yet before the motion to amend was decided, the Plaintiff filed its Motion for Summary Judgment.

The District Court then decided to split its ruling on the Motion for Summary Judgment to postpone a decision on the tort claim until a new Amended Petition was filed to add a new claim. The Plaintiff was granted twenty-one days to file an Amended Petition. (Memorandum Opinion, ROA v.4 at pgs. 356-357). No action was taken within the specified time parameter, and a renewed motion to amend (coupled with a motion to amend or vacate the Memorandum Order) was filed the following month. This motion was definitive about the nature of its request:

"5. Plaintiff seeks leave to amend its claims in Counts III and IV, to more particularly state claims for the intentional torts of Outrage (Intentional Infliction of Emotional Distress) and Trespass."

During a hearing which followed the motion, the Plaintiff was given ten days to file an Amended Petition and told that a new Summary Judgment motion should thereafter be filed to encompass new actions to be alleged. (ROA v.6 pgs. 26-27). This directive was then consolidated into a Journal Entry which read, in part (at ROA v.4 pg. 368):

"2. Plaintiff's motion for Leave to Amend the Petition as to Counts III and IV of the amended petition is sustained.
3. Plaintiff shall serve upon Defendant Plaintiff's amended petition on or before May 16, 2012.

5. Plaintiff shall file on or before July 2, 2012, a new summary judgment motion discussing Counts III and IV"

Leave to amend was then declined by letter to the Court (ROA v.5 pg. 3) which read, in part:

> " At the conclusion of the hearing on May 11, 2012, you directed that I amend the Plaintiff's Petition to re-state Counts III and IV, as requested in my motion and that an amended Summary Judgment Motion be filed by July 1, 2012, relative to those counts.
>
> My client's [sic] have asked, instead, that the Court simply rule on the Summary Judgment/Dismissal motions and resolve all the still-pending issues, and at that point enter a final judgment in the matter."

Therefore, the Plaintiff has waived all tort claims which were not included within its Amended Petition. Yet, just as the Plaintiff's adverse possession claim shifted focus from Animal Care, Inc. to Debra Anderson, its tort claim shifted from intentional interference with business relationships, to a non-pleaded claim based upon a tort which does not exist.

[A] INTENTIONAL INTERFERENCE WITH BUSINESS RELATIONSHIPS

The one specific tort claim pleaded by the Plaintiff was intentional interference with present or prospective business relationships, which has five specific requirements:

> "The requirements to show tortious interference with an existing or prospective business relationship are: (1) the existence of a business relationship or expectancy with the probability of future economic benefit to the plaintiff; (2) knowledge of the relationship or expectancy by the defendant; (3) that, except for the conduct of the defendant, plaintiff was reasonably certain to have continued the relationship or realized the expectancy; (4) intentional misconduct by defendant; and (5) damages suffered by plaintiff as a direct or proximate cause of defendant's misconduct. *Macke Laundry Service Ltd. Partnership v. Mission Assocs., Ltd.,* 19 Kan.App.2d 553, 561, 873 P.2d 219, *rev. denied* 255 Kan. 1002 (1994)."

Meyer Land & Cattle Co. v. Lincoln County Conservation Dist., 31 P.3d 970, 975, 29 Kan. App.2d 746, 751 (Kan.App. 2001). Also see, e.g.: *Turner v. Halliburton Co.*, 722 P.2d 1106, 1115, 240 Kan. 1, 11 (Kan. 1986); and *Cohen v. Battaglia*, 293 P.3d 752, 755 (Kan. 2013).

Of these five requirements, *Dickens v. Snodgrass, Dunlap & Co.*, 872 P.2d 252, 255

Kan. 164 (Kan. 1994) emphasized that "Tortious interference with a contract is predicated on malicious conduct by the defendant." (at P.2d 257, Kan. 169)

[B] ABSENCE OF DAMAGES

The Plaintiff's intentional interference claim must immediately fail, for there was no suggestion in the Plaintiff's affidavits or documentation that the Defendant caused one single existing or prospective customer to decline doing business with the Plaintiff, to miss an appointment, or even come late to an appointment. Consequently, the essential element of damages is entirely absent. While further discussion will be offered to rebut allegations, it is only for the sake of completeness since the requirements of the tort have not been satisfied.

[C] HARASSMENT AND COMPLAINTS TO THE POLICE AND CITY

The Plaintiff's appellate brief never once mentioned the intentional interference tort allegation. Instead, it argued the Plaintiff has been harassed, and now seeks an injunction against the Defendant from "making groundless claims to various governmental agencies."

A definition of harassment was provided as the guiding light for the Plaintiff's claim. Yet the citation, taken from K.S.A. 60-31a02(b), does not provide a civil cause of action. It simply recites a definition applicable to the Protection from Stalking Act, which has no connection with this case. Similarly, citing K.S.A. 21-3818 which makes it a crime to falsely report a crime, does not authorize a Court to enjoin a person from a false report.

If false reports to the city or police are the core of Plaintiff's complaint, then the underlying injury would not be harassment, but defamation. However, defamation cannot be enjoined (See, generally, *Unified School Dist. No. 503 v. McKinney*, 689 P.2d 860, 236 Kan. 224 (Kan. 1984)), and an injunction cannot be issued without a demonstration that irreparable injury will otherwise be suffered by the Plaintiff (*id.*), which is not alleged here.

In support of its harassment claim, numerous pages draw the Court through section after section of the Topeka zoning code to prove the Defendant's complaint about a building code violation was actionable harassment. Brief mention is also made of reports to the police. All of these, however, equate to a red herrings, distracting from the facts and law.

As to a complaint sent to the City, the Plaintiff's Motion for Summary Judgment, provided both: an August 10, 2010 letter by the City to Debra Anderson stating that taking animals outside to relieve themselves violates the Topeka Municipal Code (ROA v.2 pg. 167); and the Defendant's subsequent, August 16, 2010, letter to the City complaining about the continuing violation. (ROA v.2 pg. 166). Note that the Defendant's letter "confirmed" "a conversation of yesterday" – i.e. after the Zoning Administrator already determined and wrote that Debra Anderson was in violation of the code.

The letter to Debra Anderson made it clear that the Topeka Zoning Administrator believed that an outside area cannot be used by a clinic for animals to relieve themselves. Whether she correctly guided the Defendant is not the issue. The question here is whether asking a government agency to investigate a matter, already announced as a zoning code violation, *and which request would protect the use and enjoyment of one's own property*: can be enjoined; is defamation/harassment; or is properly classified as privileged.

Moreover, the Plaintiff's zoning code expose' glossed over the key provision. In the C-4 district, TMC 18.155.030 (*http://www.codepublishing.com/ks/topeka/html/topeka18/Topeka18155.html*), allows: "(4) Animal hospitals, either large or small, veterinary clinics and *enclosed* kennels." That is, kennels which provide a place for animals to relieve themselves, must be enclosed, which does not describe the Plaintiff's outdoor areas. No provision allows using open, publically accessible areas for a clinic to toilet hundreds of

animals. The District Court, then concluded (at ROA v.4 at pg. 374): " ... it appears that use of the Defendants' property by Plaintiff for its animal patients was inconsistent with existing zoning laws .... Defendants, therefore, had a public basis, independent of the ownership of the land, to complain to government officials and seek its determination."

The Plaintiff's Motion further sought to demonstrate malicious conduct by utilizing memos of complaints to the police, produced by the Defendants (Exhibits I1, I2 and I3, ROA v.2 pgs. 168-173). These were only mentioned in passing in Plaintiff's appellate brief.

Each of the three August, 2010 memos report complaints to the police of distressing barking by dogs when the Plaintiff decided to keep its building windows open. One memo noted that an officer responding to the call found the Plaintiff's building closed. Such "false claim" could not have resulted in any form of damage to the Plaintiff, and could not have resulted in any loss of business. The remaining two memos report a next-day follow-up to the visit which occurred when the Plaintiff's building was closed, and a subsequent visit several days later. In these cases, the dogs were heard barking, and in one case, the officer went to the Plaintiff's office to ask that they close their windows. Key to these memos is that the officers determined there was indeed noise from the Plaintiff's building.

Note that the truth of the statements within the memos is not at issue. The reason is simple: the memos were offered as evidence by the Plaintiff to prove its case. Since its own "proof" demonstrates a perceivable noise problem, then the Plaintiff demonstrated that the complaints were neither false nor malicious. Moreover, the Plaintiff never once denied the noise problem existed despite the Defendant's affidavit opposing the Motion for Summary Judgment which affirmed the barking was not only disturbing him, whose office window overlooked the Plaintiff's open windows, but that the Defendants' tenant complained the

noise was disruptive. (See affidavit by Roger Shumaker, ROA v.3 pg. 227.)

The final two complaints to the police were the following year in March, 2011. The attachments to the Plaintiff's Motion as Exhibit J (ROA v.2 pgs.174-176), were actual police reports which reveal that fence posts erected by the Defendant were removed and reported as vandalism. These posts were erected before the District Court issued a temporary restraining order that construction of a new fence could not proceed, and the process stopped. (See Roger Shumaker's affidavit, ROA v3. pgs. 227-228.) According to the police report relied upon as evidence by the Plaintiff, Debra Anderson then admitted she was the one to remove the posts, pile them up, and fail to account for several missing posts. She claimed a right to remove the posts on the Defendants' property, and the police took no further action. Again, these events have nothing to do with interference with business relationships, malice or damages, and complaining about them is disingenuous since it was Debra Anderson, personally, who precipitated the action.

It should here be mentioned that the Plaintiff's request for this Court to order that summary judgment be entered in its favor fails to acknowledge that facts mitigate against such a ruling. That is: the referenced affidavit testimony that barking noise was disruptive (i.e. the police reports were not "false"); the code violation report was based upon information the zoning office provided; and the vandalism report was true. Citing these facts which oppose the Plaintiff's Motion, however, are not offered to suggest that material facts still require a trial. To the contrary, the Defendants are entitled to summary judgment since the Plaintiff has failed to provide sufficient evidence to meet necessary elements to prove intentional interference with business relationships, maliciousness, irreparable harm which would justify an injunction, and absence of justification or privilege.

[D] PRIVILEGE

Returning to the one tort actually in the Petition, and assuming business customers were lost, which was not the case, the Defendant would still have been entitled to self-help action as privileged to protect property which the Defendant owned.

In *Turner v. Halliburton Co.*, 722 P.2d 1106, 1116 240 Kan. 1, 13 (Kan. 1986), the Court accepted the principle of privilege as it quoted 45 Am.Jur.2d, *Interference* § 27:

> "'The law has crystallized relatively few concrete rules to determine the existence or want of justification or privilege in connection with the tort of interference. The issue raised on a plea of justification has been said to depend on the circumstances of the particular case, bearing in mind such factors as the nature of the interferer's conduct, the character of the expectancy with which the conduct interfered, the relationship between the various parties, the interest sought to be advanced by the interferer, and the social desirability of protecting the expectancy or the interferer's freedom of action. Generally, a circumstance is effective as a justification if the defendant acts in the exercise of a right equal or superior to that of the plaintiff, or in the pursuit of some lawful interest or purpose, but only if the right is as broad as the act and covers not only the motive and purpose but also the means used.' pp. 304-05."

Also see *Cohen v. Battaglia*, 293 P.3d 752 (Kan. 2013).

Of the various acts Plaintiff termed "harassment," the question is whether a property owner, seeking to protect his own property interest, can justly be precluded from basic, peaceful, self-help measures.

Is a person justified to complain about an ordinance violation, which if addressed, would bring an end to trespass and offensive odors? Shall freedom of speech be inhibited – and effectively punished – because the offender later argues his way out of the enforcement of such an ordinance?

Is a person justified in complaining to police about disruptive noise by a neighbor, when it is then left to the police to decide whether to act or not? Is the social utility of

allowing someone to leave the matter in the hands of the police less than the social utility of allowing offending noise (which the Plaintiff never denied) to continue unabated?

Even if the doctrine of privilege were not applicable, the final question would resolve the issue: is a minor annoyance, without resulting damages, actionable in tort?

The Plaintiff argues: yes. But the "yes" is based upon a definition of "harassment" which neither creates an actionable tort, nor creates damages where none exist. The "yes" also asks the Court to ignore the Plaintiff's failure to ever say: there was no noise as reported, or that installed fence posts were not removed.

In contrast with the Plaintiff's protestations, each of the actions of the Defendant were fully privileged, as found by the District Court.

CONCLUSION

Four simple questions are appropriate:

1. Did the *corporation*, Animal Care, Inc., as a tenant in the shopping center, have a good faith, reasonable basis to belief that it owned the grassy strip?
2. Did the *corporation*, Animal Care, Inc., offer any evidence of an intent to acquire property it did not own, by claiming it?
3. Did the *corporation*, Animal Care, Inc., as a tenant, subordinate in its rights to the Anderson Partnership, and required to share the grassy strip with every other tenant in the shopping center, and which grassy strip was both regularly used by customers and continually maintained by Westport Plaza Partnership, have exclusive possession of the grassy strip?
4. Did the corporation, Animal Care, Inc. incur any loss of business or suffer any

other damages due to a claimed intentional interference with business relationships by the Defendants?

The answer to each of these questions is: no. For this reason, this Honorable Court is requested to affirm the judgment of the District Court.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that two (2) true and correct copies of the foregoing brief were deposited in the U.S. Mail, postage prepaid, on the 21st day of June, 2013, addressed to:

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