NOT DESIGNATED FOR PUBLICATION

No. 110,973

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

GAYE C. WHITTAKER,
Appellant,

v.

VICTORIA PRESTON,
and
REED M. PRESTON,
Appellees.

MEMORANDUM OPINION

Appeal from Johnson District Court; JAMES F. VANO, judge. Opinion filed October 17, 2014. Affirmed in part and remanded with directions.

Kristopher C. Kuckelman, of Lowe, Farmer, Bacon & Roe, LLP, of Olathe, for appellant.

Amy E. Elliott, of Law Office of Amy E. Elliott, of Overland Park, for appellees.

Before MCANANY, P.J., GREEN and BUSER, JJ.

Per Curiam: In 2006, Gaye C. Whittaker and her sons, Reed and Tyler Preston, took title to real property located in Johnson County, Kansas. The quit claim deed granted Gaye, Reed, and Tyler title to the property as joint tenants with the right of survivorship and not as tenants in common. In 2012, Reed's ex-wife, Victoria Preston, registered a Tennessee judgment for unpaid child support in the Johnson County District Court. Gaye filed an action in the trial court asking that the judgment not attach to the real property because Reed held no beneficial ownership interest in the property. Alternatively, Gaye argued in an amended petition that any interest Reed did hold in the property was held in

a resulting trust for her benefit. After the parties filed competing summary judgment motions, the trial court issued memorandum decisions denying Gaye's motion and granting Victoria's motion.

Gaye raises two arguments on appeal: (1) that the trial court erred in refusing to consider extrinsic evidence when determining whether Reed held an interest in the property; and (2) that the trial court erred in holding that the facts were insufficient to support the creation of a resulting trust. Finding no merit in Gaye's first contention, we affirm. As to the second contention, the case is remanded to the trial judge to clarify whether he granted Gaye's motion to amend her petition to add the resulting trust theory. Moreover, if the trial judge granted the motion to amend, did he reject Gaye's resulting trust contention because "this theory was not previously argued, the Court will not consider it in a Motion for Reconsideration"? Accordingly, we affirm in part and remand with instructions.

During their marriage, Stephen E. Preston and his wife, Gaye had three children: Reed, Tyler, and Lane. A suggestion of death has been filed for Gaye. The suggestion of death stated that she died on July 5, 2014. Lane is also deceased and is not a party to this action. In 1972, Stephen and Gaye purchased 38 acres of land (property) located in Johnson County, Kansas. The property included a house that the couple resided in during the marriage. The deed described Stephen and Gaye's ownership interest as joint tenants with the right of survivorship. Stephen and Gaye divorced in 1980. Following the divorce, Gaye and Stephen agreed that they would continue to own the property as joint tenants. The couple also agreed that Gaye would continue to reside in the residence located on the property. On July 19, 2000, Stephen died.

In 2006, Gaye decided to sell part of the property. Specifically, Gaye decided to sell 10 of the 38 acres to James and LaFawn Olson. But instead of executing a deed conveying the 10 acres, Gaye—along with her sons (Reed and Tyler) and daughters-in-

law—executed a deed conveying 28 acres of the property to the Olsons. Gaye's son, Tyler, has since died. He died on July 24, 2014. Shortly after the conveyance, the parties discovered that the deed mistakenly described a 28-acre tract instead of a 10-acre tract.

To correct the error, the Olsons executed a deed conveying the 28-acre tract back to Gaye and her sons. The deed from the Olsons to Gaye and her sons stated the following:

> "THIS DEED, is made this 21st day of December, 2006 by and between James G. Olson and M. LaFawn Olson, husband and wife, as Grantor(s), and Gaye C. Whittaker, a single woman, Tyler Lake Preston, a married man and Reed Monroe Preston, a married man, as Grantees . . .
>
> "WITNESSETH, that the Grantor(s) for and in consideration of the sum of One Dollar and other good and valuable consideration paid by the Grantees, the receipt and sufficiency of which is hereby acknowledged by Grantor(s), do/does by these presents QUIT CLAIM unto the Grantees, *AS JOINT TENANTS WITH RIGHT OF SURVIVORSHIP, AND NOT AS TENANTS IN COMMON*, the following described Real Estate, situated in the County of Johnson and State of Kansas . . . ." (Emphasis added.)

After the Olsons conveyed the 28 acres, Gaye and her sons executed a deed conveying the Olsons the 10 acres that originally was supposed to be conveyed to them.

On July 7, 2008, Reed and Victoria divorced. For whatever reason, Reed's interest in the Kansas property was not mentioned in either the martial dissolution agreement or in the final divorce decree. Reed was ordered to pay $402 per month in child support for their minor daughter. Despite the order, Reed failed to pay his court ordered child support obligation. On April 4, 2012, the Knox County, Tennessee Circuit Court ruled that Reed owed Victoria $17,889.00 in unpaid child support. Victoria tried to collect the child support in Tennessee. Victoria's efforts, however, were unsuccessful. Because Victoria

knew about Reed's ownership of the 28-acre property in Johnson County, she registered her Tennessee judgment in Kansas. To comply with K.S.A. 60-2202, Victoria mailed notices of lien to the record owners of the 28-acre property: Reed, Tyler, and Gaye.

Shortly after Victoria mailed the lien notices, Gaye filed a petition in Johnson County District Court challenging Victoria's lien attachment. In her petition, Gaye asserted that Victoria's lien should not attach to the 28-acre property because Reed held "no equitable interest in the real property." Eventually, each side moved for summary judgment.

On January 24, 2013, the trial court issued a memorandum decision denying Gaye's summary judgment motion. The trial court held that the unambiguous language in the deed from the Olsons to Gaye, Reed, and Tyler established that Reed was a joint owner of the 28-acre property. As a result, Victoria's lien properly attached to the property. Gaye moved for reconsideration on February 12, 2013. In her motion, Gaye argued that the trial court should reconsider its previous ruling for two reasons: (1) that "counsel did not artfully state [Gaye's] position and argument in [her] motion" and (2) that the Court should find that Reed holds his one-third interest in the property in an implied trust or resulting trust for the benefit of Gaye.

The trial court denied Gaye's motion to reconsider. In its memorandum decision, the trial court stated that Gaye's resulting trust argument "was not advanced in her Motion for Summary Judgment and was not even a theory of the case until [her] Amended Petition was filed, which was after the Court had ruled on [her] Motion for Summary Judgment." Consequently, the trial court stated that it would not consider Gaye's resulting trust argument because it "was not previously argued." After denying Gaye's motion to reconsider, the trial court granted Victoria's summary judgment motion.

Did the Trial Court Err in Refusing to Consider the Extrinsic Evidence Offered by Gaye Based on Its Ruling That the Unambiguous Language of the Deed Showed That Reed Was a Joint Owner of the 28-Acre Property?

On appeal, Gaye argues that the trial court erred in allowing Victoria's Tennessee judgment to attach to the 28-acre property. First, Gaye maintains that even though Reed held legal title to property because it was deeded to him as a joint tenant with the right of survivorship, extrinsic evidence showed that Reed held only an equitable or beneficial interest in the property. As a result, Victoria's Tennessee judgment for unpaid child support could not attach to the property. Nevertheless, Victoria argues that the "unambiguous language [of the deed] cannot be defeated or supplemented by unwritten, unrecorded agreements or understandings between joint owners which are contrary or supplemental to the recorded instrument."

The material facts of this case are uncontroverted. Where no factual dispute exists, appellate review of an order granting summary judgment is de novo. *David v. Hett*, 293 Kan. 679, 682, 270 P.3d 1102 (2011). Moreover, the interpretation and legal effect of written instruments are matters of law. Consequently, Kansas appellate courts exercise unlimited review of written instruments. *National Bank of Andover v. Kansas Bankers Surety Co.*, 290 Kan. 247, 263, 225 P.3d 707 (2010).

When interpreting conveyances, Kansas appellate courts first look at the language used within the four corners of the instrument in an attempt to determine the intent of the parties. *Heyen v. Hartnett*, 235 Kan. 117, 122, 679 P.2d 1152 (1984). If the written instrument—in this case a deed—is determined to be unambiguous, the trial court may look only to the four corners of the agreement to determine the parties' intent. *Central Natural Resources v. Davis Operating Co.*, 288 Kan. 234, 244-45, 201 P.3d 680 (2009); *Brown v. Lang*, 234 Kan. 610, 614-15, 675 P.2d 842 (1984). Contract language is ambiguous when the words used to express the intent of the parties are insufficient and

have two or more possible meanings. Facts and circumstances surrounding the execution of the instrument may be used to ascertain and carry out the intention of the parties only if the instrument is deemed ambiguous. When construing an ambiguous contract, Kansas appellate courts may consider the interpretation placed upon the contract by the parties themselves. *First Nat'l Bank of Olathe v. Clark*, 226 Kan. 619, 624, 602 P.2d 1299 (1979). In addition, Kansas appellate courts may look at the parties' later conduct where their actions manifested a mutual understanding of the contract's meaning. *Central Natural Resources*, 288 Kan. at 245.

In this case, Victoria contends that "Kansas Courts have consistently declined to consider extrinsic evidence where there is no ambiguity or uncertainty in a deed and where the grantor's intention is clearly and unequivocally expressed." Victoria's contention seems sound. *e.g.*, *Westar Energy, Inc. v. Wittig*, 44 Kan. App. 2d 182, 206-07, 235 P.3d 515 (2010) ("Wittig's argument fails because the contract of the parties is not ambiguous. . . . Therefore, we see no need for the district court here to consider the conduct of the parties in order to interpret this contract."); *Cf. Harder v. Wagler*, 17 Kan. App. 2d 403, 408-09, 838 P.2d 366 (1992), *rev. denied* 251 Kan. 938 (1992) (Because documents were ambiguous, parol evidence was necessary to ascertain intent of the parties.)

Here, the Olsons executed a deed granting the property to Gaye, Reed, and Tyler as "JOINT TENANTS WITH RIGHT OF SURVIVORSHIP, AND NOT AS TENANTS IN COMMON." This language is unambiguous and therefore clearly establishes the parties' intention that Gaye, Reed, and Tyler held the property as joint tenants with the right of survivorship. Indeed, "where, in a written grant or agreement, the magic words 'as joint tenants with rights of survivorship' are used, the grantor's intention is clearly manifested and, in the absence of fraud or mutual mistake, parol evidence is not admissible to explain or vary the terms of the instrument." *Winsor v. Powell*, 209 Kan. 292, 299, 497 P.2d 292 (1972).

Because the deed clearly conveyed the property to Gaye, Reed, and Tyler as joint tenants with the right of survivorship, each of the grantees owned an undivided one-third interest in the property. See *Hall v. Hamilton*, 233 Kan. 880, 882, 667 P.2d 350 (1983). Consequently, the trial court properly refused to consider the extrinsic evidence that Gaye offered to show that she and her sons did not hold the property as joint tenants. Accordingly, Gaye's initial argument carries little weight and must fail.

Did the Trial Court Err In Holding That the Facts Were Insufficient to Support the Creation of a Resulting Trust?

But a determination that the plain language of the deed created a joint tenancy does not end the analysis. Gaye contends that even if the plain language of the deed establishes that Reed owns an undivided interest in the property as a joint tenant, Reed holds his interest "in a resulting trust for the benefit of [her]." Victoria, however, contends that Gaye's argument fails because a resulting trust theory cannot be used against a third-party judgment creditor.

Gaye relies in part on K.S.A. 58-2408 to support her argument. Interpretation of a statute is a question of law over which appellate courts have unlimited review. *Jeanes v. Bank of America*, 296 Kan. 870, 873, 295 P.3d 1045 (2013).

Before reaching the merits of Gaye's resulting trust argument, it must be noted that this issue raises procedural concerns. Gaye did not plead a resulting trust theory or include that theory in her initial summary judgment motion. In fact, Gaye did not raise the argument until after the trial court had denied her summary judgment motion. After the trial court denied Gaye's summary judgment motion, she moved to amend her petition and moved for reconsideration. Gaye's motion to reconsider stated that her counsel "did not artfully state [her] position and argument in [the] Motion for Summary Judgment."

In response to Gaye's motions, Victoria maintained that Gaye's motion to amend to allow advancement of a new legal theory omitted from the original petition should be denied. The trial court agreed with Victoria and declined to reach the merits of Gaye's resulting trust argument. In its order denying Gaye's motion to reconsider, the trial court stated the following:

> "[Gaye's resulting trust] argument was not advanced in her Motion for Summary Judgment and was not even a theory of the case until [Gaye's] Amended Petition was filed, which was after the Court had ruled on [Gaye's] Motion for Summary Judgment. Because this theory was not previously argued, the Court will not consider it in a Motion for Reconsideration. The Court notes only in passing that the face of the deed in question reflects no suggestion or hint of any trust or life estate."

In refusing to consider Gaye's resulting trust theory, the trial court cited to *Renfro v. City of Emporia, Kansas*, 732 F. Supp. 1116 (1990). In *Renfro*, the trial court explained the restrictions of a Rule 52 motion: "A Rule 52 motion for the court to alter or amend its findings is not intended to allow the parties to relitigate old issues, to advance new theories, or to rehear the merits of a case." 732 F. Supp. at 1117.

Moreover, the trial court in *Renfro* quoted from a recent decision of Judge Crow: "'[A] party's failure to present his strongest case in the first instance does not entitle him to a second chance in the form of a motion to amend.'" *Paramount Pictures Corp. v. Video Broadcasting Sys., Inc.*, No. 89-1412-C, 1989 WL 159369, at *1 (1989) (unpublished opinion) (citing *United States v. Carolina Eastern Chem. Co., Inc.*, 639 F. Supp. 1420, 1423 [D.S.C. 1986]).

Here, the record does not contain the trial court's order granting Gaye's motion to amend her petition to add the resulting trust theory. Moreover, the trial court was equivocal about whether Gaye had been granted permission to amend her petition. During the hearing on Victoria's summary judgment motion, the trial court stated that "I

don't think it's appropriate after the fact, and I'm really, I guess, somewhat dismayed that this implied trust notion is even in the pleadings after the fact. It wasn't part of the original pleading." The appellant is responsible for providing an adequate record on appeal and to direct the court to specific references within such a record. *State v. Bryant*, 285 Kan. 970, 980, 179 P.3d 1122 (2008). As a result, we are uncertain as to whether the resulting trust theory is properly before this court. For this reason, this case is remanded to the trial judge to clarify as expeditiously as feasible whether he granted Gaye's motion to allow her to amend her petition to add the resulting trust theory. Moreover, if the trial court granted the amendment, did it dispose of Gaye's resulting trust theory based on the reasoning set out in the previously cited *Renfro* decision?

Affirmed in part and remanded with directions.