

FILED

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

SEP 7 2011

JAMES K. OWENS, THE JAMES K. OWENS)
TRUST, BRENT J. OWENS, RITA OWENS)
MARY FRAZIER, JIMMY HAGEN, KAREN)
HAGEN, AND JACK SLOAN,)

Appellants,)

v.)

ROBERT L. BATEMAN, et al.)

Respondents.)

CLERK, SUPREME COURT

91898 *ndh*

Case No. WD71053
Appeal from the Circuit Court
of Platte County, Missouri
Case No. 06AE-CV02075

APPELLANTS' BRIEF

AND APPENDIX

Respectfully submitted,

WHITE GOSS BOWERS MARCH SCHULTE
& WEISENFELS, a Professional Corporation

Mary Jo Shaney MO# 35919

James C. Bowers, Jr. MO# 23533

4510 Belleview, Suite 300

Kansas City, Missouri 64111

Telephone: (816) 753-9211

Facsimile: (816) 753-9211

Email: mshaney@whitegoss.com

Email: jbowers@whitegoss.com

SERVICE BRIEF
DO NOT REMOVE
FROM FILE ROOM

CO
COUNSELS FOR APPELLANTS JAMES K.
OWENS, THE JAMES K. OWENS TRUST,
BRENT J. OWENS, RITA OWENS, MARY
FRAZIER, JIMMY HAGEN, KAREN
HAGEN, AND JACK SLOAN

SCANNED

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

JAMES K. OWENS, THE JAMES K. OWENS)
TRUST, BRENT J. OWENS, RITA OWENS)
MARY FRAZIER, JIMMY HAGEN, KAREN)
HAGEN, AND JACK SLOAN,)

Appellants,)

v.)

ROBERT L. BATEMAN, et al.)

Respondents.)

Case No. WD71053
Appeal from the Circuit Court
of Platte County, Missouri
Case No. 06AE-CV02075

APPELLANTS' BRIEF

AND APPENDIX

Respectfully submitted,

WHITE GOSS BOWERS MARCH SCHULTE
& WEISENFELS, a Professional Corporation

Mary Jo Shaney MO# 35919
James C. Bowers, Jr. MO# 23533
4510 Belleview, Suite 300
Kansas City, Missouri 64111
Telephone: (816) 753-9200
Facsimile: (816) 753-9201
Email: mshaney@whitegoss.com
Email: jbowers@whitegoss.com

ATTORNEYS FOR APPELLANTS JAMES K.
OWENS, THE JAMES K. OWENS TRUST,
BRENT J. OWENS, RITA OWENS, MARY
FRAZIER, JIMMY HAGEN, KAREN
HAGEN, AND JACK SLOAN

TABLE OF CONTENTS

TABLE OF CASES AND OTHER AUTHORITIES	ii
JURISDICTIONAL STATEMENT	1
STATEMENT OF FACTS	2
POINTS RELIED ON	15
ARGUMENT	18
CONCLUSION	42
APPENDIX	45

TABLE OF CASES AND OTHER AUTHORITIES

Cases

<i>American Family Mutual Insurance Co. v. Tickle</i> , 99 S.W.3d 25 (Mo.App. 2003)	18
<i>Basye v. Fayette R-III School Dist. Bd. of Educ.</i> , 150 S.W.3d 111 (Mo.App. 2004) .	38, 40
<i>Bates v. Mueller</i> , 413 S.W.2d 853 (Mo.App. 1967)	21
<i>Building Owners & Managers Ass'n of Greater Kansas City v. City of Kansas City</i> , 231 S.W.3d 208 (Mo.App. 2007)	18
<i>Busch v. Hurricane Deck Holding Company</i> , 882 S.W.2d 723 (Mo.App. 1994)	31, 33
<i>Chapman v. Lavy</i> , 20 S.W.3d 610 (Mo.App. 2000)	19, 27, 28, 30
<i>City of Sarcoxie v. Wild</i> , 64 Mo.App. 403, 1896 WL 1935 (Mo.App. 1896). 22, 23, 25, 38	
<i>Earls v. Majestic Pointe, Ltd.</i> , 949 S.W.2d 239 (Mo.App. 1997) 18, 19, 27, 28, 31, 32, 33	
<i>Ginter v. City of Webster Groves</i> , 349 S.W.2d 895 (Mo. 1961).....	23, 24
<i>Hoechst v. Bangert</i> , 440 S.W.2d 476, 478 (Mo. 1969).....	28
<i>Hill v. Hopson</i> , 131 S.W. 357 (Mo.App. 1910).....	21
<i>Hogate v. American Golf Corporation</i> , 97 S.W.3d 44 (Mo.App. 2003)	32
<i>Kiwala v. Biermann</i> , 555 S.W.2d 663 (Mo.App. 1977)	25
<i>Miller v. Anthony</i> , 825 S.W.2d 67 (Mo.App. 1992)	21
<i>Murphy v. Carron</i> , 536 S.W.2d 30 (Mo. banc 1976).....	18
<i>Northridge Ass'n of St. Joseph, Inc. v. Welsh</i> , 924 S.W.2d 305 (Mo.App. 1996)	38
<i>Old Farm Homeowners Ass'n v. Lindgren</i> , 13 S.W.3d 30 (Mo.App. 2000).....	24, 33
<i>Robert Jackson Real Estate Company, Inc. v. James</i> , 755 S.W.2d 343 (Mo.App. 1988) 25	
<i>Skinner v. Osage County</i> , 822 S.W.2d 437 (Mo.App. 1991).....	21
<i>State ex rel. Brandon v. Dolan</i> , 46 S.W.3d 94 (Mo.App. 2001).....	40

State ex rel. State Highway Commission v. Public Water Supply District No. 2 of Jefferson County, 559 S.W.2d 538 (Mo.App. 1977) 28

Stevens v. Howard, 197 S.W.3d 182 (Mo.App. 2006)..... 37

Stonebrook Estates, LLC, and GL3, LLC v. Greene County, Missouri, 275 S.W.3d 353 (Mo.App. 2008)..... 20

Terre Du Lac Property Owners' Association, Inc. v. Wideman, 655 S.W.2d 803 (Mo.App. 1983)..... 38

Tuf Flight Industries, Inc. v. Harris, 129 S.W.3d 486, 489 (Mo.App. 2004)..... 34, 35

Weakey v. State Highway Commission, 364 S.W.2d 608 (Mo.App. 1963)..... 28

Wendy's of Mid-Missouri, Inc. v. West, 606 S.W.2d 215 (Mo.App. 1980)30, 31

Whittom v. Alexander-Richardson Partnership, et al., 851 S.W.2d 504 (Mo. banc 1993) 34, 35

Winschel v. County of St. Louis, 352 S.W.2d 652 (Mo. 1962) 20

Statutes

§ 228.190, RSMo. 19, 21, 23

§ 445.070, R.S.Mo. 19, 20, 23, 24

§ 516.010, R.S.Mo. 37, 38

§ 516.090, R.S.Mo. 38

Court Rules

S. Ct. Rule 84.04(b)..... 1

S. Ct. Rule 84.13(d)..... 18

JURISDICTIONAL STATEMENT

This appeal arises from the trial court's January 28, 2009 Judgment granting the relief requested in Respondents' Petition declaring Bridle Parc Lane located in Platte County, Missouri, to be a private road. App. A1 to A7; L.F. 415 to 421¹. Appellants filed a Motion to Amend the Judgment on February 26, 2009, which was denied on May 19, 2009. L.F. 422 to 436, 457. Appellants then filed their Notice of Appeal on May 28, 2009. L.F. 458 to 472.

Appellants challenge the trial court's declaration that Bridle Parc Lane is a private road because Bridle Parc Lane was dedicated to public use by statutory dedication or, alternatively, by common law dedication. Even if Bridle Parc Lane was not dedicated to public use, it became a public road by virtue of a prescriptive easement.

General appellate jurisdiction is vested in the Missouri Court of Appeals – Western District pursuant to Article V, Section 3 of the Missouri Constitution. S. Ct. Rule 84.04(b). No issue in this appeal by Appellants involves the exclusive jurisdiction of the Missouri Supreme Court.

¹ References in this Brief to the Legal File are cited as "L.F. ___." The Transcript is cited as "Tr. ___." Citations to the Appendix to this Brief are cited as "App. A ___."

STATEMENT OF FACTS

I. Overview.

Bridle Parc Lane ("BP Lane") is a public road that begins at Mace Road in Platte County, Missouri and runs south through two subdivisions known as Bridle Parc Estates ("BP-I") and Bridle Parc Estates II ("BP-II"), dead-ending at the southernmost property in BP-II. App. A14 to A16; L.F. 338, 340 and 365. Historically, BP Lane began as an access way to property that was later platted as BP-II. A8-A13; L.F. 342 to 349. Over the years, as BP-I and BP-II were subdivided and platted, the road was extended, dedicated to public use, and used by anyone that needed access. App. A14 to A16; Tr. 126.

On July 7, 2006, Respondent Robert Bateman ("Respondent Bateman") filed a Petition for Declaratory and Injunctive Relief ("Petition") against Platte County, Missouri ("Platte County") seeking a judicial determination that BP Lane was a private road rather than a public road. L.F. 12 to 22. Respondent Bateman claimed that by virtue of certain easements granting the right to use a strip of land traversing BP-I, that BP Lane could not be dedicated to public use. L.F. 12 to 22.

Both Platte County and Appellants asserted that BP Lane had been and was statutorily dedicated to public use through three recorded plats, the Bridle Parc Estates Plat ("BP-I Plat"), Bridle Parc Estates II Plat ("BP-II Plat"), and the Bridle Parc Estates II Replat ("BP-II Replat") (collectively, the "Plats"). L.F. 263 to 305. Alternatively, Appellants asserted that, in the event the trial court found that BP Lane was not statutorily dedicated to public use, it became a public road through a common law

dedication or through a prescriptive easement. L.F. 263 to 305. Appellants also claimed that Respondents did not assert their cause of action within the time allowed by law. L.F. 334. On January 28, 2009, the trial court issued its Judgment declaring that BP Lane was a private road not public. App. A1 to A7; L.F. 415 to 421. Following the trial court's denial of Appellants' Motion to Amend the Judgment, Appellants filed their Notice of Appeal on May 28, 2009. L.F. 458 to 472.

II. The Parties.

Respondent Bateman filed the Petition against Platte County, Missouri. L.F. 12 to 22. Respondent Bateman owns the property located at 7805 N.W. Bridle Parc Lane ("Bateman Property"). L.F. 12. The Bateman Property is located within BP-II. L.F. 318.

Platte County, Missouri, owns the county right-of-way known as Bridle Parc Lane dedicated with the Plats. App. A14 to A16; L.F. 338, 340 and 365.

Appellants are Defendants who intervened in the underlying action. L.F. 96 to 99; L.F. 107 to 108. Appellant Owens owns property in BP-II known as Lot 1, Owens Estate, located on N.W. Bridle Parc Lane. L.F. 100. Appellant James K. Owens Trust owns property of 75 acres located in BP-II at 7780 Bridle Parc Lane. L.F. 100. Appellants Brent and Rita Owens own property located in BP-II at 7755 N.W. Bridle Parc Lane. L.F. 100 to 101. Appellant Mary Frazier owns property located in BP-I at 7900 N.W. Bridle Parc Lane. L.F. 101. Appellant Jimmy and Karen Hagen own property located in BP-II at 7730 N.W. Bridle Parc Lane. L.F. 101. Appellant Jack Sloan owns property located in BP-I at 7940 N.W. Bridle Parc Lane. L.F. 101.

Respondents, Randy and Chris Stewart, Ross and Michelle Piacenza, Bill and Kathleen Gray, David and Karen Bales, Keith Sargent and Allen Reed Sargent, were Plaintiffs who intervened in the action. ("Respondents – Intervenors"). L.F. 96 to 99 and 318. They own property located along N.W. Bridle Parc Lane as follows: Respondents Stewart – 7725 N.W. Bridle Parc Lane (BP-II); Respondents Piacenza – 7585 N.W. Bridle Parc Lane (BP-II); Respondents Gray – 7835 N.W. Bridle Parc Lane (BP-I); Respondents Bales – 7685 N.W. Bridle Parc Lane (BP-I); and Respondents Sargent – 7998 N.W. Bridle Parc Lane (BP-I). L.F. 92 to 93.

III. History of BP Lane.

a. Easements

In 1984, Yiddy Bloom ("Bloom") owned the land presently subdivided as BP-II. L.F. 180. At this time, Bloom's property was a single tract. L.F. 180. Immediately north of the Bloom property was the property which is now platted as BP-I, at the time owned by at least three separate owners. App. A8 to A13; L.F. 342 to 349. On September 16, 1980, owners of these three properties, Gary and Janice Worden jointly with Donald and Grace Cruise, Ray and Gerry Hawkins, and Marie Pease, granted three parallel 30 foot wide access and utility non-exclusive easements (the "Easements") to Bloom which began at Mace Road and continued south to the northern property line of property owned by Bloom and now known as BP-II. App. A8 to A13; L.F. 342 to 349, and Tr. 154 and 157 to 158. Collectively, these three Easements formed a private access easement to allow the Bloom property to access Mace Road. App. A8 to A13; L.F. 342 to 349.

Specifically, the Easements each conveyed:

"a street and right of way easement over, along, across and under the lands hereinafter described, together with easements in remaining lands on the abutting property along and adjacent to said street and right of way where required (*sic.*) for the location, construction and maintenance of an embankment or for sloping the sides of cuts back to construct and maintain said street at the established grade[.]" App. A8 to A13; L.F. 342 to 349.

The Easements further provided that "the undersigned additionally waive damages, if any, by reason of the grading of said street." App. A8 to A13; L.F. 342 to 349. The Easements were recorded as documents 52137, 52138, and 52139 with the Platte County Recorder of Deeds. App. A8 to A13; L.F. 342 to 349.

b. Platting of BP-I

On December 28, 1981, the BP-I Plat was recorded with the Platte County, Missouri Recorder of Deeds. *See Bridle Parc Estates Plat*, App. A14; L.F. 365. The BP-I Plat included the land bounded on the north by Mace Road and bounded at the south by the Bloom property. App. A14; L.F. 365. The BP-I Plat subdivided the land into 10 lots. App. A14; L.F. 365. All of the owners of property within BP-I executed the plat consenting to the creation of the lots and dedication of the street known as Bridle Parc Lane to public use. App. A14; L.F. 365.

Dividing Lots 3 through 7 from Lots 8, 9 and 10, a 60 foot strip of land running north to south from Mace Road through the BP-I Plat was labeled "STREET." App. A14; L.F. 365. This "street" was dedicated to public use through the following language on the BP-I Plat: "The streets and roads shown on this plat, and not heretofore

dedicated to public use are hereby so dedicated." App. A14; L.F. 365. Although not precise, the street labeled in the BP-I Plat generally tracked the path of the Easements. Tr. 46 to 47. All property owners within the BP-I Plat attested the BP-I Plat. App. A14; L.F. 365. The Plat was recorded with the Platte County Recorder of Deeds on December 24, 1981. App. A14; L.F. 365. Bateman waived any challenge to the dedication of the Plats in this action at trial. Tr. 86 and 99.

On September 19, 1984 and September 25, 1984, Lillian Blumenfield² and Yiddy and Vema Bloom, respectively, conveyed a 20% interest and an 80% interest in the property now platted as BP-II to Robert Pease ("Pease"). L.F. 357 to 361 and 370 to 373. These conveyances incorporated the Easements. L.F. 360 and 373.

c. Platting of BP-II

Prior to Pease's purchase of the Bloom property, on September 11, 1984, the Platte County Planning Commission approved the Bridle Parc Estates II ("BP-II") subdivision of the Bloom property into six tracts ("BP-II Plat")³. See *Bridle Parc Estates II Plat*, App. A15; L.F. 338. These tracts form an irregularly shaped subdivision. App. A15; L.F. 338.

² It is not known when Blumenfield obtained an interest in this property.

³ The BP-II Plat divided the property into "tracts" while the BP-I Plat divided the property into "lots". There is no difference between these terms. The "tracts/lots" were created for the purposes of creating individual lots or tracts that could be conveyed.

Dividing Tracts 4 and 5 from Tracts 6 and 1, a 60 foot strip of land running north to south through the BP-II Plat was labeled "STREET." App. A15; L.F. 338. In the BP-II Plat, the street continues through Tract 2 and ends at the northern boundary of Tract 3. App. A15; L.F. 338. This street connects on the north to the street dedicated in the BP-I Plat. App. A15 and A14; L.F. 338 and 365. This "Street" was dedicated to public use through the following language on the BP-II Plat: "The streets and roads shown on this plat, and not heretofore dedicated to public use are hereby so dedicated." App. A15; L.F. 338. This Street provided public street access to Tracts 1 to 6 as the Easements did not extend into BP-II. Tr. 52 and 154.

On September 28, 1984, Pease sold the tracts which were platted in BP-II as follows:

Tract 1: Burney D. Waldon, Sr. and Bonnie Waldon (collectively "Waldon") (L.F. 375 to 378);

Tract 2: Wayne Woolsey and Nancy Woolsey (collectively "Woolsey") (L.F. 391 to 393);

Tract 3: Joel M. Loving and Kim D. Loving (collectively "Loving") (L.F. 387 to 389);

Tract 4: Virgil Kingrey and Opal Kingrey (collectively "Kingrey") (L.F. 383 to 385);

Tract 5: Gerald E. Terreau and Shirley J. Terreau (collectively "Terreau") (L.F. 379 to 381); and

Tract 6: Larry Beethe and Mary Beethe (collectively "Beethe") (L.F. 354 to 355).

Also on September 28, 1984, the Plat of BP-II ("BP-II Plat") was executed by all of the new BP-II property owners consenting to the creation of the lots and dedication of the street to public use. *See Bridle Parc II Plat*, App. A15; L.F. 338.

Each of the conveyances from Pease to the BP-II property owners followed the boundaries of the Tracts in BP-II and did not convey any fee interest to the area on the BP-II Plat titled "STREET." L.F. 354 to 355 and 375 to 393. The warranty deeds conveying these tracts identified the Easements. L.F. 354 to 355 and 375 to 393. The only access to these Tracts was through use of the area marked as the "Street" in the BP-II Plat for public use. App. A15; L.F. 338.

Tract 2 was conveyed from the Woolseys to John and Nancy Wagner on April 13, 1985. App A17-A20. On October 10, 1988, the Wagners transferred part of Tract 2, to Ross A. Piacenza and Cynthia Michelle Piacenza ("Piacenzas"). Tr. 132; App. A21-A22. The warranty deed to the Piacenzas did not make specific reference to the Easements, but rather, stated, "subject to all easements, reservations, restrictions, and covenants, if any, now of record." App. A21-A22.

Just prior to this transfer, the Piacenzas' title company told the Piacenzas that they could not purchase the property unless there was an amendment to the BP-II Plat to make sure that owners to the south could access their property. Tr. 134 to 135. As a result, BP-II was replatted. Tr. 135; A16.

On October 2, 1988, all of the owners within BP-II executed the Replat of BP-II. App. A16; L.F. 340. The BP-II Replat corrected boundary lines, vacated the street in the original BP-II Plat, and rededicated a modified street to public use. App. A16; L.F. 340. The modified street was nearly identical to the previously dedicated street, except, rather than traversing Tract 2, it turned west and south along the Tract 2 lot line, neighboring the Lakeview subdivision on the west and ended at the northwest corner of Tract 1 in BP-II. App. A16; L.F. 340. The Replat of BP-II was executed by the property owners and Platte County and recorded with Platte County on October 3, 1988. App. A16; L.F. 340.

IV. Public Use of BP Lane.

The public used BP Lane to access a Christmas tree farm dating back to at least 1987. Tr. 125 to 126 and 182 to 183. Since that time, BP Lane has been continuously open to commercial traffic, including UPS men, moving trucks, construction companies, employees of home offices, and non-Easement holders accessing their homes. Tr. 32, 135, 185, and 125. Police patrolled the road on a weekly basis. Tr. 183 and 201. Homes were built on the BP Lane. Tr. 113 and 135. Suppliers and workers would necessarily use BP Lane. Although mailboxes were at the entry to BP Lane, the mailman occasionally delivered packages to the residences. Tr. 185. People came to home offices on BP Lane. Tr. 125 and 191. There was never a question raised as to whether people were trespassing through the use of BP Lane. Tr. 126. BP Lane was not gated. Tr. 200.

At the time the Piacenzas purchased part of Tract 2 in BP-II, BP Lane was a gravel road that extended from Mace Road to the Kingrey property, Tract 4. Tr. 135. The

Piacenzas had their construction company continue the gravel road to Tract 2 to provide access their property in order to build a home. Tr. 135. Since that time, property owners in both BP-I and BP-II contributed to mowing, snow removal and upkeep of BP Lane. Tr. 31. Gail Cantu with Platte County testified that building permits for the homes along Bridle Parc Lane were issued with Bridle Parc Lane being a dedicated street right of way. Tr. 172 and 174. These permits would not have been issued if the street was not public right of way without obtaining a variance. Tr. 172 to 174.

BP Lane was used by residents of BP-I who were not Easement holders. The Easements did not grant any rights or benefits to property owners in BP-I. Tr. 150 to 151. Any lawful use of BP Lane by the BP-I residents who were not adjacent to Mace Road would exist only if BP-I owners had public access or an easement to cross over property between Mace Road and their individual tracts. Tr. 151. This applied to Lots 4, 5, 6, 7, and 9 in BP-I. App. A14. Residents of both BP-I and BP-II maintained the road and shared in costs for the road. Tr. 29 and 122. BP-I property owners enjoyed full use of BP Lane. In examining the Easements, Respondents' expert witness opined that a prescriptive easement existed. L.F. 47.

Deborah Lofgren ("Lofgren") was a resident of Lot 7 in BP-I. Tr. 32. This is one of the southernmost lots in BP-I. App. A14; L.F. 365. Lofgren allowed her moving van to use BP Lane. Tr. 32. She invited commercial traffic, including the UPS man to use BP Lane for deliveries to her house. Tr. 32. Kathleen Gray ("Gray") owned the south half of Lot 9 in BP-I. Gray freely used the road, considering it a long driveway. Tr. 126.

V. Respondents Do Not Have Access To Individual Properties If BP Lane Is Not A Public Road.

Bateman purchased a southern portion of Tract 6 in BP-II with his wife on October 15, 1999, from Larry Beethe and Mary Beethe. L.F. 351 to 352. The Beethes were property owners in the original BP-II at the time of the recording of the BP-II Plat. App. A15; L.F. 338. The general warranty deed conveying the property to Bateman conveyed part of Tract 6, "[t]ogether with easements for ingress and egress as set forth in the instruments filed October 6, 1980, and recorded as Document 52137, in Book 593, at Page 576, Document No. 52138, In Book 593, at Page 578, and as Document No. 52139, in Book 52139, at Page 580." L.F. 352. The conveyance to Bateman did not include either a fee interest or an easement in the street in BP-II. L.F. 352.

Likewise, no other Respondent who testified at trial had any access rights to the portion of BP Lane in BP-II absent the dedication to public use. Lofgren and Gray owned property in BP-I and the Easements never benefitted their properties. Tr. 30, 51 to 52, and 125. Bateman and Piacenza both purchased properties legally described as Tracts on the BP-II Plat that did not include any interest in the street area of the BP-II Plat. L.F. 351 to 352 and App. A21 to A22. Neither of these deeds conveyed any interest in the street in BP-II. Bateman's predecessor-in-interest, the Beethes, attested and consented to both the BP-II Plat and the BP-II Replat dedicating BP Lane within the BP-II Plat to public use. App. A15 to A16; L.F. 338 and 340. Piacenzas predecessors-in-interest, the Wagners, also attested and consented to the BP-II Replat. App. A16;

L.F. 340. In the event that BP Lane is not a public road, access to each property would need to be reexamined to verify access to the individual lots. Tr. 151 and 153 to 154.

VI. Trial Court Judgment.

Nearly 26 years after the first dedication of BP Lane to public use in BP-I, Respondents brought this action asserting the BP Lane was a private road. L.F. 12 to 22. This case was tried on October 29, 2008, before the Honorable Abe Shafer of the Circuit Court of Platte County, Missouri. Tr. 6. On January 28, 2009, the trial court's Judgment granted judgment in favor of Respondents. App. A1 to A7; L.F. 415 to 421. On May 19, 2009, the trial court denied Appellant/Intervenors' Motion to Amend the Judgment and this appeal followed. L.F. 457 to 472.

The trial court found in favor of Respondents on the basis of the court's findings and conclusions summarized as follows:

1. There are three ways for a street to become public: 1) statutory dedication, 2) a common law dedication, and 3) prescription;
2. Three easements recorded in the Platte County Recorder of Deeds Office as document numbers 52137, 52138, and 52139 (the "Three Easements") held by Yiddy Bloom ("Bloom") and his successors-in-interest were never relinquished;
3. Bloom did not sign the BP-I Plat and never dedicated the Three Easements to the public;
4. None of the elements required for common law dedication were present in this case because:

- a. Bloom did not sign the plat of BP-I and this indicated Bloom did not have the unequivocal intent to dedicate the Three Easements to public use;
 - b. No government has performed any maintenance or repairs on BP Lane, necessary for public acceptance; and
 - c. The road is not a through way so anyone using the road would be an invitee of the residents, thus there existed insufficient public use for dedication;
5. A prescriptive easement did not exist as there has been no adverse use of BP Lane by the public because:
- a. The general public did not use BP Lane which ends in a driveway;
 - b. Lost citizens, curious passersby, or invitees are the only members of the public who used BP Lane, and even then, it was to visit, complete business, or turn around and therefore a prescriptive easement does not exist as there had been no adverse use of BP Lane by the public; and
 - c. The uses cited by Appellant/Intervenors are not public; and
6. Platte County, Missouri had not spent public money to construct, maintain, or repair BP Lane and therefore BP Lane is not a public road by virtue of Section 228.190, RSMo.

App. A1 to A7; L.F. 415 to 421. The trial court declared BP Lane to be a private road.
App. A7; L.F. 421. On May 19, 2009, the trial court denied Appellants' Motion to
Amend the Judgment and this appeal followed. L.F. 457 to 472.

POINTS RELIED ON

I. THE TRIAL COURT ERRED IN DECLARING THAT BRIDLE PARC LANE WAS A PRIVATE ROAD BECAUSE BRIDLE PARC LANE WAS STATUTORILY DEDICATED TO PUBLIC USE IN THAT THE PLATS DEDICATING BRIDLE PARC LANE TO PUBLIC USE WERE APPROVED BY AND RECORDED WITH THE COUNTY AND SIGNED BY ALL OWNERS OF PROPERTY WITHIN THE PLATS, BRIDLE PARC LANE WAS USED BY THE PUBLIC, PUBLIC EXPENDITURE OF FUNDS IS NOT REQUIRED FOR A STATUTORY DEDICATION, AND ANY EASEMENTS OVERLAPPING BRIDLE PARC LANE WERE NOT EXCLUSIVE.

Chapman v. Lavy, 20 S.W.3d 610 (Mo.App. 2000).

Ginter v. City of Webster Groves, 349 S.W.2d 895 (Mo. 1961).

Old Farm Homeowners Ass'n v. Lindgren, 13 S.W.3d 30 (Mo.App 2000).

Winschel v. County of St. Louis, 352 S.W.2d 652 (Mo. 1962).

STATUTES

§ 445.070, R.S.Mo.

§ 228.190, R.S.Mo.

COURT RULES

S. Ct. Rule 84.13(d).

II. ALTERNATIVELY, THE TRIAL COURT ERRED IN DECLARING THAT BRIDLE PARC LANE WAS A PRIVATE ROAD BECAUSE BRIDLE PARC LANE WAS DEDICATED TO PUBLIC USE BY COMMON LAW DEDICATION IN

THAT THE RESPONDENTS' PREDECESSORS-IN-INTEREST INTENDED TO DEDICATE BRIDLE PARC LANE TO PUBLIC USE, THE PUBLIC USED THE ROAD FOR MORE THAN TEN YEARS, AND THE PUBLIC ACCEPTED THE ROAD FOR PUBLIC USE.

Busch v. Hurricane Deck Holding Company, 882 S.W.2d 723 (Mo.App. 1994).

Chapman v. Lavy, 20 S.W.3d 610 (Mo.App. 2000).

Earls v. Majestic Pointe, Ltd., 949 S.W.2d 239 (Mo.App. 1997).

Wendy's of Mid-Missouri, Inc. v. West, 606 S.W.2d 215 (Mo.App. 1980).

III. ALTERNATIVELY, THE TRIAL COURT ERRED IN DECLARING THAT BRIDLE PARC LANE WAS A PRIVATE ROAD BECAUSE EVEN IF BRIDLE PARC LANE WAS NOT DEDICATED TO PUBLIC USE BY STATUTORY OR COMMON LAW DEDICATION, A PRESCRIPTIVE EASEMENT WAS CREATED IN THAT THE PUBLIC CONTINUOUSLY, VISIBLY, AND ADVERSELY USED THE ROAD FOR A PERIOD GREATER THAN TEN YEARS IN NON-RECOGNITION OF THE EASEMENT HOLDERS' AUTHORITY TO PERMIT OR PROHIBIT THE CONTINUED USE OF THE ROAD AND THE EASEMENT HOLDERS TOOK NO ACTION TO PREVENT THE PUBLIC FROM USING THE ROAD.

Tuf Flight Industries, Inc. v. Harris, 129 S.W.3d 486, 489 (Mo.App. 2004).

Whittom v. Alexander-Richardson Partnership, et al., 851 S.W.2d 504 (Mo. banc 1993).

IV. FURTHERMORE, THE TRIAL COURT ERRED IN FAILING TO DISMISS RESPONDENTS' CLAIM AS OUTSIDE OF THE STATUTE OF LIMITATIONS

SET FORTH IN § 516.010, R.S.Mo., BECAUSE THE CLAIM WAS BROUGHT OUTSIDE TEN YEAR PERIOD IN THAT IT WAS FILED 25 YEARS AFTER THE RECORDING OF THE PLAT OF BRIDLE PARC ESTATES DEDICATING BRIDLE PARC LANE TO PUBLIC USE.

Basye v. Fayette R-III School Dist. Bd. of Educ., 150 S.W.3d 111 (Mo.App. 2004).

Brandon v. Dolan, 46 S.W.3d 94 (Mo.App. 2001).

Northridge Ass'n of St. Joseph, Inc. v. Welsh, 924 S.W.2d 305 (Mo.App. 1996).

Terre Du Lac Property Owners' Association, Inc. v. Wideman, 655 S.W.2d 803 (Mo.App. 1983).

STATUTES

§ 516.010, R.S.Mo.

§ 516.090, R.S.Mo.

ARGUMENT

I. THE TRIAL COURT ERRED IN DECLARING THAT BRIDLE PARC LANE WAS A PRIVATE ROAD BECAUSE BRIDLE PARC LANE WAS STATUTORILY DEDICATED TO PUBLIC USE IN THAT THE PLATS DEDICATING BRIDLE PARC LANE TO PUBLIC USE WERE APPROVED BY AND RECORDED WITH THE COUNTY AND SIGNED BY ALL OWNERS OF PROPERTY WITHIN THE PLATS, BRIDLE PARC LANE WAS USED BY THE PUBLIC, PUBLIC EXPENDITURE OF FUNDS IS NOT REQUIRED FOR A STATUTORY DEDICATION, AND ANY EASEMENTS OVERLAPPING BRIDLE PARC LANE WERE NOT EXCLUSIVE.

A. Standard of Review

The standard of review for a judge-tryed case is governed by Missouri Court Rule 84.13(d) and *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). The judgment of the trial court will be affirmed unless it is not supported by substantial evidence, is against the weight of the evidence, or erroneously declares or applies the law. *Id.* at 32. This Court will defer to the circuit court's factual determinations, but all questions of law are reviewed *de novo*. *Building Owners & Managers Ass'n of Greater Kansas City v. City of Kansas City*, 231 S.W.3d 208, 211 (Mo.App. 2007); *American Family Mutual Insurance Co. v. Tickle*, 99 S.W.3d 25, 28 (Mo.App. 2003). A trial court's conclusion that evidence is insufficient to demonstrate public use or intent to dedicate a road to public use is a question of law reserved for the independent judgment of the reviewing court. *See Earls v. Majestic*

Pointe, Ltd., 949 S.W.2d 239, 246 (Mo.App. S.D. 1997). The issue as to whether BP Lane became a public road through statutory dedication is a question of law for this Court.

B. The Trial Court Misapplied The Law Because Expenditure of Funds Is Not The Sole Method To Establish A Public Road Under § 228.190, R.S.Mo.

Public roads may be established in three ways: (1) by statute, (2) by prescription, and (3) by implied or common law dedication. *Chapman v. Lavy*, 20 S.W.3d 610, 613 (Mo.App. 2000). BP Lane was validly established as a public road through a statutory dedication. There are several ways in which to complete a statutory dedication of public right of way for public use. Two of these methods include: (1) §445.070, R.S.Mo. (platting of subdivisions/additions; and (2) § 228.190 (by order of the county commission and use for more than ten years). Bridle Parc Lane was statutorily dedicated in compliance with both of these statutes and is therefore a public right of way dedicated for public use as a road. The trial court erred in its January 28, 2009, Judgment as a matter of law when it concluded otherwise.

Specifically, § 445.070 provides:

"2. *Such ...plats of such cities, town, villages and additions made, acknowledged, certified and recorded, shall be a sufficient conveyance to vest the fee of such parcels of land as are therein named, described or intended for public use in such city, town, or village, when incorporated, in trust and for the uses therein named, expressed or intended, and for no other use or purpose.*

3. *If such city, town or village shall not be incorporated, then the fee of such lands conveyed as aforesaid shall be vested in the proper county in like trust and for the uses and purposes aforesaid, and none other."*

[Emphasis added]. App. A23.

The Plats were approved by and recorded with the County. App. A14 to A16; L.F. 338, 340 and 365. All owners of property within the Plats approved the Plats and acknowledged the dedication of BP Lane to public use. App. A14 to A16; L.F. 338, 340 and 365. The Plats identified BP Lane as "Street" and specifically dedicated the street to public use by stating: "The streets and roads shown on this Plat, and not heretofore dedicated to public use are hereby so dedicated." App. A14 to A16; L.F. 338, 340 and 365. Respondents waived any challenge to the dedication of the Plats in this action. Tr. 86 and 99.

The well established law is that courts are to give plain meaning and intent exhibited in plats by the language used on the plats. *Stonebrook Estates, LLC, and GL3, LLC v. Greene County, Missouri*, 275 S.W.3d 353, 355 (Mo.App. 2008). The plain language of the dedications in the Plats listed BP Lane as a road dedicated to public use contrary to the trial court's Judgment. App. A14 to A16; L.F. 338, 340 and 365.

Under § 445.070, Bridle Parc Lane was dedicated to the County as street right of way at the time the Plats were recorded. *See Winschel v. County of St. Louis*, 352 S.W.2d 652, 653 (Mo. 1962) (holding that under § 445.070.3 subdivision plats outside of city limits vest title in the streets to the county). Duly acknowledged, certified and recorded plats describing land intended for public use are statutorily dedicated to the county where

plats are not located in an incorporated town. *Bates v. Mueller*, 413 S.W.2d 853, 855 (Mo.App. 1967); *Hill v. Hopson*, 131 S.W. 357, 359 (Mo.App. 1910).

Section 228.190 sets forth a second method in which a road is deemed to be established as a public road. It sets forth two ways to establish a public road: (1) by any order of the county commission and having been used as a public highway for a period of more than ten years or (2) where public money or labor has been expended for a period of more than ten years. § 228.190.1, R.S.Mo.; App. A24; see *Skinner v. Osage County*, 822 S.W.2d 437, 441 (Mo.App. 1991); see also, *Miller v. Anthony*, 825 S.W.2d 67, 69 (Mo.App. 1992).

In its Judgment, the trial court concluded that BP Lane was not properly dedicated by statute under § 228.190 for two reasons: (1) finding that all County records admitted into evidence list BP Lane as a private road and (2) finding that Platte County, Missouri had not spent public money to construct, maintain, or repair BP Lane. App. A6 and L.F. 420. The Judgment misapplied the law.

The public used BP Lane for greater than ten years. See *Statement of Facts*, p. 9-10. BP Lane was statutorily dedicated to public use under the first prong of § 228.190. There is no requirement that public funds be expended in order for BP Lane to be statutorily dedicated to public use. A proper statutory dedication occurred. The trial court misapplied the law when it concluded that the road was private because the County had not expended any funds on the maintenance of the road.

C. Landowners Had Statutory Authority to Dedicate BP Lane to Public Use.

The trial court relied on *City of Sarcoxie v. Wild*, 64 Mo.App. 403, 1896 WL 1935 (Mo.App. 1896) as the legal basis to reject the dedication of BP Lane to public use, asserting that an easement must be relinquished as a prerequisite for the dedication of a private road. L.F. 415 to 421. In *Sarcoxie*, Herman Wild reserved a 30 foot strip of land for road purposes surrounding a tract he deeded to his daughter, Emma Carnahan. 64 Mo.App. at 403 to 404. Carnahan platted the land into separate lots and dedicated a portion of the road to public use. *Id.* at 405. Wild was criminally charged and convicted of obstructing a city street with a rail fence. *Id.* The court of appeals held a private road may be transformed into a public one only where the owner fully consented to the change or there is some element of estoppel to deprive him of his rights. *Id.* at 407. Not only was Section 228.190 first enacted in 1939, 45 years after *Sarcoxie* was decided, but the facts of this case differ from *Sarcoxie* and *Sarcoxie* does not control.

A core difference between Mr. Wild in *Sarcoxie* and Respondents is that Wild never consented to or exhibited an intention to dedicate his road. In fact, it was the opposite for Wild, and this feature of the case appears notable to the *Sarcoxie* court, which referenced the absence of consent. *Id.* at 406. Here, Respondents' predecessors-in-interest all signed the Plats dedicating BP Lane to public use thereby consenting to the public dedication of BP Lane. App. A15 to A16; L.F. 338 and 340. Respondents here have never questioned whether BP Lane users were trespassing. Tr. 126.

Further, in *Sarcoxie*, even though the opinion does not specifically state that Wild reserved an exclusive easement, the facts of the case demonstrate that Wild's easement was exclusive. Wild reserved an easement "for himself," 64 Mo.App. at 404, whereas in this case, several persons granted an interest in an easement and the Easements were not reserved by the property owner. App. A8 to A13; L.F. 342 to 349. In *Sarcoxie*, Wild retained rights in the road that are inconsistent with a non-exclusive roadway easement. Wild excluded others from accessing his easement by the erection of a fence. *Id.* at 405. Wild did not give permission to others to use his easement. *Id.* at 406. There is no evidence in the present case of fencing or any limiting use. The Easements granted the easement holder a damage waiver for street grading, but did not grant the easement holder the exclusive right to construct a street. App. A8 to A13; L.F. 342 to 349. The easement holders may still enjoy all rights of access and passage that were granted in the original easements. BP Lane has continuously been open with access to the public at all times.

The trial court relied on *Sarcoxie* for the assertion that the Easement holders did not consent to the dedication of BP Lane to public use and therefore, the dedication was not effective against the Easement holders. App. A4 to A6; L.F. 418 to 420. This conclusion overlooks the uncontroverted evidence that the Easements did not extend into BP-II. Tr. 154. *Sarcoxie* has no application to BP Lane within BP-II.

The statutory dedication of BP Lane to public use is a valid dedication pursuant to § 445.070 and § 228.190 (§ 228.190 was enacted after the holding in *Sarcoxie*). In *Ginter v. City of Webster Groves*, 349 S.W.2d 895, 897 (Mo. 1961), a recorded plat

dedicated roads to public use in conflict with a private Indenture of Restrictions reserving parks and streets for the exclusive use of the owners of lots in the subdivision. In holding that the streets were public, the Missouri Supreme Court stated: "While common law dedication of land to public use has not been abolished, our statutes provide a comprehensive plan for the platting and approval of real estate subdivisions, and the dedication of land for streets and for other public uses." *Id.* at 899. This procedure is set forth in § 445.070. App. A23.

Similarly, in *Old Farm Homeowners Ass'n v. Lindgren*, 13 S.W.3d 711, 719 (Mo.App. 2000), the Court held that a plat dedication of a road to public use was valid despite a previously recorded private Declaration of Restriction that authorized such a dedication only after a 2/3 vote of the homes association voting class. *Old Farm Homeowners Ass'n* is factually similar to this case. First, a plat dedicating a road to public use was recorded after subdivision restrictions were recorded. *Id.* at 713. A second plat extending the road in question was recorded, also dedicating the road to public use. *Id.* The original surface of the road was gravel. *Id.* at 714. The road was a dead end, ending in a cul-de-sac. *Id.* It was important to some property owners that the road be public, while it was important to others that the road be private. *Id.* at 715. The road was not publicly maintained. *Id.* at 719. The private Declaration of Restrictions, like the private Easements here, did not state that the road was for the exclusive use and benefit of the lot owners in the subdivision. *Id.* at 719. *Ginter* and *Old Farm Homeowners Ass'n* dictate that BP Lane is a public road.

D. The Easements Are Not Inconsistent With The Dedication Of BP Lane To Public Use.

Not only do the facts of this case differ from *Sarcoxie*, but Missouri law governing concurrent easements has evolved since 1896 when *Sarcoxie* was decided such that subsequent concurrent easements are permissible provided they are not inconsistent or reasonably burdensome. *Kiwala v. Biermann*, 555 S.W.2d 663, 667 (Mo.App. 1977).

In general, an owner of property burdened with an easement may use his property in any way that is consistent with the easement. *Kiwala*, 555 S.W.2d at 666. The existence of an easement does not hinder concurrent easements over the same service tenement as long as the subsequent easement is not inconsistent with the first easement. *Id.* If the original easement is not exclusive and the subsequent easement is not inconsistent or overly burdensome, the subsequent easement is valid. *Id.* at 667. The increase of use of an easement, including the number of vehicles using the road covered by the easement, is not a burden of the use of the easement because it does not involve a change of character of the easement. *Robert Jackson Real Estate Company, Inc. v. James*, 755 S.W.2d 343, 346 (Mo.App. 1988).

The dedication of the street in the BP-I Plat is not inconsistent with the easements granted to the original owner of BP-II. The Easements are not exclusive and are for the purpose of access and utilities. The Easements hold easement holders harmless from damage caused by construction of a street for access, but do not grant the easement holders the exclusive right to construct a street. App. A8 to A13; L.F. 342 to 349. The dedication for public use as a street is not inconsistent with the Easements and does not

burden the use of the Easements. The Easement holders may still enjoy all rights of access and passage that were granted in the Easements. The land owners in BP-I were entitled to make the dedication set forth in the BP-I Plat.

II. ALTERNATIVELY, THE TRIAL COURT ERRED IN DECLARING THAT BRIDLE PARC LANE WAS A PRIVATE ROAD BECAUSE BRIDLE PARC LANE WAS DEDICATED TO PUBLIC USE BY COMMON LAW DEDICATION IN THAT THE RESPONDENTS' PREDECESSORS-IN-INTEREST INTENDED TO DEDICATE BRIDLE PARC LANE TO PUBLIC USE, THE PUBLIC USED THE ROAD FOR MORE THAN TEN YEARS, AND THE PUBLIC ACCEPTED THE ROAD FOR PUBLIC USE.

A. A Common Law Dedication Occurred Because All Property Owners on BP Lane Intended to Dedicate BP Lane to the Public and BP Lane Was Accepted and Used By The Public.

As stated previously, a trial court's conclusion that evidence is insufficient to demonstrate public use or intent to dedicate a road to public use is a question of law reserved for the independent judgment of the reviewing court. *See Earls v. Majestic Pointe, Ltd.*, 949 S.W.2d at 246.

Absent formal statutory dedication, common law dedication occurs where: 1) there is evidence the owner clearly showed his intent to dedicate the land for public use; 2) land is accepted by the public; and 3) land was used by the public. *Chapman v. Lavy*, 20 S.W.3d at 613. The dedication is not required to be accepted by the governmental authority, so long as it is accepted by the public, which is shown through public use of the dedication. *Earls*, 949 S.W.2d at 246. The trial court's finding that none of the factors for a common law dedication were present was against the weight of the evidence. App. A6; L.F. 420. The trial court's finding that performance of government

maintenance is necessary for public acceptance misstated the law. App. A6; L.F. 420. *See Chapman*, 20 S.W.3d at 613. ("Dedication is not required to be accepted by a governmental authority, so long as the land is in fact accepted by the public as demonstrated by the use made of it."); *Earls*, 949 S.W.2d at 246; and *State ex rel. State Highway Commission v. Public Water Supply District No. 2 of Jefferson County*, 559 S.W.2d 538, 541 (Mo.App. 1977).

Alternatively, if this Court determines that BP Lane was not dedicated statutorily by the acceptance and recording of the Plats with the County, BP Lane became a public road by common law dedication. Intent to create a public use was expressly made by all property owners on the Plats. The public accepted the dedication through continuous use. *See Statement of Facts*, p. 9-10.

B. All Property Owners Clearly Intended to Dedicate BP Lane To Public Use.

Intention of the proprietors of land to dedicate strips to public use may be made by execution and acknowledgment of a plat containing a formal, written dedication "to public use forever." *Weakey v. State Highway Commission*, 364 S.W.2d 608, 612 (Mo.App. 1963). A court need not look past a plat to determine the intent of parties to dedicate land to public use. *See Hoechst v. Bangert*, 440 S.W.2d 476, 478 (Mo. 1969).

i. All Property Owners in BP-I Consented to Dedication of BP Lane to Public Use.

The BP-I Plat was approved and executed by all property owners within BP-I. App. A14; L.F. 365. The BP-I Plat demonstrates the unequivocal intent of these

owners to dedicate the portion of BP Lane in BP-I to public use, evidenced by the BP-I Plat which states, "The streets and roads shown on this Plat, and not heretofore dedicated to public use are hereby so dedicated." App. A14; L.F. 365.

ii. All Property Owners in BP-II Consented to Dedication of BP Lane within BP-II to Public Use.

The BP-II Plat was approved and executed by all property owners within BP II. App. A15 and A16; L.F. 338 and 340. The BP-II Plat demonstrates the unequivocal intent of these owners to dedicate the portion of BP Lane in BP-II to public use, evidenced by the BP-II Plat which stated: "The streets and roads shown on this Plat, and not heretofore dedicated to public use are hereby so dedicated." *Id.* These owners dedicated the portion of BP Lane within the BP-II Plat identified as "Street" to public use. *Id.* None of the Easements ran through BP-II. Tr. 154.

The trial court improperly focused on the intent of Bloom to dedicate BP Lane to public use. App. A3; L.F. 417. Bloom was the original Easement holder. App. A8 to A13; L.F. 342 to 349. However, Bloom no longer owned property in BP-II or an interest in the Easements at the time of the dedication of the BP-II Plat and BP-II Replat. App. A15 and A16; L.F. 338 and 340. The trial court did not consider the intent of the Easement holders at the time of the recording of the BP-II Plat where all Easement holders dedicated BP Lane within the BP-II Plat to public use. The trial court's focus on the intent of Bloom misapplied the law.

iii. Easement Holders Intended to Dedicate BP Lane in Its Entirety to Public Use.

Owners of the properties within BP-II at the time of the dedication of the street and platting of BP-II were the holders of the Easements. Owners within BP-II had access to BP-II by virtue of Easements. Had the BP-II property owners intended for BP Lane to remain private, they would not have dedicated the extension of BP Lane through the Plats of BP-II to public use. It is inconsistent for these owners to dedicate the portion of BP Lane within BP-II to public use if they did not intend for the public to have access to very street they dedicated to the public. Respondents' predecessors-in-interest consented to and intended for BP Lane to be a public road.

D. The Public Accepted and Used BP Lane.

In *Wendy's of Mid-Missouri, Inc. v. West*, 606 S.W.2d 215, 216 (Mo.App. 1980), Wendy's sought to have an access road declared public because of a common law dedication and further sought an injunction to prevent defendant, an adjacent property owner, from closing the road. The evidence showed that the road had been travelled continuously by members of the public, there were no "private road" signs or barricades and the city maintained the road. *Id.* In finding that a common law dedication had occurred, the Court held that acceptance by the public is shown by the use made of the street, rather than acceptance by the public body. *Id.*; see also, *Chapman*, 20 S.W.3d at 613 (public acceptance and common law dedication occurred where roadway was used by numerous area residents).

In *Busch v. Hurricane Deck Holding Company*, 882 S.W.2d 723 (Mo.App. 1994), the Court held that a common law dedication had occurred. In so holding, the Court considered that the public had previously used the road to reach a nearby resort, the road was never barricaded, previous owners used the road to reach their properties, mail carriers used the road to deliver mail, building suppliers used the road for deliveries, and at one point, a school bus occasionally used the road. *Busch*, 882 S.W.2d at 726.

As in *Wendy's* and *Busch*, the dedication of BP Lane for public use was accepted by both the public and Platte County. A moving van used BP Lane. Tr. 32. The public used the road to get to a Christmas tree farm in BP-II. Tr. 125 to 126 and 182 to 183. A construction company graveled part of BP Lane. Tr. 135. Non-easement holders used BP Lane to access their property. Tr. 125. United Parcel Service and FedEx used BP Lane. Tr. 32 and 183. People came to home offices on BP Lane. Tr. 185 and 191.

Platte County acknowledged acceptance of the dedication when the Plats were recorded with the Recorder of Deeds. App. A14 to A16; L.F. 338, 340 and 365. Platte County further issued building permits to property owners which it would not have done if BP Lane was not public right-of-way. Tr. 172 and 174. The fire department and Platte County police patrolled BP Lane. Tr. 183 and 201.

It was never questioned whether BP Lane users were trespassing. Tr. 126. There were no signs indicating that BP Lane was a private road. No barricades were ever put in place to prevent the public from using the road. Tr. 200. *See Earls*, 949 S.W.2d at 247 (owner's conduct in not barricading road showed intent to dedicate road to public use).

E. Designation of the Public as "Invitees" Forces an Inappropriate Legal Conclusion and Characterization Not Warranted by the Testimony.

The trial court concluded that the public had not used BP Lane because anyone using BP Lane would be an "invitee" of the residents. L.F. 417. The use of the term "invitee" in the Judgment misstated the law and is not relevant to a determination of public use. L.F. 417. The term "invitee" is a term used to describe the status of a person on land of another to determine the duty of care owed by the owner of land. *Hogate v. American Golf Corporation*, 97 S.W.3d 44, 47 (Mo.App. 2003). A person's status can be a trespasser, a licensee, or an invitee. *Id.* Persons also become invitees when the possessor "extends an invitation to enter the land to the public generally." *Id.*

Whether someone who uses BP Lane is an invitee is not relevant to question of whether a common law dedication of BP Lane occurred. At issue is whether the public used the road. Invitees are the public. The easement holders expected a material benefit from allowing the public to use BP Lane such as building houses, getting packages delivered, conducting business, and obtaining building permits. Tr. 32, 125-126, 135, 182-183, 185, and 91. Easement holders allowed public use of BP Lane to obtain that benefit. In any case, even the trial court acknowledged public use in its Judgment when it stated: "Lost citizens, curious passersby or invitees are the only *members of public* who use BP Lane." (Emphasis added). App. A3; L.F. 417.

The trial court further determined that, since the road is not a through way, anyone using the road would be an invitee of the residents. App. A3; L.F. 417. There is no requirement that a road must be a through way to be dedicated to public use. *See Earls*,

949 S.W.2d at 244 (Mo.App. 1997) (road terminating at lot was public road by common law dedication); *Old Farm Homeowners*, 13 S.W.3d at 714 (road ending in cul-de-sac was public road). Rather, the character of the use is examined. In *Busch*, suppliers of building materials permissibly using the road in question provided evidence of public use. *Busch*, 882 S.W.2d at 727. As in *Busch*, Respondents received a benefit from the public using the road. They had houses built, obtained building and occupancy permits, received deliveries, and operated businesses by allowing public use of BP Lane. Tr. 113, 132, 172, 174, 32, 183, 185, 185, and 191. Permissive use does not negate a finding of public use. Rather, it supports the intent of the easement holders to allow public use of BP Lane.

III. ALTERNATIVELY, THE TRIAL COURT ERRED IN DECLARING THAT BRIDLE PARC LANE WAS A PRIVATE ROAD BECAUSE EVEN IF BRIDLE PARC LANE WAS NOT DEDICATED TO PUBLIC USE BY STATUTORY OR COMMON LAW DEDICATION, A PRESCRIPTIVE EASEMENT WAS CREATED IN THAT THE PUBLIC CONTINUOUSLY, VISIBLY, AND ADVERSELY USED THE ROAD FOR A PERIOD GREATER THAN TEN YEARS IN NON-RECOGNITION OF THE EASEMENT HOLDERS' AUTHORITY TO PERMIT OR PROHIBIT THE CONTINUED USE OF THE ROAD AND THE EASEMENT HOLDERS TOOK NO ACTION TO PREVENT THE PUBLIC FROM USING THE ROAD.

In the alternative, if this Court determines that BP Lane was not a public road dedicated through a statutory or common law dedication, a prescriptive easement was established because the public used BP Lane continuously, visibly and for an uninterrupted period greater than ten years. A prescriptive easement is established by use that is: 1) continuous, 2) uninterrupted, 3) visible, 4) and adverse for a period of ten years. *Whittom v. Alexander-Richardson Partnership, et al.*, 851 S.W.2d 504, 508 (Mo. 1993).

Continuous use does not refer to constant use, but rather to the attitude of mind to continue to use the easement. *Tuf Flight Industries, Inc. v. Harris*, 129 S.W.3d 486, 489 (Mo.App. 2004). To determine whether use is uninterrupted, courts look at the actions of the owner of the servient estate. *Id. at 489* (Mo.App. 2004). Failure of an owner to restrict use supports a finding of uninterrupted use. *Id.* Visible use is notorious and open

use. *Id.* at 490. Use is visible where any reasonable person would have discovered its existence. *Id.* To be adverse, it is only required that the use is in non-recognition of the owner's authority to permit or prohibit the continued use of the land. *Whittom*, 851 S.W.2d at 508. It is not required that the user intend to violate the owner's rights. *Id.* Nor is it required that the adverse use be exclusive or hostile. *Id.* at 508-509. Proof that a use of another's land has in fact occurred justifies a finding that use has been adverse. *Id.* at 509. Inaction of a landowner in excluding the public from the use of the road can serve as proof of either common law dedication or prescriptive easement. *Id.*

The trial court rejected that a prescriptive easement was established by concluding that the general public had not used BP Lane. App. A3 to A4; L.F. 417 to 418. The trial court's finding was in direct conflict with the evidence. The public used the road continuously from at least 1987 until the time of trial. *See Statement of Facts*, p. 9-10. One of the Respondents, Kathleen Gray, testified that the public used BP Lane to get to a Christmas tree farm in BP-II dating back to 1987. Tr. 125 to 126. There was no evidence that Respondents granted permission for the public to use the road in the ten years after the public began using the road. At best, the use was not questioned. Tr. 126.

The testimony revealed extensive continuous, uninterrupted, visible and adverse use of BP Lane by members of the public including business patrons, delivery vehicles, non-residents, home builders, suppliers, and police. Tr. 185, 32, Tr. 32, 183, 125-126, 182, 183, 183, and 201. Furthermore, Plaintiff's own expert witness gave the opinion that a prescriptive easement existed. Tr. 47.

No evidence was presented that any easement holder took any action within the ten year period to prohibit public use of the road. In the event that the easement holders did not intend for the easement property to be a public road, the inaction for a period exceeding ten years resulted in the establishment of a prescriptive easement.

IV. THE TRIAL COURT ERRED IN FAILING TO DISMISS RESPONDENTS' CLAIM AS OUTSIDE OF THE STATUTE OF LIMITATIONS SET FORTH IN § 516.010, R.S.MO., BECAUSE THE CLAIM WAS BROUGHT OUTSIDE THE TEN YEAR PERIOD IN THAT IT WAS FILED 25 YEARS AFTER THE RECORDING OF THE PLAT OF BRIDLE PARC ESTATES DEDICATING BRIDLE PARC LANE TO PUBLIC USE.

The trial court erroneously applied the law because the Court did not apply the statute of limitations set forth in § 516.010, R.S.Mo.; App. A25 to A27. Whether a statute of limitations applies to an action is a question of law and is reviewed *de novo*. *Stevens v. Howard*, 197 S.W.3d 182, 185 (Mo.App. 2006).

Civil actions must be commenced within the time prescribed under Missouri statute. Appellants/Intervenors plead and briefed the issue of statute of limitations as an affirmative defense. L.F. 104, 334, and 441-442. § 516.010 provides that no action for recovery of any lands or hereditaments shall be commenced unless the plaintiff or his predecessor was seized of the premises within ten years before the commencement of the

action.⁴ App. A25 to A27. Easements that run with the land are hereditaments subject to a ten year statute limitations. *Terre Du Lac Property Owners' Association, Inc. v. Wideman*, 655 S.W.2d 803, 805 fn. 1 (Mo.App. 1983) (§ 516.010 is correct statute of limitations for enforcing restrictive covenants, which are easements). *See also Northridge Ass'n of St. Joseph, Inc. v. Welsh*, 924 S.W.2d 305, 307 (Mo.App. 1996) (easement holders have ten years to bring a cause of action under § 516.010). Respondents' claim to recover an interest in Easements for the private use of BP Lane is governed by the ten year limitations period.

The trial court's Judgment relied heavily on *Sarcoxie* for the proposition that Respondents' Easements must have been relinquished by the easement holders as a prerequisite for dedication to public use. App. A2 to A5; L.F. 416 to 419. Yet, the trial court made no mention of the statute of limitations in its Judgment. *See* App. A1 to A7; L.F. 415 to 421. Respondents' claims should have been brought by Respondents' or their predecessor grantors when their private use of BP Lane was first seized. *See* § 516.010

⁴ § 516.090, R.S.Mo., provides that any statute of limitations shall not extend to any lands granted to any public use. This statute does not apply in this case because this statute operates to preclude persons from claiming public land on the basis of adverse possession, rather than to remove limitations of actions against public land. App. A28. *See Basye v. Fayette R-III School Dist. Bd. of Educ.*, 150 S.W.3d 111, 116 (Mo.App. 2004).

(claim shall be commenced by "plaintiff, his ancestor, predecessor, grantor, or other person under who he claims was seized"). App. A25 to A27.

The first act in violation of Respondents' private use of BP Lane, assuming that public use is not consistent with Respondents' Easements, was the dedication of land including the Easements to public use in the BP-I Plat and the recording of that plat with the Platte County Recorder on December 24, 1981. App. A14; L.F. 365. The trial court found that BP-I was platted in 1981 and Yiddy Bloom, the owner of the Easements at that time, did not sign the BP-I Plat. App. A2; L.F. 416. At that time, Yiddy Bloom could have asserted a claim that the dedication violated his rights to use the Easements.

Pease purchased the Bloom property in 1984. L.F. 357 to 361. Pease was a property owner in BP-I and signed the BP-I Plat dedicating BP Lane to public use. App. A14; L.F. 365. On September 28, 1984, Pease subdivided the land and conveyed the Easements with each tract sold in BP-II. App. A15; L.F. 338. At this time, BP-II was platted with an extension of BP Lane dedicated to public use. App. A15; L.F. 338. This extension further interfered with private use of the Easements because the public would have to cross the Easements to reach BP Lane in BP-II.

Respondents' evidence at trial revealed that the public used the road at least as far back as 1987 to access a Christmas tree farm in BP-II. Tr. 125 to 126. The evidence overwhelmingly showed continuous public use since that time. *See Statement of Facts, p. 9-10.* Respondents or their predecessors should have brought their claim no later than December 24, 1991. Even assuming that Respondents' claim did not accrue until the public actually began using BP Lane, Respondents' claim should have been brought no

later than 1997, ten years after the public began using BP Lane to go to a Christmas tree farm to purchase trees. Tr. 125 to 126.

Respondent Bateman filed his Petition on October 16, 2006. Nearly twenty-five years had passed between the 1981 dedication and the filing of this lawsuit. The ten year statute of limitations had run and, therefore, the Petition failed to state a claim upon which relief could be granted. *See Basye v. Fayette R-III School Dist. Bd. of Educ.*, 150 S.W.3d 111 (Mo.App. 2004).

The trial court's failure to apply the statute of limitations produced an unjust result because it destroyed access to the properties on BP-I and BP-II. Public policy supports statutes of limitations as they tend to promote the peace and welfare of society and are favored by law. *State ex rel. Brandon v. Dolan*, 46 S.W.3d 94, 97 (Mo.App. 2001). Failure to apply the statute of limitations shreds the access rights of both BP-I and BP-II residents, who only had access to traverse the BP Lane through the public dedication.

The Judgment produced an unjust and illogical result because, in declaring BP Lane to be "private," it terminated the right of landowners in BP-I to access their properties, and it ran over the BP-II recorded plat dedication, for which there were no easements. The Easements designated a strip of land for ingress and egress beginning at Mace Road, traversing through BP-I, and terminating at the north end of BP-II. Seven lots are adjacent to the Easements. The trial court's conclusion that there was no intent for BP Lane to be dedicated to public use resulted in five of the lots located within BP-I being landlocked. The same result occurred with the southern lots in BP-II.

The Judgment also terminated the BP-II landowners' access to their properties. The Easements granted to Bloom only gave access rights to Bloom, at the time, who was the owner of the BP-II tract. The Easements prevented Bloom, in BP-II, from being landlocked. The Easements were in favor of Bloom and his successors. When Bloom's property was subdivided by Pease, BP-II owners only gained access along BP Lane in BP-II through the public dedication in the BP-II Plat. Pease, the immediate successor-in-interest to Bloom, did not convey the land identified as Street on the BP-II Plat to any of the purchasers. L.F. 354 to 355 and 373 to 393. In the event that BP Lane is declared a private road and the public dedication fails, BP-II residents' access no longer exists past the northern boundary of BP-II.

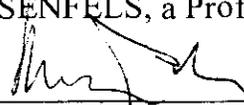
The uncontroverted expert testimony at trial demonstrated the detrimental effect of the southern tracts in BP-I and BP-II in the event that BP Lane is a private road. Mindy Turner, legal counsel for Stewart Title, explained the chaos and clouded title that would result if BP Lane is not a public road. Tr. 150 to 154. Title insurance companies, banks, and BP-I successors-in-interest have relied on public access to these BP-I properties since 1981. *See, e.g.*, Tr. 134 to 135 (title company required replat of BP-II prior to sale of tract to extend public dedication to southern lot). Many BP-I and BP-II owners would no longer have legal access to their properties. Public policy supports the application of the ten year statute of limitations to Respondents' claims.

CONCLUSION

WHEREFORE, for the reasons stated above, Appellants respectfully request that this Court reverse the trial court's January 28, 2009 Judgment and find that Bridle Parc Lane is a public road by virtue of proper statutory dedication through the dedication of the street right of way on the Plats. In the alternative should this Court not find that a statutory dedication of the road occurred, Appellants request that the Court reverse the trial court and find that BP Lane is a public road through a common law dedication. Alternatively, if this Court determines that there is no statutory or common law dedication, then this Court should reverse the trial court and find that BP Lane is public through a prescriptive easement. Furthermore, this Court should reverse the decision of the trial and dismiss Respondents' petition as barred by the ten year statute of limitations.

Respectfully submitted,

WHITE GOSS BOWERS MARCH SCHULTE
& WEISENFELS, a Professional Corporation

By: 

Mary Jo Shaney MO #35919
James C. Bowers, Jr. MO #23533
4510 Belleview, Suite 300
Kansas City, MO 64111
Telephone: (816) 753-9200
Telecopier: (816) 753-9201
E-mail: mshaney@whitegoss.com
E-Mail: jbowers@whitegoss.com

ATTORNEYS FOR APPELLANTS JAMES K.
OWENS, THE JAMES K. OWENS TRUST,
BRENT J. OWENS, RITA OWENS, MARY
FRAZIER, JIMMY HAGEN, KAREN
HAGEN, AND JACK SLOAN

{31546 / 64509; 261589.2}

{31546 / 64509; 261589.2}

CERTIFICATIONS OF COUNSEL

The undersigned certifies that:

1. As required by Missouri Supreme Court Rule 84.06(b), this Brief is proportionally spaced and, excluding the cover, certificate of service, signature block, and any certifications of counsel, contains 10,607 words. I relied upon my word processor to obtain the word count, Microsoft Word 2003.

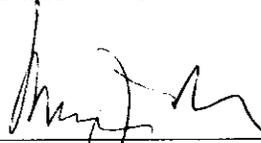
2. Pursuant to Missouri Supreme Court Rule 84.05, and Western District Special Rule XII the original and seven (7) copies of Appellants' Brief were filed with the Missouri Court of Appeals, Western District on this 12th day of August 2010, via hand-delivery, addressed as follows: Terrence G. Lord, Clerk of the Missouri Court of Appeals for the Western District, 1300 Oak Street, Kansas City, Missouri 64106.

3. Pursuant to Missouri Supreme Court Rule 84.05, two (2) copies of Appellants' Brief were served upon Respondents and upon Platte County on this 12th day of August 2010, addressed as follows to:

William M. Quitmeier, Esq.
Quitmeier Martsching Law Firm PC
10150 N. Ambassador Drive, Suite 100
Kansas City, MO 64153
Attorney for Respondents

Robert H. Shaw, Esq.
McGinness & Shaw, LLC
303 Marshall Road, Suite 1
P.O. Box 168
Platte City, MO 64079
Attorney for Defendant Platte County, Missouri

4. The undersigned further certifies that the diskette filed herewith containing this Appellants' Brief in electronic form complies with Missouri Supreme Court Rule 84.06(g) because it has been scanned for viruses and is virus-free.

A handwritten signature in black ink, appearing to be "M. J. ...", written over a horizontal line.

Attorney for Appellants

{31546 / 64509; 261589.2}

the trial and dismiss Respondents' petition as barred by the ten year statute of limitations

Respectfully submitted,

WHITE GOSS BOWERS MARCH SCHULTE
& WEISENFELS, a Professional Corporation

Word Count

Statistics:

Pages	45
Words	10,607
Characters (no spaces)	50,701
Characters (with spaces)	61,760
Paragraphs	211
Lines	871

Include footnotes and endnotes

Show Toolbar Close

MO #35919
MO #23533
White 300
4111
753-9200
753-9201
ney@whitegoss.com
ers@whitegoss.com
PPELLANTS JAMES K.
S K. OWENS TRUST,
ITA OWENS, MARY

FRAZIER, JIMMY HAGEN, KAREN
HAGEN, AND JACK SLOAN

(31546 / 64509, 261589.2)