

IN THE SUPREME COURT OF MISSOURI

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. SC 91898
Appeal from the Circuit Court
of Platte County, Missouri
Case No. 06AE-CV02075

**APPELLANTS' SUBSTITUTE REPLY BRIEF
AND APPENDIX TO SUBSTITUTE REPLY BRIEF**

Respectfully submitted,

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RESPONSE TO RESPONDENTS BATEMAN PRELIMINARY STATEMENT

Respondents Bateman set forth a "Preliminary Statement" in the beginning of their Substitute Brief of the Respondents ("Respondents' Substitute Brief"). Appellants object to this Preliminary Statement as it is a recitation of facts without any references to the record in violation of Supreme Court Rule 84.04(i). Additionally, this Preliminary Statement contains incorrect "factual" statements. For instance, in the first paragraph, Respondents Bateman state that: "The easements give Mr. Bloom and his successors, the BP II owners, the exclusive right to construct and maintain an access road to Mace Road." The easements that Respondents are referencing did not provide an exclusive right and this was not supported by the record. *See* Appellant's Appendix A8 to A13 which are the Easement Conveyances to Yiddy Bloom. Further, in the second paragraph, Respondents state: "The County's records always have referred to BP Lane as a 'private street'. The BP I owners over whose land it runs pay property tax on that land." This is not a fair recitation of the testimony that occurred at trial. *See* Appellant's Response contained herein in response to Respondents Bateman's Statement of Facts. Finally, this Preliminary Statement contains argument and mischaracterizations. In the third paragraph, Respondents state: "The developer and his allies" in a derogatory sense. Appellants respectfully request that this Court dismiss this Preliminary Statement which is set forth in Respondents' Substitute Brief in violation of Missouri Supreme Court Rules.

STATEMENT OF FACTS

Appellants agree with the additional facts set forth in the brief filed by Respondent Platte County, Missouri¹ ("Respondent Platte County"). With regard to the Statement of Facts set forth by Respondents Robert L. Bateman, et al. ("Respondents Bateman")², Appellants state as follows:

In summarizing Kathleen Gray's testimony, Respondents ended their summary by stating that the gravel road extended slightly beyond her property but then stopped. Respondents' Substitute Brief at p. 4. In fact, Ms. Gray acknowledged that the road extended further south to the Christmas tree farm owned by Virgil Kingrey at the time (now the property is owned by Appellant Owens). Tr. 125-126. She testified that people who would come to the Christmas tree farm would use Bridle Parc Lane (referred to

¹ While Defendant Platte County, Missouri is denoted as a Respondent in this matter, Respondent Platte County agrees with the facts and arguments made by Appellants in this appeal.

² In Respondents Bateman's Statement of Facts, Respondents reference many exhibits admitted into evidence in the trial court proceeding. None of Respondents Bateman's exhibits were filed with the Missouri Court of Appeals and most of them were not included in Respondents' Appendix filed with its Substitute Brief. Only Respondent Platte County filed exhibits with the Court of Appeals. Appellants included copies of pertinent exhibits in its Appendix filed with its Appellants' Brief and are filing one additional exhibit referenced herein in the Appendix to this Substitute Reply Brief.

herein as "Bridle Parc Lane" or "BP Lane"). Tr. 126. She stated that, at the time, they never questioned whether the people who were using Bridle Parc Lane to get to Christmas tree farm were trespassing. Tr. 126.

Further, Respondents Bateman stated that, at some point, the adjacent residents erected an old painted sign for Bridle Parc Lane at its intersection with Mace Road and cited page 192 of the transcript as support for this factual statement. Respondents' Substitute Brief at p. 4. Page 192 of the transcript does not support this statement. In fact, Mr. Owens' testimony on page 192 was that he recalled the old painted sign that was out there stated "Bridle Parc Lane"; he never testified as to who initially installed the sign. Tr. 192. Rather, he testified that there was a new street sign denoting Bridle Parc Lane that was installed by the road district. Tr. 193. Mr. Owens also testified that he believed that Bridle Parc Lane is a public road due to the fact that the public uses the road. Tr. 188.

Next, Respondents Bateman indicated that there may be some question as to whether the Christmas tree farm existed and used the road by stating on page 5 of Respondents' Substitute Brief that "Mrs. Gray believed that, in 1987, there had been a 'Christmas tree farm' south of her in BP II." This mischaracterizes Mrs. Gray's testimony. She stated: "Virgil Kingrey had a Christmas tree farm that was south, which is actually part of Bridle Parc II now, and it's a property that Jim Owens owns but it was a Christmas tree farm at the time so that road extended beyond our house, similar, gravel." Tr. 125-126. When asked who would use the road, she affirmatively testified that people that frequented the tree farm would use the road. Tr. 126.

Citing Mrs. Lofgren's testimony, Respondents Bateman stated that she testified that she had never seen the general public use Bridle Parc Lane. Respondents' Substitute Brief at p. 6. On cross examination, Mrs. Lofgren testified that she purchased the property in June 2006 but did not move into the home until April 2007 so she had not had much time to observe who was using the road. Tr. 34-35.

On page 7 of Respondents' Substitute Brief, Respondents stated that Brent Owens testified that while his son had received a ticket from the police that patrolled the road, it had been dismissed. Brent Owens' complete testimony was that the ticket was dismissed with a warning. Tr. 201. He also testified that there are speed limit signs on Bridle Parc Lane. Tr. 201.

On page 8 of Respondents' Substitute Brief, Respondents Bateman indicated that: "The County records, too, never have recorded BP Lane as being anything other than a private road" and cite Tr. 81-84 as supporting that factual statement. This misstates the testimony (and exhibits that Respondents have not filed with this Court). Mr. Bateman testified that the County Treasurer included Bridle Parc Lane in a tax bill not that all of the County's records indicated that Bridle Parc Lane is a private road. Tr. 82. In fact, one of the exhibits, Exhibit 35-A, that Respondents Bateman admitted during the trial court proceeding showed that in 1991 the reference to Bridle Parc Lane as a private road was deleted and instead it was denoted as a "token value public road". Tr. 82. Exhibit 35-A specifically notes that BP Lane was dedicated as a public street. *See* Appendix to Substitute Reply Brief, p. A1. Further, this reference to the transcript does not support

Respondents Bateman next statement in its Statement of Facts that the owners "always have paid property taxes on the land containing BP Lane."

In addition to Mr. Brulja's testimony cited by Respondents Bateman on page 10 of Respondents' Substitute Brief, Mr. Brulja also testified that his title search did not show any access easements for the lots included within the plat of Bridle Parc Estates ("BP I"). Tr. 66-67.

Respondents Bateman have further misstated the testimony of Mindy Turner when they stated that Ms. Turner "opined the 1980 easements" 'create an easement across a portion of BP I, but 'don't benefit' the owners of lots in BP II." Respondents' Substitute Brief at p. 11. Rather, Ms. Turner testified that the easements do not benefit the lots within BP I not BP II. Tr. 150-151. Ms. Turner testified that, from a title insurance company perspective, she would have a concern if Bridle Parc Lane were declared to be a private street and the adjacent landowners had no access to a public street and also no access rights via any type of access easements. Tr. 152-155. She stated that, if a title company could not find any easement rights, it would raise an exception on the title policy as to lack of access. Tr. 151. If it turned out that a title company had insured title to property owners within BP I and BP II and there was no legal right of access via a public street or a private access easement, the title company could face claims from those owners due to a lack of access. Tr. 152-153. She also testified that, based on her experience, it is not unusual that there may be overlapping easement rights on the same property as long as those rights are consistent and non-exclusive. Tr. 156-157.

Next, on page 11 of Respondents' Substitute Brief, Respondents Bateman stated that Mr. Owens "tried to re-plat his tract 5 as 'Owens Estates'" and cited page 178 of the transcript. The testimony by Mr. Owens was that tract 5 had been replatted not that he tried to do so. Tr. 178.

Finally, on page 14 of Respondents' Substitute Brief, Respondents Bateman indicated that the court took the case under submission at the conclusion of the testimony and cited page 229 of the transcript. In fact, the trial court's statement was that the case would be taken under submission when the court received all of the proposed judgments and briefs. At this time, the court also invited the parties to submit any additional briefing that they desired on the issues that had been raised at the trial court proceeding. Tr. 228-229.

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.³

The first issue identified in Appellants' Brief is whether the trial court erred when it declared that Bridle Parc Lane was not statutorily dedicated to public use. This issue is a question of law reserved for the independent review of this Court. *See Earls v. Majestic Pointe, Ltd.*, 949 S.W.2d 239, 246 (Mo.App. 1997).

Bridle Parc Lane was statutorily dedicated through the approval by Respondent Platte County of the plats of BP I and BP II (sometimes referred to herein as "Plats") and

³ Respondents' Substitute Brief reorders Appellants' Points on Appeal and also combines their response to Appellants' Points II, III and IV into one single point. Appellants choose to continue with the order and scope of the Points on Appeal as identified in its Appellants' Brief as filed with the Court of Appeals-Western District. Appellants will address Respondents Bateman's arguments made in the applicable Point on Appeal.

recording of these Plats. 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.

As such, the street was statutorily dedicated through the acceptance and recording of the Plats. Section 445.070, R.S.Mo., provides that the acceptance and recording of plats shall be a sufficient conveyance to vest the parcels of land as therein named for public use.

On page 55 of their Respondents' Substitute Brief, Respondents Bateman now claim that the issue of whether the street had been statutorily dedicated was not preserved for appeal. This argument is disingenuous if one reviews the transcript of the trial court proceeding along with the briefs filed both prior to trial and following trial. Statutory dedication through the recording of the plats was a central focus of this matter. L.F. 296-305; L.F. 319-321 (Respondents Bateman's own Trial Brief identified the statutory dedication issue); L.F. 326-329; Tr.23-25; Tr. 206-208; Tr. 214-225; L.F. 326-335; L.F. 394-396 and 399; L.F. 401-420. While the specific statutory citation may not have been mentioned in these references, the issue was clearly identified, thoroughly tried and briefed and is preserved for appeal.

Respondents Bateman cite *Arnold v. Minger*, 334 S.W.3d 650, 652 (Mo.App. 2011); *Lincoln Credit Co. v. Peach*, 636 S.W.2d 31, 36 (Mo. banc 1982); and *Sheppard v. East*, 192 S.W.3d 518, 524 (Mo.App. 2006) to support its position that the issue of statutory dedication was not preserved for appeal due to the fact that § 445.070 was not specifically cited until Appellants' Brief was filed with the Court of Appeals. See Respondents' Substitute Brief at p. 56. These cases do not support Respondents Bateman's argument because these cases turn on the question of whether the argument was made *at all* to the trial court below not whether the specific statutes were mentioned. Supreme Court Rule 78.07(a) requires that for jury-tried cases allegations of error must be raised in a motion for new trial in order to be preserved for review. If it is a court-tried case, no such motion is necessary. Supreme Court Rule 78.07(b). In both court-tried cases and jury-tried cases, the requirement to raise the issue first before the trial court is to provide the trial court with the opportunity to first decide the issue. *Lincoln Credit*, 636 S.W.2d at 36; *Arnold*, 334 S.W.3d at 652. The trial court's Judgment clearly stated that this issue was raised and considered by the court. App. A1-A7. Additionally, Appellants have not taken a contrary position concerning statutory dedication through § 228.190 as claimed by Respondents Bateman. The issue concerning statutory dedication was clearly preserved for appeal and is properly before this Court.

Respondents Bateman claim that BP Lane could not be dedicated to public use because Yiddy Bloom or his successors never consented to the relinquishment of the Easements or Platte County never used its power of condemnation to condemn out the private easement. Respondents' Substitute Brief at p. 44. Respondents Bateman further

argue that Respondent Platte County "unilaterally determined BP Lane was a public road." Respondents' Substitute Brief at p. 43. This ignores the fact that all of the subsequent owners of the Easement rights signed the two Plats (owners within BP I signed in 1981 and owners within BP II signed in 1984). Yiddy Bloom was no longer a property owner or holder of any easement right by 1984. His successors in interest all consented to the dedication of BP Lane as a public street. Yiddy Bloom did not have any property right that was taken by the time BP II was platted in 1984. Yiddy Bloom's consent was not required.

It is not correct to state that the Easements must be relinquished in order to dedicate the public street as argued by Respondents Bateman. As stated in Appellants' Brief, Missouri law permits subsequent concurrent easements provided they are not inconsistent or reasonably burdensome. *Kiwala v. Biermann*, 555 S.W.2d 663, 667 (Mo.App. 1977). Respondents Bateman cite no authority to support its claim that the dedication of Bridle Parc Lane could not be vested through § 445.070. Respondents' Substitute Brief at p.57. It is not Appellants' position that the Easements were voided with the dedication of the street. In fact, the Easements and Public Street Easement of Bridle Parc Lane through this statutory dedication can coexist.

Respondents Bateman cite *City of Sarcoxie v. Herman Wild*, 64 Mo.App. 403 (1896) in great detail in Respondents' Substitute Brief at pp. 44-47. Both Appellants and Respondent Platte County have distinguished the *Sarcoxie* case. *Sarcoxie* does not control and should not determine the outcome of this matter. Instead, § 445.070 dictates that BP Lane became a public street when the Plats were recorded with Platte County.

Moreover, § 228.190.1 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. Section 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).

BP Lane was statutorily dedicated to public use under the first prong of § 228.190.1. There is no requirement that public funds be expended in order for BP Lane to be statutorily dedicated to public use. The overwhelming evidence before the trial court was that the public used BP Lane for more than ten years. See Statement of Facts in Appellants' Brief, pp. 9-10.

In addition to a proper statutory dedication under § 445.070, a proper statutory dedication occurred under § 228.190.1. 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.

Respondents Bateman claim that a statutory dedication did not occur under § 228.190.1 because there was no evidence that the Platte County Commission made any order to establish BP Lane as a public street and the public did not use it. First, the acceptance and recording of the Plats is clear evidence of Platte County's order. Second, the overwhelming evidence was that the public used BP Lane, *i.e.* mailmen, delivery

person, the public using the street to access the Christmas tree farm. Tr. 32, 125-126, 183-185 and 201.

The cases cited by Respondents Bateman are not relevant to the issue as to whether a statutory dedication occurred, *i.e.* *Gowen v. Cote*, 875 S.W.2d 637 (Mo.App. 1994) and *Cheatham v. Melton*, 593 S.W.2d 900, 902 (Mo.App. 1980). In *Gowen*, the action dealt with an action by one landowner against an adjacent landowner as to whether a restrictive covenant which provided the landowner a right to use a boat ramp on the adjacent landowner's property also permitted the landowner's guests to use the boat ramp. Neither of these cases dealt with the explicit intent to statutorily dedicate a public street. They each dealt with a dispute between two private property owners as to whether an enlargement or change of a private easement was permitted.

Here, the dedication of the street in BP I 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 public 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 landowners in BP I and BP II were entitled to make the dedication set forth in the plats.

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.

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 610, 613 (Mo.App. 2000). 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 v. Majestic Pointe, Ltd.*, 949 S.W.2d 239, 246 (Mo.App. 1997).

Respondents Bateman assert that common law dedication could not have occurred because Yiddy Bloom nor any of his successors manifested any intent to relinquish the Easements. Respondents' Substitute Brief at p. 59. Again, it is not Appellants' position that the Easements were relinquished; rather the Easements can coexist with the dedication of Bridle Parc Lane. Respondents Bateman further argue that there was no evidence to demonstrate that the successors in interest intended to dedicate BP Lane as a public street. This argument clearly ignores the facts in the record.

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

portion of BP Lane in BP I to public use, evidenced by the plat of BP I 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.

BP II was approved and executed by all property owners within BP II. App. A15 and A16; L.F. 338 and 340. BP II demonstrates the unequivocal intent of these owners to dedicate the portion of BP Lane in BP II to public use, evidenced by the plat of BP II 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 plat of BP II identified as "Street" to public use. *Id.* None of the Easements ran through BP II. Tr. 154.

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." *Weakley 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).

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 plat of BP II and replat of BP II. 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 plat of BP II where all easement

holders dedicated BP Lane within the plat of BP II to public use. The trial court's focus on the intent of Bloom misapplied the law.

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*, 851 S.W.2d 504, 508 (Mo. 1993).

Respondents Bateman claim that there could be no evidence of a prescriptive easement because the easement holders never gave up dominion and control. They state that the easement holders have maintained the road and consistently fought Platte County from changing their private road to a public road. This argument ignores the fact that the owners within BP I and BP II at the time of platting dedicated BP Lane as a public street. The street was accepted and used by the public.

Respondents Bateman's references to cases supporting their position are not applicable to the facts before the Court. *Shapiro Bros., Inc. v. Jones-Festus Props. L.L.C.*, 205 S.W.3d 270 (Mo.App. 2006), actually dealt with whether a cut through across a parking lot had been established as a public prescriptive easement. *Terry v. City of Independence*, 388 S.W.2d 769 (Mo. banc 1965) actually supports the findings of a prescriptive easement in this case. In *Terry*, this Court held that the City had established a prescriptive easement over a portion of the Terrys' property that had been used as extension of an adjacent roadway. The *Terry* Court held that while the payment of taxes on the land in question is a factor to be considered in finding a prescriptive easement; that fact alone is not sufficient to overcome other indisputable facts establishing a prescriptive easement. *See Terry*, 388 S.W.2d at 773. As in *Terry*, the evidence here clearly demonstrated that the public had used Bride Parc Lane for a number of years.

Tuf Flight Indus., Inc. v. Harris, 129 S.W.3d 486 (Mo.App. 2004), as cited by Appellants, clearly sets forth the standards for determining whether a prescriptive easement exists. To determine whether the use is uninterrupted, courts look at the actions of the owner of the servient estate. *Id.* at 489. 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.*

When one reviews the transcript of the hearing, it is evident that Respondents Bateman are clearly wrong in its statement to this Court that "the public never used BP Lane at all." *See* Respondents' Substitute Brief at p. 60. The testimony at trial revealed extensive, continuous, uninterrupted, visible and adverse use of BP Lane by members of the public including business patrons (those using Bridle Parc Lane for access to Christmas tree farm), delivery vehicles, non-residents, home builders, suppliers, and police. Tr. 32, 125-126, 182-185 and 201. Furthermore, Respondents Bateman's own expert witness gave the opinion that a prescriptive easement existed. Tr. 47. The trial court erred in failing to find that a prescriptive easement had been established for the public street of BP Lane.

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.

a. Section 516.010 was specifically raised in the trial court proceeding and is appropriately before this Court for consideration.

Respondents Bateman claim that the Court of Appeals was incorrect in holding that § 516.010, R.S.Mo., applied. Respondents Bateman now argue for the first time to this Court that § 516.010 was not specifically raised in either Appellants' Answer or Respondent Platte County's Answer and, therefore, this issue cannot be raised on appeal. While it is correct that the specific citation of § 516.010 was not listed in either Answer, the issue that the action was barred by the statute of limitations was raised. *See* L.F. 27 and 88. This specific statutory citation was raised through the supplemental trial court briefs filed by Appellants and Respondent Platte County prior to the trial court closing this matter. L.F. 334 and 397. The trial court specifically held the matter open at the end of the trial court proceeding on October 29, 2008, until all additional briefing and the proposed judgments were submitted to the Court. L.F. 229.

Respondents Bateman, on two separate occasions at the trial court level, responded to the argument that the statute of limitations of § 516.010 applied by arguing that the ten year period had not yet run at that time. L.F. 403 and 412. Respondents Bateman did not

argue that the issue was not properly before the trial court. L.F. 403 and 412. Pursuant to Missouri Supreme Court Rule 55.33(b), the statute of limitations was raised and tried by the consent of the parties given the briefs that were filed and submitted to the trial court by the parties prior to the time that the trial court considered the case submitted. Respondents Bateman's argument that § 516.010 was not properly raised fails.

b. Section 516.010 applies to the facts here and the ten year period began to run with the recording of BP II in 1984.

As stated in Appellants' Brief, the trial court was incorrect in its Judgment because it did not apply the statute of limitations contained in § 516.010, R.S.Mo. App. A25 to A27. Section 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. Respondents Bateman's Easements are hereditaments that are subject to the ten year statute of limitations. *Terre Du Lac Property Owners' Association, Inc. v. Wideman*, 655 S.W.2d 803, 805 fn. 1 (Mo.App. 1983); *Northridge Ass'n of St. Joseph, Inc. v. Welsh*, 924 S.W.2d 305, 307 (Mo.App. 1996).

Respondents Bateman's petition which they filed was not one for inverse condemnation or a taking without compensation. Rather, it was a petition "for injunctive relief against seizing a private roadway and declaratory relief." L.F. 12-22. This petition requested that the trial court issue an injunction against the interference with Respondents' rights under the Easements and declare the rights of the parties. L.F. 15, 16 and 19. This is the very type of action that is the subject of the ten year statute of limitations in § 516.010.

Respondents Bateman claim that § 516.010 does not apply to declaratory judgments seeking to enforce present rights and rely on *Reorganized School Dist. R-1 of Crawford Co. v. Reorganized School Dist. R-111 of Washington Co.*, 360 S.W.2d 376, 381 (Mo.App. 1962) to support their position. Respondents' Substitute Brief at p. 30. *Reorganized School Dist. R-1* does not support Respondents Bateman's statements made in their Respondents' Substitute Brief. This case involved a boundary dispute between two school districts. The court stated: "This action is neither for the recovery of real property or a personal action within the statute. The action is to enforce a public right and it is therefore not within the statutes mentioned." *Reorganized School Dist. R-1*, 360 S.W.2d at 381. The whole focus of Respondents Bateman's "Petition for Injunctive Relief Against Seizing Private Roadway and Declaratory Relief" was to enforce the real property rights Respondents Bateman believed they had through the Easements. This matter clearly falls within § 516.010.

Respondents Bateman further mislead this Court by stating that: "Rather, the parties agreed the question was entirely whether the easements over BP I making BP Lane a private road are presently in effect." Respondents' Substitute Brief at p. 30. Respondents Bateman refer this Court to pages 85-87 of the transcript as evidence of this "agreement." A careful review of these pages of the transcript clearly demonstrates that this was not the stipulation of the parties. Rather, the stipulation was that the BP I and BP II Plats were not at issue and were valid. L.F. 86-87. Both Respondent Platte County and Appellants argued throughout the proceeding that the Easements granted to

Respondents Bateman and the street dedication to Respondent Platte County could coexist and the Easements were not exclusive. L.F. 216 and 220-221.

The trial court's failure to apply the statute of limitations produced an unjust result because it destroyed access to the properties within 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 shredded the access rights of both BP I and BP II residents, who only had access to traverse the BP Lane through the public dedication.

Both Appellants' and Respondent Platte County's Briefs provide compelling reasons for the ten year statute of limitations and reasons why it applies in this case. As of 1984 (when the plat of BP II was recorded), every successor in title to Yiddy Bloom was aware of the statutory dedication of BP Lane. None of them complained of the dedication nor did they bring any action in court to assert their rights under the Easements. Lots have been sold and resold and homes have been constructed based upon the plats of BP I and BP II and access to these lots through the public dedication of BP Lane. To now assert that the road is not a public street creates hardships for all owners along BP Lane since the permits providing for the construction of their homes were based upon the street being a public street and, if it were not, the homes would then be nonconforming structures. Tr. 171 to 172.

Alternatively, Respondents Bateman next assert that, if § 516.010 applies, it did not begin to accrue until 2005 or 2006. Respondents Bateman's Brief at p. 17. This statement is

contrary to the evidence and law as to when the statute of limitations applies. The ten years began in 1984 when the plat of BP II was recorded (BP I was signed and recorded in 1981). Each of the owners who signed the plat was aware of the dedication of BP Lane as a public street. This is the relevant date; not a date when a subsequent owner became aware of the fact that the street was a dedicated public street. Section 516.010. Respondents Bateman's petition was clearly filed outside of the statute of limitations and should have been dismissed by the trial court.

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 Bridle Parc 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 Bridle Parc Lane is public through a prescriptive easement. Furthermore, consistent with the opinion of the Court of Appeals below, this Court should reverse the decision of the trial court and dismiss Respondents Bateman's petition as barred by the ten year statute of limitations, § 516.010.

Respectfully submitted,

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CERTIFICATION OF COUNSEL

I hereby certify that I prepared this brief using Microsoft Word 2003 in Times New Roman size 13 font. I further certify that this brief complies with the word limitations of Rule 84.06(b), and that it contains 6,264 words.

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CERTIFICATE OF SERVICE

I hereby certify that on November 8, 2011, I filed a true and accurate Adobe PDF copy of this Appellants' Substitute Reply Brief and Appendix to Substitute Reply Brief via the Court's electronic filing system, which notified the following of that filing:

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