

IN THE SUPREME COURT OF MISSOURI

**ORLA HOLMAN CEMETERY
and SUSAN RECTOR,**

Plaintiffs/Respondents,

vs.

Supreme Court No. SC90133

**THE ROBERT W. PLASTER TRUST,
STEPHEN PLASTER, TRUSTEE OF
ROBERT W. PLASTER TRUST AND
THE VILLAGE OF EVERGREEN,**

Defendants/Appellants.

**On Appeal from the Circuit Court of Camden County, Missouri
26th Judicial Court
the Honorable Carl DeWitt Gum, Jr., Judge**

**RESPONDENTS ORLA HOLMAN CEMETERY, INC.
AND SUSAN RECTOR'S SUBSTITUTE BRIEF**

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JURISDICTIONAL STATEMENT

Respondents Orla Holman Cemetery, Inc. and Susan Rector accept, solely for the purposes of this appeal, the Jurisdictional Statement contained in Appellants' Brief. Because this matter does not involve any issues within the exclusive jurisdiction of the Missouri Supreme Court, it is within the general appellate jurisdiction of the Missouri Court of Appeals, Southern District, pursuant to Article V, Sec. 3 of the Missouri Constitution. Following an opinion by that court, the Supreme Court of Missouri granted transfer upon a timely application for transfer filed by Plaintiffs. Rule 83.04, Mo. Rules of Court.

STATEMENT OF FACTS

The Statement of Facts provided by Appellants Robert W. Plaster Trust, Stephen Plaster, Trustee of the Robert W. Plaster Trust and the Village of Evergreen (hereinafter collectively “Defendants”) leaves out crucial facts and misconstrues the record concerning the dispute between Defendants and Plaintiffs Orla Holman Cemetery, Inc. (hereinafter “Holman Cemetery”) and Susan Rector (hereinafter collectively “Plaintiffs”). Plaintiffs provide the following statement of facts as a substitute.

Creation of Holman Cemetery and Row Crop Road

Holman Cemetery is a county owned cemetery located in Laclede County, Missouri. (LF 401-405, 492-493). It has been in use for well over one hundred years. (LF 401-405, 492-493). Approximately one half of the cemetery was deeded to Laclede County as early as November 16, 1901 by Joseph Holman and Evan Addison for use as a public cemetery (LF 401). Additional property was added to the cemetery in 1910, once again for use as a “public burial ground.” (LF 402). In total, the cemetery today consists of approximately one acre of land. (LF 403-404). Although property for the cemetery was first deeded to the county in 1901, the land had been in use as a cemetery for a significant period of time before that time and local families, including that of Ms. Rector, had “buried their loved ones in the Orla Holman Cemetery...since time out of memory.” (LF 404). A survey depicting the relative location of the cemetery and Row Crop Road and a metes and bounds description of Row Crop Road by Registered Land Surveyor Robert Shotts was produced by Defendants in support of their Statement of Uncontroverted Facts before the trial court. (LF 39, 58-59).

The cemetery is accessed from Highway V on what today is known as Row Crop Road. (LF 404). The road was built by Laclede County in approximately 1954 or 1955 (LF 531). It stretches from Highway V for a quarter to half mile to the Holman Cemetery and then, at one time, extended an additional quarter of mile to the house occupied by the Massey family. (LF 531). Ever since the road was built, Laclede County maintained it approximately twice a year, including having a road grader go over the road prior to Memorial Day (LF 404, 540-541).

Between the edge of the Holman Cemetery and Row Crop Road there is a grassy area referred by the parties in the case as the “Parking Area.” (LF 880-881). “All” of the Parking Area has been used, for as long as anyone can remember, for individuals to park their vehicles and walk to the cemetery when visiting a loved one’s grave or for a funeral (LF 880-881, 885-886). Grave digging equipment, hearses and some vehicles have driven across the parking area into the cemetery. (LF 886). According to the Shotts survey, the parking area measures 62.8 feet east-to-west and runs the entire distance of the east boundary of the cemetery, north-to-south. (LF 58). Defendants’ answer conceded that the parking area “had been used by the public” for more than ten years. (LF 695). Other than Row Crop Road and the parking area, there is currently no way for anyone to access the cemetery from a public road. (LF 815, 863-864, 281). No one visiting the cemetery had ever asked for permission to enter. (LF 885-886).

Closure of Row Crop Road by Defendants

From 1955, when Row Crop Road was constructed, until 2002 it and the parking area were open for Plaintiffs and the public to use in accessing Holman Cemetery. (LF 404-405, 880, 881, 885-886). In 2002 Billy Ray Massey, whose family had owned the farmland surrounding the cemetery and Row Crop Road since the 1950's, sold all of the Massey Farm to the Robert W. Plaster Trust (hereinafter "Plaster Trust"). (LF 530, 812). The Plaster Trust and its affiliate, Empire Ranch, own approximately 10,000 acres used for raising cattle, wildlife and "agricultural products to support the cattle" taking up all but a small portion of Defendant Village of Evergreen. (LF 571, 1045).

Defendant Village of Evergreen is a village in Laclede County, Missouri with a population of only 42 persons, according to the 2000 U.S. Census, spread out with a population density of 4 persons per square mile, compared with a population density of 81.2 persons per square mile for state of Missouri.¹ Other than the Plaster Trust, Empire Ranch, and one other individual landowner, there are no other property owners in the Village of Evergreen. (LF 1045) Several of the employees of Empire Ranch reside in the Village of

¹ This Court may take judicial notice of census data whether or not it was introduced at the court below. *See Opponents to Petition for Formation of Community Care Nursing Home District v. Petitioners for Formation of Community Care Nursing Home District*, 564 S.W.2d 552, 554 (Mo. App. 1978); *Moulder v. Webb*, 527 S.W.2d 417, 420 (Mo. App. 1975).

Evergreen in houses provided by either Empire Ranch or the Plaster Trust as part of their compensation. (LF 1046).

The Deed from Mr. Massey to the Plaster Trust excepted both the “1 acre ... now used for cemetery” purposes and “any part [of the Massey farm] deeded, taken or used for road or highway purposes.” (LF 651-652). A survey performed by Robert S. Shotts, Inc., the Laclede County Surveyor, for Robert Plaster on March 28, 2005 contains a metes and bounds description of Row Crop Road and graphically depicts the road as the *only* road completely surrounded by the Massey farm, except at its junction with a Highway V. LF 58-59, Exhibit H filed with the Court (a full-size copy of the survey found at LF 58-59).²

In 2002, Defendants placed a gate across Row Crop Road completely barring access to the cemetery from Highway V. (LF 484, 575). The gate, which was locked, was installed shortly after the Plaster Trust bought the surrounding property from the Masseys. (LF 575). A sign on the gate told people to “keep out” and provided the number of the police chief of Evergreen, also an employee of Empire Ranch, for persons to call in order to gain access to the cemetery. (LF 575, 1044, 1047). The sign, which was located at or near Row Crop

² The Massey family had also deeded a fifteen foot easement to Laclede County in 1973, although Row Crop Road was built in the 1950s. (LF 1157). The fifteen foot easement is not adjacent to Row Crop Road. (LF 281). The fifteen foot easement has never been maintained as a road and would require substantial improvements to use it as a road for vehicles.

Road's junction with Highway V, also declared that the road was "private property." (LF 484, 575, 662-664).

Some patrons of the cemetery, Dorothy Buck and her son Mike Buck, attempted to visit it in 2002, called the number on the sign, and, after being admitted, were locked inside by the gate being re-locked behind them after they had entered the road. (LF 484, 1005, 1090-1091). Mike Buck was forced to partially dismantle the gate so they could both leave. (LF 1091). Subsequent to the two cemetery patrons being locked in the cemetery, the hinges on the gate were welded so that if anyone else was trapped inside the cemetery in the future, he or she would be unable to dismantle the gate and remove it from the hinges in order to exit. (LF 601-602, 1091). Defendants have placed gates similar to the one on Row Crop Road to close or vacate county roads in the past, although there was no evidence before the trial court of any gate currently being across other roads in the Village. (LF 580).

Because of the public's problem in reaching the cemetery, the Laclede County Commission held a public meeting on December 15, 2003 regarding the locked gate across Row Crow Road and the county's inability to maintain the road. (LF 1097). The Commission recognized at the meeting that Row Crop Road was a county road and asked the Defendants to remove the gate or otherwise the Commission itself would have the gate removed. (LF 484, 1097). After Defendant's failed to remove the gate, it was removed by the county. (LF 485, 729, 1097).

Purported Annexation of Massey Farm by Evergreen

Subsequent to the purchase of the Massey farm, the Village of Evergreen had purported to annex the farm, including all of the land surrounding Row Crop Road and the Holman Cemetery into the village. (LF 832-840). Under the terms of the purported annexation, all of the Massey farm was annexed into the Village of Evergreen except the cemetery and “except any part [of the Massey farm] deeded, taken or used for road or highway purposes.” (LF 836) (See also a copy of ordinance in the Appendix to this brief). Neither this statement of facts nor the one offered by Defendants identifies any evidence showing Row Crop Road, a county road, has ever been platted, dedicated, condemned, used or maintained as a street of the Village of Evergreen for the simple fact that none exists.

The validity of the annexation ordinance is not obvious on the face of the record before the trial court. The ordinance of annexation, number 03-01, states it was passed and approved on January 29, 2003. (LF 833). The only signatures on the ordinance are those of Steven R. Plaster, one of the trustees for the Robert W. Plaster Trust and Chairman of the Board of the Village of Evergreen, and Larry Weis as Village Clerk. (LF 833). Nothing in the record shows that anyone else attended that meeting of the Board of Trustees of Evergreen. (LF 587,655). The quorum for trustees meetings is three members. (LF 587).

Second Closure of Row Crop Road by Defendants

In 2004, a second gate was constructed across Row Crop Road at its intersection with Highway V. (LF 578, 599, 1099). This gate, referred to by the parties as the “second gate” consists of two panels, one of which is locked to the ground blocking access to

approximately 15 feet of Row Crop Road and the other panel of the gate is open, with the ability to be swung closed. (LF 485, 599). The gate has a “Keep Out” sign on it that tells the public that Row Crop Road is “Closed” and says that “Orla Cemetery members” may visit the cemetery during daylight hours only. (LF 485-486, 577-578, 622). The sign claims that the road has been closed by “Order of Evergreen Chief of Police,” even though the volunteer Chief of Police for Evergreen, Ken Stidham, has issued no order closing the road to public or restricting anyone’s access to the cemetery during a particular time of day. (LF 486, 578, 1062).

Subsequent to the second gate’s erection, the Village of Evergreen claims to have enacted an ordinance, on January 19, 2005, allowing the maintenance of an unlocked gate “WHICH MAY BE OPEN AND **SHUT** ACROSS ROW CROP ROAD... [NEAR] THE INTERSECTION OF ROW CROP ROAD AND LACLEDE COUNTY ROAD VV.” (Emphasis added). (LF 486, 653-654). The ordinance, number 05-15, asserts that Row Crop Road lies “entirely within the corporate boundaries of the Village of Evergreen” and that the village has “determined to exercise its police powers pursuant to a compelling interest to protect the health and safety of its residents and in the prevention of crime within the village” by contracting Empire Ranch to erect and maintain an unlocked gate that may be open or shut across Row Crop Road. (LF 653). The ordinance creates a criminal penalty with a \$500 fine and up to 90 days in jail if a person or association “interfere (sic) with said barricade or attempt to remove same.” (LF 654). Once again, the only signatures on this purported ordinance are those of Steven Plaster and Larry Weis. Nothing in the record discloses that

anyone else attended the meeting or that a quorum was present. There was also no evidence before the trial court that littering, livestock theft or any of the other “problems” the ordinance was allegedly designed to address were in fact prohibited by another ordinance of the Village of Evergreen. The ordinance does not authorize the signage that was on the gate. (LF 622).

The erection of the second gate and signs have caused confusion and caused people with relatives buried in the Orla Holman Cemetery to believe that they do not have the right to access the cemetery. (LF 998-999). The gate also caused cemetery patrons to have trouble accessing the cemetery. (LF 998-999, 1004-1005). With the current gate system installed, it is “pretty narrow with that gate up. That road is narrow anyway, and so I’m [Ms. Wilson] always afraid I am going to drop off this ditch and into the right hand.” (LF 1004-1005). At least one individual visiting from out of town had been hesitant to visit the cemetery due to the signage and her concerns over whether or not she was considered a “member” who could visit the cemetery. (LF 999, 1017).

The “Reasonableness” of Defendants’ Actions

The Defendants, through Steven Plaster, have indicated that placing gates across roadway is how they close roads within the Village of Evergreen (LF 580). A county commissioner testified at his deposition that it was the intention of Defendants to fence off the parking area between Row Crop Road and the cemetery, denying public access to the cemetery, even if Defendants lost this lawsuit. (LF 487, 1104). While the Village of

Evergreen receives governmental revenue from the state to be spent on roadways, it spends no funds on the maintenance of Row Crop Road. (LF 487, 588-589).

Although Evergreen, in its purported ordinance authorizing the second gate, claimed that it was restricting access to Row Crop Road to prevent crime, little evidence of any crime was introduced to the trial court. There was no evidence presented to the trial court that the “crimes” Evergreen allegedly sought to prevent were the subject of any other Village ordinance. Mr. Plaster testified as a trustee for Evergreen that he had only seen one vehicle travel down Row Crop Road that was not going to the cemetery in the entire time that the Plaster Trust had owned the Massey property. (LF 593). He also testified that there had only been one incident of poaching since the cemetery area was annexed into the village and that there were numerous instances of poaching all over the village in other areas “a lot more times than anybody knows about,” and that littering had only occurred two or three times since the Plaster Trust had owned the property. (LF 594-595). The Chief of Police for Evergreen, who did not have state law enforcement certification for at least two or three years at the time of his deposition, testified that although there was littering of “pickup loads” of trash in other areas in the village, there was no more than “just a couple of beer cans” recently near Row Crop Road and only “one bag” of trash that he knew of ever in that area. (LF 1049). Similarly, fences were cut in other areas of the village along roads that were approximately eight miles away from Row Crop Road, but the fence along Row Crop Road had not been cut. (LF 1051). The ordinance, while criminalizing interference with the

Village's "barricade" on Row Crop Road, did not criminalize poaching, trespassing, littering or stealing.

Use of Row Crop Road and Parking Area Not Permissive

During summary judgment proceedings, Defendants claimed that Plaintiffs' use of the parking area to access the cemetery had been "with permission." Defendants filed an affidavit from Billy Ray Massey, the owner of the area around Row Crop Road and the cemetery prior to it being transferred to the Plaster Trust in 2002, stating that cemetery patrons used Row Crop Road "with my father's permission" and would "drive up Row Crop Road and park on our property, then walk across our property to the cemetery." (LF 550-551). Mr. Massey's affidavit further stated that he "did not recall there having ever been a dispute with anyone responsible for the cemetery." (LF 551). During his deposition, Mr. Massey explained his affidavit, stating that someone from Defendants' attorney's office had written the affidavit (LF 539-540). When asked who had been given permission to visit the cemetery, Mr. Massey testified that, "I gave nobody permission, I denied nobody" permission to access the cemetery and that, as far as he knew, his father "give nobody any permission, they visited when they wanted to." (LF 540). Mr. Massey could not testify that the words in his affidavit were his words. (LF 540).

Mr. Plaster's deposition testimony explains further what he meant by "permission." He testified that the Masseys "had never required anybody to ask them" to visit the cemetery and had never denied anyone the right to do so. (LF 591). He added "I don't think anybody [from the Defendants or Empire Ranch] has told anybody they couldn't visit the cemetery."

(LF 592). Mr. Plaster could not identify anyone that ever asked if they could visit the cemetery or use the parking area. (LF 592-593).

After both parties had submitted summary judgment motions to the Court and completed their responsive filings, the Court scheduled a hearing on both motions. (LF 10, noting December 6th Notice of Hearing). On December 14, 2006 the Court held the hearing and allowed both parties to argue their cases to it. (LF 10, Tr 1-33). Plaintiffs used a power point at the hearing to summarize their arguments and evidence, all of which are contained in the legal file.³ At the conclusion of the hearing, the Judge took the motions under advisement and set the case for a three day trial on April 23, 2007. (LF 10). A little over a month later, on January 29, 2007, the Court entered Judgment in favor of Plaintiffs, granting them an injunction and preventing Defendants from placing restrictive signage on Row Crop Road or gating it. (LF 10, 1036-1038). This appeal followed.

Key Factual Errors in Defendants' Statement of Facts

³ This Power Point presentation is included in Respondent's Brief as an Addendum.

While it was not itself introduced into the court record or introduced into evidence, the items contained in it are references to items found within the legal file. While Plaintiffs recognize that the Power Point presentation may not formally be a part of the record before this Court, they provide it to the Court as part of the addendum for its use in organizing the voluminous information provided by the parties in the legal file.

Defendants' fact statement incorrectly claims that "Orla Holman Cemetery and Row Crop Road... lie entirely within the corporate limits of the Village of Evergreen." (Defendants' Brief, 2). To the contrary, the annexation ordinance upon which Defendants rely specifically excepts from annexation, "the one acre... used for cemetery" purposes and "any part [of the Massey farm] deeded, taken or used for road or highway purposes." (LF 646).

Defendants' claim that the use of both Row Crop Road or the parking area were permissive is contradicted by the record before the trial court. Defendants rely for their claim on *ex parte* affidavits of Stephen Plaster and Billy Ray Massey. Both affidavits were discredited or recanted during their respective depositions. At depositions, neither Stephen Plaster nor Billy Ray Massey could identify any person to whom they or previous owners of the land surrounding Holman Cemetery and Row Crop Road had given or denied permission to use the road and parking area. As Mr. Plaster explained, "I don't know that anyone has to have permission to visit the cemetery" and further stated that no one has to have permission from the Village of Evergreen or otherwise to visit the cemetery. (LF 582, 591).

ARGUMENT

SUMMARY OF ARGUMENT

Summary judgment was properly granted in favor of Holman Cemetery and Ms. Rector. Defendants' barricading and attempted closure of Row Crop Road was both illegal and unreasonable. (Substitute Brief, p. 24-28, 31-39, 47-50). Even assuming Evergreen's annexation ordinance was valid, which is open to question, Row Crop Road and Holman Cemetery are specifically and explicitly exempted from the annexation. (Substitute Brief, p. 28-31). The legal description contained in the ordinance unambiguously excludes from annexation all areas "deeded, taken or used for road or highway purposes." (Substitute Brief, p. 28-31, 46-47).

The location of Row Crop Road and the parking area was known to both parties, depicted on a survey done for Defendants, and Row Crop Road had been a county road, maintained by the county and used by the public, since at least the 1950s. (Substitute Brief, p. 46-47). Because Defendants did not annex any roads, it had no power to control the road by Evergreen's purported annexation of the Massey Farm. (Substitute Brief, p. 28-31). Even assuming Evergreen did have some authority to regulate traffic on Row Crop Road, its actions here were unreasonable and exceeded its police powers as a matter of law (Substitute Brief, p. 35-39, 47-50).

Defendants' claims that Plaintiffs only used Row Crop Road and the Parking area with permission are both irrelevant and based on conclusory and contrived affidavits that cannot, as matter of law, prevent summary judgment in favor of Plaintiffs. (Substitute Brief, p. 50-55). The trial court acted properly in issuing an injunction to protect Plaintiffs and any

complaints Defendants might have had should have been, but was not, raised before the trial court. (Substitute Brief, p. 58-62).

I.

THE TRIAL COURT DID NOT ERR IN ENTERING SUMMARY JUDGMENT IN FAVOR OF PLAINTIFFS BECAUSE PLAINTIFFS WERE ENTITLED TO JUDGMENT AS A MATTER OF LAW IN THAT THE UNDISPUTED FACTS ESTABLISHED THAT THE VILLAGE OF EVERGREEN DID NOT HAVE THE AUTHORITY TO PERMANENTLY GATE ROW CROP ROAD, POST NOTICES THAT ROW CROP ROAD WAS CLOSED, AND THE VILLAGE OF EVERGREEN'S RESTRICTIONS ON THE USE OF ROW CROP ROAD WERE NOT A VALID AND REASONABLE EXERCISE OF POLICE POWERS.

Standard of Review

The Trial Court's injunction was proper and should be sustained by this Court under the applicable standard of review. As Defendants note in their brief, an award of summary judgment is reviewed *de novo*. (Appellants' Brief, Page 9); *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993). Summary judgment is proper when a party demonstrates that it is entitled to judgment as a matter of law on facts that are not in dispute. *Id.*, Rule 74.04 Mo. Rules of Court.

A material issue of fact is only in dispute when the record contains competent evidence that two plausible, but contradictory accounts of essential facts exist. *Sundermeyer v. SSM Regional Health Services*, 271 S.W.3rd 552, 553-554 (Mo. banc 2008). A genuine dispute does not exist simply because the party against whom summary judgment is sought makes any argument or claim, regardless of its credibility, in opposition to a fact claimed by

the movant. Rather, a genuine issue only exists and summary judgment may only be blocked where the claim raised by the non-movant, in this case the Plaster Trust, is not “merely argumentative, imaginary, or frivolous.” *Deer Run Property Owners Association v. Bedell*, 52 S.W.3d 14, 19. (Mo. App. S.D. 2001).

While the record is reviewed in the light most favorable to the non-moving party, the appellate court must review the *whole* record, including all responses, replies and sur-replies filed with the court. Rule 74.04, Mo. Rules of Court; *Colbert v. Mutual Benefit Life Insurance Company*, 608 S.W.2d 119, 120 (Mo. App. W.D. 1980). If summary judgment can be sustained on any theory, even if it is different from that used by or even presented to the trial court, the judgment must be affirmed. *ITT Commercial Finance Corp.*, 854 S.W.2d at 387-388; *Birdsong v. Christians*, 6 S.W.3d 218, 223 (Mo. App. S.D. 1999).

Introduction

Defendants had no authority to barricade Row Crop Road, place a locked gate across it or attempt to close the road. The trial court’s judgment was correct properly protecting the access of Plaintiffs and the public at large to both the road and Holman Cemetery.

Defendants’ Point Relied On I is without merit. While the Village of Evergreen has some authority delegated to it by the State regarding the regulation of streets within its boundaries, it does not have any sweeping power with respect to regulating county roads in general or Row Crop Road in particular. Neither does it have the power to prevent access to Holman Cemetery and close all or part of Row Crop Road, a county road, to the public, under the police powers.

No Statute Authorizes Villages to Regulate County Roads

It is long settled law that any road, such as Row Crop Road, that has been used and maintained continuously by the public for the prescriptive period is a public road. *Reardon v. Newell*, 77 S.W.3d 758, 761 (Mo. App. S.D. 2002); *Whittom v. Alexander-Richardson Partnership*, 851 S.W.2d 504 (Mo. banc 1993); Section 228.190 and 516.010 RSMo. Moreover, the public easement so established “extends to the traveled portion of the way.” *State ex rel Perkins v. Taylor*, 666 S.W.2d 853, 857 (Mo. App. S.D. 1984). Defendants, in their brief, appear to concede the obvious and undisputed fact that Row Crop Road is a legally established county road.

Here, the undisputed evidence is that the “traveled portion” of Row Crop Road includes “all” the parking Area and that portion of the road where the Defendants have erected and maintained a gate. Though used and maintained as a public road for over 50 years, Row Crop Road and the parking area have never been deeded, dedicated, platted, condemned, used or maintained as a village street.

Missouri statutes make a clear demarcation between the power of villages to regulate “streets” while granting them little or no power to regulate county roads and highways. The statutes relied on by Defendants to claim a contrary power to barricade all or part of Row Crop Road, such as Sec. 80.090 and Sec. 304.120, RSMo., are striking examples of statutes that permit regulation, albeit limited, of village *streets*. By contrast, general provisions regarding the establishment and vacation of public roads such as Row Crop Road are provided for in Chapter 228 RSMo. General provisions relating to construction and

regulations of public roads are found in Chapter 229 RSMo. Defendants repeatedly and incorrectly refer to Row Crop Road as a street.

Defendants rely specifically on Sec. 80.090(34) RSMo. as their primary authority for regulating Row Crop Road. That section, in critical part, provides that a village may “open, clear, regulate, grade, pave or improve the *streets* or *alleys* of such town.” (Emphasis added.)

There is no evidence that the Village of Evergreen has ever sought to “locate and lay out streets” or condemn any land for streets. See Sec. 80.090 (30)(31) and (33) RSMo.

The second statute relied on by Defendants to support their claim to regulate Row Crop Road is Sec. 304.120 RSMo., which provides, in relevant part, that a municipality, such as the Village of Evergreen, may “[m]ake additional rules of the road or traffic regulations” and “[e]stablish one-way streets and provide for the regulation of vehicles thereon.” The ordinance here has nothing to do with traffic safety or preventing traffic congestion. On the contrary, the gate creates traffic congestion at the intersection with a state highway and impedes safety, because vehicles approaching from opposite directions cannot safely pass through the gate. The threatened fence across the parking area, an area long used by the public to access the cemetery both on foot and by vehicle, is also not designed to establish a “rule of the road or traffic regulation.”

Nothing in either Section 80.090 or 304.120 authorizes the permanent barring of the public from a designated public road by the erection of a gate, one half of which is locked, and another half of which, at the whim of Defendants, may be swung shut and locked in a matter of seconds. (LF 485, 599). Indeed, nothing in any statutes cited even remotely

suggests that villages may place obstructions, barricades or signage asserting that the road is “CLOSED” on county roads and highways. It should come as no surprise to the Court that essentially every case upon which Plaintiffs rely involved a municipality attempting to regulate a village street rather than a county road or highway.⁴ Municipalities simply do not have the absolute right to barricade established roads and limit access to public places such as a county-owned cemetery that is asserted by Defendant. (Appellant’s Brief, p. 11).

For example, the power of a municipality to regulate structures and land used for “trade, industry, residence or other purposes” does not extend to a municipality using zoning, also a police power, to restrict the use of public property of another political subdivision. *Normandy School District v. City of Pasadena Hills*, 70 S.W.3d 488, 494 (Mo. App. E.D. 2002). Absent clear statutory authority, one political subdivision of the state, such as a village, cannot exercise its police powers over property of another political subdivision, such as a county government. Municipalities can exercise only such powers as are expressly or impliedly conferred on them and, in the event the power is doubtful, “it must be construed as not having been granted.” *Fidler v. Personnel Committee for City of Raytown*, 766 S.W.2d 158, 160 (Mo. App. W.D. 1989).

Purported Annexation of Massey Farm Does Not Give Defendants’ Power to Barricade Row Crop Road

It is a well established principle that a county or state road that passes through a municipal corporation does not become the property of that municipal corporation simply

⁴ That distinguishing characteristic will be mentioned as cases cited by the Defendants are

because the area around it has been annexed into the city. *Kroeger v. St. Louis County*, 218 S.W.2d 118, 120 (Mo. 1949); *see also St. Charles County v. Dardenne Realty Company*, 771 S.W.2d 828, 830 (Mo. banc 1989). Even assuming the Massey Farm is within Evergreen's Village limits, Row Crop Road and the cemetery clearly are not streets of Evergreen.

The cases cited to the contrary by Defendants, *Duckworth v. City of Springfield*, 184 S.W. 476 (Mo. App. 1916) and *Foster v. Kansas City*, 90 S.W. 751 (Mo. App. 1905) do not alter this conclusion. Unlike this case, neither *Duckworth* nor *Foster* dealt with a specific ordinance that exempted roadways from the terms of the annexation. *Foster* held only that a municipality that had a "state road" within its corporate limits that was no longer maintained by the county, assumed a duty to keep "it in repair." It did not authorize the municipality to close a presently maintained county road.

The *Duckworth* case actually holds that although National Avenue in the City of Springfield remained beyond city control, because it belonged to the federal government, the city was liable for its construction of sidewalks because it built them under a specific permit from the Secretary of War. *Duckworth*, 184 S.W. at 477-478. Additionally, neither case dealt with the situation where a road is specifically excluded by the terms of the annexation or with attempts by a municipality to close all or part of a currently maintained county road. Even if *Duckworth* or *Foster* ever stood for the proposition that because a county road passes through a town it becomes a street of the municipality, both were limited, if not implicitly overruled, by the later Missouri Supreme Court cases of *Kroeger* and *St. Charles County*,

discussed below.

supra. Under the plain and unmistakable language of the very statutes Defendants rely on, their power is limited to the regulation of traffic safety on streets and does not, either by express words or necessary implication, extend to the regulation of county maintained roads and highways. In no event is a village authorized to place barricades on county roads or highways that prevent or inhibit safe passage of two-way traffic.

Row Crop Road Unambiguously Excluded from Purported Annexation

Row Crop Road, including the portions of the parking area used to access the cemetery, were never annexed into the Village of Evergreen. The ordinance of annexation specifically exempts property taken or used for road purposes and property conveyed for cemetery purposes from the area annexed. (LF 832-836).⁵

⁵ The annexation ordinance itself is not valid on its face. The Chairman of the Board of Trustees for the Village of Evergreen, Steven Plaster, stated that the necessary quorum of the Village Trustees is three persons. The minutes of the meeting where the ordinance of annexation was adopted reveals that only two persons were present at the meeting. (LF 655).

Thus, the Massey Farm itself is not even within the corporate limits of the Village of Evergreen. It is a long standing rule of law in Missouri that “[o]ur cities cannot acquire territory ‘by conquest,’ and claim the rights of a de facto government therein.” *Douglas v. City of Kansas City*, 147 Mo. 428, 48 S.W. 851, 853 (Mo. 1898). That is exactly what the Village of Evergreen has attempted to do by purporting to regulate access to a road, parking area and cemetery that were never annexed or incorporated into the village. While Plaintiffs had not yet presented this argument to the trial court at the time summary judgment was

When an appellate court interprets a municipality's ordinances, it must do so according to the same standards and general rules of construction used to understand state statutes. *State ex rel Teffey v. Board of Zoning Adjustment of Kansas City*, 24 S.W.3d 681, 684 (Mo. banc 2000). An appellate court's principal duty in analyzing a statute is to give effect to the words "in their plain and ordinary meaning" and to only construe them outside of that meaning if the language is ambiguous or leads to an illogical result. *American National Life Insurance Co. of Texas v. Director of Revenue*, 269 S.W.3d 19, 21 (Mo. banc 2008). The meaning of a statute is a question of law, not a question of fact. *Estate of Hayden*, 258 S.W.3d 505, 508 (Mo. App. E.D. 2008). A court cannot create ambiguity from outside the statute or ordinance when its words are plain and no ambiguity exists in the text. *Cook v. Cook*, 97 S.W.3d 482, 485 (Mo. App. W.D. 2002); *See also Ludwigs v. City of Kansas City*, 487 S.W.2d 519, 512 (Mo. 1972).

The plain language of the annexation ordinance clearly states that "any portion" of the Massey property taken, deeded, or used for road purposes is excepted from the annexation. The undisputed evidence before the trial court and presented to this Court was that Row Crop Road stretched from Highway V past the Holman Cemetery and was surrounded by the

granted, choosing instead to rely on other arguments, this Court can affirm the trial court's ruling for any reason supported by the record, including an argument not raised to the trial court. *Birdsong*, 6 S.W.3d at 223; *Labor Discount Center, Inc. v. State Bank & Trust Co. of Wellston*, 526 S.W.2d 407, 426 (Mo. App. 1975).

Massey property on all sides except at its terminus. There was no dispute concerning where its physical location was on the earth, and Defendants themselves even put before the trial court a survey depicting its location according to metes and bounds. (LF 39, 58-59).

This Court cannot and should not ignore the language of the annexation ordinance and create, where none exists in the plain language, ambiguity. *See, e.g., Huter v. Birk*, 510 S.W.2d 177, 182-183 (Mo. 1974)(location of a road in question was not the primarily disputed matter); *Colbert v. Nichols*, 935 S.W.2d 730, 733 (Mo. App. S.D. 1996)(finding that description “sufficiently specific under the circumstances”); *Johnston v. Bates*, 778 S.W.2d 357, 365-366 (Mo. App. E.D. 1989)(finding while a more precise description may have been better, the description in an easement was sufficient).

There is no dispute between the parties, and no question on the record before this court, as to the physical location of Row Crop Road. The facts before the trial court firmly establish the location of Row Crop Road. (LF 39, 58-59). Neither Plaintiffs nor Defendants contested the physical location of the road. Indeed, the trial court had before it a survey, prepared by a professional surveyor at the request of Robert Plaster depicting the location of the cemetery, Row Crop Road, the Parking Area, (LF 39, 58-59) and Highway V and of Row Crop Road in relation to the Massey Property that was allegedly annexed by Evergreen. (LF 39, citing Exhibit C, survey of Massey Property, Row Crop Road and Orla Holman Cemetery; LF 58-59; LF 281; Exhibit H filed with the Court). According to Plaintiffs’ own documents, the Massey Farm was purportedly annexed by Ordinance No. 03-01, subject to the exception “any portion thereof used” for roads. (LF 40-41).

Even if Row Crop Road Were a Village “Street,” Evergreen May Not Barricade It

Even assuming the Village of Evergreen has some unwritten and heretofore unknown authority to treat Row Crop Road, a county maintained road, as its own village street, it has long been a principle of Missouri law that public streets in a municipality are held in trust for the use of the public and a municipality does not have the power to permit another use for a street, even if it attempts to do so by ordinance. *Lockwood v. Wabash R. Co.*, 122 Mo. 86, 26 S.W.698, 702 (Mo. 1894); *Stout v. Frick*, 333 Mo. 826, 827-28; 62 S.W.2d 1057,1058 (Mo. 1933); *City of Poplar Bluff v. Knox*, 410 S.W.2d 100, 103 (Mo. App. S.D. 1966).

Both *City of Poplar Bluff v. Knox* and the *Lockwood v. Wabash R. Co.* are instructive on this issue. A municipality, including in the *Lockwood* case, the City of St. Louis, does not have the power to “authorize such use of a street dedicated as street as will destroy it as a thoroughfare for public use” and does not have the authority under its police power to act “inconsistent with the rights of the public or abutting property owners” to travel on the road. *Lockwood*, 26 S.W. at 701.

In *Lockwood*, the public access to a street was blocked for just three and a half hours a day by railroad cars. *Id.* at 699. That interference was held “inconsistent with the rights of the public.” *Id.* at 701. The village in this case has done exactly what *Lockwood* and its progeny prohibit: it claims to use its police power to place signs and barricades designed to bar the public from using a road for the benefit a private landowner, a use wholly inconsistent with the public’s right to use the road and to access the cemetery.

The right to use a public street is vested in the public, and absent the proper procedure for vacating a street or for abandonment, it cannot cease to be a street available for use by the public. *McDonald County Special Road District v. Pickett*, 694 S.W.2d 273, 276 (Mo. App. S.D. 1985). Here, Defendants' make no claim that Row Crop Road has been vacated under the proper procedures or that it has been abandoned for the necessary five year period. See § 228.190.1 RSMo. As has been long noted, a public road cannot be abandoned absent actions by the public showing that they no longer intend to use the road and have, in fact, abandoned it. *Connell v. Baker*, 458 S.W.2d 573, 577 (Mo. App. 1970).

In *City of Poplar Bluff*, the court specifically held that “[l]and dedicated to a public use as a street cannot be diverted from that use and a city has no right to permanently obstruct the public highway...[Any] ordinance undertaking to do so is ultra vires and void.” 410 S.W.2d at 103. In that case, Bartlett Street in the City of Poplar Bluff had been deeded to the city in 1887 and had since that time “masqueraded as a thicket and briar patch.” *Id.* at 102. and the defendants had placed fence across it and constructed a home, barn and other outbuildings within the street. *Id.* At some point the city recognized the unused street and sought to eject the defendants from it. *Id.* As the court noted, dedicated streets are held in trust for the public use and may not be permanently obstructed, even if the area in question has never been used as a street or maintained. *Id.* at 103. Here, Row Crop Road has been used as a public road, continuously for more than 50 years and is, even now, still being maintained by Laclede County. The Village of Evergreen cannot, by its signage declaring the “Street Closed” and barricading the road, bar the public from this public road.

The Defendants cite *Jones v. City of Jennings*, 595 S.W.2d 1 (Mo. App. E.D. 1979) and similar cases for the proposition that Evergreen has the authority to barricade and block a street. Defendants either misunderstand or misapply these authorities. In *Jones*, the barricade the city erected, while it permanently blocked a *street*, it did not prevent all ingress and egress to a particular area by the public. *Id.* at 2. Rather, the city only restricted access to a street from a particular direction and any person wishing to travel on that street could simply go around and enter from the other direction. *Id.* The court specifically recognized that property owners have a right of ingress and egress to the system of public roads. *Id.* at 3. Here, the Village of Evergreen signage purports to deny *all* access to the cemetery and its barricade has not created a mere “circuitry of route,” but has eliminated safe passage of two-way traffic at the gate and placed signage asserting the road is “Closed” and “Keep Out.” (LF 622). The undisguised purpose of Defendants is to permanently foreclose the general public from all access to the cemetery. As Mr. Plaster stated in his deposition, placing gates across a road, as Evergreen did here, is how the Village closes a road. (LF 580). Evergreen’s ordinance authorizes a gate that the Defendants may open or shut, as they please, and criminalizes any interference with that barricade, and does not criminalize the conduct Defendants claim they wish to prevent. (LF 844). Additionally, *Jones* involved a city street, apparently dedicated as such by plat dedicating the street in 1955. *Id.* at 2. No such dedication to the village was made here.

Defendants’ claim that the gate is over only one-half of the roadway and the other half is unlocked, is a red herring. Specific signage put up by the Village denies the public any

access at all and the gate can be swung shut and locked by the city, as it has been done previous to this lawsuit being filed.

Defendants' similarly misunderstand and misconstrue *Normandy Fire Protection District v. Village of Pasadena Park*, 927 S.W.2d 516 (Mo. App. E.D. 1996). In that case, the Village Trustees ordered the barricades only to control access to the system of roadways and funnel traffic down one particular *street* into a subdivision. *Id.* at 517. The ordinance there did not purport to prevent all access to the public to the roadways nor did the village erect signs claiming to do so. *Id.* Once again, the court specifically recognized that a barricade, even a permanent one, can be used to "re-route traffic" but did not rule, as Defendants would like this Court to believe, that access to a particular road in all directions and to a particular public place, such as a cemetery, in all directions, can completely be cut off from the public. *Id.* Here if Defendants "shut" the gate, as its ordinance authorizes, any member of the public who "interferes with said barricade," even by opening it to escape being trapped inside, will face up to 90 days in jail, a fine or both. (LF 843-844).

Deutsch v. City of Ladue, also cited by Defendants, Appellants' Brief, Page 18-19, does not on its face deal with the situation that exists here. 728 S.W.2d 239 (Mo. App. E.D. 1987). Although in *Deutsch* there was no access from the City of Ladue to the project located in University City, there was no evidence that the land could not be accessed from some other direction or from University City itself. *Id.*

The right of ingress and egress to the public system of streets and highways is well recognized under Missouri law and municipalities simply are not allowed to completely

destroy access by exercise of their police power, regardless of what Defendants may wish. See e.g. *State ex rel Highway Commission v. Meier*, 388 S.W.2d 855, 857 (Mo. banc 1965); *Wilhoit v. City of Springfield*, 171 S.W.2d 95, 98 (Mo. App. 1943).

Actions Are Not Reasonable Exercises of Police Power

Evergreen's actions in barricading Row Crop Road and placing signs on it telling the public the road is closed were not reasonable. Missouri law indicates that the reasonableness of a municipality's use of its police powers ought to be a question of law. In *Wilhoit v. City of Springfield*, 171 S.W.2d 95 (Mo. App. 1943), the Court of Appeals analyzed the reasonableness of a city traffic ordinance (relating to parking meters) in terms of a question of law. *Id.* at 98. Its holding did not rely on finding of facts of trial court in researching its conclusion, and simply examined the issue of reasonableness directly. *Id.* In *White v. St. Louis & San Francisco Railway Co.*, it addressed an ordinance of the City of Marshfield that purported to limit trains to four miles an hour or less in speed. 44 Mo. App. 540, 541 (Mo. App. 1891). The court held that the ordinance was unreasonable, noting that whether the ordinance "is reasonable or not, the facts being uncontroverted, is a question of law." *Id.* at 542-543.

Other jurisdictions have not been silent on the issue. It was dealt with in Texas by its Court of Appeals. *City of Coleman v. Rhone*, 222 S.W.2d 646, 650 (Tx. Civ. App. 1949). In that case, the court was asked to determine whether a city regulation creating fire lanes was a reasonable exercise of police power. *Id.* The court ruled that "under the weight of authorities, the issues as to the reasonableness and necessity of the ordinance in question are

a matter of law for determination by the court and not fact questions for a jury.” *Id.* The court held that it was error to submit the issue as a fact question to the trier of fact. *Id.* Both the Texas Supreme Court and the Supreme Court of Wisconsin have also declared that the reasonableness of a use of police power is an issue of law, not of fact. *Steinbach v. Green Lake Sanitary District*, 715 N.W.2d 195, 200 (Wis. 2006); *City of College Station v. Turtle Rock Corp.*, 680 S.W.2d 802, 804-805 (Tex. 1984).

Defendants’ claim that the Village of Evergreen’s actions are nothing more than reasonable and lawful exercises of its police powers is erroneous. (Appellants’ Brief, Page 14-17). As the sole legal support for their claim, Defendants have cited *City of Jennings*, *Normandy First Protection District* and *City of Ladue* all which have been dealt with by Plaintiffs, *supra*.

The Village of Evergreen’s barricading and signing of Row Crop Road was an unreasonable exercise of police powers. First, as Plaintiffs have noted on numerous occasions, the gate across Row Crop Road is not unlocked. Rather, it is a two panel gate system, with one panel locked to the ground and the other swung open. (LF 485, 599). The gate can be easily “shut” (as authorized by the ordinance) in just a matter of seconds by pulling it shut, placing a chain across it and putting a padlock on. Prior to the filing of this lawsuit, that is in fact what Defendants did with the first gate. (LF 484, 575, 662-663). Unlike the cases cited by Plaintiffs, this is not an attempt to redirect or regulate traffic flow. Rather, it is part of a scheme by a single landowner, or at best a very small group of landowners, to deny the public access to a county road and to a county owned cemetery.

Defendants claim throughout their brief that the Village of Evergreen has the right to reasonably exercise its “police powers” to protect the public living inside its boundaries by closing and prohibiting the public’s access to Row Crow Road. (Appellants’ Brief, Pages 11-12). The Village of Evergreen is anything but the typical Missouri municipal corporation. Although it encompasses a huge geographic area of 10,000 acres, the Village of Evergreen’s population consisted of only 42 people, according to the 2000 Census. That results in a population density of 4 persons per square miles, as compared to Missouri’s population density of 81.2 persons per square mile per the 2000 Census. Except for one individual, the Plaster Trust and Empire Ranch, which is owned by the Plaster Trust or its affiliates, own all of the land in the Village of Evergreen. (LF 1045). Steven Plaster the co-trustee of the Robert Plaster Trust, acts as chairman of the board for the Village of Evergreen. (LF 833). Other officers of the Village, including its alleged Chief of Police, are employees of the Plaster Trust and the few persons who make up the population of the Village of Evergreen are employees of Empire Ranch, the Plaster Trust or their families, living in housing provided to them as part of their compensation. (LF 1046). The Village of Evergreen is part of a massive spread of agricultural land consisting of over 10,000 acres. (LF 571). The rural nature of the area through which a municipality purports to regulate travel is relevant in accessing the reasonableness of its use of policy powers. *See, White v. St. Louis & San Francisco Railway Co.*, 44 Mo. App. at 540-541.

Under the circumstances present in this case, the Village of Evergreen’s actions are clearly not reasonable. What is a reasonable exercise of police power is “tested largely by

ordinary usage and knowledge gained in common experience.” *Wilhoit v. City of Springfield*, 171 S.W.2d at 98. Here, the minimal crimes that Defendants seek to prevent are littering, vandalism, poaching, and “other criminal activities.” Rather than adopting an ordinance that directly prohibits these offenses, Defendants instead would impose harsh penalties for the interference with the “barricade.” The record shows limited, if any, improper activity on Row Crop Road compared with other parts of the Village. (Appellants’ Brief, Page 19; LF 593-595, 1049).

Additionally, the signs placed by the Village of Evergreen severely restrict the public’s access to the road and even people who have family members buried in the cemetery. The sign claims that the entire road is closed to the public and limits the time during which “members” of the cemetery may visit to daylight hours. A picture of the sign is included in the Appendix to this brief. (LF 485-486; 577-578, 622). This language is confusing to the public and has caused individuals coming to visit the cemetery from out of town to be hesitant to visit. (LF 999, 1017). No ordinance authorizes the signage. Additionally, the gate system currently in place makes it very difficult and even dangerous for members of the public to get to the cemetery. (LF 1004-1005).

Based on the minimal threat of harm involved, and the draconian nature of Defendants’ actions prior to the filing of this lawsuit, and its actions and threats of constructing fences and adopting harsh penalties since, leave little doubt that Evergreen’s exercise of police power under these circumstances has not been reasonable.

Defendants’ Improper Point Relied On Precludes Review

All Points Relied On raised by Defendants in their brief, including Point Relied On I, violate Rule 84.04(d) by combining multiple claims of error, thus precluding this Court from reviewing Defendants' claims. Rule 84.04(d) provides that a Point Relied On must identify a single legal error, and "state concisely the legal reasons" for the claim of error as well as why the facts of the case support the claim of reversible error. In applying Rule 84.04, this Court has prohibited "multifarious points." *Christeson v. State*, 131 S.W.3d 796, 799 (Mo. banc 2004). A multifarious point combines "disparate contentions of error into a single point relied on" and preserve nothing for the Court to review on appeal. *Rushing v. City of Springfield*, 180 S.W.3d 538, 539 (Mo. App. S.D. 2006). This Court has stated that it will review the point on the merits unless it is "so deficient that its fails to give notice to this Court and to the other parties as to the issues presented on appeal." *Christeson*, 131 S.W.3d at 799.

Here, Point Relied On I improperly joins multiple allegations of error into a single claim, making it nearly impossible for Plaintiffs to understand the claim of error let alone present an organized and logical response. Point Relied One I states as its allegation of error that the trial court erred in entering summary judgment without any further elaboration. (Appellant's Brief, Page 11). In the "in that" section of the point, the Plaintiffs allege essentially five unrelated errors or mistakes supposedly made by the Trial Court on legal issues. (Appellants' Brief, Page 11). These allegations range from a claim that the Village has a legal right to regulate and control all roads in its boundaries, that its ordinances with respect to Row Crop Road placed only "reasonable restrictions" on the road, to the claim that

a specific statute does not “prevent the Village of Evergreen’s police powers.” (Appellants’ Brief, Page 11). None of these five allegations are directly tied together.

II.

THE TRIAL COURT DID NOT ERR IN GRANTING PLAINTIFF SUMMARY JUDGMENT BECAUSE THERE WERE NO DISPUTED ISSUES OF MATERIAL FACT, IN THAT PLAINTIFF SHOWED THE VILLAGE OF EVERGREEN UNLAWFULLY AND IMPROPERLY PROHIBITED THE PUBLIC'S ACCESS TO ROW CROP ROAD AND HOLMAN CEMETERY, THAT THE VILLAGE OF EVERGREEN HAD UNREASONABLY TRIED TO EXERCISE ITS POLICE POWERS TO PREVENT ACCESS, AND THAT THE PUBLIC AND MEMBERS OF THE CEMETERY ASSOCIATION HAD A RIGHT TO ACCESS NOT ONLY ROW CROP ROAD BUT THE PARKING AREA.

Standard of Review

The Trial Court's injunction was proper and should be sustained by this Court under the applicable standard of review. As Defendants note in their brief, an award of summary judgment is reviewed *de novo*. (Appellants' Brief, Page 9); *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1999). Summary judgment is proper when a party demonstrates that it is entitled to judgment as a matter of law on facts that are not in dispute. *Id.*, Rule 74.04 Mo. Rules of Court.

A material issue of fact is only in dispute when the record contains competent evidence that two plausible, but contradictory accounts of essential facts exist. *Sundermeyer v. SSM Regional Health Services*, 271 S.W.3rd 552, 553-554 (Mo. banc 2008). A genuine dispute does not exist simply because the party against whom summary judgment is sought

makes any argument or claim, regardless of its credibility, in opposition to a fact claimed by the movant. Rather, a genuine issue only exists and summary judgment may only be blocked where the claim raised by the non-movant, in this case the Plaster Trust, is not “merely argumentative, imaginary, or frivolous.” *Deer Run Property Owners Association v. Bedell*, 52 S.W.3d 14, 19. (Mo. App. S.D. 2001).

While the record is reviewed in the light most favorable to the non-moving party, the appellate court must review the *whole* record, including all responses, replies and sur-replies filed with the court. Rule 74.04, Mo. Rules of Court; *Colbert v. Mutual Benefit Life Insurance Company*, 608 S.W.2d 119, 120 (Mo. App. W.D. 1980). If summary judgment can be sustained on any theory, even if it is different from that used by or even presented to the trial court, the judgment must be affirmed. *ITT Commercial Finance Corp.*, 854 S.W.2d at 387-388; *Birdsong v. Christians*, 6 S.W.3d 218, 223 (Mo. App. S.D. 1999).

Introduction

Defendants’ arguments in Point Relied on II, consisting primarily of non-existent factual disputes or legal conclusions, are without merit. To a large extent, Defendants’ arguments rest upon painting an inaccurate and incomplete version of the facts. By contrast, the undisputed evidence presented to the trial court was that Defendants were obstructing Row Crop Road with barricades and signage and preventing the public from freely visiting the cemetery. The undisputed evidence established both the physical location of Row Crop Road and all facts necessary to establish that it was not annexed into the Village of Evergreen.

While as a general rule easements may be subject to police powers as Defendants claim, they are only subject to the reasonable exercise of police powers as authorized by law. Plaintiffs' rights are those of the general public to use a public road paid for and maintained by the county. Plaintiffs properly established their right under adverse possession, if indeed the parking area belongs to Plaster Trust, to use it and did not rely on improper conclusion as part of their Motion for Summary Judgment. Finally, the parking area exists as a public easement if on no other basis than as a way of necessity to the cemetery from Row Crop Road. The location of the parking area is apparent on Mr. Shotts' survey, a survey relied on by all parties. (LF 39, 58-59, 281).

Defendants' Actions Prevent the Public From Accessing Row Crop Road and Holman Cemetery

On the undisputed facts before the trial court there can be no question that the actions of Defendants obstruct and prohibit the public both from using Row Crop Road and accessing Holman Cemetery. Defendants disingenuously argue otherwise, stating "the general traveling public has access to Row Crop Road." (Appellants' Brief, Page 20). In support of their claim, Defendants identify two isolated statements in the record that certain individuals have been able to access the cemetery and that the county's road graders may still maintain Row Crop Road. (Appellants' Brief, Page 23-24). Defendants' rendition of the "facts" ignores completely the reality that by ordinance, signage, and threats, public access was denied to the cemetery.

Defendants have placed a sign on the gate to Row Crop Road explicitly barring the public and even individuals who may have business at Holman Cemetery from entering Row Crop Road. A picture of the sign is included in the Appendix to this brief. The actual language on the sign placed by Defendants tells the public to “Keep Out,” informing them that the road is “Closed by order of Evergreen Chief of Police.” (LF 485-486, 577-578). How Defendants can claim to this Court that the public has access to Row Crop Road when they have placed a sign on it demanding the public to “keep out” and threatening the public with criminal sanctions if they “interfere” with a barricade on the road is entirely unfathomable. Apparently Defendants believe the public should ignore criminal sanctions implicit in the signage and explicit in the purported ordinance. (LF 485-486, 577-578).

The situation is a little better with respect to individuals who have family members or friends buried in the Holman Cemetery. First, the sign only explicitly permits only “Orla Cemetery members” to use Row Crop Road to visit the cemetery. (LF 485-486, 577-578). There is no evidence in the record that every individual with a family member or friend buried at Holman Cemetery is an “Orla Cemetery member,” or may think of themselves as such. It is completely logical that individuals living out of state wishing to visit the graves of family members, amateur genealogists and even friends of the deceased would not be considered “members” of “Orla Cemetery.” In fact, at least one person visiting from out of town was hesitant to enter the cemetery due to the signs constructed by Defendants and her own confusion over whether or not he was considered a “member” who could use Row Crop Road. (LF 999, 1017).

The alleged ordinance purportedly passed by the Village of Evergreen is no better. It allows a private entity to erect and maintain gates across Row Crop Road and creates the risk of 90 days in jail if anyone “interferes in any way” with the barricade. (LF 653-654). Because one gate of the two-panel gate system is all ready locked, obstructing at least half the roadway, and the other may be locked simply by swinging it shut, Defendants have created a very risky situation for anyone entering the cemetery. Once they proceed up Row Crop Road, the gate could, within just a few seconds, be locked behind them, trapping them inside the cemetery and the roadway. Based on the Village of Evergreen’s new ordinance, any person who attempted to open a shut gate to escape the trap set by the Village would face 90 days in jail and a fine. (LF 654).

Before Defendants dismiss this circumstance as a wild speculation, they should recall that this exact situation happened in 2002 when the elderly Dorothy Buck and her son Mike were locked inside the previous gate erected by Defendants and trapped. (LF 484, 1090-1091). In order to escape the cemetery Mr. Buck was forced to dismantle the gate. Should he do the same today, under the Village’s new ordinance, he would be risking jail time and a fine. (LF 1091). Defendants’ response to their mistake of locking a cemetery patron in the cemetery and Row Crop Road was not to resolve the situation by removing their offending signage and gate. Rather, Defendants modified the hinges on the gate so that any person locked inside in the future would be unable to dismantle it and exit. (LF 601-602, 1091). The gate itself is a barricade designed solely to prevent and hinder access to the cemetery, and to eventually close the road.

The gate as it is installed is “pretty narrow” and creates a sense of concern in some cemetery patrons, including Mary Wilson, whose testimony is cited by Defendants. (Appellants’ Brief, Page 24; LF 1004-1005). The clear public policy for requiring that roads, by law, are to be thirty feet in width and free of obstructions is to allow vehicles traveling opposite directions to pass safely. *See* § 229.010 and 229.030 RSMo. That policy is thwarted by Defendants.

Defendants’ claim that the passages cited by them in their brief create a “disputed issue of material fact concerning access to Row Crop Road and the cemetery” offend common sense. (Appellants’ Brief, Page 25). As noted, *supra*, a genuine issue of material fact that prevents summary judgment is one which is “real, not merely argumentative, imaginary or frivolous” that shows there is “competent evidence that two plausible, but contradictory accounts of essential facts exist.” *Deer Run Assoc.*, 52 S.W.3d at 18-19; *Allison*, 949 S.W.2d at 187. In light of the fact the signs placed on the gates to Row Crop Road by Defendants are designed to threaten the public with criminal sanctions, state Row Crop Road is “closed” and claims to only permit “members” of some entity referred to as Orla Cemetery to visit during daylight hours, it is difficult to see how there can be anything but a “frivolous” dispute of facts, if there is indeed one at all, on the public’s ability to access Row Crop Road and the publicly owned cemetery.

No Dispute of Facts Concerning Location of Row Crop Road

There is no factual dispute concerning Row Crop Road or its location. The record before the trial court clearly unambiguously established its location by a survey prepared on

behalf of Robert Plaster, showing by a metes and bounds description of the road, as well as depicting it graphically. LF 39, 58-59; Exhibit H. There is not, on the briefs before this court or in the record before the trial court below, any dispute or even question regarding the *physical location* of Row Crop Road.

The dispute between the parties, regarding whether or not Row Crop Road was annexed into the Village of Evergreen is one of law, not fact. The language of the purported annexation ordinance clearly exempts “any part [of the Massey property] deeded, taken or used for road or highway purposes.” LF 651-652. The undisputed record also establishes that Row Crop Road has been in use since the 1950s and has been regularly maintained by the county. Whether or not “any part [of the Massey Farm] deeded, taken or used for road . . . purposes” was excepted from the annexation ordinance is a question of law to be resolved by the Court, and not a question of fact preventing summary judgment. *Estate of Hayden*, 258 S.W.3d 505, 508 (Mo. App. E.D. 2008).

Evergreen’s Exercise of Police Powers Against Rights of Plaintiffs is Unreasonable

Defendants claim that Plaintiffs were not entitled to summary judgment because any “easement rights” of Plaintiffs are subject to the Village of Evergreen’s police powers. (Appellants’ Brief, Page 25). Defendants’ argument misses the entire point. Plaintiffs pleaded, sought summary judgment on, and received judgment that Row Crop Road was a *public road* and that Defendants, including the Village of Evergreen, did not have the legal right to obstruct or by signage prohibit access. The reasonableness of an exercise of police powers is a question of law, not fact. *See Flower Valley Shopping Center, Inc, v. St. Louis*

County, 528 S.W.2d 749, 751 (Mo. banc 1975); See Plaintiff's argument under Point I, *supra*.

Plaintiffs have argued at length in Point I of this brief that the actions of the Village of Evergreen are not reasonable, and thus are not proper exercises of its police powers against any rights, including easement rights, of Plaintiffs and the general public. Based on the facts before the trial court, the unreasonableness of the Village of Evergreen's supposed exercise of its "police powers" is beyond dispute. The case cited by Defendants as their only authority for arguing to the contrary is *Nemours v. City of Clayton*, 175 S.W.2d 60 (Mo. App. 1943). Even that case recognizes that police power must be exercised in a "reasonable and proper" manner in the "furtherance of what is conceived to be the general welfare." *Id.* at 65.

In *Nemours*, the plaintiffs were challenging the City of Clayton's right to put up traffic signals at a busy intersection and prohibit parking on the street within a certain number of feet of the intersection. *Id.* at 62-63. Here, Defendants have undertaken to bar the general public from accessing at all a **public road** to a **publicly** owned cemetery. Here the ordinance and signs do not enhance traffic safety, but actually encumbers the safe passage of two-way vehicle traffic.

Defendants have taken their action, allegedly, to prevent crime though there was little, if any, evidence of a "crime wave" having occurred on or near Row Crop Road, despite what may have occurred in other parts of the Village. (LF 593-595). Only one vehicle had been observed traveling down Row Crop Road for a purpose other than visiting the cemetery since the Massey Farm had been allegedly within the Village. There had been one incident of

poaching near the cemetery since the incorporation of the Massey Farm into the Village. By contrast, there had been numerous similar incidents all over the Village “a lot more times than anybody knows about.” (LF 593-595).

Additionally, Defendants’ ordinance threatens a fine and jail time to individuals who are simply trying to use a public road to visit a public cemetery. (LF 654). The ordinance Appellant claims is so “reasonable” does not criminalize littering, poaching, trespassing or stealing, the problems which Defendants seek to address. It only criminalizes “interfering” with a “barricade” that may be shut, at Defendants’ whim, across a public road. To claim that the Village’s actions, even assuming they had legal authority to take them, were reasonable exercises of their police powers strains credulity, because they are in no way “reasonable.” The fact that the ordinance authorizes a barricade and criminalizes conduct wholly unrelated to the claimed purposes of the ordinance is powerful evidence of its unreasonableness as a matter of law.

Plaintiffs Have Established Right to Access Parking Area

The trial court properly concluded that the Plaintiffs had the legal right to access the parking area. Defendants make two assaults on this ruling. First, Defendants claim that a prescriptive easement is not available because some cemetery patrons, including one of the named plaintiffs, believe the parking area was part of the cemetery and belonged to the county. (Appellants’ Brief, Page 27). Second, Defendants’ claim that there was no evidence that anyone had consistently used the parking area without the “permission” of the Masseys,

the previous owners of the property. (Appellants' Brief, Page 28-29). Both of these arguments are totally without legal merit or factual support.

The claim by Defendants that the public use of Row Crop Road and the parking area was "permissive" is a red herring. First § 228.190 authorizes establishment of a road even if the use is "permissive," *Claybrook v. Murphy*, 746 S.W.2d 140, 143 (Mo. App. W.D. 1988); See also *Wilson v. Sherman*, 573 S.W.2d 456, 459 (Mo. App. 1978) (adjectives such as "open, adverse, notorious, continuous, uninterrupted, exclusive and hostile" have no application where road is established pursuant to § 228.190 RSMo.)

Moreover, as the record demonstrates, the explanation of the meaning of "permission" by Mr. Massey and Mr. Plaster wholly discredits the notion that any use by the public was with permission. The mere existence of a prior contrary affidavit by Mr. Massey that is at best conclusory and at worst disingenuous cannot prevent summary judgment in favor of Plaintiffs.. As this Court noted in *ITT*, "a party may not avoid summary judgment by giving inconsistent testimony and then offering the inconsistencies into the record in order to demonstrate a genuine issue of material fact." *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 388 (Mo. banc 1993); see also *Weaver v. State Farm Mutual Auto. Ins. Co.*, 936 S.W.2d 818, 822 (Mo. banc 1997) (conclusory affidavit cannot prevent summary judgment).

In any event, the public use met all the adjectives necessary to establish the road by common law prescription from V Highway all the way to the cemetery. Defendants bear the burden of showing that the use was permissive. *Strong v. Sperling*, 200 Mo. App. 66, 205

S.W.266, 269 (Mo. App. 1918). Defendants needed to show that permission had been solicited for use of the parking area when it originally came into use and they have not done so. *Carpenter-Union Hills Cemetery v. Camp Zoe, Inc.*, 547 S.W.2d 196, 202 (Mo. App. 1977).

Even assuming this case involved a prescriptive easement rather than a statutory easement under § 228.190 RSMo., the Missouri Supreme Court has said regarding prescriptive easements:

In the context of prescriptive easements, to be adverse, it is necessary only for the use to proceed without recognition of the owner's authority to permit or prohibit the use; it is not required that the user intend to violate the owner's rights. It is not required that the adverse use be exclusive. The claimant of an easement claims only the right to make certain use of the land and does not claim to possess the whole title and exclude the owner from it for all purposes. To establish an easement by prescription, it is not necessary to show an express claim of right in words or to show that the adverse party expressly admitted knowledge of the claim. It is sufficient that the person who allegedly established the easement acts in a manner such as to indicate clearly that he or she claims a nonexclusive right to use the property. (citations omitted).

Whittom v. Alexander Richardson Partnership, 851 S.W.2d 504, 508-509 (Mo. banc 1993).

Even if permission were an issue, which it is not, the undisputed evidence is that no person going to the cemetery ever sought or was granted permission to use the parking area or Row Crop Road to go to the cemetery before Defendants built the first gate. Defendants keep pointing to the recanted and discredited affidavit by Mr. Massey that he and his father permitted cemetery patrons to park on their property and access the cemetery. (LF 62).

As Defendants are indeed aware, an affidavit that states a summary legal conclusion may not be used as support either to get summary judgment or to prevent summary judgment. *Zerebco v. Lolli Brothers Livestock Market*, 918 S.W.2d 931 (Mo. App. W.D. 1996). Here, the statement from Mr. Massey's affidavit is nothing if not conclusory. It states "they used our property with our permission" and "with my father's permission patrons of the cemetery would use Row Crop Road in order to access the cemetery." (LF 62).

Mr. Massey further explained his affidavit during his deposition stating "I gave nobody permission" and that as far he knew his father "gave nobody any permission, they visited when they wanted to" visit the cemetery. (LF 539-540). Mr. Massey's affidavit was created when someone from Defendants' attorney's office wrote the affidavit for him and asked him to sign it. (LF 539-540). He further was unable to testify that the words in the affidavit were his words. (LF 540). As Appellant Steven Plaster himself explained during his deposition what he, and his attorneys, meant by permission was that "cemetery members" had never asked anyone to access the property and had never been denied or told to leave by anyone. (LF 591).

It is immaterial whether or not cemetery patrons thought the parking area was public property. An individual acquiring title or access to property by adverse possession “need not intend to take something away which belongs to another” and may indeed “even be indifferent as to the facts of legal title.” *City of South Greenfield v. Cagle*, 591 S.W.2d 156, 160 (Mo. App. S.D. en banc 1979). The element of “hostile” possession does not require a particular intent to take something that belongs to another but rather the “intent to possess, occupy, control, use and exercise dominion over the property is sufficient.” *Id.* at 159. The fact that a claimant or claimants thought that the property in question belonged to the county does not defeat the claim. *Id.* at 160.

The *Rosemann* opinion, cited by Defendants, does not alter this result. Defendants’ Brief, Page 27. In *Rosemann*, property owners did not establish an easement across their neighbor’s land for access to a driveway when they assumed the property in question was a village street. *Rosemann v. Adams*, 398 S.W.2d 855, 858 (Mo. 1966). Here, Plaintiffs may have believed a mowed area, used for parking, was part of the cemetery property, not part of the public road. Unlike the Defendants in *Rosemann*, Plaintiffs here thought they had the right to use the parking area to access the cemetery, had done so from time immemorial and even maintained it. As explained in *City of South Greenfield*, the key question is not who Plaintiffs thought the property belonged to, but their intent to “possess, occupy, control, use, and exercise dominion over the property.” 591 S.W.2d at 159.

Plaintiffs clearly established their use of the property for access to the cemetery for many years. For as long as anyone can remember individuals used the grassy parking area to

park vehicles when going to the cemetery to visit loved ones graves or attending a funeral. (LF 880, 881, 885-886). Members of the cemetery association maintained the parking area just like they did the cemetery. (LF 140-141, 1091). Grave digging equipment, hearses and even vehicles traversed the parking area to enter the cemetery. (LF 886). Finally, Defendants admitted in their answer that the parking area “had been used by the public” for more than ten years. (LF 695).

Contrary to Defendants’ claim, these facts are not set forth as “legal conclusions” or conclusory statements in affidavits. First, use of the parking area is clearly established in the depositions of various parties that were submitted to the Court. (LF 880-881, 885-886). The fact that members of the cemetery association and the public “maintained and mowed the parking area while set forth in the affidavit of Mike Buck,” is not a legal conclusion or conclusory statement. The actual statement reads that “members of the Orla Holman Cemetery and the public have maintained and mowed the parking area situated between the Orla Holman Cemetery and Row Crop Road for longer than ten years and for time out of memory.” (LF 1091). This is a clear statement of fact, attested to by the affiant who, through both the affidavit and his deposition, was established to have knowledge of the cemetery and of what has occurred there for numerous years. Even assuming “permission” was ever relevant as a defense, Mr Massey’s subsequent statements denying he ever gave permission undermine any claim there is competent evidence that the public’s use of the parking area or the road was by “permission” or that there exists any genuine issue of disputed fact.

The location of the parking area on the “face of the earth” is also undisputed. The parking area, along with the location and legal descriptions of the road and cemetery are depicted in the survey of Mr. Shotts, relied on by both Plaintiffs and Defendants. (LF 58-59).

The Public Has an Easement By Way of Necessity to the Cemetery

Even if the parking area is construed not to be part of a public road, the public is clearly entitled to use the parking area as a way of necessity. It is undoubted that the Plaster Trust’s chain of title to the Massey farm is traceable to none other than Joseph Holman and Evan Addison, the grantors of the deeds to the cemetery. Clearly, the nearest reasonable access to a “public road” would be across the parking area.

The prerequisites for a common law easement of necessity is to show a common source of title and a subsequent deprivation of access to a public road. *King v. Jack Cooper Transport Co., Inc.*, 708 S.W.2d 194, 197 (Mo. App. W.D. 1986). Because these prerequisites exist in this case, the public would have an easement of necessity across the parking area, even if such easement were not otherwise established by prescription.

Defendants’ Improper Points Relied On Preclude Review

The Points Relied On raised by Defendants in their brief, including Point Relied On II, violate Rule 84.04(d) by combining multiple claims of error, thus precluding this Court from reviewing Defendants’ claims. Plaintiffs gave a detailed analysis of this flaw in Defendants’ Points Relied On in Point I, pages 39-40, *supra*. Like Point I, Point II is multifarious and a

violation of Rule 84.04. In the interests of brevity, Plaintiffs direct the Court to their argument under Point I regarding how all points in Appellants' Brief are multifarious.

III.

THE TRIAL COURT DID NOT ERR IN ENTERING A PERMANENT INJUNCTION AGAINST THE VILLAGE OF EVERGREEN BECAUSE THIS COURT WILL NOT REVIEW A MATTER BROUGHT FOR THE FIRST TIME ON APPEAL AND INJUNCTIONS ARE AUTHORIZED AGAINST A MUNICIPAL CORPORATION TO CONTROL ITS ACTUAL OR THREATENED UNLAWFUL ACTS IN THAT THE VILLAGE OF EVERGREEN NEVER RAISED THE ISSUE OF THE INJUNCTION BEING OVERBROAD TO THE COURT BELOW AND THE INJUNCTION IS PROPER TO RESTRAIN THE ACTUAL AND THREATENED UNLAWFUL CONDUCT OF THE VILLAGE OF EVERGREEN.

Standard of Review

The Trial Court's injunction was proper and should be sustained by this Court under the applicable standard of review. As Defendants note in their brief, an award of summary judgment is reviewed *de novo*. (Appellants' Brief, Page 9); *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993). Summary judgment is proper when a party demonstrates that it is entitled to judgment as a matter of law on facts that are not in dispute. *Id.*, Rule 74.04 Mo. Rules of Court.

A material issue of fact is only in dispute when the record contains competent evidence that two plausible, but contradictory accounts of essential facts exist. *Sundermeyer v. SSM Regional Health Services*, 271 S.W.3rd 552, 553-554 (Mo. banc 2008). A genuine dispute does not exist simply because the party against whom summary judgment is sought

makes any argument or claim, regardless of its credibility, in opposition to a fact claimed by the movant. Rather, a genuine issue only exists and summary judgment may only be blocked where the claim raised by the non-movant, in this case the Plaster Trust, is not “merely argumentative, imaginary, or frivolous.” *Deer Run Property Owners Association v. Bedell*, 52 S.W.3d 14, 19. (Mo. App. S.D. 2001).

While the record is reviewed in the light most favorable to the non-moving party, the appellate court must review the *whole* record, including all responses, replies and sur-replies filed with the court. Rule 74.04, Mo. Rules of Court; *Colbert v. Mutual Benefit Life Insurance Company*, 608 S.W.2d 119, 120 (Mo. App. W.D. 1980). If summary judgment can be sustained on any theory, even if it is different from that used by or even presented to the trial court, the judgment must be affirmed. *ITT Commercial Finance Corp.*, 854 S.W.2d at 387-388; *Birdsong v. Christians*, 6 S.W.3d 218, 223 (Mo. App. S.D. 1999).

Introduction

The trial court’s injunction cannot be overturned based on Defendants’ claim that it is “overbroad.” As a preliminary matter, Defendants failed to present this issue to the trial court even when they had the opportunity to do so. As they never complained regarding the language of the injunction and the scope of the injunction, they cannot raise this issue for the first time here on appeal. Even if Defendants had raised the issue, the injunction is proper in its scope in limiting of Defendants’ actions due to the actions that Defendants have undertaken previously and threatened to take after the conclusion of this lawsuit.

Defendants Cannot Challenge the Scope of Injunction on Appeal.

Defendants' claim cannot be considered on appeal because they did not present it to the trial court. It is a well established principle of law that issues raised for the first time on appeal are not preserved for review and cannot be used to reverse a judgment of a trial court. *Seitz v. Lemay Bank and Trust Company*, 959 S.W.2d 458, 462 (Mo. banc 1998); *Thomas v. Lloyd*, 17 S.W.3d 177, 186 (Mo. App. S.D. 2000). A trial court will not be convicted "of an error it did not commit" which is essentially what Defendants are asking this Court to do by seeking to have the trial court's judgment reversed as "overbroad" when this issue was never raised to the Court's attention. *Thomas*, 17 S.W.3d at 185.

The docket sheet for this case shows the trial court notified the parties of its decision on December 18, 2006 and signed a Judgment on January 29, 2007. (LF 10). Although a copy of this Judgment was mailed to attorneys for both Defendants and Plaintiffs, Defendants never filed anything with the court challenging the actual language of the injunction as overbroad. (LF 10-11). Clearly, Defendants could have sought relief pursuant to Rule 74.06. Defendants indeed do not raise this argument in their response to Respondent's summary judgment motion. (LF 790) (a list of arguments by Defendants in response to the motion for summary judgment). While Defendants did attempt to prevent summary judgment, they never attacked the language of the injunction as overbroad and as limiting, by its language, their legitimate police power functions.

Even if the Issue is Properly Before Court, Injunction is Not Overbroad.

The injunction issued by the trial court against Defendants is not overly broad. Defendants point to several specific ways in which they claim the injunction is overbroad. They claim that the injunction is overbroad because it does not allow them to enact “reasonable time restrictions” on the use of Row Crop Road, does not allow them to post speeding signs or “no littering signs,” and does not allow them to regulate the public’s use of the parking area. (Appellants’ Brief, Page 34-36).

Even assuming the parking area, Row Crop Road and cemetery were in the Village of Evergreen, which they are not, these claims are without merit. The text of the injunction prohibits Defendants from “taking actions to ‘deter a reasonable person from utilizing Row Crop Road to freely access Holman Cemetery’ from limiting the use of Holman Cemetery to particular times of day, placing any signage that says ‘keep out’, communicating false statements regarding Row Crop Road and the cemetery on signage, and from ‘interfering with use of the parking area ***by persons visiting the Orla Holman Cemetery.***’” (Emphasis added.) (LF 1038). Based on the language used in the Judgment and the injunction itself, it is clearly limited to only affect members of the public visiting the cemetery. Nothing in the injunction would prohibit Defendants from placing no littering signs along Row Crop Road or setting a reasonable speed limit, assuming the road is in the village.

The restrictions in the injunction are indeed reasonable under the circumstances. Defendants have shown by their conduct and by their threats an intent to take any steps they can to destroy the public’s access to Holman Cemetery and Row Crop Road. Prior to this

lawsuit being filed, they gated and locked Row Crop Road without any ordinance authorizing them to do so. (LF 484, 575). Defendants refused to remove the first gate and it was ultimately removed by the County Commissioners. (LF 485, 1097). Defendants have since erected a new gate and signs telling the public to keep out of Row Crop Road even though their own ordinance does not authorize them to do so. (LF 486, 578, 1062). Robert Plaster has threatened that Defendants intend to fence off the parking area between Row Crop Road and the cemetery to deny patrons access to the cemetery if Mr. Plaster or his associates do not win this lawsuit. (LF 487, 580, 1104). Based on the unreasonable conduct and threatened conduct of the Defendants, the language of the trial court's injunction is entirely reasonable.

Defendants have also tried to introduce another "red herring" by claiming that Missouri statutes only consider access to a cemetery during daylight hours reasonable. First, the statute referenced by Defendants actually refers to "family or private" cemeteries surrounded completely "by privately owned land, for which no public ingress or egress is available." § 214.132 RSMo. Here, there is public access to the cemetery that has been used for well over 50 years, the publicly owned and maintained Row Crop Road and the parking area adjoining the cemetery. Second, the statute refers to "reasonable hours" for visitation to the cemetery and does not specifically say that evening visits to the cemetery are inappropriate or forbidden. Accessing the cemetery here is not impinging on any private property rights, as both it and road to the cemetery are publicly owned.

As both Susan Rector and Mike Buck testified during their depositions, both had visited the cemetery during evening hours for entirely appropriate and acceptable reasons. Susan Rector visited the cemetery in the evening to visit the graves, and Mike Buck visited the cemetery as the sun set close to the evening to listen to the whipperwills. (LF 1027, 1031). The unreasonableness and capricious actions of Defendants stand in stark contrast to their complaint that the injunction is overbroad. If the injunction seems at all surprisingly strong, it was only crafted as such due to the capricious actions and threats of Defendants.

Defendants' Improper Points Relied On Preclude Review

The Points Relied On raised by Defendants in their brief, including Point Relied On III, violate Rule 84.04(d) by combining multiple claims of error, thus precluding this Court from reviewing Defendants' claims. As this issue was thoroughly addressed in Point I, Plaintiffs will not address it further.

CONCLUSION

The trial court properly granted summary judgment and an injunction in favor of Plaintiffs. The brief filed here by Defendants does nothing to change that. First, Defendants Brief cannot be properly considered because each of its three Points Relied On is multifarious and violate the dictates of Rule 84.04. Second, Appellant's claims are without merit and rest upon distortion of the record before the court. Because Respondent's were properly entitled to summary judgment and an injunction in their favor, the judgment should be affirmed.

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RULE 84.06 CERTIFICATION

The undersigned certifies that the foregoing brief complies with Supreme Court Rule 84.06. According to the word count function of Microsoft Word by which it was prepared, it contains 15,206 words, exclusive of cover, Certificate of Service, the Certification and signature block.

The undersigned further certifies that the diskette filed herewith containing this brief in electronic form has been scanned for viruses and is virus-free.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 16th day of July, 2009, he hand delivered two (2) copies of this Respondent's Substitute Brief, and one disk containing the brief, to:

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