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JURISDICTIONAL STATEMENT

This Court has jurisdiction by virtue of its order transferring this case following opinion by the Missouri Court of Appeals, Southern District. *See* MO. CONST. art. V, §10; Rule 83.04.

STATEMENT OF FACTS

Appellants add the following:

Appellants moved for judgment at the close of Respondents' case, arguing that Respondents had failed to meet their burden of proof, **Trans. p. 99-101**.

POINT RELIED ON

POINT I

THE TRIAL COURT ERRED IN QUIETING TITLE TO TRACT A IN THE RESPONDENTS BECAUSE THE TRIAL COURT MISAPPLIED THE LAW IN THAT RESPONDENTS FAILED TO MEET THEIR BURDEN TO PROVE ABANDONMENT BY CLEAR AND COGENT PROOF OF THE PUBLIC ROAD WHICH IS TRACT A IN THAT

(A) RESPONDENTS OFFERED NO EVIDENCE OF HOW THE PUBLIC ROAD ON TRACT A WAS ESTABLISHED WHICH IS AN ESSENTIAL ELEMENT OF A CLAIM OF ABANDONMENT UNDER §228.190, AND

(B) SUPREME COURT PRECEDENT SUPPORTS EXCLUSION OF ROADS CREATED BY EXPRESS COMMON LAW DEDICATION FROM §228.190 ABANDONMENT PROVISIONS, AND RESPONDENTS OFFERED NO EVIDENCE ON HOW THE PUBLIC ROAD ON TRACT A WAS ESTABLISHED.

Highfill v. Brown, 320 S.W.2d 493, 497 (Mo. 1959)

Bank of Kirksville v. Small, 742 S.W.2d 127, 132 (Mo. 1987)

Coffey v. State ex rel. County of Stone, 893 S.W.2d 843 (Mo. App. S.D. 1995)

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Missouri Revised Statute §228.190, RSMo. 1990

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN QUIETING TITLE TO TRACT A IN THE RESPONDENTS BECAUSE THE TRIAL COURT MISAPPLIED THE LAW IN THAT RESPONDENTS FAILED TO MEET THEIR BURDEN TO PROVE ABANDONMENT BY CLEAR AND COGENT PROOF OF THE PUBLIC ROAD WHICH IS TRACT A IN THAT

(A) RESPONDENTS OFFERED NO EVIDENCE OF HOW THE PUBLIC ROAD ON TRACT A WAS ESTABLISHED WHICH IS AN ESSENTIAL ELEMENT OF A CLAIM OF ABANDONMENT UNDER §228.190, AND

(B) SUPREME COURT PRECEDENT SUPPORTS EXCLUSION OF ROADS CREATED BY EXPRESS DEDICATION FROM §228.190 ABANDONMENT PROVISIONS, AND RESPONDENTS OFFERED NO EVIDENCE ON HOW THE PUBLIC ROAD ON TRACT A WAS ESTABLISHED.

Respondents argue in Point One of their Substitute Brief that Appellants' reliance on the Southern District Case of **Coffey v. State ex rel. County of Stone**, 893 S.W.2d 843 (Mo. App. S.D. 1995), is misplaced because "**Coffey** …was unfaithful to precedent," **Respondents' Substitute Brief p. 25**.

Appellants cited **Coffey v. State ex rel. County of Stone**, 893 S.W.2d 843 (Mo. App. SD 1995), in Point One of their Brief on Appeal, to show Respondents had not

provided clear and cogent proof of each element of their cause of action, i.e. abandonment of Tract A under §228.190, because **Coffey** sets out an exception to §228.190. But in this Substitute Reply Brief, Appellants will first show that for the trial court to find an abandonment under §228.190, Respondents must prove the road on Tract A is one which can be abandoned under §228.190, regardless of a **Coffey** exception. Second, and contrary to Respondents' assertion, Appellants will show that **Coffey v. State ex rel. County of Stone**, 893 S.W.2d 843 (Mo. App. S.D. 1995) is not out of line with Supreme Court precedent.

STANDARD OF REVIEW

The standard of review applicable in this court-tried case is governed by Rule 84.13(d) of the Missouri Rules of Civil Procedure, which states the appellate court is to review both the law and the evidence, giving due deference to a trial judge's ability to judge the credibility of witnesses, and by **Murphy v. Carron**, 536 S.W.2d 30, 32 (Mo. 1976), which states that the "judgment of the trial court will be sustained by the appellate court unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law." This Court shall "independently evaluate whether the trial court properly declared or applied the law to the facts presented," **Reinbott v. Tidwell**, 191 S.W.3d 102, 107 (Mo. App. S.D. 2006) (omitting internal citations). If the judgment is "based on an erroneous application of law" it will be reversed, **Kleeman v. Kingsley**, 88 S.W.3d 521, 522 (Mo. App. S.D. 2002)(omitting internal citations).

LEGAL ANALYSIS

(A) Respondents offered no evidence of how the public road on Tract A was established which is an essential element of a claim of abandonment under §228.190.

In the case at bar, the Southern District Court of Appeals agreed with Appellants' position that it could not "determine whether the road was 'abandoned' … because there was absolutely no evidence how the road became a public road," **McCullough v. Doss,** No. SD29396, slip op. at 2 (Mo. App. S.D. Dec. 30, 2009). Respondents' Substitute Reply Brief states that the Southern District was incorrect in its holding, because **Johnson v. Rasmus**, 141 S.W. 590, 591 (Mo. 1911), made abandonment by non-use under §228.190 "applicable to *any* highway or public road, however acquired," **Johnson v. Rasmus**, 141 S.W. 590, 591. This is not correct. Though not explicitly required by Supreme Court precedent, how a road at issue was created must nevertheless be an element of the claim of abandonment under **§**228.190, by virtue of the development of the law of abandonment over the last 99 years since **Johnson v. Rasmus** was decided, as well as the fundamental principles of burden of proof.

1. Johnson v. Rasmus has been consistently limited by case law and statute, as a result a court must determine how a public road was established before it can determine if the non-use provisions of §228.190 apply.

Numerous cases decided after **Johnson v. Rasmus**, 141 S.W. 590 (Mo. 1911), have limited the scope of the broad-brush statement of this Court that "any highway or

public road, however acquired" can be abandoned by non-use under §228.190, **Johnson** at 591. In addition there have been increasingly complex legislative requirements that apply to the vacation and abandonment of roads. The bottom line is that the broad "any highway or public road, however acquired" language of **Johnson v. Rasmus** is simply not controlling at this time, **Johnson** at 591.

Statute and Court decisions alike make it clear that §228.190 does not apply to "any road." Various statutory schemes address the vacation of streets and roads in addition to the language of §228.190, such as Mo. Rev. Statutes §§71.240 to 71.260, relating to vacation of streets and roads in cities and towns; §§71.270 to 71.280, relating to vacation of subdivision streets outside incorporated towns, cities or villages; §82.190, relating to vacation of streets by constitutional charter cities; §88.673, relating to vacation of streets in fourth class cities; and §88.637, relating to vacation of streets in third class cities.

This Court's and Appellate Court's decisions have specifically held that the abandonment provisions of §228.190 do not apply to state highways, *see* **Sheedy v. Missouri Highways and Transp. Com'n**, 180 S.W.3d 66 (Mo. App. S.D. 2005); do not apply to unused city streets, *see* **Robinson v. Korns,** 157 S.W. 790 (Mo. 1913), and **Bobb v. City of St. Louis**, 205 S.W. 713 (Mo. 1918); do not apply to unused platted streets in an unincorporated county subdivision, *see* **Evans v. Andres**, 42 S.W.2d 32 (Mo. App. 1931), and **Winschel v. County of St. Louis**, 352 S.W.2d 652 (Mo. 1961); do not apply to roads deeded to county by voluntary conveyance, **Coffey v. State ex rel.**

County of Stone, 893 S.W.2d 843 (Mo. App. SD 1995); and do not apply to public roads unless established by Chapter 228, prescription, or implied or common law dedication, **Przybylksi v. Barbosa,** 289 S.W.3d 641 (Mo. App. W.D. 2009), transfer denied No. SC90209 (Mo. banc 2009).

Respondents' statement that abandonment by non-use under §228.190 applies to all roads "once built", **Respondents' Substitute Reply Brief p. 12**, is simply not accurate.

2. How the road at issue was established is an essential element of proving abandonment under §228.190.

The Supreme Court cases of **Robinson v. Korns,** 157 S.W. 790 (Mo. 1913), **Bobb v. City of St. Louis**, 205 S.W. 713 (Mo. 1918), **Winschel v. County of St. Louis**, 352 S.W.2d 652 (Mo. 1961), and **State ex rel State Highway Commision v. Herman**, 405 S.W.2d 904 (Mo. 1966), four major Supreme Court §228.190 cases decided since **Johnson v. Rasmus**, 141 S.W. 590 (Mo. 1911), have all made a detailed analysis of how the road in question was established in order to determine whether §228.190 abandonment applies. In the cases of **Robinson v. Korns**, **Bobb v. City of St. Louis**, and **Winschel v. County of St. Louis**, this analysis resulted in a determination that §228.190 did not apply, whereas in the case of **Herman**, this Court determined §228.190 did apply.

Every case that Appellant has located addressing abandonment of a public road by non-use under §228.190 (or its predecessor) has discussed how the road at issue was

established, verified that §228.190 (or its predecessor) did or did not apply, and then moved on to determine if proof was presented by the advocate of abandonment. Certainly a court's review is shaped by the points on appeal, but it is worth noting that the Eastern District in **Chapman v. Lavy**, 20 S.W.3d 610 (Mo. App. E.D. 2000), prior to applying §228.190, reviewed the testimony and determined that the road at issue was established by common law dedication, although "neither side has chosen to address this particular issue on appeal," **Chapman v. Lavy**, at 613. In **Kleeman v. Kingsley**, 167 S.W.2d 198 (Mo. App. S.D. 2005)(short-cited **Kleeman II**), the Southern District Court of Appeals specifically noted that "no party challenges the trial court's determination that the old county road … was created by implied or common law dedication," **Kleeman II** at 202.

In Respondents' Substitute Brief they cite the recent case of **Przybylksi v. Barbosa,** 289 S.W.3d 641 (Mo. App. W.D. 2009) transfer denied No. SC90209 (Mo. banc 2009), as part of their argument against Appellants' reliance on **Coffey v. State ex rel. County of Stone**, 893 S.W.2d 843 (Mo. App. S.D. 1995). But Appellants believe **Przybylksi's** reference to **Coffey** is actually of far less importance than its holding which implicitly recognizes the elements of a claimants' cause of action for road abandonment under §228.190. The road at issue in **Przybylksi** was a platted but undeveloped road outside city limits, **Przybylksi** at 644. The case came to the Western District on an appeal following dismissal for failure to state a claim, **id.** at 643, and the **Przybylksi** Court addressed whether the plaintiffs' petition should survive dismissal for failure to

state a claim and "whether the averments invoke substantive principles of law which entitle the plaintiff to relief," **id.** at 644. The **Przybylksi** plaintiffs claimed a road was abandoned under §228.190 and cited **Johnson v. Rasmus**, 141 S.W. 590 (Mo. 1911), and **Winschel v. County of St. Louis**, 352 S.W.2d 652 (Mo. 1961), for the proposition that §228.190 applies to "*any* highway or public road, *however acquired*," **Przybylksi** at 645.

However, the **Przybylksi** Court disagreed with the plaintiffs' reliance on **Johnson v. Rasmus** and **Winschel**, holding that in order to survive the dismissal of their petition, plaintiffs "must show that the undeveloped land was *established as a public road* and *subsequently* abandoned by five years of continuous non-use by the public, pursuant to section 228.190," **Przybylksi** at 644 (emphasis added). The **Przybylksi** Court discussed the three ways in which a public road may be established, and found that plaintiffs' "petition fails to aver facts demonstrating that the undeveloped land was established as a public road subject to abandonment under section 228.190," **Przybylksi** at 646. Appellants believe this language shows the Western District Court of Appeals understood that how a public road was established is a threshold element of abandonment under §228.190.

The Southern District case of **McCullough v. Doss**, No. SD29396, slip op. (Mo. App. S.D. Dec. 30, 2009), now before this Court, is simply the most recent in a long line of Missouri Supreme Court and Appellate cases which recognize the simple logic that if the elements of abandonment under §228.190 must be proven by "clear and cogent" evidence, **Faustlin v. Mathis**, 99 S.W.2d 546, 551 (Mo. App. W.D. 2002), then "it is a

logical extension of that burden to require the party asserting abandonment to demonstrate its relevance by showing that the nonuser provision of section 228.190 is even applicable," **McCullough v. Doss**, No. SD29396, slip op. at 5 (Mo. App. S.D. Dec. 30, 2009).

3. Respondents have not met their burden of proof to present clear and cogent evidence of all elements of their claim of abandonment under §228.190.

a. The fundamentals of burden of proof in Missouri.

This Court recognizes that the "rules as to the burden of proof are important and indispensable in the administration of justice, and constitute a substantial right of the party on whose adversary the burden rests; they should therefore be jealously guarded and rigidly enforced by the courts.'" **Highfill v. Brown**, 320 S.W.2d 493, 497 (Mo. 1959)(internal citations omitted). Furthermore, "[t]he law in this state as to burden of proof is clear and designed to assure that hearings on contested matters provide the parties with predictable rules of procedure. The party asserting the positive of a proposition bears the burden of proving that proposition. Anchor Centre Partners Ltd. v. Mercantile Bank, N.A., 803 S.W.2d 23 (Mo. banc 1991)," **Dycus v. Cross**, 869 S.W.2d 745, 749 (Mo. 1994).

In addition, it "is universally held that an essential element of plaintiff's case cannot be left to guess or conjecture, or be established by piling inferences." **Tucker v. Delmar Cleaners, Inc.**, 637 S.W.2d 222, 225 (Mo.App. E.D. 1982)(internal cite omitted). This Court in **Bank of Kirksville v. Small**, 742 S.W.2d 127, 132 (Mo. 1987**),**

stated that the "difficulty of proving these elements does not dispense with the necessity of making the proof, and the failure to establish these elements is fatal to defendant's claim," **Bank of Kirksville v. Small**, 742 S.W.2d 127, 132 (Mo. 1987)(internal cites omitted). Finally, in connection with the elements of fraud, this Court in **Bank of Kirksville** also stated that "[w]hile it is true that fraud may be established by circumstantial evidence, it may not be presumed, and a party's case will fail if he can show only facts and circumstances which are equally consistent with honesty and good faith," **Bank of Kirksville v. Small**, 742 S.W.2d 127, 132 (Mo. 1987) (internal cites omitted).

b. Respondents have failed in their burden of proof.

The Respondents today advocate that this Court decide the public's right to utilize a public road should be wrested from the public without first determining whether the road at issue is one to which the statute even applies.

Respondents argue that since Appellants stated that Tract A is a public road in their pleadings and at trial, **Respondents' Substitute Brief pp. 28-29**, **Supp. L.F. p. 2**, **Trans. pp. 135-136, 146**, and that since everyone agreed at trial that Tract A was a public road in 1955 when Missouri State Highway 39 was constructed **Trans. pp. 30-31, 47, 106, 108**, Respondents are somehow relieved of the burden of proving how the road was established. But the "party asserting the positive of a proposition bears the burden of proving that proposition," **Dycus v. Cross**, 869 S.W.2d 745, 749 (Mo. 1994)(internal cite omitted), and Respondents are not relieved of their burden to prove all elements *of their*

claim simply because Appellants' *defense* to that claim is that a road currently exists on Tract A, **Supp. L.F. pp. 2-3**.

Appellants admit Respondents have a difficult burden to show how the road at issue was established, since it had to have occurred well over 60 years prior to trial. But the "difficulty of proving these elements does not dispense with the necessity of making the proof," **Bank of Kirksville v. Small**, 742 S.W.2d 127, 132 (Mo. 1987)(internal cites omitted), and certainly, even a routine and inexpensive title search of the Stone County Deed Records could have provided some facts to the trial court. Although Respondents' witness John Reed, the surveyor, testified that he found no records vacating the road at issue in the Stone County road commission records, **Trans. p. 97**, and that he looked at old drawings and depictions of the road, **Trans. p. 91**, these were never offered into evidence. Respondents in the case at bar simply made no effort to provide evidence of how the road was established.

The earliest testimony concerning use of the road on Tract A was from Reva Allen, who moved to the area and used the road beginning in 1949, **Trans. pp. 102-103, 105**, and from Nadine Doss, who was born in 1941, and who used the road with her family, **Trans. pp. 143-144**. Testimony at trial was that Missouri State Highway 39 was constructed in 1955, **Trans. pp. 31, 106**, and Respondent Lynn K. McCullough admitted that Tract A was the public road when he purchased his property in 1955 and before the highway was finished, **Trans. pp. 30-31, 47**. This means that the only clear testimony of Tract A's establishment as a road goes back only six years prior to the construction of

Missouri State Highway 39 and Respondents' purchase, to 1949, when Reva Allen moved to the area, **Trans. pp. 102-103**. The upshot of the record on appeal in this case is there was no evidence of how the road was established, and any existence of the road prior to 1949 is simply a "guess or conjecture," **Tucker v. Delmar Cleaners, Inc.**, 637 S.W.2d 222, 225 (Mo.App. E.D. 1982)(internal cite omitted).

Respondents want to use Appellants pleadings and Appellants' position at trial to declare that the public road on Tract A can be abandoned under §228.190**, Respondents' Substitute Brief p. 28-29**. But agreement by all witnesses at trial that Tract A was a "public road" at the moment in time when Missouri State Highway 39 was built in 1955 is "equally consistent" with Tract A being a state highway, or being established by deed, or by plat, or by county court order at any time prior to 1955, or even by being inside an incorporated city, **Bank of Kirksville v. Small**, 742 S.W.2d 127, 132 (Mo. 1987) (internal cites omitted). With the evidence in the record we cannot know if §228.190 can be applied to Tract A.

In conclusion, Appellants have consistently asserted that how the public road on Tract A was established is an element of the Respondents' case for abandonment under §228.190, at every level this case has reached. This contention began at the trial in Stone County Circuit Court, when following Respondents'(then Plaintiffs) presentation of their case, Appellants moved for judgment at the close of Respondents' evidence, based upon Respondents' failure to prove an essential element of abandonment: i.e. how the public road on Tract A was established, and failure to meet their burden of proof, **Trans. pp. 99-**

101. Appellants believe their Briefs before the Southern District and this Court additionally show that how the public road on Tract A was established is an element of Respondents' claim for abandonment under §228.190.

This Court and the Courts of Appeals and the Missouri Legislature have recognized that §228.190 does not apply to certain roads. Therefore an advocate of closing a public road must present evidence of how the road at issue was created. The record in this case is devoid of whether the public road on Tract A was part of an incorporated city, was a state highway, was in a platted subdivision, was a deeded roadway, or was established by common law dedication. Respondents, who had the burden of proof at trial, never told us anything.

Appellants believe that the Southern District in this case correctly held that "Respondents did not meet their burden when they presented no evidence of how the public road was established," **McCullough v. Doss**, No. SD29396, slip op. at 5 (Mo. App. S.D. Dec. 30, 2009). Respondents have failed in their burden of proof, this Court should "rigidly enforce" the requirements upon Respondents of this burden, **Highfill v. Brown**, 320 S.W.2d 493, 497 (Mo. 1959), and the trial court should be reversed and judgment entered for the Appellants.

(B) Supreme Court precedent supports exclusion of roads created by express common law dedication from §228.190 abandonment provisions, and Respondents offered no evidence on how the public road on Tract A was established.

The Southern District in this case did not reach a conclusion as to whether or not the Respondents proved abandonment, but found that Respondents did not prove the road on Tract A *could be* abandoned under §228.190, ordering the trial court to "take further evidence consistent with this opinion," **McCullough v. Doss**, No. SD29396, slip op. at 5 (Mo. App. S.D. Dec. 30, 2009). While Appellants in Point One of their initial Brief focused on the Southern District case of **Coffey v. State ex rel. County of Stone**, 893 S.W.2d 843 (Mo. App. S.D. 1995), and while the Southern District cited **Coffey** in its opinion, **McCullough v. Doss**, No. SD29396, slip op. at 2-3 (Mo. App. S.D. Dec. 30, 2009), Appellants have demonstrated that they should prevail on appeal irrespective of the decision in **Coffey**. Nonetheless, Appellants believe they should address Respondents' erroneous argument that **Coffey** is wrong and fails to follow precedent.

Respondents state that **Coffey v. State ex rel. County of Stone**, 893 S.W.2d 843 (Mo. App. S.D. 1995) is wrong because the Southern District "split the nut" of common law dedication, **Respondents' Substitute Brief, p. 14, 24**. Respondents also state that **Coffey** is wrong because the road in **Coffey** had been built and existed as a road, while all previous cases finding §228.190 did not apply dealt with roads that had been platted but not yet established and used as roads, **Respondents' Substitute Brief, p. 20, 25**. Appellants respectfully disagree with both these interpretations of **Coffey** and existing case law.

1. **Common law dedication of roads.**

The Supreme Court case of **Connell v. Jersey Realty & Investment Co.**, 180

S.W.2d 49, 53 (Mo. 1944)(internal cites omitted), sets out the following definition of common law dedication:

> We deduce from the law that in order to establish a common law dedication it must be shown: (1) That the owner, by his unequivocal action, intended to dedicate to public use; (2) that the land so dedicated must be accepted by the public; and (3) that land so dedicated must be used by the public. A common law dedication, sometimes termed implied dedication, operates not as a grant, but on the principle of estoppel.

The Southern District in its **McCullough v. Doss** opinion noted that common law dedication could be "express" in that a deed or conveyance expresses the required intent set out in **Connell** above, **McCullough v. Doss,** No. SD29396, slip op. at 4 (Mo. App. S.D. Dec. 30, 2009). The Southern District cited **Hoechst v. Bangert**, 440 S.W.2d 476 (Mo. 1969), which found that an owners' "unequivocal action" required for common law dedication can be shown by the "recitals in the deed and in the plat" executed by an owner of land, **Hoechst** at 479. Appellants believe that the above definition of common law dedication found in the Missouri Supreme Court case of **Connell v. Jersey Realty & Investment Co.**, 180 S.W.2d 49, 53 (Mo. 1944), and supported by **Hoechst v. Bangert**, 440 S.W.2d 476 (Mo. 1969), means that courts have already "split the nut" of common law dedication, in that it can be accomplished by express dedication if a deed, grant, plat,

or conveyance exists, or simply implied from the actions of the property owners and the public.

2. Coffey v. State ex rel. County of Stone, 893 S.W.2d 843 (Mo. App. S.D. 1995), follows precedent of express common law dedication exclusion set out in every Supreme Court case since Johnson v. Rasmus.

The Court of Appeals in **Coffey v. State ex rel. County of Stone**, 893 S.W.2d 843 (Mo. App. S.D. 1995) was faced with a road established by express common law dedication, in the form of a deed to the county for the road.

Appellants have prepared a Chart found in **Appendix A1** which sets out cases cited by Respondents in their Substitute Reply Brief addressing §228.190, and which Appellants believe is helpful in the following discussion. As is abundantly clear from even glancing at this Chart, there is clear logic to the "split" in the application of §228.190 to roads established by common law dedication.

As Respondents state, **Johnson v. Rasmus** declared that "[i]t has always been competent in this state for the public to abandon the right to highways and public roads which it acquired in the common-law method of dedication," **Johnson v. Rasmus**, 141 SW 590, 591(Mo. 1911). Appellants' Chart, **Appendix A1**, shows that this has been followed by this Court and the other appellate courts in relation to implied dedication, but has never been followed when dealing with express dedications. While Respondents have cited no Supreme Court cases since **Johnson v. Rasmus** discussing a road established by implied common law dedication, **Chapman v. Lavy**, 20 S.W.2d 610

(Mo.App. E.D. 2000), and **Kleeman v. Kingsley**, 167 S.W.3d 198, 203 (Mo. App. S.D. 2005), both had roads the appellate courts determined were established by implied common law dedication. Both **Chapman v. Lavy** and **Kleeman II** held that §228.190 applied to their claimants' abandonment claims, the former case finding no abandonment under the facts, **Chapman** at 614, and the latter case upholding abandonment under the facts, **Kleeman II** at 203. Appellants note that the Court of Appeals in **Kleeman II** found **Coffey v. State ex rel. County of Stone**, 893 S.W.2d 843 (Mo. App. S.D. 1995), did not apply to defendants' case because there was no conveyance of the property by "deed or other formality as was the case in *Coffey*," **Kleeman II** at 203.

However, looking again at Appellant's Chart, **Appendix A1**, it is equally apparent that all Supreme Court cases and Appellate Court cases which have found that §228.190 did not apply to the road at issue concerned an express common law dedication, either in the form of a plat[1] or a deed.[2] Every case that applied the §228.190 abandonment provision is a case where a road was established by an implied "common law dedication" as that term is defined by this Supreme Court in **Connell v. Jersey Realty & Investment**

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[1] *See* **Robinson v. Korns**, 157 S.W. 790 (Mo. 1913); **Bobb v. City of St. Louis**, 205 S.W. 713 (Mo. 1918); **Evans v. Andres**, 42 S.W.2d 32 (Mo. App. 1931); **Winschel v. County of St. Louis**, 352 S.W.2d 652 (Mo. 1961); and **Przyblylski v. Barbosa**, 289 S.W.3d 641 (Mo. App. W.D. 2009) transfer denied (Mo. banc. 2009).

[2] *See* **Coffey v. State ex rel. County of Stone**, 893 S.W.2d 843 (Mo. App. S.D. 1995).

Co., 180 S.W.2d 49, 53 (Mo. 1944), without a "deed or other formality," **Kleeman v. Kingsley**, 167 S.W.3d 198, 203 (Mo. App. S.D. 2005).

This Court and all the other appellate courts have found that where express common law dedication was made, §228.190 did not apply. A short discussion of those cases finding that §228.190 *does not* apply are as follows:

- **Robinson v. Korns**, 157 S.W. 790 (Mo. 1913): Supreme Court limits **Johnson v. Rasmus** by stating that the statutory predecessor of §228.190 "only applies to public roads existing or which have existed, and not to the title of lands voluntarily conveyed in trust to be used for the purpose of establishing streets thereon as they shall be needed", **Robinson** at 793, declining to apply §228.190 to an undeveloped city street in the city of St. Joseph in 1910; originally platted in 1857, the street itself had only been part of St. Joseph since approximately 1909, and was never used as a road. The Supreme Court in its discussion noted that the "appropriation of lands to public uses …deserves, and has received, the cordial encouragement of the state," **Robinson** at 793.
- **Bobb v. City of St. Louis**, 205 S.W. 713 (Mo. 1918): Supreme Court supports **Robinson v. Korns** but actually decides case on basis that grantor's widow was estopped from claiming title as against a deed previously executed by her husband, **Bobb** at 716. The road at issue had been platted in the county, and then incorporated within the City of St. Louis, **Bobb** at 715. Of interest is the Supreme Court's statement in its deliberations as to the applicability of §228.190 and that

"[h]aving acquired the land in perpetual trust, it *could only be abandoned by an act as deliberate as that by which it had been acquired*," **Bobb** at 715 (emphasis added).

- **Evans v. Andres**, 42 S.W.2d 32 (Mo. App. 1931): the Springfield Court of Appeals limits **Johnson v. Rasmus** and the application of the predecessor of §228.190, stating that there is "nothing in the language of that statute to indicate it was intended to apply to any roads other than those defined in the statute," and therefore the non-user provision does not apply to city streets, incorporated or not, although "certain broad language used in the case of **Johnson v. Rasmus**, 141 S.W. 590 (Mo. 1911) … might be so construed," **Evans** at 35. The Evans court noted in 1931 that the "Legislature has provided laws for streets and alleys separate and distinct from the general road laws," **Evans** at 35.
- **Winschel v. County of St. Louis**, 352 S.W.2d 652 (Mo. 1961): the Supreme Court discusses the application of §228.190 to an unincorporated city street and the limitation created in **Evans v. Andres**, 42 S.W.2d 32 (Mo. App. 1931), stating that "[w]e are of the view that the construction given present Section 228.190 by the court of appeals in the **Evans** case .. was correct and followed the rule of the **Korns** case … which had specifically limited the scope of the broad language in **Johnson v. Rasmus**," **Winschel** at 655. Further, in discussing **Robinson**, the **Winschel** court stated that the "reason for the nonapplicability of present Section 228.190 was not the fact that the streets happened to be located within a city but

because title to the land had been 'voluntarily conveyed in trust to be used for the purpose of establishing streets thereon as they shall be needed'," **Winschel** at 655.

- **Przyblylski v. Barbosa**, 289 S.W.3d 641 (Mo. App. W.D. 2009): Court of Appeals holds §228.190 did not apply where strip of land in the county was platted and filed with the county as a road in 1978, and established by county court order under Chapter 228 as a road, but never used, **Przyblylski** at 642, because "abandonment only applies where a public road is established by *one* of the *three* preceding methods," referring to §228.190, prescription, or common law dedication, **Przyblylski** at 645.

Appellants contend that despite Respondents' convoluted arguments and "split the nut" remarks concerning common law dedication, the Southern District decision of **Coffey v. State ex rel. County of Stone**, 893 S.W.2d 843 (Mo. App. S.D. 1995), is in line with every express common law dedication case decided by the Missouri Supreme Court, *see* Chart, **Appendix A1**. The **Coffey** case has extended the logic of those cases to apply them to express common law dedication where a road is actually used prior to allegations of abandonment. As such, it is in line with the Supreme Court's language in **Bobb v. City of St. Louis**, 205 S.W. 713, 715 (Mo. 1918), cited as well by this Court in **State ex rel State Highway Commission v. Herman**, 405 S.W.2d 904, 908 (Mo. 1966), that land conveyed to the city for streets could "only be abandoned by an act as deliberate as that by which it had been acquired."

The Southern District Court of Appeals decision in **Coffey** was consistent with

prior decisions as it attempted to apply the law to the facts presented. **Coffey** represents an interpretation of the application of §228.190 that has been in effect in the Southern District, where the case at bar was tried, for the last fifteen years. Additionally, it has been cited by various cases, including those outside the Southern District, without calling its holding into question, *see* **Kleeman v. Kingsley**, 167 S.W.3d 198, 203 (Mo. App. S.D. 2005) and **Przyblylski v. Barbosa**, 289 S.W.3d 641, 646 (Mo. App. W.D. 2009).

Respondent cites the Supreme Court case of **State ex rel State Highway Commission v. Herman**, 405 S.W.2d 904 (Mo. 1966), for the proposition that the 'any road however acquired' precedent of **Johnson v. Rasmus** is in force and effect, **Respondents' Substitute Brief p. 23**. In **Herman** the Supreme Court holds that a county road procured by condemnation in 1873 that was "legally established originally as a county road, used and existing as a public road for many years thereafter" was subject to abandonment under §228.190, having met the qualifications for §228.190 road establishment, **Herman** at 906-907. While Respondent states that prior Supreme Court cases "set the stage" for **Herman**, **Respondents' Substitute Brief p. 23**, Appellants find this statement confusing at best. **Herman** itself stated that it was decided under "fundamentally different facts" than **Robinson v. Korns**, 157 S.W. 790 (Mo. 1913), **Bobb v. City of St. Louis,** 205 S.W. 713 (Mo. 1918), **Evans v. Andres**, 42 S.W.2d 32 (Mo. App. 1931), and **Winschel v. County of St. Louis**, 352 S.W.2d 652 (Mo. 1961). **State ex rel State Highway Commission v. Herman**, 405 S.W.2d 904 (Mo. 1966). **Herman** is clearly not a case of common law dedication of the road at issue, and does not

prevent either the decision in **Coffey** or the Southern District's holding in the case at bar.

In conclusion, Appellants submit that the Southern District in **Coffey v. State ex rel. County of Stone**, 893 S.W.2d 843 (Mo. App. S.D. 1995) did not "split the nut" of common law dedication in §228.190 cases, since that occurred over eighty years earlier when the Supreme Court decided **Robinson v. Korns**, 157 S.W. 790 (Mo. 1913), holding that the predecessor to §228.190 did not apply to a road created by express common law dedication, ie a plat, **Robinson** at 793.

Appellants have shown above—without reference to **Coffey v. State ex rel. County of Stone**, 893 S.W.2d 843 (Mo. App. S.D. 1995)—that how a public road is established is an essential element of Respondents' claim of abandonment under §228.190. However, Appellants believe that **Coffey** is not out of line with Supreme Court precedent, and as such it further supports Appellants' argument that Respondents have failed in their burden of proof, the trial court in this case should be reversed, and judgment entered for the Appellants.

CONCLUSION

In conclusion, Appellants have consistently asserted and have shown that how the public road on Tract A was established is an element of the Respondents' case for abandonment under §228.190, under the statutory and the case law of Missouri. This Court and the Courts of Appeals and the Missouri Legislature have recognized that §228.190 does not apply to certain roads. Respondents, as the advocates of closing the public road on Tract A, must present evidence of how the road at issue was created in order for any court to determine if it can be abandoned under §228.190. Respondents have failed to do so, and have failed in their burden of proof.

The Southern District in this case correctly held that "Respondents did not meet their burden when they presented no evidence of how the public road was established," **McCullough v. Doss,** No. SD29396, slip op. at 5 (Mo. App. S.D. Dec. 30, 2009), the Southern District's opinion in this case should be upheld, and the trial court's decision reversed with directions to enter judgment on behalf of the Appellants that Tract A is a public road.

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06(c)

COMES NOW Cordelia F. Herrin of Melton & Herrin, P.C., Attorneys at Law, and having been duly sworn states that this Reply Brief complies with the limitations contained in Supreme Court Rule 84.06(c).

I further state that the number of words contained in the Brief are **6,461**, excluding the cover, certificate of service, and this certificate, and that this Brief was prepared with and formatted with Microsoft Word.

I further state that a CD containing the Brief is filed herewith and said disk has been scanned by Norton AntiVirus for viruses and is virus free.

STATE OF MISSOURI)
) ss
COUNTY OF BARRY)

Cordelia F. Herrin, being duly sworn, on her oath states that she is the attorney above named and that the facts stated therein are true according to the best of her knowledge and belief.

_____
Cordelia F. Herrin

Subscribed and sworn to before me this ____ day of May, 2010.

_____
Notary Public

Supreme Court of Missouri

LYNN K. McCULLOUGH and SHIRLEY A. McCULLOUGH, *Respondents*, vs. NADINE DOSS, and HOWARD ALLEN, *Appellants*.	))))))))))))))	No. SD29396

CERTIFICATE OF SERVICE

I hereby certify that two (2) true and correct copies of the above and foregoing Appellant's Substitute Reply Brief and one (1) electronic copy were mailed this ____ day of May, 2010, to:

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