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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

Respondents add the following:

Surveyor John Reed testified that from old drawings and depictions, he found that an old road existed on Tract A before the highway department installed its approach to Highway 39. Tr. 91. He did not, however, recall seeing an old road bed when he viewed the property in person. Tr. 96. From his examination of photographs at trial, he said that there did not appear to be a road bed there, based on the way he would define a road bed. Tr. 96; Def. Exs. 13-14.

Respondent Lynn McCullough, who has lived in Stone County all his life, bought his land in 1955. Tr. 4-6; Def. Ex. A. He said that the public stopped using Tract A as a road “when they built the new road. The new road took the place of it.” Tr. 31. Since that occurred before he bought his property, Tract A was no longer being used as a public road when he bought the property. Tr. 31. Consequently, he said, he has used Tract A as if it were his own property, even installing electricity to it, ever since he bought his land. Tr. 31-32. He has stored hay and equipment there for 35-40 years. Tr. 31. He knew of no one other than himself and his family who had used Tract A during the past 40-45 years. Tr. 31-32, 55. Specifically, he said, he was not aware of either Appellant Allen or

Appellant Doss using Tract A, and until June 2007 they did not cross it to get into their property. Tr. 31, 35, 40.

Lynn McCullough's son, Darron,<sup>1</sup> who was 37 years old at the time of trial, testified that Tract A was not used as a road since before he could remember. Tr. 59, 60. His father, he said, had treated it as his own property through his lifetime, or at least for as long as he could remember. Tr. 60, 68. He now uses the property in conjunction with his parents. Tr. 61. Ever since he was a child, he said, he and his family had used Tract A to store equipment, trucks, and hay. Tr. 60, 68. He, too, said that the McCulloughs had run electricity to that tract to keep the trucks warm in the winter and to provide the electricity for battery chargers and lights for security. Tr. 68. He was not aware of anyone other than his family and himself using Tract A, and he had never known either Allen or Doss to use it for anything. Tr. 61. For as long as he could remember, Stone County had not had a roadbed there—the existing one is one that he and his father built by hauling in gravel to build up the ground and fill a mud hole. Tr. 74-76.

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<sup>1</sup>Darron McCullough's name is misspelled "Darren" in the transcript.



## POINTS RELIED ON

### I

The trial court did not err by quieting title to Tract A in Respondents, because the Court did not erroneously declare and apply the law, and the evidence supports the judgment, in that

- (A) the nonuser provision of § 228.190.1 applies to work abandonment of county roads, such as the portion of the old county road on Tract A, that have been built and used by the public but later fall into disuse, and
- (B) the evidence shows that Tract A was abandoned as a county road long before 1990.

*Johnson v. Rasmus*, 237 Mo. 587, 141 S.W. 590 (1911).

*Przybylski v. Barbosa*, 289 S.W.3d 641 (Mo. App. 2009).

*Robinson v. Korn*s, 250 Mo. 663, 157 S.W. 790 (1913).

*State ex rel. State Highway Commission v. Herman*,

405 S.W.2d 904 (Mo. 1966).

MO. CONST. art. III, § 23.

§ 228.190, RSMo Cum. Supp. 2009.

## II

The trial court did not err by quieting title to Tract A in Respondents, because the evidence supports the judgment, in that there was ample evidence from which the trial court could have found that the old county road across Tract A was abandoned, that no one other than Respondents and their family used Tract A, and that Appellants took no action to require Respondents to move equipment from Tract A or otherwise to assert their rights to use the road.

*Kleeman v. Kingsley*, 167 S.W.3d 198 (Mo. App. 2005).

*Stuart v. State Farm Mut. Auto. Ins. Co.*, 699 S.W.2d 450

(Mo. App. 1985).

### III

The trial court did not err by quieting title to Tract A in Respondents, because the evidence supports the judgment, in that

- (A) the trial court could have found old county road across Tract A was abandoned before Respondent Lynn McCullough bought his property, but
- (B) in any event, Respondents' own use of Tract A was not use by the public for purposes of determining whether the public had abandoned the road.

*Kleeman v. Kingsley*, 167 S.W.3d 198 (Mo. App. 2005).

## ARGUMENT

### I

The trial court did not err by quieting title to Tract A in Respondents, because the Court did not erroneously declare and apply the law, and the evidence supports the judgment, in that

- (A) the nonuser provision of § 228.190.1 applies to work abandonment of county roads, such as the portion of the old county road on Tract A, that have been built and used by the public but later fall into disuse, and
- (B) the evidence shows that Tract A was abandoned as a county road long before 1990.

The key to this case lies in the difference between roads that have been built, on the one hand, and unimproved land that is simply held for future road construction, on the other. Appellants argue, and the Southern District ruled, that there must be proof of how the old road was acquired before a court can determine whether it has been abandoned. Certainly unimproved land held for future road construction requires formal abandonment, since the public cannot abandon by nonuse a road that was never built in the first place. But a road once built can be abandoned by nonuse under § 228.190 regardless how it is acquired.

Appellants concede that Tract A “was a public road.” App. Br. at 18. Under this Court’s longstanding precedents, that road could have been abandoned by nonuser under § 228.190. The evidence shows that it was, and consequently the trial court did not err.

**A. *Standard of review.***

The standard of review in court-tried cases is governed by *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). This standard applies in cases involving the existence of roads. *Kleeman v. Kingsley*, 88 S.W.3d 521, 522 (Mo. App. 2002) (*Kleeman I*). Thus, this Court must affirm the judgment unless it is unsupported by the evidence or against the weight of the evidence or unless the trial court erroneously declared or applied the law. *Murphy*, 536 S.W.2d at 32; *Kleeman I*, 88 S.W.3d at 522.

**B. *The nonuser provision of § 228.190.***

Section 228.190 provides for abandonment of roads because of nonuse by the public. That provision, which now appears in § 228.190.1, has remained essentially the same since it was enacted in 1887, except that the legislature lowered the nonuser period from ten years to five in 1953. It states that “nonuse by the public for five years continuously of *any* public road shall be deemed an abandonment and vacation of the same.” § 228.190.1, RSMo Cum. Supp. 2009 (emphasis added).

C. *The Southern District's ruling.*

The issue that the Southern District found dispositive is whether the abandonment provision of § 228.190.1 applies

- to “*any*” existing road, “however acquired,” as this Court said in *Johnson v. Rasmus*, 237 Mo. 587, 141 S.W. 590, 591 (1911), and reiterated in *State ex rel. State Highway Commission v. Herman*, 405 S.W.2d 904, 907 (Mo. 1966), or
- to only those existing common-law roads dedicated by use rather than by a deed or other formality, as the Southern District had earlier said in *Kleeman v. Kingsley*, 167 S.W.3d 198, 203 (Mo. App. 2005) (*Kleeman II*).

The Southern District followed *Kleeman II*, which had split the nut of common-law dedication. *Kleeman II* had distinguished the Southern District’s earlier decision in *Coffey v. State ex rel. County of Stone*, 893 S.W.2d 843, 848 (Mo. App. 1995), which held that § 228.190.1 did not apply when common-law dedication occurs through a deed or other formality. *Kleeman II*, 167 S.W.3d at 203. Since *Kleeman II* involved a common-law dedication through use, the Southern District said that *Coffey* did not apply there. *Id.*

Together, *Coffey* and *Kleeman II* form the basis for the Southern

District's ruling here that the trial court had to know how the road was created in order to determine whether the road could be abandoned by nonuse under § 228.190.1. *McCullough v. Doss*, No. SD29396, slip op. at 5, (Mo. App. S.D. Dec. 30, 2009). The court ruled that only when the grantor's intent to dedicate a road "is inferred from use by the public rather than expressed in a deed" has the legislature provided under § 228.190.1 that the road "will be deemed abandoned after five years of the public's nonuse." *Id.* at 3. It said that Respondents did not show "that the nonuser provision of section 228.190.1 is even applicable" because they "presented no evidence of how the public road was established." *Id.* at 5. Since the Southern District could not "determine whether the road was 'abandoned' or whether the prior deed controls because there was absolutely no evidence how the road became a public road," it held that the trial court likewise could not have found the road abandoned because it had no evidence of how the road was created. *Id.* at 2, 5. It reversed and remanded "with directions, if necessary, to take further evidence consistent with" the opinion. *Id.*

The Southern District acknowledged Respondents' argument that under this Court's decisions, the manner in which the old road was created is irrelevant:

Respondents argue that it does not matter how the road was established because our prior cases, which indicate that the abandonment provision of section 228.190.1 is not applicable to land voluntarily conveyed to a county to be used for a road, were a misreading and misapplication of controlling Supreme Court authority. *Id.* at 2 (footnote omitted). Yet the court neither discussed nor even cited *Johnson*, *Herman*, or the other decisions of this Court that Respondents discussed. Instead, it assumed the answer to the very question at issue:

As noted by Appellants, each case cited by Respondents regarding abandonment of a road under section 228.190 provided evidence of how the road in question had been created, which allowed the courts *to correctly apply the law of abandonment.*

*Id.* at 3 (emphasis added). In other words, the court said that its own prior decision in *Kleeman II*, not this Court's prior decisions, "correctly [applied] the law of abandonment." *Id.* It viewed as "instructive" the dicta in another Southern District case whose "ultimate holding" it conceded does not apply here. *Id.* at 3-4. Notably, although Respondents' Brief discussed *Johnson*, *Herman*, and other cases from this Court, all of the cases that the Southern District said Respondents cited were decisions of

the Court of Appeals. *Id.*

D. *Section 228.190 applies to abandonment of a road that has been built, regardless how it was acquired.*

In *Johnson*, this Court held that the predecessor to § 228.190.1 applied to effect the abandonment of a county road for nonuse by the public following allegedly void formal abandonment proceedings. *Johnson*, 141 S.W. at 590-91. It pointedly said that Missouri law has always permitted abandonment of a road acquired by common-law dedication:

It 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 methods of dedication* and prescription arising from adverse use, or by the statutory method . . . .

*Id.* at 591 (emphasis added). The Court explained that the predecessor to § 228.190.1 established the length of the requisite period of nonuser in order to effect abandonment regardless of the method by which the road was acquired:

In 1887 a statute was adopted in this State, fixing the length of time of nonuser sufficient to prove an abandonment of any public road. This statute has been carried into each revision since its passage. . . . In all stages of its existence, the statute has read: “And non-user by

the public for a period of ten years continuously of any public road shall be deemed an abandonment of the same.” . . . The terminology of the above quotation from the statutes shows that it is applicable to *any* public road; hence there is no reason why it should be construed as having been intended to apply *only* to roads which the public acquired through imperfect proceedings in the county court. . . . In the paragraph under consideration, the Legislature designed to fix the length of time abandonment of the use of a highway must be shown, before the right to it as such could be lost to the public. The statute recognized that any public road might be vacated or abandoned according to law, and provided in this paragraph the length of time which the proof must show nonuser, before said defense could arise. It was not designed to confine this defense to that class of roads only which the public had acquired in a particular way; but the statute, by clear and positive terms, is made applicable to *any* highway or public road, however acquired.

*Id.*

Consequently, relying on *Johnson*, this Court held in *Herman* that § 228.190 applies to effect the abandonment of a county road for which the land was condemned. It rejected the State Highway Commission’s argument that the nonuser provision of § 228.190 applied only to roads

established by prescription or user. *Herman*, 405 S.W.2d at 907. Instead, it said, a road “legally established originally as a county road, *used and existing as a public road* for many years thereafter, which falls into disuse and is not used by the public . . . , may be declared abandoned and vacated under the nonuser clause of § 228.190.” *Id.* (emphasis added). Quoting *Johnson*, the Court reiterated that the nonuser clause “in positive terms is made applicable to *any* public road, ‘however acquired.’” *Id.*

Using language on which *Coffey* later relied, *Herman* acknowledged the State Highway Commission’s argument that the nonuser provision was not intended to apply to title of lands voluntarily conveyed in trust *to be used for the purpose of establishing streets thereon as they shall be needed* and that lands so dedicated in perpetual trust and platted for such purpose can only be abandoned by an act as deliberate as that by which they were acquired, that is, by proceeding under § 228.110, *Robinson v. Korns*, 250 Mo. 663, 157 S.W. 790; *Bobb v. City of St. Louis*, 276 Mo. 59, 205 S.W. 713; *Winschel v. County of St. Louis*, Mo. Sup., 352 S.W.2d 652, and to this extent the ruling in *Johnson v. Rasmus* . . . has been limited.

*Id.* at 908 (emphasis added). But, *Herman* said, “[n]othing in the last

three cited cases militates . . . against our present ruling, which is made upon fundamentally different facts.” *Id.*

Those “fundamentally different facts”—the key to deciding this case correctly—were that the supposedly abandoned roads in *Robinson*, *Bob*, and *Winschel* had never been built in the first place.

*Robinson*, which the Court decided two years after *Johnson*, established that the nonuser provision of § 228.190 does not apply to land held in trust for future development. It held that the predecessor to § 228.190 did not apply to effect the abandonment of unimproved land dedicated for streets on a town plat. The Court explained that it would produce a “startling” result if streets that were platted but not yet opened “should at once and automatically be extinguished” by the passage of time, so that the land would revert to abutting landowners “before it could be used for the purpose to which it has already been dedicated.” *Robinson*, 157 S.W. at 793. Consequently, in light of specific statutory coverage for platted streets, the nonuser provision of the predecessor to § 228.190.1 did not apply: “Making it as broad as we can by literal interpretation, aided by every possible presumption which may arise from necessity or expediency,” the Court said, the predecessor to § 228.190.1 “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*.” *Id.* (emphasis

added).

Subsequent cases followed this interpretation:

- In *Bobb v. City of St. Louis*, 276 Mo. 59, 205 S.W. 713 (1918), this Court discussed the predecessor of § 228.190.1 in the context of a city street. A 30-foot-wide street existed when a new plat was recorded in 1869 to widen it to 50 feet. *Id.* at 713-14, 715. The city annexed the land in 1876. *Id.* at 715. A fence along the original street boundary existed, though, until 1890, leaving the original street on one side of the fence and the added land on the other. *Id.* at 714.

The city finally took exclusive possession of the land in 1909, paved it, and added sidewalks, sewers, and lamp posts. *Id.* at 713-14. Meanwhile, the Court said, there had been no abandonment of the additional 20 feet of land added to the street. Citing *Robinson*, the Court found it “unthinkable that the Legislature should enact that in every city addition the streets and alleys *not opened* within ten years should be automatically closed and revert to the dedicators.” *Id.* at 715 (emphasis added). Instead, the public acquired the land “in perpetual trust,” so the platted but unbuilt street could “only

be abandoned by an act as deliberate as that by which it had been acquired.” *Id.*

Ultimately the Court confirmed the city’s rights in the street by ruling that Bobb, who had signed the dedication, was estopped to deny the validity of the conveyance even though it was arguably defective. *Id.* at 716.

- In *Winschel v. County of St. Louis*, 352 S.W.2d 652 (Mo. 1961), this Court again held that an unbuilt street could not be abandoned by nonuse under the predecessor to § 228.190.1. The street was dedicated on the plat for a subdivision in an unincorporated part of St. Louis County. *Id.* at 652. The street itself, though, was never built. *Id.* at 653. The Court said that *Robinson* had made clear “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 the 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.’” *Id.* at 654. *Robinson*, it said, ruled “with respect to a ‘class of titles’ which came into existence by voluntary conveyances in trust, irrespective of whether the

dedicated streets were or were not within an incorporated city.” *Id.*

*Winschel* overruled *Odom v. Hook*, 177 S.W.2d 165 (Mo. App. 1943), which had reached a contrary result based on *Johnson*. As in *Winschel*, the street in *Odom* was platted but unbuilt. *Odom*, 177 S.W.2d at 166-69. No “right of public easement . . . had ever been used since 1888.” *Id.* at 171. Thus, citing *Johnson*, the Court of Appeals ruled that abandonment occurred after the statutory period expired. *Id.* But *Winschel* abrogated that holding, noting that the Court of Appeals had ignored *Robinson*. Thus, *Odom* was erroneous insofar as it held that the nonuser provision of § 228.190 applied to streets “dedicated in accordance with the provisions of a statute and . . . specified on a recorded plat of a tract of land located outside the limits of a town or city whereby title to said streets in trust has been vested in the county of the land’s location.” *Winschel*, 352 S.W.2d at 655.

These cases set the stage for *Herman*. As noted above, in *Herman* this Court reiterated *Johnson’s* statement that the nonuser clause “in positive terms is made applicable to *any* public road, *however acquired.*”

*Herman*, 405 S.W.2d at 907 (second emphasis added). It agreed that § 228.190.1 does not apply to land held in trust “for the purpose of establishing streets thereon as they shall be needed” but said that such land was “fundamentally different” from the road in *Herman*, which was already “legally established originally as a county road.” *Id.* at 907, 908.

**E. *Coffey was wrong, and hence Appellants’ argument is invalid.***

It makes no difference, then, whether the old county road here was acquired by common-law dedication through use or through a deed or other formality. Either way, the nonuser provision of § 228.190.1 applies. Appellants’ contrary argument under *Coffey* and *Kleeman II* is wrong because *Coffey* fundamentally misapplied *Herman*. Had *Coffey* correctly applied *Herman*, there would be no dichotomy between *Coffey* and *Kleeman II*—no split in the common-law dedication nut—and hence no basis for the Southern District’s ruling here.

In plain error review of an unpreserved point, *Coffey* took *Herman’s* language out of context and changed the law by applying it to completely different facts. Quoting *Herman*, *Coffey* observed that the nonuser provision of § 228.190.1 “does not apply when . . . lands are

voluntarily conveyed to a county *to be used* for a road for public purposes.” *Coffey*, 893 S.W.2d at 848 (emphasis added). From that it concluded that the disputed road there could not be abandoned under § 228.190.1. *Id.* But in *Coffey* the county did not hold undeveloped land for future use—but, instead, the road had already been both established and allegedly abandoned. *Id.* at 847-48. *Coffey* erroneously used *Herman’s* statement that § 228.190.1 does not effect abandonment of land *to be used* for road purposes as the basis for ruling that § 228.190.1 does not effect abandonment of an *already established* road.<sup>2</sup>

Under *Johnson*, even as limited by *Robinson*, the nonuser provision of § 228.190 applies to existing roads and thus in fact did apply in *Coffey*. Indeed, *Robinson* expressly said that the predecessor to § 228.190.1 applied “to public roads existing or which have existed” but 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*, 157

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<sup>2</sup>*Coffey* likewise failed to acknowledge the Southern District’s earlier statement, based on *Herman*, that § 228.190.1 does not apply “to title to lands voluntarily conveyed in trust to be used for the purpose of establishing streets as they are needed.” *Harrison v. State Highways & Transp. Comm’n*, 732 S.W.2d 214, 219 (Mo. App. 1987).

S.W. at 793.

*Coffey* thus was unfaithful to precedent. The Western District no doubt recognized this recently and tried to massage *Coffey* back into line by correctly applying its language to an undeveloped portion of a platted subdivision road. *Przybylski v. Barbosa*, 289 S.W.3d 641, 646 (Mo. App. 2009).

In *Przybylski*, the undeveloped strip ran between plaintiffs' and defendants' lots. *Id.* at 642. It had been dedicated for use as a subdivision road, and the county had issued an order under § 228.080 aimed at establishing it as such, but the road over it was never built, and so it was never used as a public road. *Id.* at 642, 644-45. Plaintiffs fenced it off from the public, planted grass, trees, and shrubbery on it, and maintained it. *Id.* at 642. After defendants allegedly removed the fence, plaintiffs sought a declaration that they owned the undeveloped strip by adverse possession, claiming that the county had abandoned it under § 228.190. *Id.* Plaintiffs relied on *Johnson* and *Winschel*. *Id.* at 645.

The Western District affirmed the trial court's dismissal of the action. *Id.* at 646. Plaintiffs' reliance on *Johnson* and *Winschel*, it said, was misplaced. *Id.* at 645. The parties agreed that the dedication of the undeveloped land "was a sufficient conveyance to the county," which, the

court said, “served to vest title to the undeveloped land to the county, in trust, for use as a public road.” *Id.* at 644. Yet the county’s order under § 228.080 did not itself establish the undeveloped strip as a road, and neither *Johnson* nor *Winschel* supported plaintiffs’ claim to the contrary. *Id.* at 645. Thus, the nonuser provision of § 228.190.1 did not work abandonment of the strip:

In holding that a public road, *however acquired*, is subject to abandonment under Section 228.190, *Winschel* and *Johnson* were alluding to public roads established by one of three methods . . . : (1) Under Section 228.190 RSMo; (2) by prescription; or (3) by implied or common law dedication. . . . Abandonment under section 228.190 applies only where a public road is established by *one* of the *three* preceding methods. . . . None of the methods support Plaintiffs’ argument that the 1978 county court order, by itself, established a public road subject to abandonment under section 228.190.

*Id.* at 645. Instead, absent actual development of the strip into a road, the land was simply held by the county, “in trust, for use as a public road.” *Id.* at 646. Citing *Coffey*, and in turn *Robinson*, *Bobb*, *Winschel*, and *Herman*, the Western District said that numerous Missouri courts “have held that the abandonment provision of section 228.190 was not intended

to apply to title of lands voluntarily conveyed in trust to be used for the purpose of establishing streets thereon as they shall be needed.” *Id.* It concluded:

As the court in *Coffey* noted, the preceding cases stand for the principle that the abandonment provision of section 228.190 does not apply when, such as here, lands are voluntarily conveyed to a county *to be used* for a road for public purposes. . . . Thus, the abandonment provision of section 228.190 does not apply to the *undeveloped* land.

*Id.* (emphasis added).

This Court denied transfer in *Przybylski v. Barbosa*, No. SC90209 (Mo. banc Sept. 1, 2009).

*Coffey* reached the right result on its facts.<sup>3</sup> Its reasoning, however, is not viable authority for Appellants' argument here. Appellants agree that Tract A, the part of the abandoned county road in question, was once a public road. App. Br. at 18. Indeed, they pleaded that in their Second

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<sup>3</sup>*Coffey's* essential ruling that the road there could not be abandoned absent a formal county commission proceeding was correct because there was evidence, and the trial court indeed found, that the road had not been abandoned because it had been used within the five-year nonuser period required for abandonment under § 228.190.1. *Coffey*, 893 S.W.2d at 845-46. That, coupled with the fact that the court reviewed the abandonment claim for plain error, *id.* at 847, put *Coffey* in line with other abandonment cases on its facts.

Amended Counterclaim. Supp. L.F. 2. The nonuser provision of § 228.190.1 “applies to public roads existing or which have existed.” *Robinson*, 157 S.W. at 793. Appellants’ argument thus is incorrect that the trial court could not declare Tract A abandoned under § 228.190.1 absent evidence of how the old road was created.

***F. Appellant’s argument regarding CART funds is unpersuasive.***

Appellants cite § 228.190.2 for the proposition that, after 1990, roads for which the county received county aid road trust (CART) funds may not be abandoned except through formal abandonment proceedings. App. Br. at 22-23. Without knowing whether these apply, Appellants claim, the trial court’s finding of abandonment also fails. *Id.* at 23-25, 26-27.

The General Assembly amended § 228.190 to add Subsection 2 in 2006. *See* S.B. 932, Sec. A, § 228.190, 93d Gen. Assem., 2d Reg. Sess., 2006 Vernon’s Mo. Sess. Laws 181, 183. It states:

From and after January 1, 1990, any road in any county that has been identified as a county road for which the county receives allocations of county aid road trust funds from or through the department of transportation for a period of at least five years shall be conclusively

deemed to be a public county road without further proof of the status of the road as a public road. No such public road shall be abandoned or vacated except through the actions of the county commission declaring such road vacated after public hearing, or through the process set out in section 228.110.

§ 228.190.2, RSMo Cum. Supp. 2009. For two reasons, Appellant's reliance on it is misplaced.

1. **§ 228.190.2 appears to be unconstitutional.**

The constitutional validity of this provision, which relates to when roads are deemed to be public county roads, is doubtful. The bill in which it was enacted was entitled an "act . . . to enact . . . ten new sections relating to county officers." S.B. 932, Sec. A, § 228.190, 93d Gen. Assem., 2d Reg. Sess., 2006 Vernon's Mo. Sess. Laws 181, 181. The Constitution requires that a bill contain only "one subject which shall be clearly expressed in its title." MO. CONST. art. III, § 23. This provision is mandatory, not directory. *Carmack v. Director, Mo. Dept. of Agriculture*, 945 S.W.2d 956, 959 (Mo. banc 1997). The title of the bill, referring to "county officers," does not impart that the bill also relates to the status and abandonment of county roads. It obviously confused even the Revisor of Statutes, who has appended to § 228.190 a title stating that the statute

relates to “[r]oads legally established, when—*deemed abandoned, when—roads deemed public county roads, when.*” § 228.190 (emphasis added). Furthermore, even if this section were construed to relate to “county officers” rather than roads, the General Assembly’s statement that the bill related generally to “county officers” is overbroad, for it is “too broad and amorphous to be meaningful” and affects much of the legislation that the General Assembly enacts. *Jackson County Sports Complex Auth. v. State*, 226 S.W.3d 156, 161 (Mo. banc 2007).

**2. On the facts, whether the county received CART funds for Tract A is irrelevant.**

That aside, § 228.190.2 expressly applies only to the abandonment of county roads “[f]rom and after January 1, 1990.” Tract A was abandoned well before 1990.

Surveyor John Reed testified that from old drawings and depictions, he found that an old road existed on Tract A before the highway department installed its approach to Highway 39. Tr. 91. He did not, however, recall seeing an old road bed when he viewed the property in person. Tr. 96. From his examination of photographs at trial, he said that there did not appear to be a road bed there, based on the way he would define a road bed. Tr. 96; Def. Exs. 13-14.

Respondent Lynn McCullough, who has lived in Stone County all his life, bought his land in 1955. Tr. 4-6; Def. Ex. A. He said that the public stopped using Tract A as a road “when they built the new road. The new road took the place of it.” Tr. 31. Since that occurred before he bought his property, Tract A was no longer being used as a public road when he bought the property. Tr. 31. Consequently, he said, he has used Tract A as if it were his own property, even installing electricity to it, ever since he bought his land. Tr. 31-32. He has stored hay and equipment there for 35-40 years. Tr. 31. He knew of no one other than himself and his family who had used Tract A during the past 40-45 years. Tr. 31-32, 55. Specifically, he said, he was not aware of either Appellant Allen or Appellant Doss using Tract A, and until June 2007 they did not cross it to get into their property. Tr. 31, 35, 40.

Lynn McCullough’s son, Darron, who was 37 years old at the time of trial, testified that Tract A was not used as a road since before he could remember. Tr. 59, 60. His father, he said, had treated it as his own property through his lifetime, or at least for as long as he could remember. Tr. 60, 68. He now uses the property in conjunction with his parents. Tr. 61. Ever since he was a child, he said, he and his family had used Tract A to store equipment, trucks, and hay. Tr. 60, 68. He, too, said that the

McCulloughs had run electricity to that tract to keep the trucks warm in the winter and to provide the electricity for battery chargers and lights for security. Tr. 68. He was not aware of anyone other than his family and himself using Tract A, and he had never known either Allen or Doss to use it for anything. Tr. 61. For as long as he could remember, Stone County had not had a roadbed there—the existing one is one that he and his father built by hauling in gravel to build up the ground and fill a mud hole. Tr. 74-76.

The trial court, which was free to believe or disbelieve part, all, or none of the testimony of any witness, *Watson v. Mense*, 298 S.W.2d 521, 525 (Mo. banc 2009), was free to believe this evidence and obviously did. Lynn McCullough’s testimony established that the old road across Tract A was no longer in use when he bought the land in 1955. Even giving Appellants the benefit of any possible doubt, however, based on Darron McCullough’s testimony Tract A had not been used as a public road since before he was born—some 37 years before trial on December 17, 2007—which goes back to 1970 and thus predates the statutory effective date of January 1, 1990, by some 20 years. Consequently, Appellants’ argument with respect to the need to determine whether Stone County ever received CART funds for Tract A is unavailing because the

evidence supports the finding that Tract A was abandoned long before the statutory trigger date for application of § 228.190.2.

## II

The trial court did not err by quieting title to Tract A in Respondents, because the evidence supports the judgment, in that there was ample evidence from which the trial court could have found that the old county road across Tract A was abandoned, that no one other than Respondents and their family used Tract A, and that Appellants took no action to require Respondents to move equipment from Tract A or otherwise to assert their rights to use the road.

The trial court was entitled to believe the testimony that no one other than Respondents had used Tract A for years. The evidence supports the judgment.

### A. *Standard of review.*

In a bench-tried case, this Court must affirm the judgment unless it is either unsupported by the evidence or against the weight of the evidence. *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976).

*Murphy* requires that the appellate court give due regard to the trial court's opportunity to assess witness credibility, Rule 84.13(d)(2), and hence deference to its findings of fact, *Brawley v. McNary*, 811 S.W.2d 362, 365 (Mo. banc 1991). This recognizes the reality that the trial judge is better positioned to determine the credibility of witnesses, their

sincerity and character, and other trial intangibles not apparent in the record. *Essex Contracting, Inc. v. Jefferson County*, 277 S.W.3d 647, 652 (Mo. banc 2009). The trial court is free to believe or disbelieve part, all, or none of the testimony of any witness. *Watson v. Mense*, 298 S.W.2d 521, 525 (Mo. banc 2009).

Accordingly, when determining the sufficiency of the evidence, an appellate court must accept as true the evidence and inferences favorable to the judgment and disregard all contrary evidence and inferences. *Id.* at 526. It “must defer to the trial court on factual issues and cannot substitute its judgment for that of the trial court.” *Kisselev v. Director of Revenue*, 97 S.W.3d 538, 541 (Mo. App. 2003). Any issues on which the trial court has not made specific findings of fact—as it made none at all here—are deemed to be found in accordance with the trial court’s result. Rule 73.01(c).

“The credibility of witnesses and the weight to be given their testimony is a matter for the trial court[.]” *Herbert v. Harl*, 757 S.W.2d 585, 587 (Mo. banc 1988). The “weight” of the evidence means its weight in probative value, not its weight in quantity or amount. *O’Shea v. Pattison-McGrath Dental Supplies, Inc.*, 352 Mo. 855, 180 S.W.2d 19, 23 (1944). When assessing the weight of the evidence, then, an appellate

court may set aside the judgment only cautiously, and then only with a firm belief that the judgment is wrong. *Murphy*, 536 S.W.2d at 30.

**B. *The evidence supports the judgment.***

There was ample evidence that no one other than Respondents had used Tract A for years and that, accordingly, the old county road that crossed it before Lynn McCullough bought his property in 1955 had long since been abandoned. That evidence is recounted in the argument under Point I above and, for brevity, is incorporated here.

McCullough quite reasonably agreed that he does not guard Tract A for 24 hours a day in order to make sure that no one steps across it in the middle of the night. Tr. 54. So, he said, there was no way that he could say with certainty “that nobody has snuck in there in the middle of the night and used it.” Tr. 54. As a practical matter, it would be impossible to prove such a negative—that no one else had ever gone across Tract A—with certainty. *See Stuart v. State Farm Mut. Auto. Ins. Co.*, 699 S.W.2d 450, 455 (Mo. App. 1985). But his observation over the last 40 years, he said, was that no one had used the property except him and his family. Tr. 55. *Cf. Kleeman v. Kingsley*, 167 S.W.3d 198, 204 (Mo. App. 2005) (*Kleeman II*) (property owner claiming abandonment “stated that he had ‘never personally seen’ Defendants nor anyone else utilizing the

disputed area”).

In any event, it was the trial court’s duty, not that of this Court, to resolve any conflict in the testimony and determine the credibility of the witnesses. The trial court resolved the issues in favor of Respondents, and the evidence amply supports its determination.

Appellants’ argument that Respondents “may not rely upon their own actions blocking the road on Tract A as evidence of non-use by members of the public,” App. Br. at 33, does not aid them. While “an ‘encroachment upon or obstruction of a public highway is an unlawful act . . . evidence that access to a public road has been entirely blocked and cut off . . . and that the encroachment has been submitted to by the public may be taken as evidence that the road has been abandoned.” *Kleeman II*, 167 S.W.3d at 205. Thus, “the fact that Plaintiffs placed various . . . obstructions . . . across the disputed area is irrelevant to the trial court’s finding of abandonment.” *Id.* Instead, “it is the ‘doings of the parties entitled to [use] the road . . . ’ that is important.” *Id.* Appellants “had but to . . . specifically complain of the obstructions on the roadway” or “initiate court action to enforce their purported rights to the disputed area. Yet the weight of the evidence shows [Appellants] took no such actions.” *Id.*



### III

The trial court did not err by quieting title to Tract A in Respondents, because the evidence supports the judgment, in that

- (A) the trial court could have found old county road across Tract A was abandoned before Respondent Lynn McCullough bought his property, but
- (B) in any event, Respondents' own use of Tract A was not use by the public for purposes of determining whether the public had abandoned the road.

Finally, Appellants argue that Respondents used the old county road across Tract A as members of the public and that, accordingly, the road was never abandoned. That argument fails for two reasons. First, it presupposes that the road was not abandoned before Respondent Lynn McCullough ever bought his property and began using Tract A. Second, under *Kleeman II*, Respondents' own use of the property is not enough to prevent abandonment of the road.

A. *Standard of review.*

The standard of review is set forth fully under Point II above and, for brevity, is incorporated here.

**B. *The trial court could have found that the road was abandoned before Respondents began using Tract A.***

Fundamentally, the evidence supports a finding that the old county road across Tract A was abandoned before Respondents ever began using it. As discussed under Point I above, Lynn McCullough testified that the public stopped using Tract A as a road “when they built the new road. The new road took the place of it.” Tr. 31. Since that occurred before he bought his property, Tract A was no longer being used as a public road when he bought the property in 1955. Tr. 4-6, 31; Def. Ex. A. Consequently, he said, he has used Tract A as if it were his own property, even installing electricity to it, ever since he bought his land. Tr. 31-32. The trial court was entitled to believe that testimony. If so, then it makes no difference whether Respondents’ use of Tract A constitutes use by the public.

**C. *Respondents’ use was not public use for abandonment purposes.***

But Respondents’ own use of Tract A does not constitute use by the public for purposes of abandonment analysis. The Southern District rejected precisely the same argument in *Kleeman II*. See Brief of Appellants at 34-36, *Kleeman II*. And indeed the court noted that the

landowner claiming abandonment there had maintained part of the area in dispute. *Kleeman II*, 167 S.W.3d at 204. Thus, Appellants' argument that Respondents themselves used Tract A is unavailing.

## CONCLUSION

The nonuser provision of § 228.190.1 applies to the abandonment of existing county roads. The evidence amply supports the trial court's finding that the old county road across Tract A was abandoned and that Respondents own the entirety of Tract A by deed and adverse possession. The judgment should be affirmed.

Respectfully submitted,

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By \_\_\_\_\_

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## CERTIFICATE OF COMPLIANCE WITH RULE 84.06

I certify the following:

1. The foregoing Brief complies with the type and volume limitation of Rule 84.06. The typeface is Century 725 BT.
2. The signature block of the foregoing Brief contains the information required by Rule 55.03(a). To the extent that Rule 84.06(c)(1) may require inclusion of the representations appearing in Rule 55.03(b), those representations are incorporated herein by reference.
3. The foregoing Brief, excluding the cover, certificate of service, this certificate, and the signature block, contains 7,135 words as counted by Word Perfect 9.
4. This Brief has been prepared using Word Perfect 9 for Windows.
5. The disk submitted herewith as required by Rule 84.06(g) has been scanned for viruses and is virus free.

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Richard L. Schnake, # 30607

## CERTIFICATE OF SERVICE

I certify that I served one copy of this Respondents' Substitute Brief in the form specified by Rule 84.06 and one copy of the disk required by Rule 84.06(g) on Mr. Donald L. Cupps and Ms. Cordelia F. Herrin by mailing them to them at their respective addresses of record on April 9, 2010.

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Richard L. Schnake, # 30607