

IN THE SUPREME COURT OF MISSOURI

Supreme Court No. SC 90133

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

Defendants/Appellants,

vs.

ORLA HOLMAN CEMETERY, INC. AND SUSAN RECTOR

Plaintiffs/Respondents.

APPEAL FROM THE CIRCUIT COURT OF CAMDEN COUNTY, MISSOURI
The Honorable Carl DeWitt Gum, Jr., Judge

**APPELLANTS' SUBSTITUTE REPLY BRIEF
ORAL ARGUMENT REQUESTED**

LOWTHER JOHNSON
Attorneys at Law, LLC
Michael K. Cully, MO Bar No. 26794
David A. Fielder, MO Bar No. 34644
Lee J. Viorel, MO Bar No. 36886
901 St. Louis Street, 20th Floor
Springfield, MO 65806
Telephone: 417-866-7777
Fax: 417-866-1752
mcully@lowtherjohnson.com

Attorneys for Defendants/Appellants

Table of Contents

Table of Additional Authorities.....	2
Statement of Additional Facts	3
Argument.....	4
Conclusion.....	17
Certificate of Compliance with Rule 84.06 and Certificate of Service.....	18

Table of Additional Authorities

CASES:

Anderson v. Anderson, 850 S.W.2d 404, 406 (Mo.App. 1993) 12

City of Cuba v. Williams, 17 S.W.3d 630 (Mo.App. S.D. 2000) 9

Greene County V. Pennel, 992 S.W.2d 258 (Mo.App. 1999)..... 14

Kurtz v. Knapp, 106 S.W. 537 (Mo.App. 1908)..... 14

Lierheimer v. Minnesota Mutual Life Ins. Co., 99 S.W. 525, 527 (Mo.App. 1907) 16

Watters v. Travel Guard Int’l., 136 S.W.3d 100, 109 (Mo.App. 2004)..... 17

Wunsch v. Sun Life Assurance Co. of Canada, 92 S.W.3d 146, 153 (Mo.App. 2003) ... 16

RULES:

84.04(c)..... 5, 6

84.04(d)..... 4, 5, 17

TREATISES:

McQuillin, *The Law of Municipal Corporation*, §30.12 (3rd Ed.)..... 14

STATEMENT OF ADDITIONAL FACTS

Respondents state in their Statement of Facts, at page 15, that “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, if Defendants lost this lawsuit (LF 487, 1104).” (emphasis added) The actual exchange which took place during Joe Pickering’s deposition is as follows:

Question: Has anyone ever told you that if the Plaintiffs take this case to trial that the parking area around the cemetery will be fenced off?

Answer: I believe a statement was made that it rightfully could be fenced off.

(LF 190).

ARGUMENT

Sufficiency of Appellants' Points Relied On

Respondents attack each of Appellants' points relied on. Respondents claim the points relied on violate Rule 84.04(d) by combining multiple claims of error. It is obvious that counsel for Respondents either misunderstand or misapply the requirements imposed by Rule 84.04(d).

Rule 84.04(d) requires an appellant to identify the ruling or action challenged on appeal, state concisely the legal reason the ruling or action was erroneous, and to explain why, in the context of the case, the legal reasons support the claimed error. Rule 84.04(d) sets forth the form to be filed when drafting points relied on. Hence, a point relied on identifies *one* challenged trial court ruling, *one or more* legal reasons the action was improper, and *multiple* factual references to the case which substantiate the claim of error.

Here, Appellants' points relied on follow precisely the standards set forth in Rule 84.04(d). Point I identifies the trial court's entry of summary judgment as the challenged ruling. Next, it concisely states the legal reason the trial court's action was erroneous, the fact Respondents were not entitled to judgment as a matter of law. Next, the point identifies and references five separate factual, contextual areas of the case showing why Respondents were not entitled to judgment as a matter of law. Similarly, Point II identifies the trial court's entry of summary judgment as the challenged action or ruling. Point II differs from Point I by stating a different legal reason why the action was erroneous—the fact there were disputed issues of material fact present in the record.

Finally, Point II goes on to summarily identify six different areas of the record which demonstrate the presence of these disputed material facts. Finally, Point III challenges the trial court's entry of permanent injunctions against the Village of Evergreen. The legal reason raised in Point III is the overbreadth of the injunctions. Finally, Point III develops four separate factual reasons, in the context of the case, that the injunctions are overbroad.

Respondents are disingenuous in their citation of *Rushing v. City of Springfield*, 180 S.W.3d 538 (Mo. App. S.D. 2006). *Rushing* involved two points relied on which each covered two and a half pages. *Id.* at 540, 541. Neither point concisely stated the legal reasons for the asserted trial court error. *Id.* They contained incidents of error that did not relate to any issue included in the point relied on. *Id.* Clearly, the *Rushing* case has no application to the claims of Respondents directed at Appellants' points relied on. Appellant has complied with the rule by citing multiple factual references in the point relied on.

For the foregoing reasons, Appellants suggest their points relied on are proper and in conformity with the requirements of Rule 84.04(d).

Respondents Have Violated Rule 84.04(c)

Rule 84.04(c) controls the statement of facts. The rule requires the statement of facts to be fair and concise, relevant and presented without argument. In their brief, Respondents state as "fact" that Appellants' intention was to fence off the parking area between Row Crop Road and the cemetery. (Respondents' Brief p. 9). Such recitation is false. Nowhere in the legal file is there any *factual support* for the claim that Appellants

intended or threatened to fence off the parking area. Rather, Joe Pickering testified in his deposition that Robert Plaster told him he “rightfully could” fence off the parking area. Respondents have intentionally mischaracterized and misrepresented Mr. Pickering’s deposition testimony, and have done so in a manner calculated solely to inflame this court and prejudice Appellants. Respondents disregarded Rule 84.04(c)’s requirement that facts be stated both fairly and without argument.

**Respondents Have Included “Facts” Not Framed by
Their Statement of Uncontroverted Material Facts**

Respondents claim Appellants’ Statement of Facts “leaves out crucial facts and misconstrues the record.” (Respondents’ Substitute Brief, pg. 8) As the following discussion illustrates, Respondents themselves have misconstrued the record by their repeated, intentional reference to matters not contained within their Statement of Uncontroverted Facts. Rule 74.04(c)(1) required Respondents to attach a Statement of Uncontroverted Material Facts to their Motion for Summary Judgment. The statement serves as a template by which the issues are framed and to which Appellants respond. The following summary demonstrates the extent to which Respondents’ Statement of Facts exceeds their Statement of Uncontroverted Facts:

- discussion at page 8 concerning the age of the cemetery;
- grave digging equipment, hearses and vehicles had driven across the parking area into the cemetery, page 9;
- discussion at page 10 concerning the size of Empire Ranch;
- population density of the Village of Evergreen at pages 10 and 11;

- the village Chief of Police is also an employee of Empire Ranch, page 11;
- the Laclede County Commission’s public meeting on December 15, 2003, was held because of the public’s problems in reaching the cemetery and the county’s inability to maintain the road, page 12;
- discussion at page 13 concerning the “purported” annexation of the Massey farm by the Village of Evergreen;
- discussion at page 14 concerning the Village of Evergreen’s contracting with Empire Ranch to erect and maintain an unlocked gate;
- fines associated with Village of Evergreen Ordinance 05-15, page 14;
- discussion at pages 14 through 15 concerning the validity of Ordinance 01-15;
- discussion at page 15 concerning “confusion” and “trouble” experienced by cemetery patrons;
- patron fears that they will “drop off” into the ditch and questions concerning who could visit the cemetery, page 15;
- claims that “placing gates across roadway is how they close roads within the Village of Evergreen,” page 15;
- discussion at page 16 concerning the absence of evidence concerning criminal activity along Row Crop Road;
- discussion at pages 17-18 concerning Stephen Plaster’s statements that the Masseys did not require permission to visit the cemetery and that Appellants had not denied anyone access to the cemetery or parking area, similar discussion at page 19.

Not one of the facts identified above were contained in Respondents' Statement of Uncontroverted Facts submitted to the trial court. (LF 482 – 490). Respondents should be constrained to their Statement of Uncontroverted Facts when defending the propriety of the Trial Court's ruling. Respondents' attempts to defend the Trial Court ruling with matters not contained within the Statement of Uncontroverted Facts are prejudicial and unfair to Appellants. For example, Respondents raise numerous issues concerning the Village of Evergreen, Empire Ranch, and the population density of the village. The same holds true regarding Respondents' attacks on the validity of Village of Evergreen ordinances annexing the Massey farm and authorizing the second gate. None of these factual matters were contained within Respondents' Statement of Uncontroverted Facts and thus they were not addressed or raised by Appellants. However, Respondents now feel compelled to raise inferences, if not make arguments, that these factual matters somehow validate and support the Trial Court's grant of summary judgment. Such arguments are inappropriate, prejudicial and should not be entertained by this Court.

**Respondents Have Raised Issues and Arguments Not Presented
to the Trial Court**

Respondents' brief raises several novel arguments and issues which Appellants have not previously heard. Although Respondents agree with Appellants' recitation of *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371 (Mo. Banc 1993), as setting forth the applicable standard of review, they have either misunderstood or ignored the fact that this Court's review is of "the record" below. *Id.* at 376. Implicit within this Court's review of "the record" is that new issues cannot be

raised for the first time on appeal. Arguments and issues not contained in the record are not properly raised for the first time on appeal. *City of Cuba v. Williams*, 17 S.W.3d 630, 632 (Mo. App. S.D. 2000). A party is foreclosed from raising on appeal a different theory than that considered by the trial court. *Id.* In this appeal from the grant of summary judgment, Respondents are bound by the positions they took in the trial court. *Id.*

A unique argument, submitted by Respondents on appeal for the first time, is that Row Crop Road “includes” the parking area. (Respondents’ Brief p. 24). A review of Respondents’ First Amended Petition reveals Respondents consistently treated Row Crop Road and the parking area separately in the trial court. Their First Amended Petition describes and identifies Row Crop Road in paragraph 10 (LF 626), while dealing separately with the parking area in paragraph 46. (LF 630) Nowhere in their First Amended Petition do they raise the issue or argument that Row Crop Road includes the parking area.

Indeed, a review of their First Amended Petition clearly exemplifies the demarcation between their treatment and arguments concerning the road and those concerning the parking area. (LF 625 – 641). Moreover, Respondents’ Statement of Uncontroverted Facts filed in the trial court serves only to highlight the dichotomy between their treatment of the road and that given the parking area. Respondents claim rights by adverse possession and public use concerning the road, while claiming prescriptive easements over the parking area. (LF 482 – 491) Respondents cannot now be heard, for the first time, to argue that the road and parking area are now one unified area.

Respondents have likewise raised new issues concerning the validity of certain ordinances enacted by Appellant Village of Evergreen. On page 28 of their brief, footnote 5, Respondents question the annexation ordinance which brought the disputed areas within the boundaries of the Village of Evergreen. Specifically, Respondents state: “The annexation ordinance itself is not valid on its face.” Once again, Respondents have interjected issues and arguments into this appeal which were not presented to the trial court. Neither Respondents’ First Amended Petition, nor their Statement of Uncontroverted Facts, makes any argument that the annexation ordinance was improper. As such, Respondents cannot now make such arguments in this Court.

Respondents likewise seek to interject new issues impugning both Appellant Village of Evergreen and Steve Plaster. Respondents begin their attack on page 37 of their brief, referring to it as “anything but” a municipal corporation and questioning whether it really is a “small urban community.” Respondents did not raise any issue in the trial court concerning the Village of Evergreen’s status as a village in Missouri. Again, their failure to raise such an issue in the trial court precludes them from attacking its status as a village now. Respondents’ inclusion of these references in their brief is improper and calculated solely to divert the court’s attention from the true issues in the case. The main issue before the court is whether the Village of Evergreen’s exercise of police power “bears a reasonable and rational relation to the ends of the enactment.” *St. Louis County v. Hanne*, 761 S.W.2d 697, 700 (Mo.App. 1988).

Appellants' Ability to Challenge Scope of Injunction on Appeal

Respondents cite to *Seitz v. Lemay Bank and Trust Co.*, 959 S.W.2d 458 (Mo. Banc1998) and *Thomas v. Lloyd*, 17 S.W.3d 177 (Mo. App. S.D. 2000) as support for their contention that Appellants are barred from challenging the scope of the trial court's injunction. Respondents misunderstand or misapply the holding of these cases. *Seitz* was a negligent bailment case tried to a jury. 959 S.W.2d at 460. On appeal, Lemay Bank argued issues not included in its Motion for Directed and for JNOV. *Id.* at 461. This Court correctly noted the issues were not preserved for appellate review. *Id.* at 462. *Thomas* involved multiple legal and equitable claims between former paramours. 17 S.W.3d at 181. The defendant raised new theories on appeal as to how partnership property should be divided. *Id.* at 186. While both cases do apply the well-established rule of law that parties cannot raise issues on appeal for the first time, neither case involved entry of summary judgment, nor did they involve injunctive relief. Both *Seitz* and *Thomas* involved contested cases tried to completion, the former to a jury and the latter to a judge. In those situations, it is beyond dispute that litigants are barred from injecting new theories, claims, or defenses on appeal for the first time.

In this case, there has been no trial on the merits. Rather, the court entered summary judgment in favor of Respondents. The scope and breadth of injunctions was never an issue in the summary judgment proceedings. Indeed, the injunctions were issued with the trial court's ruling entering summary judgment. Both Appellants' and Respondents' attention, effort and arguments were directed to the merits of whether summary judgment was appropriate. At no time during the summary judgment

proceedings was there discussion by any of the parties about the breadth, extent or scope of proper injunctive relief. Simply stated, the trial court sustained Respondents' motion for summary judgment and entered judgment in the case. As such, Appellants respectfully submit Respondents' authorities are inapposite in that the scope of the trial court's injunctions is a proper issue in this court. What if the trial court had included a damage award or an award of attorney's fees in its judgment? Would Appellants be foreclosed from attacking the validity of such an award because they didn't challenge it in the trial court? Certainly not. Likewise, Appellants should not be precluded from challenging the scope of the court's injunction.

Finally, Respondents erroneously cite to Rule 74.06. That rule deals with relief from judgments or orders as a result of errors resulting from oversight or omission, mistake and neglect, fraud, and other extrinsic reasons. It is clear it has no application to an injunction which is broad, vague and ambiguous. Moreover, *Anderson v. Anderson*, 850 S.W.2d 404, 406 (Mo.App. 1993) states that Rule 74.06 is not intended as an alternative to a timely appeal. No case has been cited by Respondents to support their position that Appellants are barred as a result of their failure to file a Rule 74.06 motion, and Appellants submit that no such authority exists.

Respondents' Reliance on *Kroeger* and *St. Charles County* Is Misplaced

Respondents' claim at page 26 of their brief that "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 because the area around it has been annexed into the city." In support for this claim, Respondents cite two Supreme Court

cases, *Kroeger v. St. Louis County*, 218 S.W.2d 118 (Mo. 1949) and *St. Charles County v. Dardenne Realty Co.*, 771 S.W.2d 828 (Mo. Banc 1989). For the reasons developed below, it is obvious that these cases offer no support for Respondents' claimed "well established principle" of law.

Kroeger v. St. Louis County, 218 S.W.2d 118 (Mo. 1949) was an action to determine the title of a narrow strip of land in University City, Missouri. The land in question had been condemned by St. Louis County as part of a county highway system project. *Id.* at 118. Some years later, University City enacted an ordinance purporting to vacate the highway easement over the land in question. *Id.* at 120. The court in *Kroeger* ultimately held that the City did not have the power to vacate the County's easement. Two points in this opinion are relevant to the issues currently before the court. First, there was no question about the municipality's police power to control the traffic on the county road in question, which power of the municipality was conceded by the County in its brief. *Id.* at 119. Secondly, the Supreme Court cited with approval to *Duckworth v. City of Springfield*, 184 S.W. 476 (Mo. App. 1916). The Supreme Court's approval of *Duckworth* stands in stark contrast with Respondents' claims that *Duckworth* was overruled by the Supreme Court in this case. (Respondents' brief, p. 18)

St. Charles County v. Dardenne Realty Co., 771 S.W.2d 828 (Mo. Banc 1989) involved a county's petition for injunction alleging public nuisance and zoning violations. The area in question involved a state highway, not rural county or village roads. *Id.* at 830. The Supreme Court acknowledged that the construction and maintenance of state highways falls within the exclusive jurisdiction of the Missouri Highway and

Transportation Commission. *Id.* As such, a state highway is under the exclusive control of the state, notwithstanding the fact it may physically lie within a county and/or municipality. *Id.* The Court held that if the county wanted to bring suit to enjoin the nuisance, it must do so in the name of the State of Missouri and not the county. *Id.* Nothing in *St. Charles County* abrogates a municipality's police power to regulate roads within its boundaries.

Moreover, a county has only those powers delegated it by statute. *See, Greene County v. Pennel*, 992 S.W.2d 258, 262 (Mo.App. S.D. 1999). Respondents cite no statutory provisions authorizing a county to regulate roads within a municipality. When the land through which a county road runs becomes part of a city or village, the road becomes a city or village street. 10A McQuillin, Mun. Corp. §30.12 (3rd Ed.) This is true whether the city or village is initially incorporated or expands its boundaries through annexation. *Id.* Jurisdiction over, and the right to control, the road passes from the county to the municipality. *Id.* *See also, Kurtz v. Knapp*, 106 S.W. 537, 538 (Mo.App. 1908).

Speculation and Conjecture Cannot Support the Trial Court's Action

Implicit within the summary judgment standards set forth in *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371 (Mo. Banc 1993) is the principle that summary judgment must be based upon *facts*, not mere speculation or possibility. Respondents attempt to justify the trial court's entry of summary judgment with a "parade of imagined horrors" concerning the two-panel gate system at issue on Row Crop Road.

The ordinance authorizing the subject gate authorizes only an *unlocked gate*. (LF 398) The only evidence of anyone being locked in by the gate involved Dorothy and Mike Buck (LF 484), a single instance when they were accidentally locked behind the gate (LF 1071). This involved what has been referred to as the “first gate,” and occurred several years before the subject gate was even installed. (LF 484-485) There is nothing in the record to indicate the current gate has ever been shut, or that anyone has been “locked in.” Despite this, Respondents’ argument repeatedly resorts to speculation, conjecture and mere possibility to support their arguments. A few examples include:

“[Gate], at the whim of Defendants, may be swung shut and locked in a matter of seconds.” Respondents’ brief, p. 25.

“The gate can be swung shut and locked by the City.” Respondent’s brief p. 34

“If Appellants ‘shut’ the gate.” Respondents’ brief p. 34

“The gate can easily be ‘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.” Respondent’s brief p. 36

“Because one gate of the two-panel gate system is already locked, obstructing at least half the roadway, and the other may be locked simply by swinging it shut, Appellants have created a very risky situation for anyone entering the cemetery.” Respondents’ brief p. 45

“The gate could, within just a few seconds, be locked behind them, trapping them inside the cemetery and the roadway.” Respondents’ brief p. 45

As the above examples demonstrate, Respondents have resorted to numerous “what if” hypotheticals in an effort to bolster the trial court’s ruling. The propriety of the trial court’s entry of summary judgment rests upon the *facts* in the case, and not the litany of imagined horrors submitted by Respondents.

Determination of “Reasonableness” Is a Question of Fact

The Court of Appeals correctly found that the reasonableness of Evergreen’s ordinances is a fact question for the jury rather than a question of law for the court. Respondents misunderstand and misconstrue authorities on this topic. In *Wilhoit v. City of Springfield*, 171 S.W. 2d 95 (Mo.App. 1943), nowhere did the court analyze or discuss the fact question/legal question dichotomy. The opinion does not address nor hold that an ordinance’s reasonableness is a legal question and not a factual question. Moreover, the *White v. St. Louis & San Francisco Railway Co.*, 44 Mo.App. 540 (1891) opinion noted that the reasonableness of an ordinance is a question of law *when the facts are uncontroverted*. *Id.* at 542-543. As the Court of Appeals correctly noted, there are genuine issues of material facts concerning the reasonableness of the regulations on the use of Row Crop Road. As such, the *White* opinion is inapposite.

Missouri courts have consistently held that reasonableness determinations are factual matters. *Lierheimer v. Minnesota Mutual Life Ins. Co.*, 99 S.W. 525, 527 (Mo.App. 1907) (“what constitutes reasonable time within which to declare a rescission is ordinarily a question of fact”); *Wunsch v. Sun Life Assurance Co. of Canada*, 92 S.W.3d 146, 153 (Mo.App. 2003) (“reasonableness of actions is a

question of fact for the jury rather than a question of law for the court”); *Watters v. Travel Guard Int’l.*, 136 S.W.3d 100, 109 (Mo.App. 2004) (“generally a question of reasonableness is a question of fact for the jury rather than a question of law for the court”). Appellants submit that the Court of Appeals correctly found the reasonableness of Evergreen’s regulation of Row Crop Road was a question of fact for the jury and not a question of a law for the court.

CONCLUSION

Appellants respectfully submit that the trial court erred in entering summary judgment in the case. Appellants’ points relied on are in compliance with Rule 84.04(d) and illustrate the impropriety of the trial court’s action. Moreover, Respondents’ attempts to misstate facts, divert this Court’s attention and raise new arguments on appeal are inappropriate. For the reasons stated herein, as well as those in Appellants’ main brief, Appellants ask the Court to reverse the trial court’s entry of summary judgment and remand the case for further proceedings.

Certificate of Compliance with Rule 84.06 and Certificate of Service

Pursuant to Rule 84.06(c), counsel for Appellants certifies that this brief complies with the limitations contained in Rule 84.06(b). There are 3,884 words in this brief. Counsel for Appellants relied upon the word of his word processing system in making this certification.

Pursuant to Rule 84.06(g), counsel for appellants certifies that the CD filed herewith has been scanned for viruses and is virus-free.

Further, counsel for Appellant states that Appellants' Reply Brief in the within cause was by him served, either by hand delivery or by ordinary mail, postage prepaid, in the following stated number of copies addressed to the following named persons at the address shown, all on this 24th day of July, 2009:

10 Copies:	Thomas F. Simon Clerk of the Missouri Supreme Court Supreme Court Building 207 W. High Street Jefferson City, MO 65102
2 Copies	John C. Holstein Shughart Thomson & Kilroy, P.C. 901 St. Louis Street, Suite 1200 Springfield, MO 65806

LOWTHER JOHNSON
Attorneys at Law, LLC

By: _____
Michael K. Cully, MO Bar No. 26794
David A. Fielder, MO Bar No. 34644
Lee J. Viorel, MO Bar No. 36886
901 St. Louis Street, 20th Floor
Springfield, MO 65806
Telephone: 417-866-7777
Fax: 417-866-1752
mcully@lowtherjohnson.com
Attorneys for Defendants/Appellants