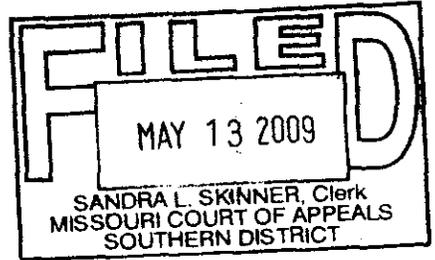


Missouri Court of Appeals
Southern District



LYNN K. McCULLOUGH and)
SHIRLEY A. McCULLOUGH,)

Respondents,)

vs.)

NADINE DOSS,)

and)

HOWARD ALLEN,)

Appellants.)

90673

No. SD29396

Oral Argument Requested

FILED

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Thomas F. Simon
CLERK, SUPREME COURT

Appeal from the Stone County Circuit Court Division I

Honorable Alan Mark Blankenship, Judge

APPELLANTS' BRIEF

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SCANNED

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JURISDICTIONAL STATEMENT

Appellants Nadine Doss and Howard Allen appeal from a final Judgment and Order of the Stone County Circuit Court, quieting title in Respondents to property located in Stone County, Missouri, which is within the territorial boundaries of the Southern District Court of Appeals pursuant to RSMo. §477.060, **L.F. pp. 21-29**.

The Southern District Court of Appeals has general appellate jurisdiction of this appeal pursuant to Article V, § 3 of the Missouri Constitution.

Following trial on Respondents' Petition to Quiet Title, **L.F. pp. 6-14**, and Appellants Second Amended Counter-Claim, **Supp. L.F. p. 2.**, the Judgment and Order appealed from was entered by The Honorable Alan M. Blankenship on September 25, 2008, **L.F. pp. 21-29**. At trial, Respondents claimed title by deed and by adverse possession in certain surveyed properties, **Trans. p. 31**, while Appellants claimed that portions of the same properties were a public roadway. **Trans. pp. 135-136, 146**.

No post-trial motions were filed by either party, so the Judgment became final on October 27, 2008, **L.F. pp. 21-29**. Appellants filed their Notice of Appeal on October 9, 2008, **L.F. p. 30**, which is considered to be filed immediately after October 27, 2008, for purposes of a timely filing of a Notice of Appeal, **State ex rel. Nilges v. Rush**, 532 S.W.2d 857(Mo. App. 1975).

STATEMENT OF FACTS

Respondents Lynn K. and Shirley A. McCullough are husband and wife and the owners of approximately 70 acres located east of the public road in rural Stone County, Missouri, **Trans. p. 8, Exhibit A, Exhibit B, Exhibit X.** Appellants Nadine Doss and Howard Allen are siblings and the owners of the 10 acres which is excepted in the Respondents' deed, **Trans. p. 6-8, Exhibit A, Exhibit B, Trans. p. 82.** The Appellants' property lies west of the public road which ran between the Appellants' property and the Respondents' property, **Trans. p. 138.** A portion of this road is now referred to as Royal Point Road or sometimes Royal Point Drive, **Trans. pp. 10, 15, 122.**

Respondents filed a Petition to Quiet Title alleging that they had superior title to Appellants of certain property including Tract A, a portion of the road lying north of Royal Point Road's intersection with Missouri State Highway 39. The Respondents claim they have title to this tract both by virtue of their deed and adverse possession, **L.F. pp. 6-14.** The Appellants denied the allegations of Respondents' Petition and in their Second Amended Answer and Second Amended Counter-Claim alleged that Tract A was a public road; that Respondents had blocked the public road and had blocked Appellants' access to Appellants' property, **L.F. p. 15, Supp. L.F. pp. 2-3.** Trial was held on December 17, 2007, **L.F. p. 4.** Respondents' declared position at trial was that the portion of the public road described as Tract A had been abandoned and they owned one half of Tract A by deed and the other half by adverse

possession, **Trans. p. 39**. The trial court issued its Judgment and Order (hereinafter Judgment) on September 25, 2008, quieting title to all the disputed property in Respondents, including Tract A, and finding against Appellants on their counterclaims, **L.F. pp. 21-29**. This appeal followed, in which Appellants contend the trial court erred in quieting title to Respondents of Tract A.

The witnesses at trial consisted of Respondent Lynn K. McCullough, his son Darren McCullough, a surveyor, John William Reed, the Appellant Howard Allen, the Appellant Nadine Doss and Reva Allen.

All the parties in this case have been familiar with the properties in question for fifty or more years. The Appellants Nadine Doss and Howard Allen, along with their deceased brother Herman Allen, grew up on and then inherited their property from Earnest and Mary Bell Allen, **Trans. p. 138**. Their parents had owned the farm which included the 10 acres which has been previously described along what is now Royal Point Road since as early as 1949, **Trans. p. 104**. At the time of trial, there were two homes on the Appellants' property, the Appellant Howard Allen's home, **Trans. pp. 21, 122**, and the old Earnest Allen home in which Appellant Nadine Doss lives part time, **Trans. pp. 19-20, Trans. p. 138**. Both homes have driveways onto Royal Point Road, **Trans. pp. 15-16, Trans. p. 122-123, Trans. p. 138, Exhibit 1**.

Respondent Lynn K. McCullough purchased his 70 acre property in 1955, with his older brother taking title and then deeding it to Mr. McCullough, **Trans. p. 6**. This deed was not recorded until June, 1957, after Mr. McCullough came of age,

Trans. p. 6, and then Mr. McCullough transferred the property into his and Shirley McCullough's name as husband and wife, **Trans. pp. 7-8, Exhibit A, Exhibit B**. Respondents consider they purchased the property in 1955, **Trans. p. 50**, rather than the date their deed was recorded, **Trans. pp. 7-8, Exhibit A, Exhibit B**. The Respondents' residence is not on Royal Point Road, **Trans. p. 4**.

Prior to the construction of Missouri State Highway 39, which was finished in approximately 1955, **Trans. pp. 31, 106**, the public road was the road that ran between Appellants and Respondents' properties, **Trans. p. 82-83, Trans. p. 86, Exhibit X, Exhibit Y**. When Highway 39 was constructed, **Trans. p. 31, Trans. p. 106**, the new highway left the route of the existing public road near the north end of the two properties and made an Eastward curve through Respondents' property. **Trans. p. 108, Exhibit X, Exhibit Y**. South of where the right of way of Highway 39 and the existing public road right of way diverged there was left the area of the old public road right of way that is in dispute. This disputed tract lies between Appellants' East fence line and the West right of way line of Missouri State Highway 39. **Trans. p. 79-80**, This disputed tract is described as Tract A in both pleadings and at trial, **L.F. p. 6-14, Supp. L.F. p. 2-3, Trans. pp. 79-80, 97, Exhibit X**.

John Reed, a surveyor called by Respondents, stated that Royal Point Road is in same location as the Southern portion of the county road that existed prior to the construction of Highway 39, **Trans. pp. 83-84, 86**, and it is shown on Exhibit Y by dashed lines, **Trans. p. 86, Exhibit Y**. Mr. Reed stated that Exhibit Y also shows the

Appellants' fence line is in the same location as the fence line just prior to construction of Highway 39, **Trans. pp. 88-89, Exhibit Y**. Mr. Reed stated this supports his projection of the right-of-way of the existing county road onto Tract A, **Trans. pp. 90-91, 93, Exhibit X**, as do old drawings and depictions he consulted, **Trans. p. 91**. Mr. Reed stated that Tract A is completely contained within the right of way of the old public road, **Trans. p. 97**, and further that there is no record of the county commission closing the public road, **Trans. p. 97**.

Both parties relied on John Reed's survey, Exhibit X for legal descriptions of Tract A in their pleadings, **L.F. p. 6-14, Supp. L.F. p. 2-3**, and at trial. Mr. Reed testified that Tract A was all the land that lay between the Appellants' fence line on the West, and the Missouri State Highway 39 right-of-way on the East, **Trans. pp. 79-80, Exhibit X**. Mr. Reed located the centerline of the old public road by projecting north from the existing road. **Trans. p. 93**. He further refined his survey to describe Tract B as everything West of the centerline of the old public road, while Tract C is everything to the East of the centerline, **Trans. pp. 80-81**. Tract A consists of Tract B and Tract C added together, **Trans. p. 79-80**.

Mr. Reed testified that the legal descriptions for Appellants' and Respondents' properties did not overlap or encroach on each other, **Trans. p. 82-83**, and in his opinion the Respondents' deed gave them legal title to the centerline of Tract A, **Trans. pp. 83, 90-91**.

Respondents also believe there is no conflict between their legal descriptions and Appellants' deeds, **Trans. pp. 6, 38, 82-83, Exhibit A, Exhibit B.** Respondent Lynn McCullough admitted his deed recorded in 1955 gave him title to the middle of the old public road, **Trans. pp. 53-54.**

Respondent Lynn K. McCullough testified that Tract A was the public road in 1955, **Trans. pp. 30-31, 47,** that it ran from north to south as shown on Exhibit X, **Trans. p. 30, Exhibit X,** and that it was the public road that existed when Respondents purchased their property in 1955, **Trans. p. 47.** Respondents' son Darren McCullough testified that although the road on Tract A was from before he could remember, **Trans. p. 60,** as far as he knew the public road had been on Tract A, **Trans. p. 64,** and he was told that Tract A was "an old public road", **Trans. p. 73.**

Appellant Nadine Doss, who was born in 1941 and raised on the Earnie Allen property, **Trans. p. 144,** stated that Tract A was the path of the old public road that her family used to go north from their farm, **Trans. p. 143.** Appellant Howard Allen stated that the "old county road" went "straight down" and that he had utilized it all his life, **Trans. pp. 123-124.**

The only disinterested witness with personal knowledge of the area was Reva Allen, whose husband was Lynn K. McCullough's first cousin and Nadine Doss and Howard Allen's uncle, **Trans. p. 103.** She testified that she moved to the area in 1949 before the construction of Missouri State Highway 39, **Trans. pp. 102-103.** Reva testified that they visited frequently at homes along the public road dividing

Appellants' and Respondents' properties beginning in 1949, **Trans. p. 105**. She supported all the testimony that the public road continued on north from where the intersection of Royal Point Road and Highway 39 is now, going north beyond the Earnie Allen property, **Trans. pp. 107-108**. When Highway 39 was constructed, Reva said that the public road "went along with 39" until Highway 39 curved off, **Trans. p. 108**, so that the public road was west of the new highway, **Trans. p. 108**. Reva identified a truck belonging to Respondents in a photo on Tract A as sitting in middle of the public road which is Tract A, **Trans. p. 109**.

At the time of trial, two openings were in the fence line along Appellants' property near or adjacent to Tract A. According to Respondents, there was a wire gate opposite the entrance to Highway 39, **Trans. pp. 33-34, Exhibit E and Exhibit F**, and a metal gate that was installed by Appellants in the summer of 2007, on Tract A just north of the Highway 39 entrance, approximately 13-15 paces north of the wire gap, **Trans. p. 11-12, 32-33, Exhibit G**. Appellants and Reva Allen testified that the new metal gate replaced the existing wire gate which was the entrance onto Appellants' property from the public road, **Trans. pp. 109-110, 125-126, 145**. Respondents denied this, **Trans. p. 157**.

With the exception of John Reed, the surveyor, all the witnesses testified that they had used the public road which is Tract A at some time. Respondent Lynn K. McCullough stated he began parking tractors and rakes on the public road on Tract A

as soon as Respondents purchased their property, **Trans. pp. 11-12**, and they stored hay and equipment on Tract A until the date of trial, **Trans. pp. 31, 60**.

Appellant Howard Allen testified he used the public road on Tract A until the late 1990's to access cattle on his property, by going through an old wire gate in the fence line along Tract A, **Trans. pp. 126, 130-131**, and he used the public road on Tract A for access to his property when he was cutting hay or moving a bulldozer, **Trans. p. 126**. Appellant Howard Allen testified that while Respondent used the old public road on Tract A, Respondent did not block or prevent others from using the road until Appellants' brother Herman Allen grew ill before his death in 2005, **Trans. pp. 126-128**.

Reva Allen stated that she used the public road on Tract A to visit Earnie and Mary Bell Allen, Appellants' parents, when they were working in the fields adjacent to the public road on Tract A, **Trans. pp. 110-112**. Reva used the public road on Tract A as late as the mid-1990's to pick walnuts with a friend in Appellants' pasture, **Trans. pp. 110-111, 118**. Reva testified that the new metal gate installed by Appellants in June, 2007, was in the same place as the old wire gate she recalled using to access Earnest Allen's farmland off the public road, **Trans. p. 109**. Despite not being able to state conclusively the metal gate was in exactly the same place as the old wire gate she recalled using, Reva was firm on cross-examination that the gate she used to gain access to the Allen property was not on the paved road that is now Royal Point Road, but rather "off of the existing road ... kind of a little on the old road bed,"

Trans. p. 116, and that to get to the old wire gate she had driven “across this old road bed” on Tract A, **Trans. p. 117**. Reva testified that while Mr. McCullough “started parking trucks and things” on Tract A he “kind of kept them off of the old road to the east. And the road was left open to an extent.” **Trans. p. 112**.

Views of Tract A looking North, at the entrance from Highway 39 onto the county road, are shown close up in Respondents’ photos marked as **Exhibit D** and **Exhibit E, Trans. p. 9-10**. Respondents’ **Exhibit I** is a view from the North end of Tract A looking South, where Tract A meets the Highway 39 right-of-way, **Trans. p. 13**. In Respondents’ **Exhibit D** one can see the back of the same highway sign shown from the front on the edge of Respondents’ **Exhibit I**.

Respondent Lynn K. McCullough testified that most of the time his machinery and equipment blocked the road on Tract A so that no one could drive through it, **Trans. pp. 56-57**. Darren McCullough testified that Mr. McCullough’s equipment blocked Tract A when it was parked on the road, **Trans. pp. 63-64, 73-74**.

Respondent Lynn K. McCullough and his son stated that they had never known Appellants to utilize the road, **Trans. pp. 54, 61**, but they could not state that no one ever used the road when they were not present to see them, **Trans. p. 54, 63, 64**.

Respondent Lynn K. McCullough admitted he could not state that a five year period ever existed since 1955 when someone had not entered on and used the road on Tract A , **Trans. p. 50**. Respondents presented no additional evidence of non-use by anyone other than their own blocking of the public road on Tract A, **Trans. pp. 56-**

57, 63-64, 73-74, and that at some time there had been bushes grown up on the north end of the road on Tract A, **Trans. pp. 49-50, 64.**

Respondent Lynn K. McCullough testified that the South end of Tract A was “trafficable from 1955 to today”, **Trans. pp. 49-50.** He testified that at times the North end of Tract A was not “trafficable” but he did not know “whether there was any pedestrian traffic” on it during that time period, **Trans. p. 50.** Respondent Lynn K. McCullough admitted he did not know if there was a five year period in which Tract A was not used by pedestrians, automobiles, or tractors, **Trans. p. 50,** nor could he state that the Appellants or others had not used Tract A from time to time, **Trans. p. 54,** as he did not “sit up there 24 hours a day” watching the road, **Trans. p. 54.** Respondent Lynn K. McCullough was not a full-time farmer, but rather operated several accounting offices in the surrounding area that necessitated his attention during normal business hours, **Trans. pp. 55-56.**

Darren McCullough was not aware of anyone other than his family using the road on Tract A, **Trans. p. 61,** and he testified that no one could drive through Tract A because “[t]here wasn’t a culvert to get out on Highway 39”, **Trans. pp. 64, 76,** but he could not say that no one had walked all the way through, **Trans. p. 64.**

Respondent Lynn K. McCullough stated that the public road on Tract A “quit being a public road” when “they built the new road,” **Trans. pp. 30-31,** meaning Highway 39.

After trial of this cause, the trial court entered its Judgment and Order on September 25, 2008, stating that Respondents were “entitled to Judgment quieting title” in Tract A and “entitled to Judgment” on Appellants’ counter-claim, **L.F. p. 21-**

29. The trial court declared Respondents to be the “owners in fee simple” of Tract A, L.F. p. 21-22, and this appeal followed.

POINTS 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 OF THE PUBLIC ROAD WHICH IS TRACT A AS RESPONDENTS OFFERED NO EVIDENCE OF HOW THE PUBLIC ROAD ON TRACT A WAS ESTABLISHED AND IT IS IMPOSSIBLE TO DETERMINE WHETHER THE EVIDENCE PRESENTED BY THE RESPONDENT WAS SUFFICIENT TO DETERMINE HOW THE ROAD COULD BE VACATED OR ABANDONED.

Faustlin v. Mathis, 99 S.W.3d 546 (Mo.App. S.D. 2003)

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

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

McEneny v. Gerlach, 142 S.W.2d 1095 (Mo.App. 1940)

Missouri Revised Statute §228.190, RSMo. 1990

Missouri Revised Statute §228.110, RSMo. 1990

POINT II

THE TRIAL COURT ERRED IN QUIETING TITLE TO TRACT A IN RESPONDENTS BECAUSE IF THE TRIAL COURT CORRECTLY APPLIED §228.190.1 TO FIND ABANDONMENT OF THE ROAD DESCRIBED AS TRACT A, THERE IS NO SUBSTANTIAL EVIDENCE SUPPORTING THE TRIAL COURT'S FINDING THAT TRACT A HAD BEEN ABANDONED AS A PUBLIC ROAD UNDER §228.190.1 IN THAT (A) RESPONDENTS DID NOT PRESENT CLEAR AND COGENT PROOF OF NON-USE BY MEMBERS OF THE PUBLIC, AND (B) RESPONDENTS MAY NOT RELY UPON THEIR OWN ACTIONS BLOCKING THE ROAD ON TRACT A AS EVIDENCE OF NON-USE BY MEMBERS OF THE PUBLIC.

Faustlin v. Mathis, 99 S.W.3d 546 (Mo.App. S.D. 2003)

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

Burris v. Mercer County, 252 S.W.3d 199 (Mo.App. W.D. 2008)

Missouri Revised Statute §228.190, RSMo. 1990

POINT III

THE TRIAL COURT ERRED IN QUIETING TITLE TO TRACT A IN RESPONDENTS BECAUSE IF THE TRIAL COURT CORRECTLY APPLIED §228.190.1 TO FIND ABANDONMENT OF THE ROAD DESCRIBED AS TRACT A, THE TRIAL COURT'S DECISION MISAPPLIES THE LAW UNDER §228.190.1 IN THAT RESPONDENTS FAILED TO PROVE ABANDONMENT THROUGH FIVE YEARS' NON-USE BY THE PUBLIC SINCE RESPONDENTS' USE OF TRACT A IS AS MEMBERS OF THE PUBLIC.

Kleeman v. Kingsley, 88 S.W.3d 521(Mo.App. W.D. 2002)

Burris v. Mercer County, 252 S.W.3d 199 (Mo.App. W.D. 2008)

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 OF THE PUBLIC ROAD WHICH IS TRACT A AS RESPONDENTS OFFERED NO EVIDENCE OF HOW THE PUBLIC ROAD ON TRACT A WAS ESTABLISHED AND IT IS IMPOSSIBLE TO DETERMINE WHETHER THE EVIDENCE PRESENTED BY THE RESPONDENT WAS SUFFICIENT TO DETERMINE HOW THE ROAD COULD BE VACATED OR ABANDONED.

STANDARD OF REVIEW

The standard of review applicable to all points raised by Appellants in this court-tried case is governed by Rule 84.13(d) of the Missouri Rules of Civil Procedure, which states that 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 gives us the by-now familiar litany 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.” In Reinbott v. Tidwell, 191 S.W.3d 102, 107 (Mo.App. S.D. 2006), the Southern District Court of Appeals confirmed the application of 84.13(d) and Murphy v. Carron in a quiet title suit involving prescriptive easements, specifically noting that “[w]e independently evaluate whether the trial court properly declared or applied the law to the facts presented,” (Citing Ridgway v. TTnT Dev. Corp., 126 S.W.3d 807, 813 (Mo.App. 2004)). Further, in Kleeman v. Kingsley, 88 S.W.3d 521, 522 (Mo.App. S.D. 2002)(hereinafter short citations as “Kleeman I”), involving the characterization of an old public road, this Court noted that a judgment “will be affirmed if it is correct under any reasonable theory supported by the evidence,” but “will be reversed, however, if it is based on an erroneous application of law”, Kleeman I at 522 (omitting internal citations).

Additionally, since in the case before this Court no specific findings of fact or conclusions of law were made by the trial court in the Judgment and Order, **L.F. p. 21-22**, Rule **73.01(c)** of the Missouri Rules of Civil Procedure directs that “all fact issues upon which no specific findings are made shall be considered as having been found in accordance with the result reached,” **73.01(c)**; Kleeman v. Kingsley, 88 S.W.3d 521, 522 (Mo.App. W.D. 2002). However, where “there is no factual dispute bearing on the issues in question,” the standard of review is whether the trial court properly declared and applied the law, In re Expungement of Arrest Records Related to Brown v. State, 226 S.W.3d 147, 150 (Mo. 2007), and an “implied

finding on an issue cannot stand when it is not supported by the evidence or is against the weight of the evidence,” **Cushman v. Mutton Hollow Land Development, Inc.**, 782 S.W.2d 150, 152 (Mo.App. S.D. 1990).

LEGAL ANALYSIS

Though the absence of specific findings by the trial court allows this Court to assume all facts in “accordance with the result reached,” **Kleeman v. Kingsley**, 88 S.W.3d 521, 522 (Mo.App. W.D. 2002), this does not relieve the Respondents of their burden of proof. All the parties admitted that Tract A was a public road. Since there was no conflict in the testimony that Tract A was a public road, for the trial court to have quieted title in favor of the Respondents, it had to find that the public road was either vacated or abandoned.

The Appellants’ submit the trial court’s Judgment and Order (hereinafter “Judgment”), **L.F. p. 21-29**, in this matter should be reversed because Respondents failed to meet an essential element required to prove the vacation or abandonment of the public road described as Tract A.

Appellants and Respondents are adjacent landowners who now own properties that were divided by the public road prior to the construction of Missouri State Highway 39, completed in approximately 1955, **Trans. pp. 31, 106**. This appeal relates only to the portion of that public road described in the evidence as Tract A, **Trans. p. 79**. Tract A is the portion of the public road that is between Appellants’

East fence and the West right-of-way line of Highway 39, **Trans. p. 79-80.**

Respondents claimed ownership of Tract A by deed and adverse possession, **L.F. p. 21-22.** Appellants answered this claim by asserting that Tract A was still a public road, **L.F. p. 15,** and counter-claimed seeking injunctive relief, **Supp. L.F. p. 2.** Respondents' declared position at trial was that the portion of the public road described as Tract A had been abandoned and they owned one half of Tract A by deed and the other half by adverse possession, **Trans. p. 39.**

The trial court's Judgment stated that Respondents are "entitled to a Judgment quieting title in the real estate and that [Respondents] are also entitled to Judgment on [Appellants'] Second Amended Counterclaim," **L.F. p. 21.** In order to have made this judgment, the trial court had to have found the portion of the public road described as Tract A was not a public road at the time of trial, **L.F. p. 21-29,** since Respondents cannot adversely possess public property, *see* Missouri Revised Statute **§516.090, RSMo. 2002; Basye v. Fayette R-III School Dist. Bd. of Educ., 150 S.W.3d 111, 116 (Mo.App. W.D. 2004).**

Every witness with personal knowledge of the area testified that Tract A was a part of the public road in 1955 when Respondents purchased their property. Respondent Lynn K. McCullough testified that Tract A was the public road prior to the construction of Highway 39 in 1955, **Trans. pp. 30, 31, 47.** Darren McCullough, who had not yet been born when his parents purchased their property, had been told that Tract A was the public road, **Trans. p. 73.** Reva Allen, who moved to the area in

1949, **Trans. pp. 102-103**, testified that the public road continued North from where the existing intersection of Royal Point Road and Highway 39 is now, and continued North beyond the Earnie Allen property, **Trans. pp. 107-108**. Reva Allen identified Tract A as being the public road going North from the intersection of Royal Point Road and Highway 39, **Trans. p. 109**. Appellant Nadine Doss testified that Tract A was the public road, **Trans. p. 143**. Appellant Howard Allen testified that the public road “went straight down” and that he had used the “old county road” all his life, **Trans. pp. 123-124**.

The Missouri Supreme Court in **In re Expungement of Arrest Records Related to Brown v. State**, 226 S.W.3d 147, 150 (Mo. 2007), discussed the standard of review where the facts were “essentially uncontroverted,” stating that where “there is no factual dispute bearing on the issues in question,” the standard of review is whether the trial court properly declared and applied the law, **Records Related to Brown** at page 150. This Court has noted in applying Rule 73.01 in **Jones v. Jones (Scoggins)**, 891 S.W.2d 551 (Mo.App. S.D. 1995) that “when the facts are not controverted or the case involves admitted facts, or where the evidence is not in conflict, there is no deference due the trial court's judgment,” **Jones**, at 553 (citing **Cushman v. Mutton Hollow Land Development, Inc.**, 782 S.W.2d 150, 152 (Mo.App. 1990)). Further, an “implied finding on an issue cannot stand when it is not supported by the evidence or is against the weight of the evidence,” **Cushman v. Mutton Hollow Land Development, Inc.**, 782 S.W.2d 150, 152 (Mo.App. S.D. 1990).

Appellants submit there is no factual conflict before the trial court regarding the fact that Tract A was a public road when Highway 39 was constructed in approximately 1955.

Since the trial court's Judgment in the case at bar granted title of the public road described as Tract A to Respondents, **L.F. pp. 21-29**, it had to have determined that the public road had been vacated or abandoned, as this is the only finding that could be "in accordance with the result reached," **Kleeman v. Kingsley**, 88 S.W.3d 521, 522 (Mo.App. W.D. 2002).

The party "asserting abandonment of a public road must carry the burden of showing such abandonment by clear and cogent proof," **Faustlin v. Mathis**, 99 S.W.3d 546, 551 (Mo.App. S.D. 2003), and the lack of specific findings does not relieve the Respondents of this burden.

How may public roads be vacated or abandoned? It depends on how the road is established and the date of the alleged abandonment or vacation. Therefore, in order for the trial court to have found the public road described as Tract A was abandoned or vacated, it must know how that road was established.

The Missouri Supreme Court in **Karashin v. Haggard Hauling & Rigging, Inc.**, 653 S.W.2d 203 (Mo. banc 1983), confirmed that a "public road may be established in three ways: Under section 228.190 RSMo 1978; by prescription; or by implied or common law dedication," **Karashin** at 204 (internal citations omitted); **Atwell v. Jack Henry and Associates, Inc.**, 748 S.W.2d 929, 934 (Mo.App. S.D.

1988).

Establishment of a public road pursuant to §228.190 can be by order of the county commission:

All roads in this state that have been established by any order of the county commission, and have been used as public highways for a period of ten years or more, shall be deemed legally established public roads ...

§228.190.1, RSMo. 1990 (all statutory references are to 1990 unless otherwise noted)

or by use and expenditure of public funds:

... all roads that have been used as such by the public for ten years continuously, and upon which there shall have been expended public money or labor for such period, shall be deemed legally established roads ... **§228.190.1**.

To vacate or abandon a road established under §228.190 requires knowing whether county order or use established the road, when it was allegedly vacated or abandoned, and whether the county received CART (“county aid road trust”) funds for the road. Section 228.190.2 provides that after 1990, a road “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” may not be “abandoned or vacated except through the actions of the county commission declaring such road vacated after public hearing” or through the

petition process provided by §228.110.

Section 228.190.1 provides that “nonuse by the public for five years continuously of any public road shall be deemed an abandonment and vacation of the same.” However, “the nonuser provision of §228.190 does not apply when ... lands are voluntarily conveyed to a county to be used for a road for public purposes,” but such a road may be vacated under the petition process set out in §228.110, **Coffey v. State ex rel. County of Stone By and Through Hamilton**, 893 S.W.2d 843, 848 (Mo.App. S.D. 1995), and presumably by the county commission of its own volition.

The Respondents filed their Petition to Quiet Title in 2006. However, Respondents presented no evidence from which it could be found or inferred how the public road on Tract A might have been established. Thereby the trial court and this Court cannot know whether an order of the county commission is required to vacate the road or if it could be found to be abandoned with the application of the five-years’ non-use provision of §228.190.1.

To establish a public road by implied or common law dedication of a road, “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) the land so dedicated must be used by the public,” **Coffee v. State ex rel. Cty. Of Stone**, 893 S.W.2d 843, 846 (Mo.App. S.D. 1995)(citing Wendy’s of Mid-Missouri, Inc. v. West, 606 S.W.2d 215, 217 (Mo.App. 1980)). This Court has also noted that for a county road to be established by common law dedication “there must be an

acceptance by the public through some action by the county court (now county commissioners), as no private person can establish, by unilateral act, a public road over his own property,” **Atwell v. Jack Henry and Associates, Inc.**, 748 S.W.2d 929, 934 (Mo.App. S.D. 1988).

To vacate or abandon a road created by implied or common law dedication, either §228.190’s five-year non-user provision or a county order to vacate is required. This Court in **Kleeman v. Kingsley**, 167 S.W.3d 198, 202-203 (Mo.App. S.D. 2005)(hereinafter short citations as “**Kleeman II**”) held that §228.190 does apply to a road created by common law dedication where there is no voluntary conveyance by the property owner, **Kleeman II** at 202-203.

Respondents presented no evidence from which it could be found or inferred that the public road on Tract A was established by implied or common law dedication, thereby allowing the trial court to apply the five-years’ non-use provision of §228.190.1. Further, even a road established by common law dedication could require an order of the county commission depending on the date of abandonment and whether the road received CART funds Respondents presented no evidence regarding county maintenance, or lack thereof, on the road described as Tract A.

To establish a road by prescription requires “evidence of open, continuous, and adverse public use for at least ten years,” **Karashin** at 204. The most recent case Appellants have located specifically discussing abandonment of a road created by prescription is **McEneny v. Gerlach**, 142 S.W.2d 1095 (Mo.App. 1940), where the

Court found the defendant had failed to provide clear and cogent proof of abandonment by “non-user on the part of the public of the road in question for a period of ten years,” **McEneny** at 1098. While it has not been specifically held that abandonment under §228.190 applies to prescriptive roads, the **McEneny** Court was applying a prior version of §228.190 that required ten years of non-use, **McEneny** at 1097.

Again, Respondents presented no evidence from which it could be found or inferred that the public road on Tract A was established by prescription, possibly allowing application of §228.190.1’s five years’ non-use provision if CART funds were not collected on the road.

The Respondents and their witnesses freely admitted at trial that Tract A was a public road, **Trans. pp. 30, 47, 64, 73, 97**, but they did not present any evidence as to how the public road on Tract A was established. Unless there is evidence of how the public road was established, unless there is evidence of whether CART funds were received for the road, and unless there is evidence of the alleged date of abandonment, the trial court cannot determine how the public road on Tract A may be vacated or abandoned.

In **Coffey v. State ex rel. County of Stone By and Through Hamilton**, 893 S.W.2d 843, 848 (Mo.App. S.D. 1995), this Court reviewing the history of a disputed road found it could not be abandoned by non-use where a deed was admitted dedicating the road, the road was maintained by the county, and “regular use of the

road by neighboring property owners and their representatives and by the school bus” occurred, **Coffey at 847.**

In **Chapman v. Lavy**, 20 S.W.2d 610, 612 (Mo.App. E.D. 2000), the “evidence amply” supported common law dedication where there was testimony of prior record owners and “[n]umerous witnesses who have lived in the area of the roadway for many years,” allowing the Court to apply §228.190.1 in order to determine if abandonment had occurred.

In **Kleeman v. Kingsley**, 88 S.W.3d 521 (Mo.App. S.D. 2002), evidence of the road’s history came from an 88 year old man who lived in the area, a mail carrier, **Kleeman I** at 524, two road district commissioners, and a road district employee, **Kleeman I** at 525, among others. In **Kleeman v. Kingsley**, 167 S.W.3d 198, 202-203 (Mo.App. S.D. 2005), this Court noted that the “record shows the old county road had been opened as early as 1916 or 1917,” revealing that the parties must have presented evidence as to the road’s history going back nearly 85 years, **Kleeman II** at 202-203.

In all these cases the claimants presented substantial evidence concerning the establishment and early history of the disputed roads, allowing the courts to determine how the road at issue was established and thereby apply the correct method of vacation or abandonment.

Respondents in this case failed to present any evidence as to the manner in which the public road described as Tract A was established. It is worth noting here that Respondents also did not present any evidence that the public road shown in

Tract A was vacated by order of the county commission. The Respondents' witness John Reed testified he could find no record of the county commission closing the public road, **Trans. p. 97.**

Respondents had the burden to present clear and cogent proof that the portion of the public road described as Tract A was abandoned, **Faustlin v. Mathis**, 99 S.W.3d 546, 551 (Mo.App. S.D. 2003), which, depending entirely on how it was established, whether CART funds were used, and when the road was "abandoned", would be either by a county commission order vacating the road or by five years' non-user under §228.190.1.

With no evidence of how the public road on Tract A was established, neither the trial court nor this Court can determine that it has been vacated so that it may be wrested from the public and granted to Respondents. Appellants assert that the trial court's Judgment must therefore be reversed.

POINT II

THE TRIAL COURT ERRED IN QUIETING TITLE TO TRACT A IN RESPONDENTS BECAUSE IF THE TRIAL COURT CORRECTLY APPLIED §228.190.1 TO FIND ABANDONMENT OF THE ROAD DESCRIBED AS TRACT A, THERE IS NO SUBSTANTIAL EVIDENCE SUPPORTING THE TRIAL COURT’S FINDING THAT TRACT A HAD BEEN ABANDONED AS A PUBLIC ROAD UNDER §228.190.1 IN THAT (A) RESPONDENTS DID NOT PRESENT CLEAR AND COGENT PROOF OF NON-USE BY MEMBERS OF THE PUBLIC, AND (B) RESPONDENTS MAY NOT RELY UPON THEIR OWN ACTIONS BLOCKING THE ROAD ON TRACT A AS EVIDENCE OF NON-USE BY MEMBERS OF THE PUBLIC.

STANDARD OF REVIEW

The standard of review under Point II is also governed by **Rule 84.13(d)** of the Missouri Rules of Civil Procedure and by **Murphy v. Carron**, 536 S.W.2d 30, 32 (Mo. 1976), such 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.” No specific findings of fact or conclusions of law were made by the trial court in this matter, **LF pp. 21-22**, so **Rule 73.01(c)** of the Missouri Rules of Civil Procedure directs that “all fact issues upon which no specific findings

are made shall be considered as having been found in accordance with the result reached,” **Kleeman v. Kingsley**, 88 S.W.3d 521, 522 (Mo.App. W.D. 2002).

LEGAL ANALYSIS

Appellants assume for the purposes of Point II of their Appeal that the public road in question is one which may be abandoned under §228.190.1, a conclusion which as is pointed out in Point I, Appellants believe is unsupported.

Even if the public road is one which can be abandoned by non-use under §228.190.1, the trial court’s Judgment should be reversed because the Respondents failed “to show a period of five continuous years in which the road had not been used,” **Burris v. Mercer County**, 252 S.W.3d 199, 206 (Mo.App. W.D. 2008) as required by §228.190.1, and they had the burden to present clear and cogent proof that the portion of the public road described as Tract A was abandoned, **Faustlin v. Mathis**, 99 S.W.3d 546, 551 (Mo.App. S.D. 2003). The only evidence the Respondents presented of non-use was the testimony of Respondent Lynn K. McCullough and his son Darren that they did not see the Appellants use the road, that the road had been “abandoned” when Highway 39 was constructed, and that no one could use the road described as Tract A because it was blocked by Respondents’ trucks and equipment.

(A) Respondents did not present clear and cogent proof of non-use by members of the public

Respondent Lynn K. McCullough and his son Darren McCullough both testified that they had never known Appellants to use Tract A, **Trans. pp. 54, 61**, although Respondent Lynn K. McCullough admitted he did not “sit up there 24 hours a day” to make sure no one had used it, **Trans. p. 54**. Respondents did not reside on the public road near Tract A, **Trans. p. 4**, and Respondent Lynn K. McCullough was not a full-time farmer, but rather operated several accounting offices in the surrounding area that necessitated his attention during normal business hours, **Trans. pp. 55-56**.

Specifically, Respondents could not state that members of the public had not used the road when Respondents were not present, **Trans. pp. 54, 63, 64**, nor could they state that a five year period ever existed since 1955 when some member of the public had not used the portion of the public road described as Tract A, **Trans. p. 50**. Respondents were certainly unable to testify that the portion of the public road described as Tract A was impassable to vehicles, since they themselves have been driving trucks and farm equipment on it since 1955, **Trans. pp. 12, 31, 60**.

Respondent Lynn K. McCullough admitted that the south end of Tract A was “trafficable from 1955 until today,” **Trans. pp. 49-50**. Although at times the north end of Tract A was not trafficable due to bushes and the lack of a culvert at Highway 39, **Trans. pp. 49, 64, 76-77**, Respondent Lynn K. McCullough did not know

“whether there was any pedestrian traffic” on it at that time, **Trans. p. 50**, nor did his son, **Trans. p. 64**. Respondent Lynn K. McCullough also did not know whether there was a five year period in which Tract A was not used by pedestrians, automobiles, or tractors, **Trans. p. 50**, nor could he state that the Appellants or others had not used Tract A from time to time, **Trans. p. 54**. Respondents’ own photographic evidence reveals that one can drive onto the road described as Tract A from either the south end off what is now known as Royal Point Road, **Exhibit E**, or the north end off Highway 39, **Exhibit D, Exhibit I**.

In **Kleeman v. Kingsley**, 167 S.W.3d 198 (Mo.App. S.D. 2005), this Court upheld a trial court’s finding of an abandoned road under §228.190.1. While no one had been seen using the disputed road, the evidence in **Kleeman II** was that no part of the roadway showed evidence of people using it, such as trampled grass or trash left behind, **Kleeman II at 204**, that the disputed roadway was “completely impassable to people and vehicles,” and it was “impossible to discern where a road might have been in the past,” **id.**

Respondents’ evidence completely fails to show the clear and cogent evidence of non-use as described above in **Kleeman v. Kingsley**, 167 S.W.3d 198, 204 (Mo.App. S.D. 2005). Respondents offered no evidence that Tract A was not used by members of the public during any five year period from 1955 to the present, **Burris v. Mercer County**, 252 S.W.3d 199, 206 (Mo.App. W.D. 2008).

Respondents stated in response to questioning from their attorney that the road

described as Tract A “quit being a public road” when “they built the new road,” **Trans. pp. 30-31**, meaning Highway 39. In **Burris v. Mercer County**, 252 S.W.3d 199 (Mo.App. W.D. 2008), evidence of use of the road focused on a period beginning in 1994, **Burris** at 200. The appellants in **Burris** asserted the road in question had been abandoned when a bridge was destroyed in the 1950’s, but offered no evidence of non-use from 1950 to 1994, **Burris** at 205-206. The **Burris** court stated that the appellants “were required to show a period of five continuous years in which the road had not been used,” and simply alleging abandonment in 1950 was “an improper shift in the burden of proof,” **Burris** at 206, because “[m]erely stating that the bridge had been destroyed in the 1950s is not clear and cogent evidence of abandonment,” **Burris** at 206.

In the case at bar the Respondents simply conclude that when Highway 39 was built in 1955, the portion of the public road described as Tract A “quit being a public road” because Highway 39 “took the place” of it, **Trans. pp. 30-31**. But the road described as Tract A was “trafficable”, **Trans. p. 49-50, Exhibit D, Exhibit E, Exhibit I**, and Respondents could not testify that no one used the portion of the public road described as Tract A, **Trans. pp. 50, 54, 64**. There was no evidence produced by the Respondents to support their conclusion that the public road described as Tract A “quit being a public road” when Highway 39 was constructed in 1955, **Trans. pp. 30-31**. Merely stating that Highway 39 “took the place” of the public road is not clear and cogent proof of abandonment, **Trans. pp. 30-31, Burris v. Mercer County**, 252

S.W.3d 199, 206 (Mo.App. W.D. 2008).

(B) Respondents may not rely upon their own actions blocking the road on Tract A as evidence of non-use by members of the public

While Respondents' machinery and equipment usually blocked the road on Tract A so that no one could drive through it, **Trans. pp. 56- 57, 63-64, 73-74**, when Respondents were utilizing their trucks and equipment in farming operations someone could drive down the public road, **Trans. pp. 56-57, 73-74**. Respondents allege in pleadings that they possessed Tract A to the exclusion of others, **LF. p. 7**, but Respondents presented no evidence of this exclusive use other than their own inconsistent blocking of the public road described as Tract A, **Trans. pp. 56-57, 73-74**.

In **Faustlin v. Mathis**, 99 S.W.3d 546 (Mo.App. S.D. 2003) this Court reiterated the well-established rule that the loss of the public's right to use a road "may result only from the acts and doings of the parties entitled to the road, not from the antagonistic or hostile possession of others," **Faustlin** at 551. Appellants note that while Respondents did not gate or fence off Tract A, it is clear that Respondents are relying at least in part upon their use of Tract A preventing anyone else from using it as proof of abandonment.

Respondents' evidence that they "blocked" the road with their equipment and trucks, **Trans. pp. 56-57, 73-74**, cannot support their claim of abandonment by the

public.

Appellants submit that even if the trial court was correct that the public road described as Tract A was a type of road which could be abandoned under §228.190.1, there is no substantial evidence to support that it was abandoned, the Respondents' evidence does not rise to the level of clear and cogent proof of abandonment as required under §228.190.1, and Respondents may not rely upon their own prevention of others using the road as evidence of abandonment. The Judgment quieting title to Tract A in the Respondents should therefore be reversed.

POINT III

THE TRIAL COURT ERRED IN QUIETING TITLE TO TRACT A IN RESPONDENTS BECAUSE IF THE TRIAL COURT CORRECTLY APPLIED §228.190.1 TO FIND ABANDONMENT OF THE ROAD DESCRIBED AS TRACT A, THE TRIAL COURT’S DECISION MISAPPLIES THE LAW UNDER §228.190.1 IN THAT RESPONDENTS FAILED TO PROVE ABANDONMENT THROUGH FIVE YEARS’ NON-USE BY THE PUBLIC SINCE RESPONDENTS’ USE OF TRACT A IS AS MEMBERS OF THE PUBLIC.

STANDARD OF REVIEW.

The standard of review of Point III is also governed by **Rule 84.13(d)** of the Missouri Rules of Civil Procedure and by **Murphy v. Carron**, 536 S.W.2d 30, 32 (Mo. 1976), such 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.” Again, no specific findings of fact or conclusions of law were made by the trial court in this matter, **LF pp. 21-22**, so **Rule 73.01(c)** of the Missouri Rules of Civil Procedure directs that “all fact issues upon which no specific findings are made shall be considered as having been found in accordance with the result reached,” **Kleeman v. Kingsley**, 88 S.W.3d 521, 522 (Mo.App. W.D. 2002).

LEGAL ANALYSIS

Appellants again assume for the purposes of Point III of their Appeal that the public road in question is one which may be abandoned under §228.190.1, which as Appellants pointed out in Point I, they believe is unsupported. If the public road on Tract A is one which can be abandoned by non-use under 228.190.1, Appellants' submit that the trial court's Judgment in this matter should be reversed because Respondents' use of Tract A is as members of the public.

Appellants contend that when Respondents began using Tract A as a road in 1955 they themselves were members of the public, and they themselves have provided to the trial court overwhelming evidence that Tract A was not abandoned as a public road.

Respondents began parking tractors and rakes on the road on Tract A immediately upon the purchase of their property in 1955, **Trans. pp. 11-12**, and they continued to park trucks and farm equipment on Tract A until the date of trial without cessation, **Trans. pp. 31, 56-57, 60, 63-63, 73-74, Exhibit D, Exhibit E, Exhibit I**. In the Southern District case of **Kleeman v. Kingsley**, 88 S.W.3d 521 (Mo.App. S.D. 2002), this Court specifically held that use by "adjoining landowners" is use of a road by "the public", **Kleeman I** at 525, and that a public road is one used by "inhabitants of a particular place," **Kleeman I** at 525 (citing **South Highland Land & Improvement Co. v. Kansas City**, 172 Mo. 523, 72 S.W. 944, 947 (1903)).

In the recent Western District case of **Burris v. Mercer County**, 252 S.W.3d 199 (Mo.App. W.D. 2008), the court upheld a finding that a public road had not been abandoned under §228.190 when the evidence of recent use was by the adjoining landowner and a farmer of nearby land, **Burris** at 203. Of interest to the case at bar is the **Burris** Court's statement that "if even one member of the public ... does not concur in its abandonment and uses the road, it is not abandoned," **Burris** at 204. "[The Respondent] used the road; therefore, the whole public did not abandon it," **Burris** at 204. The **Burris** court pointed out that "[t]he law does not fix the number of persons who must travel upon a road to determine its existence," **Burris** at 204 (citing **Oetting v. Pollock**, 189 Mo.App. 263, 175 S.W. 222, 224 (1915)).

Appellants submit that **Kleeman v. Kingsley**, 88 S.W.3d 521 (Mo.App. S.D. 2002) and **Burris v. Mercer County**, 252 S.W.3d 199 (Mo.App. W.D. 2008), provide the principal that when adjoining landowners utilize a public road they do so as members of the public, so that use as a road by even one adjoining landowner shows the public does not want to abandon the road. In the case at bar, the Respondents are the public, and their use of the road described as Tract A beginning in 1955 and continuing without cessation up to trial in 2007, shows that the public in this case does not want to abandon this road.

Like the claimant in **Faustlin v. Mathis**, 99 S.W.3d 546, 551 (Mo.App. S.D. 2003) who wanted a road to remain open, the Respondents in the case at bar "also have continued to use the road, and, as evidenced by the present action, they have

given no such indication that they desire to abandon or surrender that right,” **Faustlin** at 551. Nor have Respondents in this case presented any evidence that they requested the county to close the road described as Tract A, which they could have done any time in the 52 years preceding trial.

Appellants assume that Respondents will argue to this Court that they are not “the public” for purposes of determining use of Tract A as a road, and will cite this Court to **Kleeman v. Kingsley**, 167 S.W.3d 198 (Mo.App. S.D. 2005) for the proposition that adjoining landowners can use a roadway and yet it can be “abandoned” under §228.190. But **Kleeman II** is distinguished by its facts from the case at bar. In **Kleeman II**, the adjoining landowners were not using the abandoned road as a road: rather, they had blocked the road off as it entered their property by placing cattle panels across the roadway, **Kleeman II** at 200, they had placed barb wire fencing across the roadway, **id.**, and they had maintained their cattle operation over portions of the roadway, **id.** at 204.

In stark contrast to the case at bar, Tract A remains open to vehicular traffic, **Trans. pp. 49-50, 73-74, Exhibit D, Exhibit E, Exhibit I**. Respondents have not physically blocked anyone’s access to Tract A as a road with gates, since they themselves are using Tract A as a road. While Respondents testified at trial that you could not drive through Tract A to Highway 39, **Trans. pp. 49, 76-77**, their own exhibits show that trucks and equipment were driven by Respondents in both directions on the road described as Tract A, **Exhibit D, Exhibit E, Exhibit I**, nor are

public roads abandoned merely because they may have “no outlet” and have become a “cul-de-sac,” **Connell v. Baker**, 458 S.W.2d 573, 577 (Mo.App. 1970), **State ex re. Carter County v. Lewis**, 294 S.W.2d 954, 958 (Mo.App. 1956).

All the evidence shows that in 1955 Tract A was a public road. Respondents began using the road on Tract A in 1955 as members of the public and have continued to use it in the very manner in which it is most functional. Respondents never stopped using Tract A as a road for a five year period which would allow the road to be considered abandoned through Respondents’ non-use. The Respondents “used the road; therefore, the whole public did not abandon it,” **Burris v. Mercer County**, 252 S.W.3d 199, 204 (Mo.App. W.D. 2008). Respondents proved at trial continual use by the public of Tract A as a public road from 1955 to 2007, thereby absolutely preventing the trial court from finding Tract A had been abandoned as a public road under Missouri Statute §228.190.1. The trial court misapplied the law under §228.190 in this matter, and its Judgment must be reversed.

CONCLUSION

In conclusion, Appellants Nadine Doss and Howard Allen submit that the trial court in the case at bar misapplied the law when it granted title of Tract A to Respondents in its Judgment, because Respondents admitted Tract A was a public road and had the burden to prove it was abandoned. Yet Respondents presented no evidence of how the road on Tract A was established, thereby determining what method of vacation or abandonment the trial court is allowed to apply.

Furthermore, Appellants assert that if §228.190.1 is an appropriate method by which the road on Tract A may be vacated or abandoned, there is still no substantial evidence to support the trial court's Judgment. Respondents did not present any clear and cogent proof of non-use by members of the public as required, and they may not rely upon their own actions blocking the road on Tract A to assert that the road is not used by others.

Finally, if the trial court correctly used §228.190.1 to determine the road on Tract A was vacated or abandoned, it misapplied the law of §228.190.1, in that Respondents themselves are members of the public. Therefore the trial court cannot find the road on Tract A is abandoned, when Respondents' evidence actually shows the public has used the road on Tract A continuously from 1955 until the date of trial.

For any and all of the above reasons, Appellants request this Court to reverse

the trial court's Judgment in the case at bar and direct the trial court to enter judgment for the Appellants.



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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 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 10,034, and that this Brief was prepared with and formatted with Microsoft Word.

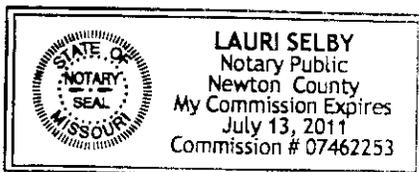
I further state that a CD containing the Brief is filed herewith and said disk has been scanned by Norton AntiVirus for viruses and is virus free.

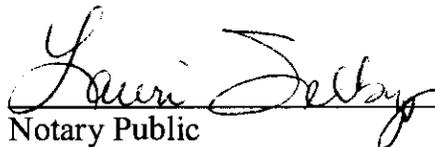
STATE OF MISSOURI)
) ss
COUNTY OF BARRY)

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 13th day of May, 2009.




Notary Public

Missouri Court of Appeals
Southern District

LYNN K. McCULLOUGH and)	
SHIRLEY A. McCULLOUGH,)	
)	
<i>Respondents,</i>)	
)	
vs.)	No. SD29396
)	
NADINE DOSS,)	
)	
and)	
)	
HOWARD ALLEN,)	
)	
<i>Appellants.</i>)	

CERTIFICATE OF SERVICE

I hereby certify that two (2) true and correct copies of the above and foregoing Appellant's Brief were hand-delivered this 13th day of May, 2009, to:

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