In the Missouri Court of Appeals
Eastern District

DIVISION ONE

DAVID MAUE,	)	No. ED108696
	)	
Appellant,	)	Appeal from the Circuit Court
	)	of Jefferson County
vs.	)	17JE-CC00665
	)	
FIEDLER ACRES SUBDIVISION, et al.,	)	Honorable Dianna L. Bartels
	)	
Respondents.	)	Filed: December 8, 2020

David Maue ("Plaintiff") appeals the trial court's judgment dismissing Count V of his first amended petition, a road maintenance action filed under section 228.369 RSMo 2016[1] ("section 228.369" or "the statute") against individually named defendants, for failure to state a claim upon which relief can be granted.[2] The roadway maintenance action in Count V of Plaintiff's first amended petition seeks a court order establishing a plan of road maintenance for a roadway adjacent to Fiedler Acres Subdivision ("Subdivision") that is known as Fiedler Lane/Morgan Woods Drive ("Roadway").

[1] Unless otherwise indicated, all further statutory references are to RSMo 2016. Section 228.369, which is set out in full in Section IV.A. of this opinion, is a statutory cause of action allowing a party to petition the circuit court for an order establishing a plan of maintenance for a private road under certain circumstances. *See* section 228.369.1-.6.

[2] Fiedler Acres Subdivision ("Subdivision") is not a party to Count V of Plaintiff's first amended petition but remains a party to the remaining counts in the underlying case including: keeping the Subdivision from repairing the roadway at issue in this case beyond what is necessary or in a more-expensive-than-reasonable manner (Count I); directing the Subdivision to abide by provisions of 1988 Restrictions including with respect to the collection of assessments (Count II); enforcing provisions in the 1988 Restrictions including prohibiting recreational vehicles from being parked in front of residences, prohibiting livestock, and prohibiting overnight parking on the streets of the Subdivision (Count III); seeking specific performance to carry out the 1988 Restrictions (Count IV); having an equitable accounting on any assessments collected by the Subdivision (Count VI); and imposing a constructive trust on assessments that are alleged to have been improperly collected by the Subdivision (Count VII).

The individually named defendants who are parties to Count V can be grouped into three categories: (1) individuals who own property located on the Roadway, whose property is in the Subdivision, and who are subject to Subdivision covenants ("Subdivision Owners"); (2) individuals who own property located on the Roadway, but whose property is not in the Subdivision, and who are not subject to Subdivision covenants ("Benefitted Owners"); and (3) Georgia Rosemann in her capacity as Trustee ("Trustee") of the Subdivision (collectively "all individually named Defendants").

On appeal, Plaintiff only argues the trial court erred in dismissing Count V as to Subdivision Owners and Benefitted Owners.[3,4] Because Plaintiff does not argue on appeal that the trial court erred in dismissing Count V as to defendant Trustee, we affirm the portion of the judgment dismissing Trustee from Count V. And because we agree with Plaintiff that the trial court erred in dismissing Count V as to defendants Subdivision Owners and Benefitted Owners, we reverse the portion of the judgment dismissing Count V as to Subdivision Owners and Benefitted Owners, and we remand for further proceedings consistent with this opinion.

[3] The Subdivision Owners and Benefitted Owners are: John S. and Diana M. Wood; Matthew and Kara Ruth Guckes; Diane K. Williams; David T. and Emma Wallen; William K. and Denise Y. Morgan; Omar and Tiffany Garcia; Richard J. and Kathleen A. Hoelzer; Joseph Holycross; Kelly Thies; Andrew F. and Donna M. Fischer; Steven L. Schneider; Cuttler Properties, LLC; Alexander J. Maldonado; John E. and Irma V. Greever; Owen D. Neill; Angela M. Foppe; James Galen Leroy a/k/a Galen L. James; Nancy James; Chris E. and Janet D. Davis; Munir and Alphea Halilovic; Ward D. and Robynne M. Cook; Neal Family Trust; Daniel and Kristin Hudson; Vernon and Rita J. Miller; Gruttke Living Trust; Benjamin F. and Terri J. Ashmore; Lyshing and Thipphavanh Saeou; Marty and Mary C. Sweeney; George and Georgia Rosemann Trust a/k/a the Rosemann Family Trust, George and Georgia Rosemann, Trustees; Cameron D. and Brittney S. Jungewaelter; James R. Baxter, Jr.; and Richard M. and Donna L. Rands.

[4] Plaintiff raises three points on appeal (points one, two, and four), arguing the trial court erred in dismissing Count V as to Subdivision Owners and Benefitted Owners. Quizzically, Plaintiff also raises another point on appeal (point three), contending the trial court erred in dismissing Count V as to the Subdivision. We deny Plaintiff's third point on appeal outright at this juncture because the record on appeal shows the Subdivision is not a party to Count V of Plaintiff's first amended petition, and therefore, the trial court could not have erred in dismissing it. *See* footnote 2 of this opinion; *see also* Section I.B. of this opinion.

I. BACKGROUND

A. The Relevant Allegations in Plaintiff's First Amended Petition

Because this appeal involves a dismissal by the trial court for failure to state a claim upon which relief can be granted, it is important to initially set out the relevant allegations of Plaintiff's first amended petition. These allegations are as follows.

Plaintiff is the owner of lot thirteen of the Subdivision located in Jefferson County, Missouri. There are a set of restrictions for the Subdivision that were recorded in 1988 ("1988 Restrictions") with the Jefferson County Recorder of Deeds and attached to the first amended petition as Exhibit A. The 1988 Restrictions provide for the collection of assessments for maintaining the surrounding roads as well as other restrictive covenants. The Roadway at issue in this case, known as Fiedler Lane/Morgan Woods Drive, is allegedly to be maintained by the Subdivision's trustees. Further, the 1988 Restrictions provide in relevant part that "[t]he obligation and expense of . . . maintaining the streets [and] roads . . . shall be the responsibility of owners of lots in [the Subdivision]."

Plaintiff, Subdivision Owners, and Benefitted Owners are all owners of property located along the Roadway. Plaintiff and Subdivision Owners own property located on the Roadway, whose property is in the Subdivision, and who are subject to Subdivision covenants in the 1988 Restrictions. Benefitted Owners own property located on the Roadway, whose property is not in the Subdivision, and who are not subject to Subdivision covenants in the 1988 Restrictions.

In 2016, the trustees of the Subdivision raised the assessments for homeowners in the Subdivision which were alleged to be excessive, unreasonable, arbitrary, and unnecessary. Additionally, it was alleged the Subdivision's trustees failed to require assessments to be collected from all homeowners of the Subdivision and from all others who used the Roadway.

Plaintiff filed his amended petition consisting of seven total counts. Counts I, II, III, IV, VI, and VII pleaded allegations only against the Subdivision. *See* footnote 2 of this opinion. Count V was the sole count against all individually named Defendants seeking a court order among all necessary parties for the maintenance of the Roadway pursuant to section 228.369. Specifically, Count V states in relevant part:

> 41. [All individually named] Defendants are the owners of property located along [ ] [the Roadway, i.e.,] Fiedler Lane, which transitions into Morgan Woods Drive, in Fenton, Missouri.
>
> 42. While there are [1988] Restrictions for [the Subdivision], which provide for the maintenance of the streets and roads, including [the Roadway], said Subdivision does not include all necessary parties as some of the owners along said [R]oadway, are not a part of the [S]ubdivision, and therefore, [are] not bound by the [1988] Restrictions to share the costs to maintain and repair the [R]oadway.
>
> 43. There is no written agreement between all necessary parties for maintenance of the [R]oadway.
>
> 44. The above-referenced [R]oadway is in negligible state of disrepair.
>
> WHEREFORE, Plaintiff requests that this [c]ourt enter an order establishing a plan of maintenance for [the Roadway] to ensure its maintenance, repair, and improvement, that same [o]rder be filed with the Jefferson County Recorder of Deeds, Plaintiff's costs for bringing Count V, and any and all other relief that this [c]ourt deems just and proper under the circumstances.

B. Procedural Posture

After Plaintiff filed his original petition, the Trustee filed a motion to dismiss for failure to state a claim upon which relief can be granted, or in the alternative, a motion to require joinder of necessary parties, on Count V of Plaintiff's petition because Plaintiff failed to include all of the homeowners in the platted Subdivision as defendants, i.e., all Subdivision Owners. The Honorable Mark T. Stoll of the Circuit Court of Jefferson County granted the motion for failure to join all necessary parties and allowed Plaintiff to file an amended petition. On September 18, 2018, Plaintiff filed his first amended petition properly joining all the Subdivision Owners and

Benefitted Owners for Count V, named the Trustee as a party to Count V, and explicitly excluded the Subdivision as a party as to that count.

In March 2019, some of the individually named Defendants (Marty and Mary C. Sweeney, James R. Baxter, Jr., and Lyshing and Thipphavanh Saeou) filed three separate motions to dismiss Count V of Plaintiff's first amended petition for failure to state a claim upon which relief can be granted. In April 2019, the Honorable Brenda Stacey of the Circuit Court of Jefferson County ("Judge Stacey") denied the motions to dismiss "certain [d]efendants."[5] Specifically, Judge Stacey found: (1) "[w]ritten covenants for [the Subdivision] [, i.e., the 1988 Restrictions] contain terms for the maintenance of [the Roadway], however, said provisions do not address [Benefitted Owners, i.e.,] adjoining homeowners who are benefitted by the use of an abutting [Roadway] which are not included in the covenants [found in the 1988 Restrictions][;]" (2) "[t]he agreement [, i.e, the 1988 Restrictions], has not been executed by all necessary homeowners[;]" and (3) "[t]he plain meaning of 228.369.1 RSM[o] (2012) does not apply."

There was then an administrative order dated July 23, 2019, which transferred the case from Judge Stacey to the Honorable Dianna L. Bartels of the Circuit Court of Jefferson County ("the trial court").

In August 2019, Plaintiff filed a motion for partial summary judgment regarding Count V for all individually named Defendants. Later that month, two of the individually named Defendants, Marty and Mary C. Sweeney, filed a motion for rehearing of their motion to dismiss. Various hearing dates were set but it is unclear whether a hearing was held.

In September 2019, some of the individually named Defendants (Munir and Alphea Halilovic; Ward D. and Robynne M. Cook, Galen L. and Nancy James; William K. and Denise

[5] It appears from the legal file that Judge Stacey denied the three separate motions to dismiss filed by defendants Marty and Mary C. Sweeney, James R. Baxter, Jr., and Lyshing and Thipphavanh Saeou.

M. Morgan, the Rosemann Family Trust, George and Georgia Rosemann, Trustees; and Cameron D. and Brittney S. Jungewaelter) filed a joint motion to dismiss for failure to state a claim upon which relief can be granted as to Count V ("September 2019 motion to dismiss"). Attached to the September 2019 motion to dismiss were: the 1988 Restrictions that were attached as an exhibit to Plaintiff's first amended petition; and an additional document outside the Plaintiff's pleadings known as the 1979/1986 agreement ("1979/1986 agreement") of certain residents of the Roadway for road improvements. On October 15, 2019, the trial court called the September 2019 motion to dismiss, it was argued, and it was then taken under submission. The trial court then ordered briefing on the issue.

On January 22, 2020, Plaintiff's motion for partial summary judgment was called; however, on the trial court's own volition, it took up additional argument on the previously argued motions to dismiss at the hearing. During the argument, Plaintiff orally sought to amend his first amended petition to add a declaratory judgment count. Plaintiff's counsel asserted at the hearing and in briefing that "this other agreement [, i.e., the 1979/1986 agreement raised for the first time in the September 2019 motion to dismiss]" was a matter outside of Plaintiff's first amended petition. Additionally, there were numerous references to the 1979/1986 agreement at the hearing.

The trial court ultimately dismissed Count V of Plaintiff's first amended petition as to all individually named Defendants and denied Plaintiff's motion to amend his petition. The trial court did not differentiate in its judgment between the different motions to dismiss discussed above. Additionally, the trial court, in accordance with Missouri Supreme Court Rule 74.01(b) (2020),[6] entered judgment as to Count V, found no just reason for delay, and certified the matter for appeal.

[6] Unless otherwise indicated, all further references to Rules are to Missouri Supreme Court Rule (2020).

Plaintiff then filed a notice of appeal with this Court. Subsequently, some of the individual Defendants filed two motions to dismiss Plaintiff's appeal for improper certification under Rule 74.01(b), alleging there was no final appealable judgment. The first motion was filed by defendants Marty and Mary C. Sweeney and Richard C. and Donna L. Rands, and the second motion was filed by defendants James R. Baxter, Jr. and Lyshing and Thippavanh Saeou. Our Court then ordered both motions to dismiss Plaintiff's appeal be taken with the case. Submission of this appeal followed.

II. MOTIONS TO DISMISS PLAINTIFF'S APPEAL

Both motions to dismiss Plaintiff's appeal present the same arguments. Specifically, the motions contend the trial court's certification under Rule 74.01(b) was not proper because: the case still has counts pending in the trial court which affects all parties; there are still counts seeking relief similar to relief requested in Count V; the claims remaining in the trial court could moot the claim currently being appealed; and the factual underpinnings of all the claims in Plaintiff's first amended petition are intertwined. For the reasons discussed below, we disagree and find certification was proper.

There must be a final, appealable judgment for an appellate court to consider the merits of an appeal. *See Wilson v. City of St. Louis*, 600 S.W.3d 763, 765-73 (Mo. banc 2020). A final judgment must satisfy two criteria: (1) "it must be a judgment ([,] i.e., it must fully resolve at least one claim in a lawsuit and establish all the rights and liabilities of the parties with respect to that claim)";[7] and (2) "it must be 'final,' either because it disposes of all claims (or the last claim) in a lawsuit, or because it has been certified for immediate appeal pursuant to Rule 74.01(b)." *Wilson*, 600 S.W.3d at 771. A judgment is eligible to be certified for immediate

[7] "To satisfy this first criteria, the judgment must be in writing, signed by the judge, and expressly denominated a judgment." *Wilson*, 600 S.W.3d at 771 (citing Rule 74.01(a)). It is undisputed the first criteria was met in this case.

appeal pursuant to Rule 74.01(b) "only if it disposes of a 'judicial unit' of claims, meaning it: (a) disposes of all claims by or against at least one party, or (b) it disposes of one or more claims that are sufficiently distinct from the claims that remain pending in the circuit court." *Wilson*, 600 S.W.3d at 771. Additionally, "[d]etermining whether these criteria are met is a question of law and depends on 'the content, substance, and effect of the order,' not the circuit court's designation." *Id*. (quoting *Gibson v. Brewer*, 952 S.W.2d 239, 244 (Mo. banc 1997)).

On January 22, 2020, the trial court entered a judgment dismissing Count V of Plaintiff's first amended petition, which was the only count against all individually named Defendants. The remaining counts in Plaintiff's first amended petition are against the Subdivision. Here, the judgment disposes of a "judicial unit" of claims because it disposes of all claims by or against at least one party, i.e., all individually named Defendants. *See Wilson*, 600 S.W.3d at 771. Accordingly, the judgment was eligible to be certified for immediate appeal pursuant to Rule 74.01(b). *See Wilson*, 600 S.W.3d at 771.

Next, we must determine whether the certification was appropriate. *See ARC Industries, Inc. v. Siegel-Robert, Inc.*, 157 S.W.3d 344, 346 (Mo. App. E.D. 2005). In making this determination, we apply a four-factor test: "(1) whether the action remains pending in the trial court as to all parties; (2) whether similar relief can be awarded in each separate count; (3) whether determination of the claims pending in the trial court would moot the claim being appealed; and (4) whether the factual underpinnings of all the claims are intertwined." *Id*. Additionally, the trial court "should not make that certification if resolution of the remaining claims by the circuit court could affect or even moot appellate review of the claims already resolved." *See Wilson*, 600 S.W.3d at 772.

Here, Rule 74.01(b) certification is proper. Plaintiff's action does not remain pending in the trial court as to all individually named Defendants. Additionally, similar relief cannot be awarded on the remaining counts as to Count V, which sought relief from all individually named Defendants under section 228.369. The determination of the Subdivision's obligations under the 1988 Restrictions is separate and will not affect or moot any claim against all individually named Defendants. Finally, the factual underpinnings of the claims against the Subdivision and the claim against all individually named Defendants are sufficiently separate.

In conclusion, there is a "final judgment," and certification is proper under Rule 74.01(b). Therefore, we review the merits of Plaintiff's appeal. The motions to dismiss Plaintiff's appeal filed by some of the individually named Defendants are denied.

III. GENERAL STANDARD OF REVIEW FOR GRANT OF MOTION TO DISMISS

Our review of a trial court's judgment granting a motion to dismiss is de novo. *Aldridge v. Francis*, 503 S.W.3d 314, 316 (Mo. App. E.D. 2016). A motion to dismiss for failure to state a claim upon which relief can be granted is only a test of the adequacy of the plaintiff's petition. *Id*. When reviewing a motion to dismiss on appeal, we accept as true the allegations in the plaintiff's petition and liberally grant him all reasonable inferences therefrom. *Id*. This Court does not attempt to weigh whether the factual allegations are credible or persuasive. *Id*. Instead, the petition is reviewed "in an almost academic manner, to determine if the facts alleged meet the elements of a recognized cause of action, or of a cause that might be adopted in that case." *Id*. (quoting *Nazeri v. Missouri Valley College*, 860 S.W.2d 303, 306 (Mo. banc 1993)). If a plaintiff's petition alleges any set of facts that, if proven, would entitle him to relief, then the petition states a claim. *Brewer v. Cosgrove*, 498 S.W.3d 837, 843 (Mo. App. E.D. 2016).

IV. DISCUSSION

In this case, Plaintiff raises three points on appeal (points one, two, and four), arguing the trial court erred in dismissing Count V as to Subdivision Owners and Benefitted Owners. *See* footnote 4 of this opinion denying Plaintiff's third point on appeal.

Before discussing the merits of and the specific arguments within Plaintiff's points on appeal, we must determine the circumstances under which a party in Plaintiff's position adequately pleads a cause of action under section 228.369 to "petition the circuit court for an order establishing a plan of maintenance" for a private road such as the Roadway in this case. *See* section 228.369.1-.6. This issue, which is necessary to both provide a legal framework for our discussion to give the trial court guidance on remand, is one of first impression in Missouri Courts.

A. When a Plaintiff Adequately Pleads a Cause of Action Under Section 228.369

The circumstances under which a party in Plaintiff's position adequately pleads a cause of action under section 228.369 is a matter of statutory interpretation that is subject to de novo review. *See Roesing v. Director of Revenue*, 573 S.W.3d 634, 637 (Mo. banc 2019). The primary rule in interpreting a statute is to determine the intent of the legislature from the language used, to give effect to the intent, and to consider the words in their plain and ordinary meaning. *Dynasty Home, L.C. v. Public Water Supply District Number 3 of Franklin County, Missouri*, 453 S.W.3d 876, 879 (Mo. App. E.D. 2015).

Two principles of statutory interpretation are relevant to the interpretation of section 228.369 in this appeal. First, we read a statute as a whole and give all words their meaning. *See Sun Aviation, Inc. v. L-3 Communications Avionics Systems, Inc.*, 533 S.W.3d 720, 724 (Mo. banc 2017). And second, "[c]ourts must avoid statutory interpretations that are unjust, absurd, or

unreasonable." *State ex rel. Nixon v. Premium Standard Farms, Inc.*, 100 S.W.3d 157, 162 (Mo. App. W.D. 2003); *see also Hamrick ex rel. Hamrick v. Affton School Dist. Bd. of Educ.*, 13 S.W.3d 678, 680 (Mo. App. E.D. 2000) (similarly finding).

The statute in dispute, section 228.369, states in full:

> 1. For any private road subject to the use of *more than one homeowner*, in the absence of a prior order or written agreement for the maintenance of the private road, including covenants contained in deeds or state or local permits providing for the maintenance of a private road, when *adjoining homeowners who are benefitted by the use of an abutting private road*, or *homeowners who have an easement to use a private road*, collectively *owners or benefitted owners* are unable to agree in writing upon a plan of maintenance for the maintenance, repair, or improvement of the private road and including the assessment and apportionment of costs for the plan of maintenance, *one or more of the owners* may petition the circuit court for an order establishing a plan of maintenance.
>
> 2. The cost of a plan of maintenance for a private road shall be apportioned among the *owners of residences abutting the private road* and *holders of easements to use the private road*, with the cost apportioned commensurate with the use and benefit to *residences benefitted by the access*, as mutually agreed by *the benefitted homeowners* or as ordered by the court with such method of apportionment as agreed by *the homeowners* or ordered by the court, including, but not limited to, equal division, or proportionate to the residential assessed value, or to front footage, or to usage or benefit.
>
> 3. The court may implement the same procedures to order and subsequently determine a plan of maintenance for a private road as provided in this chapter for establishing or widening a private road, including the appointment and compensation of disinterested commissioners to determine the plan and the apportionment of costs.
>
> 4. Where *the homeowners who are benefitted by the private road* are not able to agree upon the designation of a supervisor to complete the plan of maintenance, the commissioners appointed by the court shall designate a supervisor who shall be compensated for his or her services in the same manner as the commissioners.
>
> 5. Any agreement executed by *all the homeowners*, or final order approving, a plan of maintenance for a private road shall be recorded with the county recorder of deeds.
>
> 6. One or more *adjoining homeowners* or *holders of any easement to use* a private road may bring an action to enforce the plan of maintenance for a private road, whether as mutually agreed or as ordered by the court.

(emphasis added).

We initially note Section 228.369 is challenging to read and interpret because of, *inter alia*, the above-italicized terms which are widely varying and undefined. *See id*.; *see generally* sections 228.341 to 228.374 governing the establishment and vacation of private roads; *see also* section 228.341 set forth in footnote 8 of this opinion below (providing the only definition in sections 228.341 to 228.374 – for the term "private road"). Nevertheless, we must give effect to the legislature's intent in section 228.369.1-.6, determining when a homeowner such as Plaintiff adequately pleads a cause of action under section 228.369 to "petition the circuit court for an order establishing a plan of maintenance."

To undergo this difficult task, we will, (i) discuss the relevant parts of each subsection of section 228.369, considering the words used in their plain and ordinary meaning; and then (ii) read all of the subsections of section 228.369 as a whole, giving all words their meaning, and avoiding statutory interpretations that are unjust, absurd, or unreasonable. *See Sun Aviation, Inc.*, 533 S.W.3d at 724; *Dynasty Home, L.C.*, 453 S.W.3d at 879; *State ex rel. Nixon*, 100 S.W.3d at 162; *see also Hamrick ex rel. Hamrick*, 13 S.W.3d at 680; section 228.369.1-.6.

1. The Relevant Parts of Each Subsection of the Statute

a. Section 228.369.1

Subsection one of section 228.369 is challenging to read and interpret, in part because it is a single sentence, containing over 130 words, with potentially five different clauses separated by commas, with additional conditions within those clauses, ultimately concluding in the fifth and final clause that "one or more of the owners may petition the circuit court for an order establishing a plan of maintenance." *See* section 228.369.1.

Reading the first and fifth clauses of section 228.369.1 together, "one or more of the owners may petition the circuit court for an order establishing a plan of maintenance" only when, *inter alia*, there is a subject "private road" used by "more than one homeowner." *See* section 228.369.1. "[P]rivate road" has a lengthy definition in section 228.341, and as relevant to this case, the term "private road" is generally defined as any road that is not owned by a governmental entity "which provides a means of ingress and egress by motor vehicle for any owner or owners of residences from [ ] homes to a public road." *See* section 228.341.[8] Because "homeowner" is not defined in section 228.369 or any of the other statutes governing the establishment and vacation of private roads, we look to the dictionary definition of the term to determine its plain and ordinary meaning. *See* section 228.369; *see generally* sections 228.341 to 228.374; *see also Gash v. Lafayette County*, 245 S.W.3d 229, 232 (Mo. banc 2008). *Merriam-Webster* defines a "homeowner" as "a person who owns a home." *See Merriam-Webster*, https://www.merriam-webster.com/dictionary/homeowner (last visited Dec. 1, 2020).

Reading the second and fifth clauses of section 228.369.1 together indicates that "one or more of the owners may petition the circuit court for an order establishing a plan of maintenance" only "*in the absence of a* prior order or *written agreement for the maintenance of*

[8] Section 228.341 defines "private road" for purposes of, *inter alia*, section 228.369. *See* section 228.341. Section 228.341 provides:

> For purposes of sections 228.341 to 228.374, 'private road' with regard to a proceeding to obtain a maintenance order means any private road established under this chapter or any easement of access, regardless of how created, which provides a means of ingress and egress by motor vehicle for any owner or owners of residences from such homes to a public road. A private road does not include any road owned by the United States or any agency or instrumentality thereof, or the State of Missouri, or any county, municipality, political subdivision, special district, instrumentality, or agency of the State of Missouri. Nothing in sections 228.341 to 228.374 shall be deemed to apply to any road created by or included in any recorded plat referencing or referenced in an indenture or declaration creating an owner's association, regardless of whether such road is designated as a common element. Nothing in sections 228.341 to 228.374 shall be deemed to apply to any land or property owned or operated by any railroad regulated by the Federal Railroad Administration.

(emphasis omitted).

the private road, including covenants contained in deeds or state or local permits providing for maintenance of a private road[.]" *See* section 228.369.1 (emphasis added). Where, as in this case, there is no allegation of a prior order for the maintenance of a subject private road and no allegation of state or local permits providing for maintenance of such a road, a reading of the preceding, italicized language along with the final clause of section 228.369.1 in isolation suggests that any prior written agreement or covenant among even just a few owners prohibits a cause of action seeking a court-order establishing a plan of maintenance under the statute.[9] *See id*.

The third, fourth, and fifth clauses of section 228.369.1 read together provide that "one or more of the owners may petition the circuit court for an order establishing a plan of maintenance" (fifth clause) "when adjoining homeowners who are benefitted by the use of an abutting private road, or homeowners who have an easement to use a private road," (third clause) "collectively owners or benefitted owners are unable to agree in writing upon a plan of maintenance for the maintenance, repair, or improvement of the private road and including the assessment and apportionment of costs for the plan of maintenance[.]" (fourth clause). *See* section 228.369.1

Because "adjoining homeowner" is not defined in section 228.369 or any of the other statutes governing the establishment and vacation of private roads, we look to dictionary definitions of the two words within the term to determine the term's plain and ordinary meaning.

[9] Reading the second and fifth clauses of section 228.369.1 together indicates that "one or more of the owners may petition the circuit court for an order establishing a plan of maintenance" only "in the absence of a prior order *or* written agreement for the maintenance of the private road, including covenants contained in deeds or state or local permits providing for maintenance of a private road[.]" *See* section 228.369.1 (emphasis added). Although we note a prior order for the maintenance of a private road may preclude a cause of action under section 228.369 in some circumstances, our focus in this case going forward is interpreting under what circumstances a prior agreement or covenant for the maintenance of a private road precludes the use of the statute, because, (1) Plaintiff does not allege the existence of a prior order for the maintenance of the Roadway in this case; and (2) Plaintiff does allege the existence of a prior agreement/covenant for the maintenance of the Roadway in this case, i.e., the 1988 Restrictions.

See section 228.369; *see generally* sections 228.341 to 228.374; *see also Gash*, 245 S.W.3d at 232. *Black's Law Dictionary* defines "adjoining" as "[t]ouching; sharing a common boundary; CONTIGUOUS." (11th ed. 2019) (emphasis in original). Additionally, "adjoining owner" is defined as "[s]omeone who owns land abutting another's." *Id*. Further, *Merriam-Webster* defines a "homeowner" as "a person who owns a home." *See Merriam-Webster*, https://www.merriam-webster.com/dictionary/homeowner (last visited Dec. 1, 2020). Under these preceding definitions, we find an "adjoining homeowner" for purposes of section 228.369.1 is someone who owns a home sharing a common private road and who is benefitted by the use of that private road.

Therefore, the third, fourth, and fifth clauses of section 228.369.1 read together provide that "one or more of the owners may petition the circuit court for an order establishing a plan of maintenance" (fifth clause) "when adjoining homeowners [, i.e., those who own homes sharing a common private road] who are benefitted by the use of an abutting private road," or "homeowners who have an easement to use a private road" (third clause) "collectively owners or benefitted owners are unable to agree in writing upon a plan of maintenance for the maintenance, repair, or improvement of the private road and including the assessment and apportionment of costs for the plan of maintenance[.]" (fourth clause). *See* section 228.369.1. Given the varying use of undefined terms, and the absence of the conditional conjunctive antecedent "if" before the fourth clause, these clauses read together are not crystal clear but suggest that a cause of action seeking a court-order establishing a plan of maintenance under section 228.369 can take place when there is no collective agreement for the maintenance of a private road between dissimilarly-positioned landowners.

b. Section 228.369.2-.6

Subsection two of section 228.369.2 directs the parties or the court to apportion costs commensurate with use and benefit of the private road, referring to the parties as "the owners of residences abutting the private road," "holders of easements to use the private road," "residences benefitted by the access," "the benefitted homeowners," and "the homeowners." *See* section 228.369.2. These terms are undefined and vary from other terms used throughout section 228.369. *See* section 228.369.2; *see also* section 228.369.1; section 228.369.4-.6. Subsection 2 of the statute also indicates "[t]he cost of a plan of maintenance for a private road shall be . . . apportioned commensurate with the use and benefit to residences by the access," suggesting a cause of action under section 228.369 is appropriate when not all benefitted homeowners are paying maintenance costs which are commensurate with their use and benefit of a private road. *See* section 228.369.2.

Subsections three and four of section 228.369 refer to procedures a court may use in determining a plan of maintenance, including the appointment of disinterested commissioners. *See* section 228.369.3 and .4. Section 228.369.4 also uses the term "the homeowners who are benefitted by the private road," arguably similar to the term "the benefitted homeowners" found in section 228.369.2. *See* section 228.369.4; *see also* section 228.369.2.

Subsection five of section 228.369.5 introduces the term "all." *See* section 228.369.5 (providing "[a]ny agreement executed by *all* of the homeowners, or final order approving, a plan of maintenance for a private road shall be recorded with the county recorder of deeds") (emphasis added). Finally, subsection six of section 228.369 enables "[o]ne or more adjoining homeowners" or "holders of any easement to use a private road" the right to enforce such a plan. *See* section 228.369.6.

2. Section 228.369 as a Whole

In determining when a homeowner such as Plaintiff adequately pleads a cause of action under section 228.369 to "petition the circuit court for an order establishing a plan of maintenance" for a private road such as the Roadway in this case, our challenge is to interpret the legislative meaning of the statute taken as a whole and not simply pick and choose application of the above-discussed individual clauses and subsections. *See Sun Aviation, Inc.*, 533 S.W.3d at 724; *see also* section 228.369.1-.6. Because section 228.369 makes reference to so many different terms including "homeowners," "adjoining homeowners," "benefitted owners," and simply "owners," it is our task to find the intent of all its provisions taken together. *See* section 228.369.1-.6; *Sun Aviation, Inc.*, 533 S.W.3d at 724; *Dynasty Home, L.C.*, 453 S.W.3d at 879.

Whether the first clause of section 228.369.1 has been met is relatively straightforward. As discussed in detail in the preceding subsection, reading the first and fifth clauses of section 228.369.1 together provides, "one or more of the owners may petition the circuit court for an order establishing a plan of maintenance" only when, *inter alia*, there is a subject "private road" used by "more than one homeowner." *See* section 228.369.1.

The ultimate question in this case is whether the second clause of section 228.369.1 referenced above prohibits the use of the statute's cause of action if *any* written prior agreement or covenant exists as to the maintenance of a private road when there are parties alleged to be benefitting from the use of the road without contributing towards its maintenance and repair. *See* section 228.369.1 (providing in relevant part that "in the absence of a prior . . . written agreement for the maintenance of the private road, including covenants contained in deeds . . . [(second clause of section 228.369.1)] . . . one or more of the owners may petition the circuit court for an order establishing a plan of maintenance [(fifth clause of section 228.369.1)]").

A strict reading of the second and fifth clauses in isolation from the other clauses in subsection 1 and the other subsections in section 228.369 would suggest that the existence of a bilateral agreement or covenant among as few as two homeowners would inhibit the appropriate allocation maintenance costs for a private road benefitting many more homeowners. *See* section 228.369.1. We find such an interpretation would be contrary to our two guiding principles of statutory interpretation, i.e., to read all of the subsections of section 228.369 as a whole, giving all words their meaning, and to avoid statutory interpretations that are unjust, absurd, or unreasonable. *See Sun Aviation, Inc.*, 533 S.W.3d at 724; *Dynasty Home, L.C.*, 453 S.W.3d at 879; *State ex rel. Nixon*, 100 S.W.3d at 162; *see also Hamrick ex rel. Hamrick*, 13 S.W.3d at 680; section 228.369.1-.6.

Instead, we find that the existence of a prior written agreement or covenant for the maintenance of the private road involving fewer than all of the benefitting landowners, in, abutting, or adjoining the private road at issue does not in and of itself prohibit a cause of action under section 228.369 to "petition the circuit court for an order establishing a plan of maintenance" for a private road. Reading all subsections of section 228.369 as a whole and giving all words their meaning, we find that this is the very circumstance of this statute's intended use, i.e., when there are various classes of landowners, each benefitting from the value of the private road, but not all being subject to the same agreement or appropriate allocation of maintenance costs.

In reaching this conclusion, we give meaning to: the use of the term "collectively" in the fourth clause of section 228.369.1 when referring to a lack of agreement between dissimilarly-positioned landowners; the language in section 228.369.2 suggesting a cause of action under section 228.369 is appropriate when not all benefitted homeowners are paying maintenance costs

which are commensurate with their use and benefit of a private road; and the use of the language "an[ ] agreement executed by *all* the homeowners" in section 228.369.5. *See* section 228.369.1; section 228.369.2; section 228.369.5 (emphasis added).

Moreover, we find that the language in the second and fifth clauses of section 228.369.1 relates to the prohibition on the statute's use when there is the existence of a prior written agreement entered into between all landowners benefitting from the use of the private road or a covenant to which all landowners benefitting from the use of the private road are subject. *See* 228.369.1-.6. To hold otherwise would allow a few homeowners to defeat a statutory mechanism designed to address a dispute when not all benefitted homeowners are paying their fair share of maintenance costs for a private road, which is a result that would be unjust, absurd, and unreasonable. *See State ex rel. Nixon*, 100 S.W.3d at 162 ("[c]ourts must avoid statutory interpretations that are unjust, absurd, or unreasonable"); *see also Hamrick ex rel. Hamrick*, 13 S.W.3d at 680 (similarly finding).

Finally, and importantly, section 228.369.5 requires that, *inter alia*, an agreement or order regarding a plan of maintenance for a private road "shall be recorded with the county recorder of deeds." *See* 228.369.5.

In summary, we find a homeowner-plaintiff states a claim under section 228.369 to "petition the circuit court for an order establishing a plan of maintenance" for a private road when, (1) there is a subject "private road" used by "more than one homeowner"; and (2) there is not a recorded prior written agreement or recorded prior covenant for the maintenance of the private road collectively affecting all landowners benefitting from the use of the private road. *See* section 228.369.1-.6. Stated another way, a homeowner-plaintiff is precluded from pursuing a claim under section 228.369 to "petition the circuit court for an order establishing a plan of

maintenance" for a private road when there is a recorded prior written agreement or recorded covenant for the maintenance of the private road that collectively affects all landowners benefitting from the use of the private road. *See* section 228.369.1-.6.

B. Analysis of Plaintiff's Specific Arguments on Appeal

In this case, Plaintiff's second and fourth points on appeal argue the trial court erred in dismissing Count V as to Subdivision Owners and Benefitted Owners because Plaintiff's first amended petition states a claim against those defendants for a road maintenance action under section 228.369 to "petition the circuit court for an order establishing a plan of maintenance." *See* section 228.369.1-.6. For the reasons discussed below, we agree.[10]

1. The Relevant Allegations in Plaintiff's First Amended Petition

The relevant allegations in Plaintiff's first amended petition are as follows. The 1988 restrictions for the Subdivision were recorded with the Jefferson County Recorder of Deeds and attached to the first amended petition as Exhibit A. The 1988 Restrictions provide for the collection of assessments for maintaining the surrounding roads as well as other restrictive

[10] In Plaintiff's first point on appeal, he claims the trial court erred in dismissing Count V as to Subdivision Owners and Benefitted Owners because the trial court inappropriately considered matters outside of the pleadings – the 1979/1986 agreement raised for the first time in a September 2019 motion to dismiss – in granting some of the individual Defendants' motions to dismiss, thereby improperly converting the motions to dismiss into motions for summary judgment. *See Isom v. Deutsche Bank National Trust Company*, 549 S.W.3d 498, 501 (Mo. App. W.D. 2018) (Rule 55.27 allows a trial court to treat a motion to dismiss as a motion for summary judgment "if the trial court considers evidence outside the pleadings and certain procedural requirements are satisfied") (referring to pre-2020 version of Rule 55.27) (quoting *In re Estate of Ridgeway*, 369 S.W.3d 103, 109 (Mo. App. E.D. 2012); *see also Conoyer v. Kuhl*, 562 S.W.3d 393, 401 n.3, 404 (Mo. App. E.D. 2018) ("[i]n granting [a defendant's] motion to dismiss, [a] trial court [is] obligated to consider only the sufficiency of [a plaintiff's] . . . [p]etition to state a claim upon which relief may be granted; in the alternative, the trial court may consider matters outside of the petition, and in so doing convert the motion to dismiss into a motion for summary judgment. Rule 55.27(a). If it does so, it is required to follow the procedural requirements of Rule 74.04, which are mandatory") (referring to Missouri Supreme Court Rules (2017)); *Aldridge*, 503 S.W.3d at 316 (a motion to dismiss for failure to state a claim upon which relief can be granted is only a test of the adequacy of the plaintiff's petition); Rule 55.27(a). While it appears this claim raised in Plaintiff's first point on appeal may have some merit, we decline to address it because Plaintiff's second and fourth points on appeal (arguing the trial court erred in dismissing Count V as to Subdivision Owners and Benefitted Owners because Plaintiff's first amended petition states a claim against those defendants for a road maintenance action under section 228.369) are dispositive. *See id*. Nevertheless, we note that the trial court is free to consider the 1979/1986 agreement, as well as the 1988 Restrictions, as potentially relevant evidence when determining the merits of Count V of Plaintiff's first amended petition on remand.

covenants. The Roadway at issue in this case, known as Fiedler Lane/Morgan Woods Drive, is allegedly to be maintained by the Subdivision's trustees. Further, the 1988 Restrictions provide in relevant part that "[t]he obligation and expense of . . . maintaining the streets [and] roads . . . shall be the responsibility of owners of lots in [the Subdivision]."

Plaintiff, Subdivision Owners, and Benefitted Owners are all owners of property located along the Roadway. Plaintiff and Subdivision Owners own property located on the Roadway, whose property is in the Subdivision, and who are subject to Subdivision covenants in the 1988 Restrictions. Benefitted Owners own property located on the Roadway, whose property is not in the Subdivision, and who are not subject to Subdivision covenants in the 1988 Restrictions.

2. Whether Plaintiff's First Amended Petition States a Claim Against Subdivision Owners and Benefitted Owners for a Road Maintenance Action Under Section 228.369

As previously held in Section IV.A.2. of this opinion, in order for Plaintiff to state a claim under section 228.369 to "petition the circuit court for an order establishing a plan of maintenance" for the Roadway, he must sufficiently allege, (1) there is a subject "private road" used by "more than one homeowner"; and (2) there is not a recorded prior written agreement or recorded prior covenant for the maintenance of the private road collectively affecting all landowners (Plaintiff, Subdivision Owners, and Benefitted Owners) benefitting from the use of the private road. *See* section 228.369.1-.6. Accepting as true the allegations in Plaintiff's first amended petition and liberally granting him all reasonable inferences therefrom, *see Aldridge*, 503 S.W.3d at 316, we find Plaintiff has sufficiently alleged both of the preceding elements of a road maintenance action under section 228.369.

First, Plaintiff has sufficiently alleged the Roadway is a "private road" used by "more than one homeowner," i.e., "a person who owns a home," in that it is a road not owned by a

governmental entity and the road provides a means of ingress and egress by motor vehicle for Plaintiff, Subdivision Owners, and Benefitted Owners (at least some of which are homeowners) to a public road. *See* section 228.341 (defining "private road"); *Merriam-Webster*, https://www.merriam-webster.com/dictionary/homeowner (last visited Dec. 1, 2020) (defining "homeowner").

Second, accepting the allegations in Plaintiff's first amended petition as true, Plaintiff has alleged there is not a recorded prior written agreement or recorded prior covenant for the maintenance of the Roadway collectively affecting all landowners (Plaintiff, Subdivision Owners, and Benefitted Owners) benefitting from the use of the Roadway. *See* section 228.369.1-.6. Furthermore, as previously held in Section IV.A.2. of this opinion, the existence of a prior written agreement or covenant for the maintenance of the private road such as the 1988 Restrictions which involves fewer than all of the benefitting landowners, in, abutting, or adjoining the Roadway does not in and of itself prohibit a cause of action under section 228.369 to "petition the circuit court for an order establishing a plan of maintenance" for the Roadway. This is because, reading all subsections of section 228.369 as a whole and giving all words their meaning, we find that this is the very circumstance of this statute's intended use, i.e., when there are various classes of landowners, each benefitting from the value of a private road such as the Roadway, but not all being subject to the same agreement or appropriate allocation of maintenance costs as is alleged in this case.

Based on the foregoing, Plaintiff has stated a claim under section 228.369 to "petition the circuit court for an order establishing a plan of maintenance" for the Roadway against Subdivision Owners and Benefitted Owners. Moreover, because Plaintiff has sufficiently alleged that Subdivision Owners and Benefitted Owners are landowners benefitting from the use

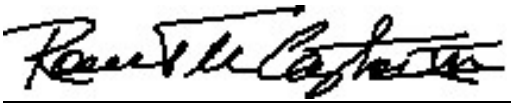
of the Roadway, they are necessary parties to Plaintiff's road maintenance action under Count V of his first amended petition. *See* section 228.369.1-6. Therefore, the trial court erred in dismissing Count V as to Subdivision Owners and Benefitted Owners. Points two and four are granted.

C. Conclusion as to the Trial Court's Judgment Dismissing Count V as to Trustee, Subdivision Owners, and Benefitted Owners

As previously stated near the beginning of this opinion, Plaintiff only argues the trial court erred in dismissing Count V as to Subdivision Owners and Benefitted Owners. Because Plaintiff does not argue on appeal that the trial court erred in dismissing Count V as to defendant Trustee, we affirm the portion of the judgment dismissing Trustee from Count V. Furthermore, because we agree with Plaintiff that the trial court erred in dismissing Count V as to defendants Subdivision Owners and Benefitted Owners, we reverse the portion of the judgment dismissing Count V as to Subdivision Owners and Benefitted Owners, and we remand for further proceedings consistent with this opinion.

V. CONCLUSION

Based on the foregoing, we affirm the trial court's judgment in part as to the Trustee, and we reverse in part as to Subdivision Owners and Benefitted Owners and remand for further proceedings consistent with this opinion.



ROBERT M. CLAYTON III, Judge

Colleen Dolan, P.J., and
Mary K. Hoff, J., concur,