

**Summary of SC90673, *Lynn Kay McCullough and Shirley Ann McCullough, his wife v. Nadine Doss and Howard Allen***

Appeal from the Stone County circuit court, Judge Alan Mark Blankenship  
Argued and submitted May 18, 2010; opinion issued July 16, 2010

**Attorneys:** Doss and Allen were represented by Donald L. Cupps of Ellis, Cupps and Cole in Cassville, (417) 847-2734, and Cordelia F. Herrin of Melton & Herrin PC in Cassville, (417) 847-4144; the McCulloughs were represented by Richard L. Schnake of Neale & Newman LLP in Springfield, (417) 882-9090.

*This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.*

**Overview:** Landowners appeal a judgment that a tract of land that once had been a public road was the property of their neighbors. In a unanimous decision written by Judge Richard B. Teitelman, the Supreme Court of Missouri affirms the judgment. The trial court did not err in applying the nonuse provision of the applicable statute, and its judgment is not against the weight of the evidence, which is sufficient to establish the road had been abandoned by the public.

**Facts:** In the mid-1950s, the state highway department constructed Missouri Highway 39 following a public road that ran between property now owned by Lynn and Shirley McCullough and property now owned by Nadine Doss and Howard Allen. Near the north end of the two properties, the new highway left the existing public road and curved eastward through the McCulloughs' property, leaving a portion of the public road intact as a border between the two properties. Lynn McCullough testified that he bought the land in 1955, after the highway was completed; that since then, he has used it to store farm equipment; and that neither Doss nor Allen nor any member of the public has used it since then. The McCulloughs sued Doss and Allen to quiet title to this tract of land, claiming they had acquired title by deed and adverse possession. The trial court entered judgment in the McCulloughs' favor. Doss and Allen appeal.

**AFFIRMED.**

**Court en banc holds:** (1) The trial court did not err in applying the nonuse provision of section 228.190.1, RSMo, in the absence of evidence demonstrating how the road traversing the tract became a public road. Under this statute, "nonuse by the public for five years continuously of any public road shall be deemed an abandonment and vacation of the same." This Court's precedent consistently has applied the plain language of section 228.190.1 and never has required proof of the manner in which the public road was established. Through reliance on three of its previous holdings, this Court in *State ex rel. Highway Commission v. Herman*, 405 S.W.2d 904 (Mo. 1966), recognized the self-evident proposition that the public cannot abandon a public road that never was built or otherwise established. As such, the party asserting abandonment of an existing public road need prove only "nonuse by the public for five years continuously ...." The decisions in *Coffey v. State ex rel. County of Stone*, 893 S.W.2d 843, 848 (Mo. App. 1995), and *Kleeman v. Kingsley*, 167 S.W.3d 198, 203 (Mo. App. 2005), misinterpret the nonuse provision and, on that point, no longer should be followed. Section 228.190.2, dealing with roads

for which a county receives county aid road trust funds, does not make the nonuse provision inapplicable because the evidence shows the road here was abandoned long before 1990.

(2) The trial court's judgment is not against the weight of the evidence, which is sufficient to establish nonuse of the road. The trial court was free to believe the McCulloughs' evidence that they had used the tract as their own and that no one else, including Doss or Allen, had used the road on the tract in the last 40 years. Further, the evidence shows that the McCulloughs did not prevent Doss or Allen or any member of the public from accessing the tract. Finally, although the McCulloughs are members of the public, their use of the road does not constitute use by the public for purposes of analyzing an abandonment claim pursuant to section 228.190.1.