



Missouri Court of Appeals  
Southern District

Division One

ORLA HOLMAN CEMETERY, INC., )  
and SUSAN RECTOR, )  
)  
Plaintiffs-Respondents, )  
)  
v. )  
)  
THE ROBERT W. PLASTER TRUST, )  
and STEPHEN R. PLASTER, Trustee )  
of the Robert W. Plaster Trust, )  
)  
and )  
)  
VILLAGE OF EVERGREEN, )  
)  
Defendants-Appellants. )

No. SD28304  
Opinion Filed: March 31, 2009

APPEAL FROM THE CIRCUIT COURT OF CAMDEN COUNTY

Honorable Carl D. Gum, Jr., Senior Judge

**REVERSED AND REMANDED**

The trial court granted a summary judgment in favor of the Orla Holman Cemetery, Inc., and Susan Rector (referred to individually as Cemetery and Rector, and collectively as Plaintiffs) and against Steven Plaster, in his capacity as Trustee of the Robert W. Plaster Trust, and the Village of Evergreen (referred to individually as trustee

Plaster and Evergreen, and collectively as Defendants).<sup>1</sup> Defendants argue, *inter alia*, that summary judgment was improperly granted because there are genuine issues of material fact requiring a trial to resolve. This Court agrees. The judgment is reversed, and the cause is remanded for further proceedings consistent with this opinion.

### I. Factual and Procedural Background

The Cemetery is a county-owned cemetery located in Laclede County, Missouri. Rector's parents are buried there. The Cemetery consists of approximately one acre of land. The first parcel of this property was deeded to the county in 1901, and the remainder was conveyed in 1910. From the 1940's through 2002, the Cemetery was located wholly within property formerly owned by the Massey family. In 2002, Billy Massey sold his family's property (the Massey property) to trustee Plaster. Evergreen is an incorporated village located in Laclede County. Police Chief Vernon Stidham (Chief Stidham) resides in Evergreen.

The Cemetery is accessed from Highway V on a gravel road known as Row Crop Road (the Road). Whether the Road is the only means of access to the Cemetery is in dispute. The Road was built in approximately 1954 or 1955 by Laclede County. It stretches from Highway V for one-quarter to one-half mile to the Cemetery. In 2002, when Massey sold his property to trustee Plaster, the deed excepted both the "1 acre ...

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<sup>1</sup> The Robert W. Plaster Trust also was named as a defendant in this case. A trust is not a legal entity that is capable of suing or being sued. *Sunbelt Environmental Services, Inc. v. Rieder's Jiffy Market, Inc.*, 138 S.W.3d 130, 134 (Mo. App. 2004). As trustee, Steven Plaster is the legal owner of all of the trust property. See *Stevens Family Trust v. Huthsing*, 81 S.W.3d 664, 665 n.2 (Mo. App. 2002); *Rosenfeld v. Thoele*, 28 S.W.3d 446, 452 (Mo. App. 2000). Therefore, this Court has ignored all references in the record on appeal to the trust as a defendant.

now used for cemetery” and “any part [of the Massey property] deeded, taken or used for road or highway purposes.”

In 2002, shortly after the Massey property was sold to trustee Plaster, Defendants placed a locked gate across the Road, which completely barred access to the Cemetery from Highway V. A sign on the gate told people to “Keep Out” and provided the telephone number of Chief Stidham for persons to call in order to gain access to the Cemetery. The sign, which was located at or near the Road’s junction with Highway V, also declared that the Road was “Private Property.”

In January 2003, Evergreen enacted Ordinance No. 03-01 to annex the Massey property and other surrounding property into the village. The ordinance references an “Exhibit A” listing the property descriptions of the annexed properties. The Massey property description includes the aforementioned exceptions for the Cemetery and property “used for road or highway purposes.” No objections were filed to the annexation. According to affidavits filed by trustee Plaster and Chief Stidham, the Cemetery and the Road both lie entirely within Evergreen’s corporate limits as a result of the annexation.

In December 2003, the Laclede County Commission (the Commission) held a public meeting regarding the locked gate across the Road. At the meeting, the Commission determined that the Road was a county road. By letter, the Commission asked Defendants to remove the gate and advised them that the Commission itself would have the gate removed if Defendants took no action. After Defendants’ failed to remove the gate, it was removed by the county.

In 2004, a second gate was constructed across the Road at its intersection with Highway V. This second gate consisted of two panels. One panel was locked to the ground, which blocked access to approximately 15 feet of the Road. The other panel was left unlocked and open, but it could be swung closed. The gate had a sign on it that stated:

Street Closed  
KEEP OUT  
Orla Cemetery Members  
may enter during  
Daylight Hours Only  
by order of Evergreen Chief of Police

(emphasis in original).

On November 1, 2004, Plaintiffs filed a petition claiming Defendants improperly obstructed and denied access to the Road and the Cemetery. Plaintiffs' multi-count petition sought declaratory relief, injunctive relief, damages and mandamus. One of the affirmative defenses raised by Defendant was that Evergreen had annexed the Road, which lies entirely within the village's corporate boundaries and that Evergreen was "empowered to regulate and control public travel and traffic on Row Crop Road."

In January 2005, Evergreen enacted another ordinance allowing the maintenance of an unlocked gate across the Road. Ordinance No. 05-15 stated that the Road lies "entirely within the corporate boundaries of [Evergreen]" and that the village had "determined to exercise its police powers pursuant to a compelling interest to protect the safety and health of its residents and in the prevention of crime within the Village" by contracting with a third party to erect and maintain an unlocked gate across the Road that may be open or shut by pedestrians and motorists. The ordinance created a criminal

penalty with a \$500 fine and up to 90 days in jail if a “person, corporation or association ... interfere [sic] with said barricade or attempt to remove same ....”

In April 2005, Defendants filed a motion for summary judgment. In the statement of uncontroverted material facts, Defendants asserted the Road “falls within the village limits of the Village of Evergreen, situated entirely between land properly annexed by the Village ....” That material fact was controverted by Plaintiffs. In October 2005, Plaintiffs moved for summary judgment as well. Plaintiffs’ position was that the Road is a county road that was not annexed or subject to regulation by Evergreen as a street. Defendants’ position was that the Road lies within Evergreen’s corporate limits and that the two-panel gate system was a reasonable exercise of the village’s statutory regulatory authority. In January 2007, the trial court granted Plaintiffs’ motion for summary judgment and denied Defendants’ motion. This appeal followed.

## II. Standard of Review

A summary judgment can only be granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Hitchcock v. New Prime, Inc.*, 202 S.W.3d 697, 699 (Mo. App. 2006); *Lindsay v. Mazzio’s Corp.*, 136 S.W.3d 915, 919 (Mo. App. 2004); Rule 74.04(c)(6).<sup>2</sup> Appellate review is *de novo*. *Wilson v. Rhodes*, 258 S.W.3d 873, 875 (Mo. App. 2008). This Court uses the same criteria the trial court should have used in initially deciding whether to grant Plaintiffs’ motion. *Harris v. Smith*, 250 S.W.3d 804, 806 (Mo. App. 2008). Appellate review is based upon the record submitted to the trial court. *Sexton v. Omaha Property and Cas. Ins. Co.*, 231 S.W.3d 844, 845 (Mo. App. 2007). That record is viewed in the light most

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<sup>2</sup> All references to rules are to the Missouri Court Rules (2008).

favorable to the party against whom judgment was entered, and the nonmoving party is accorded the benefit of all inferences which may reasonably be drawn from the record. *ITT Commercial Finance Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993). When the record contains two plausible, but contradictory, accounts of the essential facts, there is a genuine issue of material fact that precludes entry of a summary judgment. *Southers v. City of Farmington*, 263 S.W.3d 603, 608 (Mo. banc 2008).

Rule 74.04 distinguishes between motions for summary judgment filed by a “claimant” and by a “defending party.” Rule 74.04(a), (b); *ITT*, 854 S.W.2d at 380. In deciding a movant’s entitlement to judgment as a matter of law, it makes a significant difference whether the movant is a claimant or a defending party. *ITT*, 854 S.W.2d at 381. A “claimant” is defined as “a party seeking to recover upon a claim ....” Rule 74.04(a); *see ITT*, 854 S.W.2d at 380. In order to be entitled to judgment as a matter of law:

A claimant must establish that there is no genuine dispute as to those material facts upon which the claimant would have had the burden of persuasion at trial. Additionally, where the defendant has raised affirmative defenses, the claimant’s right to judgment depends as much on the non-viability of the affirmative defenses as it does on the viability of the claimant’s claim. A claimant moving for summary judgment in the face of affirmative defenses must also establish that each affirmative defense fails as a matter of law. However, as to each defense, the claimant need only establish that any one of the facts necessary to support the defense cannot be established.

*Stormer v. Richfield Hospitality Services, Inc.*, 60 S.W.3d 10, 12 (Mo. App. 2001) (citations omitted); *Hearod v. Baggs*, 169 S.W.3d 198, 203 (Mo. App. 2005). Thus, as claimants below, Plaintiffs were not entitled to summary judgment unless they negated at least one of the facts necessary to support Defendants’ affirmative defenses.

### III. Discussion and Decision

Defendants present three points for decision, but we consider only Point II because it is dispositive. In that point, Defendants contend the trial court erred in granting summary judgment because there are genuine issues of material fact that require a trial to resolve. For the following reasons, this Court agrees.

One of Defendants' affirmative defenses was that Evergreen had the authority to control and regulate roads within its boundaries pursuant to § 80.090 and § 304.120.<sup>3</sup> The former statute authorizes a village's Board of Trustees to "open, clear, regulate, grade, pave or improve the streets and alleys of such town ...." § 80.090(34). The latter statute further provides that "[m]unicipalities, by ordinance, may: (1) Make additional rules of the road or traffic regulations to meet their needs and traffic conditions ...." § 304.120.2(1); see *Jones v. City of Jennings*, 595 S.W.2d 1, 3 (Mo. App. 1979) (holding that § 304.120 is a delegation of power to all classes and types of cities and municipalities within this state). Thus, Evergreen has the authority to make reasonable regulations concerning traffic on roads within its corporate limits. *City of St. Louis v. Cook*, 221 S.W.2d 468, 469 (Mo. 1949) (reasonable regulation of traffic is a valid exercise of the police power); *Wilson v. City of Waynesville*, 615 S.W.2d 640, 643 (Mo. App. 1981) (same holding). This affirmative defense, however, is based upon the factual premise that the Road lies entirely within Evergreen's corporate boundaries, as Defendants contend, and that the regulations imposed by the village were reasonable. Both of these material facts are sharply controverted.

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<sup>3</sup> All references to statutes are to RSMo (2000).

With respect to the first issue, Plaintiffs argue that the trial court properly determined as a matter of law that the Road was not within Evergreen's boundaries. This Court disagrees. Ordinance No. 03-01 identified the property to be annexed by reference to an attached exhibit, which included the deed conveying the Massey property to trustee Plaster. Plaintiffs argue that the Road was not annexed because the deed excepted the Cemetery and "any part [of the Massey property] deeded, taken or used for road or highway purposes." That general exception does not identify any such roads with specificity or describe their location. Therefore, it is unclear whether the Road was, or was not, included within the exception in the deed. *See, e.g., McGeechan v. Sherwood*, 760 A.2d 1068, 1082 (Me. 2000) (Alexander, J., concurring and dissenting) (explaining that the location of a road described in a deed is a mixed question of law and fact because construction of the deed is a question of law, but locating the land described therein on the face of the earth is a question of fact); *Eaton v. Town of Wells*, 760 A.2d 232, 240 (Me. 2000) ("[t]he existence and nature of particular boundaries is a question of law and the location of those boundaries is a question of fact"). Accordingly, whether the Road is within or without Evergreen's boundaries is a genuine issue of material fact that precludes the entry of summary judgment for Plaintiffs. *See, e.g., Fiorina v. Wabash Ry. Co.*, 260 S.W. 123, 124 (Mo. App. 1924) (whether the crossing was or was not within the limits of the city is a question of fact and not a question of law); *cf. Bennett v. Kitchin*, 400 S.W.2d 97, 106 (Mo. 1966) (holding that courts do not take judicial notice of whether a street is within the boundary of a city); *Kieffer v. City of Berkeley*, 508 S.W.2d 295, 297 (Mo. App. 1974) (same holding).

With respect to the second issue, Plaintiffs argue that the trial court properly determined as a matter of law that Evergreen's regulation of the Road was not a reasonable exercise of the police power. As noted above, "[t]he test used to decide the validity of a state's police power is one of reasonableness." *Tgb, Inc. v. City of St. Louis Bd. of Bldg. Appeals*, 154 S.W.3d 353, 356 (Mo. App. 2004); *City of Kansas City v. Jordan*, 174 S.W.3d 25, 41 (Mo. App. 2005). "Generally, a question of reasonableness is a question of fact for the jury rather than a question of law for the court." *Watters v. Travel Guard Int'l*, 136 S.W.3d 100, 109 (Mo. App. 2004). The test is whether fair-minded people could reach different conclusions on the issue in controversy. See *Wunsch v. Sun Life Assur. Co. of Canada*, 92 S.W.3d 146, 153 (Mo. App. 2002). Reviewing the record most favorably to Defendants, this Court concludes that there is a genuine issue of material fact concerning the reasonableness of the regulations on the use of the Road imposed by Evergreen.

In conclusion, Plaintiffs have failed to negate a fact essential to one of Defendants' affirmative defenses. Because there are genuine issues of material fact still to be decided, the trial court erred in granting summary judgment in Plaintiffs' favor. See *Taggart v. Maryland Cas. Co.*, 242 S.W.3d 755, 760-61 (Mo. App. 2008). Point II is granted. The judgment is reversed, and the cause is remanded for further proceedings consistent with this opinion.

Jeffrey W. Bates, Judge

LYNCH, C.J. – Concur

SCOTT, J. – Concur

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Division I