



Missouri Court of Appeals  
Southern District

Division Two

LYNN KAY McCULLOUGH and )  
SHIRLEY ANN McCULLOUGH, )  
his wife, )  
 )  
Plaintiffs-Respondents, )  
 )  
v. )  
 )  
NADINE DOSS and HOWARD ALLEN, )  
 )  
Defendants-Appellants. )

No. SD29396

**Filed: December 30, 2009**

APPEAL FROM THE CIRCUIT COURT OF STONE COUNTY

Honorable Alan M. Blankenship, Associate Circuit Judge

**REVERSED AND REMANDED WITH DIRECTIONS**

The Missouri Highway Department constructed Missouri State Highway 39 ("Highway 39") between 1954 and 1955, following a public road that ran between two properties owned by Nadine Doss and Howard Allen ("Appellants") and Lynn Kay and Shirley Ann McCullough ("Respondents"). 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 the property of Respondents. The area that is the subject of this dispute is a tract of land known as Tract A, which encompasses land east of Appellants' fence line and west from the right-of-way of the public road and north off of the right-of-way of

Highway 39. The parties agreed that the former Highway 39 was a public road; Respondents claimed part of Tract A, up to the center of the former road, by the prior deed, and the rest of Tract A by adverse possession. The court quieted title to Respondents with no findings of fact requested or given.

Appellants claim in their first point relied on that there was no evidence of how the public road was established and, therefore, it is impossible to determine whether the evidence presented by Respondents was sufficient to determine how the road could be vacated or abandoned. Respondents argue that it does not matter how the road was established because our prior cases, which indicate that the abandonment provision of section 228.190.1<sup>1</sup> is not applicable to land voluntarily conveyed to a county to be used for a road, were a misreading and misapplication of controlling Supreme Court authority. *See, e.g., Coffey v. State ex rel. County of Stone*, 893 S.W.2d 843, 848 (Mo. App. S.D. 1995) (holding the nonuser provision of section 228.190 does not apply to a road created by common law dedication where land was voluntarily conveyed for use as a public road). We agree with Appellants that we cannot determine whether the road was "abandoned" or whether the prior deed controls because there was absolutely no evidence how the road became a public road.<sup>2</sup>

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<sup>1</sup> All references to statutes are to RSMo Cum. Supp. 2007, unless otherwise specified. Section 228.190.1 provides:

[a]ll 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; and 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; and nonuse by the public for five years continuously of any public road shall be deemed an abandonment and vacation of the same.

<sup>2</sup> A public road may be established in three ways: 1) under section 228.190; 2) by prescription; or 3) by implied or common law dedication. *Kleeman v. Kingsley*, 167 S.W.3d 198, 203 n.7 (Mo. App. S.D. 2005).

As noted by Appellants, each case cited by Respondents regarding abandonment of a road under section 228.190 provided evidence of how the road in question had been created, which allowed the courts to correctly apply the law of abandonment. *See, e.g., Atwell v. Jack Henry & Assoc., Inc.*, 748 S.W.2d 929, 935 (Mo. App. S.D. 1988) (finding quitclaim deed from county invalid where public road was never established due to lack of acceptance by the county); *Coffey*, 893 S.W.2d at 848 (holding the nonuser provision of section 228.190 does not apply to a public road where land was voluntarily conveyed by warranty deed for use as a public road); *Kleeman v. Kingsley*, 167 S.W.3d 198, 202-05 (Mo. App. S.D. 2005) (applying the nonuser provision of section 228.190.1 where it found that a public road had been established by implied common law dedication); *Przybylski v. Barbosa*, 289 S.W.3d 641, 646 (Mo. App. W.D. 2009) (holding that where land was voluntarily conveyed for use as a public road and road was never constructed, plaintiffs did not have a valid adverse possession claim because no public road existed and thus it could not be abandoned under section 228.190.1); *Faustlin v. Mathis*, 99 S.W.3d 546, 551 (Mo. App. S.D. 2003) (finding that a public road had been established by implied common law dedication, and that sporadic public use was sufficient evidence that the road had not been abandoned under section 228.190.1).

We find the reasoning of *Sheedy v. Missouri Highways & Transp. Com'n*, 180 S.W.3d 66 (Mo. App. S.D. 2005), to be instructive.<sup>3</sup> In *Sheedy*, the landowners brought suit relying on section 228.190 against the Missouri Highway and Transportation Commission ("the Commission"), claiming that the Commission had abandoned a 1.2-acre tract. In 1929, the Commission paid the Sheedys' predecessors in title to purchase a right-of-way interest in the land that was conveyed by way of quit-claim deed. At some

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<sup>3</sup> We set forth the facts of *Sheedy* without further attribution.

point in time, the state highway was rebuilt so that the 1.2-acre tract became an unused roadbed. The public had not used the old roadbed at any time since the Sheedys acquired the property. Mr. Sheedy utilized the roadbed as a place to park his tractor-trailer unit when he was not on the road. The Commission decided to expand the highway into a four-lane road but did not seek to condemn the 1.2 acres, claiming it still had the right to use the easement it purchased in 1929 for the same purpose. The trial court decided that section 228.190 did not apply to state highways and granted summary judgment to the Commission. The Sheedys directly addressed the argument that section 228.190 applied to state highways to the trial court and to this Court. We reiterated that section 228.190 does not apply to state highways unless two prerequisites are met, neither of which is applicable to this case. *Id.* at 72-74.

While the ultimate holding of *Sheedy* is that section 228.190 does not apply to state roads, we also found: that the Commission had purchased an easement, which was conveyed by a quit-claim deed; that the Sheedys had accepted a warranty deed to their real estate "excepting therefrom 1.2 acres . . . for Right-of-way . . ."; and that the Sheedys therefore owned a fee-simple interest in the 1.2 acres subject to the Commission's easement. *Id.* at 72. Inherent in our discussion in *Sheedy* is the reasoning that an express dedication transfers a fee-simple interest, and that a fee-simple interest cannot be abandoned in a manner less formal than the manner in which it is conveyed.

When title is conveyed by express dedication, the intent to dedicate the land for public use as a road and any limitations on the grant are expressed by the grantor, usually in the form of a deed; therefore, the grantor's will to relinquish his or her interest in the land to the government is clear, as evidenced by the deed. *Hoechst v. Bangert*, 440

S.W.2d 476, 479 (Mo. banc 1969). On the other hand, when a public road is established by implied dedication, no such intent or limitation is stated because the grantor's intent is inferred from use by the public rather than expressed in a deed. *Kleeman v. Kingsley*, 167 S.W.3d 198, 203 n.7 (Mo. App. S.D. 2005). In the latter case, the legislature has provided that it will be deemed abandoned after five years of the public's nonuse. Section 228.190.1.

Our dilemma in this case is that the trial court had absolutely no information as to how the original public road was established; consequently, neither does this Court. "Vacations of highways are not favored and the presumption will always be in favor of their continuance." *Burris v. Mercer County*, 252 S.W.3d 199, 201 (Mo. App. W.D. 2008). The party asserting abandonment of a public road must carry the burden of showing abandonment by clear and cogent proof. *Id.* at 206. It is a logical extension of that burden to require the party asserting abandonment to demonstrate its relevance by showing that the nonuser provision of section 228.190.1 is even applicable. Respondents did not meet their burden when they presented no evidence of how the public road was established. We reverse and remand to the trial court with directions, if necessary, to take further evidence consistent with this opinion.

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Nancy Steffen Rahmeyer, Judge

Scott, C.J., Barnes, S.J., concur.

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Division II