IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

91898

CASE NO. WD71053

JAMES K. OWENS, THE JAMES K. OWENS TRUST, BRENT J. OWENS, RITA OWENS, MARY FRAZIER, JIMMY HAGEN, KAREN HAGEN AND JACK SLOAN

Appellants,

vs.

ROBERT L. BATEMAN, et al.,

Respondents.

APPEAL FROM THE CIRCUIT COURT OF PLATTE COUNTY, MISSOURI – CASE NO. 06AE-CV02075

THE HONORABLE ABE SHAFER

RESPONDENT PLATTE COUNTY'S BRIEF

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TABLE OF CASES AND AUTHORITIES

JURISDICTIONAL STATEMENT

Respondent Platte County adopts the Jurisdictional Statement set forth in Appellants' Brief. In addition, Respondent Platte County notes that this Court has territorial jurisdiction pursuant to Section 477.070 RSMo. 2000.

STATEMENT OF FACTS

Respondent Platte County adopts and approves the Statement of Facts set forth in Appellants' Brief with the inclusion of the additional facts set forth below.

The three (3) easement documents were introduced into evidence as Exhibits 2-A, 2-B and 2-C and are included in the Appendix to Appellants' Brief at pages A8 through A13. The legal descriptions included on those easement documents were platted by Mr. Charlie Kutz (identified in the transcript as "Charles E. Coots"), a professional land surveyor hired by Respondent Bateman (T 42 L 12 – T 43 L 11), on documents marked as Exhibits 45 and 46 (T 44 L1-10). Those Exhibits indicated that the legal descriptions included on the easement documents barely extended into the property platted as Bridle Parc Estates II (T 51 L16 – T 52 L 20). Instead, the easements described in the documents were almost completely confined to land platted as part of the original Bridle Parc Estates plat. In addition, the easement tracts described in the easement documents were not contiguous and consisted of two 30 foot wide easements separated by a 10 foot strip (T 46 L 4-9; T 54 L 21-24). Despite the existence of the gap between the two easement strips, no affidavit or correction deed has been filed to make the easements contiguous (T 50 L 20 – T 51 L 15). The 10 foot strip not encompassed within the legal descriptions of any of the easement documents was encompassed by the dedicated public right-of-way running through the Bridle Parc Estates plat (Exhibits 45 and 46; T 51 L 3-10).

Testimony was offered by Ms. Mindy Turner, legal counsel for Stewart Title (T 147 L 14-19). She testified that the three (3) easements offered by Appellant did not include any language purporting to make those easements exclusive and that, in the case of non-exclusive easements, it is not inconsistent for two different easements to overlap over the same property (T 157 L 3 – T 158 L 15). Ms. Turner also noted that voiding the public right-of-way dedication in the Bridle Parc Estates I and Bridle Parc Estates II plats would create access problems for a number of the individuals owning property in Bridle Parc Estates I and Bridle Parc Estates II (T 149 L 18 – T 155 L 2).

Ms. Gale Cantu, Building Inspector and Codes Enforcement Officer of Platte County, also offered testimony (T 170 L 5-14). Ms. Cantu noted that invalidation of the public road right-of-way dedications set forth in the plats of Bridle Parc Estates I and Bridle Parc Estates II would result in all structures on properties located on Bridle Parc Lane being classified as nonconforming structures, as Platte County requires any property to have frontage on a public road right-of-way before issuing a building permit for that property (T 171 L 9 – T 172 L 11). As a result of the nonconforming status of the structures, property owners would not be automatically entitled to obtain a building permit to rebuild the structures if a casualty loss should occur (T 171 L 9-21). Furthermore, as the Platte County Zoning Order requires road frontage in order to obtain a building permit, a property owner could not obtain a building permit to construct any additional structures on any properties fronting Bridle Parc Lane without obtaining a variance from the Platte County Board of Zoning Adjustment (T 172 L 1-11).

POINT RELIED ON I

THE TRIAL COURT ERRED IN DECLARING THAT BRIDLE PARC LANE WAS A PRIVATE ROAD BECAUSE BRIDLE PARC LANE WAS STATUTORILY DEDICATED TO PUBLIC USE IN THAT THE PLATS DEDICATING BRIDLE PARC LANE TO PUBLIC USE WERE APPROVED BY AND RECORDED WITH THE COUNTY AND SIGNED BY ALL OWNERS OF PROPERTY WITHIN THE PLATS, BRIDLE PARC LANE WAS USED BY THE PUBLIC, PUBLIC EXPENDITURE OF FUNDS IS NOT REQUIRED FOR A STATUTORY DEDICATION, AND ANY EASEMENTS OVERLAPPING BRIDLE PARC LANE WERE NOT EXCLUSIVE.

Earls v. Majestic Pointe, Ltd., 949 S.W.2d 239, 246 (Mo.App. S.D. 1997)

Ginter v. City of Webster Groves, 349 S.W.2d 895 (Mo. 1961)

Old Farm Homeowners Association v. Lindgren, 13 S.W.3d 711 (Mo. App. SD 2000)

Supreme Court Rule 84.13(d)

POINT RELIED ON II

ALTERNATIVELY, THE TRIAL COURT ERRED IN DECLARING THAT BRIDLE PARC LANE WAS A PRIVATE ROAD BECAUSE BRIDLE PARC LANE WAS DEDICATED TO PUBLIC USE BY COMMON LAW DEDICATION IN THAT THE RESPONDENTS' PREDECESSORS-IN-INTEREST INTENDED TO DEDICATE BRIDLE PARC LANE TO PUBLIC USE, THE PUBLIC USED THE ROAD FOR MORE THAN TEN YEARS, AND THE PUBLIC ACCEPTED THE ROAD FOR PUBLIC USE.

POINT RELIED ON III

ALTERNATIVELY, THE TRIAL COURT ERRED IN DECLARING THAT BRIDLE PARC LANE WAS A PRIVATE ROAD BECAUSE EVEN IF BRIDLE PARC LANE WAS NOT DEDICATED TO PUBLIC USE BY STATUTORY OR COMMON LAW DEDICATION, A PRESCRIPTIVE EASEMENT WAS CREATED IN THAT THE PUBLIC CONTINUOUSLY, VISIBLY, AND ADVERSELY USED THE ROAD FOR A PERIOD GREATER THAN TEN YEARS IN NON-RECOGNITION OF THE EASEMENT HOLDERS' AUTHORITY TO EPRMIT OR PROHIBIT THE CONTINUED USE OF THE ROAD AND THE EASEMENT HOLDERS TOOK NO ACTION TO PREVENT THE PUBLIC FROM USING THE ROAD.

POINT RELIED ON IV

FURTHERMORE, THE TRIAL COURT ERRED IN FAILING TO DISMISS RESPONDENTS' CLAIM AS OUTSIDE OF THE STATUTE OF LIMITATIONS SET FORTH IN SECTION 516.110, RSMO. 2000, BECAUSE THE CLAIM WAS BROUGHT OUTSIDE TEN YEAR PERIOD IN THAT IT WAS FILED 25 YEARS AFTER THE RECORDING OF THE PLAT OF BRIDLE PARC ESTATES DEDICATING BRIDLE PARC LANE TO PUBLIC USE.

Stevens v. Howard, 197 S.W.3d 182 (Mo. App. SD 2006)

Wyper v. Camden County, 160 S.W.3d 850 (Mo. App. SD 2005)

Section 516.110 RSMo. 2000

ARGUMENT – POINT RELIED ON I

THE TRIAL COURT ERRED IN DECLARING THAT BRIDLE PARC LANE WAS A PRIVATE ROAD BECAUSE BRIDLE PARC LANE WAS STATUTORILY DEDICATED TO PUBLIC USE IN THAT THE PLATS DEDICATING BRIDLE PARC LANE TO PUBLIC USE WERE APPROVED BY AND RECORDED WITH THE COUNTY AND SIGNED BY ALL OWNERS OF PROPERTY WITHIN THE PLATS, BRIDLE PARC LANE WAS USED BY THE PUBLIC, PUBLIC EXPENDITURE OF FUNDS IS NOT REQUIRED FOR A STATUTORY DEDICATION, AND ANY EASEMENTS OVERLAPPING BRIDLE PARC LANE WERE NOT EXCLUSIVE.

Even though Platte County is designated as a Respondent in this action, Platte County agrees with Appellant that the trial court's judgment is contrary to the law and the facts of the case and Platte County joins with Appellant in praying that this Court reverse the trial court's decision. Accordingly, Respondent Platte County adopts and approves the argument set forth in Appellant's Brief under Point I and advances the additional arguments and discussion as set forth below.

Respondent Platte County is in agreement with the standard of review as set forth by Appellant on page 18 and 19 of Appellants' Brief as repeated herein.

The standard of review for a judge-tried case is governed by Supreme Court Rule 84.13(d) and Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. banc 1976). The judgment of the trial court will be affirmed unless it is not supported by substantial evidence, is against the weight of the evidence, or erroneously declares or applies the law. Id. at 32. This Court will defer to the circuit court's factual determinations, but all questions of law are reviewed de novo. Building Owners & Managers Ass'n of Greater Kansas City v. City of Kansas City, 231 S.W.3d 208, 211 (Mo.App. 2007); American Family Mutual Insurance Co. v.

Tickle, 99 S.W.3d 25, 28 (Mo.App. 2003). A trial court's conclusion that evidence is insufficient to demonstrate public use or intent to dedicate a road to public use is a question of law reserved for the independent judgment of the reviewing court. See Earls v. Majestic Pointe, Ltd., 949 S.W.2d 239, 246 (Mo.App. S.D. 1997). The issue as to whether BP Lane became a public road through statutory dedication is a question of law for this Court.

In reaching its decision, the trial court relied heavily upon the case decision of City of Sarcoxie v. Wild, 64 Mo. App. 403 (Mo. App. KC 1896) (LF 415-421; Appendix A-1 – A-3 herein). Respondent Platte County contends that the Sarcoxie case is distinguishable from the case at bar and that more recent case decisions have contradicted the holding in Sarcoxie.

On pages 2 and 3 of its Judgment, the trial court stated that Mr. Yiddy Bloom did not indicate an intent to dedicate the public road right-of-way known as Bridle Parc Lane. However, in 1984 every one of his successors in title executed the plat of Bridle Parc Estates II (Defendant's Exhibit B). That plat included a dedication of the public road right-of-way known as Bridle Parc Lane. These successors in title were the only people who had any ownership interest in the easement strips described in Plaintiff's Exhibits 2-A, 2-B and 2-C in 1984, and every single one of them expressed their intent to dedicate public road right-of-way. Furthermore, the public road right-of-way described in the plat of Bridle Parc Estates II was connected to a public road in 1984, contrary to Finding No. 11 in this Court's Judgment (LF 416). According to Plaintiff's own evidence as set forth in the testimony of Charlie Kutz, even at the date of trial, a 10 foot strip of the dedicated

public road right-of-way running through the Bridle Parc Estates plat was not encompassed within the legal descriptions of any of the easement strips, thus providing an uncontested public road right-of-way connection between Bridle Parc Estates II and Mace Road. Accordingly, while Mr. Bloom may not have intended to dedicate a public road right-of-way, his successors in interest as of 1984 all did intend to make such a dedication and, in fact, participated in the dedication of the public road right-of-way. In like fashion, while Respondent Bateman may not have intended to dedicate a public road right-of-way, his predecessors in interest all did intend to make such a dedication and, in fact, participated in the dedication of the public road right-of-way.

As set forth in Plaintiff's Exhibit 3, the predecessors in title to Respondent Bateman were Larry and Mary Beethe. Mr. and Mrs. Beethe are the parties from whom Mr. Bateman obtained any easement rights which he now holds. Mr. and Mrs. Beethe executed both the plat of Bridle Parc Estates and the plat of Bridle Parc Estates II, indicating their intent that the road right-of-way known as Bridle Parc Lane be dedicated for public use (Defendant's Exhibits A and B). Furthermore, as indicated in Plaintiff's Exhibit 4, the predecessor in title to Mr. and Mrs. Beethe was Mr. Robert Pease. Mr. Pease also executed the plat of Bridle Parc Estates and served as the spokesman for the plat approval of Bridle Parc Estates II. Mr. and Mrs. Beethe and Mr. and Mrs. Laun, another predecessor in title to a portion of Respondent Bateman's property, also signed the Replat of Bridle Parc Estates II, dedicating the road right-of-way known as Bridle Parc Lane to public use (Defendant's Exhibit C).

In the Sarcoxie case, there is no indication that anyone in the chain of title who held a right to the 30-foot strips of land ever demonstrated their intent to dedicate the strips for public road right-of-way. In this case, Respondent Bateman's predecessors in title not only consented to the dedication of public road right-of-way, they executed the documents which served to dedicate that right-of-way.

The same situation exists with regard to Respondent Intervenors Piacenza. As demonstrated in the certified copy of the deed to Mr. and Mrs. Piacenza (Defendant's Exhibit Y), Mr. and Mrs. Wagner conveyed the property to Mr. and Mrs. Piacenza. Both Mr. and Mrs. Wagner executed the Replat of Bridle Parc Estates II, dedicating the road right-of-way known as Bridle Parc Lane to public use (Defendant's Exhibit C). As set forth in Plaintiff's Exhibit 18, Mr. and Mrs. Wagner received the property from Mr. and Mrs. Woolsey. Mr. and Mrs. Woolsey executed the plat of Bridle Parc Estates II, dedicating the road right-of-way known as Bridle Parc Lane to public use (Defendant's Exhibit B). Finally, as set forth in Plaintiff's Exhibit 24, Mr. and Mrs. Woolsey received the property from Mr. Pease. As mentioned earlier, Mr. Pease executed the original plat of Bridle Parc Estates which included the dedication of public road right-of-way.

These instances of consent demonstrate a major distinction between the Sarcoxie decision and the case at bar. In the Sarcoxie decision, Mr. Wild did not ever execute a subdivision plat as the predecessors of Respondents did. Mr. Wild did not indicate an intent to convey his strips of land for public road right-of-way, as the predecessors of Respondents did. Mr. Wild did not dedicate the strips of land for public road right-of-

way, as the predecessors of Respondents did. Accordingly, in this major aspect of the decision, the Sarcoxie case is not factually comparable to the present situation.

Furthermore, as with many older case decisions, it can be difficult to determine all of the facts involved in the Sarcoxie decision. The actual reservation of property rights by Mr. Wild is stated as being "Except, reserving the right of a strip of land thirty (30) feet wide on each side, viz.: west, east, north and south of said tract of land for road purposes." While the Sarcoxie opinion refers to the reservation as an "easement", this Court should note that the term "easement" is nowhere to be found in the reservation. Instead, the reservation could be interpreted as reservation of full ownership rights of the land. The Court noted that, at all times, Mr. Wild held possession of the strips. Mr. Wild enclosed the strips with other land belonging to him. Mr. Wild allowed timber to be cut from the land. Mr. Wild obstructed the street with a rail fence. Mr. Wild exercised the control of the possessor and owner of the land. These are not actions consistent with the rights of a mere easement holder. At a minimum, the rights were treated as an exclusive easement in favor of Mr. Wild.

By contrast, the actions of Mr. Wild are not consistent with the powers exercised by Respondents and their predecessors in title. Respondents and their predecessors in title never attempted to block access to Bridle Parc Lane. (As noted in Earls v. Majestic Pointe, Ltd., Supra, a failure by the owner to barricade a road indicates an intent to dedicate it to public use.) Respondents and their predecessors in title never attempted to enclose Bridle Parc Lane. Respondents and their predecessors in title never attempted to prevent public use of Bridle Parc Lane. Respondents and their predecessors in title

allowed public use of Bridle Parc Lane. Respondents and their predecessors in title allowed use of Bridle Parc Lane by the property owners of the first Bridle Parc Estates Subdivision, even though those property owners did not have easements over Bridle Parc Lane. Finally, there is no question that the easement documents at issue in this case do not create exclusive easements (T 157 L 21 – T 158 L 15). Accordingly, it appears that the Sarcoxie decision is not on point with regard to the issues presented in the case at bar.

As noted in Appellant's Brief, more recent decisions such as Ginter v. City of Webster Groves, 349 S.W.2d 895 (Mo. 1961) and Old Farm Homeowners Association v. Lindgren, 13 S.W.3d 711 (Mo. App. SD 2000) have held that a road may be properly dedicated for public use through a plat making such a dedication even though the dedication may be in conflict with a private indenture or declaration of restrictions. Accordingly, these decisions indicate that the dedication of Bridle Parc Lane was in compliance with Missouri law and that the trial court's decision should be reversed.

Finally, as set forth on pages 25 and 26 of Appellant's Brief, the dedication of public road right-of-way in the plats entered into evidence is not inconsistent with the non-exclusive easements originally granted to Mr. Bloom. As noted by Ms. Turner, general counsel of Stewart Title, it is not inconsistent for two different easements to overlap over the same property (T 157 L 3 – T 158 L 15). As noted by Appellant, overlapping easements are permitted in Missouri under the case decisions in Kiwala v. Biermann, 555 S.W.2d 663 (Mo. App. STL 1977) and Robert Jackson Real Estate Company, Inc. v. James, 755 S.W.2d 343 (Mo. App. ED 1988). Accordingly, the

dedications of public road right-of-way as set forth in the plats are consistent with Missouri law.

ARGUMENT – POINT RELIED ON II

ALTERNATIVELY, THE TRIAL COURT ERRED IN DECLARING THAT BRIDLE PARC LANE WAS A PRIVATE ROAD BECAUSE BRIDLE PARC LANE WAS DEDICATED TO PUBLIC USE BY COMMON LAW DEDICATION IN THAT THE RESPONDENTS' PREDECESSORS-IN-INTEREST INTENDED TO DEDICATE BRIDLE PARC LANE TO PUBLIC USE, THE PUBLIC USED THE ROAD FOR MORE THAN TEN YEARS, AND THE PUBLIC ACCEPTED THE ROAD FOR PUBLIC USE.

Respondent Platte County adopts and approves the argument set forth by Appellants under Point II and joins Appellants in praying that this Court reverse the trial court's Judgment on the basis set forth therein.

ARGUMENT – POINT RELIED ON III

ALTERNATIVELY, THE TRIAL COURT ERRED IN DECLARING THAT BRIDLE PARC LANE WAS A PRIVATE ROAD BECAUSE EVEN IF BRIDLE PARC LANE WAS NOT DEDICATED TO PUBLIC USE BY STATUTORY OR COMMON LAW DEDICATION, A PRESCRIPTIVE EASEMENT WAS CREATED IN THAT THE PUBLIC CONTINUOUSLY, VISIBLY, AND ADVERSELY USED THE ROAD FOR A PERIOD GREATER THAN TEN YEARS IN NON-RECOGNITION OF THE EASEMENT HOLDERS' AUTHORITY TO PERMIT OR PROHIBIT THE CONTINUED USE OF THE ROAD AND THE EASEMENT HOLDERS TOOK NO ACTION TO PREVENT THE PUBLIC FROM USING THE ROAD.

Respondent Platte County adopts and approves the argument set forth by Appellants under Point III and joins Appellants in praying that this Court reverse the trial court's Judgment on the basis set forth therein.

ARGUMENT – POINT RELIED ON IV

FURTHERMORE, THE TRIAL COURT ERRED IN FAILING TO DISMISS RESPONDENTS' CLAIM AS OUTSIDE OF THE STATUTE OF LIMITATIONS SET FORTH IN SECTION 516.110, RSMO. 2000, BECAUSE THE CLAIM WAS BROUGHT OUTSIDE THE TEN YEAR PERIOD IN THAT IT WAS FILED 25 YEARS AFTER THE RECORDING OF THE PLAT OF BRIDLE PARC ESTATES DEDICATING BRIDLE PARC LANE TO PUBLIC USE.

Respondent Platte County agrees with Appellant that the trial court erroneously applied the law by failing to bar Respondent's Petition due to expiration of the statute of limitations set forth in Section 516.110 RSMo. 2000. As stated by Appellant, the issue of whether a statute of limitations applies to an action is a question of law and is to be reviewed by this Court on a de novo basis. Stevens v. Howard, 197 S.W.3d 182 (Mo. App. SD 2006). In support of this position, Respondent Platte County adopts and approves the argument set forth by Appellants under Point IV and joins Appellants in praying that this Court reverse the trial court's Judgment on the basis set forth therein.

In its answer filed herein, Respondent Platte County raised the affirmative defense of the statute of limitations (LF 23-27). Respondent Platte County further discussed the statute of limitations defense at length in its post trial brief, describing exactly why Respondents' cause of action was barred by the statute of limitations (LF 394-400). However, in spite of this discussion of the statute of limitations defense, the trial court made no mention whatsoever of the statute of limitations issues in its Judgment and provided no explanation as to why an action filed 25 years after the recording of the

Bridle Parc Estates plat was not barred by the 10 year statute of limitations set forth in Section 516.110 RSMo. 2000 (LF 415-421).

The initial dedication of the public right-of-way of Bridle Parc Lane occurred in 1981 upon the platting of Bridle Parc Estates (Defendant's Exhibit A). The southern portion of Bridle Parc Lane was dedicated as public right-of-way in 1984 upon the recording of the Plat of Bridle Parc Estates II (Defendant's Exhibit B). Respondent Bateman filed this action in 2006, 25 years after the recording of the first plat and 22 years after the recording of the second plat. In accordance with the affirmative defense raised by Respondent Platte County in its answer, Respondent Bateman's action is barred by the statute of limitations. Section 516.110 RSMo. 2000 states that the statute of limitations for various other real estate actions and for actions for relief not otherwise provided for is 10 years. Both Respondent Bateman and his predecessors in title failed to file suit within the limitation period and this action is therefore barred.

The policy reasons for enforcement of the statute of limitations are clearly illustrated in this case. The property owners in Bridle Parc Estates I and Bridle Parc Estates II in 1984 were aware of the existence of the plats as most of them had signed the plats or received deeds referencing the plats. They further were aware of the existence of the easements, as most of the original owners of Bridle Parc Estates II had the easements mentioned in their deeds. In spite of the knowledge of Respondents and their predecessors in title, no one brought an action seeking to enforce the alleged claim under the easements until 2006. Rather, both Respondents and their predecessors in title merely sat back and took no action to prevent the public use of the Bridle Parc Lane dedicated

public road right-of-way. In the meantime, as indicated in the evidence, the general public made extensive use of the Bridle Parc Lane right-of-way. The failure of Respondents or their predecessors in title to bring this action in a timely manner served to cause legal detriment to the general public which has relied on the public right-of-way status of Bridle Parc Lane for over 20 years. Respondent's action in bringing his stale claim at this time creates tremendous unfairness and hardship on the general public.

At various times, Respondents have claimed that the cause of action herein did not accrue until Appellant Intervenor Owens began taking steps toward developing property he owns which could be accessed by Bridle Parc Lane. However, the cause of action actually accrued when the purported dedications of the public road right-of-way known as Bridle Parc Lane were recorded in 1981 and 1984. An analogous situation was addressed by the Missouri Court of Appeals in the case of Wyper v. Camden County, 160 S.W.3d 850 (Mo. App. SD 2005). The case involved an action for inverse condemnation due to the county's construction of a roadway. The roadway at issue was constructed in 1950, long before the institution of any litigation. The plaintiffs tried to avoid the 10 year statute of limitations by claiming that their damage, and hence the cause of action, did not accrue until the county refused to provide a legal description of the roadway to the plaintiffs upon request in 2000. The court denied plaintiffs' argument and ruled in favor of the county that the statute of limitations had expired.

In like fashion, the statute of limitations has expired in this case. In 1984, Yiddy Bloom no longer had any ownership interest in the property encompassed by the plat of Bridle Parc Estates II or in the easement strips. In 1984, every single successor to the

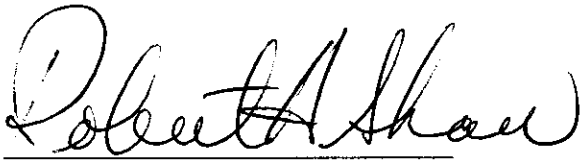
title of Yiddy Bloom signed the plat of Bridle Parc Estates II which conveyed public road right-of-way known as Bridle Parc Lane. In addition, some of the same property owners, including the predecessors in title of Respondent Bateman, Mr. and Mrs. Beethe, signed the plat of Bridle Parc Estates I, dedicating the public road right-of-way known as Bridle Parc Lane. As of 1984, every successor in title to Mr. Bloom was aware of the dedication. Every single property owner who had a right to raise a complaint concerning the dedication of public road right-of-way was informed of that dedication no later than 1984. No one other than the successors in title had standing in 1984 to assert rights based on the easement documents, and they did not do so within the limitation period. Accordingly, the statute of limitations expired years before Respondent Bateman acquired his property in 1998. Both Respondent Bateman and his predecessors in title failed to file suit within the limitation period and this action is therefore barred.

CONCLUSION

As set forth herein, the trial court's decision erroneously declared and applied the law in finding in favor of Respondents, both by ruling in favor of Respondents on the merits of the case and by failing to bar Respondents' cause of action by virtue of the 10 year statute of limitations. Accordingly, Respondent Platte County requests that this Court reverse the trial court's Judgment and find that Bridle Parc Lane was dedicated as public road right-of-way by the dedication language set forth on the various plats introduced into evidence.

Respectfully Submitted,

McGINNESS & SHAW, LLC

By: 

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CERTIFICATIONS OF COUNSEL

The undersigned certifies that:

1. As required by Supreme Court Rule 84.06(b), this Brief is proportionally spaced and, excluding the cover, certificate of service, signature block and any certifications of counsel, contains 4,441 words. I relied upon my word processor to obtain the word count, Microsoft Office Word 2003.

2. Pursuant to Supreme Court Rule 84.05, and Western District Special Rule XII, the original and seven (7) copies of Respondent Platte County's Brief were filed with the Missouri Court of Appeals, Western District on the 13th day of October, 2010, via hand-delivery, addressed as follows: Terrence G. Lord, Clerk of the Missouri Court of Appeals for the Western District, 1300 Oak Street, Kansas City, MO 64106.

3. Pursuant to Supreme Court Rule 84.05, two (2) copies of Respondent Platte County's Brief, along with one (1) electronic copy of a CD in Microsoft Office Word 2003 format were served upon Appellants and Respondents on the 13th day of October, 2010, addressed as follows to:

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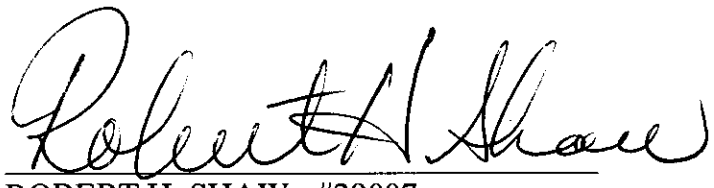
4. The undersigned further certifies that the CD filed herewith containing Respondent Platte County's Brief in electronic form complies with Supreme Court Rule 84.06(g) because it has been scanned for viruses and is virus-free.



ROBERT H. SHAW - #29007

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C

Kansas City Court of Appeals, Missouri.
CITY OF SARCOXIE, Respondent,
v.
HERMAN WILD et al., Appellants.
Jan. 6, 1896.

West Headnotes

Dedication 119  **13**

119 Dedication
1191 Nature and Requisites
119k13 k. Capacity or Authority to Dedicate.
Most Cited Cases
Where a grantor of land, which was practically surrounded by other land belonging to the grantor, reserved a strip of land on each side of the tract granted for road purposes, the purchaser had no power to dedicate the private way thus reserved for a public road.

***1** *Appeal from the Jasper Circuit Court.*--HON. W. M. ROBINSON, Judge.

REVERSED.

E. O. Brown and *George P. Whitsett* for appellants.
(1) The words "Except, reserving the right of a strip of land thirty (30) feet wide on each side, viz.: west, east, north, and south of said tract of land for road purposes" contained in the deed from Herman Wild to his daughter, secured to the grantor an easement for himself of a private roadway over the thirty-foot strips mentioned in said deed. Emma Carnahan never obtained a title thereto sufficient to enable her to make a valid dedication of the same to the public as streets. Tiedeman on Real Property, sec. 843; *Jones v. De Lassus*, 84 Mo. 541. (2) Herman Wild at all times held possession of these strips. They were inclosed with other land belonging to him, and, exercising the control of the possessor and owner, he allowed timber to be cut from them. To maintain estoppel *in pais* some conduct, acts, language, or silence must be shown amounting to a representation or concealment of material facts. 2 Pomeroy's Equity Jurisprudence, sec. 805. (3) There could have been no dedication of the strips of land in question for streets except by Herman Wild, who was the sole owner of the right of way over them. *City of Detroit v. Railroad*, 23 Mich. 173. Permissive use is not such a dedication. Elliott on Roads and Streets, pp. 3, 96; *Stacey v. Miller*, 14 Mo. 478. (4) Emma Carnahan could not dedicate the thirty-foot strips in question for public streets and thus defeat the estate her grantor had excepted and reserved for himself--namely, a private roadway. No one but the absolute owner can dedicate land to the public use, and for such a dedication to convey any interest to an intangible public or municipal corporation the person so attempting to make such a dedication must have the whole title. *Ward v. Davis*, 3 Sandf. (N. Y.) 513; *City of Hannibal v. Adm'r of Draper*, 36 Mo. 332; *McShane v. City of Moberly*, 79 Mo. 44; *Kyle v. Town of Logan*, 87 Ill. 64; 2 Greenleaf, Evidence, 663.

Howard Gray for respondent.
(1) The deed from Herman Wild to Emma Carnahan on the fourteenth day of March, 1876, conveyed to her the land in controversy. He only reserved the right to use a part of it for road purposes. *Kister v. Reeser*, 42 Am. Rep. 608; S. C., 98 Pa. St. 1; *Elliott v. Small*, 29 N. W. Rep. 158; S. C., 35 Minn. 396; *Jones v. De Lassus*, 84 Mo. 541; *Day v. Philbrook*, 26 Atl. Rep. 999. (2) Had Herman Wild intended to retain the title to said strips his deed would have read: "Except a strip thirty feet wide on each side thereof." *Elliott v. Small*, 29 N. W. Rep. 158.

ELLISON, J.
The defendants were arrested, tried, and convicted before the police judge of the city of Sarcoxie, on the charge of having obstructed, with a rail fence, one of the streets of said city. They appealed to the circuit court and were again convicted, and now bring their

case here.

*2 It appears that the land on which the street is alleged to exist is a twenty acre tract, which one of the defendants owned and deeded to Emma T. Carnahan, wife of John Carnahan. The tract was practically surrounded by said defendant's other farm land. In said deed there was this reservation, immediately following the description of the land: "Except, reserving the right of a strip of land thirty (30) feet wide on each side, viz.: west, east, north, and south of said tract of land, for road purposes."Afterward, said land was included within the limits of said city and was then platted as an addition to the city and was laid off into lots by said Carnahans--they filing a plat purporting to dedicate that portion of the reserved strip in question to the public, as a street.

There are many questions presented in behalf of defendants, which are combated by the city, but as one of these is sufficient for a final disposition of the case, we will not pass on any others raised. The reservation in the deed, connected with the evidence showing the circumstances of the parties (*Jones v. De Lassus*, 84 Mo. 541), makes for the defendant grantor a private way of the width of the strip reserved over the land granted. Mrs. Carnahan became the owner of the whole tract, subject to the incumbrance of the easement of the private way, which the defendant grantor had reserved to himself. Of this he could not be deprived, without his consent, or by some lawful and regular proceeding. The attempted dedication by the Carnahans was noneffective as against the owner of the way; for they must have been the absolute owners of the unincumbered title, in order to make a dedication against the interests of others in the lands. *Ward v. Davis*, 3 Sanf. 513; *McShane v. Moberly*, 79 Mo. 44; *Hannibal v. Draper*, 36 Mo. 332; *Kyle v. Logan*, 87 Ill. 64; Tiedeman on Real Prop., sec. 843.

It may be suggested that making a public street, in a city, out of a private way, is but an enlargement of the easement to the public, which would include the grantor, and therefore there could be no objection to it, since it would not harm the grantor. But this can not be allowed. A private way is a property right in the owner, of which he can not be deprived, regardless of whether he would be injured by the taking. The defendant, as owner of a private way over this land, is the owner of the dominant estate. Granting that the Carnahans have attempted, by dedication to the city, to make the latter the owner of such estate, they did so without the consent of defendant. If this be allowed, the defendant, as owner of the private way, is deprived of many of his rights as such. He loses control of the way. He has the right to repair it to suit his convenience, so he does not injure the servient estate. *Brown v. Stone*, 10 Gray, 61; *Lyman v. Arnold*, 5 Mason, 195; *Wyncoop v. Burger*, 12 Johns. 222.

"The very existence of a right of way precludes the idea that the party who has the right can not repair or keep the way in order. * * * Having the easement carries with it the right to make necessary repairs." *McMillen v. Cronin*, 57 How. Pr. 53.

*3 But when the city takes possession and control, the way may be put to uses which injure him, or it may be repaired and improved in a manner which will result in his injury. There would arise a conflict of authority. Grades might be changed by the city, either by cutting or filling, which might destroy the use to him. *Kelly v. Saltmarsh*, 146 Mass. 585. In speaking with reference to the rights of the owner of the servient estate, which ought to apply as well to the owner of the dominant estate, Elliott, in his work on streets and roads, 3, says: "A private way may, doubtless, be transformed into a public one, but in order that this may result it must appear that the owner fully consented to the change, or there must be some element of estoppel to deprive him of his rights."

The argument in behalf of the city seems to be based upon the idea that though the easement was reserved to defendant, yet that the Carnahans being owners of the fee, could make a perfect and complete dedication, without the consent of defendent. This would allow the Carnahans to annihilate defendant's property rights. In order to a proper dedication (at least, so far as affects defendant) defendant should have acted as to his interests. He must release his rights, or else he must be deprived of them by process of law.

The evidence shows clearly the reservation and its object, and the fact that he may not at all times have used the way is of no consequence.

It follows from what we have said that the defendants should not have been convicted. The judgment will, therefore, be reversed and the defendants discharged.

All concur.
Mo.App. 1896.
City of Sarcoxie v. Wild
64 Mo.App. 403, 1896 WL 1935 (Mo.App.)

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