

**IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT**

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| BLUE POOL FARMS, LLC, |) | |
| |) | |
| Appellant/Plaintiff, |) | |
| |) | |
| v. |) | |
| |) | Appeal No. ED89462 |
| RUTH BASLER, TRUSTEE OF |) | |
| REVOCABLE TRUST OF RUTH |) | |
| BASLER, DATED MAY 11, 1998, |) | |
| AND ANTJE HORTON, |) | |
| |) | |
| Respondents/Defendants. |) | |
| |) | |

**ON APPEAL FROM THE
CIRCUIT COURT OF STE. GENEVIEVE COUNTY
HONORABLE RAYMOND M. WEBER**

BRIEF OF APPELLANT BLUE POOL FARMS, LLC

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STATUTES AND CONSTITUTIONAL AUTHORITY

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SECONDARY AUTHORITY

T. Tyniecki, “Elements--adverse,” 18A Mo.Prac., Real Estate Law—Transact. & Disputes §67.3 (3d ed. 2006).....32

JURISDICTIONAL STATEMENT

This is an appeal from a judgment entered by Judge Raymond M. Weber of the Ste. Genevieve County Circuit Court (the “trial court”) on claims for a prescriptive easement or a private road. (L.F. 86-95) The trial court rejected both claims and entered its judgment against Appellant/Plaintiff Blue Pool Farms, LLC (“Blue Pool”) and in favor of Respondents/Defendants Ruth Basler, Trustee of Revocable Living Trust of Ruth Basler (“Mrs. Basler”) and Antje Horton (“Mrs. Horton”). (L.F. 43-46) The trial court also found in favor of Mrs. Horton on her counterclaim and enjoined Blue Pool and others acting on its behalf from entering on Mrs. Horton’s property. (L.F. 45) The judgment was entered December 13, 2006. (L.F. 46) On December 19, 2006, Blue Pool filed a motion to amend or set aside the judgment, for a new trial, to reopen the evidence or to set a supersedeas bond for appeal. (L.F. 47-52) The trial court denied Blue Pool’s motion on March 14, 2007 (L.F. 53) Blue Pool filed its notice of appeal on March 21, 2007. (L.F. 54-58) This case does not involve the validity of a statute or constitutional provision, nor does it involve the construction of revenue laws or title to any state office. Therefore, the grounds for conferring exclusive jurisdiction in the Missouri Supreme Court do not apply and jurisdiction of this Court is properly invoked pursuant to Article 5, §3 of the Missouri Constitution.

STATEMENT OF FACTS

A. Nature of the Case

This is an appeal from the trial court's decision to reject Blue Pool's claims for a prescriptive easement or a private road. (L.F. 43-46) The trial court entered its judgment on these claims in favor of the neighboring property owners, Mrs. Basler and Mrs. Horton. (L.F. 45) Because the trial court found against Blue Pool on its claims for a prescriptive easement or a private road, the trial court granted Mrs. Horton's counterclaim for an injunction to prevent Blue Pool or its members, agents, employees, invitees or other representatives from entering upon Mrs. Horton's property. (L.F. 45)

Blue Pool raises two points in its appeal. First, Blue Pool charges that the trial court erred in rejecting Blue Pool's private road claim because Blue Pool presented substantial evidence, including admissions, to establish the need for a road. Second, Blue Pool contends that the trial court misapplied the law in rejecting Blue Pool's claims for a prescriptive easement. If Blue Pool is successful on either point, Blue Pool requests this Court to reverse the judgment and to set aside the injunction.

B. Procedural History

Julia Maffitt Lamy was at one time the owner of Lamy-Ste. Genevieve, LLC, the original plaintiff in this action. (Tr. 112) Lamy-Ste. Genevieve filed a petition to establish a prescriptive easement, easement by necessity or a private road to ensure access to the company's tract of real estate in Ste. Genevieve

County. (L.F. 1) Blue Pool later purchased the tract of land from Lamy-Ste. Genevieve and was substituted as the plaintiff. (L.F. 29) Blue Pool filed its First Amended Petition seeking essentially the same relief as the original plaintiff. (L.F. 18-28)

Blue Pool alleged in its First Amended Petition that it accesses its property from a roadway which connects to a state highway and passes through the real estate owned by Horton and Basler. (L.F. 24) Blue Pool also alleged that the company and its predecessors in title used the roadway for over eighty-five years as an easement. (L.F. 24) Blue Pool claimed that this use was adverse, visible, continuous and uninterrupted, under a claim of right, and has been open and notorious for over forty years. (L.F. 24) On its alternative private road claim, Blue Pool alleged that the establishment of a private road was a strict necessity because Blue Pool has no other means of accessing its landlocked property. (L.F. 26)

Mrs. Horton filed her Answer to Blue Pool's First Amended Petition and her Counterclaim for an Injunction. (L.F. 30-37) In response to the request for a prescriptive easement, Mrs. Horton alleged that the prior use of the roadway in dispute was permissive, and that the use by Blue Pool's predecessors in title had not been exclusive. (L.F. 31) In response to the request for a private road, Mrs. Horton alleged that the proposed road would bisect her land and diminish its value. (L.F. 32) In her Counterclaim, Mrs. Horton sought to enjoin Blue Pool or its agents, employees, contractors, invitees or professional representatives from entering upon her property. (L.F. 33-34)

Mrs. Basler also filed an Answer to Blue Pool's First Amended Petition. (L.F. 38-40) In response to the request for a prescriptive easement, Mrs. Basler raised an affirmative defense that any use by Blue Pool's predecessors in title was permissive and not adverse.

The trial court heard evidence during a one-day trial and then took the matter under submission. (Tr. 1-320) Close to three months later, the trial court entered its Judgment in favor of Mrs. Horton and Mrs. Basler on both the prescriptive easement and private roadway claims. (L.F. 43-46)

In rejecting Blue Pool's claim for a prescriptive easement, the trial court agreed with Blue Pool's contention about the existence of a roadway accessing Blue Pool's property which crosses the respective property of the defendants. (L.F. 44) The trial court also found that Blue Pool's predecessor, Mrs. Lamy, used the roadway for many years to access the property. (L.F. 44) But the trial court found that her use was permissive in origin and remained permissive. (L.F. 44) And the trial court found that Mrs. Lamy's use was not exclusive. (L.F. 44) The trial court failed to find clear and convincing evidence that Blue Pool's predecessors' use was continuous, uninterrupted and adverse. (L.F. 45)

In rejecting Blue Pool's claim for a private road, the trial court found that Blue Pool failed to produce evidence other than its manager's testimony that the proposed roadway was the only way to access the property. (L.F. 45) The trial court also found from the testimony of a current tenant and hunters that others had accessed the property by a different way. (L.F. 45) The trial court concluded that

Blue Pool failed to present clear and convincing evidence that Blue Pool did not have access to its property. (L.F. 45)

Having found against Blue Pool on its claims for prescriptive easement or a private road, the trial court made the corresponding legal conclusion that Blue Pool's continued use of the roadway would constitute a trespass on Mrs. Horton's property. (L.F. 45) The trial court then granted Mrs. Horton's counterclaim for injunctive relief. (L.F. 45)

Blue Pool filed a motion to amend or set aside the judgment, for a new trial, to reopen the evidence, or to set a supersedeas bond. (L.F. 47-52) The trial court denied Blue Pool's motion, and Blue Pool appealed. (L.F. 53-58)

C. Summary of the Evidence

1. The Parties

Blue Pool is a Missouri limited liability company. (Tr. 201) Dale Port testified on behalf of Blue Pool at trial. (Tr. 200-201) The members of the company entered into a contract with Mrs. Lamy to purchase her Ste. Genevieve County property, and then put the property into Blue Pool's name prior to closing. (Tr. 202) Blue Pool closed on the purchase of the property shortly before trial. (Tr. 202)

Mrs. Horton is a resident of Arlington, Virginia. (L.F. 18) Mrs. Horton and her deceased husband, William, initially purchased 100 acres of the neighboring property in 1972. (Tr. 278) William was the son of Mack Horton, the

predecessor in title to this neighboring property. (Tr. 278) Mrs. Horton acquired sole title to the property when her husband died in the late 1990s. (Tr. 278)

Mrs. Basler is a resident of Farmington, Missouri. (L.F. 18) Basler owns her neighboring property in the name of her revocable trust. (Tr. 292) Mrs. Basler acquired this property through a 1948 deed from her father, Jim Horton. (Tr. 293) But Mrs. Basler did not record the deed until her father died in 1968. (Tr. 292) Mrs. Basler owned the property jointly with her husband, Lyndon, and later, it was transferred into her trust. (Tr. 199, 292-293) (Plaintiff's Exhibit 74).

2. The Ownership History of the Blue Pool Property

Mrs. Lamy testified by videotaped deposition about the ownership history of her former property. Mrs. Lamy's family referred to it as the "Blue Pool" property. (Tr. 123) The property originally was part of a larger tract owned by the Jonca Ore partnership. (Tr. 115) The Jonca Ore partnership goes back to 1918 or 1919. (Tr. 115) Mrs. Lamy's grandfather was a partner in Jonca Ore. (Tr. 115) Mrs. Lamy's grandmother acquired the Blue Pool property in her sole name when Mrs. Lamy's grandfather died in 1928 (Tr. 115)

Mrs. Lamy's grandmother owned the property from 1928 until her death in 1951. (Tr. 115, 121) When Mrs. Lamy's grandmother died, she was survived by Mrs. Lamy's mother, Julia Walsh Lamy; her uncle, Edward J. Walsh, Jr.; and her aunt, Ellen Walsh Corley. (Tr. 121) Mrs. Lamy's parents initially managed her grandmother's properties. (Tr. 123) But after her grandmother's estate settled, this particular property passed to her uncle, Edward, and to his wife, Katherine. (Tr.

123) As a surprise, Mrs. Lamy's uncle gifted the property to Mrs. Lamy in 1968.
(Tr. 123) (Tr. 199) (Plaintiff's Exhibits 76 and 77)

Mrs. Lamy or her investment entities continued to own the property until she sold it to Blue Pool. (Tr. 135, 184, 185, 202) Title records show that Mrs. Lamy transferred the property to Lamy Investments, LP in 2002, and two years later, she transferred the property to Lamy Ste. Genevieve, LLC (Tr. 199) (Plaintiff's Exhibit 78) (Plaintiff's Exhibit 79) Blue Pool acquired its title in 2006. (Plaintiff's Exhibit 80).

3. The Use of the "Upper" and "Lower" Roads to Access the Blue Pool Property

Blue Pool presented the testimony of a surveyor, Gerald Bader, to show the location of what was referred to as "upper" and "lower" roads leading Blue Pool property. (Tr. 44-45) Mr. Bader accepted a rough description of the two branches as forming a "Y" turned on its side. (Tr. 13) Bader visually examined the roadways and he reviewed deeds, maps from the assessor's office and a series of aerial photographs. (Tr. 4, 9-11) Bader used this information to prepare his survey of both the upper and lower roads. (Tr. 14, 20) (Plaintiff's Exhibits 37, 52)

Mr. Bader testified that the location of roads had not changed over the years. As part of the survey process, Bader reviewed aerial photographs spanning a time period from 1996 through 2006. (Tr.4, 5, 11, 25-26, 41) The earliest photograph from 1966 showed evidence of an upper and lower road which matched almost identically Mr. Bader's survey of those roads prepared for trial.

(Tr. 11) Mr. Bader also testified that the maps he reviewed from 1981 and 1997 were consistent in showing a defined observable roadway. (Tr. 9) Bader did not observe any other access to the Blue Pool property. (Tr. 53)

Mrs. Lamy understood there was a residence on the Blue Pool property at the time her grandmother acquired it in the 1928 Jonca Ore transaction. (Tr. 115) Indeed, Mrs. Lamy identified a document reflecting the existence of two residences on the Jonca Ore property in 1919. (Tr. 169-171) (Plaintiff's Exhibit 32) The seller in that document offered to sell the property, but reserved mineral rights with "ingress and egress." (Plaintiff's Exhibit 32) Mrs. Lamy later testified that there always was a residence on her property. (Tr. 197) And Mrs. Lamy testified that as far back as 1928, the residence was accessed by the lower road. (Tr. 118-119) (Tr. 197)

Mrs. Lamy first visited the property with her grandmother in the mid-1940s. (Tr. 119) Mrs. Lamy testified that she went down to the property to look at wild flowers. (Tr. 119) Her grandmother owned the property at that time. (Tr. 120) Mrs. Lamy and her grandmother took the lower road to access the property (Tr. 120) They passed by the Horton home, said hello to Jim Horton and his wife and proceeded on the road to the house on her grandmother's property. (Tr. 120) Mrs. Lamy testified that the lower road was in the same general location shown on Mr. Bader's survey when she visited her grandmother. (Tr. 179-180) And that it has been in continuous existence since that time. (Tr. 180)

Mack Horton's daughter, Patsy Bequette, testified for the defendants, but she confirmed Mrs. Lamy's testimony about her grandmother's use of the lower road in the 1940s. Mrs. Bequette grew up on the Horton farm. (Tr. 268) She testified that her father, Mack, used both the upper and lower roads for his farming operations. (Tr. 269) But she testified that the Walsh family used the lower road to get to the house on the Blue Pool property. (Tr. 269) Mrs. Bequette admitted: "If you had to go there, yes. It's the road they had to use." (Tr. 269-270) Mrs. Bequette described her father's relationship with the Walsh family as "cordial." (Tr. 271)

Mrs. Lamy went to high school and college in the East and did not visit the Blue Pool property through most of the 1950s. (Tr. 124) But Mrs. Lamy began visiting the property periodically again after 1960, while it still was owned by her uncle and aunt. (124) Mrs. Lamy customarily used the lower road to access the property during the 1960s. (Tr. 133) Occasionally in dry weather, she would use the alternative unpaved route which followed a fence line along Mack Horton's field. (Tr. 134-35) But she testified that the lower road was better. (Tr. 135)

Mrs. Lamy testified that Jim Horton acted as her uncle's agent in taking care of the Blue Pool property. (Tr. 126) Jim's brother, Mack, also assisted occasionally with larger projects. (Tr. 126) Because Jim died at some point during those years, Mrs. Lamy worked more with Mack after she took ownership. (Tr. 127) Mrs. Lamy identified correspondence which she and prior family members had with Jim and Mack Horton over caretaking issues. (Tr. 151-166)

Almost all these letters involved hunting, woodcutting or road maintenance on the Blue Pool property. (Tr. 166) (Plaintiff's Exhibits 8, 9, 17-27)

Once Mrs. Lamy became the owner in 1968, she started visiting the Blue Pool property about once each month, on average, for long weekends. (Tr. 128). Mrs. Lamy always stayed in the house on the property. (Tr. 128) And she accessed that house by using the lower road, passing by Mack Horton's house on the way. (Tr. 128-129) There were no gates on the road, but there was a cable with a padlock. (Tr. 129) Mrs. Lamy had a key to the padlock. (Tr. 129) Mrs. Lamy testified that no one ever denied her access to her property through this route. (Tr. 129)

In a 1971 letter, Mack Horton charged Mrs. Lamy for cutting back brush and repairing the road leading to her property. (Tr. 150) (Plaintiff's Exhibit 9) Mrs. Lamy expressed shock because they had never discussed an arrangement for these kinds of repairs. (Plaintiff's Exhibit 8) But Mrs. Lamy offered to discuss the matter and work out some kind of payment. (Plaintiff's Exhibit 8)

On one of her visits to the Blue Pool property, Mrs Lamy was surprised to find a group of hunters at her house. (Tr. 129) She found them playing cards and drinking beer. (Tr. 129) Mrs. Lamy was angry because she "hadn't a clue" that they would be there. (Tr. 130) But later, on advice of counsel, Mrs. Lamy gave this same group permission to hunt on her property through a series of license agreements beginning in 1971. (Tr. 130-131, 136, 190) Her lawyers from Bryan Cave worked with the hunters to process the licenses. (Tr. 190) Mrs. Lamy

imposed two general conditions for the licenses: first, that the hunters would not harm the property, and second, that they would keep the house in order. (Tr. 131) Mrs. Lamy assumed that the hunters were using the same lower road she used to access her property. (Tr. 148)

Several of these hunters testified about their use of both the upper and lower roads to access the Blue Pool property. (Tr. 75-76, 96, 101, 250) But they mainly used the lower road. (Tr. 250) There were about 10 to 13 hunters in this group. (Tr. 79) Some members began hunting in the area back in 1963, with Mack Horton's permission. (Tr. 68, 75, 86) Kermit Davitz and Dennis Huck testified that they did not realize until their later confrontation with Mrs. Lamy that they actually were hunting on the Lamy property, and not the Horton property. (Tr. 69-70, 75, 86, 89)

After the hunting group signed its license agreements with Mrs. Lamy, the group agreed to do certain projects to keep up the property. (Tr. 65, 83, 255) Jerry Bequette described this work as payment for the privilege of hunting there. (Tr. 255) The hunters periodically hauled rock to take care of the lower road. (Tr. 65, 77, 103-104, 258) Even though the written license agreements stopped, the hunting group has operated continuously in that fashion from 1970 until the date of trial. (Tr. 66)

Mr. Davitz, Mr. Huck and Mr Bequette all testified that they occasionally saw other hunters from outside their group using the lower road. (Tr. 79-80,93) But Davitz and Bequette characterized these other hunters as trespassers. (Tr. 80,

249) Huck also saw a group of visitors using the lower road one year when Mrs. Lamy sold some timber off her property. (Tr. 93)

Davitz customarily used the lower road to access the Blue Pool property, but he recalled coming in “the back way” through Louie Bauman’s property once many years ago. (Tr. 66-67, 72) Davitz had a friendly relationship with Mr. Bauman, but he denied that he would have felt confident in relying on that friendship to cross over the Bauman property. (Tr. 73) And because this happened only one time so long ago, Davitz expressed doubt if he could find the road going past the Bauman property. (Tr. 73) Jerry Bequette also mentioned that it was possible to access the Blue Pool property if you came across the Bauman property. (Tr. 263) But Bequette was unaware of any easement across that property. (Tr. 263)

Dale Port of Blue Pool testified that he was unaware of any other access to the Blue Pool property other than the upper and lower roads. (Tr. 203-204) Mr. Port also testified that in the two-year period since Blue Pool entered into contractual relations with Mrs. Lamy, no one objected to Blue Pool’s use of the road. (Tr. 204)

Mr. Port testified that Mrs. Lamy was required under her contract with Blue Pool to file the lawsuit to establish an easement to her property. (Tr. 203) Mrs. Lamy did not believe this was a contract condition, but she acknowledged that the buyers asked her to look into the easement question. (Tr. 185-186) Mrs. Lamy

testified that it never occurred to her this was an issue because “we’d always used the road.” (Tr. 186)

4. The Horton Tenant’s Objection to the Use of the Roads for Nonfarming Purposes.

Eugene Gegg has rented the Horton property for farming operations since 1984. (Tr. 216-217) When he first rented the property, he was operating the farm with a partner, Tom Ryan. (Tr. 217) The Horton farm is comprised of 640 acres, 112 of which have been cleared for pasture and hay. (218)

Mr. Gegg testified that he had done a considerable amount of work on both the upper and lower roads. (Tr. 219-220, 223) Gegg claimed to have graded the lower road “from start to finish” sometime in the 1980s. (Tr. 224) Gegg admitted that he had allowed one of the Lamy hunting group members, Dennis Huck, to borrow his tractor and grade part of the lower road. (Tr. 225) But Gegg considered any hunters using the roads to be “trespassers.” (Tr. 222-223).

Mr. Gegg claimed that the proposed use of the roads by Blue Pool would be devastating to his farming operations. (Tr. 225-228) Gegg described a series of gates he had put up on both the upper and lower roads. (Tr. 228-229) Gegg testified that the lower road had six gates and a cable, and that the upper road had eight gates plus the cable. (Tr. 228-229) Gegg expressed worry about the possibility of people leaving gates open. (Tr. 227-228)

On rebuttal, Dennis Huck testified that when Mack Horton operated the farm before 1984, there were only three gates. (Tr. 307) And during hunting

season, Mack kept his cattle penned up and left the gates open. (Tr. 306) The cable was placed at the entrance to the Blue Pool property at Mrs. Lamy's instigation. (Tr. 398) Huck understood that Mrs. Lamy, Mr. Gegg and Tom Ryan all had keys. (Tr. 307) Despite Mr. Gegg's hostility toward hunters, Huck felt that the Lamy hunting group had a good relationship with Gegg. (Tr. 309) Huck testified that if gates were open, his group would leave them open. But if gates were closed, they left them closed. (Tr. 311)

5. The Objections of the Neighboring Property Owners

Mrs. Horton expressed concern that the value of her property would drop if the trial court granted Blue Pool an easement. (Tr. 281-282) When Mrs. Horton was approached about voluntarily granting an easement, she declined. (Tr. 284)

Mrs. Horton was asked if she knew of an alternate route to the Blue Pool property if the need for a private road were established. (Tr. 286-287) In response, Mrs. Horton proposed "a perimeter road that would go under those power lines." (Tr. 287) Over Blue Pool's objection, Mrs. Horton's counsel introduced into evidence an easement deed given by William Horton in 1972 to Union Electric Company. (Tr. 289-291) (Defendants' Exhibit B) The defendants presented no evidence of any existing "perimeter road" which ran within the boundaries of this utility easement. Nor did the defendants show that the electric company's utility easement provides direct access to the public roadway from the Blue Pool property. (*See*, Tr. 289-290)

During her deposition testimony, Mrs Lamy did not believe that the electric company did anything to the existing roads when utility easement was created. (Tr. 167) And Mrs.Lamy was unaware of any negotiations with the electric company to make road improvements. (Tr. 168) The surveyor, Mr. Bader, testified that only about the last quarter mile of the lower road ran with the power lines. (Tr. 45-46) And Bader declined to speculate about the feasibility of putting a road under the power lines. (Tr. 51) Dennis Huck testified that the utility easement was not level, it was difficult to ride even on horseback and it probably was not passable in spots with a rugged all-terrain vehicle. (Tr. 98-99)

Mrs. Basler also opposed the creation of an easement for Blue Pool. Mrs. Basler remembered the lower road, but she thought of the upper road as just a field. (Tr. 296) If Blue Pool were granted an easement by necessity, Mrs. Basler proposed that a road be created along the north property line. (Tr. 297)

On cross-examination, Mrs. Basler admitted that the lower road had been in existence as long as she could remember. (Tr. 298-299) But she qualified this admission by stating that “it sure wasn’t much of a road.” (Tr. 298-299) Mrs. Basler also admitted that she was unaware of any road that has never been used to access the Blue Pool property, other than the road that went through her farm. (Tr. 300)

POINTS RELIED ON

I

THE TRIAL COURT ERRED IN REJECTING BLUE POOL'S CLAIM TO ESTABLISH A PRIVATE ROAD BY STRICT NECESSITY BECAUSE THIS DECISION WAS CONTRARY TO LAW, NOT SUPPORTED BY SUBSTANTIAL EVIDENCE AND AGAINST THE WEIGHT OF THE EVIDENCE IN THAT THE TRIAL COURT MISAPPLIED §228.342 RSMo (2000) IN IMPOSING THE BURDEN UPON BLUE POOL TO SHOW THE NEED FOR A PRIVATE ROAD BY CLEAR AND CONVINCING EVIDENCE; BLUE POOL PRESENTED SUBSTANTIAL EVIDENCE THAT THERE WAS NO ACCESS TO THE LANDLOCKED BLUE POOL PROPERTY OTHER THAN BY USING THE UPPER OR LOWER ROADS; THAT THIS POINT WAS ESTABLISHED, NOT ONLY BY THE TESTIMONY OF BLUE POOL'S MANAGER, BUT ALSO BY THE TESTIMONY OF JULIA LAMY, THE SURVEYOR AND MULTIPLE HUNTERS, AS WELL AS BY THE ADMISSIONS OF RUTH BASLER AND PATSY BEQUETTE; AND THE TRIAL COURT WAS NOT FREE TO RELY ON EVIDENCE OF ONE OR MORE ISOLATED INSTANCES WHERE TRESPASSING HUNTERS MAY HAVE ACCESSED THE PROPERTY BY CROSSING OVER THE BAUMAN PROPERTY OR BY ANTJE HORTON'S PROPOSAL OF BUILDING A PERIMETER ROAD UNDER THE POWER LINES

**BECAUSE NEITHER ALTERNATIVE PRESENTED BLUE POOL WITH
A LEGALLY ENFORCEABLE RIGHT OF ACCESS.**

Spier v. Brewer, 958 S.W.2d 83 (Mo.App. E.D. 1997)

Kirkpatrick v. Webb, 58 S.W.3d 903 (Mo.App.S.D. 2001)

Moss Springs Cemetery Association v. Johannes, 970 S.W.2d 372

(Mo.App. S.D. 1998)

Hill v. Kennoy, 522 S.W.2d 775 (Mo. banc 1975)

§228.342 RSMo (2000)

II

**THE TRIAL COURT ERRED IN REJECTING BLUE POOL'S
CLAIM FOR A PRESCRIPTIVE EASEMENT BECAUSE THE TRIAL
COURT MISAPPLIED THE LAW AND THE DECISION WAS AGAINST
THE WEIGHT OF THE EVIDENCE IN THAT THE TRIAL COURT
SHOULD NOT HAVE CONSIDERED WHETHER BLUE POOL'S
PREDESSOR IN TITLE, JULIA LAMY, HAD EXCLUSIVE USE OF THE
UPPER OR LOWER ROADS; AND BECAUSE THE USE OF THE ROADS
BY MRS. LAMY'S GRANDMOTHER AFTER THE JONCA ORE
TRANSACTION WAS NOT SHOWN TO BE PERMISSIVE IN ORIGIN,
THE TRIAL COURT SHOULD HAVE SHIFTED THE BURDEN TO THE
DEFENDANTS TO PROVE THAT THE USE BY BLUE POOL'S
PREDECESSORS IN TITLE WAS PERMISSIVE AND NOT ADVERSE;**

BUT INSTEAD, THE TRIAL COURT IMPROPERLY IMPOSED THE BURDEN ON BLUE POOL TO PROVE THIS ELEMENT OF ITS PRESCRIPTIVE EASEMENT CLAIM BY CLEAR AND CONVINCING EVIDENCE; THAT IF THE BURDEN HAD BEEN ALLOCATED PROPERLY, BLUE POOL PRESENTED A SUBMISSIBLE CASE FROM WHICH THE TRIAL COURT SHOULD HAVE FOUND THERE WAS NO FORMAL AGREEMENT PERMITTING THE USE OF THE LOWER ROAD BY MRS. LAMY OR HER LICENSEES, AND THAT THEIR USE OF THE ROAD WAS ADVERSE IN THAT IT CONTINUED WITHOUT RECOGNITION OF THE RIGHT OF THE NEIGHBORING PROPERTY OWNERS OR TENANT TO PERMIT OR PROHIBIT SUCH USE.

Smith v Chamblin Properties, LLC, 201 S.W.3d 582 (Mo.App.W..D. 2006)

Whittom v. Alexander-Richardson Partnership, 851 S.W.2d 504 (Mo. banc 1993)

McDougall v. Castelli, 501 S.W.2d 855, 858 (Mo.App. St.L.D. 1973)

Harmon v. Hamilton, 903 S.W.2d 610 (Mo.App. S.D. 1995)

ARGUMENT

I

THE TRIAL COURT ERRED IN REJECTING BLUE POOL'S CLAIM TO ESTABLISH A PRIVATE ROAD BY STRICT NECESSITY BECAUSE THIS DECISION WAS CONTRARY TO LAW, NOT SUPPORTED BY SUBSTANTIAL EVIDENCE AND AGAINST THE

WEIGHT OF THE EVIDENCE IN THAT THE TRIAL COURT MISAPPLIED §228.342 RSMo (2000) IN IMPOSING THE BURDEN UPON BLUE POOL TO SHOW THE NEED FOR A PRIVATE ROAD BY CLEAR AND CONVINCING EVIDENCE; BLUE POOL PRESENTED SUBSTANTIAL EVIDENCE THAT THERE WAS NO ACCESS TO THE LANDLOCKED BLUE POOL PROPERTY OTHER THAN BY USING THE UPPER OR LOWER ROADS; THAT THIS POINT WAS ESTABLISHED, NOT ONLY BY THE TESTIMONY OF BLUE POOL'S MANAGER, BUT ALSO BY THE TESTIMONY OF JULIA LAMY, THE SURVEYOR AND MULTIPLE HUNTERS, AS WELL AS BY THE ADMISSIONS OF RUTH BASLER AND PATSY BEQUETTE; AND THE TRIAL COURT WAS NOT FREE TO RELY ON EVIDENCE OF ONE OR MORE ISOLATED INSTANCES WHERE TRESPASSING HUNTERS MAY HAVE ACCESSED THE PROPERTY BY CROSSING OVER THE BAUMAN PROPERTY OR BY ANTJE HORTON'S PROPOSAL OF BUILDING A PERIMETER ROAD UNDER THE POWER LINES BECAUSE NEITHER ALTERNATIVE PRESENTED BLUE POOL WITH A LEGALLY ENFORCEABLE RIGHT OF ACCESS.

In its first point, Blue Pool challenges the trial court's decision to reject Blue Pool's claim for a private road by strict necessity. The trial court erred in

three ways. First, the trial court misapplied §228.342¹ in imposing the burden on Blue Pool to prove its need for a road by clear and convincing evidence. Second, the trial court erred in looking only to the testimony of Blue Pool's manager on this issue. Blue Pool presented substantial evidence to show that the upper and lower roads were the only means of accessing its landlocked property. This point was established by the testimony of Blue Pool's manager, Julia Lamy, the surveyor and multiple hunters, as well as by the admissions of Ruth Basler and Patsy Bequette. And finally, the trial court erred in speculating about possible alternative routes to the property that were not legally enforceable.

A. Standard of Review

In a bench-tried case, the judgment of the trial court will be sustained unless there is no substantial evidence to support it, unless it is against the weight of the evidence, or unless it erroneously declares or applies the law. *Kirkpatrick v. Webb*, 58 S.W.3d 903, 905 (Mo.App.S.D. 2001) This standard of review generally requires permissible inferences to be viewed favorably to the judgment, and the trial court must be given deference to determine the credibility of witnesses. *Id.* at 905. But in private road cases, appellate courts will reverse a judgment rejecting the need for a road if the judgment is against the weight of the evidence. *See, e.g., id.* at 907-08; *Spier v. Brewer*, 958 S.W.2d 83, 87 (Mo.App. E.D. 1997); *Moss Springs Cemetery Association v. Johannes*, 970 S.W.2d 372, 376-77 (Mo.App. S.D. 1998).

¹ All references to this statute are to RSMo (2000).

B. The elements required to establish a private road by strict necessity

For a plaintiff to establish a private road under §228.342 RSMo (2000), the plaintiff must show: (a) the plaintiff owns the land, (b) no public road goes through or alongside the tract of land, and (c) the private road petitioned for is a way of “strict necessity.” *Farrow v. Brown*, 873 S.W.2d 918, 920 (Mo.App. E.D. 1994). “Strict necessity” has been defined as “the lack of a legally enforceable right to use a practical way to and from a person’s land, either public or private.” *Kirkpatrick v. Webb*, 58 S.W.3d at 907, quoting *Anderson v. Mantel*, 49 S.W.3d 760, 763 (Mo.App. S.D. 2001).

If a party seeking a private road has no legally enforceable right to use an alternative route, he is entitled to a way of necessity. *Moss Springs Cemetery Association v. Johannes*, 970 S.W.2d at 376. An alternative route which is merely permissive does not provide any legally enforceable right to ingress and egress. *Spier v. Brewer*, 958 S.W.2d at 87. And the defendants may not defeat the plaintiff’s claim of strict necessity by showing that other landowners exist against whom the plaintiff also might have asserted a claim. *Moss Springs Cemetery Association*, 970 S.W.2d at 377.

Here, the defendants never challenged Blue Pool’s evidence (a) that it owns the Blue Pool property (Tr. 202), or (b) that the nearest public road, Highway 144, does not go through or alongside the property. (Tr. 9) The sole question is whether Blue Pool met its burden of showing the need for a private road by “strict necessity.” (Tr. 336)

C. The trial court misapplied §228.342 by requiring Blue Pool to prove its need for a road by “clear and convincing evidence.”

In addressing the central issue of “strict necessity,” the trial court misapplied §228.342 by imposing a heightened burden of proof on Blue Pool. The trial court found that Blue Pool failed to present “clear and convincing evidence” that Blue Pool did not have access to its property. (L.F. 45) But neither the statute nor the case law suggests that the plaintiff in a private road case must meet this heightened burden of proof.² Blue Pool’s trial counsel raised this error in its post-judgment motion, but the trial court refused to amend the judgment or reconsider its decision. (L.F. 50) (Tr. 330) (L.F. 53).

D. Blue Pool presented substantial evidence, including admissions, to establish the need for a private road.

Appellate courts will reverse the trial court’s decision to reject a statutory private road claim if the plaintiff presented sufficient evidence to show a need for the road. *Kirkpatrick v. Webb*, 58 S.W.3d at 908 (plaintiffs presented sufficient evidence by testifying that they did not feel they had permission to use road on neighboring property); *Moss Springs Cemetery Association v. Johannes*, 970

² On appeal, the trial court’s decision to create a private road will be affirmed if is supported by substantial evidence. And “substantial evidence” is no more than competent evidence from which the trier of fact could reasonably decide the case. *Anderson v. Mantel*, 49 S.W.3d at 764.

S.W.2d at 376 (plaintiff presented testimony that no public road ran through or alongside cemetery property and plaintiff had no legally enforceable right to use neighbors' property) *Hill v. Kennoy, Inc.*, 522 S.W.2d 775, 778-779 (Mo. banc 1975) (plaintiff's access to property from terminable at will lease did not provide legally enforceable right of ingress and egress); *Spier v. Brewer*, 958 S.W.2d 2d 83, 87 (Mo.App. E.D. 1997) (plaintiff's testimony that his uncle gave him permission to use a road to access his property did not provide a legally enforceable right to ingress and egress).

In evaluating the evidence, this Court may consider admissions by the neighboring landowners and their witnesses. *See, Kirkpatrick v. Webb*, 58 S.W.3d at 908 (neighbor's admissions showed realization that the plaintiff's property was landlocked); *Anderson v. Mantel*, 49 S.W.3d at 764 (defendant and his son admitted no knowledge of any deeded easement or government records that would permit plaintiffs to use public access to reach their land). *Kirkpatrick* and *Anderson* demonstrate the weight given to admissions in showing "strict necessity."

Blue Pool met its burden here of presenting substantial evidence that the upper and lower roads were the only means of accessing the Blue Pool property.³

³ The parties' dispute over this factual issue controls the private road claim because the trial court refused to grant Blue Pool a prescriptive easement for the upper or

The trial court found that Blue Pool failed to produce any evidence on this point other than its manager's testimony. (L.F. 45) Blue Pool's manager, Dale Port, testified that he was unaware of any access to the Blue Pool property other than the upper or lower roads. (Tr. 203-204) But the trial court was wrong in concluding that Mr. Port's testimony stood alone.

Julia Lamy, the surveyor and multiple hunters all corroborated Mr. Port's testimony that there was no other access to the property. Mrs. Lamy testified that she customarily used the lower road, and only occasionally used the alternative unpaved route (the upper road) which followed a fence line along Mack Horton's field. (Tr. 128-129, 133, 135) Mrs. Lamy never mentioned any third alternative route. Mrs. Lamy did not believe this even was an issue because "we'd always used the road." (Tr. 186) The surveyor, Gerald Bader, testified that he did not observe any other access to the property. (Tr. 53). And several members of the Lamy hunting group also testified about their sole use of the upper and lower roads to access the Blue Pool property. (Tr. 75-76, 96, 101, 250)

Blue Pool's evidence about the upper and lower roads also was confirmed by the admissions of Patsy Bequette and Mrs. Basler. Mrs. Bequette testified that when she was growing up on the Horton farm, the Walsh family used the lower road to get to the house on the Blue Pool property. (Tr. 269) Testifying on behalf

lower road. (L.F. 44-45) Blue Pool is challenging the trial court's judgment on the prescriptive easement claim in the second point of this appeal.

of the defendants, Mrs. Bequette described her father's relationship with the Walsh family as "cordial." (Tr. 271) But in addressing the private road issue, Mrs. Bequette admitted: "If you had to go there, yes. It's the road you had to use." (Tr. 269-270) In a similar vein, Mrs. Basler admitted that she was unaware of any road that has never been used to access the Blue Pool property, other than the road that went through her farm. (Tr. 300)

Blue Pool presented substantial evidence, including these admissions, to show that the upper and lower roads were the only means of accessing the Blue Pool property. Even if the trial court had discretion to reject the credibility of Dale Port's testimony on this point, the trial court was not free to ignore the totality of Blue Pool's evidence.

E. The trial court erred in speculating about possible alternative routes that were not legally enforceable.

In rejecting Blue Pool's private road claim, the trial court found "there was testimony by Defendants' [sic] current tenant and from hunters of accessing by a different way." (L.F. 45) Even viewing this vague finding in the light most favorable to the judgment, there was no evidence to show that Blue Pool has a legally enforceable right to use any alternative route. *See, Moss Springs Cemetery Association v. Johannes*, 970 S.W.2d at 376. And the defendants cannot defeat Blue Pool's claim of strict necessity by showing that another landowner exists against whom Blue Pool also might have asserted a claim. *Moss Springs Cemetery Association*, 970 S.W.2d at 377.

At most, the evidence showed only one or more isolated instances where hunters may have accessed the Blue Pool property by trespassing on Louie Bauman's property. Kermit Davitz recalled coming in "the back way" through the Bauman property once many years ago. (Tr. 66-67, 72) Davitz had a friendly relationship with Mr. Bauman, but he denied that he would have felt confident in relying on that friendship to cross over the Bauman property. (Tr. 73) And because this happened only one time many years ago, Davitz expressed doubt if he could find the road going past the Bauman property. (Tr. 73) Jerry Bequette also mentioned that it was possible to access the Blue Pool property if you came across the Bauman property. (Tr. 263) But Bequette was unaware of any easement across that property. (Tr. 263) Neither Davitz nor Bequette gave any evidence to support the theory that Blue Pool has a legally enforceable right to cross over the Bauman property.

Nor can the trial court's judgment be justified by the testimony of the Horton farm tenant. The tenant, Eugene Gegg, testified that he occasionally asked Mr. Bauman's permission to cross the Bauman land with farming equipment or a horse trailer. (Tr. 221-222) But such permissive use does not create an enforceable right of ingress or egress. *Spier v. Brewer*, 958 S.W.2d at 87. And Mr. Gegg said nothing about anyone having a legally enforceable right to cross over the Bauman property to access the Blue Pool property. Mr. Gegg also testified that in his younger years, he rode horseback into the Blue Pool property before he knew who the owner was. (Tr. 231-232) But Mr. Gegg did not identify

the route he took to access the property on these occasions. (Tr. 231-232) Mr. Gegg's reminiscence about his prior acts of trespass on the Blue Pool property has no bearing on whether Blue Pool has a legally enforceable right of access.

Finally, the trial court could not justify its judgment by relying on Mrs. Horton's proposal of creating "a perimeter road that would go under those power lines." (Tr. 286-287) Mrs. Horton presented her proposal in response to the question of whether she knew of an alternate route to the Blue Pool property if the need for a private road were established. (Tr. 286-287) Mrs. Horton's response itself was an admission that Mrs. Horton knew of no other access to the Blue Pool property short of creating a whole new road. *See, Kirkpatrick v. Webb*, 58 S.W.3d at 908 (neighbor's proposal of a "free easement" of his choosing was an admission that the neighbor's land was a barrier between the plaintiff's property and a public road).

Once strict necessity is established, the burden of proving the practicality of an alternate route rests with the party who proposes it. *Hamai v. Witthaus*, 965 S.W.2d 379, 383 (Mo.App. E.D. 1998) Here, Mrs. Horton presented no evidence on the practicality of her proposal for a "perimeter road." Mrs. Horton even failed to show that the electric company's utility easement provides direct access to the public roadway from the Blue Pool property. (*See*, Tr. 289-290)

Some witnesses raised questions over whether Mrs. Horton's proposal presented a feasible or practical alternative. Dennis Huck testified that the utility easement was not level, it was difficult to ride even on horseback and it probably

was not passable in spots with a rugged all-terrain vehicle. (Tr. 98-99) Mrs. Lamy did not believe that the electric company did anything to the existing roads when the utility easement was created. (Tr. 167) And Mrs. Lamy was unaware of any negotiations with the electric company to make road improvements. (Tr. 168) The surveyor, Mr. Bader, testified that only about the last quarter mile of the lower road ran with the power lines. (Tr. 45-46) And Bader declined to speculate about the feasibility of putting a road under the power lines. (Tr. 51)

Regardless of whether Mrs. Horton's proposal was feasible, the trial court could not find from this evidence that the electric company's utility easement gave Blue Pool any legal enforceable right to create a "perimeter road" under the power lines. The utility easement gave certain rights to the electric company, but not to Blue Pool.⁴ "The right to ask is not equivalent to the right to enforce." *Moss Springs Cemetery Association v. Johannes*, 970 S.W.2d at 376 (rejecting argument that plaintiff had a legally enforceable right to use an easement held by the Highway Department).

⁴ The deed creating this easement restricts the electric company's use to activities associated with surveying, constructing, erecting, operating, inspecting, maintaining or relocating its facilities "for the purpose of transmitting electric energy or other power, and telephone and telegraph messages...." (Defendants' Exhibit B) This deed language does not give the electric company the right to build a road for a general right-of-way.

For these reasons, the trial court's decision to reject Blue Pool's statutory private road claim must be reversed. The case should be remanded for a determination of the location of the road, as well as the related issues of the width of the road, the parties' respective rights to its use and enjoyment, and an allocation of the costs to build or maintain it.

II

THE TRIAL COURT ERRED IN REJECTING BLUE POOL'S CLAIM FOR A PRESCRIPTIVE EASEMENT BECAUSE THE TRIAL COURT MISAPPLIED THE LAW AND THE DECISION WAS AGAINST THE WEIGHT OF THE EVIDENCE IN THAT THE TRIAL COURT SHOULD NOT HAVE CONSIDERED WHETHER BLUE POOL'S PREDESSOR IN TITLE, JULIA LAMY, HAD EXCLUSIVE USE OF THE UPPER OR LOWER ROADS; AND BECAUSE THE USE OF THE ROADS BY MRS. LAMY'S GRANDMOTHER AFTER THE JONCA ORE TRANSACTION WAS NOT SHOWN TO BE PERMISSIVE IN ORIGIN, THE TRIAL COURT SHOULD HAVE SHIFTED THE BURDEN TO THE DEFENDANTS TO PROVE THAT THE USE BY BLUE POOL'S PREDECESSORS IN TITLE WAS PERMISSIVE AND NOT ADVERSE; BUT INSTEAD, THE TRIAL COURT IMPROPERLY IMPOSED THE BURDEN ON BLUE POOL TO PROVE THIS ELEMENT OF ITS PRESCRIPTIVE EASEMENT CLAIM BY CLEAR AND CONVINCING

EVIDENCE; THAT IF THE BURDEN HAD BEEN ALLOCATED PROPERLY, BLUE POOL PRESENTED A SUBMISSIBLE CASE FROM WHICH THE TRIAL COURT SHOULD HAVE FOUND THERE WAS NO FORMAL AGREEMENT PERMITTING THE USE OF THE LOWER ROAD BY MRS. LAMY OR HER LICENSEES, AND THAT THEIR USE OF THE ROAD WAS ADVERSE IN THAT IT CONTINUED WITHOUT RECOGNITION OF THE RIGHT OF THE NEIGHBORING PROPERTY OWNERS OR TENANT TO PERMIT OR PROHIBIT SUCH USE.

In its second point, Blue Pool challenges the trial court's decision to reject Blue Pools' claim for a prescriptive easement. The trial court misapplied the law in reaching this decision. First, the trial court improperly considered evidence that the use of the upper and lower roads by Blue Pool's predecessor, Julia Lamy, was not exclusive. Second, the trial court erred in imposing the burden on Blue Pool to prove by clear and convincing evidence that the use by Blue Pool's predecessors was adverse and not permissive. Because the use of the roads by Mrs. Lamy's grandmother after the Jonca Ore transaction was not shown to be permissive in origin, the trial court should have shifted the burden to defendants to prove that the prior use was permissive. These errors were prejudicial because Blue Pool made a submissible case from which the trial court should have found in its favor on the prescriptive easement claim. There was no evidence of any formal agreement permitting the use of the roads by Mrs. Lamy or her licensees. And this use was

adverse in that it continued for many years without recognition of the right of the neighbors or their tenant to permit or prohibit such use.

A. Standard of Review

The trial court's decision to deny the prescriptive easement is reviewed under the same standard as the private road issue. The decision of the trial court should not be reversed "unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law." *Smith v. Chamblin Properties, LLC*, 201 S.W.3d 582, 587 (Mo.App. W.D. 2006) (award of prescriptive easement affirmed, but rejection of counterclaim for mutual prescriptive easement reversed). An appellate court will reverse the judgment under this standard if the trial court makes an error of law. *Spier v. Brewer*, 958 S.W.2d 83, 86 (Mo.App. E.D. 1997) (trial court erred as matter of law in denying prescriptive easement against defaulting defendants); *see also, Whittom v. Alexander-Richardson Partnership*, 851 S.W.504, 509 (Mo. banc 1993) (trial court erred in forcing plaintiff to elect between claims for prescriptive easement and common law dedication). The trial court's rejection of a prescriptive easement claim also will be reversed if the judgment is against the weight of the evidence. *McDougall v. Castelli*, 501 S.W.2d 855, 859 (Mo.App. St.L.D. 1973).

B. The elements for a prescriptive easement

For a plaintiff to establish a prescriptive easement, the plaintiff must show use that there has been continuous, uninterrupted, visible and adverse for a period

of ten years. *Harmon v. Hamilton*, 903 S.W.2d 610, 612 (Mo.App.S.D. 1995). Ordinarily, the plaintiff must prove the existence of an easement by prescription by clear and convincing evidence. *Id.* at 613. But a long and continuous use justifies the presumption of adversity and shifts the burden to the owner to counter the presumption by proving that permission was given for the use. *Smith v. Chamblin Properties, LLC*, 201 S.W.3d 582, 587-588 (Mo.App.W.D. 2006).

The “adversity” element does not require a showing of hostility in the sense of belligerency. *Whittom v. Alexander-Richardson Partnership*, 851 S.W.2d 504 at 509. Nor does it require use under a belief or claim of right that is legally justified. *Id.* at 508.⁵ All that is required for the use to be adverse is non-recognition of the owner’s authority to permit or prohibit the continued use of the land. *Id.* A finding of adversity under this standard often is inferred and not directly proved. *Smith v. Chamblin Properties, LLC*, 201 S.W.3d at 587. And for use to be continuous, it is not necessary that it be constant. What is necessary is that there is be no break in the essential attitude of the mind required for adverse use. *Whittom*, 851 S.W.2d at 508.

⁵ By clarifying this point, the Supreme Court in *Whittom* removed an oft-stated requirement that the use must be under a “claim of right.” This has been described as “one of the more exasperating elements of prescriptive easement claims.” T. Tyniecki, “Elements--adverse,” 18A Mo.Prac., Real Estate Law—Transact. & Disputes §67.3 (3d ed. 2006).

C. The trial court misapplied the law in requiring Blue Pool’s predecessor to have had exclusive use of the roadway.”

In this appeal, Blue Pool was seeking a prescriptive easement from the continuous, uninterrupted, visible and adverse use of the roadway leading to the Blue Pool property. (L.F. 18-25) In rejecting this claim, the trial court found it significant that Blue Pool’s predecessor, Julia Lamy, “did not have exclusive use of said roadway.” (L.F. 44) But the Missouri Supreme Court has stated that “[i]t is not required that the adverse use be exclusive.” *Whittom*, 851 S.W.2d at 508; *Accord, Smith v. Chamblin Properties, LLC*, 201 S.W.3d at 588. The trial court erred as a matter of law in considering this “exclusivity” factor as part of its decision.

D. The trial court misapplied the law in imposing the burden of proof on Blue Pool to show by clear and convincing evidence that the predecessor’s use was adverse.

Proof of an open, notorious, continuous and uninterrupted use of a roadway for the required period of ten years, without evidence to explain how it began, raises a presumption that it was adverse. *McDougall v. Castelli*, 501 S.W.2d 855, 858 (Mo.App. St.L.D. 1973) Such proof casts upon the owner of the servient tenements, here Mrs. Horton and Mrs. Basler, the burden of showing that the use was permissive by virtue of some license, indulgence or agreement. *Id.*; *Accord, Kohllepel v. Owens*, 613 S.W.2d 168, 174 (Mo.App. W.D. 1981) (burden shifts to landowner in the absence of some showing that the use was permissive in origin);

see also, Harmon v. Hamilton, 903 S.W.2d 610, 613 (Mo.App. S.D. 1995); *Smith v. Chamblin Properties, LLC*, 201 S.W.3d 582, 587-588 (Mo.App.W.D. 2006) (long and continuous use creates presumption of adversity and casts burden on neighboring landowner to show permissiveness). This presumption of adversity realistically tempers the ordinary rule that the plaintiff must prove all the elements of a prescriptive easement by clear and convincing evidence. *Kohlleppel v. Owens*, 613 S.W.2d at 174.

The trial court tried to avoid the presumption here by finding that the use of the roadway by Blue Pool and its predecessor “was permissive in origin and remained permissive.” (L.F. 44) But there was no evidence to support this finding about the original permissive use of the roadway. And because this finding was not supported by substantial evidence, the trial court erred in requiring Blue Pool to prove adversity by clear and convincing evidence. (L.F. 44)

Blue Pool presented evidence of an open and continuous use of the lower road by Mrs. Lamy’s family dating back to the 1928 Jonca Ore transaction. (Tr. 118-119) (Tr. 197) Mrs. Lamy understood there was a residence on the Blue Pool property at the time her grandmother acquired it in that transaction. (Tr. 115) Indeed, Mrs. Lamy identified a document reflecting the existence of two residences on the Jonca Ore property in 1919. (Tr. 169-171) (Plaintiff’s Exhibit 32) The seller in that document offered to sell the property, but reserved its minerals rights with “ingress and egress.” (Plaintiff’s Exhibit 32) This statement is significant because it suggests the existence of a means of ingress and egress to

the two residences when the property was owned by the Jonca Ore partnership. And Mrs. Lamy testified that as far back as 1928, the Blue Pool residence was accessed by the lower road. (Tr. 118-119) (Tr. 197) Mrs. Lamy personally started using the lower road to access the Blue Pool property with her grandmother in the mid-1940s. (Tr. 119-120)

The defendants cannot argue that the trial court's finding about the original permissive use of the road was supported by Patsy Bequette's testimony. Mrs. Bequette testified that her father, Mack Horton, had a cordial relationship with the Walsh family when they used the road in the 1940s. (Tr. 271) But Mrs. Bequette never testified that Mack Horton entered into any formal license or agreement with Mrs. Lamy's grandmother to give her permission to use the lower road. And Mack Horton's acquiescence to the Walsh family's use of the road is not the same as his permission for adversity purposes. *Smith v. Chamblin Properties, LLC*, 201 S.W.3d at 588 (affirming trial court's finding that use was by acquiescence and not permission). Assuming *arguendo* that Mrs. Bequette's testimony about her father's acquiescence could be used to show permission, Mrs. Bequette offered no explanation of how the Walsh family's use of the road originally began. Because of this omission, Blue Pool was entitled to the presumption under the law that the original use was adverse.

E. But for the trial court's errors, Blue Pool made a submissible case from which the trial court should have found the existence of a valid prescriptive easement.

Blue Pool suffered prejudice from the trial court's errors, first, in improperly considering whether Mrs. Lamy's use was "exclusive," and second, in misallocating the burden of proof on the adversity issue. But for these errors, Blue Pool presented a submissible case from which the trial court should have found the existence of a valid prescriptive easement.

In rejecting Blue Pool's claim, the trial court agreed with Blue Pool's contention about the existence of a roadway accessing Blue Pool's property which crossed the respective property of the defendants. (L.F. 44) The trial court also found that Blue Pool's predecessor, Mrs. Lamy, used the roadway for many years to access the property. (L.F. 44) Indeed, the evidence showed that Mrs. Lamy and her hunting group licensees continuously used the upper and lower roads to access the Blue Pool property for many years beyond the ten-year prescriptive easement period. (Tr. 66, 75-76, 96, 101, 128-129, 250) Leaving aside the irrelevant consideration of whether Mrs. Lamy had exclusive use of the upper or lower roads, the sole question is whether the use by Mrs. Lamy and her licensees was adverse or permissive.

If the trial court had allocated the burden of proof properly, Blue Pool presented sufficient evidence to prevail on the adversity issue. All that is required for the use to be adverse is non-recognition of the owner's authority to permit or

prohibit the continued use of the land. *Whittom v. Alexander-Richardson Partnership*, 851 S.W.2d at 509. The defendants produced no formal license or agreement with Mrs. Lamy or with any of her family members giving them express permission to use the upper or lower roads. And Mrs. Lamy and her licensees used the roads (mostly the lower road) without any recognition of the right of the neighboring property owners or their farming tenant to permit or prohibit such use. (Tr. 66, 75-76, 96, 101, 128-129, 250) Mrs. Lamy treated it as her road when she put a cable at the entrance to the Blue Pool property. (Tr. 398) And Mrs. Lamy's hunting group licensees showed a similar state of mind when they repaired the road on Mrs. Lamy's behalf. (Tr. 65, 77, 103-104, 258) Even Mack Horton treated the road as Mrs. Lamy's easement when he charged her for repairing it back in 1971. (Tr. 150) (Plaintiff's Exhibit 9)

In evaluating whether neighboring landowners rebutted the presumption of adversity in other cases, courts have treated the same kind of conduct shown here as evidence of adverse use. *Gill Grain Company v. Poos*, 707 S.W.2d 434, 438 (Mo.App. W.D.1986) (user maintained roadway by mowing the grass); *Johnston v. Bates*, 778 S.W.2d 357, 363 (Mo.App. E.D. 1989) (user cabled off road and shared padlock keys with the defendants); *Smith v. Chamblin Properties, LLC*, 201 S.W.3d at 588 (neighbor acquiesced by not seeking legal aid to stop use of land within time period). The open and continuous use of the road by Mrs. Lamy and her licensees showed no break in the essential attitude of the mind required for

adverse use. *Whittom*, 851 S.W.2d at 508. Mrs. Lamy did not believe that this was an issue because, as she put it: "...[W]e'd always used the road." (Tr. 186)

The defendants may argue that they rebutted any presumption of adversity by showing that Jim and Mack Horton had a cordial relationship with Mrs. Lamy and her family back in the days when they used the road. (See, e.g, Tr. 120, 271) And the defendants may try to support this claim with the correspondence produced by Mrs. Lamy to show that Jim, and later Mack, helped do odd jobs to take care of the Blue Pool property. (Tr. 151-166) (Plaintiff's Exhibits 8, 9, 17-27) But as previously mentioned, this evidence of Jim and Mack's acquiescence to the Walsh family's use of the road is the not same as permission for adversity purposes. *Smith v. Chamblin Properties, LLC*, 201 S.W.3d at 588.

Even if Jim and Mack Horton's conduct is construed by this Court as evidence of permission, defendants produced no evidence that such permission continued after both of these prior landowners had died. *See, Roberts Pallet Co., Inc. v. Molvar*, 955 S.W.2d 586, 588 (Mo.App. S.D. 1997) (original permission to construct and use roadway did not extend to successors in interest). Mrs. Horton admitted that she never spoke with Mrs. Lamy until a phone conversation in 2004. (Tr. 283) And her husband, Bill, only met with Mrs. Lamy once in the early 1970s. (Tr. 283) Mrs. Horton did not present any evidence about the substance of this one meeting. (Tr. 283) Similarly, Mrs. Basler testified that she never saw Mrs. Lamy use the road and that she never talked with the woman until 2004. (Tr. 296) Eugene Gegg, the Horton farm tenant, testified that he never saw Mrs. Lamy

on the property. (Tr. 222) And Mr. Gegg considered any hunters using the lower road, including the Lamy hunting group, to be “trespassers.” (Tr. 222-223)

Although Dennis Huck felt that the Lamy hunting group had a good relationship with Gegg, the evidence on this point is, at best, mixed and hardly sufficient to rebut the presumption of adversity. (Tr. 309)

For these reasons, the trial court’s decision to reject Blue Pool’s prescriptive easement claim was contrary to law and against the weight of the evidence. At a minimum this Court should remand the prescriptive easement claim for reconsideration based on a proper allocation of the burden of proof on the adversity issue and a removal of the “exclusivity” factor from the trial court’s determination.

CONCLUSION

Blue Pool requests this Court to reverse the judgment on both the private road and prescriptive easement claims. If Blue Pool is successful in overturning the judgment on either claim, Blue Pool also requests this Court to vacate the injunction granted in favor Mrs. Horton and to remand the case with appropriate instructions consistent with this Court's decision.

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Attorneys for Appellant

CERTIFICATE UNDER RULE 84.06(c)

I, Daniel R. Schramm, hereby certify that I am one of the attorneys for Appellant Blue Pool Farms, LLC, and that the foregoing Brief of Appellant:

- (1) Includes the information required by Rule 55.03;
- (2) Complies with the limitations contained in Rule 84.06(b); and
- (3) Contains 10,536 words.

The undersigned further certifies that the disk submitted with this Brief has been scanned for viruses and is virus-free.

/s/ Daniel R. Schramm
Daniel R. Schramm

CERTIFICATE OF SERVICE

I, Daniel R. Schramm, hereby certify that I am one of the attorneys for Appellant Blue Pool Farms, LLC, and that on the 17th day of August, 2007, I caused one copy of the aforesaid Brief of Appellant and a copy of the disk for the brief to be served upon counsel for the Respondents by depositing the same in the United States mail, postage prepaid, addressed as follows:

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Farmington, Missouri 63640

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/s/ Daniel R. Schramm
Daniel R. Schramm

APPENDIX OF APPELLANT BLUE POOL FARMS, LLC

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In the Circuit Court of Ste. Genevieve County

State of Missouri

| | | |
|----------------------------------|---|------------------------|
| BLUE POOL FARM, LLC, |) | |
| A Missouri Limited Liability Co |) | |
| |) | |
| Plaintiff, |) | Cause No. 05SG-CC00087 |
| |) | |
| vs |) | |
| |) | |
| RUTH BASLER, Trustee of Revoc- |) | |
| Able Living Trust of Ruth Basler |) | |
| Dated May 11, 1998 |) | |
| |) | |
| and |) | |
| |) | |
| ANTJE HORTON |) | |
| |) | |
| Defendants. |) | |

Judgment Entry

Comes now the Court, having taken the within cause under advisement after full hearing on September 20, 2006, after view of the subject premises and after receipt of the memorandums of the respective parties herein and enters judgment herein on Plaintiffs' claims and Defendant's Horton's counterclaim.

Based upon all the evidence, the Court finds as follows:

1. That Plaintiff is the owner of real property in Ste. Genevieve as described in Plaintiffs' petition.
2. That Defendants each own real property in Ste. Genevieve as described in the pleadings herein.

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 C. STEINER
 CIRCUIT CLERK
 STE. GENEVIEVE COUNTY

3. That there is an existing roadway accessing Plaintiffs' property as described in Plaintiffs' Exhibit 37, and said roadway crosses the respective property of Defendants.
4. That Plaintiff obtained said property in 2006.
5. That Plaintiffs' predecessor used said existing roadway for many years to access said property.
6. That Plaintiffs use and Plaintiffs predecessor's use of said roadway was permissive in origin and remained permissive.
7. That Plaintiffs' predecessor did not have exclusive use of said roadway.
8. That the standard of proof to establish a prescriptive easement is clear and convincing evidence.
9. That the Court fails to find clear and convincing evidence that Plaintiffs predecessors use was continuous, uninterrupted and adverse.
10. That there was no common owner or source of title of the respective properties now owned by Plaintiff and Defendants.
11. That the properties owned by Defendants are not "wild land" for prescriptive easement purposes.
12. That there is no common law easement of necessity, exclusive of easement by implication.
13. That the standard of proof to establish a private road of strict necessity, the Plaintiff must show that no public road goes through or along side the property and that the roadway is a way of strict necessity.

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CIRCUIT CLERK
STE. GENEVIEVE COUNTY

14. That Plaintiff failed to produce evidence except Plaintiff's managers testimony that this proposed roadway was the only way to access the property; in addition, there was testimony by Defendants current tenant and from the hunters of accessing by a different way.

15. That Plaintiff failed to present clear and convincing evidence that Plaintiff did not have reasonable legal access to the property.

16. That the Plaintiffs use of the existing roadway or on easement thereupon would have significant impact as to the use and value of Defendant Horton's property.

17. That Plaintiffs continued use of the roadway herein constitutes trespass upon the property of Defendant Horton and that said Defendant lacks an adequate remedy at law.

Based upon the foregoing findings, the Court finds the issues herein in favor of Defendants as to Count I, II and III of Plaintiffs' petition and, therefore, enters judgment on all counts in favor of Defendants.

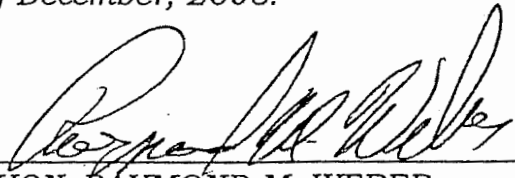
The Court further finds in favor of Defendant, Antje Horton, on her counterclaim and hereby enters judgment and orders and decrees that Plaintiff, its members, agents, employees, invitees and other representatives are expressly and permanently enjoined against entering or traveling upon the property of Defendant, Antje Horton located in Ste. Genevieve County and specifically set forth in Paragraph 14 of Plaintiffs' First Amended Petition.

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The Court further orders that the court costs incurred herein be
taxed to Plaintiff.

SO ORDERED this 6th day of December, 2006.



HON. RAYMOND M. WEBER
JUDGE

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CLERK
CIRCUIT CLERK
STE. GENEVIEVE COUNTY

IN THE CIRCUIT COURT OF STE. GENEVIEVE COUNTY, MISSOURI,
AT STE. GENEVIEVE

BLUE POOL FARMS, LLC,
A Missouri Limited Liability Company

Plaintiff,

vs.

Case No. 05SG-CC00087

RUTH BASLER, Trustee of Revocable Living
Trust of Ruth Basler dated May 11, 1998

and

ANTJE HORTON

Defendants.

**MOTION TO AMEND JUDGMENT, MOTION TO SET ASIDE JUDGMENT,
MOTION FOR NEW TRIAL, MOTION TO INTRODUCE ADDITIONAL EVIDENCE, AND
MOTION TO SET SUPERSEDEAS BOND ON APPEAL**

Comes now Plaintiff, Blue Pool Farms, LLC, by its counsel and hereby moves this Court to amend its Judgment, set aside its Judgment, to set the case for a new trial, to introduce additional evidence, and finally to set a supersedeas bond on appeal, and in support thereof states to the Court as follows:

1. The Court in its Judgment, paragraph 6, stated that the Plaintiff's and its predecessors "use of said roadway was permissive in origin and remained permissive". Said finding is an improper declaration of the evidence, is against the weight of evidence, there is no evidence to support it, and is a misdeclaration of law. In fact, the uncontradicted evidence at trial indicates that the road was used as a roadway to access the property from the 1920s on forward. Missouri case law specifically establishes that in the event a roadway is being used for a period in excess of 10 years, it is presumed that the use is adverse and not permissive, and that the burden of proof shifts to the Defense to prove permissiveness. See, McDougall v. Castelli, 501 S.W. 2d 855, 858 (Mo.App. E.D. 1973), Kohlleppel v. Owens, 613 S.W.

2d 168,174 (Mo.App. 1981). In truth and in fact, there was no evidence adduced by either Defendant that the use of the property was permissive. Accordingly, there is no evidence at all to support the Court's findings.

2. That the Court in paragraph 7 found that Plaintiff's predecessor did not have exclusive use of said roadway. Said finding is against the weight of evidence, is contrary to the evidence, and contrary to law in that there is no requirement under a prescriptive easement finding that there be an exclusive use of said roadway. See, Harmon v. Hamilton, 903 S.W. 2d 610, 612-13 (Mo.App. 1998).

"To establish a prescriptive easement, it is necessary to show use that has been continuous, uninterrupted, visible and adverse for a period of ten years. . . . To be adverse the use does not need to be under a belief or claim of right that is legally justified. . . . All that is required for the use to be adverse is non-recognition of the owner's authority to permit or prohibit the continued use of the land. . . . For use to be continuous it is not necessary that it be constant. What is necessary, however, is that there be no break in the essential attitude of the mind required for adverse use. [Citation omitted.] Whether the use of the land establishes a prescriptive easement is a fact question to be inferred from the circumstances and the nature and character of the use."

3. In paragraph 9, the Court claims it failed to find clear and convincing evidence of Plaintiff's predecessors' use for the road was continuous, uninterrupted, and adverse. As indicated above, the Harmon court indicates that use need not be constant, merely, that there be no break in the state of mind. In any event, the continuous and uninterrupted use was uncontested at trial. There was no evidence to the contrary that the use was uninterrupted and continuous for a period in excess of 70 years. And again, there is a presumption that the use of the roadway in excess of 10 years is adverse and nonpermissive.

4. That contrary to the Judgment's paragraph 13, the correct standard of proof to establish a private road of strict necessity is a three prong test:

- A. The Plaintiff owns the land.
- B. No public road goes through or along side the tract of land.
- C. The private road throughway petitioned for is a way of strict necessity.

Strict necessity is defined as the lack of a legally enforceable right to use a practical way to and from a person's land, either private or public. See, Anderson v. Mantel, 49 S.W.3d 760 (Mo.App. SD 2001). See, Moss Springs Cemetery Association v. Johannes, 970 SW 2d 372 (Mo.App. 1998).

The Court's finding in paragraph 14 states that there was no evidence to support those proofs, are contrary to evidence, contrary to weight of evidence, was in fact uncontested, and the Court's finding is contrary to the law and the evidence in that:

- 1) The Plaintiff's ownership of the real estate was uncontested.
- 2) That the uncontroverted evidence by Mrs. Lamy, who testified by deposition, by surveyor, Jerry Bader, who testified in person, and by Dale Port, one of the owners of the Plaintiff, was that there is no other public road going through or along side the tract of land. Further, these witnesses testified that there was no other easement or way to access the property. There was introduced into evidence aerial photographs, plats, surveys, and reassessment maps, all of which clearly stated no other roads.
- 3) While the Plaintiff did assert that the prescriptive easement roadway was its access to Plaintiff's property, this Court has held that Plaintiff has no right to said road. Accordingly, there is no other legal access, and the need is one of "strict necessity".

5. After Plaintiff's case, the Defendants adduced no evidence in rebuttal that there in fact was any other legal access to Plaintiff's real estate. See, Spier v. Brewer, 958 S.W.2d 83 (Mo.App. E.D. 1997), which specifically held that a "road" that was referred to in testimony in Defendants' case as being used to access the subject property was insufficient to defeat a private roadway by necessity claim, in the absence of showing that the record was a "legal access". "Nothing in the record would support a finding that Plaintiff has a legally enforceable right to use the road. An alternative route which is merely permissive does not provide any legally enforceable right to ingress and egress." Id at 87, citing Hill v. Kennoy, Inc., 522 S.W.2d 775, 779 (Mo.Bank 1975). Also, note that the Spier case specifically directed the trial Court to enter an order to declare a private road over the roadway that was found not to be a prescriptive easement. A copy of the Spier case is attached hereto.

So too here, the only evidence to support this Court's finding of other access, was some testimony about a utility easement of some unknown area, going over and across various other people's property, and a statement that one hunter or a neighbor had come over and across the fields. Neither one of those statements indicate a legally enforceable right for Plaintiff to access the property. The use of the utility easement is not a roadway. It is a highline only, and is used for electric uses. The Defendants did not produce for the Court any evidence of any recordable enforceable right to use a roadway to access the Plaintiff's property. The access must be legal. The lack of a legally enforceable right to use a practical way to and from a person's land, either private or public results in the proof for a private road. See, Anderson v. Mantel, 49 S.W.3d 760 (Mo.App. SD 2001).

6. In paragraph 15, the Court asserts the Plaintiff failed to present clear and convincing evidence that Plaintiff did not have reasonable legal access to the property. The argument set forth in paragraphs 5 & 6 above also applies here. This finding is contrary to the weight of the evidence, and in fact is contrary to all of the evidence, and there is no evidence to support this finding of the Court. Furthermore, there is no requirement of clear and convincing evidence. The evidence presented by the Plaintiff was that there was no access to any roadway from the property, and that the property did not adjoin any legal access to the property. That is sufficient proof by law. What more proof could there have been?

This Court in its Judgment says that Plaintiff has failed its burden of proof. Yet the Court has not specified what it is that the Plaintiff failed to prove. The Plaintiff has adduced evidence that it owns the property, it has no legal access to the property, and that absent the use of the roadway that they sued upon for prescriptive easement, the necessity is one of strict necessity. The Defendants adduced no evidence to the contrary. This Plaintiff is unable to fathom what other evidence this Court requires. Is the Court requiring proof of the negative? How can one prove there is no legal access other than to say

so? However, this Plaintiff after thorough search of all the case law concerning private roads, has yet to find one single case that the testimony by the owner is not sufficient to satisfy its burden of proof. In essence, that is what this Court is holding, and such a holding is not permitted by law.

However, since the trial was heard on this case, the Plaintiff has had a survey performed of the outer boundary areas of the subject property, and testimony can be adduced by Zahner & Associates, Inc., the surveyor who performed that survey, that in fact the property does not adjoin any public or private access to the property. In addition, if the Court really requires it, there can be additional testimony adduced by the assessor's office of Ste. Genevieve County and by the title company that there is no recorded easement. Accordingly, Plaintiff moves the Court to reopen the matter for introduction of additional evidence.

7. This Court held in paragraph 17 of its Judgment, that the Plaintiff's continued use of the roadway constitutes trespass upon Defendant Horton. That finding is also contrary to the evidence, against the weight of evidence, and it is a misdeclaration of law. Before there can be a trespass, there must be proof of non-permissive use. This Court has specifically held in the Judgment that the prescriptive easement roadway claim was defeated because the use of the same was permissive. If in fact the use was permissive, there is not one single iota of evidence introduced into evidence wherein it was indicated that the Plaintiff's use of the roadway "by permission" had been terminated. Accordingly, this Court is without jurisdiction to enter injunctive relief against the Plaintiff, and the Courts Judgment is inherently contradictory.

8. In the event that this Court erroneously overrules this Motion and intends to maintain the Judgment, this Court has truly made this property land locked, Plaintiff has no other access. The Plaintiff must therefore appeal this Judgment. For Plaintiff to have access to the property during the duration of this appeal, this Court must and should enter its order setting a reasonable supersedeas bond on appeal


so that appellate determination of the viability of this Court's decisions can be ascertained.

WHEREFORE, for the foregoing reason the Plaintiff prays the Court set aside judgment, to amend its Judgment, to set the matter for a new trial, for leave to introduce additional evidence, and to set a supersedeas bond on appeal.

Respectfully submitted,

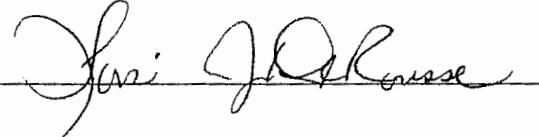
ELPERS & INMAN, P.C.
601 Market Street
P.O. Box 404
Ste. Genevieve, MO 63670
(573) 883-5000

By:


FRANK J. ELPERS #29972
Attorney for Petitioner

PROOF OF SERVICE

The undersigned certifies that a complete copy of this instrument was mailed to the attorneys of each party to the above action, addressed to said attorneys at their business address, on the 19th day of December, 2006.



STATE OF MISSOURI)
) SS.
COUNTY OF STE. GENEVIEVE)

IN THE CIRCUIT COURT OF THE COUNTY OF STE. GENEVIEVE

STATE OF MISSOURI

BLUE POOL FARMS, LLC,)
A Missouri Limited Liability Co)

PLAINTIFF,)

vs.)

RUTH BASLER, Trusee of Revoc-)
Able Living Trust of Ruth Basler)
Dated May 11, 1998)

And)

ANTJE HORTON,)

DEFENDANTS.)

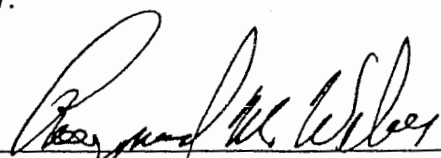
CASE NO. 05SG-CC00087

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MAR 14 2007
CAROL A. STEIGER
CIRCUIT CLERK
STE. GENEVIEVE COUNTY

JUDGMENT ENTRY

Comes now the Court having taken Plaintiffs' motion to amend judgment, motion to set aside judgment, motion for new trial, motion to introduce additional evidence and motion to set supersedeas bond on appeal, under advisement after hearing oral argument thereupon on December 27, 2006 and enters judgment thereupon. Upon full review the Court does deny each of Plaintiffs' motions, to set aside judgment, to amend judgment, for new trial, to introduce additional evidence and to set supersedeas bond on appeal.

So ordered this 14th day of March, 2007.


RAYMOND M. WEBER
JUDGE

Westlaw.

Page 1

V.A.M.S. 228.342

C

VERNON'S ANNOTATED MISSOURI STATUTES
TITLE XIV. ROADS AND WATERWAYS
CHAPTER 228. ESTABLISHMENT AND VACATION OF ROADS
PRIVATE ROADS

→228.342. Establishment or widening--grounds for--petition--proceeding-- property owner as defendant

A private road may be established or widened in favor of any owner or owners of real property for which there is no access, or insufficiently wide access, from such property to a public road if the private road sought to be established or widened is a way of strict necessity. As used in this section, the term "strict necessity" shall include the necessity to establish or widen a private road in order to utilize the property for the uses permitted by law. Any petition for the establishment or widening of a private road shall be filed and the proceeding shall be conducted in the circuit court of the county where the proposed road is to be located. The owners of the real property over which the proposed private road shall pass shall be named as defendants.

Statutes are current with emergency legislation approved through July 13, 2007, of the 2007, First Regular Session of the 94th General Assembly, Constitution is current through the November 7, 2006 General Election.

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