SC91898

IN THE SUPREME COURT OF MISSOURI

ROBERT L. BATEMAN, *et alia*,
Respondents,

JAMES K. OWENS, *et alia*,
Appellants,

vs.

PLATTE COUNTY, MISSOURI,
Respondent.

On Appeal from the Circuit Court of Platte County
Honorable Abe Shaffer, IV, Circuit Judge
Case No. 06AE-CV02075

SUBSTITUTE BRIEF OF THE RESPONDENTS

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Preliminary Statement

Bridle Parc Lane ("BP Lane") is a road in Platte County running from Mace Road through the Bridle Parc Estates ("BP I") subdivision and into the Bridle Parc Estates II ("BP II") subdivision, where it dead-ends. It originates in three continuous easements the pre-plat owners of BP I granted in 1980 to Yiddy Bloom, the pre-plat owner of BP II, who had no access to his land. The easements give Mr. Bloom and his successors, the BP II owners, the exclusive right to construct and maintain an access road to Mace Road.

Neither Mr. Bloom nor his successors ever relinquished the easements. The easements always have been attached to and/or referenced in all deeds to all relevant properties in BP I and BP II. The County's records always have referred to BP Lane as a "private street." The BP I owners over whose land it runs pay property tax on that land. The public never has used BP Lane, nor has any public authority ever maintained it.

In 2006, a developer who was attempting to plat a new subdivision out of some BP II tracts sought Platte County's approval to use BP Lane as a public thoroughfare. When BP II resident Robert Bateman objected and informed the County of the easements, the County told him it had determined BP Lane was a public road. Mr. Bateman then filed a declaratory action against the County to enforce the easements. The trial court agreed. It found the public never used BP Lane and held the easements are in effect. It declared BP Lane a private road. The developer and his allies, who had intervened, appeal.

Appellants argue Mr. Bateman's action violated the ten-year statute of limitations for "recovery of lands" in § 516.010. But this affirmative defense was not sufficiently raised below. In their answers, the defendants alleged Mr. Bateman's petition was

"barred by the statute of limitations," but did not invoke any specific statute. The first time they invoked § 516.010 was after trial. Moreover, § 516.010 cannot apply to this case because this is not an action for recovery of lands. And, even if it applied, it could not bar Mr. Bateman's petition. His action against Platte County was not ripe until the County determined in 2006 that BP Lane was a public road. He filed two months later.

Appellants also argue the trial court should have declared BP Lane a public road. They argue it was dedicated to the public by statute or at common law, or that the public acquired a prescriptive easement over it. But they never raised their statutory dedication argument before the trial court. As well, all these arguments must fail because the BP Lane easements never were lawfully relinquished and the public never used BP Lane.

The trial court did not err in declaring BP Lane a private road. This Court should affirm its judgment.

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Jurisdictional Statement

This is an appeal from a declaratory judgment enforcing easements and declaring that a road running along them is a private road.

This case does not fall within this Court's exclusive appellate jurisdiction under Mo. Const. art. V, § 3. Appellants timely appealed to the Missouri Court of Appeals, Western District. This case arose in Platte County. Under § 477.070, R.S.Mo., venue lay within that district of the Court of Appeals. The Court of Appeals designated this case as No. WD71053.

On May 31, 2011, the Court of Appeals issued an opinion reversing the trial court's judgment. Respondents filed a timely Motion for Rehearing and Application for Transfer in the Court of Appeals, both of which were denied. Respondents then filed a timely Application for Transfer in this Court pursuant to Rule 83.04. On August 30, 2011, the Court sustained that application and transferred this case.

Therefore, pursuant to Mo. Const. art. V, § 10, which gives this Court authority to transfer a case from the Court of Appeals "before or after opinion because of the general interest or importance of a question involved in the case, or for the purpose of reexamining the existing law, or pursuant to supreme court rule," this Court has jurisdiction.

Statement of Facts

A. History of Yiddy Bloom's easements, BP I, and BP II

In 1980, Yiddy Bloom owned a single tract of un-platted land in Platte County to the south of three separate tracts of land that he did not own (Legal File 180, 342-49; Plaintiffs' Exhibits 2A, 2B, 2C, 44). Mr. Bloom's land was inaccessible from the nearest road, Mace Road, which ran along the north side of one of the properties north of his (L.F. 342-49).

On September 16, 1980, in order for Mr. Bloom to be able to have access to his land from Mace Road, the owners of the three properties north of his granted him three continuous, parallel, 60-foot-wide easements extending from Mace Road through their property to his (L.F. 342-49; Plt. Ex. 2A, 2B, 2C, 44). The easements grant Mr. Bloom, "his successors and assigns,"

> a street and right of way easement over, along, across, and under the lands hereinafter described, together with easements in remaining lands on the abutting property along and adjacent to said street and right of way where requried [*sic*] for the location, construction and maintenance of an embankment or for sloping the sides of cuts back to construct and maintain said street at the established grade.

(Transcript 39; L.F. 342-49; Plt. Ex. 2A, 2B, 2C). Copies of the easements were introduced into evidence as Plaintiffs' Exhibits 2A, 2B, and 2C (Tr. 57; L.F. 342-49).

On December 28, 1981, the three properties over which Mr. Bloom's easements ran were platted as the Bridle Parc Estates ("BP I") subdivision (Tr. 113-14; L.F. 365).

BP I was bounded on the north by Mace Road and on the south by Mr. Bloom's property line (L.F. 365). The plat subdivided BP I into ten lots (L.F. 365).

The BP I plat showed a "street" down its middle tracking Mr. Bloom's easements; it stated, "The streets and roads shown on this plat, and not heretofore dedicated to public use are hereby so dedicated" (Tr. 118-19; L.F. 365; Dft. Ex. R; Plt. Ex. 7). Mr. Bloom did not sign the plat (L.F. 365).

Nearly three years later, on September 11, 1984, Platte County approved a plat for Mr. Bloom's property, subdividing it into six tracts called Bridle Parc Estates II ("BP II") (Tr. 116; L.F. 338). The plat showed a "street" running down the middle of BP II; it, too, stated, "The streets and roads shown on this plat, and not heretofore dedicated to public use are hereby so dedicated" (Tr. 119-20; L.F. 338). Mr. Bloom's signature does not appear on the BP II plat, either (L.F. 338).

On September 19 and 25, 1984, Mr. Bloom's interest in his property was transferred entirely to Robert Pease (Tr. 75; L.F. 357-61, 370-73). Mr. Bloom's street and right-of-way easements over the land in BP I were incorporated into the transfer (L.F. 360, 373). On September 28, 1984, Mr. Pease sold all the tracts that would comprise BP II (L.F. 354-55, 375-81, 383-85, 387-89, 391-93). The new owners signed the BP II plat on that date (L.F. 338).

B. The road along Mr. Bloom's easements after BP I and BP II were platted

Respondents Kathleen and William Gray bought lot 9 of BP I in February 1987 (Tr. 125). Mrs. Gray testified that, at the time, her house was the farthest south along Mr. Bloom's easements (Tr. 126). At that time, the road along the easements was merely "a

gravel road that was barely wider than one lane that basically went back to [her] house" (Tr. 125, 182). Mrs. Gray "had a gravel driveway at the time," which made the road "look like a long driveway out to Mace Road" (Tr. 125). The gravel road extended slightly beyond her property but then stopped (Tr. 125).

Respondents Michelle and Ross Piacenza bought lot 2 of BP I in October 1988 (Tr. 132-33). At the time, their property was the furthest south along the road (Tr. 133). In fact, the road initially did not physically extend to their property (Tr. 135). Instead, the Piacenzas had a construction company "put gravel down" along the easement "to be able to access" their property (Tr. 135).

At some point, the adjacent landowners began calling the gravel road "Bridle Parc Lane" ("BP Lane") (Tr. 125-26, 133, 135). They erected an "old" "painted" sign for BP Lane at its intersection with Mace Road (Tr. 192). In 2004, the landowners in BP II laid down asphalt millings over BP Lane (Tr. 181).

By the time of trial in 2008, BP Lane varied from 16 to 20 feet wide, containing "a lane and a half" (Tr. 182).

C. Maintenance of BP Lane

In 2004, the Platte County Commission passed Order 92-04, of which the trial court took judicial notice, requiring a permit for a private citizen to perform maintenance on any public road (Tr. 80, 84; Plt. Ex. 47).

In her more than 20 years living on lot 9 of BP I, Mrs. Gray "never" had "seen any government maintenance" of BP Lane (Tr. 127). Deborah Lofgren, who bought lot 6 of BP I in 2006, also stated no government agency maintained BP Lane (Tr. 30-31, 75).

Rather, only the "[p]eople that live on" the road maintain it (Tr. 31, 76, 122-23). Their maintenance includes "snow removal and mowing" (Tr. 31)

Respondent Robert Bateman, who bought a tract in BP II in 1999, personally has maintained parts of BP Lane (Tr. 113, 117; Plt. Ex. 3). He never had to obtain any permit to do so (Tr. 117). Instead, he was "acting within my easements that I have the right to locate that road, construct that road, maintain that road as I saw fit" (Tr. 121). He illustrated, "If we wanted to lower [the road] or raise it, I didn't have to come to Platte County and ask for their permission. We were in charge of it and it was made as we saw fit and we made improvements when we saw fit" (Tr. 121).

Appellant James Owens, a developer by trade who has lived in BP I or BP II for 17 years and who lived on tract 5 of BP II at the time of trial, also has engaged in maintenance of BP Lane (Tr. 33, 77, 177-78, 180-82). He, too, did so without any permit from the County (Tr. 77, 186). His maintenance work, which included cutting trees along BP Lane's roadway, grading, and snow removal, continued after the County passed its Order 92-04 in 2004 (Tr. 84). In fact, Mr. Owens donated the asphalt millings the BP II landowners used to pave BP Lane in 2004 (Tr. 181)

Despite all this, Mr. Owens opined the government does not maintain BP Lane only because the road is not "up to county standards" (Tr. 185-86).

D. Use of BP Lane

Mrs. Gray believed that, in 1987, there had been a "Christmas tree farm" south of her in BP II (Tr. 125). She thought people coming to the tree farm might have used BP

Lane to gain access to it (Tr. 126). Mr. Owens suggested this use consisted of "hundreds of cars" and required persistent re-gravelling of BP Lane (Tr. 182-83).

Mrs. Lofgren, however, explained that only "the people in BP II" ever use BP Lane (Tr. 31-32). They "have to" come through BP I on BP Lane because "[t]hey have no other way out" (Tr. 32). BP Lane "doesn't go anywhere" except "to the homes on the street" (Tr. 32).

Mrs. Lofgren never has seen the general public use BP Lane (Tr. 32). Rather, besides the residents of BP II along BP Lane, only their "invitees" use it, such as their moving vans to move them in or UPS drivers making deliveries to the homes (Tr. 32). No commercial enterprises or public parks are accessible via BP Lane (Tr. 32). There are no "busses, no Postal Service, no Avon lady, anything like that," using BP Lane (Tr. 35)

As such, "all" of the non-resident "traffic, other than utilities companies," are "invitees of anybody on the street" (Tr. 32). If a member of the public turned onto BP Lane who was not "going to somebody's house on" the road, "[t]hey'd have to turn around in somebody's driveway" (Tr. 32)

Mr. Owens disagreed; he averred the public did use BP Lane, including "police," "fire department," "UPS trucks, FedEx trucks," and people coming to home offices to do business (Tr. 183-85). He believes BP Lane is a public road because "everyone uses that road" (Tr. 188).

But Mr. Owens admitted even the U.S. Postal Service usually does not use BP Lane, delivering the adjacent landowners' mail instead to "a community box" on Mace Road (Tr. 184). He acknowledged even the mailman only comes to the houses along BP

Lane when there is "stuff he can't get in the [community] box" (Tr. 185). He said "Sunday drivers" also come to BP Lane who are "just lost" (Tr. 192). Mr. Owens admitted no member of the public goes through BP Lane "to anyplace" (Tr. 192).

Appellant Brent Owens, James Owens's brother who owns tract 4 in BP II, also said the public uses BP Lane (Tr. 200). He said there is "a ton" of "daily public traffic" on BP Lane, including people he knows "personally" and people he does not know (Tr. 201). Brent Owens said the police patrol the road and have ticketed his son for riding an all-terrain vehicle on it, though the case was dismissed (Tr. 201). He said there are "speed limit" signs along BP Lane (Tr. 201-02).

E. Owners' knowledge of the BP Lane easements

Though she did not know for sure when she bought her property in BP I in 1987, Mrs. Gray always had assumed there was an easement over the gravel road next to her property for the landowner in BP II south of her (Tr. 126-27). She later found just such an easement ran "over and past" her BP I property (Tr. 126-27).

A copy of Mr. Bloom's 1980 easement was attached to the deed Mrs. Piacenza received from her title company (Tr. 132-33; Plt. Ex. 49). When the Piacenzas bought their property, there had been "some concern about access to" it (Tr. 132-33; Plt. Ex. 49). That is, they were "concerned about being able to get out onto" BP Lane and wanted to ensure they "had an easement to be able to access Mace Road and get out" (Tr. 134). The previous owners told the Piacenzas the easement ran with the land; eventually the title company was satisfied with the easement (Tr. 132-34).

Mr. Bateman's 1999 BP II deed expressly references the easements over BP I "for ingress and egress as set forth in instruments filed" in 1980 (Tr. 72, 74, 87-88, 113; Plt. Ex. 3). In fact, Mr. Bateman found every deed "that had transferred property from the time [Mr. Bloom] owned it to the present owners," and all of them, just as his, reference the easements originally "granted to" Mr. Bloom for "a right of ingress and egress" (Tr. 74, 88-93).

At the time of her purchase in 2006, Mrs. Lofgren was "made aware" of "a road and utility easement that runs along [BP] Lane and we were told that [BP] Lane was a private road and it had the easement and that we would be expected to maintain and plow" (Tr. 30-31). On Mrs. Lofgren's title insurance policy, it states "Easement reserved over a portion of subject property as set forth in the instrument recorded in Book 593, Page 576" (Tr. 36-38). That easement corresponds to the "conveyance to" Mr. Bloom in 1980 that gives residents of BP II "a right to access over … that part of the private road … next to [Mrs. Lofgren's] property (Tr. 38-39).

Just as the other BP II owners, Mr. Owens also acquired Mr. Bloom's easements for BP Lane (Tr. 75-76). Mr. Bateman was able to determine from County records that, like Mr. Owens, all the landowners in the subject properties in BP II also had done so (Tr. 76). Mr. Owens admitted his warranty deed specifically had incorporated Mr. Bloom's 1980 "easement for ingress and egress" appurtenant to his BP II property (Tr. 195; Plt. Ex. 50).

The County's records, too, never have recorded BP Lane as being anything other than a private road (Tr. 81-84). The owners in BP I over whose land BP Lane runs

always have paid property taxes on the land containing BP Lane, which Platte County's tax records always expressly have called a "private street" (Tr. 81-84).

F. Expert review of the BP Lane easements' existence

At trial, three expert witnesses testified regarding the continued existence of the BP Lane easements over BP I: Steven Brulja, "a title examiner in the title insurance business" who testified for the plaintiffs (Tr. 63); Charles Coots, a licensed land surveyor who testified for the plaintiffs (Tr. 42); and Mindy Turner, legal counsel for a title insurance company, Stewart Title, who testified for the defendants (Tr. 147-48).

Mr. Coots reviewed the BP I and BP II plats but did not resurvey them (Tr. 42-43). Instead, he calculated the plats "to make sure [they were] mathematically sound" and plotted Mr. Bloom's easements on them (Tr. 42-43). He showed there are "three separate easements" over BP I creating the portion of BP Lane in BP I (Tr. 45). "[O]ne went the entire length of" BP I (Tr. 45). "[T]he other was divided into two different [original] owners … written separately so that they would encumber" those owners' rights (Tr. 45). A "10-foot strip" separated the one-owner easement from the other two, which Mr. Coots stated "in his professional opinion" was "a scrivener's error" (Tr. 45-47).

As Mr. Coots showed, the easements collectively are "a 60-foot-wide use strip" wherein the dominant estate is BP II and the servient estate is BP I (Tr. 47-48). They exist so "the people from BP II can get out" onto Mace Road (Tr. 48). They were "written for the advantage of the ownership to the south" in what later became BP II, and "when these lots were platted they were platted up to what would have been the easterly and westerly edges of these easements to allow for the access of the lots themselves to

Mace Road" (Tr. 54). The easements continue south "to the south line" of BP I "within a hundredth of a foot," and "do not extend into" BP II (Tr. 49, 51).

Mr. Brulja found Mr. Bloom's three "easements for the BP II landowners over BP I" in the Platte County land records (Tr. 65). Then, he investigated "whether those easements have been extinguished as a matter of record," and found they had not (Tr. 65-66). He "went to the Platte County Recorder of Deeds office and ran the grantor/grantee index under Yiddy Bloom's name and couldn't find anything that affected" the easements (Tr. 65). He then went to the Old Republic Title Company "and rand the land index" from "the easement description," including "the whole quarter section" of land containing BP I and its "adjoining lots" (Tr. 65). Mr. Brulja found "nothing that extinguished the three easements" in Exhibits 2A, 2B, or 2C (Tr. 65-66).

Ms. Turner also investigated the easements, though her expert opinion was limited to a title insurance standpoint; she admitted it would be outside her expertise as legal counsel for a title insurer "to testify to anything that doesn't have to do with title insurance" (Tr. 161). She reviewed the deeds by which the owners took title to the property subsequently platted as BP I and BP II, the plats of BP I and BP II themselves, and subsequent re-plats (Tr. 148-49). But she did not "do complete searches of every chain of title in the plats" (Tr. 150).

Instead, Ms. Turner was concerned whether there were some provision for access to the lots in BP II, which she said otherwise would have necessitated a title insurance exception for lack of access (Tr. 151). In such as case, "people would file claims under their title insurance" (Tr. 152). She acknowledged, though, that if there were no

"publicly dedicated roadway" on which to rely for access to BP II, an easement granting access through another property to Mace Road would suffice (Tr. 161).

On direct examination, Ms. Turner opined the 1980 easements "create an easement across portions of" BP I, but "don't benefit" the owners of lots in BP II (Tr. 151). She said the easements do not "grant any rights to the current owners" in BP II, because they do not "extend any way [*sic*] into" BP II (Tr. 150-51, 154). But, reviewing the easements themselves, she acknowledged that, in addition to "access," they also gave rights to "maintenance" and "construction" of BP Lane (Tr. 162).

On cross-examination, Ms. Turner ultimately admitted Mr. Bloom's 1980 easements do give "the people on" BP II an "easement over the land on" BP I "that is in existence and not extinguished" (Tr. 163-64). She acknowledged the easements existed before the plat of BP I and admitted they gave the BP II landowners "access to [BP I] to get out to Mace [Road] and to make improvements to the road and to change the grade if they wanted and for utilities" (Tr. 164). She agreed "nobody in [BP I] could close down that access" (Tr. 164). She also agreed the BP I landowners could not "[d]edicate their land for public right of way" so as to void the BP Lane easements (Tr. 169).

G. Platte County's 2006 declaration

In 2005, Mr. Owens attempted to have Platte County approve a preliminary plat of his tracts of BP II into a new subdivision called Brentwood Parc (Tr. 94-95, 207, 220; L.F. 226; Appx. A10). He also tried to re-plat his tract 5 as "Owens Estates" (Tr. 178).

In anticipation of constructing his new subdivision, Mr. Owens built a building on tract 5 comprising more than 10,000 square feet with some residential space and "five

bays of commercial truck storage" (Tr. 33, 191). It "looks like a business" (Tr. 33). At trial, he called it a "Morton building" (Tr. 191). While Mr. Owens initially lived in that building, he later "built a second house or a second building on" his tract (Tr. 33, 192). By the time of trial, there was "a commercial building sitting there that nobody lives in" (Tr. 33). Mr. Owens refused to admit it was a commercial building, but he did admit his salesmen come there and three of his employees "report to work" there (Tr. 191-92).

Upon learning of Mr. Owens's plans for Brentwood Parc, which would have "change[d] [BP Lane] from a private street to a public street" and allowed it to be used as a general public thoroughfare, Mr. Bateman brought the BP Lane easements to Platte County's attention (Tr. 94-96; L.F. 226; Appx. A10). He advised the County of "our easements and [the fact] I was willing to protect them" (Tr. 96). Mr. Bateman and his neighbors were "not interested in having through traffic on our private road and for years we have fought other developers other than Mr. Owens … [W]e don't want it changed from a private street to a public street" (Tr. 94-95).

On May 25, 2006, the County informed Mr. Bateman in writing that "It is the opinion of the County that Bridle Parc Lane is within public right-of-way" (Tr. 95-96; L.F. 226; Plt. Ex. 9; Appx. A10). The County suggested Mr. Bateman "and/or [his] attorney may choose to react" to further developments on the issue of the Brentwood Parc subdivision (Tr. 95-96; L.F. 226; Plt. Ex. 9; Appx. A10).

H. Proceedings below

React Mr. Bateman did. Less than two months later, on July 7, 2006, he filed a petition against the County in the Circuit Court of Platte County for declaratory and

injunctive relief, stating two counts (L.F. 9, 12). He sought the court to enforce the BP Lane easements, declare BP Lane is a private road, and enjoin the County from "seizing" the road (L.F. 12-22). At trial, the parties agreed this was "[s]imply a declaratory action for the Court to determine whether [the] right of way" easements "exist[] or not and whether the road is public or private" (Tr. 73). It was not an inverse condemnation seeking money damages (Tr. 72-73). The parties all told the court that the sufficiency or insufficiency of the BP I or BP II plats was not at issue (Tr. 85-87). Rather, they agreed the question was whether the 1980 easements were in effect (Tr. 85-87).

On January 3, 2007, the County moved to dismiss Mr. Bateman's action, arguing that, since "there are approximately 16 other property owners whose property adjoins" BP Lane and "whose legal rights would be effected [*sic*]" by the action, Mr. Bateman had failed "to join all necessary and indispensable parties" (L.F. 8, 28-29). The trial court denied that motion on March 2, 2007, but instead ordered Mr. Bateman and the County to notify all property owners adjoining BP Lane about the action and that those owners would have right to intervene on either side (L.F. 7, 73).

Thereafter, ten landowners intervened as plaintiffs joining Mr. Bateman: Randy and Chris Stewart; Mrs. Piacenza and her husband, Ross; Mrs. Gray and her husband, Bill; David and Karen Bales; and Keith and Allen Sargent (L.F. 10, 92-84). Eight landowners intervened as defendants: Mr. Owens; Mr. Owens's trust; Brent Owens and his wife, Rita; Mary Frazier; Jimmy and Karen Hagen; and Jack Sloan (L.F. 10, 76-99).

Many of the intervenor-defendants did or had done business with Mr. Owens or otherwise were involved with him (Tr. 189-90). Mr. Owens sold Mr. Hagen his lot (Tr.

189). Mr. Sloan, a building framer by trade, had framed homes for Mr. Owens's development business (Tr. 190). Brent Owens is Mr. Owens's brother (Tr. 200).

In their answers to Mr. Bateman's petition, both the County and the intervenor-defendants mentioned a statute of limitations. The County's answer alleged both of Mr. Bateman's claims were "barred by the statute of limitations" (L.F. 25, 26). The intervenor-defendants' answer alleged, "Plaintiff's claims are untimely and barred by the statute of limitations" (L.F. 104).

After both parties waived a jury trial, the case was tried by the court on October 29, 2008 (Tr. 2-4; L.F. 3). The parties stipulated to exhibits containing the plat of BP I, photos of BP Lane, copies of the 1980 easements, and other exhibits (Tr. 9-15). The court heard testimony from Mrs. Lofgren, Mr. Coots, Mr. Brulja, Mr. Bateman, Mrs. Gray, Mrs. Piacenza, Ms. Turner, James Owens, and Brent Owens (Tr. 2-4). The court took the case under submission (Tr. 229).

On January 28, 2009, the court granted judgment to the plaintiffs, issuing findings of fact and conclusions of law (L.F. 2, 415-21; Appx. A1-7). It found BP I was platted in 1981 and the plat purported to dedicate BP Lane to public use (L.F. 416; Appx. A2). It found that, at the time of that plat, Mr. Bloom owned an easement over BP Lane in favor his dominant estate, which allowed him access through BP I as well as the right to construct and maintain that access road (L.F. 416; Appx. A2). The court found Mr. Bloom never signed the BP I plat and never dedicated his easement in BP Lane to the public (L.F. 416; Appx. A2).

The court further found that, as Mr. Bloom sold his dominant estate, he conveyed his easement over BP Lane to the purchasers by deed (L.F. 416; Appx. A2). When BP II was platted in 1984, purporting to dedicate the portion of the road through BP II to public use, that portion had no continuity with any public road (L.F. 416; Appx. A2). Finally, the court found, "The easements authorizing Plaintiffs to locate, construct and maintain [BP Lane] existed at the time of the purported dedications [of BP I and BP II] in 1981 and 1984 and still exist today" (L.F. 416; Appx. A2).

In its conclusions of law, the trial court held neither the BP I plat nor the BP II plat legally dedicated BP Lane to public use because neither Mr. Bloom nor his successors ever affirmatively relinquished their easements over BP I (L.F. 416-17; Appx. A2-3). There was no dedication by common law, because Mr. Bloom did not sign the BP I plat, no government ever performed any maintenance on BP Lane, and the public never used BP Lane (L.F. 417; Appx. A3).

The trial court concluded there also was no easement for the public "by prescription" because "the general public has not used" BP Lane (L.F. 417; Appx. A3). Instead, it concluded, "Lost citizens, curious passersby or invitees are the only members of the public who use" BP Lane (L.F. 417; Appx. A3). It concluded these are not public uses, "they are private" (L.F. 418; Appx. A4). Besides homeowners and these private users, the court concluded "the people who use" BP Lane "are invitees" (L.F. 418; Appx. A4). The court found even the "mailman does not use BP Lane" (L.F. 418; Appx. A4). Thus, the court concluded, "no prescriptive easement exists, as there has been no adverse use of [BP Lane] by the public" (L.F. 418; Appx. A4).

The court also concluded BP Lane is "not a public road by virtue of the operation of Section 228.190 RSMo." because "[a]ll County records admitted into evidence list [BP Lane] as a private road and Platte County, Missouri has not spent public money to construct, maintain, or repair" BP Lane (L.F. 420; Appx. A6).

Therefore, the court entered judgment for the plaintiffs, "declaring Bridal Parc Lane to be a private road that has never been legally dedicated or established as a public road" (L.F. 421; Appx. A7). It declared the 1980 easements "are in existence and fully effective" (L.F. 421; Appx. A7).

On February 26, 2009, the intervenor-defendants moved to amend the judgment (L.F. 2, 422). The trial court denied that motion on May 19, 2009 (L.F. 1, 457). On May 28, 2009, the intervenor-defendants (but not the County) appealed to the Missouri Court of Appeals, Western District (L.F. 1, 458).

On May 31, 2011, the Court of Appeals issued an opinion reversing the trial court's judgment. On August 30, 2011, this Court sustained Respondents' application for transfer and transferred this case.

Response to Appellants' Points Relied On

I. Appellants' affirmative defense that Respondents' action was barred by the statute of limitations in § 516.010, R.S.Mo., is not preserved for appellate review *because* this defense was insufficiently raised before the trial court *in that* the defendants' answers merely alleged Respondents' claims "are barred by the statute of limitations" without alleging any specific statutory provision that Respondents violated, and no defendant invoked § 516.010 until after trial.

(First response to Appellants' Point Relied On IV)

S.W. Bell Tel. Co. v. Buie, 758 S.W.2d 157 (Mo. App. 1988)

Indep. Gravel Co. v. Arne, 695 S.W.2d 914 (Mo. App. 1985)

Neidert v. Neidert, 637 S.W.2d 296 (Mo. App. 1982)

Tudor v. Tudor, 617 S.W.2d 610 (Mo. App. 1981)

Rule 55.08

II. Respondents' declaratory action did not violate the ten-year limitations period in § 516.010, R.S.Mo., on actions for recovery of lands *because* § 516.010 does not apply to this case and declaratory actions cannot accrue to start a statute of limitations running until there is a real, substantial, presently-existing controversy that is ripe for judicial determination *in that* this was not an action for recovery of lands and there was no controversy ripe for judicial determination in this case until May 2006, less than two months before it was filed.

(Second response to Appellants' Point Relied On IV)

Beavers v. Recreation Ass'n of Lake Shore Estates, 130 S.W.3d 702 (Mo. App. 2004)

Mo. Ass'n of Nurse Anesthetists, Inc. v. State Bd. of Registration for the Healing Arts, ___ S.W.3d ___, 2011 WL 2552549 (Mo. banc 2011)

Akin v. Dir. of Revenue, 934 S.W.2d 295 (Mo. banc 1996)

Reorg. Sch. Dist. R-I of Crawford Cnty. v. Reorg. Sch. Dist. R-III of Wash. Cnty., 360 S.W.2d 376 (Mo. App. 1962)

§ 516.010, R.S.Mo.

III. The trial court did not err in declaring BP Lane was a private road *because* there was no statutory or common-law dedication of BP Lane to public use, and the public never acquired a prescriptive easement over it *in that* neither the original easement holder nor his successors ever manifested any intent to relinquish their easements granting BP Lane to their use and maintenance as a private access road, no public authority ever maintained BP Lane, and, viewing the evidence in a light most favorable to the trial court's judgment, the public never used of BP Lane.

(Response to Appellants' Points Relied On I, II, and III)

City of Sarcoxie v. Wild, 64 Mo. App. 403 (1896)

White v. Meadow Park Land Co., 213 S.W.2d 123 (Mo. App. 1948)

Cheatham v. Melton, 593 S.W.2d 900 (Mo. App. 1980)

Whittom v. Alexander-Richardson P'ship, 851 S.W.2d 504, 508 (Mo. banc 1993)

§ 228.190, R.S.Mo.

§ 445.070, R.S.Mo.

Argument

I. Appellants' affirmative defense that Respondents' action was barred by the statute of limitations in § 516.010, R.S.Mo., is not preserved for appellate review *because* this defense was insufficiently raised before the trial court *in that* the defendants' answers merely alleged Respondents' claims "are barred by the statute of limitations" without alleging any specific statutory provision that Respondents violated, and no defendant invoked § 516.010 until after trial.

(First response to Appellants' Point Relied On IV)

Standard of Review

As this case was tried by a court, the trial court's judgment "will be affirmed unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law." *Hightower v. Myers*, 304 S.W.3d 727, 731-32 (Mo. banc 2010) (citing *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976)). "In reviewing the trial court's decision, this Court is primarily concerned with the correctness of the trial court's result, not the route taken by the trial court to reach that result." *Trimble v. Pracna*, 167 S.W.3d 706, 716 (Mo. banc 2005). The judgment below "will be affirmed under any reasonable theory supported by the evidence …." *Id.*

* * *

In Missouri, to raise a statute of limitations defense, a defendant must state in its answer the specific statutory provision it alleges the plaintiff violated. If the defendant merely alleges the plaintiff's claim "is barred by the statute of limitations," without stating that particular statute, it has not sufficiently raised this defense, the trial court is

without power to decide the merits of this defense, and those putative merits are unreviewable on appeal. In this case, all the defendants' answers merely alleged the plaintiffs' claims were "barred by the statute of limitations," without alleging any specific statutory provision. They did not invoke any specific statute until after trial. Is their statute of limitations defense preserved for appeal?

In their fourth Point Relied On, Appellants argue the trial court "erred in failing to dismiss Respondents' claim as outside the statute of limitations set forth in § 516.010, R.S.Mo." (Appellants' Brief 16-17, 37-41). But the trial court did not merely "fail to dismiss" Respondents' claims as time-barred; it considered no statute of limitations defense at all (Legal File 415-21; Appendix A1-7). As Appellants recognize, the trial court's judgment simply "made no mention" of it (Aplt. Br. 38).

This was entirely proper. In Missouri, it is well-established that, to raise a statute of limitations defense sufficiently enough to give the trial court power to consider its merits, at the very least a defendant must state in its answer the specific statutory provision it believes the plaintiff's claim violated. Otherwise, the trial court is without power to consider the defense at all, and the putative merits of the defense cannot be reviewed on appeal.

In this case, both Appellants' and the County's answers failed this basic requirement. Neither defendant actually invoked § 516.010 until after trial. Under these circumstances, their statute of limitations defense was not sufficiently raised for the trial court to have authority to consider it. And, as a result, the supposed merits of Appellants' statute of limitations defense are not preserved for this Court's review.

A. To raise a statute of limitations defense sufficiently enough for its merits to be considered, a defendant must state in its answer the specific statutory provision it alleges the plaintiff violated.

A defense that a plaintiff's action is barred by a statute of limitations is an affirmative defense that must be pleaded specifically in the defendant's answer. Rule 55.08. As such, to raise it, the defendant must set forth "a short and plain statement of the facts showing that [it] is entitled to the defense." *Id.*

For well over a century, Missouri courts uniformly have held that, to meet this requirement, at the very least a "party desiring to avail himself of the statute of limitations must plead the particular statute upon which he relies." *S.W. Bell Tel. Co. v. Buie*, 758 S.W.2d 157, 161 (Mo. App. 1988); *Tudor v. Tudor*, 617 S.W.2d 610, 613 (Mo. App. 1981) (citing cases back to 1875 so holding). It is well-established that a mere "allegation, in an answer, that the claim sued on [is] 'barred by the statute of limitations' [is] insufficient to raise [that] affirmative defense …." *Livingston v. Webster Cnty. Bank*, 868 S.W.2d 154, 156 (Mo. App. 1994).

Eventually "[i]dentifying and asserting the relevant statute of limitation after the trial is over in a motion for new trial comes too late." *Reynolds v. Carter Cnty.*, 323 S.W.3d 447, 453 (Mo. App. 2010). Even stating the specific statute *during* trial is insufficient. *Patel v. Pate*, 128 S.W.3d 873, 876-77 (Mo. App. 2004).

Rather, the defendant "must plead the very provision on which he depends" in his answer. *Modine Mfg. Co. v. Carlock*, 510 S.W.2d 462, 467 (Mo. 1974) (quoting *Knisely v. Leathe*, 166 S.W. 257 (Mo. 1914)). The defendant may satisfy this rule by pleading

several specific statutes in the alternative. *Reed v. Rope*, 817 S.W.2d 503, 507 (Mo. App. 1991). Even if only one out of several defendants invokes a statute in its answer, it is sufficient. *Thompson v. Crawford*, 833 S.W.2d 868, 870 n.1 (Mo. banc 1992). But merely stating the plaintiff's claim is "barred by the statute of limitations," without stating any particular statute allegedly violated, is wholly insufficient to raise this affirmative defense. *Neidert v. Neidert*, 637 S.W.2d 296, 300-01 (Mo. App. 1982).

This insufficiency effectively kills off any merit the defense may have had. The plaintiff need not address the inadequately raised defense in a summary judgment motion. *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 384 (Mo. banc 1993). The trial court simply is without power to decide the merits of the defense at all; if it ultimately considers and accepts the defense, it must be reversed. See, e.g., *State ex rel. BAW v. Zupan*, 901 S.W.2d 250, 251-52 (Mo. App. 1995); *Livingston*, 868 S.W.2d at 156-57.

Most importantly for this case, if the defendant fails to plead in his answer the particular statute on which he relies and then appeals the trial court's denial of that defense, its supposed merits are not preserved for appellate review because it was not raised sufficiently in the first place. *S.W. Bell*, 758 S.W.2d at 161; *Indep. Gravel Co. v. Arne*, 695 S.W.2d 914, 916 (Mo. App. 1985); *Neidert*, 637 S.W.2d at 300-01; *Tudor*, 617 S.W.2d at 613.

In *Neidert*, a defendant argued on appeal that one of the plaintiff's claims violated the statute of limitations in § 516.120, R.S.Mo. 637 S.W.2d at 300. In its answer, however, it merely had alleged "the claims stated in Count II are barred by the statute of

limitations." *Id.* at 301. The Court of Appeals held "this mode of pleading was insufficient to raise the affirmative defense of the statute of limitations," and refused to consider the defendant's argument. *Id.*

In *S.W. Bell*, the plaintiff alleged "defendant's counterclaim, Count III, is barred by the statute of limitations." 758 S.W.2d at 161. On appeal, it argued the counterclaim was "barred by the statute of limitations under the National Labor Relations Act." *Id.* The Court of Appeals held that, because the plaintiff "failed to specifically plead the particular statute [of limitations] upon which it relied" in its answer to the counterclaim, the court neither could "reach" nor "decide" the merits of that issue. *Id.*

In *Indep. Gravel*, the defendant argued on appeal that that the plaintiff had violated "the applicable five-year statute of limitations, § 516.120, even as extended by the operation of § 516.230." 695 S.W.2d at 916. But its answer "merely pleaded that 'the general statute of limitations has passed.'" *Id.* The Court of Appeals held this "was insufficient to raise the affirmative defense of the statute of limitations." *Id.* Because the defendant's answer "failed to plead the applicability of either § 516.120 or § 516.230," its argument on appeal "ha[d] not been preserved." *Id.*

Given the function of appellate review, this makes sense. If a trial court is without power to decide an insufficiently raised affirmative defense, then a reviewing appellate court cannot do so, either. In this case, Appellants have the same problem as the parties in the above cases. On appeal, they seek to apply the statute of limitations in § 516.010. But no defendant argued Respondents' petition was barred by that statute until after trial. Appellants' fourth Point Relied On is not preserved for this Court's review.

B. Because no statute of limitations defense sufficiently was raised below, this Court cannot consider Appellants' fourth Point Relied On.

Respondent Robert Bateman originally filed his two-count petition against only Respondent Platte County (L.F. 12). In its answer, the County made two mentions of a statute of limitations defense:

> 15. That the alleged claims set forth in Count I of the Petition are barred by the statute of limitations. …
>
> 13. That the alleged claims set forth in Count II of the Petition are barred by the statute of limitations.

(L.F. 25-26). But nowhere in its answer did the County set forth any particular statute it alleged Mr. Bateman's petition had violated.

After the trial court allowed Appellants to intervene, they filed their own answer to the petition, which also mentioned a statute of limitations defense. Under the heading "Affirmative Defenses to All Counts," they alleged: "5. Plaintiff's claims are untimely and barred by the statute of limitations." (L.F. 104). Like the County, though, they mentioned no particular statute of limitations they alleged Mr. Bateman had violated. Neither the County nor Appellants later amended their answers.

After discovery, Respondents moved for summary judgment (L.F. 119-36), which they later withdrew (Transcript 7). In their responses to that motion, however, neither Appellants nor the County mentioned any statute of limitations defense (L.F. 263-79, 288-300). Appellants also did not mention a statute of limitations defense in their trial brief (L.F. 310-17).

In fact, the first time any defendant actually argued Mr. Bateman's petition was time-barred specifically by § 516.010, R.S.Mo., was in a perfunctory section at the end of Appellants' "supplemental trial brief" filed more than two weeks after trial (L.F. 3, 334). After judgment, Appellants again invoked § 516.010 in their motion to amend (L.F. 423, 425, 427).

Under Rule 55.08, the defendants' answers alleging Mr. Bateman's petition was "barred by the statute of limitations" but pleading no particular statute they alleged his claims violated were insufficient and inadequate as a matter of law to raise an affirmative defense. *S.W. Bell*, 758 S.W.2d at 161; *Tudor*, 617 S.W.2d at 613; *Livingston*, 868 S.W.2d at 156. Appellants' eventual, post-trial invocation of § 516.010 came "too late." *Reynolds*, 323 S.W.3d at 453; *Patel*, 128 S.W.3d at 876-77.

Under these circumstances, the trial court did not have authority to consider Appellants' insufficiently-raised statute of limitations defense. It correctly declined to do so. Indeed, its acceptance of that defense would have been reversible error. *BAW*, 901 S.W.2d at 251-52; *Livingston*, 868 S.W.2d at 156-57. As a result, this Court cannot consider this inadequately raised defense, either. *S.W. Bell*, 758 S.W.2d at 161; *Indep. Gravel*, 695 S.W.2d at 916; *Neidert*, 637 S.W.2d at 300-01; *Tudor*, 617 S.W.2d at 613.

Appellants' fourth Point Relied On is not preserved for appellate review. The Court should deny it and should affirm the trial court's judgment.

II. Respondents' declaratory action did not violate the ten-year limitations period in § 516.010, R.S.Mo., on actions for recovery of lands *because* § 516.010 does not apply to this case and declaratory actions cannot accrue to start a statute of limitations running until there is a real, substantial, presently-existing controversy that is ripe for judicial determination *in that* this was not an action for recovery of lands and there was no controversy ripe for judicial determination in this case until May 2006, less than two months before it was filed.

(Second response to Appellants' Point Relied On IV)

Standard of Review

As this case was tried by a court, the trial court's judgment "will be affirmed unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law." *Hightower v. Myers*, 304 S.W.3d 727, 731-32 (Mo. banc 2010) (citing *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976)). This Court "views the evidence and permissible inferences drawn from the evidence in the light most favorable to the judgment." *Hightower*, 304 S.W.3d at 732.

"In reviewing the trial court's decision, this Court is primarily concerned with the correctness of the trial court's result, not the route taken by the trial court to reach that result." *Trimble v. Pracna*, 167 S.W.3d 706, 716 (Mo. banc 2005). The judgment below "will be affirmed under any reasonable theory supported by the evidence …." *Id.*

Whether a statute of limitations bars an action is reviewed *de novo*. *Elrod v. Treasurer of Mo.*, 138 S.W.3d 714, 716 (Mo. banc 2004).

* * *

A declaratory action cannot accrue to start a statute of limitations running until there is a real, substantial, presently-existing controversy admitting of specific relief that is ripe for judicial determination. Under 1980 easements, Bridle Parc Lane ("BP Lane") is a private road. The public never has used it. In May 2006, Platte County declared BP Lane to be a public road. In July 2006, Mr. Bateman brought an action against Platte County seeking a declaratory judgment to enforce the easements. Was his action barred by the ten-year limitations period in § 516.010 for "recovery of lands"?

Appellants argue Mr. Bateman's petition was barred by the ten-year statute of limitations in § 516.010, R.S.Mo. (Appellants' Brief 16-17, 37-41). This statute bars commencement of any action "for recovery of any lands or hereditaments" (Aplt. Br. 37). Appellants claim it barred Mr. Bateman's declaratory action to enforce the 1980 BP Lane easements because the "private use of BP Lane was first seized" as early as 1981 or 1984, when Bridle Parc Estates ("BP I") and Bridle Parc Estates II ("BP II") were platted, or 1987, when "continuous public use" of BP Lane began (Aplt. Br. 38-39).

This argument misstates the law and fails to view the facts in a light most favorable to the trial court's judgment. Section 516.010 does not apply to declaratory actions seeking to enforce present rights. And, in any case, a declaratory action cannot accrue to start a statute of limitations period running until there is a presently-existing controversy ripe for judicial determination. The trial court found there was no public use of BP Lane. Mr. Bateman's action against Platte County to enforce his easements granting BP Lane as a private road was not ripe until May 2006, when the County declared BP Lane to be a public road. Mr. Bateman filed less than two months afterward.

A. Section 516.010 does not apply to this case.

Section 516.010 provides:

> No action for the recovery of any lands, tenements or hereditaments, or for the recovery of the possession thereof, shall be commenced, had or maintained by any person … unless it appear that the plaintiff, his ancestor, predecessor, grantor or other person under whom he claims was seized or possessed of the premises in question, within ten years before the commencement of such action.

(Appendix A9).

This statute is known most for creating adverse possession, because it bars ejectment and quiet title actions after ten years from encroachment. See, e.g., *Ollison v. Vill. of Climax Springs*, 916 S.W.2d 198, 200 (Mo. banc 1996). It also bars actions for breach of a restrictive covenant after ten years from the breach. *Northridge Ass'n of St. Joseph, Inc. v. Welsh*, 924 S.W.2d 305, 306-07 (Mo. App. 1996); *Terre Du Lac Prop. Owners' Ass'n, Inc. v. Wildeman*, 655 S.W.2d 803, 805-06 (Mo. App. 1983).

This case, however, does not seek the "recovery of any lands, tenements or hereditaments" or "the possession thereof." Rather, it is an action for declaratory relief (Legal File 12). Under the Declaratory Judgment Act, the purpose of a declaratory action is "to declare rights, status, and other legal relations …." § 527.010, R.S.Mo. The Declaratory Judgment Act is "to be liberally construed," and is designed to "terminate the controversy or remove an uncertainty." §§ 527.020 and 527.050, R.S.Mo.

At trial, the parties agreed this case was "[s]imply a declaratory action for the Court to determine whether" easements presently "exist[] or not and," as a result, whether BP Lane presently "is public or private" (Transcript 73). There was no claim for inverse condemnation seeking money damages (Tr. 72-73). The sufficiency of any plats was not at issue (Tr. 85-87). Rather, the parties agreed the question was entirely whether the easements over BP I making BP Lane a private road presently are in effect (Tr. 85-87).

Section 516.010 does not apply to declaratory actions seeking to enforce present rights. *Reorg. Sch. Dist. R-I of Crawford Cnty. v. Reorg. Sch. Dist. R-III of Wash. Cnty.*, 360 S.W.2d 376, 381 (Mo. App. 1962). A declaratory action to enforce present property rights is not "for the recovery of real property" under § 516.010. *Id.* Rather, it is "to enforce a … right, and it is therefore not within" § 516.010. *Id.*

Indeed, declaratory actions seeking determinations of present rights do not fall within any particular statute of limitations. Counsel is unable to find any case in which this Court applied a time-bar to a general action for declaratory relief seeking a declaration of parties' present rights. In fact, the Court has upheld general declarations of present rights concerning facts occurring as long as *30 years earlier* against statute of limitations defenses. See, e.g., *Hughes v. Neely,* 332 S.W.2d 1, 6 (Mo. 1960) (agreeing that present rights of parties were such that judgment entered in 1930 was void).

Rather, only when a declaratory action asked for relief specifically addressed in a statute of limitations has the Court applied that statute to it. See, e.g., *Cmty. Bancshares v. Sec'y of State,* 43 S.W.3d 821, 825-26 (Mo. banc 2001) (tax refund); *Beatty v. Metro. St. Louis Sewer Dist.,* 700 S.W.2d 831, 835 (Mo. banc 1985) (election contest).

Given the purpose of the Declaratory Judgment Act, this approach is eminently sensible. As a rather extreme example, this Court has held declaratory relief appropriate to relieve sex offenders convicted before 1996 of the obligation to register under the 1996 Sex Offender Registration Act because to do so retroactively violated the Constitution. See *Doe v. Phillips*, 194 S.W.3d 833, 852 (Mo. banc 2006). If one of the plaintiffs in that case had been required to register in 1996 but had not sought declaratory relief until 2007, could a statute of limitations justly bar his action? Of course not: holding so would render his present constitutional rights a nullity.

In the same vein, § 516.010 cannot nullify presently existing rights to use land, either. *Reorg. Sch. Dist.*, 360 S.W.2d at 381. These, too, are a species of constitutional rights. *Infra* at 43. If this principle protects convicted sex offenders, it surely protects law-abiding citizens' private property rights. Under Appellants' argument, however, if someone recorded an invalid deed claiming he owned another's home, waited more than ten years, and only then sought to move into the home, the homeowner would be time-barred from seeking declaratory relief to uphold his present right to ownership. Plainly, it makes sense that the statute barring "recovery of lands" does not apply actions seeking a declaration of the parties' present property rights. *Reorg. Sch. Dist.*, 360 S.W.2d at 381.

There may be some argument that some other statute of limitations applies to this case. But Appellants have invoked only § 516.010 – and then only after trial (see Point I, above). On appeal, they cannot now invoke another. As § 516.010 "is not applicable," "[w]hat particular statute of limitations, if any, may have been appropriate here need not be determined." *Tudor v. Tudor*, 617 S.W.2d 610, 613 (Mo. App. 1981).

B. Even if § 516.010 applied to this case, Respondents did not violate it.

Even if the ten-year limitations period in § 516.010 applied to this case, Appellants' fourth Point Relied On still is without merit. A declaratory action cannot accrue to start a statute of limitations running until all the elements necessary to bring it are met. Here, that did not occur until May 2006, less than two months before Mr. Bateman filed his action against Platte County.

i. A declaratory action cannot accrue to start a statute of limitations running until there is a real, substantial, presently-existing controversy admitting of specific relief that is ripe for judicial determination.

The statute of limitations in § 516.010 "is triggered not by discovery of damage, but by the commencement of the right to sue." *Ryan v. Spiegelhalter*, 64 S.W.3d 302, 309 (Mo. banc 2002). For a party to have the right to bring a declaratory action, he first must be able to present four elements to the trial court:

> (1) a justiciable controversy that presents a real, substantial, presently-existing controversy admitting of specific relief, as distinguished from an advisory decree upon a purely hypothetical situation; (2) a plaintiff with a legally protectable interest at stake ...; (3) a controversy ripe for judicial determination; and (4) an inadequate remedy at law.

Mo. Ass'n of Nurse Anesthetists, Inc. v. State Bd. of Registration for the Healing Arts, ___ S.W.3d ___, 2011 WL 2552549 at *8 (Mo. banc 2011) (quoting *Mo. Soybean Ass'n v. Mo. Clean Water Comm'n*, 102 S.W.3d 10, 25 (Mo. banc 2003)).

Because a party's right to bring a declaratory action cannot commence until all these elements are met, when applied to a declaratory action a statute of limitations cannot begin to run until then, either. *Beavers v. Recreation Ass'n of Lake Shore Estates, Inc.*, 130 S.W.3d 702, 715 (Mo. App. 2004). There is a "justiciable controversy" only once a "genuine disagreement and substantial controversy exists between the parties as to" the subject of the action. *Mo. Ass'n*, 2011 WL 2552549 at *8. And a "court cannot render a declaratory judgment unless … [that] controversy [is] ripe for judicial determination." *Mo. Soybean*, 102 S.W.3d at 26.

"In order that a controversy be ripe for adjudication a 'sufficient immediacy' must be established. Ripeness does not exist when the question rests solely on a probability that an event will occur." *Buechner v. Bond*, 650 S.W.2d 611, 614 (Mo. banc 1983). The controversy at issue must be "of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Ports Petrol. Co., Inc. of Ohio v. Nixon*, 37 S.W.3d 237, 241 (Mo. banc 2001). "A mere difference of opinion or disagreement on a legal question is insufficient, but parties must show that their rights and liabilities are affected." *Akin v. Dir. of Revenue*, 934 S.W.2d 295, 298 (Mo. banc 1996).

The Court of Appeals' decision in *Beavers* illustrates how this works with regard to a statute of limitations. In *Beavers*, a homeowners' association filed liens in 2000 against a member's property for allegedly past-due assessment payments. 130 S.W.3d at 706. In 2001, the member sought a declaratory judgment that the liens were void because the association, first purportedly incorporated in 1972, was in fact a void entity and thus had no power to record the liens. *Id.* at 706-07. The trial court dismissed the member's

petition, holding it was barred by the ten-year statute of limitations in § 516.010. *Id.* at 708. It held that, because the validity of the association could have been challenged as early as 1972, the member's action was nearly two decades too late. *Id.*

The Court of Appeals reversed. While apparently the member and the association had an ongoing disagreement about the lawfulness of the association's existence for many years prior to 2000, "this mere difference of opinion, alone, [was] insufficient to give rise to an actual controversy ripe for judicial determination." *Id.* at 716. For, until "2000, when the Association threatened to file a lien" on the member's property, "no actual controversy existed that would have entitled [the member] to seek declaratory judgment or injunctive relief." *Id.*

Thus, although the allegedly invalid act had occurred in 1972, "the statute of limitations could not have started running prior to November 7, 2000 …." *Id.* Because the member "filed the instant suit on May 11, 2001, well within the ten-year statute of limitations period, the trial court erred in finding [its] petition was barred by the ten-year statute of limitations." *Id.*

Like *Beavers*, this case concerns the present effect of three-decade-old legal instruments. But, as in *Beavers*, an actual, present, ripe controversy between the plaintiffs and Platte County concerning those instruments did not arise until many decades later. Mr. Bateman filed this action within two months of that cause accruing. Even if § 516.010 somehow applied to the claims in this case, it could not bar Mr. Bateman's petition.

ii. This action was filed within two months after a real, substantial, presently-existing controversy between Mr. Bateman and Platte County first became ripe for judicial determination.

Appellants argue this action violated § 516.010 because "Respondents or their predecessors should have brought their claim" within ten years of either 1981, when BP I was platted, 1984, when BP II was platted, or 1987, when "the public began actually using BP Lane" (Aplt. Br. 39). They argue one of these events was when Respondents' "private use of BP Lane was first seized" (Aplt. Br. 38).

This argument is without merit. First, Appellants ignore the trial court's express finding that "the general public has *not* used" BP Lane (L.F. 417; Appendix A3) (emphasis added); see also *infra* at 52-55. Besides the adjacent residents, the only other "people who use" BP Lane are those invited by the residents (L.F. 418; Appx. A4). These are not "public uses," they are "private" (L.F. 418; Appx. A4). Simply put, "there has been no … use of [BP Lane] by the public" (L.F. 418; Appx. A4).

In arguing otherwise, Appellants fail to view the evidence in a light most favorable to the trial court's judgment. They harp on "evidence at trial … that the public used the road at least as far back as 1987 to access a Christmas tree farm in" BP II (Aplt. Br. 39). They flatly state the "evidence overwhelmingly showed continuous public use since" 1987 and cite to their own statement of facts to support this (Aplt. Br. 39).

The trial court plainly disbelieved this evidence. Its judgment does not mention any Christmas tree farm. "A trial court is free to disbelieve any, all, or none of th[e] evidence," and "this Court defers to the trial court's determination of credibility." *White*

v. Dir. of Revenue, 321 S.W.3d 298, 308 (Mo. banc 2010). The trial court "is in a better position not only to judge the credibility of witnesses and the persons directly, but also their sincerity and character and other trial intangibles which may not be completely revealed by the record." *Id.* at 308-09 (citation omitted). As such, this Court confines its review of the facts "to determining whether substantial evidence exists to support the trial court's judgment [or] whether the judgment is against the weight of the evidence – 'weight' denoting probative value and not the quantity of evidence …." *Id.* at 309 (citations omitted).

"When determining the sufficiency of the evidence," this Court "will accept as true the evidence and inferences from the evidence that are favorable to the trial court's [judgment] and disregard all contrary evidence." *Watson v. Mense*, 298 S.W.3d 521, 526 (Mo. banc 2009). Under this standard, the trial court's finding that there was no public use of BP Lane is supported by substantial evidence.

Deborah Lofgren explained only "the people in BP II" use BP Lane (Tr. 31-32). They "have to" come through BP I on BP Lane because "[t]hey have no other way out" (Tr. 32). BP Lane "doesn't go anywhere" except "to the homes on the street" (Tr. 32). As a result, besides the residents of BP II along BP Lane, only their "invitees" use it, such as their moving vans to move them in or UPS drivers making deliveries to the homes (Tr. 32). No commercial enterprises or public parks are accessible via BP Lane (Tr. 32). There are no "busses, no Postal Service, no Avon lady, anything like that," using BP Lane (Tr. 35).

Mrs. Lofgren explained "all" of the non-resident "traffic, other than utilities companies, would be invitees of anybody on the street" (Tr. 32). If a member of the public turned onto BP Lane who was not "going to somebody's house on" the road, "[t]hey'd have to turn around in somebody's driveway" (Tr. 32)

Even Appellant James Owens admitted on cross-examination that no member of the public goes through BP Lane "to anyplace" (Tr. 192). He further acknowledged the U.S. Postal Service does not use BP Lane, instead delivering the adjacent landowners' mail to "a community box" on Mace Road (Tr. 184).

Plainly, the trial court believed this testimony and disbelieved any contrary testimony. Appellants cannot retry these facts. Thus, since there never was any public use of BP Lane, Appellants' invocation of the statute of limitations in § 516.010 must rest entirely on a notion that Respondents' predecessors could have filed a declaratory action against Platte County to enforce the 1980 easements as early as 1981 or 1984.

Mr. Bateman brought this action after a series of events beginning in 2005, when Mr. Owens sought Platte County's permission to use BP Lane as a public thoroughfare for a new subdivision, Brentwood Parc (Tr. 94-95, 207, 220; L.F. 226; Appx. A10). Upon learning of Mr. Owens's plans, Mr. Bateman brought the 1980 easements to Platte County's attention (Tr. 94-96; L.F. 226; Appx. A10). He and his neighbors were "not interested in having through traffic on our private road and for years we have fought other developers other than Mr. Owens … and we don't want it changed from a private street to a public street" (Tr. 94-95).

On May 25, 2006, the County informed Mr. Bateman in writing that "It is the opinion of the County that BP Lane is within public right-of-way," and suggested Mr. Bateman "and/or [his] attorney may choose to react" further to that statement (Tr. 95-96; L.F. 226; Plt. Ex. 9; Appx. A10). On July 7, 2006, less than two months later, Mr. Bateman filed this action, which the parties agreed at trial is "[s]imply a declaratory action for the Court to determine whether [the] right of way" easements "exist[] or not and whether the road is public or private" (Tr. 73; L.F. 9, 12).

Thus, this action was timely. The right to bring a declaratory action must be "liberally construed." § 527.120. While the County and Appellants ultimately argued that the 1981 and 1984 plats vitiated the 1980 easements, until 2006 no one ever had sought to use BP Lane as a public road. No actual controversy of "sufficient immediacy" existed over whether the easements remained in effect until 2006, when Platte County declared BP Lane in writing to be a public road and invited Mr. Bateman to contact an attorney if he disagreed.

Thus, until the County's May 2006 declaration that BP Lane was a public road, there was no justiciable controversy between Mr. Bateman and the County that was ripe for judicial determination. As the trial court found, BP Lane never was maintained or repaired by any public authority and never was used as a public road (L.F. 417; Appx. A3). Although someone somewhere might have had some hypothetical disagreement as to the private-ness or public-ness of BP Lane in 1981 or 1984, no one actually sought to use BP Lane as a public road until 2006. An earlier action would not have been ripe.

For, until 2006, there was no "justiciable controversy that present[ed] a real, substantial, presently-existing controversy admitting of specific relief." *Mo. Ass'n*, 2011 WL 2552549 at *8. Before then, there could not have been a "sufficiently immediate" controversy amenable to a declaratory judgment. *Buechner*, 650 S.W.2d at 614. At most, there could have been a purely academic question over BP Lane's status. But this "mere difference of opinion or disagreement" would have been "insufficient" to give rise to a declaratory action, because no party's actual "rights and liabilities" were threatened until 2006. *Akin*, 934 S.W.2d at 298.

Appellants cite only two cases to support their notion that the ten-year limitations period began to run in this case in the early 1980s: *Terre Du Lac*, 655 S.W.2d at 803, and *Northridge*, 924 S.W.2d at 305 (Aplt. Br. 38). But neither was a declaratory action. Rather, both sought injunctions for breach of restrictive covenants. In *Terre Du Lac*, a suit was filed in 1980 against defendants alleged to have begun violating a restrictive covenant in 1976. 655 S.W.2d at 805. There was no violation of § 516.010's ten-year period. *Id.* at 805-06. In *Northridge*, a suit was filed in 1991 against defendants alleged to have begun violating a restrictive covenant in 1990. 924 S.W.2d at 306. Again, there was no violation of § 516.010. *Id.* at 307.

Terre Du Lac and *Northridge* bear no similarity to this case. Respondents' action against Platte County was not one for breach of a restrictive covenant. They did not point to any covenant they alleged either the County or Mr. Owens had violated, let alone one they alleged the defendants began violating more than ten years ago. Instead, they successfully sought a determination that the present rights of the parties are such that the

1980 BP Lane easements are and always have been alive and well, unthreatened until 2006, BP Lane is thus a private road, and the County's May 2006 determination was legally wrong.

A mere difference of opinion about the public-ness or private-ness of BP Lane before 2006, standing alone, would have been insufficient to give rise to an actual controversy ripe for judicial determination in a declaratory action. *Beavers*, 130 S.W.3d at 716. Instead, until May 2006, when Platte County determined in writing that BP Lane was a public road, purporting to allow future development to start using it as a true public thoroughfare, no actual controversy existed that would have entitled Respondents to seek declaratory relief. *Id.* Any declaratory judgment before then impermissibly would have been "an advisory decree upon a purely hypothetical situation …" *Mo. Ass'n*, 2011 WL 2552549 at *8.

Section 516.010 does not apply to this case. Even if it somehow did apply, Respondents' action did not violate its ten-year period.

The Court should affirm the trial court's judgment.

III. The trial court did not err in declaring BP Lane was a private road *because* there was no statutory or common-law dedication of BP Lane to public use, and the public never acquired a prescriptive easement over it *in that* neither the original easement holder nor his successors ever manifested any intent to relinquish their easements granting BP Lane to their use and maintenance as a private access road, no public authority ever maintained BP Lane, and, viewing the evidence in a light most favorable to the trial court's judgment, the public never used BP Lane.

(Response to Appellants' Points Relied On I, II, and III)

Standard of Review

As this case was tried by a court, the judgment below "will be affirmed unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law." *Hightower v. Myers*, 304 S.W.3d 727, 731-32 (Mo. banc 2010) (citing *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976)).

This Court "views the evidence and permissible inferences drawn from the evidence in the light most favorable to the judgment." *Hightower*, 304 S.W.3d at 732. "A trial court is free to disbelieve any, all, or none of th[e] evidence," and "this Court defers to the trial court's determination of credibility." *White v. Dir. of Revenue*, 321 S.W.3d 298, 308 (Mo. banc 2010). "When determining the sufficiency of the evidence," this Court "will accept as true the evidence and inferences from the evidence that are favorable to the trial court's [judgment] and disregard all contrary evidence." *Watson v. Mense*, 298 S.W.3d 521, 526 (Mo. banc 2009).

* * *

A private road can become public by statutory or common law dedication, or by prescription. If the road is private by virtue of an easement, the easement holder affirmatively must relinquish his easement in order for the servient estate to have lawful power to dedicate the road to public use. Moreover, common-law dedication and prescription require actual public use of the road for a period. Bridle Parc Lane ("BP Lane") was a private road by virtue of easements. Neither the easement holder nor any of his successors ever relinquished those easements. There never was any public use of BP Lane. Did the trial court err in declaring BP Lane remained a private road?

Appellants argue BP Lane was a public road because it was statutorily dedicated as such (Appellant's Brief 15, 18-26). Alternatively, they argue it was dedicated as such at common law (Aplt. Br. 15-16, 27-33). Alternatively still, they argue the public acquired a prescriptive easement over it (Aplt. Br. 16, 34-36).

These arguments share two glaring deficiencies. First, Appellants fail to view the evidence in a light most favorable to the trial court's judgment. The trial court expressly found there *never* had been *any* public use of BP Lane. Substantial evidence supported this finding. Second, the easements making BP Lane a private road are a property interest that cannot be taken away without the easement holder's express consent. Neither the original easement holder nor his successors ever manifested any consent to relinquish the easements granting BP Lane to their exclusive, private use.

Appellants' arguments are untenable. The Court should affirm the trial court's judgment.

A. When a road is private by virtue of easements, the easement holder or his successors affirmatively must have relinquished them in order for the servient estate lawfully to have power to dedicate the road to public use.

An easement is a right to use another's property in a certain manner that simultaneously acts as a limitation on that other person's ability to use his or her property in an unrestricted manner. II AMERICAN LAW OF PROPERTY § 8.4 (A.J. Casner ed., 1952). It is a property right against the subjected land as well as all other parties. *Id.* at § 8.5. It cannot be terminated by the possessor of the land subject to it. *Id.* at § 8.14.

Thus, an easement creates a property right protected by the Takings Clause of U.S. Const. Amend. 5, *United States v. Causby*, 328 U.S. 256, 265 (1946), incorporated to the states through U.S. Const. Amend. 14. *Chicago, B. & Q. R.R. Co. v. City of Chicago*, 166 U.S. 226, 241 (1897). Easements similarly are protected against takings without just compensation by Mo. Const. art. I, § 26. *Aronstein v. Mo. State Highway Comm'n*, 586 S.W.2d 328, 329 (Mo. banc 1979).

In this case, Platte County unilaterally determined BP Lane was a public road (Transcript 95-96; Legal File 226; Plaintiff's Exhibit 9; Appendix A10). But BP Lane, originally unnamed, was created by three continuous easements the owners of what eventually would become Bridle Parc Estates ("BP I") granted to Yiddy Bloom in 1980, in order for Mr. Bloom to have access the nearest public road, Mace Road, from his landlocked property (L.F. 342-49).

They granted Mr. Bloom and his successors and assigns:

> a street and right of way easement over, along, across, and under the lands hereinafter described, together with easements in remaining lands on the abutting property along and adjacent to said street and right of way where requried [*sic*] for the location, construction and maintenance of an embankment or for sloping the sides of cuts back to construct and maintain said street at the established grade.

(Tr. 39; L.F. 342-49; Plt. Ex. 2A, 2B, 2C).

As the trial court paraphrased it, the easements granted Mr. Bloom "access and the right to construct and maintain that access road," authorizing him and his successors "to locate, construct and maintain" BP Lane (L.F. 416; Appx. A2). As such, in order for BP Lane to become a public road, either (1) Mr. Bloom or his successors must have relinquished the easements, or (2) Platte County must use its power to bring a condemnation action to determine the easements' value, and then must pay that value to Mr. Bloom's successors. *City of Sarcoxie v. Wild*, 64 Mo. App. 403, 406 (1896). For, "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." *Id.* at 407 (citation omitted).

In *Wild*, Emma Carnahan acquired a twenty-acre property, the deed to which reserved a strip of the land to Herman Wild, her neighbor, as an access easement over it "for road purposes." *Id.* at 405. Mrs. Carnahan tried to plat the land into lots, in which she also attempted to dedicate the reserved strip to the public as a public road. *Id.* When Mr. Wild erected "a rail fence" to prevent access to the road, he was charged with a

municipal offense of obstructing a public road. *Id.* After trial and conviction, he appealed. *Id.*

The Court of Appeals reversed the conviction, as Mrs. Carnahan had no lawful authority to dedicate the road to public use. *Id.* at 407. Her property was the servient estate in Mr. Wild's easement; she could not dedicate the strip containing the easement road to public use because she could not have had whole title without first obtaining the consent of Mr. Wild, who owned the dominant estate. *Id.* at 406-07. Mrs. Carnahan's ownership of the land containing the road was "subject to the incumbrance [*sic*] of the easement of the private way." *Id.* at 406. Mr. Wild never consented to the dedication. *Id.* Thus, Mrs. Carnahan's purported dedication of the road to the public was of no effect. *Id.* Mr. Wild "could not be deprived" of his easement "without his consent, or by some lawful and regular proceeding." *Id.*

That Mr. Wild was a member of the public and thus could use the road even with the dedication was irrelevant:

> It may be suggested that making a public street … 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 cannot be allowed. A private way is a property right in the owner, of which he cannot be deprived, regardless of whether he would be injured by the taking. [Mr. Wild], 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 [Mr. Wild].

Id.

Mr. Wild's consent was necessary for Mrs. Carnahan's dedication to be effective, because Mr. Wild's easement was a property right of which he could not be deprived without due process and just compensation:

> If [Mrs. Carnahan's dedication] be allowed, [Mr. Wild], 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. … 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.
>
> 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 may be changed by the city, either by cutting or filling, which might destroy the use to him. …
>
> The argument in behalf of the city seems to be based upon the idea that though the easement was reserved to [Mr. Wild], yet that the Carnahans being owners of the fee, could make a perfect and complete dedication,

without the consent of [Mr. Wild]. This would allow the Carnahans to annihilate [Mr. Wild]'s property rights.

Id. at 406-07.

Neither Mrs. Carnahan nor the city could do this. Rather, Mr. Wild "must release his rights, or else he must be deprived of them by process of law." *Id.* at 407. Because neither had occurred, Mrs. Carnahan's purported dedication was "of no consequence," and Mr. Wild's conviction had to be reversed. *Id.*

This case repeats the circumstances of *Wild*, only 110 years later and as a civil case. The owners of property in BP I hold title to land their predecessors encumbered by three private right-of-way easements granted to Mr. Bloom, whose successors are Mr. Bateman and the other BP II owners (Tr. 38-39, 45-58, 64-65). While BP I's plat may have purported to dedicate the servient land encumbered by Mr. Bloom's dominant easement to the public, neither Mr. Bloom nor any of his successors ever manifested any consent to that dedication. But Mr. Bloom – and, thus, Mr. Bateman and the other BP II owners – could not be deprived of their property interests in the easement "without [their] consent, or by some lawful and regular proceeding." *Wild*, 64 Mo. App. at 406. The trial court correctly reached the same result as the Court of Appeals in *Wild*.

B. Neither Mr. Bloom nor any of his successors ever relinquished their easements over BP Lane, and neither the platting of BP I nor the platting of BP II voided the easements.

Mr. Bloom and his successors' non-relinquishment of their easements is best shown in a timeline:

Date	Event
September 16, 1980	Mr. Bloom is granted easements to access Mace Road over three properties north of his tract (L.F. 342-49; Plt. Ex. 2A, 2B, 2C, 44).
December 28, 1981	The three properties servient to Mr. Bloom's easements are platted as BP I, which purports to dedicate a "street" over his easements to the public; Mr. Bloom did not sign the plat (Tr. 113-14; L.F. 365).
September 11, 1984	Platte County approves plat for Mr. Bloom's land into Bridle Parc Estates II ("BP II"); the plat purports to dedicate a "street" down its middle to the public; Mr. Bloom did not sign the plat (Tr. 116; L.F. 338).
September 25, 1984	Mr. Bloom's property interests in BP II, including the easements over BP I, are transferred to Robert Pease (Tr. 75; L.F. 357-61, 370-73).
September 28, 1984	Mr. Pease sells all the tracts comprising BP II (L.F. 354-55, 375-81, 383-85, 387-89, 391-93).
September 28, 1984	The new owners of the tracts in BP II sign its plat (L.F. 338).

Appellants argue the respective plats for both BP I and BP II, standing alone, lawfully dedicated BP Lane to public use (Aplt. Br. 20). They argue this case is distinguishable from *Wild* because "Respondents' predecessors-in-interest all signed the Plats dedicating BP Lane to public use thereby consenting to the public dedication of BP Lane" (Aplt. Br. 22).

This is untrue. First, Mr. Bloom did not sign the plat for BP I in 1981, which purportedly dedicated the road overlying his easements to public use (L.F. 365). As a result, this case is directly on point with *Wild*, commanding the same result.

At the time BP I was platted in 1981, Mr. Bloom was the sole easement holder. Thus, without his consent, the owners of the properties north of his – the servient estate to his easements – could not have had lawful authority to dedicate the road to public use via their 1981 plat of BP I. *Wild*, 64 Mo. App. at 407. The BP I subdividers' ownership of the land was "subject to the [en]cumbrance of the easement of the private way." *Id.* at 406. Thus, their purported dedication in 1981 of Mr. Bloom's road to the public was "of no consequence." *Id.* At the time of BP I's platting, Mr. Bloom "could not be deprived" of his easement "without his consent, or by some lawful and regular proceeding." *Id.*

Neither the subdividers nor the County by approving their plat could "annihilate [Mr. Bloom]'s property rights" in his access and maintenance easement. *Id.* at 407. Rather, Mr. Bloom had to "release his rights, or else he must be deprived of them by process of law" – i.e. by condemnation. *Id.* He did not. Thus, the platting of BP I in 1981 could not lawfully have deprived Mr. Bloom of his easements. *Id.*

Appellants argue the 1981 dedication to public use and Mr. Bloom's easements for private use are "concurrent easements" (Aplt. Br. 25-26). Citing *Kiwala v. Biermann*, 555 S.W.2d 663, 667 (Mo. App. 1977), and *Robert Jackson Real Estate Co., Inc. v. James*, 755 S.W.2d 343 (Mo. App. 1988), they argue the two are consistent with each other and thus the plat's purported dedication is valid (Aplt. Br. 25-26). As Appellants state, those cases hold that "existence of an easement does not hinder concurrent

easements over the same service tenement as long as the subsequent easement is not inconsistent with the first easement" (Aplt. Br. 25).

While this recitation of the law is accurate, it is inapplicable here. The issue in this case is not one of competing concurrent easements. Rather, as in *Wild*, it is about a public dedication versus a private property right. The easements give the dominant estate the rights to "location, construction and maintenance of an embankment or for sloping the sides of cuts back to construct and maintain said street at the established grade" (L.F. 342-49). As in *Wild*, dedicating the road to the public would annihilate these rights. Thus, as in *Wild*, the public dedication is wholly *inconsistent* with Respondents' private property rights in their easements. The easements give their holders vastly more rights than mere access. No cases permit a private way easement such as this to exist concurrently with a public road. *Kiwala* and *Robert Jackson* are inapposite.

Second, the platting of BP II in 1984 by Mr. Bloom's successors equally had no effect on the easements. While the plat of BP II shows a "street" running down its middle that it purports to dedicate to public use (L.F. 338), the trial court found, "At the time the BP II plat was platted the portion of the road through BP II had no continuity with any public road" (L.F. 416; Appx. A2). In fact, at that time, no road yet had been laid through BP II at all (Tr. 126, 132-33). The road in BP I did not even extend all the way through BP I until many years after BP II was platted (Tr. 126, 132-33). As well, the road that did exist in BP I was private. *Infra* at 47-50.

This rendered ineffective any attempted public dedication from that plat of what would later become the portion of BP Lane in BP II. In order to dedicate a private road

to public use, the private road must connect to a public road *at the time of the purported dedication*, because one cannot dedicate to the public what is impossible for the public to reach. *White v. Meadow Park Land Co.*, 213 S.W.2d 123, 126 (Mo. App. 1948). The law of Missouri does not allow for road islands. *Id.*

Moreover, the plat to BP II neither mentions any of the easements over BP I nor manifests any intent to relinquish them. The intent of a plat is derived from its plain language. *Saladin v. Jennings*, 111 S.W.3d 435, 441 (Mo. App. 2003). Here, the BP II plat states, "The streets and roads *shown on this Plat*, and not heretofore dedicated to public use are hereby so dedicated" (L.F 338) (emphasis added). There is no mention of any easement somewhere else. The BP II plat's express language limits itself to what is shown thereon. It cannot reasonably be read to include something located in BP I.

Thus, the platting of BP II in 1984 also could not lawfully have affected the existence of Mr. Bloom's and his successors' easements over BP I.

Both the County and all the other BP I and BP II owners always have known the 1980 private way easements remain in effect. Mrs. Gray, who moved into BP I in 1987, knew the easement ran "over and past" her property in BP I (Tr. 126-27). The easements were attached to and/or referenced in the deeds of the Piacenzas, who moved to BP I in 1989 (Tr. 132-33; Plt. Ex. 49), Mr. Bateman (Tr. 72, 74, 87-88, 113; Plt. Ex. 3), Mrs. Lofgren (Tr. 30-31), Mr. Owens (Tr. 195; Plt. Ex. 50), and every deed in BP II "from the time [Mr. Bloom] owned [it] to the present owners" (Tr. 74, 88-93). All the County's records show BP Lane to be a "private street," and the landowners in BP I pay property taxes on the land containing the road (Tr. 81-84; L.F. 420; Appx. A6).

The expert witnesses in this case also all agreed that Mr. Bloom's easements never were relinquished. Respondents' title expert, Steve Brulja, investigated whether Mr. Bloom's "easements have been extinguished as a matter of record," and found they had not (Tr. 65-66). He found "nothing" in the public record "that extinguished the three easements" (Tr. 65-66). Even Appellants' expert, Mindy Turner, testified the easements existed before the plat of BP I and gave the BP II landowners "access to [BP I] to get out to Mace [Road] and to make improvements to the road and to change the grade if they wanted and for utilities" (Tr. 164). She testified "nobody in [BP I] could close down that access" and the BP I landowners could not "[d]edicate their land for public right of way" so as to void Mr. Bloom's easements (Tr. 164, 169).

Plainly, neither Mr. Bloom nor any of his successors-in-interest ever affirmatively manifested any consent to relinquish their easements granting BP Lane to their exclusive use as a private road.

C. The trial court's finding that there never was any public use of BP Lane is supported by substantial evidence.

Appellants repeatedly insist there was "continuous" "public use" of BP Lane for more than ten years (Aplt. Br. 21, 28, 30-33). A whole section of their second Point Relied On is devoted to arguing "The Public Accepted and Used BP Lane" (Aplt. Br. 30-31). The entire point of their third Point Relied On is that "the public used BP Lane continuously, visibly and for an uninterrupted period greater than ten years" (Aplt. Br. 34-36).

This argument wholly ignores the standard of review. Appellants give short shrift to the trial court's express finding that "the general public has *not* used" BP Lane (L.F. 417; Appx. A3) (emphasis added). Rather, the court found that, besides the adjacent residents, the only other "people who use" BP Lane were those whom the residents invited (L.F. 418; Appx. A4). It found these uses were private, not public (L.F. 418; Appx. A4). Simply put, "there has been no … use of [BP Lane] by the public" (L.F. 418; Appx. A4).

At one point, Appellants attack these findings as "against the weight of the evidence" (Aplt. Br. 27). But when this Court reviews whether a judgment is against the weight of the evidence, "'weight' denot[es] probative value and not the quantity of evidence …." *White v. Dir. of Revenue*, 321 S.W.3d 298, 309 (Mo. banc 2010).

In this case, all the evidence regarding the use of BP Lane was testimonial. Thus, both Respondents' and Appellants' testimony had the same probative value. As such, the trial court was "free to disbelieve any, all or none of" the testimony, and "this Court defers to the trial court's determination of credibility." *Id.* at 308. Review of the trial court's findings in this case therefore must be confined "to determining whether substantial evidence exists to support the trial court's judgment …." *Id.* at 309 (citations omitted). In so determining, the Court must "accept as true the evidence and inferences from the evidence that are favorable to the trial court's [judgment] and disregard all contrary evidence." *Watson v. Mense*, 298 S.W.3d 521, 526 (Mo. banc 2009).

Under this deferential standard, the trial court's finding that there never was any public use of BP Lane is supported by substantial evidence. Deborah Lofgren testified

only "the people in BP II" use BP Lane (Tr. 31-32). They "have to" come through BP I on BP Lane because "[t]hey have no other way out" (Tr. 32). BP Lane "doesn't go anywhere" except "to the homes on the street" (Tr. 32). Besides the residents of BP II along BP Lane, only their "invitees" use it, such as their moving vans to move them in or UPS drivers making deliveries to the homes (Tr. 32). No commercial enterprises or public parks are accessible via BP Lane (Tr. 32). There are no "busses, no Postal Service, no Avon lady, anything like that," using BP Lane (Tr. 35).

As Mrs. Lofgren explained, "all" the non-resident "traffic" on BP Lane is from "invitees of anybody on the street" (Tr. 32). If a member of the public turned onto BP Lane who was not "going to somebody's house on" the road, "[t]hey'd have to turn around in somebody's driveway" (Tr. 32). Even Mr. Owens admitted no member of the public goes through BP Lane "to anyplace" (Tr. 192). He acknowledged the U.S. Postal Service does not use BP Lane, instead delivering the adjacent landowners' mail to "a community box" on Mace Road (Tr. 184).

The trial court believed this testimony and disbelieved any contrary testimony. This Court defers to that credibility determination. This testimony must be accepted as true, and any contrary testimony must be disregarded.

Appellants criticize the trial court for describing non-residents using BP Lane to visit the BP II residents as "invitees" (Aplt. Br. 32-33). The label the trial court chose to give these people is of no consequence. The usage rights of a person holding an appurtenant easement extend "to himself, members of his family, servants, bona fide guests, and other persons visiting him or his premises for legitimate reasons, business or

social," without that use being deemed public. *Gowen v. Cote*, 875 S.W.2d 637, 641 (Mo. App. 1994) (citation omitted); see also *Cheatham v. Melton*, 593 S.W.2d 900, 902 (Mo. App. 1980) (use of private road by "tradesmen, delivery personnel, mail carriers, business invitees and other private visitors to the residences" along it was not public use).

Viewing the evidence in a light most favorable to the trial court's judgment and taking all evidence and inferences in support of the judgment as true, the only people who ever used BP Lane were the adjacent residents themselves, members of their family, their servants, and other people legitimately visiting them or their premises for business or social reasons. As the trial court correctly found, this use was private, not public.

D. Appellants' arguments as to how BP Lane is a public road are without merit.

As Appellants state, "Public roads may be established in three ways: (1) by statute, (2) by prescription, and (3) by implied or common law dedication" (Aplt. Br. 19). Appellants argue BP Lane became a public road by each of the three methods.

Appellants never raised their statutory dedication argument before the trial court. As a result, it is not preserved for appeal. Even if it were preserved, the easements' continuing existence and the complete lack of public use and public maintenance of BP Lane negate this argument. Additionally, these facts vitiate Appellants' other two arguments that BP Lane was dedicated to the public as a matter of law, or that the public acquired a prescriptive easement over the road.

i. Appellants' statutory dedication argument is not preserved for appeal.

Appellants argue BP Lane was "statutorily dedicated to public use" by means of either §§ 228.190 or 445.070, R.S.Mo. (Aplt. Br. 15, 18-21).

Before the trial court, however, neither Appellants nor the County ever invoked either statute as a reason BP Lane was public – be it in their answers (L.F. 23-28, 100-06), summary judgment responses (L.F. 263-79, 288-300), or trial briefs (L.F. 310-17, 325-37, 394-400). Until appeal, no party ever even *cited* § 445.070. As for § 228.190, Appellants admitted in their motion to amend that "a public expenditure of funds is a requirement to establish a public road pursuant to … § 228.190," and "Defendants have never claimed that [BP Lane] was made public by virtue of … § 228.190" (L.F. 432).

"Even in a court-tried case, where no post-trial motion is required to preserve substantive issues for appellate review, Rule 78.07(b), [an appellate court] cannot address arguments that the appellant failed to raise at trial." *Arnold v. Minger*, 334 S.W.3d 650, 652 (Mo. App. 2011) (citation omitted). "[I]t has long been stated that this Court will not, on review, convict a lower court of error on an issue which was not put before it to decide." *Lincoln Credit Co. v. Peach*, 636 S.W.2d 31, 36 (Mo. banc 1982). As well, a party automatically is estopped from taking a position on appeal contrary to one it took before the trial court. *Sheppard v. East*, 192 S.W.3d 518, 524 (Mo. App. 2006).

Appellants never raised any argument below that BP Lane was statutorily dedicated to the public under either § 445.070 or § 228.190. In fact, with regard to § 228.190, they admitted to the contrary. They cannot raise these arguments for the first time on appeal. The Court should not consider Appellants' first Point Relied On.

ii. Even if Appellants' statutory dedication argument were preserved, it fails.

First, Appellants argue BP Lane became a public road under § 445.070, which provides that "plats of … cities … made, acknowledged, certified and recorded" are "a

sufficient conveyance to vest the fee of such parcels of land as are therein named, described, or intended for public use in such city," and if there is no incorporated city, "the fee of such lands … shall be vested in the proper county" (Aplt. Br. 19-20). Appellants argue that, because the plats of BP I and BP II "were approved by and recorded with the County," it must follow that BP Lane "was dedicated to the County as a street right of way at the time the plats were recorded" (Aplt. Br. 20).

As explained above, however, the platting of BP I could not lawfully supersede Mr. Bloom's preexisting easements over BP I. *Infra* at 47-50. Similarly, the plat of BP II neither affected those easements nor could dedicate its then-nonexistent road to public use. *Infra* at 50-52. Thus, the plats of BP I and BP II could not have vested anything in the County under § 445.070. They cannot have voided the easements. *Infra* at 47-52.

Second, Appellants argue BP Lane became a public road under § 228.190.1, which they paraphrase as setting "forth two ways to establish a public road: (1) by any order of the county commission and having been used as a public highway for a period of more than ten years or (2) where public money or labor has been expended for a period of more than ten years" (Aplt. Br. 21). They argue "BP Lane was statutorily dedicated to public use under the first prong of" this statute because the "public used BP Lane for greater than ten years" (Aplt. Br. 21).

Appellants incorrectly paraphrase this statute. Section 228.190.1 actually states:

> All roads in this state that have been established by any order of the county commission, and have been used as public highways for a period of ten years or more, shall be deemed legally established public roads; and all

> roads that have been used as such by the public for ten years continuously, and upon which there shall have been expended public money or labor for such period, shall be deemed legally established roads …

(Appx. A8).

Thus, this language promulgates two possible methods for a private road to become public, each of which has two requisite elements of its own. Under the first method, the road must have been (1) "established by order of the county commission" and (2) "used as [a] public highway[] for a period of ten years or more." Under the second, (1) the road must have "been used … by the public for ten years continuously" and (2) there must "have been expended public money or labor" on it for that period.

Appellants have conceded both at trial and on appeal that no public authority ever spent any money on BP Lane or maintained it in any way (Aplt. Br. 21; L.F. 432). So, their argument that § 228.190 made BP Lane a public road must be limited to that statute's first method. But no "order of the county commission" "established" BP Lane, nor do Appellants point to any such order. Moreover, the public has never used BP Lane, let alone for ten years or more. *Infra* at 35-37, 52-55.

Even if this line of argument were preserved for appellate review, BP Lane could not have become a public road by virtue of either §§ 445.070 or 228.190. The Court should affirm the trial court's judgment.

iii. As Mr. Bloom's easements never were relinquished and the public never used BP Lane, the road cannot have been dedicated to public use at common law.

A private road can be dedicated to the public as a matter of common law where: (1) "there is evidence the owner clearly showed his intent to dedicate the [road] for public use;" (2) the road "is accepted by the public;" and (3) the road "was used by the public" (Aplt. Br. 27). A "governmental authority" need not actually accept the dedication, so long as it "is accepted by the public, which is shown through public use of the" road (Aplt. Br. 27). Appellants argue BP Lane was dedicated to public use at common law because "all property owners clearly intended to dedicate BP Lane to public use" and "the public accepted and used BP Lane" (Aplt. Br. 28-33).

"The intention of the owner to set apart land for public use is the foundation of every" common law dedication. *Whittom v. Alexander-Richardson P'ship*, 851 S.W.2d 504, 508 (Mo. banc 1993). "The acts establishing a dedication must be unequivocal, indicating … a purpose to create a right in the public to use the land." *Id.*

In this case, neither element of a common law dedication – neither the intent of the owner nor public use – is present. Neither Mr. Bloom nor any of his successors ever manifested any intent, and certainly not *unequivocal* intent, to relinquish their easements granting BP Lane to their exclusive, private use and maintenance and instead to dedicate the road to the public. *Infra* at 47-52. And the public never used BP Lane. *Infra* at 35-37, 52-55.

As a result, BP Lane could not have been dedicated to public use at common law. The Court should affirm the trial court's judgment.

iv. As there never was any public use of BP Lane, the public cannot have acquired a prescriptive easement over it.

Finally, Appellants argue "a prescriptive easement was created" in right of the public over BP Lane because "the public continuously, visibly, and adversely used the road for a period greater than ten years," which "the easement holders took no action to prevent" (Aplt. Br. 34). A prescriptive easement can be established by use of land that is continuous, uninterrupted, visible, and adverse for a period of ten years. *Whittom*, 851 S.W.2d at 508.

In rare circumstances, the public can acquire a prescriptive easement over a private road if the public continuously, visibly, and adversely used the road for an uninterrupted period of ten years. *Shapiro Bros. v. Jones-Festus Props., L.L.C.*, 205 S.W.3d 270, 274 (Mo. App. 2006); see also *Terry v. City of Independence*, 388 S.W.2d 769, 774 (Mo. banc 1965). But the law of Missouri "does not favor prescriptive easements." *Orla Holman Cemetery v. Plaster Trust*, 304 S.W.3d 112, 119 (Mo. banc 2010). A "party claiming the existence of [a prescriptive easement] must show the elements by clear and convincing evidence." *Shapiro Bros.*, 205 S.W.3d at 274.

In this case, this argument is obliterated by the fact that the public never used BP Lane *at all*, let alone continuously, visibly, and adversely for an uninterrupted period of ten years. *Infra* at 35-37, 52-55. Appellants simply cannot overcome this.

Under all three recognized methods whereby a private road can become a public road, the trial court correctly held BP Lane remains a private road. Appellants' arguments otherwise are untenable. This Court should affirm the trial court's judgment.

Conclusion

The Court should affirm the trial court's judgment.

Respectfully submitted,

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Certificate of Compliance

I hereby certify that I prepared this brief using Microsoft Word 2010 in Times New Roman size 13 font. I further certify that this brief complies with the word limitations of Rule 84.06(b), and that it contains 18,311 words.

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Certificate of Service

I hereby certify that on October 11, 2011, I filed a true and accurate Adobe PDF copy of this Substitute Brief of the Respondents and its Appendix via the Court's electronic filing system, which notified the following of that filing:

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