WD86145

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

ERIC ENGLISH and ASHLEY ENGLISH,

Plaintiffs / Appellants,

vs.

JASON BARNETT, SARA BARNETT, and BARNETT REAL ESTATE INSPECTIONS, LLC,

Defendants / Respondents,

and

MATTHEW HARSHMAN AND ERICA HARSHMAN,

Third-Party Defendants / Respondents.

On Appeal from the Circuit Court of Jackson County
Honorable Kyndra J. Stockdale, Associate Circuit Judge
Case No. 2116-CV10560

BRIEF OF THE APPELLANTS

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Jurisdictional Statement

This is an appeal from a judgment of the Circuit Court of Jackson County granting declaratory and injunctive relief.

This case does not involve the validity of a Missouri statute or constitutional provision or a federal statute or treaty, the construction of Missouri's revenue laws, the title to statewide office, or the death penalty. So, under Mo. Const. art. V, § 3, this case does not fall within the Supreme Court's exclusive appellate jurisdiction and jurisdiction of this appeal lies in the Missouri Court of Appeals. This case arose in Jackson County. Under § 477.070, R.S.Mo., venue lies in the Western District.

Statement of Facts

A. Overview

Ashley and Eric English bought their home in Grain Valley in 2015 (Tr. 7-8; Stip. Ex. 16). Their property is to the south of East Stony Point Road, which they access with a gravel driveway (Stip. Ex. 2; App. A17). Sara and Jason Barnett live directly west of that driveway, and the east boundary line of their property abuts the length of the Englishes' driveway (Stip. Ex. 12; App. A67-68). The Barnetts have their own driveway with direct access to East Stony Point Road (Tr. 50-51).

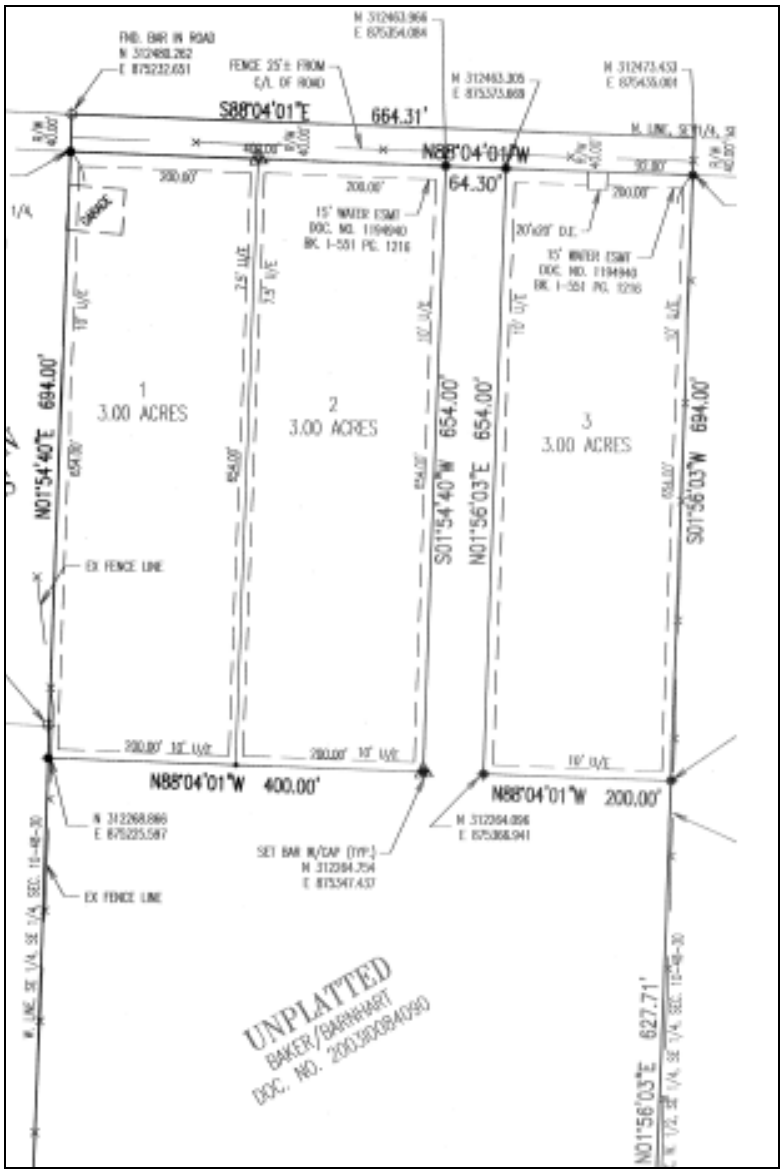
In 2019, the Barnetts began building a shed on the southern end of their property, using the Englishes' driveway to haul in the necessary building materials, and continuing to use the driveway to access the shed after they finished constructing it (Tr. 55-56). The Englishes sued the Barnetts for trespass, nuisance, and injunctive relief (D9). The Barnetts responded they had a right to use the driveway under a 2005 easement created by the developers of the land that later became the Barnett and English properties (D13). The Englishes disagreed, arguing the easement was invalid because it was created by and granted to the same person, and that the Barnetts had no right to use the driveway (D15; D22 pp. 5-6).

After a bench trial, the court granted declaratory and injunctive relief in the Barnetts' favor, declaring the 2005 easement valid and barring the Englishes from preventing the Barnetts from using the driveway (D20; App. A1).

The Englishes now appeal (D25).

B. Meadow View Estates' creation and the easements

In 2004, Matthew Baker, Janet Barnhart, and Bruce Barnhart ("the Developers") owned undeveloped land in eastern Jackson County (Tr. 32-33). In June 2004, they filed a tax certificate for a plat creating Meadow View Estates, a subdivision with three lots (Stip. Ex. 4; App. A23). Each lot bordered the southern edge of East Stony Point Road, with a small strip of un-platted land running between Lots 2 and 3 from the road down into more un-platted land to the south, as shown here (Stip. Ex. 4; App. A25):



Before filing this tax certificate creating Lots 1-3, in February 2004 Developer Matthew Baker recorded an easement to himself covering the then-un-platted strip of land between Lots 2 and 3 ("the Original Easement") (Stip. Ex. 3; App. A18). The Original Easement stated: "Grantor does hereby grant to Grantee an irrevocable easement and right of way over, across, around, and through" the English Property's driveway, but made no mention as to which properties the Original Easement was meant to benefit (Stip. Ex. 3 at 2-3; App. A19-20). It was recorded as Document #2004I0020682 (Stip. Ex. 3 at 1; App. A18). The Developers released the Original Easement in April 2005 (Stip. Ex. 10; App. A55-56).

In March 2005, before releasing the Original Easement, developer Matthew Baker again granted himself an easement in the strip of land between lots 2 and 3 (Stip. Ex. 9; App. A50). The Developers re-recorded the easement in April 2005 to correct a clerical error in its description ("the Underlying Easement") (Stip. Ex. 11; App. A59). The Underlying Easement also stated: "Grantor does hereby grant to Grantee an irrevocable easement and right of way over, across, around, and through" the English Property's driveway and also made no mention as to which properties it was designed to benefit (Stip. Ex. 11 at 3-5; App. A61-63). It was recorded as Document #2005I0030089 (Stip. Ex. 11 at 1; App. A59).

On the same day the Developers filed the tax certificate creating Lots 1-3, they also filed a "Declaration of Covenants, Conditions and Restrictions" (Stip. Ex. 5; App. A27). It said the three lots were subject to "[e]asements for installation and maintenance of utilities and drainage facilities," which would

be "reserved by" the Developers (Stip. Ex. 5 at 5; App. A31). The declaration also said the unoccupied space between Lots 2 and 3 could be used as a common driveway, should the owners choose to do so: "Should owners of Lots 2 or 3 elect to use the common driveway easement provided for in Document 2004I0020682, they shall participate equally in the maintenance and repair of said driveway" (Stip. Ex. 5 at 5; App. A31). The declaration specifically said Lot 2's and Lot 3's use of the driveway was pursuant to the Original Easement, which was referenced by its instrument number [2004I0020682] and was "reserved as appurtenant to the land owned by the respective tract owners" (Stip. Ex. 5 at 5; App. A31).

Two weeks after creating Lots 1-3, the Developers filed a "certificate of survey" creating Tracts D and E in the previously un-platted area directly south of Lots 1-3 (Stip. Ex. 6; App. A37). Tract E included the strip of land between Lots 2 and 3 (Stip. Ex. 6; App. A38). The Developers filed another "Declaration of Covenants, Conditions and Restrictions" applying only to Tracts D and E (Stip. Ex. 7 at 2; App. A41). It stated, "[a] non-exclusive and permanent easement and right of way for a private driveway common" to the two tracts "is and will be reserved according to the recorded plat" (Stip. Ex. 7 at 5; App. A44). It said the easement "is reserved as appurtenant to the land owned by" the owners of Tracts D and E (Stip. Ex. 7 at 5; App. A44).

Neither the certificate creating Tracts D and E, nor the associated declaration incorporated the two tracts into Meadow View Estates (Stip. Ex. 6; Stip. Ex. 7; App. A37-39, A40-49). Tract E, which later became the English Property, is not in the Meadow View Estates subdivision (Tr. 15).

C. Property conveyances

In February 2005, the Developers deeded Lot 3 to Matthew and Erica Harshman ("the Harshman Property") (Plaintiff's Ex. 55).

In April 2005, the Developers deeded Lot 2 to Jason and Sara Barnett (Stip. Ex. 12; App. A68). This brief refers to their property as "the Barnett Property." The deed said the conveyance was "[s]ubject to Building lines, easements, restrictions and conditions of record, if any" (Stip. Ex. 12; App. A68).

In May 2005, the Developers deeded Tract E to Eric and Regina McKinney ("the McKinneys") (Stip. Ex. 13; App. A71). The deed contained identical language to the Barnetts' deed regarding potential easements across the property (Stip. Ex. 13; App. A72). In March 2010, the McKinneys deeded to the Barneses a five-foot wide strip of land running the length of the driveway abutting the Barnett Property (Stip. Ex. 15).

The McKinneys deeded Tract E to Eric and Ashley English in December 2015 (Tr. 7-8; Stip. Ex. 16). This brief refers to the property as "the English Property." The Englishes' title insurer noted the Underlying Easement and explained it was not insuring the Englishes against any loss or damage arising out of it (Stip. Ex. 17 at 7).

In March 2008, the Developers deeded Tract D ("the Barnes Property") to Jason and Andrea Barnes.

D. The Barnetts' use of the Englishes' driveway

Both the Original and Underlying Easements covered the land the Englishes and the Harshmans used as a driveway to access their properties

from East Stoney Point Road (Stip. Ex. 2; App. A17). The English Property is the southernmost one pictured here (including the length of the driveway), and the Harshman Property is the northeastern lot (Stip. Ex. 2; App. A17):

After the Barnetts purchased their property, pictured above to the northwest, they built a new home with its own driveway and access to East Stony Point Road (Tr. 50-51). Mr. Barnett used the English Property driveway to bring in building materials to his own property during the home's construction, when the McKinneys were also building their home on the English Property and the Harshmans had yet to build their own (Tr. 51). Mr. Barnett said neither owner objected to his use of the driveway (Tr. 51).

Mr. Barnett also used the driveway in 2018 when he built a pool in his backyard (Tr. 52). He said he also used the driveway when refilling the propane tank in his property's southwest corner (Tr. 52). In 2019, Mr. Barnett began building a shed in the southwest corner of his property near that propane tank (Tr. 55-56). He used the driveway to access the shed during its construction, which finished in summer 2020 (Tr. 11, 55-56).

E. Proceedings below

1. Initial proceedings

In May 2021, the Englishes filed a petition against the Barnetts and Mr. Barnett's real estate company in the Circuit Court of Jackson County (D2; D4). The Englishes' second amended petition alleged trespass and nuisance claims against the Barnetts based on the Barnetts' use of the English Property's driveway and the Barnetts' offensive behavior during it (D9 pp. 3-5). The Englishes' third Count sought injunctive relief ordering the Barnetts to stop using the driveway (D9 pp. 5-6).

In their answer, the Barnetts alleged, among other affirmative defenses, that they had a right to use the English Property's driveway due to

the Underlying Easement (D13 p. 4). They also stated counterclaims seeking declaratory and injunctive relief against the Englishes establishing the Barnetts' right to use the driveway per the Underlying Easement and enjoining the Englishes from interfering with that right (D13 pp. 7-9). They also stated tort counterclaims against the Englishes alleging nuisance, assault, and intentional infliction of emotional distress (D13 pp. 9-12).

On the Barnetts' motion, the trial court ordered the Harshmans added as third-party defendants (D10; D12). The Englishes agreed the Harshmans, who otherwise had no direct access of their own to East Stony Point School Road, used their driveway, but stated this was not because of the Underlying Easement (D15 p. 3). Rather, the Englishes alleged that use was under an agreement between them and the Harshmans (D15 p. 3).

In May 2022 the Englishes executed a "revocation of ingress and egress easement," which stated the Underlying Easement, "as expressed in … Document No. 2005I0030089, is Withdrawn, Cancelled, and Revoked" (Stip. Ex. 19 at 2).

After trial, the Barnetts moved to dismiss their own tort counterclaims, which the trial court granted (D18; D20 p. 15; App. A15).

2. Trial

The case proceeded to a bench trial in August 2022, in which the Englishes and the Barnetts presented 20 stipulated exhibits, which the court admitted (Tr. 4; Stip. Exs. 1-20). Mr. English and Mr. Harshman testified for the Englishes, and Mr. Barnett and a local real estate broker testified for the

Barnetts (Tr. 2, 73-74). No party sought findings of fact and conclusions of law before trial (D1 pp. 14-15).

Mr. English and Mr. Harshman both testified the Harshmans used the driveway under an agreement with the McKinneys and then the Englishes, and that the Harshmans otherwise had no right to its use (Tr. 16, 45). They also both testified about a formal, written driveway easement and maintenance agreement the Englishes entered into with the Harshmans one month before trial (Tr. 19, 46-47; Stip. Ex. 20).

Mr. English testified he did not believe the Underlying Easement was necessary or valid because the Developers had granted it to themselves, so the Englishes executed the release of it (Tr. 18-19; Stip. Ex. 19). He said he and his wife owned the driveway and accordingly believed that absent a valid easement, the Barnetts did not have any right to access it (Tr. 14, 18-19).

Mr. Barnett testified he contracted a surveyor to determine the scope of the Underlying Easement, who confirmed his belief the easement was valid and that he had a right to its use (Tr. 58-59; Stip. Ex. 18). Attorney and real estate broker Brantley Elsberry testified Mr. Barnett approached him asking for an opinion on the Underlying Easement's validity as to the Barnett Property (Tr. 79). Mr. Elsberry opined that the Underlying Easement was valid and ran with the land (Tr. 82-84).

3. Judgment

The trial court issued its judgment in November 2022 concluding the Underlying Easement was valid and the Barnett Property was the dominant tenement (D20 p. 8; App. A8). It reasoned that even though the Developers

granted themselves the Underlying Easement, it was valid because they intended to create it "for the benefit of the future owners rather than themselves" and it became effective "at the time Developers conveyed Lot 2 to the Barnetts" (D20 p. 11; App. A11).

Based on its conclusion the Underlying Easement is valid and benefits the Barnett Property, the trial court denied the Englishes' trespass and injunctive relief claims, but granted their nuisance claim against the Barnetts and awarded them $2,500 in damages (D20 pp. 12-13; App. A12-13). It then granted the Barnetts' counterclaims for declaratory and injunctive relief (D20 pp. 13-14; App. A13-14).

The Englishes timely moved to amend the judgment, arguing the trial court erred in concluding the Underlying Easement was valid because the Developers impermissibly granted it to themselves (D22 pp. 5-6). When the trial court did not rule on their motion within ninety days (D1 pp. 17-20), the Englishes timely appealed to this Court (D25).

Point Relied On

The trial court erred in holding the Developers intended the Underlying Easement to run for the benefit of the Barnett Property's future owners, a finding necessary to sustain the judgment *because* this lacked substantial evidence in its support, as the law of Missouri is that a developer-created easement only runs with the land when it is included in a subdivision plat or in individual property conveyance deeds *in that* viewing the evidence in the light most favorable to the trial court's judgment, the Developers did not create the Underlying Easement in the Meadow View Estates subdivision plat or include it in the deed conveying any of the relevant properties, and the only evidence linking the Barnett Property to an easement over the driveway is a declaration incorporating only the Original Easement, which the Developers released.

Woodling v. Polk, 473 S.W.3d 233 (Mo. App. 2015)

Phelan v. Rosener, 511 S.W.3d 431 (Mo. App. 2017)

Ball v. Gross, 565 S.W.2d 685 (Mo. App. 1978)

Gardner v. Moffitt, 74 S.W.2d 604 (Mo. 1934)

Argument

The trial court erred in holding the Developers intended the Underlying Easement to run for the benefit of the Barnett Property's future owners, a finding necessary to sustain the judgment *because* this lacked substantial evidence in its support, as the law of Missouri is that a developer-created easement only runs with the land when it is included in a subdivision plat or in individual property conveyance deeds *in that* viewing the evidence in the light most favorable to the trial court's judgment, the Developers did not create the Underlying Easement in the Meadow View Estates subdivision plat or include it in the deed conveying any of the relevant properties, and the only evidence linking the Barnett Property to an easement over the driveway is a declaration incorporating only the Original Easement, which the Developers released.

Preservation Statement

This point is preserved for appellate review. The Englishes made the argument in it in their motion to amend the judgment (D22 pp. 5-6). Moreover, under § 510.310.4, R.S.Mo., "[t]he question of the sufficiency of the evidence to support the judgment may be raised whether or not the question was raised in the trial court." Therefore, an argument that a judgment lacks substantial evidence in its support is not a challenge to the form or language of the trial court's judgment and so does not require a post-judgment motion under Rule 78.07(c), and instead automatically is preserved for appeal. *In re Marriage of Harris*, 446 S.W.3d 320, 330-31 (Mo. App. 2014) (Rahmeyer, J., joined by Sheffield, J.).

Standard of Review

In a judge-tried case, the standard of review from *Murphy v. Carron*, 536 S.W.2d 30 (Mo. banc 1976), applies. *In re Marriage of Woodson*, 92 S.W.3d 780, 785 (Mo. banc 2003). The judgment will be affirmed "unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law." *Murphy*, 536 S.W.2d at 32.

This Court "views the evidence and permissible inferences drawn from the evidence in the light most favorable to the judgment." *Ivie v. Smith*, 439 S.W.3d 189, 198-99 (Mo. banc 2014). "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). But "when the evidence is uncontested,"

> no deference is given to the trial court's findings. Evidence is uncontested in a court-tried civil case when the issue before the trial court involves only stipulated facts and does not involve resolution by the trial court of contested testimony; in that circumstance, the only question before the appellate court is whether the trial court drew the proper legal conclusions from the facts stipulated.

Id. (internal citation omitted).

"When determining the sufficiency of the evidence" under the *Murphy v. Carron* standard, 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). "Whether evidence is substantial and whether any inferences drawn are reasonable is a question of law," reviewed de novo.

Wagner v. Bondex Int'l, Inc., 368 S.W.3d 340, 348 (Mo. App. 2012) (citation omitted). And when no findings of fact are requested, this Court "consider[s] all fact issues upon which no specific findings were made as having been found in accordance with the result reached per Rule 73.01(c)." *Hurricane Deck Holding Co. v. Spanburg Invs., LLC*, 548 S.W.3d 390, 395 (Mo. App. 2018) (citation omitted).

A. Summary

The trial court's judgment recognized the general principle that a property owner may not grant himself an easement over his own land, and any attempt to do so is void due to merger. But it concluded this principle did not apply to void the Underlying Easement because the Developers intended it to run with the Barnett Property to benefit future owners. This finding lacked substantial evidence in its support.

The law of Missouri is a subdivision developer may preserve an easement across its own property for future lot owners' benefit by either creating the easement in the subdivision plat, in the individual lot conveyance deeds, or both. Evidence that the developer created the easement that way is required to support that he or she intended the easement to run for future owners' benefit, avoiding its extinguishment for merger.

Here, the trial court erroneously concluded the Developers intended to run the Underlying Easement for the Barnett Property's benefit despite their failure to include it in the subdivision plat or in any conveyance deeds. It purportedly relied on a declaration of covenants to uphold the easement. Even assuming the document is sufficient evidence to support the Developers'

intent, which it is not, it still is not substantial evidence supporting the judgment because the English Property is not subject to it, and it only incorporates a specific easement that the Developers later released.

Therefore, no substantial evidence supports the trial court's holding that the Developers intended the Underlying Easement to run for the Barnett Property's benefit, a fact necessary to support the judgment. This Court should reverse the trial court's judgment, enter judgment declaring no valid easement benefitting the Barnett Property exists, and remand this case for further proceedings on the Englishes' trespass and injunction claims.

B. A subdivision developer's easement across his own property created before the property's division is presumed invalid because property owners may not have an easement across their own land.

"An easement is a non-possessory interest in the real estate of another." *Burg v. Dampier*, 346 S.W.3d 343, 353 (Mo. App. 2011). An easement owner has the right "to use the real estate of another for a general or specific purpose." *Id.* (citing *Farmers Drainage Dist. of Ray Cnty. v. Sinclair Refining Co.*, 255 S.W.2d 745, 748 (Mo. 1953)).

"Easements are either 'appurtenant' or 'in gross.'" *Tenampa, Inc. v. Bernard*, 616 S.W.3d 327, 335 (Mo. App. 2020) (quoting *Burg*, 346 S.W.3d at 353). "An easement appurtenant creates a dominant tenement (the land which benefits from the easement) and a servient tenement (the land which is burdened by the easement)." *Id.*

The law of Missouri is that "a man cannot have an easement over his own land." *Ball v. Gross*, 565 S.W.2d 685, 688 (Mo. App. 1978) (quoting *Bales v. Butts*, 274 S.W. 679 (Mo. 1925)). So, when an appurtenant easement's

dominant and servient tenements "are merged under common ownership and possession … the easement is generally extinguished." *Woodling v. Polk*, 473 S.W.3d 233, 236 (Mo. App. 2015).

Under this principle, when a subdivision developer grants himself an easement through his own land, the purported easement is invalid, as this Court held in *Woodling*. There, a developer owned two adjacent residential lots with a single driveway situated on only one of the lots but serving both. 473 S.W.3d at 234. The developer executed a deed creating an easement across the driveway "[f]or the use and benefit of the present and future owners" of the lot without the driveway. *Id.* When the developer began negotiating the sale of the dominant estate, the potential buyers requested he just adjust the boundary line to include some or all of the driveway in the dominant estate's lot. *Id.* The developer did so, adjusting the boundary line of the dominant estate to include a one-car-width portion of the driveway. *Id.*

The dominant estate buyers then sold to another party, who routinely used the servient estate's portion of the driveway to enter and exit his property. *Id.* at 235. After the servient estate owners placed large rocks to prevent access to their side of the driveway, the dominant tenement owner sued, seeking a declaration that his use of the entire driveway was legal under the easement. *Id.* The trial court disagreed, holding the initial deed did not create a valid easement because the developer could not grant an easement to himself. *Id.*

This Court affirmed, finding the developer's driveway easement invalid because "an owner cannot grant himself property rights he already

possesses." *Id.* at 236. It explained that when a developer wants to create easements over the land, he can include them in the individual deeds conveying each lot or create them through the subdivision plat. *Id.* Because neither of those things was done, it was insufficient that the developer previously executed and recorded the driveway easement and then the conveyances alerted buyers they took the property line "subject to existing … easements … now of record, if any." *Id.* at 238.

C. A developer-created easement may only escape merger if the developer intended it to run with the land by either creating it in the subdivision plat, creating it via the conveyance deeds for each affect property, or both.

Here, the trial court concluded the Underlying Easement survived merger because the "Developers intended to create it for the benefit of future landowners" (D20 p. 9; App. A9), and so "the merger doctrine merely delay[ed] creation of the [Underlying Easement] until" the Developers sold the affected properties, "thereby severing the owner's title" (D20 p. 9; App. A9) (citing *Phelan v. Rosener*, 511 S.W.3d 431, 439 (Mo. App. 2017)).

The trial court is correct that in limited cases, the merger doctrine will not invalidate a developer's easement. When a developer wishes to create an easement to benefit and burden future property owners in a subdivision, he has "essentially two options." *Woodling*, 473 S.W.3d at 236. He either "can include the easement in the individual deeds conveying each lot" or "create easements through a subdivision plat ...." *Id.* at 237. The Court in *Woodling* held the best practice is for developers to do both, including identical language creating the easement in the original subdivision plat and in the deeds conveying each affected lot. *Id.*

In these situations, a developer's easement to himself is not valid "until a severance of title occurs." *Gardner v. Moffitt*, 74 S.W.2d 604, 607 (Mo. 1934). The easement's creation is therefore delayed until "a third party acquires title to some part of the property[.]" *Phelan*, 511 S.W.3d at 439. To determine whether a developer's preexisting easement passes after severance of title notwithstanding merger, "[t]he intention of the parties is the paramount and controlling question. That intention is to be ascertained from the terms of the deed considered in the light of the circumstances surrounding the parties." *Gardner*, 74 S.W.2d at 607.

The *Woodling* rule requiring clear easement creation language in either the plat or the deed makes sense, as property restrictions "will not be extended by implication to include anything not clearly expressed." *Id.* So, when the appellant in *Woodling* argued the developer intended the easement to run for the benefit of future landowners, this Court disagreed because neither the subdivision plat nor the conveyance deeds contained language creating an easement. 473 S.W.3d at 238. Language in the deed stating the buyers purchased the land "'subject to existing ... easements ... now of record, if any,' was not specific enough" to shield the easement from merger. *Id.*

For these reasons, in *Phelan* this Court found a developer's easement survived merger, as specific, necessary language in multiple documents confirmed its existence. There, subdivision developers entered into a Road Maintenance Agreement ("RMA"), which they signed as both grantors and trustees, creating a private roadway easement through the subdivision but bordering a neighboring property not part of the new neighborhood. 511

S.W.3d at 435. The RMA explicitly stated all "present and future tract owners, their heirs, successors, assigns and personal representative, and the covenants and agreements contained herein shall run with the land[.]" *Id.* All but two of the developers' subsequent conveyance deeds included either identical easement creation language or specifically incorporated the RMA easement. *Id.* at 436.

After a series of conveyances, owners of three subdivision properties sued owners of two non-subdivision properties bordering the RMA easement, alleging the non-subdivision owners had no right to its use. *Id.* at 436. The trial court entered summary judgment concluding both non-subdivision owners were permitted to use the easement, and this Court affirmed. *Id.* at 436-37, 441-42. It held merger did not invalidate the easement because the developers conveyed one of the subdivision properties to a buyer on the same day the developers executed the RMA, even if the developers still owned the remaining subdivision properties bordering the easement. *Id.* at 436, 440. So, because at that point the developers did not own one of the affected properties when creating the easement, it survived merger. *Id.*

Moreover, "the terms of the deed[s] considered in the light of the circumstances surrounding the parties" supported the easement's preservation because (1) the RMA's express language created the "easement for the present and future benefit" of specific properties, *id.* at 441, and (2) three of the properties the developers' deeded included reference to or identical language to the RMA easement. *Id.* at 436, 440. So, following the same rule as in *Woodling*, because the developers included the easement in

their conveyance deeds and specifically said it would run with the land, it ran for and against future owners of the affected properties. *Id.* at 440-41.

The Supreme Court employed a similar rule in *Gardner* to uphold a durational building line restriction on a property. There, a subdivision developer created a building line on all lots in his subdivision plat but did not specify how long the restriction would last. 74 S.W.2d at 605. He later conveyed three of the subdivision's properties to a single buyer and included provisions in the deed limiting the building line's existence in *all* affected lots to 25 years. *Id.*

The appellants, owners of one lot included in the original conveyance and one not included there, argued the building line endured beyond the 25-year limitation because the language in the subdivision plat did not include any similar durational language. *Id.* at 964. The Supreme Court disagreed, holding the 25-year restriction applied to invalidate the building line, as that period had passed when the Court decided the case. *Id.* at 965-67. It concluded that because the developer clearly included the limitation in the first conveyance deed, and subsequent conveyances specifically incorporated the terms of that deed, the parties intended the building line to survive only for 25 years notwithstanding the failure to include similar language in the plat. *Id.* This result makes sense because, as this Court explained in *Woodling*, if easement descriptions in a plat and conveyance deed conflict, "the easement language in the conveyance deed controls." 473 S.W.3d at 237.

These decisions make plain Missouri's rule that a developer-created easement across his own property only survives merger when clear language

in a subdivision plat, conveyance deed, or both binds future owners to its terms. A deed's general reference to "any easements of record" alone is insufficient evidence of that intent. *Woodling*, 473 S.W.3d at 238.

D. The trial court's finding that the Developers intended the Underlying Easement to survive merger and run for the Barnett Property's benefit lacked substantial evidence in its support, as neither the Meadow View subdivision plat nor any relevant conveyance deed mentions the easement, and the only evidence linking the Barnett Property to an easement over the driveway specifically references a different easement that the Developers released.

1. Summary

Neither the Meadow View Estates plat nor any of the Developers' conveyance deeds specifically creates, references, or incorporates the Underlying Easement. The Underlying Easement deed, which the Developers executed to themselves, does not include the Barnett Property as a dominant tenement. This lack of evidence to establish developer intent alone means the trial court's finding lacks substantial evidence in its support.

To the extent the law permits courts to look beyond the plat and conveyance deeds, there is still no substantial evidence supporting the trial court's finding. The only evidence specifically linking the Barnett Property to any easement over the Englishes' driveway is a declaration of covenants the Developers filed alongside the Meadow View plat, which incorporated only the Original Easement, which the Developers later released. Moreover, the English Property, which is not in the Meadow View subdivision, is not even subject to the declaration.

None of the Barnetts' evidence supports the trial court's finding upholding the Underlying Easement. This Court should reverse the trial court's judgment, enter judgment declaring no valid easement exists for the Barnett Property's benefit, and remand for further proceedings on the Englishes' trespass and injunctive relief claims.

2. Challenged factual proposition necessary to support the judgment: the Developers intended the Underlying Easement to benefit the Barnett Property and its future owners.

In *Houston v. Crider*, 317 S.W.3d 178, 186-87 (Mo. App. 2010), this Court laid out this required rubric for a not-supported-by-substantial-evidence challenge under *Murphy v. Carron* review:

> (1) identify a challenged factual proposition, the existence of which is necessary to sustain the judgment;
>
> (2) identify all of the favorable evidence in the record supporting the existence of that proposition; and,
>
> (3) demonstrate why that favorable evidence, when considered along with the reasonable inferences drawn from that evidence, does not have probative force upon the proposition such that the trier of fact could not reasonably decide the existence of the proposition.

Here, the challenged factual proposition necessary to sustain the judgment is the trial court's finding that the Underlying Easement "is a valid easement granting [the Barnetts] a right of way over [the Englishes' driveway] to access the Barnett Property" and that the "Developers intended to create it for the benefit of future landowners (D20 pp. 8-9; App. A8-9).

Absent this factual proposition, the judgment below would have been in favor of the Englishes. As the trial court explained, "Missouri courts have also voided easements under the merger doctrine where the developer grants

an easement" to himself (D20 p. 9; App. A9). The trial court concluded only thing saving the Underlying Easement from merger is its finding that the Developers intended the Underlying Easement to run with the land and for the Barnett Property's benefit (D20 pp. 9-11; App. A9-11).

So, the issue here is whether substantial evidence supports the trial court's finding that the Developers intended to run the Underling Easement with the land for the Barnett Property's benefit.

3. The favorable evidence in the record supporting the existence of the challenged factual proposition.

The trial court listed five reasons why it found the Developers intended the Underlying Easement to run with the Barnett Property (D20 pp. 9-11; App. A9-11):

> (a) The Declarations demonstrate Developers always intended to subdivide and develop the land at issue into a residential subdivision and/or separate tracts. Specifically, the Declarations state Developers "desire[] to provide for the enhancement of the property values, amenities and opportunities in a residential subdivision to be developed in the aforesaid area…" *See* [Stip. Exs.] 5, 7. It follows that when Developers subsequently executed the [Underlying] Easement, they did so for the purpose of benefiting the future owners of the parcels within the subdivision.
>
> (b) Developers then actually followed through with their plan to subdivide and develop the land into a subdivision. Unlike the owner in *Ball*, Developers did not retain any ownership over any of the properties referenced in the [Underlying] Easement. In other words, Developers did not intend to grant themselves an easement so they could assert it against an unsuspecting landowner in the future.
>
> (c) The Declarations also demonstrate Developers intended for there to be a common driveway providing access to the various

properties within the development. *See* [Stip. Exs.] 5, 7. Specifically, paragraph 14 of both Declarations references a common driveway for the benefit of the properties. *Id.* at ¶ 14.

(d) The June Declaration references the Original Easement as a means for creating a common driveway. *See* [Stip. Ex.] 5. While Developers ultimately released the Original Easement, they executed and recorded the [Underlying] Easement before doing so. The fact Developers thought it was necessary to have at least one easement providing access to the common driveway at all times further solidifies their intent to create the [Underlying] Easement for the benefit of future landowners.

(e) It also bears noting that Developers recorded the Current Easement on March 10, 2005. *See* [Stip. Ex.] 9. On April 5, 2005 – less than a month later – Developers severed their title by conveying Lot 2 to the Barnetts. *See* [Stip. Ex.] 12. Paralleling *Phelan*, the short amount of time between recordation of the Current Easement and the subsequent sale to the Barnetts demonstrates Developers created the [Underlying] Easement for the benefit of the Barnetts (and other buyers who purchased shortly thereafter). Moreover, after severing and selling the Barnett Property to the Barnetts, Developers reaffirmed their intent by correcting a clerical error in the legal description of the [Underlying] Easement to ensure [the Barnetts] would have access to the entirety of the Driveway as opposed to a thirty-foot wide portion of the Driveway. *See* [Stip. Ex.] 11.

Additional favorable evidence supporting a finding the Developers intended the Underlying Easement to run for the benefit of the Barnett Property is language from the Developers initial conveyance deeds for the Barnett and English Properties, which stated both conveyances were "[s]ubject to … easements … of record, if any" (Stip. Exs. 12, 13).

The evidence supporting these reasons is (1) the Developers' actions, (2) the Original Easement covering the driveway, (3) the declarations' language regarding easements, and (4) the timing of the Developers' conveyance of the Barnett Property (D20 pp. 9-11; App. A9-11). As explained below, none of these are sufficient to support the finding that the Developers intended the Underlying Easement benefits the Barnett Property.

4. The favorable evidence does not have probative force upon the challenged factual proposition, and so the trial court could not reasonably find that proposition.

a. The Developers' mere intention to create a subdivision and subsequent fulfillment of that intention is not probative of their intent to run the Underlying Easement with the Barnett Property.

As this Court explained in *Woodling*, a developer intending to create a subdivision and wishing to preserve developer-created easements for use by future property owners in the subdivision must include the easement in the subdivision plat, the conveyance deeds, or both. 473 S.W.3d at 236-37.

The Developers' intention to create and eventual creation of Meadow View Estates on its own does not fall into either of these categories. While the subdivision was created by plat, the plat is not probative of any intent for the Underlying Easement to run with the land because it contains no reference to the Underlying Easement, instead depicting the area as un-platted land (Stip. Ex. 4; App. A25). This failure to include the Underlying Easement in the Meadow View plat is even more damning considering the Developers already had created the Original Easement (covering the same area) when platting the subdivision (Stip. Exs. 3, 4).

So, under *Woodling*, evidence that the Developers wanted to create Meadow View Estates and eventually followed through with that creation is not probative evidence of their intent to preserve any easement. Moreover, the Meadow View plat itself is not probative because it contains no reference to any easement over the driveway.

b. The Original Easement is not probative of the Developers' intent for the Underlying Easement to run with the Barnett Property.

The Developers executed the Original Easement covering the driveway to themselves before creating Meadow View Estates (Stip. Ex. 3; App. A18). Then, just over one year later, they executed the Underlying Easement, covering the same area but containing a different legal description than the Original Easement, which was re-recorded shortly after to fix a clerical error in the easement description (Stip. Exs. 9, 11). Then, another year after that, the Developers released the Original Easement (Stip. Ex. 10; App. A55-56). The Barnett Property is not identified in any of the easement descriptions (Stip. Exs. 3, 9, 11).

The Original Easement is not probative of the Developers' intent to run the Underlying Easement with the Barnett Property for two reasons.

First, it makes no mention of the Barnett Property at all. While the declaration filed alongside Meadow View Estates' plat specifically contemplates use of the Original Easement by the Barnett Property owners, the failure to include that language in the subdivision plat itself or any subsequent conveyance deed means it is insufficient evidence under *Woodling*

to create any interest in the easement by the Barnett Property owners (Stip. Ex. 5; App. A27).

Moreover, by its own terms, the declaration is limited exclusively to Lots 1-3 of Meadow View Estates (Stip. Ex. 5 at 2; App. 28). It makes no mention of the Barnes or English Properties, neither of which is a part of Meadow View Estates (Tr. 15; Stip. Ex. 6; App. A37-39). And the declaration for those two properties, which on its face does *not* state it applies to the Barnett Property, but rather only to the Barnes and English Properties (Stip. Ex. 7 at 2; App. A41), makes no reference to the Original Easement at all. Instead, it reserves a private driveway easement *for use only by the owners of those two properties* (Stip. Ex. 7 at 2; App. A41). So, the Meadow View declaration's reference to the Original Easement cannot be evidence that an entirely different easement burdens property that the Meadow View declaration does not even cover.

Second, the Developers released the Original Easement, effectively extinguishing it and scrubbing it of any legal validity. *See Midella Enters., Inc. v. Mo. State Hwy. Comm'n*, 570 S.W.2d 298, 300 n.1 (Mo. App. 1978) (explaining that "the owner of an easement may release the right to the owner of the servient estate via a deed or writing"). Because it had no legal effect after its release, the Original Easement cannot be probative evidence that an entirely separate easement runs against the English Property and benefits the Barnett Property.

c. Neither declaration mentions the Underlying Easement, and so cannot be read as a statement of the Developers' intention it run with the Barnett Property.

As noted in the preceding section, the Meadow View declaration specifically contemplates using the Original Easement as a "common driveway" between the owners of the Barnett and Harshman Properties, *should they choose to use it as such* (Stip. Ex. 5 at 5; App. A31). The Barnetts never used it as such, choosing to build their own driveway with direct access to East Stoney Point Road (Stip. Ex. 2; Tr. 51; App. A17). Regardless, the Developers released the Original Easement and failed to make any amendments to the declaration to include the Underlying Easement. Absent any language tying the Meadow View declaration to the Underlying Easement (and accordingly the Underlying Easement to the Barnett Property), that declaration cannot be substantial evidence of the Developers' intention to run the Underlying Easement for the Barnett Property's benefit.

Nor can the declaration affecting the English Property be evidence of the Developers' intention to run the Underlying Easement for the Barnett Property's benefit. On its face, that declaration applies only to the Barnes and English Properties (Tracts D and E) (Stip. Ex. 7 at 2; App. A41). It also makes no mention of either the Original or Underlying Easements, instead contemplating a private driveway easement for "all tract owners" included in the declaration – i.e., the Barnes and English properties (Stip. Ex. 7 at 5; App. A44). So, if anything, this declaration language provides the driveway easement runs with those two properties alone.

d. The Barnett Property conveyance itself is not probative of the Developers' intention to run the Underlying Easement with the Barnett Property.

That the Developers executed the Underlying Easement one month before conveying the Barnett Property also has no bearing on whether they intended to preserve that easement for the Barnett Property's benefit. As explained above, the timing of the conveyance alone cannot be substantial evidence of the Developers intent under Woodling.

The trial court cites *Phelan* as a "parallel[]" fact scenario (D20 p. 10; App. A102), but this case does not resemble *Phelan* at all. There, the developers conveyed one of the affected properties *on the same day* they created the easement, avoiding merger altogether because the conveyance "severed the [developers'] title." 511 S.W.3d at 431. The Developers here did not make any same-day conveyances when executing the Underlying Easement, instead conveying the Barnett Property one month later. This does not avoid merger the same way the *Phelan* developers did, and so is not evidence of any intention to run the Underlying Easement with the Barnett Property.

The Barnett deed itself also makes no difference. While it did convey the Barnett Property "subject to … easements … of record, if any," it made no specific reference to the Underlying Easement and did not contain any easement descriptions (Stip. Ex. 12; App. A68-69). The same omissions caused the easement in *Woodling* to fail. There, the deed contained identical language generally informing the buyer he was purchasing property subject to any easements of record. *Woodling*, 473 S.W.3d at 238. This Court held

that language "was not specific enough" to create an easement surviving merger. *Id.* The same is true here: that the Barnett Property contained general language referring to easements of record is not substantial evidence of the Developers' specific intent to run the Underlying Easement with the Barnett Property.

As in *Woodling*, the Developers did not create the Underlying Easement via a subdivision plat or conveyance deed. The only evidence linking *any* easement over the Englishes' driveway to the Barnett Property is the Meadow View declaration, which specifically references the *Original* Easement by instrument number. Even if this somehow were sufficient evidence to create an easement over the driveway notwithstanding *Woodling* (and it is not), the Developers released it, extinguishing any rights the Barnetts may have had in it. Moreover, the general language in the Barnett deed subjecting the conveyance to any easements of record is insufficient evidence to tie the Barnett Property to the Underlying Easement, as *Woodling* directly holds.

No substantial evidence supports the trial court's finding that the Developers specifically intended the Underlying Easement to themselves to run for the benefit of the Barnett Property. This Court should reverse the trial court's judgment, enter judgment declaring no valid easement exists for the Barnett Property's benefit, and remand for further proceedings on the Englishes' trespass and injunctive relief claims.

Conclusion

This Court should reverse the trial court's judgment, enter judgment declaring no valid easement benefitting the Barnett Property exists, and remand this case for further proceedings on the Englishes' trespass and injunctive relief claims.

Respectfully submitted,

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Certificate of Compliance

I certify that I prepared this brief using Microsoft Word for Office 365 in 13-point, Century Schoolbook font, which is not smaller than 13-point, Times New Roman font. I further certify that this brief complies with the word limitations of Supreme Court Rule 84.06(b) and this Court's Rule 41, as this brief contains 7,512 words.

/s/Jonathan Sternberg
Attorney

Certificate of Service

I certify that I signed the original of this brief of the appellant, which is being maintained by Jonathan Sternberg, Attorney, P.C. per Rule 55.03(a), and that on September 27, 2023, I filed a true and accurate Adobe PDF copy of this brief of the appellant and its appendix via the Court's electronic filing system, which notified the following of that filing:

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