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IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CIVIL DEPARTMENT

J. T. KLAUS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 03-CV-4809**
	)	
WESLEY HOPKINS, GAYLA HOPKINS and CECIL HOUSE,	)	
	)	
	)	
Defendants.	)	

DEFENDANTS' TRIAL BRIEF

COME NOW Defendants Wesley Hopkins, Gayla Hopkins and Cecil House ("Defendants"), by and through their attorney, Shannon A. Kelly, and submit to the Court their Trial Brief. In support, Defendants state as follows:

RELEVANT FACTS

1. A certified copy of the complete plat of the Willowdell Addition to Mulvane, Kansas ("Willowdell Plat"), acknowledged by Paul and Vivian Nye ("the Nyes") and filed of record on August 28, 1963, in the Office of the Register of Deeds, Sedgwick County, Kansas, is attached hereto as Exhibit "A" and incorporated herein by this reference.

2. Plaintiff resides at #6 Willowdell Drive, Mulvane, Sedgwick County, Kansas 67110. Plaintiff's property consists of Lot 2, as well as portions of Lots 3 and 4, of Block 1, as shown in Figure A-1 and on the Willowdell Plat.

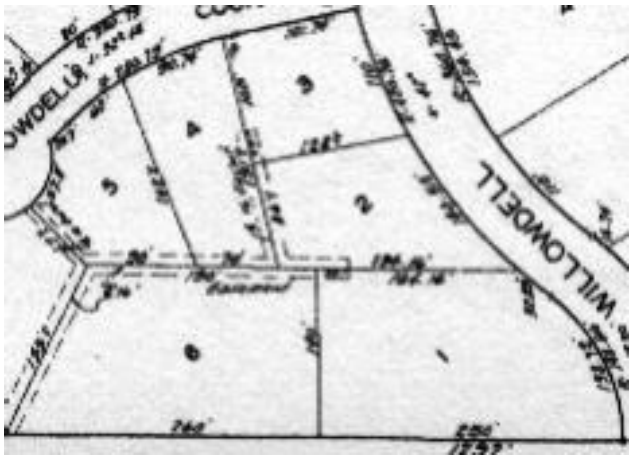

Figure A-1

3. The Nyes later replatted and renamed Lots 1 and 6, of Block 1, shown in Figure A-1 and on the Willowdell Plat. A certified copy of the complete plat of the Nye 3rd Addition to Mulvane, Kansas ("Nye 3rd Plat"), acknowledged by the Nyes on December 29, 1977, and filed of record on February 17, 1978, in the Office of the Register of Deeds, Sedgwick County, Kansas, is attached hereto as Exhibit "B" and incorporated herein by this reference.

4. Defendants Hopkins reside on Lot 2, Nye 3rd Addition, Mulvane, Sedgwick County, Kansas 67110, commonly known as "2 Willow Lane", shown in Figure B-1 and on the Nye 3rd Plat.

5. Defendant House resides on Lot 3, Nye 3rd Addition, Mulvane, Sedgwick County, Kansas 67110, commonly known as "3 Willow Lane", shown in Figure B-1 and on the Nye 3rd Plat.

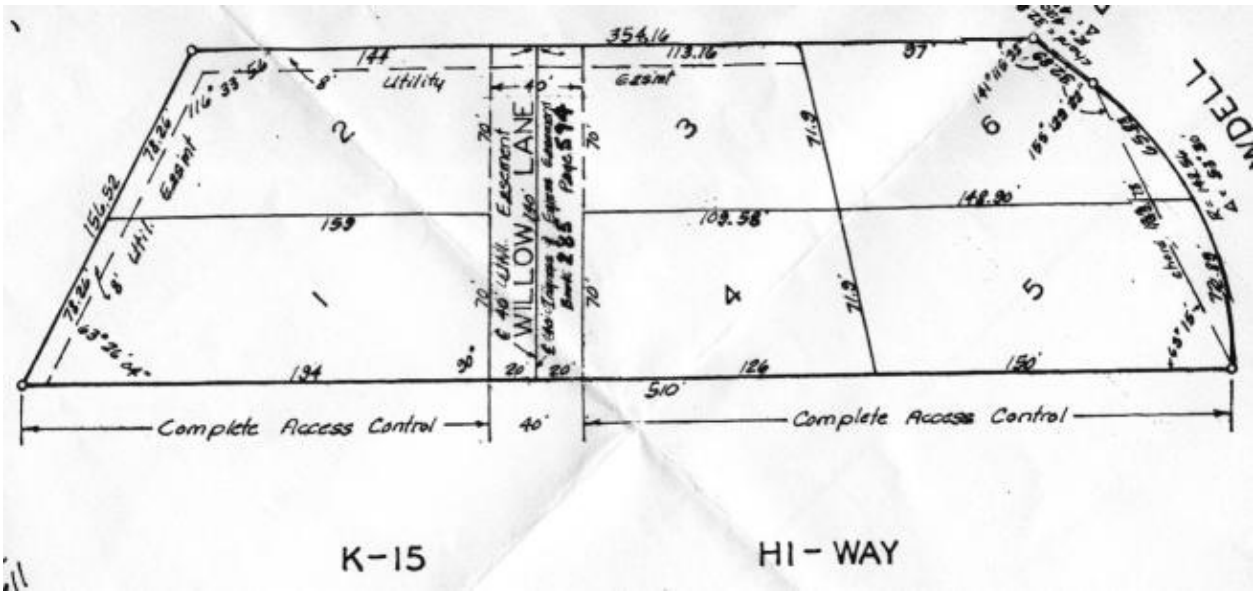

Figure B-1

6. Careful examination of Figure B-1 reveals that Lots 2 and 3, Nye 3rd Addition, are "dog-legs" or "L"-shaped, each augmented by a strip twenty-feet (20') wide. Together, these strips, legally described as follows:

The southeasterly 20 feet of Lot 2 and the northwesterly 20 feet of Lot 3, Nye 3rd Addition, Mulvane, Sedgwick County, Kansas.

Figure C-1 – Easement Legal Description

afford access to K-15 Highway ("K-15") to all four (4) lots as provided by an easement executed by the Nyes on December 29, 1977, the same day they acknowledged the Nye 3rd plat, entitled "Dedication of Private Ingress and Egress Easement and Public Utility Easement" ("Easement"), filed of record on January 5, 1978, at Book/Film 285, Page 594, in the Office of the Register of Deeds, Sedgwick County, Kansas, a true and correct copy of which is attached hereto as Exhibit "C" and incorporated herein by this reference. These twenty-foot (20') wide strips of Lots 2 and 3, Nye 3rd Addition, comprise a forty-foot (40') wide strip commonly known as "Willow Lane" which is the subject of this litigation.

7. On May 23, 2001, Plaintiff purchased the complete Lot 4, Willowdell Addition, as evidenced by the deed filed of record on June 6, 2001, at Book/Film 2215, Page 0483, in the Office of the Register of Deeds, Sedgwick County, Kansas, a true and correct copy of which is attached hereto as Exhibit "D" and incorporated herein by this reference. On July 27, 2001, Plaintiff subdivided and sold off the street-accessed parcel of Lot 4, Willow-dell Addition, as evidenced by the deed filed of record on July 30, 2001, at Book/Film 2249, Page 1604, in the Office of the Register of Deeds, Sedg-wick County, Kansas, a true and correct copy of

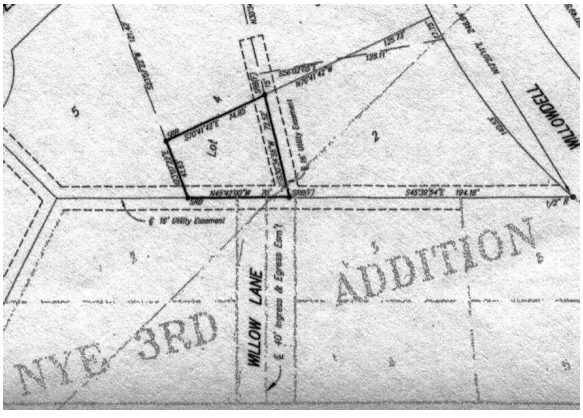

Figure F-1

Figure F-2

which is attached hereto as Exhibit "E" and incorporated herein by this reference. Plaintiff absorbed the remaining land-locked parcel of Lot 4, Willowdell Addition, into his own property. This acquisition and its relationship to "Willow Lane", shown in Figure F-1, is depicted in a boundary survey Plaintiff contracted for and received on or about June 8, 2001, a true and correct copy of which is attached hereto as Exhibit "F" and incorporated herein by this reference, and put Plaintiff on notice, as shown in Figure F-2, that "Willow Lane" is a forty-foot (40') ingress and egress easement, not a public street.

8. Regardless, Plaintiff chose to orient his "garage and recreational house" so that it exited onto "Willow Lane", as shown in Figure G-1 and in a survey of his property completed on or about January 22, 2004, a true and correct copy of which is attached hereto as Exhibit "G" and incorporated herein by this reference.

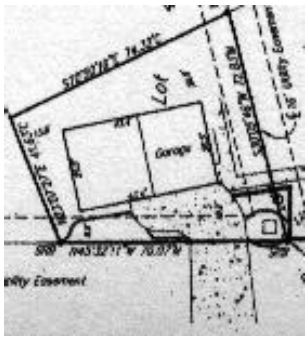

Figure G-1

9. Article VI, Section 5 of the Subdivision Regulations for Mulvane, Kansas, in effect at the time the Nye 3rd Addition was platted, a true and correct copy of which is attached hereto as Exhibit "H" and incorporated herein by this reference. Plaintiff has stipulated to the foundation of these Regulations and intends to submit them as an exhibit at trial.

ARGUMENT

Defendants Hopkins and House Are the Owners of "Willow Lane"

10. The only real issue in this case – the determinative issue – is the ownership of "Willow Lane." Ownership is to be determined by the record in the office of the register of deeds

of the county, without regard to private surveys made subsequently to the recording of the plat of the addition. *See Hammond v. City of Ottawa*, 127 Kan. 874, 275 P. 141 (1929) (sufficiency of protest against street improvement). Defendants House and Hopkins are the current owners of record of Lots 2 and 3, Nye 3rd Addition. Lots 2 and 3 are "dog-legged" or "L"-shaped, each augmented by a strip twenty-feet (20') wide providing access to K-15 Highway, as shown on the Nye 3rd Plat. Through the Easement, use of these strips – together forty-feet (40') wide and denominated "Willow Lane" – is limited to Defendants House and Hopkins and the owners of Lots 1 and 4, Nye 3rd Addition; utility companies are allowed access to service their utilities. Plaintiff is trespassing upon "Willow Lane," and Defendants are entitled to judgment as a matter of law.

"Willow Lane" Is Not a Public Highway

11. Plaintiff alleges that "Willow Lane" became public through dedication; in Kansas, a public highway also may be established by prescription or by purchase or condemnation. *Kratina v. Board of Com'rs of Shawnee County*, 219 Kan. 499, 502, 548 P.2d 1232, 1235 (1976).

12. A dedication is an offer by the owner to devote property to public use, manifesting an intention that it shall be accepted and used presently or in the future. *Carlson v. Burkhart*, 271 Kan. 856, 862, 27 P.3d 27, 32 (2001); *Wagon Wheel Landowners Ass'n, Inc. v. Wallace*, 17 Kan.App.2d 395, 399, 838 P.2d 361, 364 (1992). Dedication is the devotion of land to a public purpose by the unequivocal act of the owner manifesting the intention that it shall be used for such public purpose, and that his intention may be evidenced by his specific act, as where he files a plat, or it may be inferred from his acts and declarations. *City of Kingman v. Wagner*, 168 Kan. 558, 562, 213 P.2d 979, 982 (1950).

13. Land may be dedicated to the public use by either statutory or common law dedication. *City of Kechi v. Decker*, 230 Kan. 315, 318, 634 P.2d 1099, 1102 (1981). Statutory dedications are necessarily express, while common law dedications may be either express or implied. 26 C.J.S. *Dedication* § 1 (2001).

There Is No Statutory Dedication of "Willow Lane" to Public Use

14. A statutory dedication of streets and highways is accomplished by the filing of a plat in substantial compliance with K.S.A. 12-401 *et seq.* *City of Kechi*, *id.*; *see also* 23 AM. JUR. 2D *Dedication* § 35 (2002). This statutory procedure for the platting of cities and towns has been in force substantially in the same form ever since 1855. *See Cooper v. City of Great Bend*, 200 Kan. 590, 594, 438 P.2d 102, 106 (1968); *City of Russell v. Russell County Bldg. & Loan Ass'n*, 154 Kan. 154, 158-59, 118 P.2d 121, 124-25 (1941); *Armstrong v. Portsmouth Bldg. Co.*, 57 Kan. 62, 45 P. 67 (1896).

15. K.S.A. 12-401[1] provides for the recordation of plats of proposed cities and towns, or proposed additions thereto, *requiring that the plat accurately and particularly set forth and describe all parcels of ground reserved for public purposes*. Before a plat will operate as a grant of the land

[1]K.S.A. 12-401 provides:

> Before any proprietor or proprietors of any proposed city of the second or third class or of any town, or of any proposed addition to any such city or town shall record the plat of such proposed city, town or addition, he or she shall furnish to the county attorney of the county in which such proposed city or town is located, or the city attorney and governing body in case of a proposed addition, an abstract of title and the plat to the land which is to be incorporated into such city, town or addition. Such county attorney, in case of any proposed city or town, or such city attorney and governing body in case of a proposed addition, after examination duly made, shall approve or disapprove said plat. Such city attorney, and governing body in case of any proposed addition to any town or city may require the streets and alleys, therein shown, to be as wide as, and to be conterminous with, the streets and alleys, of that part of the city or town to which it adjoins.
>
> The plat shall accurately and particularly set forth and describe: First, all the parcels of ground within such city or town or addition reserved for public purposes, by their boundaries, course and extent whether they be intended for avenues, streets, lanes, alleys, commons, parks or other uses; and, second, all lots intended for sale, by numbers, and their precise length and width.

to the public for use as a street, it must be made and acknowledged by the owner of the land. K.S.A. 12-402[2]; *Armstrong v. City of Topeka*, 36 Kan. 432, 13 P. 843 (1887); *Brooks v. City of Topeka*, 34 Kan. 277, 8 P. 392 (1885). It also must be approved by the appropriate governing body. K.S.A. 12-403[3]. The filing of the plat with the register of deeds constitutes a conveyance of fee title of any property intended for public use, *for the uses therein named, expressed or intended, and for no other use or purpose*. K.S.A. 12-406[4]. Previously, upon dedication of property within a municipality for public use, fee title passed completely from the dedicator to the county in trust, while the authority to control, use and improve such property vested in the city. *Cooper*, 200 Kan. at 594, 438 P.2d at 106; *City of Russell*, 154 Kan. at 159, 118 P.2d at 125. On July 1, 1984, fee title of such property transferred from the applicable county to the applicable city. K.S.A. 12-406a[5]. *See also* K.S.A.

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[2]K.S.A. 12-402 provides, "Such map or plat shall be acknowledged by the proprietor, or if incorporated company, by the chief officer thereof, before some court or other officer authorized by law to take the acknowledgment of conveyances of real estate."

[3]K.S.A. 12-403 provides:

> The map or plat so made, acknowledged and certified shall be filed and recorded in the office of the register of deeds and a copy thereof filed with the county clerk of the county in which the city or addition is situated: Provided, however, That said register of deeds is hereby prohibited from filing and recording such map or plat unless the same shall have attached thereto a certificate in due form showing the approval of said map or plat by the county attorney in case of a town or city or by the governing body in case of a proposed addition to any city of the second or third class or any town.

[4]K.S.A. 12-406 provides:

> Such maps and plats of such cities and towns, and additions, made, acknowledged, certified, filed and recorded with the register, shall be a sufficient conveyance to vest the fee of such parcels of land as are therein expressed, named or intended for public uses in the city, in trust and for the uses therein named, expressed or intended, and for no other use or purpose. The recording of such map or plat shall not constitute a conveyance of any interest in the oil, gas and other minerals underlying the avenues, streets, lanes, alleys and other parcels therein named or intended for public uses. The provisions of this act shall apply to all maps or plats, heretofore or hereafter made, acknowledged, certified, filed and recorded with any such register. Nothing herein contained shall be construed as granting any right to enter upon the surface of such parcels of land for purposes of exploring for or the extraction of such minerals, or in any other manner to interfere with the public uses named in such maps, plats and additions.

[5]K.S.A. 12-406a provides:

> On the effective date of this act, the fee to any parcel of land intended for public use in cities of the first, second and third classes which is held in trust by the county is hereby transferred and conveyed to the city in which such property is located. The city shall hold the fee to such parcels of land intended for public use in the city in trust and for the uses therein named, expressed or intended and for no other

12-404[6] (register of deeds to preserve plat); K.S.A. 12-405[7] (sale of lot before recording of plat; penalty).

16. No one other than the owner, or some one authorized to act for him, can plat or lay out a town or an addition thereto, and to constitute a valid dedication, there must be a clear intention, manifested by his acts, to dedicate the streets, alleys or other property designated on the plat to public use. *Brooks, id.*; *see also City of Kingman, id.* (filed plat specific evidence of intention of owner or dedicator).

> [I]n construing a plat of city property the general rules to be followed are the same as for the construction of deeds or other instruments granting or pertaining to real property. The purpose of construction is to determine the intention of the dedicator. The instrument must be considered as a whole. All lines, figures, letters and records used on the plat and in the certificates, which are a part of it, must be considered. The construction should be fair and reasonable.

City of Russell, 154 Kan. at 159, 118 P.2d at 125.[8] No part of a plat or map is to be rejected as superfluous or meaningless, if it can be avoided, and the same quality of evidence needed to demonstrate the existence of a dedication must be presented to show the extent thereof. 23 AM. JUR. 2D *Dedication* § 29 (2002). Where there is no question of ambiguity, the effect of a recorded plat

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use or purpose.

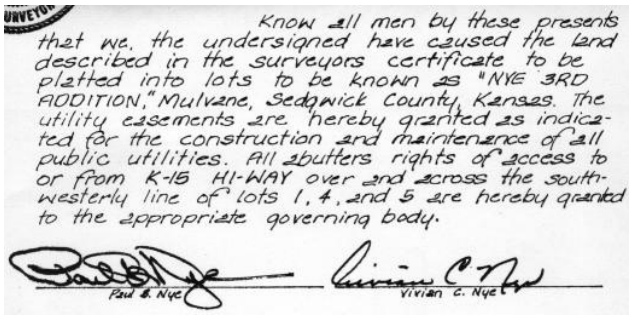
[6]K.S.A. 12-404 provides, "The register of deeds shall preserve such map or plat in his or her office, among the records thereof."

[7]K.S.A. 12-405 provides, "If any person sell or offer for sale any lot within any city, town or addition before the map or plat thereof be made out, acknowledged, filed and recorded as aforesaid, such person shall forfeit a sum not exceeding three hundred dollars for every lot which he or she shall sell or offer to sell."

[8]Plaintiff relies, in part, on *Byam v. Kansas City Public Service Co.*, 328 Mo. 813, 41 S.W.2d 945 (1931), purportedly interpreting Missouri dedication statutes "borrowed" by Kansas. An adopted statutes carries the construction placed upon it by the courts of the original state only up to the date it is adopted by the adopting state. *J & S Bldg. Co., Inc. v. Columbian Title & Trust Co.*, 1 Kan.App.2d 228, 233, 563 P.2d 1086, 1091 (1977). Thus, *Byam* is of no precedential value.

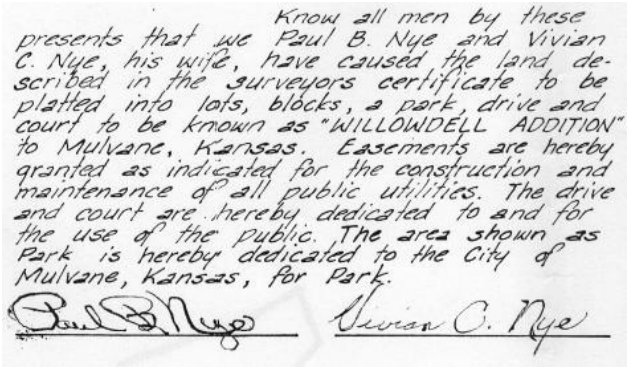
is determined from its face, unambiguous language is given its manifest meaning, and effect is given to the full extent intended by the dedicator and no more. *Id.*[9]

17. Plaintiff argues that the mere naming of "Willow Lane" on the Nye 3rd Plat through the use of "oversized, all-capital letters" in and of themselves exclaim unequivocal intent to dedicate it as a public street and, therefore, constitutes a sufficient conveyance to public use. The fallacy of Plaintiff's argument is that it disregards the requirement in K.S.A. 12-401 that if any parcels of ground are reserved for public use, they must be accurately and particularly set forth and described on the plat, and completely ignores the dedicators' certificate from the Nye 3rd Plat, required pursuant to K.S.A. 12-402 and shown in Figure B-2, which contains no mention of "Willow Lane" or "Lane." When property is dedicated to public use, the owner's intention is so reflected in his acknowledgment; compare, for example, with Figure A-2 from the Willowdell Plat and its specific dedications of "drive," "court" and "park." *See also Cooper*, 200 Kan. at 591, 438 P.2d at 104 ("Lafayette Park is intended as a public promenade park and is reserved and dedicated for public purposes only upon that express condition and for that use and for no other"); *City of Russell*, 154 Kan. at 154, 118 P.2d at 121 ("all streets and alleys described on said plat are for public use"); *Board of Commissioners of Wyandotte County v. First Presbyterian Church*, 30 Kan. 620, 1 P. 109 (1883) (in duly-acknowledged


Know all men by these presents that we, the undersigned have caused the land described in the surveyors certificate to be platted into lots to be known as "NYE 3RD ADDITION," Mulvane, Sedgwick County, Kansas. The utility easements are hereby granted as indicated for the construction and maintenance of all public utilities. All abutters rights of access to or from K-15 HI-WAY over and across the southwesterly line of lots 1, 4, and 5 are hereby granted to the appropriate governing body.

Paul B. Nye — Vivian C. Nye

Figure B-2


Know all men by these presents that we Paul B. Nye and Vivian C. Nye, his wife, have caused the land described in the surveyors certificate to be platted into lots, blocks, a park, drive and court to be known as "WILLOWDELL ADDITION" to Mulvane, Kansas. Easements are hereby granted as indicated for the construction and maintenance of all public utilities. The drive and court are hereby dedicated to and for the use of the public. The area shown as Park is hereby dedicated to the City of Mulvane, Kansas, for Park.

Paul B. Nye — Vivian C. Nye

Figure A-2

[9] Ambiguities, if any, are construed against the dedicator and in favor of the public. *City of Russell*, 154 Kan. at 159, 118 P.2d at 125.

dedication written out on plat, three lots marked "church lots" were said to be "dedicated to church purposes"); *Harden v. Metz*, 10 Kan.App. 341, 58 P. 281 (1899), *aff'd* 62 Kan. 867, 63 P. 1126 (1901) (on plat was written statement that streets and alleys indicated thereon were "dedicated" to public use). Conversely, when there is nothing in a recorded plat of an addition to a city, or in the proprietor's acknowledgment, to indicate for what purpose a piece of land included within the boundary lines of such plat is intended to be used, it cannot be considered as one of the public streets of the city. *Fisher v. Carpenter*, 36 Kan. 184, ___, 12 P. 941, 942 (1887); *see also* Kan. Atty. Gen. Op. No. 84-83 (designation 'County' on plat does not express or restrict use of block, court may not engage in speculation as to what may have been dedicator's intent, thus no statutory dedication to public use).[10] Because no parcels were accurately and particularly reserved for public use on the Nye 3rd Plat, no fee title was conveyed to the public pursuant to K.S.A. 12-406, and there was no statutory dedication of "Willow Lane" to public use.

There Is No Express Common Law Dedication of "Willow Lane" to Public Use

18. An incomplete statutory dedication may be a good common-law dedication. *Brooks, id.* In the Nye 3rd Plat, however, not only do the Nyes decline to dedicate any property to public use, but they affirmatively indicate a clear intent to do just the opposite, that is, establish the existence of a forty-foot (40') utility and ingress/egress easement designated "Willow Lane," as shown in Figure B-3.

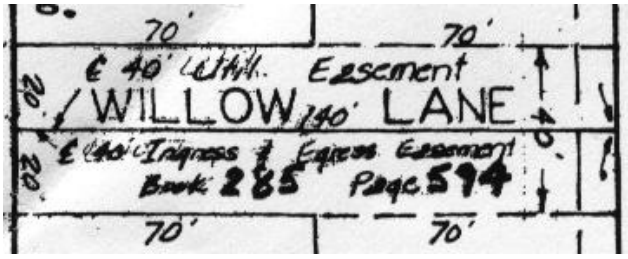


Figure B-3

[10] Attorney general opinions are at times persuasive but are not binding on any court. *McCraw v. City of Merriam*, ___ Kan. ___, 26 P.3d 689, 692 (2001).

19. Both the Easement and the Nye 3rd Plat were executed by the Nyes on December 29, 1977, and are simultaneous expressions of their intent that only the present and future owners of Lots 1, 2, 3, and 4, not the general public, were to have ingress and egress rights over "Willow Lane":

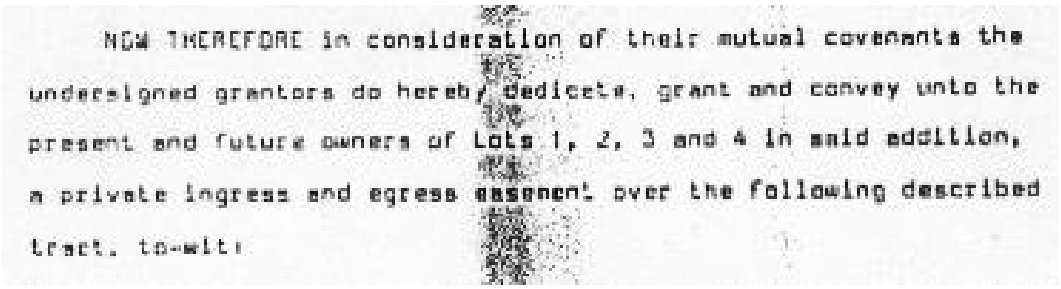

NOW THEREFORE in consideration of their mutual covenants the undersigned grantors do hereby dedicate, grant and convey unto the present and future owners of Lots 1, 2, 3 and 4 in said addition, a private ingress and egress easement over the following described tract, to-wit:

Figure C-2 – Easement Paragraph 2

Further, nothing otherwise in the recorded Easement contradicts the Nyes' intent as expressed on the Nye 3rd Plat and, in fact, bolsters the conclusion that "Willow Lane" was never intended to be a public street. Note that *three* times in the body of the Easement — in addition to its title — the Nyes make reference to a "*private* ingress and egress easement" (emphasis supplied). When the word "public" is used, it is only in reference to "utilities", as in:

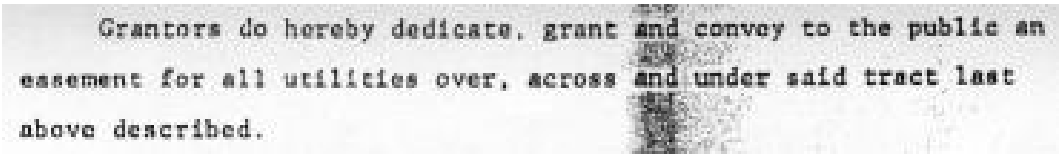

Grantors do hereby dedicate, grant and convey to the public an easement for all utilities over, across and under said tract last above described.

Figure C-3 – Easement Paragraph 6

One who dedicates land to the public use may attach such reasonable conditions and limitations as he or she may see fit, providing that such conditions and limitations are not repugnant to the grant, do not limit the lawful control of the public authorities, and are not against public policy. *City of Kechi*, 230 Kan. at 319-20, 634 P.2d at 1103. Once property is dedicated for a particular purpose, however, it generally cannot be used for any other. *Connolly v. Frobenius*, 2 Kan.App.2d 18, 30-31, 574 P.2d 971, 980 (1978).

20. Despite contemporaneous execution by the Nyes of both documents, Plaintiff contends that the Easement is ineffective because it was filed before the Nye 3rd Plat. A conveyance

is effective to pass title even though the real property is described by reference to an unrecorded plat. *Mead v. United Brethren*, 43 Kan. 178, 23 P. 103 (1890); *Bemis v. Becker*, 1 Kan. 226, 249 (1862); *see also Stauth v. Brown*, 241 Kan. 1, 8, 734 P.2d 1063, 1068 (1987) (contract for sale of real estate not invalidated nor made ambiguous).

21. Despite Plaintiff's protestations, Lots 2 and 3, Nye 3rd Addition, are not landlocked. The boundaries and centerline of "Willow Lane" are clearly marked on the plat, with dimensions precisely identifying its length and width. As shown in Figure C-1, Lots 2 and 3 are separated from each other by a solid line indicating a 140' boundary; those lots are, in turn, separated from Lots 1 and 4 by solid lines indicating 70' boundaries; and dashed lines indicate 70' measurements across the "dog-legged" or "L"-shaped Lots 2 and 3. Only space that forms no part of platted lots can be construed to be dedicated to public use. *Hitchcock v. City of Oberlin*, 46 Kan. 90, __, 26 P. 466, 467 (1891).

There Is No Implied Common Law Dedication of "Willow Lane" to Public Use

22. In the absence of a plat filed in substantial compliance with K.S.A. 12-401 *et seq.*, a party may still assert that certain property has been dedicated to public use, but he bears the burden of proof and must show: (1) an intent by the property owner to dedicate the land for such use; *and* (2) acceptance by the public.[11] *Carlson*, 271 Kan. at 862, 27 P.3d at 32; *City of Kechi*, 230 Kan. at 319, 634 P.2d 1099; *Cemetery Association v. Meninger*, 14 Kan. 312, 316 (1875). "Failure to prove *either* of the elements is fatal to the party asserting implied dedication." *Carlson*, *id.* (emphasis added) (citing *Tabor v. Hogan*, 955 S.W.2d 894, 896 (Tex.App.1997) (determination of intent is

[11]When a plat designating property for public use is filed and recorded, no formal acceptance by the city is necessary to complete the dedication. *Moore*, 232 Kan. at 359-60, 654 P.2d at 451; *City of Kechi*, 230 Kan. at 318-19, 634 P.2d 1099; *City of Council Grove v. Ossmann*, 219 Kan. 120, 127, 546 P.2d 1399 (1976); *City of Russell*, 154 Kan. at 160, 118 P.2d 121; *Gardarl v. City of Humboldt*, 87 Kan. 41, 42, 123 P. 764 (1912).

"pivotal" to determination of implied dedication); *Jackson v. Byrn*, 216 Tenn. 537, 393 S.W.2d 137, 140 (1965) (when determining whether land has been provided to public by way of implied dedication, intent must be proved by clear and convincing evidence)).

23. Just as with statutory or express dedication, the owner's or dedicator's intent is paramount. Thus, dedication can be accomplished only through the manifestation of an intent to dedicate on the part of the owner, clearly and unequivocally shown, and an acceptance by the public. *Shanline v. Wiltsie*, 70 Kan. 177, 78 P. 436, 437 (1904); *State v. Adkins*, 42 Kan. 203, 21 P. 1069 (1889). Courts are not concerned with any secret intention in the mind of the owner, but only with the intention expressed in his visible conduct and open acts. *Kansas City v. Burke*, 92 Kan. 531, 141 P. 562, 564 (1914); *Raymond v. City of Wichita*, 70 Kan. 523, 532, 79 P. 323, 326-27 (1905). The criterion is whether the owner's acts fairly and reasonably induce a belief in an ordinarily prudent man that the owner intended to dedicate the property to public use. *Raymond*, 70 Kan. at 532, 79 P. at 327.

24. At best, Plaintiff misreads *Carlson* in his statement that "the element of intent on the part of the property owner was established by numerous factors, including use by the public and no demands by the landowners being made to return the road to private use." Plaintiff overlooks, however, two factors in that decision highly indicative of intent: (1) in filing an inverse condemnation action, the landowners described their property as not including the tract at issue;[12] and (2) even more telling, one landowner also served as a county commissioner and signed a resolution on behalf of the county agreeing to maintain the road running through the tract. *Carlson*, 271 Kan. at 858, 863, 27 P.3d at 30, 33. Clearly, neither is present here.

[12]Predecessors in interest to the landowners entered into a right-of-way agreement with the county commissioners regarding the tract at issue subject to the condition that construction of a highway would begin within five years. Thus, the tract was omitted from a contract and escrow agreement through which the landowners obtained title, and the subsequent deed conveyed a reversionary interest in the tract. *Carlson*, 271 Kan. at 858-59, 27 P.3d at 30-31, 33.

25. Defendants expect Vivian C. Nye and Byron C. Nye to testify at trial that the developers of the Nye 3rd Addition to Mulvane, Kansas, always intended that Lots 2 and 3, Nye 3rd Addition, own the private drive known as "Willow Lane", with access and use provided to all four (4) lots by easement. Mr. Nye purchased Lot 2, Nye 3rd Addition, from his parents, built the house thereon, and lived there from approximately 1978 until 1982. He also constructed the driveway with curbs and paved it to make the lots and homes more saleable. Originally, he posted a sign at the opening to the driveway reading "No Through Street" and with another reading "Willow Lane." To his knowledge, the City of Mulvane has never maintained "Willow Lane" and it does not meet city specifications for a city street or cul-de-sac.

26. Plaintiff attempts, improperly, to shift the burden of proof to Defendants by contending that the mere naming of "Willow Lane" on the Nye 3rd Plat constitutes a sufficient conveyance as a public street, and that if the Nyes intended to reserve the ingress and egress rights of "Willow Lane" only to the adjacent owners, they needed to state so expressly on the plat. These arguments are mutually inconsistent and unwarranted by existing Kansas law: if naming the easement "Willow Lane" on the Nye 3rd Plat were adequate, in and of itself, to statutory dedicate it as a street for public use, its fee title would pass completely from the Nyes to Sedgwick County in trust (control of a street would rest in the City of Mulvane), and there would be no present interest therein which could be reserved in a conveyance of the adjoining property. *See J & S Bldg. Co., Inc. v. Columbian Title & Trust Co.*, 1 Kan.App.2d 228, 234, 563 P.2d 1086, 1091-92 (1977); *City of Russell*, 154 Kan. at 159, 118 P.2d at 125. This conclusion would be, without a doubt, contrary to the Nyes' wishes and intention.

27. Defendants submit that the unambiguous and unequivocal intention on the part of the Nyes, as expressed on the Nye 3rd Plat and in the Easement, prevents Plaintiff, as a matter of law,

from establishing clear and convincing evidence of intent necessary for implied dedication. Nevertheless, Plaintiff attempts to distract this Court from that fact by enumerating examples of alleged conduct by the City of Mulvane leading to the conclusion, in his mind, that there can be no doubt that the City of Mulvane has accepted an implied dedication of "Willow Lane." Quite obviously, without an offer of dedication, there can be no acceptance. Section 5(9)(a), Article VI, of the Subdivision Regulations for Mulvane, Kansas, in effect when the Mulvane City Council approved the Nye 3rd Plat on January 3, 1978, pursuant to K.S.A. 12-403, required streets in residential areas to have a minimum right-of-way of 64 feet; Section 5(11) required dead-end streets to have a turn-around at the closed end with an outside roadway diameter of at least 70 feet. *See* Exhibit "H." Presumably, the Mulvane City Council would not have approved a plat attempting to dedicate to public use as a street a strip only 40 feet wide.

28. Plaintiff also makes much of the fact that the City of Mulvane occasionally may use "Willow Lane" to fix a street light, maintain a transformer and read an electric meter at the northeast end of the easement, access clearly contemplated and permitted by the Easement (see Figure C-3), which further specifies that the responsibility to maintain "Willow Lane" belongs to the owners of Lots 1, 2, 3 and 4, not the City of Mulvane:

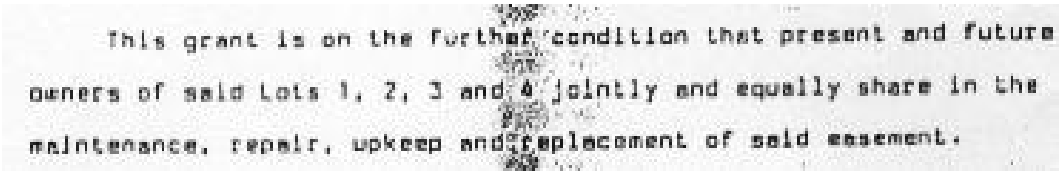

This grant is on the further condition that present and future owners of said Lots 1, 2, 3 and 4 jointly and equally share in the maintenance, repair, upkeep and replacement of said easement.

Figure C-4 – Easement Paragraph 4

Finally, evidence of the assessment and payment of taxes is not determinative of whether there has been a valid dedication and acceptance of property to public use, but it is only one factor to be considered with other circumstances. *Armstrong v. City of Topeka*, 36 Kan. 432, 13 P. 843 (1887); 23 AM. JUR. 2D *Dedication* § 72 (2002). Thus, even if there had been a valid offer of dedication, less than compelling evidence exists to support a conclusion of acceptance thereof.

29. Plaintiff believes the Easement's prohibition against parking and its admonishment that "Willow Lane" be kept open for vehicles creates a public right-of-way. This argument is in direct conflict with the express grant in the Easement of rights *only* to the present and future owners of Lots 1, 2, 3 and 4. Reading these provisions together leads to the obvious conclusion that the prohibition against parking provides a right of enforcement to the owners of those lots against each other and their guests where traffic laws may not be enforced.

30. Overwhelming evidence exists that the Nyes did not dedicate a public street when they created the easement known as "Willow Lane" and judgment must be granted to Defendants accordingly.

"Estoppel by Silence" Is Not Applicable

31. Plaintiff further alleges that he has been damaged as a result of his reliance upon Defendants' silence in improving his property and their failure to take any action to protest his trespass upon their property to access his own. The effect of Plaintiff's claim is an improper attempt to "back-door" an easement by prescription, and judgment for Defendants is appropriate.[13]

32. On numerous occasions, the Kansas Supreme Court consistently has held that mere silence gives rise to estoppel only under circumstances where there is a duty to speak or make disclosure. *Holley v. Allen Drilling Co.*, 241 Kan. 707, 713, 740 P.2d 1077, 1082 (1987); *Turon State Bank v. Bozarth*, 235 Kan. 786, 789, 684 P.2d 419, 422 (1984); *Service Oil Co., Inc. v. White*, 218 Kan. 87, 97, 542 P.2d 652, 661 (1975); *Bruce v. Smith*, 204 Kan. 473, 477, 464 P.2d 224, 227

[13]To establish a highway by prescription the land in question must have been used by the public with the actual or implied knowledge of the landowner, adversely under claim or color of right, and not merely by the owner's permission, and continuously and uninterruptedly, for the period required to bar an action for the recovery of possession of land or otherwise prescribed by statute. *Kratina*, 219 Kan. at 502, 548 P.2d at 1235 (quoting *Shanks v. Robertson*, 101 Kan. 463, 465, 168 P. 316, 317 (1917)). K.S.A. 60-503 provides that the applicable time period is fifteen (15) years. Even if he could prove the other required elements for an easement by prescription, Plaintiff concedes that he and others at his request did not begin to use "Willow Lane" to access his property until May 2001.

(1970); *Bowen v. Lewis*, 198 Kan. 706, 712-13, 426 P.2d 244, 250 (1967). Plaintiff fails to allege any basis for imposition of this duty upon Defendants.

33. In addition, the complaining party must show (1) the silent parties' intent to mislead or willingness to deceive, (2) knowledge or reason to suppose that someone is relying on that silence, *and* (3) as a result of that reliance, that someone is acting or about to act as he or she would not otherwise act. *City of Olathe v. Stott*, 253 Kan. 687, 695, 861 P.2d 1287, 1293 (1993) (citing *Turon State Bank*, 235 Kan. at 790, 684 P.2d at 423)). In particular, Plaintiff bases his claim on Defendants' alleged failure to protest only *after* he began to improve his property. Thus, Plaintiff's own Petition establishes that no act of Defendants, or any failure to act, influenced Plaintiff's decision regarding where he placed his driveway. Judgment must be granted to Defendants accordingly.

Plaintiff Is Not Entitled to an "Easement by Necessity" over Defendants' Property

34. Finally, Plaintiff has alleged that he has an "easement by necessity" over "Willow Lane" providing access to his property. Plaintiff confuses necessity with convenience, and accordingly, judgment for Defendants is appropriate.

35. If, in dividing a tract of land, an owner deprives one parcel – the "servient estate" – of access to a public road, an "easement by necessity" is implied over the other – the "dominant estate." *See Horner v. Heersche*, 202 Kan. 250, 447 P.2d 811 (1968); *Van Sandt v. Royster*, 148 Kan. 495, 83 P.2d 698 (1938); *Moll v. Ostrander*, 124 Kan. 757, 262 P. 592 (1928); *Wilkins v. Diven*, 106 Kan. 283, 187 P. 665 (1920); *Mead v. Anderson*, 40 Kan. 203, 19 P. 708 (1888). A way of necessity must be more than one of convenience; it must strictly be of necessity. *Horner*, 202 Kan. 250, Syl. ¶6, 447 P.2d 811. Ways of necessity cannot exist without previous unity of ownership

of the alleged dominant and servient tenements, for *no one can have a way of necessity over the land of a stranger*. *Smith v. Harris*, 181 Kan. 237, 248, 311 P.2d 325, 335 (1957).

36. Plaintiff purchased and subdivided Lot 4, Willowdell Addition, which has access to a public road, Willowdell Court, selling off the dominant estate and absorbing the servient estate into his own property, accessible from Willowdell Drive. Under such circumstances, Plaintiff would seem to be unable to establish strict necessity, but should it exist, an easement by necessity would lie *only* over the dominant parcel of Lot 4. Without the requisite previous unity of title, Plaintiff cannot establish an easement by necessity over Lots 2 and 3, Nye 3rd Addition, and judgment must be granted to Defendants accordingly.

CONCLUSION

37. Defendants House and Hopkins are the current owners of record of two strips, each twenty-feet (20') wide, known together as "Willow Lane." The Nyes never exhibited even the slightest intention of permitting public use of "Willow Lane"; thus, Plaintiff has no right to use "Willow Lane" under any theory of statutory or common law dedication. Plaintiff's claim of "estoppel by silence" is an improper attempt to "back-door" an easement by prescription, when he has not been using "Willow Lane" anywhere close to the necessary fifteen (15) years. Plaintiff cannot establish the unity of title required for an "easement by necessity," which he confuses with mere convenience. Plaintiff is trespassing upon "Willow Lane," and Defendants are entitled to judgment as a matter of law.

WHEREFORE, Defendants Wesley Hopkins, Gayla Hopkins and Cecil House respectfully request that the Court enter judgment in their favor on Plaintiff's Petition, for costs incurred herein, and for such other and further relief as the Court deems just and proper.

Respectfully submitted,

KELLY LAW OFFICES

SHANNON A. KELLY KS No. 18821
Attorney For Defendants

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing was mailed, by U.S. Mail, postage prepaid, this _____ day of June, 2004, to: Rachael K. Pirner, TRIPLETT, WOOLF & GARRETSON, L.L.C., 2959 North Rock Road, Suite 300, Wichita, KS 67226.

SHANNON A. KELLY KS No. 18821