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Alan C. Thomson, Ernest L. Wilkinson and Sidney M. Horman v. Nick J. Condas, Chris J. Condas, Mary Condas Leh-Mer, Ellen Condas Bayas and Alexandra C0Ndas Ockey : Brief of Respondents

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

ALAN C. THOMSON, ERNEST L. WILKINSON and SIDNEY M. HORMAN,

Plaintiffs and Appellants,

vs.

GEORGE J. CONDAS, NICK J. CONDAS, CHRIS J. CONDAS, MARY CONDAS LEHMER, ELLEN CONDAS BAYAS and ALEXANDRA CONDAS OCKEY,

Defendants and Respondents

Case No. 12,458

BRIEF OF RESPONDENTS

Appeal from the Judgment of the Fourth District Court, In and For Summit County
Honorable Allen B. Sorensen, Judge

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FEDERAL STATUTES

IN THE SUPREME COURT OF THE STATE OF UTAH

ALAN C. THOMSON, ERNEST L. WILKINSON and SIDNEY M. HORMAN,

Plaintiffs and Appellants,

vs.

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STATEMENT OF KIND OF CASE

Action by plaintiffs to establish a public thoroughfare across defendants' lands in Summit County, Utah, and for damages claimed to have resulted from defendants' alleged interference with plaintiffs' use thereof. By way of Counterclaim, defendants sought to quiet title to their lands free and clear of all claims of a public thoroughfare, and for damages against plaintiffs for trespass. The issue on this appeal is limited to whether the trial court erred in finding no public thoroughfare.

DISPOSITION IN LOWER COURT

By their Complaint plaintiffs sought to establish that the upper road across defendants' lands, known as the Quarry Road, is a public road, and to recover damages for alleged interference with plaintiffs' use thereof. Defendants deny that a public road had been established across their property, and by their Counterclaim sought to quiet title to their lands free and clear of such claims and for damages against plaintiffs for trespass. Pursuant to a pretrial conference, the only issue tried was whether the roadway in question was a public thoroughfare and all issues relating to damages, both on plaintiffs' Complaint and defendants' Counterclaim, were reserved for trial at a later date (R. 217, 226). That issue was tried by the court sitting without a jury, and upon the conclusion of the evidence plaintiffs filed a Motion To Amend their Complaint pursuant to Rule 15(b) U.R.C.P. to include in their pleadings the Lower Road, asking that it be declared a public highway (R. 197, 198). Plaintiffs' Motion To Amend was granted (R. 214) over defendants' objections (R. 195, 196). Thereafter the trial court made and entered its Findings Of Fact and Conclusions Of Law (R. 217-223, incl.) and Judgment (R. 226, 227) of "no cause of action" on plaintiffs' Complaint and quieting defendants' title to their property free and clear of all claims that either the Quarry Road or the Lower Road is a public road and that both are private roads and that plaintiffs have

no possessory interest therein. Upon entry the Judgment became final except as to defendants' Counterclaim for damages against plaintiffs, which was reserved for trial at a later date (R. 227). No objection has been made by plaintiffs to that procedure, either in the court below or on this appeal. Plaintiffs then filed a Motion For New Trial (R. 213), which was denied (R. 231). Thereupon plaintiffs filed their Notice Of Appeal (R. 235).

RELIEF SOUGHT ON APPEAL

Respondents (defendants) seek on this appeal to affirm the Findings Of Fact and Conclusions Of Law and Judgment made and entered by the trial court.

STATEMENT OF FACTS

Respondents (hereinafter referred to as defendants) cannot agree with appellants' (hereinafter referred to as plaintiffs') Statement Of Facts in their Brief because the facts are there stated for the most part in a light most favorable to plaintiffs, who lost below, and in so doing violates the time honored rule that the facts on appeal must be reviewed in the light most favorable to the Findings and Judgment below. Furthermore, plaintiffs attack the Findings Of Fact generally as not conforming to the evidence, with no attempt to specifically point up wherein such Findings do not conform. And so defendants believe it not only proper but essential that a Statement be made setting forth the facts of the case as found by

the trial court and as supported by the evidence with the foregoing rules in mind.

Defendants are the owners of approximately 80 acres of land situate in Summit County as successors in interest of the original patentee under patent issued by the United States of America dated October 23, 1931 (Fdg. 1, R. 218; Exh. P-7, page 16). In the year 1928 there existed across the southerly portion of defendants' lands the remnants of an abandoned railroad spur track bed which entered from the west and coursed southeasterly through the southerly portion thereof, terminating in several stone quarries situated to the north and east (Fdg. 2, R. 218; Tr. 11, 12, 176, 181, 185, 308, 309).

In 1928 there also existed an unimproved dirt road, hereinafter designated as the Lower Road, which commenced at Highway U-248 to the west of defendants' lands and followed an easterly course along the abandoned railroad bed, entering defendants' lands from the west, and thence turning south, crossing said abandoned railroad bed within but near the west line of defendants' lands and thence continuing easterly along the base of Quarry Mountain along the north side of an old fence line through swampy areas and terminating at an abandoned rock house and out-buildings associated with the operation of the stone quarries during years prior thereto (Fdg. 3, R. 218, 219; Tr. 11, 184, 185, 268, 335).

In 1929 defendants' predecessor constructed a steel post and wire stock fence along the west line of defendants' property across the abandoned railroad bed and a gate was constructed in the fence across the Lower Road immediately below its crossing of the abandoned railroad bed (Fdg. 4, R. 219; Tr. 21, 22, 23, 177, 178, 220, 221, 261, 310, 311). In 1930 defendants' predecessor converted the abandoned railroad bed into a crude roadway which he used to haul sheep wagons and supplies in his sheep operation (Tr. 313, 314). In 1931 additional minor repairs were made by one Halloway in exchange for permission to take and haul stone from the quarry on defendants' property, and the stock fence was cut and a wire gate installed across the bed to permit his passage (Fdg. 5, R. 219; Tr. 32, 33, 309, 311, 312).

In 1932 two posts were erected on each side of the converted railroad bed on defendants' property approximately 150 feet east of the fork to the Lower Road and a cable or chain was stretched between said posts and was equipped with a lock which physically obstructed and blocked the roadway to all vehicular traffic except to defendants' predecessors in interest and others who had a key to the lock. The purpose thereof was to prohibit unauthorized persons from using the Quarry Road and to prevent pilfering and the hauling away of quarried stone by persons unknown. At approximately the same time "Keep Out" and similar warning signs were

attached to the cable or chain (Fdg. 6, R. 220; Tr. 26, 27, 28, 221, 223, 315, 316).

During the entire period from 1932 to and including the year 1958 two posts with a cable or chain equipped with a lock and stretched across the Quarry Road were maintained at the approximate same location. On a number of occasions the posts were pulled out, but were always replaced upon the discovery at approximately the same location. Intermittently during that period a large boulder was placed in the roadway near the chain or cable during the fall of the year and was removed during the following spring. During the same period "Keep Out" or similar warning signs were maintained, attached to the cable or chain or to the post. During the whole of the period from 1932 to and including the year 1958 the locked cable or chain stretched across the Quarry Road and periodic placing of the boulder effectively obstructed the roadway to all vehicular traffic except to those lessees of the quarries who had keys to the lock and to defendants' predecessors in interest who either had a key or access to one (Fdg. 7, R. 220; Tr. 28, 31, 32, 84, 85, 86, 91, 190, 191, 195, 196, 198, 199, 200, 202, 208, 221, 222, 223, 243, 244, 251, 265, 273, 274, 290, 291, 315, 316, 319).

During the spring of 1959 the posts and chain were moved from the prior location farther up the roadway and were also there equipped with a lock to prevent unauthorized persons from circumventing

the locked cable or chain at its prior location. The posts, with the locked chain stretched across the roadway, were maintained at that location continuously from 1959 until 1967 after plaintiffs acquired their property, and during that entire period constituted an obstruction to all vehicular traffic beyond that point except to lessees of the quarries who had keys and to defendants and their predecessors who either had a key or access to one (Fdg. 8, R. 221; Tr. 87, 95, 244, 275, 320, 321).

During the period from 1931 to 1966, inclusive, the use of the Quarry Road was limited to the private use of defendants and their predecessors in interest for the haulage of their sheep wagons and supplies and moving their sheep in their sheep operations and the private use of the lessees of the stone quarries as ingress and egress thereto and for the intermittent hauling of stone therefrom, all with the consent and permission of the defendants and their predecessors in interest. During that period there was an occassional sight-seer or hunter who used the roadway when the chain was temporarily down and who of necessity returned on the same road since such roadway terminates at the quarries and does not connect with any passable road, nor does it lead to any point of public interest (Fdg. 9, R. 221; Tr. 19, 32, 40, 93, 179, 181, 188, 199, 204, 208, 229, 246, 250, 252, 266, 277, 292).

In the year 1931 the width of Quarry Road was approximately 8 feet. During the period from 1931

until 1966, inclusive, the surface of Quarry Road was intermittently repaired and maintained by defendants' predecessors in interest and the lessees of the quarries, resulting in the widening of parts thereof to a maximum width of 12 feet. That at no time did Summit County or the Utah State Highway Department ever repair or maintain the bed or surface of Quarry Road (Fdg. 11, R. 222; Tr. 94, 95, 146, 196, 200, 225, 227, 283, 288, 321, 322).

Prior to 1931 the use of the Lower Road was limited to intermittent private use of the lessees of the quarries and their employees as a means of ingress and egress to the quarries and the rock house and out-buildings associated therewith and to the owners of property immediately to the south thereof. In addition thereto the Lower Road was then used by an occasional hunter or fisherman. That from 1928 to 1931 the Lower Road was used by defendants' predecessors in interest in their sheep operations, and after 1931 the use of the Lower Road was limited to intermittent use by defendants and their predecessors in interest in their sheep operations and to the private use of owners of farming property immediately to the south thereof and to an occasional hunter or fisherman (Fdg. 12, R. 222; Tr. 215, 257, 274, 280, 283, 292, 328).

That neither the Quarry Road nor the Lower Road was used during any period of time by the general public as a public road or thoroughfare, and there is no evidence that defendants or their predecessors

in interest intended to dedicate or abandon either road across their property to the use of the public, and both roads presently are and at all times have been private roadways (Fdg. 13, R. 222).

On the basis of the foregoing Findings Of Fact, the trial court entered its Judgment of "no cause of action" on plaintiffs' Complaint and quieting defendants' title to their property free and clear of all claims that either the Quarry Road or the Lower Road is a public road.

POINT I.

UNDER THE CARDINAL RULES OF REVIEW THE FINDINGS, CONCLUSIONS AND JUDGMENT OF THE TRIAL COURT IN THIS CASE MUST BE AFFIRMED.

Plaintiffs attack the Findings Of Fact generally as not conforming to the evidence, without specifying which Findings and without attempting to specifically point up wherein such Findings do not conform to the evidence. In *Charlton v. Hackett*, 11 Utah 2d 389, 360 P. 2d 176 (1961) this Court held that in considering such an attack on the Findings and Judgment of the trial court it is the duty of this Court to follow these cardinal rules of review, to-wit:

> (1) To indulge them a presumption of validity and correctness;
>
> (2) To require the appellant to sustain the burden of showing error;

(3) To review the record in the light most favorable to them; and

(4) Not to disturb them if they find substantial support in the evidence.

As to (1) and (2) above, plaintiffs have the burden on this appeal of overcoming the presumption of validity and correctness. Nowhere in Appellants' Brief do they even attempt to point out where the findings of the trial court are in error. They simply ignore such findings and purport to summarize generally under three paragraphs under Point I of their Brief what they characterize as facts developed from uncontroverted testimony. Not only is such testimony controverted but the statements set forth therein are fraught with inaccuracies, assumptions and bridging over with nonexistent evidence and in part are downright untrue, as will be noted hereinafter under Point II of this Brief.

As to (3) and (4) above, the evidence outlined under respondents' Statement Of Facts with direct references to the record and transcript make it abundantly clear that the findings of the trial court are in fact supported by substantial evidence in the record. That being so, the findings of the trial court should not be disturbed on this appeal.

And since the Conclusions Of Law are predicated upon and are supported by the findings, such Conclusions must be affirmed. Likewise, since the Judgment follows the Conclusions it too must be affirmed herein.

POINT II.

THE EVIDENCE SUPPORTS THE FINDING OF THE TRIAL COURT THAT THE LOWER ROAD IS A PRIVATE ROAD AND NOT A PUBLIC THOROUGHFARE.

At the outset it should be noted that under their Complaint plaintiffs sought only to establish that the Upper Road or Quarry Road was a public road. It was not until after all the evidence was in that plaintiffs moved to amend their Complaint and pleadings to include the Lower Road. Plaintiffs were permitted to so do over defendants' objections, with which defendants now have no quarrel since defendants are satisfied, as was the trial court, that plaintiffs failed to prove the Lower Road to be a public thoroughfare.

Under Point I of their Brief the plaintiffs argue that the trial court erred in failing to find that there was a public use of the Lower Road. Plaintiffs had the burden of proving by clear and convincing evidence that the Lower Road had been dedicated to the public as a public thoroughfare by continuous and uninterrupted user by the general public for ten years. *Petersen v. Combe*, 20 Utah 2d 370, 438 P. 2d 545 (1968). The trial court refused to so find, and in fact found to the contrary (Fdg. 13, R. 222). And the trial court having refused to so find, the correct rule here is that this Court should not upset the trial court's refusal to so find unless the evidence is such that all reasonable minds would so conclude and thus compel such a finding. *Park v.*

Alta Ditch & Canal Company, 23 Utah 2d 86, 458 P. 2d 625 (1969).

Under the record in this case it would be sheer nonsense for plaintiffs to argue that the evidence is so clear and convincing that all reasonable minds would conclude that the Lower Road had been dedicated to the public as a public thoroughfare by continuous and uninterrupted user by the general public for ten years . Yet that is plaintiffs' burden on this appeal. We submit that not only do plaintiffs fail to meet their burden on this appeal but the evidence overwhelmingly shows otherwise.

Under Point I of Appellants' Brief they make a futile attempt to summarize generally under three short paragraphs what they characterize as facts developed from the uncontroverted testimony. Not only is such testimony controverted but the statements set forth therein contain inaccuracies, assumptions and the bridging over with non-existent evidence. Moreover, such statements are in part downright untrue.

Thus, as to paragraph A on page 6 of Appellants' Brief, it is the *use* of the Lower Road that is important and not the fact of its existence. Its existence as a wagon road was established from 1894 to 1898 (Tr. 334, 335, 337). It terminated at the buildings associated with the quarry operations (Tr. 335).

The record is devoid of any evidence as to the

existence of the Lower Road from 1898 to 1915. In 1915 the Lower Road existed as a wagon road that went up to the quarry (Tr. 184). It did not exist beyond the quarry, nor were there any tracks beyond the quarry area (Tr. 185). The Lower Road was washed out around the hill in the spring run-off and winter snows kept it pretty well gutted with little trenches (Tr. 188).

The evidence as to the existence of the Lower Road after 1915 is unclear until the year 1926 (Tr. 105). Thereafter its existence was generally established. It was a little, rutty road that separates the Condas property from the Peterson property (Tr. 11). When the Condas family first went into the area in 1925 or 1926 they attempted to use the Lower Road and got bogged down and stuck (Tr. 308, 329). There is a creek running by the Lower Road and over the years the road was inundated half the time and full of pot holes (Tr. 329). It was difficult to get through because there were bog holes and a good possibility of getting stuck because it was always wet and marshy along the fence line (Tr. 255, 257).

In 1929 a board gate made out of scrap lumber was constructed across the Lower Road just beyond the railroad grade in the fence along the Condas west line (Tr. 23, 178, 220, 221, 310). The board gate was replaced with a wire gate (Tr. 23, 310). The wire gate was maintained thereafter until 1938 or 1939 (Tr. 29, 179). The gate obstructed traffic

from going along the Lower Road past the fence (Tr. 310) and for a period was equipped with a chain and a lock in the chain (Tr. 184).

As to paragraph B on pages 6 and 7 of Appellants' Brief, fifteen to twenty men working the quarry, the Wabel family and two Chinese cooks hardly make it a "community". The statement of plaintiffs' witness McAlevey that 200 men worked in the quarry at one time (Tr. 97) was a voluntary statement made by him as he was stepping down from the witness chair, which the trial court obviously disregarded since his knowledge of the area was limited to the period from 1953 to 1962 (Tr. 81).

During the period 1894 to 1898 the only evidence of the use of the Lower Road was limited to the Snyder family visiting with their married daughter (Tr. 334, 337) who lived in the cottage near the quarry (Tr. 335) and a Snyder boy who drove pigs along it on one occassion (Tr. 345) and whatever interferences might be drawn from the fact that between fifteen and twenty men worked in the quarries (Tr. 338) and two Chinese cooks worked and slept in the boarding house (Tr. 338, 341). Except for their visits, the witness Snyder could not recall specifically any other individuals who used the Lower Road (Tr. 345). There was no evidence nor any inferences that the Lower Road was used by anyone except those connected with the quarry operations.

The record is devoid of any evidence of any use of the Lower Road from 1898 until 1915 when the witness McPolin used it to go up to the quarry where he worked and where it terminated (Tr. 189). The evidence is unclear from 1915 to 1926 as to what use, if any, was made of the Lower Road. The last time any rock was moved out of the quarry by the railroad was in 1919 or 1920 (Tr. 176). From 1928 to 1931 the Lower Road was used by defendants' predecessors in their sheep operations (Fdg. 12, Tr. 328). There was no evidence that the quarries were operated thereafter until about 1932. Thereafter the use of the Lower Road was limited to the intermittent use by defendants and their predecessors in their sheep operations and the private use of the owners of farming property immediately to the south and to an occasional hunter or fisherman (Fdg. 12, R. 222; Tr. 215, 257, 274, 280, 283, 292, 328).

As to paragraph C on page 7 of Appellants' Brief, the only use of the Lower Road in 1931 and 1932 for any sheep purposes was for the defendants' own sheep (Tr. 327, 329). The statement that the Lower Road continues to be used by the public is unsupported by any evidence and is simply untrue.

And so can it be said that such evidence is so clear and convincing that all reasonable minds would conclude that the Lower Road had been dedicated to the public as a public thoroughfare by continuous and uninterrupted public user for ten years? Is

273 P. 2d 720 (1954); *Gillmor v. Carter*, 15 Utah 2d 280, 391 P. 2d 426 (1964); and *Petersen v. Combe*, supra.

The trial court correctly applied the foregoing rule to the facts of this case and found that the Lower Road was not used during any period of time by the general public as a public road or thoroughfare and it presently is, and at all times has been, used as a private roadway (Fdg. 13, R. 222). We respectfully submit that such finding must be affirmed.

POINT III.

THE EVIDENCE SUPPORTS THE FINDINGS OF THE TRIAL COURT THAT THE USE OF BOTH THE QUARRY ROAD AND THE LOWER ROAD PRIOR TO PATENT DID NOT CONSTITUTE A USE BY THE GENERAL PUBLIC AS A PUBLIC THOROUGHFARE.

At the outset, we are at a loss to understand whether plaintiffs make any claim on this appeal as to the Upper or Quarry Road. In their "Relief Sought on Appeal" on page 2 of Appellants' Brief they seek a reversal of the lower court and to have the case rewarded (remanded) for additional evidence describing a right of way over the "Lower Road". Under captioned "Point II" of their Brief plaintiffs assert that the use of the Upper Quarry Road (and the Lower Road) was established by public user and dedication prior to patent. Yet in their agrument of Point II no mention is made of the Upper Road or Quarry Road and all references therein seem to be directed to the Lower Road.

By their own Statement Of Facts on page 4 of Appellants' Brief plaintiffs concede that the Quarry Road did not exist prior to 1928 or 1929 except as an old railroad grade — "kind of a scar on the hill." Plaintiffs then concede that the railroad grade was thereafter gradually improved and made usable for vehicular traffic. The patent to the Condas land was issued on October 23, 1931 pursuant to entries made prior thereto (Fdg. 1, R. 218). Thus plaintiffs must concede that it was impossible for the Quarry Road to become a public thoroughfare while the Condas lands were still a part of the public domain since the Quarry Road did not even come into existence until after the year 1929. And so the cases of *Lindsay Land & Livestock Company v. Chournos*, 75 Utah 384, 285 P. 646 (1929) and *Sullivan v. Condas*, 76 Utah 585, 290 P. 954 (1930) cited on page 10 of Appellants' Brief have no application to the Quarry Road. Those cases deal with the creation of public highways over the public domain and are simply not in point here.

Nor is the case of *Oregon Shortline Railroad Company v. Murray City*, 2 Utah 2d 427, 227 P. 2d 78 (1954) of any help to plaintiffs here since the holding there is limited to the proposition that a railroad *could* acquire a railroad right-of-way under 43 U.S.C.A. Section 932 for a *trans-continental* railroad constructed between the Act of 1866 (43 U.S.C.A. Section 932) and the Act of 1875 (43 U.S.C.A. Section 934). Here the railroad *spur* was con-

structed after the Act of 1875 (43 U.S.C.A. Section 934) and there is no evidence of any compliance with the requirements thereof, i.e. filing a copy of its Articles of Incorporation with the Secretary of Interior, profile of the railroad, etc. 43 U.S.C.A. Section 937.

Apparently plaintiffs do not claim that the Quarry Road became a public thoroughfare after patent since their Point II, if in fact it does apply to the Quarry Road, does not raise that issue. Furthermore, plaintiffs concede in their Brief, on page 5 thereof, that from 1934 (actually 1932) until 1959 a chain was placed across the Quarry Road and was maintained there until 1959 when it was moved to a point on defendants' property.

However, if we are mistaken as to plaintiffs' claims we say that the facts are, as found by the trial court, that from 1932 to and including the year 1967 the Quarry Road was equipped with a locked cable or chain which effectively obstructed the passage of all vehicular traffic except as to the lessees of the quarries and the defendants and their predecessors in interest and was posted with "Keep Out" or similar warning signs besides being periodically blocked with a large boulder (Fdgs. 6, 7, 8; R. 220, 221). Likewise during the period from 1931 to 1966 inclusive the use of the Quarry Road was limited to the private use of defendants and their predecessors in interest for the haulage of their sheep wagons and supplies and moving their sheep in their sheep

operations and the private use of lessees of the stone quarries as ingress and egress thereto and for the intermittent hauling of stone therefrom, all with the consent and permission of the defendants and their predecessors in interest. During that period there was an occasional sight-seer or hunter who used the Quarry Road when the chain was temporarily down and who of necessity returned on the same road since such road terminates at the quarries and does not connect with any passable road, nor does it lead to any point of public interest (Fdg. 9, R. 221).

Those facts as found by the trial court and as supported by the substantial weight of the evidence make it crystal clear that the Quarry Road was never used during any period of time by the general public as a public road or thoroughfare and does not meet the requirements of *Morris v. Blunt*, supra, nor the line of cases cited thereafter.

The facts of this case as they relate to the Quarry Road are closely akin to the facts of *Petersen v. Combe*, supra. There as here the roadway dead-ended in the sagebrush and rocks. There as here warning signs were posted and the primary use of the roadway was by the owners adjacent thereto and there was nothing of public interest along the road. Plaintiffs there as here were subdividers of adjoining land and complained that defendants had obstructed the use of the roadway by prospective lot purchasers. Similar deficiencies existed in the complaints and similar claims of dedication by

resolution of the County Commissioners and by official maps permeated both cases. In *Petersen v. Combe,* supra, this Court rejected the very same arguments as were advanced by plaintiffs herein, and its conclusion as set forth on page 380 of the Utah Reports we submit is dispositive of this case to-wit:

> "We think the procedure and facts of this case are pretty much controlled by the following cases: Morris v. Blunt, 49 Utah 243, 161 P. 1127 (1916); Hall v. No. Ogden City, 109 Utah 325, 175 P. 2d 703 (1946); Thompson v. Nelson, 2 Utah 2d 340, 273 P. 2d 720 (1954); Gillmor v. Carter, 15 Utah 2d 280, 391 P. 2d 426 (1964); and by the fact that plaintiffs, by their own witnesses and evidence, actually supported the defendants' contentions that the taking of the property must be proved by clear and convincing evidence that constitutionally must be justified, and that the burden of proof to justify such conclusion has not been borne here."

The facts relating to the Lower Road both prior and after patent are covered in our argument under the foregoing Point II and need not be further discussed here. Suffice it to say plaintiffs wholly failed to sustain their burden in the trial court of establishing the Lower Road as a public thoroughfare by clear and convincing evidence or at all as they have have failed to sustain their burden in this Court of showing error by the trial court.

We respectfully submit that the Findings Of Fact, Conclusions Of Law and Judgment of the trial court must be in all respects affirmed.

Respectfully submitted,

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