

**IN THE CIRCUIT COURT OF ST. LOUIS CITY  
STATE OF MISSOURI**

MARK T. MCCLOSKEY AND	)	
PATRICIA N. MCCLOSKEY,	)	
	)	
Plaintiffs/Counterclaim Defendants,	)	Cause No. 1722-CC11832
	)	
v.	)	Division 20
	)	
KERRIN KOWACH,	)	
RICHARD GEMBERLING, AND	)	
DANIEL TIMOTHY LADENBERGER,	)	
as Trustees of the Portland Place Association,	)	
	)	
Defendant/Counterclaim Plaintiffs.	)	

**AFFIDAVIT OF MARK T. MCCLOSKEY**

Before me, the undersigned authority, personally appeared Mark T. McCloskey, known to me to be the person whose name is subscribed hereto below and being by me first duly sworn on his oath did testify as follows:

1. My name is Mark T. McCloskey. I am an attorney at law licensed to practice in the States of Missouri and Illinois and all the facts recited herein are within my personal knowledge and are true and correct to my best knowledge, information and belief and all photographs attached hereto are fair and accurate depictions of the scenes portrayed.

2. On February 11, 1988, myself and my wife Patricia Novak McCloskey (hereinafter the "McCloskeys") jointly acquired the property commonly referred to as One Portland Place in the City of St. Louis.

3. One Portland Place is a portion of City Blocks 4907-A and 4908 which has an east/west dimension of 200 feet and a north/south dimension of 265 feet 5 inches constituting Parcel #49070102600 all within the City of St. Louis. See St. Louis Assessor's search page and map generated by City of St. Louis mapping (see Exhibit 1).

4. Portland Place is a “private place” created pursuant to the Property Restrictions and Trust Agreement of Portland Place adopted by a vote of 100% of the property owners of such private place which became effective July 2, 1958. See Property Restrictions and Trust Agreement of Portland Place (see Exhibit 2).

5. In the Indenture of Portland Place, contained within such Property Restrictions and Trust Agreement:

[T]he Parties of the First Part [the homeowners of Portland Place] have created and granted, and hereby do create and grant unto the said Trustees, Parties of the Second Part, their survivors, successors and successive successors as such Trustees, rights and easements, in, over, along, under and upon the following:

All of City Blocks 4905 and 4908 except the portion, sixty (60) feet by 130 feet, 10 inches, above conveyed all in the City of St. Louis, State of Missouri

for streets and parks for the exclusive use of those persons who may from time to time reside in the Subdivision.

(see Exhibit 2, page 5)

6. The area in dispute in this action (hereinafter, “the Parcel”) lays within City Block 4908 and consists of one thousand one hundred forty-three (1,143) square feet laying south of the south line of City Block 4907-A fronting Lots 1 and 2 of Portland Place and laying north of the Portland Place sidewalk, as depicted in the Pitzman’s Company of Surveyors and Engineers (see Exhibit 3).

7. Exhibit 4 is a photograph taken looking from the west to the east showing the Kingshighway entrance tower to Portland Place (“A”), the pedestrian sidewalk (“B”) and the brick and stone wall (“C”).

8. Exhibit 5 is a photograph looking east to west from the Kingshighway side showing the Kingshighway entrance tower (“A”), the pedestrian gate (“B”) and the brick and stone wall (“C”).

9. Exhibits 6 and 7 are photographs showing an overhead view of the Parcel. Exhibit 6 shows the Parcel as the area between the sidewalk and the black line and Exhibit 7 shows the Parcel as the hashmarked area.

10. At the time of the McCloskeys’ purchase of One Portland Place, within the Parcel, there were several trees within the Parcel including at least two large trees, a maple and an ash, and, on the east end of such area was a Japanese garden of sorts consisting of two teacup magnolia trees of approximately thirty-years of age, with a stone or concrete Japanese lantern, birdbath and Japanese figure, all of which area was covered in gravel and surrounded by plants known as “hens and chickens” (see Exhibit 8 showing the Japanese garden and Exhibit 9 showing a stump of the tree in the Parcel removed by Mark McCloskey within a week of acquisition of One Portland Place)

11. Running north and south through the east end of the Parcel at all times since the McCloskeys purchased One Portland Place there has been a brick and stone wall with a decorative iron railing (see Exhibit 10).

12. At the time of the McCloskeys’ acquisition of One Portland Place, such stone and brick wall was in bad repair, was in need of cleaning and tuckpointing, and the iron fence had significant rust and an absence of paint.

13. At the time of the McCloskeys’ acquisition of One Portland Place, there was physically affixed to such stone and brick wall a leaded conduit supplying electrical power to

such wall, which conduit ran north and then west to the electric meter metering power to One Portland Place.

14. On the Kingshighway side of such stone and brick wall, being between it and the public sidewalk on the west side of Kingshighway, was one small holly tree surrounded by nothing but open dirt and debris (Exhibit 11).

15. On December 12, 1988, the McCloskeys removed a tree by the Kingshighway wall at their expense (Exhibit 12).

16. On April 12, 1990, more trees were removed from and hauled away from the Parcel (Exhibits 12, 13, 14).

17. On June 4, 1990, the McCloskeys had the brick and stone wall (with the iron) cleaned by sandblasting (Exhibit 15) and McCloskeys then repainted the iron on the wall.

18. In August, 1990, the McCloskeys then cut down the final trees in the Parcel including the two teacup magnolia trees and had them removed (Exhibit 16). The figure, birdbath and lantern had been removed by the McCloskeys from the space in 1988.

19. In or about May, 1991, the McCloskeys employed David Minnaar to dig out the gravel and top several inches of dirt that covered most of the Parcel and the McCloskeys rented two 10 yard dumpsters which were very visibly placed on the Portland Place street in front of the Parcel at One Portland Place for days for Mr. Minnaar to fill by hand before they could be moved.

20. Thereafter, in May, 1991, the McCloskeys purchased and installed additional topsoil in the Parcel (Exhibit 17) and in June, 1991, purchased zoysia sod (Exhibit 18) and had Mr. Minnaar install it in the Parcel. All of the above was done over the course of weeks or months in plain sight.

21. All of the above was done without seeking or receiving any permission, consent or comment from any Trustee of Portland Place.

22. Early on in the McCloskey's ownership of One Portland Place, there was no meaningful barrier between pedestrians entering One Portland Place from the Kingshighway side and passing through it to Portland Place since the prior wall had fallen down.

23. In 1990, the McCloskeys obtained permission from the City of St. Louis to construct a ten foot high wall running north and south along the east side of One Portland Place. In doing so, in order to achieve an attachment of such wall to the existent stone and brick wall, it was necessary to modify the north end of the stone column of the stone and brick wall, cutting it to attach in a structurally sound manner to the new wall (Exhibit 18A)(compare with Exhibit 11).

24. Prior to the installation of the new wall, residents and trespassers could physically gain access to Portland Place by stepping over the broken existing wall at One Portland Place and cross across the Parcel to the Portland Place sidewalk.

25. Between the time of acquisition of One Portland Place and the construction of the above-referenced ten foot wall, the McCloskeys regularly prohibited all persons, including Portland Place residents, from crossing the Parcel including at least at one point, challenging a resident at gun point who refused to heed the McCloskeys' warnings to stay off such property.

26. Since the time that the original plantings and surface of the Parcel were modified by the McCloskeys in 1988-1991, the McCloskeys planted hedges in front of the stone and brick wall and have maintained them and trimmed them as needed.

27. The McCloskeys have re-sodded the Parcel at least twice more, have seeded and fertilized it and, have installed steel landscape edging to create a bed for annual plants and in which the McCloskeys have planted annuals every year since such the mid- 1990s.

28. From 2005 until approximately 2013, the McCloskeys had bolted to the brick and stone wall wrought iron planter baskets which were filled by the McCloskeys with annual plants on a yearly basis.

29. In the Parcel between the brick and stone wall and the Kingshighway sidewalk, east of the wall at issue, the McCloskeys stripped the soil and re-sodded such area at least three times, planted a variety of shrubs including a boxwood hedge, yew hedge, Siberian elm, Jackson and Perkins roses, and more recently, for the past 15-18 years, have maintained euonymus ground cover around a holly tree.

30. The McCloskeys have trimmed the euonymus groundcover weekly and trimmed the holly tree for at least the last 15 years.

31. In addition, since at least the early 1990s, the McCloskeys ordered Portland Place's lawn maintenance personnel not to mow or "weed whip" the Parcel on the Kingshighway side, and since then the McCloskeys alone have mowed and weed whipped the Parcel between the brick and stone wall and the Kingshighway sidewalk.

32. In July 1995, the Trustees of Portland Place desired to replace a power cable that energized the Portland Place street lights. This cable ran from a transformer of the north side of One Portland Place's property and ran down the east side of the property (on the east of the Kingshighway wall) into the entrance tower.

33. In order to replace such cable, the Trustees sought to access property owned by the McCloskeys including property in the Parcel. Consequently, the Trustees, by and through their attorney Marvin Nodiff, drafted a license agreement whereby the McCloskeys gave the Trustees a one time license to enter upon and perform work on the McCloskey's property which included the Parcel (Exhibit 19).

34. In the course of doing the work pursuant to such license agreement, the Trustees damaged and killed various shrubs which the McCloskeys had planted in the Parcel and, in conformity with the license agreement, the Trustees paid for the shrubbery which they damaged or killed in connection with replacing such cable.

35. For several years in the late 1990's and early 2000's, at the annual homeowners' meetings, various Trustees of Portland Place had discussed the need to clean and retuckpoint the entry to Portland Place on the Kingshighway end. At each of the annual meetings where this issue was discussed, it was pointed out that the only part of the entry over which the Trustees had any rights (the tower itself) did not need cleaning or tuckpointing and that only the "wing walls" (being the brick and stone walls north and south of the sidewalk) needed work and that such wing walls belonged to the homeowners and not the Trustees.

36. At each annual meeting of the homeowners of Portland Place between 1998 and 2003, it was conceded by the Trustees that those wing walls were in fact owned by the homeowners and not the Trustees and that it was the homeowners', and not the Trustees', obligation for maintenance and repair.

37. Exhibit 20 is a copy of the February 9, 1998 minutes of the 1998 annual meeting of the homeowners of Portland Place wherein David Harris, an attorney with Greensfelder, Hemker & Gale who was a Trustee at the time, declared that the wing walls were the responsibility of the homeowners and not the Trustees. The minutes recite:

Walls (from inside the sidewalk line) will need to be tuckpointed (at \$8,000.00). David investigated the property lines at Recorder of Deeds. The property owners are responsible for maintaining walls up to sidewalk line.

38. Exhibit 21 is a copy of the minutes of the annual meeting held on February 22, 2000. At that meeting, the minutes recite:

Mark McCloskey also pointed out that the gates (sic) houses at Kingshighway are structurally sound and do not require tucking (sic) and that the walls on either side of the pedestrian (sic) gates are owned by the Resident. The Trustees agreed with Mark McCloskey's observation but pointed out that if the respective Residents ever tuck point (sic) their walls it would be beneficial to do the gate houses so that the entire gate house and walls would look as if they were a single architectural (sic) feature and add to the beauty of the street. (emphasis added)

39. It should be noted that Dick Overton, who was one of the Trustees who agreed with Mark McCloskey was and is an attorney licensed in Missouri. At that meeting, the previous years' minutes were also approved (Exhibit 21).

40. The following year, the 2001 annual meeting minutes reflect that the 2000 minutes were moved, seconded, and accepted by the vote of the residents (Exhibit 22).

41. At the annual meeting in 2004, the topic of repairing the wing walls was once again discussed in connection with the creation of a purported non-profit "Portland Place Preservation and Restoration" organization which intended to repair, restore and tuckpoint the wing wall on the north side of Portland Place, being the stone and brick wall within the Parcel, along with other areas.

42. In response thereto, on January 24, 2004, the McCloskeys sent the Trustees correspondence (See Exhibit 23) reminding them that the stone and brick wall was the private property of the McCloskeys and that the McCloskeys were not granting the Trustees permission to enter the property for the purposes of working on the McCloskeys' wall.

43. Subsequent to sending out such correspondence to the Trustees, Chip Starr of Starr Restoration was discovered on or about April 19, 2004 by the McCloskeys on the Parcel apparently about to begin cleaning the stone and brick wall within the Parcel.

44. The McCloskeys advised Chip Starr that the wall was the McCloskeys' private property and that he was not permitted to be on the property or perform work on it, and Chip



Starr signed the agreement (See Exhibit 24) wherein he agreed to not perform any work at that location or anywhere north of the sidewalk.

45. On or about April 28, 2004, The McCloskeys contracted for the cleaning and 100% tuckpointing of the stone and brick wall within the Parcel both inside and outside, which work was performed on May 8, 2004 and was paid for by the McCloskeys (Exhibit 25).

46. On the day of such tuckpointing, after the tuckpointing was completed, Bob Dolgin, an attorney licensed in Missouri and then a newly-elected Trustee of Portland Place, appeared on the Parcel to inquire about the tuckpointing of the stone and brick wall.

47. Mark McCloskey confronted Mr. Dolgin on the Parcel, ordered him off the Parcel, and engaged in a conversation with him about the Parcel, while standing on the Portland Place sidewalk.

48. At that time, Mark McCloskey reiterated his previously stated position that that the Parcel was the McCloskeys' property and the Trustees had no right to it at all.

49. Subsequently, on May 8, 2004, Mr. Dolgin, on behalf of the Trustees, forwarded correspondence (see Exhibit 26) stating that the McCloskeys did not have permission from the Trustees to tuckpoint the wall.

50. On May 11, 2004, the McCloskeys replied by once again reiterating the history of their adverse possession of and claim to such property (the Parcel with the wall included) (Exhibit 27).

51. On July 7, 2004, the Trustees of Portland Place sent the McCloskeys correspondence (Exhibit 28) with a copy of a survey showing the devising line between City Block 4907-A and City Block 4908 and stating that "the wall" was owned by Portland Place.

52. On July 9, 2004, the McCloskeys responded to the Trustees (Exhibit 29) once again pointing out that the issue was not what the metes and bounds description was in 1888, but what actual use had been for the last 116 years and pointing out that the Trustees had acknowledged that the wing walls were the property of the individual homeowners at previous annual meetings.

53. In July, 2005, the McCloskeys had their front yard, including the Parcel, resodded with zoysia and in the summer and fall of 2005, the McCloskeys installed irrigation on the Parcel (Exhibit 30) and replaced the sod damaged by the irrigation installation (Exhibit 31).

54. The installation of the irrigation system and its daily cycling on and off were and are clearly visible to all residents and Trustees of Portland Place.

55. On or about November 2, 2005, the McCloskeys hired Dunn Lawn and Landscape to replace the McCloskey's existing hedges and plants in the Parcel and plant new upright and pyramidal yews in such Parcel in front of the wall (Exhibits 32 and 10, 33, 34),

56. On or about November 2, 2005, the McCloskeys received correspondence from Barbara Combs, then a Trustee of Portland Place, once again stating the Trustees' position that they, and not the owners of One Portland Place, owned the Parcel.

57. The McCloskeys replied by correspondence dated November 3, 2005 (Exhibit 35) once more declaring their ownership through adverse possession. Just to make sure that the Trustees understood the McCloskeys' position, they included with such correspondence copies of R.S.Mo 516.010 and *Walton v. Gilton*, 175 S.W. 3d 170 (Mo. App. S.D. 2005)

58. For more than ten years after the November 3, 2005 correspondence with Trustee Barbara Combs (which was copied on all Trustees), the McCloskeys continued to maintain the Parcel, both inside and outside the wall, and the wall itself, at their discretion including planting,

painting, installing irrigation, installing landscape lighting, plumbing, electrical service and planting permanent as well as seasonal vegetation, mulching, mowing, fertilizing, seeding and resodding as necessary to the exclusion of the Trustees.

59. The manner in which the McCloskeys have planted the east end of the Parcel, both inside and outside the wall, has created a barrier which has in fact prevented anyone from accessing the wall since at least 2005 (Exhibit 36).

60. In 2009, a purported non-profit corporation with the purported consent of the Portland Place Trustees undertook to replace the previously removed roofs over the pedestrian gates on the east end of Portland Place. This work necessitated making alterations to and affixing the roof to the south end of the stone and brick wall in the Parcel. This work was being performed by Renaissance Roofing.

61. Prior to the beginning of such work, the McCloskeys met with an employee of Renaissance Roofing who was going to be managing the project and granted permission for the work to include the column on the north side of the sidewalk in the Parcel.

62. Together with the representative of Renaissance Roofing, the McCloskeys dug in the dirt in front of the brick and stone wall within the Parcel to locate fragments of the original slate roof and agreed with the representative of Renaissance Roofing on the color, shape and size of the slate tiles to be used in the roofing project.

63. The McCloskeys showed the representative of Renaissance Roofing original photographs of the roof and suggested that they redesign the previous roof to accommodate the same number of ranks of tiles as originally there (contrary to the drawings produced by the architects hired by the purported non-profit entity) and alter the color of the slate to be used.

64. Renaissance Roofing in fact altered the design to incorporate the McCloskeys' suggestions and color of tile and the McCloskeys consented to the construction of the pedestrian roof and its attachment to the column in the Parcel.

65. On or about April 27, 2015, the Trustees of Portland Place installed a sign on the east side of the wall adjacent to Kingshighway, which read "Private Street Access Limited To Residents" which sign was on a steel standard set in concrete and installed north of the sidewalk outside of the Portland Place pedestrian gate within the Parcel. (see Exhibit 37).

66. Mark McCloskey wrote to Trustee Sanjay Jain questioning both the utility of the signs themselves and why they were installed on the homeowners' side of the sidewalk instead of the Trustees' (Exhibit 38).

67. The McCloskeys subsequently received an email from Kerrin Kowach, an attorney and law professor at St. Louis University, as a Trustee of Portland Place stating that the Trustees believed that the signs were on Portland Place Property and not on the McCloskeys' property and attached a copy of the Pitzman survey (one more time) (Exhibit 39).

68. Mark McCloskey promptly wrote back to the Trustees informing them of his position that such property, to the extent that the Trustees ever had any right to it, had become the McCloskeys' through adverse possession (Exhibit 40).

69. Several emails were exchanged (see group Exhibit 41).

70. Subsequently, given the Trustees' failure to remove the sign from the Parcel, Mark McCloskey dug up the sign and reinstalled it on the south side of the sidewalk on property subject to the Trustees' easement.

71. The sign, as transferred by Mark McCloskey to the south side of the sidewalk, remains on the south side of the sidewalk to this day and the Trustees have taken no further action (Exhibit 42).

72. Beginning in about 2009, the McCloskeys placed bougainvillea trees adjacent to the wall on the Parcel behind the then mature yew hedge. These trees are wired to the wall each year from May to November and were (and are continuing to be) removed, stored in a heated area and reinstalled each spring.

73. The McCloskeys also continued to plant hundreds of annual plants in front of the hedges and continue to do so today. These annuals were and are often changed out and mulched three times per year- pansies in the spring, impatiens from May to October and mums and cabbage in the late fall by the McCloskeys (see Exhibits 43, 44).

74. In the Spring of 2015, the McCloskeys installed landscape lighting and edging (Exhibit 45) in the Parcel in front of the wall facing the plantings.

75. On October 23, 2015, Mark McCloskey observed an electrical contractor excavating on the north side of the sidewalk in front of the brick and stone wall within the Parcel.

76. Mark McCloskey immediately instructed the contractors to get off the Parcel and they did so.

77. Subsequently, on or about the 23<sup>rd</sup> day of October, 2015, the McCloskeys received correspondence from the Trustees indicating their belief that this was the Trustees' property and Mark McCloskey promptly replied with a denial that it was Trustees' property, reiterating the McCloskeys' position that to the extent the Trustees ever had any rights to such property, they had been extinguished by adverse possession (see entire email chain, Exhibit 46).

78. Despite the McCloskeys' warnings to the contrary, the Trustees had an electrical outlet installed on the brick and stone wall in the Parcel.

79. By correspondence dated October 27, 2015, the McCloskeys put the Trustees on notice that this electrical outlet was on the McCloskeys' property and that if the Trustees did not promptly remove it, Mark McCloskey would do so himself (Exhibit 47) having earlier suggested that the parties see a judge to resolve the issue but that suggestion was not accepted (Exhibit 46).

80. When the Trustees failed and refused to remove the outlet, Mark McCloskey did so himself and placed the removed electrical outlet and relevant conduit on the steps of the tower.

81. Such electrical outlet has never been replaced and the Trustees have taken no further action with regard to the removal of the outlet until such time as they filed their counterclaim to this petition to quiet title.

82. Since February 11, 1988, 100% of the maintenance, repair, construction, restoration and preservation of the Parcel and the improvements built thereon has been performed either by the McCloskeys, their contractors or their employees.

83. Since February 11, 1988, the McCloskeys have vigorously prohibited any and all people other than themselves, their contractors and their employees from being physically present on the Parcel or from performing work on the Parcel.

84. Since February 11, 1988, no one other than the McCloskeys, their employees, and their contractors have ever maintained, improved, or exercised any control over any part of the Parcel.

85. On the three occasions when the Trustees have encroached upon such property (other than the 1995 license agreement granted to install the electric cable), i.e., Chip Starr's

attempt to clean the wall in April 2004, the placement of a sign in April 2015 and the placement of an electrical outlet in October, 2015, such encroachments were, after due notice to the Trustees, promptly remedied and/or removed by the McCloskeys and such remedy and/or removal has been acquiesced to by the Trustees.

86. The McCloskeys did not have One Portland Place surveyed at the time of purchase and never saw any survey of One Portland Place, City Blocks 4907-A or 4908 until presented with such by Bob Dolgin on July 7, 2004.

87. From the date of purchase until now, the McCloskeys have occupied all of the Parcel with the intent to possess it as their property and believed it to be their property (Exhibits 48, 49).

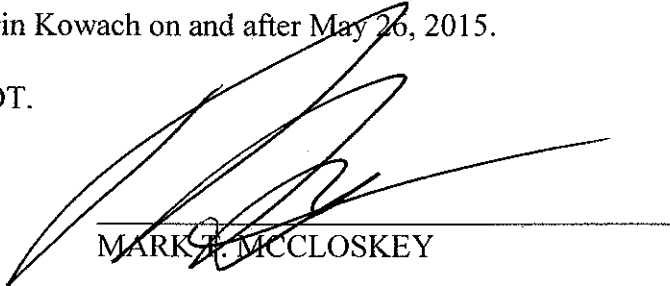
88. This was especially so in that the residents of all four corners of Portland Place and all four corners of Westmoreland Place appeared to do so and continue to do so also by landscaping, hardscaping, lighting, irrigating and otherwise exercising obvious possession and control of such property as indistinguishable from any other part of their front yards (see group Exhibit 50).

89. From February 11, 1988 to the present, the McCloskeys have paid all the real estate taxes on City Parcel #49070102600, being that real estate constituting a rectangle 200 feet by 265 feet 5 inches, running from a point 200 feet north of the north line of City Block 4908 to the midline of City Block 4908, i.e. the center line of Portland Place.

90. At no time relevant to this action and at no time prior to May 26, 2015 was any permission granted, by word or deed, by the Trustees of Portland Place to the McCloskeys for any use of the Parcel.

91. On the contrary, until May 8, 2004, the Trustees acknowledged the McCloskeys' ownership of the Parcel and every communication from the Trustees since that date has expressly denied permission until the emails from Kerrin Kowach on and after May 26, 2015.

FURTHER, AFFIANT SAYETH NOT.

  
MARK T. MCCLOSKEY

On this 6<sup>th</sup> day of September, 2019, before me personally appeared to me MARK T. MCCLOSKEY known to be the person described in and who executed the foregoing document and acknowledged that he executed the same as his free act and deed and that all statements therein are true and correct to the best of his knowledge and belief.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal in the State and County aforesaid, the day and year first above written.



THERESA M. BROWN  
My Commission Expires  
February 2, 2022  
St. Louis County  
Commission #14833014

  
NOTARY PUBLIC

My commission expires: \_\_\_\_\_