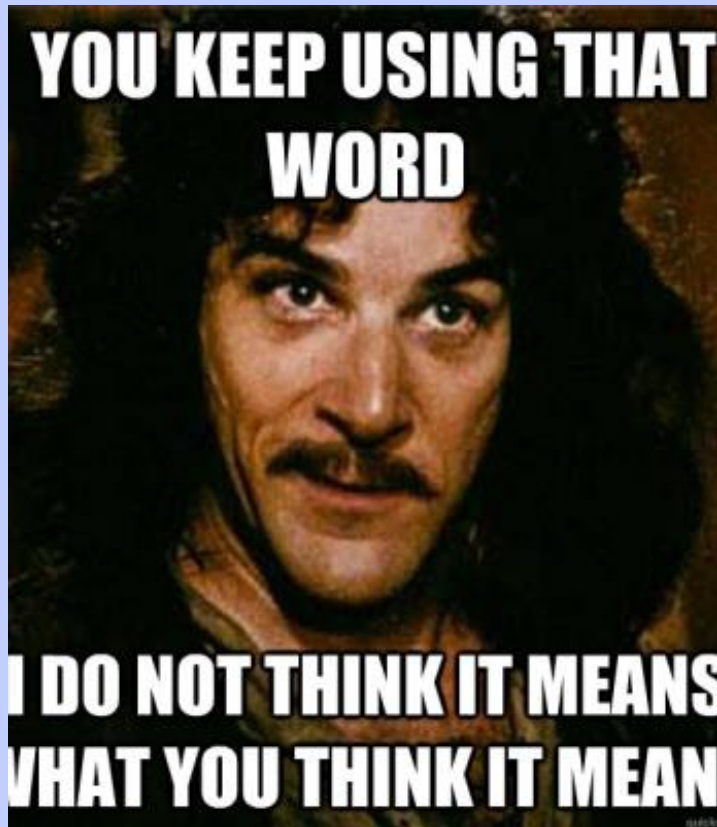


Attorney Jessica J. Shrestha



**UTILITY ROW LAW UPDATE**  
MARCH 4, 2020

# INTERPRETING EASEMENTS



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- **Focus:** The intent of the parties at the time of the grant.
- **How determined:**
  - Primary source is the granting instrument (deed, plat, easement agreement, etc.)
  - Extrinsic evidence considered solely if the granting instrument is ambiguous.
- **Extrinsic evidence:**
  - Evidence of historical use
  - Testimony
  - Plats and maps
  - Context of grant

# INTERPRETING EASEMENTS

- **THERE IS OFTEN NO CLEAR ANSWER**
- **General Easement Law:**
  - Right of reasonable enjoyment
  - Right to do whatever is reasonably necessary for the full enjoyment of the easement itself
  - Property owner cannot unreasonably interfere with easement use
  - Easement use cannot unduly burden underlying property
- ***Garza v. ATC*, WI SC 2017:**
  - 1969 easement language “comprising wood pole structures”
  - Decision:
    - Words of description not circumscription
    - Reasonable advances in technology allowed
    - Steel poles consistent with purpose of easement

# LOCATION OF EASEMENT

- **ROW Strip Easements**
  - Defined centerline
  - Defined corridor
- **Blanket Easements**
  - Prior to installation a “reasonably convenient and suitable way is presumed to be intended, and the right cannot be exercised over the whole of the land.” Court decides if parties cannot agree.
  - Location is fixed following installation and cannot be changed by utility or property owner.

NOTE: Requirement of full legal description for recording under s. 706.05(2m)(b) does not apply to most utility easements.

# RELOCATION AND ADDITIONAL LINES

- *Pahl v. ATC*, 2011 (unpublished): 1964 easement allowed for construction of a second transmission line within the right-of-way. Agreement stated: "the construction of the second line may occur some years after the first line."
  - Right to build second line not abandoned.
  - No adverse possession of easement/right.
- *Enbridge Energy v. Engelking*, 2013 (unpublished): Pipeline easement granted by blanket legal description clearly contemplated additional pipelines, but the easement location was a question of fact for the court to determine.
- *AKG Real Estate, LLC v. Kosterman*, WI 2006 106: Servient estate owner cannot unilaterally terminate or relocate an express utility easement.



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# PRESCRIPTIVE UTILITY EASEMENTS

- Wis. Stat. s. 893.28(2) (compared to (1)):
  - Continuous
  - ~~Adverse~~ Use of rights in real estate of another
  - For at least 10 ~~20~~ years
  - by [most utilities]
- *Williams v. ATC*, 2007 WI App 246, 306 Wis. 2d 181, 742 N.W.2d 882: Use by a utility need not be “adverse” to result in a prescriptive easement.
  - Pursuant to permission
  - Underground
- BUT - what is the scope of the easement???



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# ISSUE: “THERE IS NO EASEMENT”



Many old utility easements were not recorded. Recording not required – *race notice* statute (s. 706.08) not applicable.



Old easements will not show up in title search (typically 40 to 60 years).



Utility easements do not expire by operation of law. But, consider issue of unrecorded easements under s. 893.33.



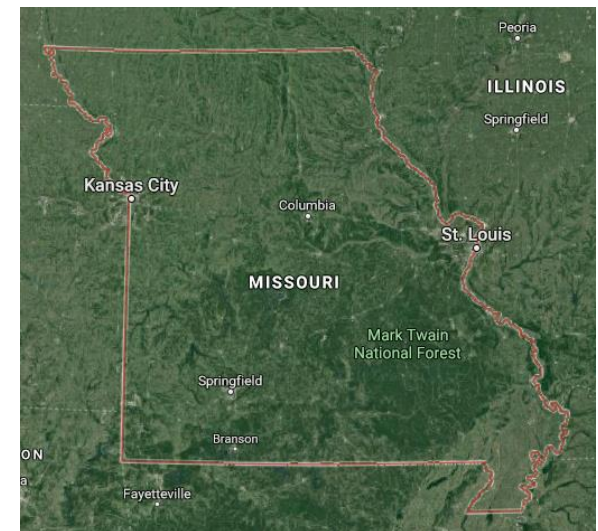
Prescriptive rights may apply – 10 years.



Not abandoned due to non-use.


# BARFIELD V. SHO-ME POWER COOPERATIVE

- Fiber optic cables installed alongside electric lines. Used for internal communications, but excess capacity was assigned to a broadband subsidiary.
- Over 2000 miles of easements at issue with varying descriptions generally for “electric transmission and distribution purposes”.
- Landowners sued in class action for trespass and unjust enrichment.
- Jury awards: 1<sup>st</sup> trial: \$79m; 2<sup>nd</sup> trial: \$130m
  - “fair market rental value”
- 8<sup>th</sup> Cir. (applying MO law):
  - The commercial uses exceeded the scope of the easements = trespass
  - Distinction between type of use and purpose
  - Unjust enrichment remedy not available
- Settlement reached for \$24 million





# COMMUNICATIONS LINES IN EASEMENT

- Easement for electric distribution and transmission line(s).
  - Easement for electric transmission, electric distribution, and communication line system(s), or any combination thereof.
  - Along with the right, permission, and authority to apportion the rights herein to third parties.
- 

# TREE TRIMMING/CLEARING

- **Electric Utility right to clear:**
  - “Reasonable clearance” inherent easement right required for safety
  - No inherent deference to utility practices and judgment
- Without express language extent of right depends on what is **“Reasonably necessary”**
- If line was placed under Wis. Stat. s. 86.16 in road ROW **consent of owner of tree** required before cutting or trimming



# PENALTIES

- **Exceeding scope of easement = Trespass**
- **Wis. Stat. s. 26.09:** civil liability for timber theft.
  - Double or quadruple damages for timber value
  - Payment for reforestation and damage to land.
  - Attorney fees and legal costs
- **Wis. Stat s. 182.017(5)** “Any [utility] which shall in any manner destroy, trim or injure any shade or ornamental tress along any such lines or systems, or, in the course of tree trimming or removal, cause any damage to buildings, fences, crops, livestock or other property, except by the consent of the owner, or after the right to do so has been acquired, shall be liable to the person aggrieved in 3 times the actual damage sustained, besides costs.”
- **Punitive Damages** may be available.



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QUESTIONS?

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