

Fall 1996

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Recommended Citation

Douglas B. Harris, *Balancing the Equities: Is Missouri Adopting a Progressive Rule for Relocation of Easements*, 61 MO. L. REV. (1996)

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Balancing the Equities: Is Missouri Adopting a Progressive Rule for Relocation of Easements?

*Umphres v. J.R. Mayer Enterprises, Inc.*¹

I. INTRODUCTION

The Missouri law of easements might not be the place one would expect to find a progressive development of the law. Half a century ago, the rules regarding a servient tenement holder's relocation of an easement appeared well settled.² Neither the easement holder nor the owner of the servient land could unilaterally relocate the easement.³ Over the past four decades, however, some courts have begun to shake up Missouri's approach to relocation of easements, while still paying lip service to the old rules.⁴ *Umphres v. J.R. Mayer Enterprises, Inc.* reflects the impact of these changes on the rule regarding a servient tenement holder's right to relocate an easement. Although Missouri courts have neither openly nor uniformly recognized the new approach,⁵ it nonetheless guides some courts' decisions. With a few distinctions, Missouri courts have experimented with what amounts to adoption of the Restatement (Third) of the Law of Property's progressive stance.⁶ An examination of *Umphres* reveals this modern approach to a servient estate holder's right to relocate an easement, and may provide a glimpse of things to come in Missouri easement law.

II. FACTS AND HOLDING

Sam and Nora Umphres commenced this case as an action in equity on November 4, 1987.⁷ They sought a temporary restraining order to prevent

1. 889 S.W.2d 86 (Mo. Ct. App. 1994).

2. See *infra* notes 36-51 and accompanying text.

3. See *infra* notes 36-51 and accompanying text.

4. See *infra* notes 66-75 and accompanying text. See, e.g., Note, *The Right of Owners of Servient Estates to Relocate Easements*, 109 HARV. L. REV. 1693, 1697 (1996) [hereinafter *The Right of Owners*].

5. *Umphres*, in fact, recites the old rule as to relocation of easements, but follows the new rule by affirming the remedy granted by the trial court. *Umphres*, 889 S.W.2d at 90. See *infra* note 131-33 and accompanying text.

6. See *infra* text accompanying notes 122-34.

7. *Umphres*, 889 S.W.2d at 89.

J. Randall Mayer, president of J.R. Mayer Enterprises,⁸ from moving a roadway that they used to access their property,⁹ and they sought a reformation of the deed of their predecessors in title.¹⁰

This case really began on September 9, 1948, when the Umphres' predecessors in title, John A. and Alma J. Keller, purchased five acres in western St. Louis County from Albert and Ida Jacobs.¹¹ On August 16, 1950, the Umphres acquired this interest from the Kellers.¹² The Kellers' original deed from the Jacobs described an "easement," ten feet wide, running north and south along the eastern line of their land.¹³ The Jacobs, however, had no property interest in the land that the easement traversed.¹⁴ The land affected by the "easement" was actually owned by Arthur and Hilda Ray, the predecessors in title of J. R. Mayer Enterprises, Inc. (hereinafter Mayer).¹⁵ The Jacobs likewise had no property interest in this "easement" that could subsequently have been conveyed to either the Kellers or the Umphres, and there was no evidence that any roadway was ever located within the bounds of the "easement" described in the deed.¹⁶ Since approximately 1950, a gravel road existed just east of this "easement" described in the 1948 deed,¹⁷ and the Umphres used this road continuously to access their property until 1987 when they commenced this action.¹⁸ The court concluded that the 1948 deed must have referred to this road, but misdescribed its location.¹⁹

Mayer built homes on the property it acquired from the Rays as a part of a subdivision development.²⁰ Both the existing roadway and the "easement" in the 1948 deed ran across lots 52, 53, and 54 of the property.²¹ These lots belonged to Mr. and Mrs. Greco, Mr. and Mrs. Hairisine, and Mr. and Mrs.

8. *Id.* at 88.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

Cook, respectively, at the time of the court's opinion.²² Some time in mid-1987, J. Randall Mayer approached the Umphres to request their consent to move the roadway to the west, closer to the property line, but the Umphres refused.²³ As a result, Mayer's attorney sent the Umphres a letter dated November 2, 1987, informing them that the roadway would be moved despite their objection on November 6, 1987.²⁴

The Circuit Court of St. Louis County denied the Umphres' request for a temporary restraining order, and Mayer moved the roadway as planned on November 6.²⁵ The newly constructed road lay approximately within the boundaries of the 1948 "easement."²⁶ The owners of the lots thereafter erected fences, hedges, gardens, and swing sets over the location of the old roadway.²⁷

The trial court found that the Umphres had a valid easement by prescription over the old roadway and that the removal of that roadway constituted an abridgement of their legal rights.²⁸ The judge, however, found that the Umphres' legal injuries were compensable and awarded damages of \$7,500 in lieu of the requested injunction.²⁹

The Umphres appealed, alleging that the trial court erred in denying injunctive relief, given the willful encroachment by Mayer.³⁰ Mayer cross-appealed, and argued that the trial court erred in finding that the Umphres had an easement by prescription over the old roadway location.³¹

The Eastern District Court of Appeals, Division Two, held that the Umphres' use of the roadway was open, adverse, visible, continuous and uninterrupted under a claim of right for ten years and thus constituted a valid

22. *Id.*

23. *Id.*

24. *Id.* at 88-89.

25. *Id.* at 89.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* For the significance of this remedy, see *infra* notes 130-31 and accompanying text.

30. *Umphres*, 889 S.W.2d at 89.

31. *Id.* Mayer maintained that any use of the old roadway by the Umphres had been permissive from the start, and thus incapable of ripening into an easement by prescription.

easement by prescription.³² The Court also held that, given all equitable considerations, the denial of the permanent injunction and the award of damages were proper, allowing the easement to remain as relocated by Mayer.³³ The court affirmed the \$7,500 damage award to enable the Umphres to repair minor construction defects so that the new road would be of equal quality with the old road.³⁴

III. LEGAL BACKGROUND

A: Missouri's Historical Approach to Relocation of Easements

The law regarding relocation of easements in Missouri is highly specialized, with few cases directly addressing the relocation issue raised in *Umphres*. As such, the courts frequently must rely upon more general rules of easements to govern these cases. In the relocation of easements area, the courts look to the rules regarding interference with easements by servient land holders to guide their decisions.³⁵ In light of this, the rules regarding interference with easements, including alteration and obstruction, must be discussed along with the few cases that deal directly with relocation questions.

Since the nineteenth century, Missouri has followed the traditional rule limiting the rights of a servient tenement holder to interfere with an easement across the servient estate.³⁶ In Missouri, a servient estate holder generally

32. *Umphres*, 889 S.W.2d at 89-90. For a general discussion of easements by prescription, see *Whittom v. Alexander-Richardson Partnership*, 851 S.W.2d 504 (Mo. 1993), *appeal after remand*, 916 S.W.2d 333 (Mo. Ct. App. 1995); *Hermann v. Lynnbrook Land Co.*, 806 S.W.2d 128, 131 (Mo. Ct. App. 1991).

33. *Umphres*, 889 S.W.2d at 91.

34. *Id.* at 90. This rationale suggests that the court had something like the modern rule in mind. See *infra* notes 130-31.

35. Relocation is really one variety of interference with an easement. Thus, interference cases are of value to the courts in formulating the rules for relocation. See *Umphres v. J.R. Mayer Enterprises, Inc.*, 889 S.W.2d 86 (Mo. Ct. App. 1994). The *Umphres* case, for example, relies heavily on cases that do not deal directly with relocation questions. See, e.g., *Hubert v. Magidson*, 243 S.W.2d 337, 343 (Mo. 1951); *RFS, Inc. v. Cohen*, 772 S.W.2d 713, 718 (Mo. Ct. App. 1989); *Hanna v. Nowell*, 330 S.W.2d 595, 603 (Mo. Ct. App. 1959).

36. See, e.g., *Cook v. Ferbert*, 46 S.W. 947 (Mo. 1898); *Downing v. Dinwiddie*, 33 S.W.2d 470 (Mo. 1895). The traditional rule is that—absent statutory authorization or mutual consent—an easement, once established, may not be unilaterally relocated by either party. This holds true even though the easement is detrimental to or decreases the efficient use of the servient estate. 28A C.J.S. *Easements* § 157 (1996).

cannot alter the route of a right of way across his or her land without the consent of the easement holder.³⁷ The Missouri Supreme Court outlined this rule in 1964 in *Bladdick v. Ozark Ore Company*.³⁸ As the facts of *Bladdick* closely parallel those in *Umphres*, a short discussion is informative.

In *Bladdick*, in order to make use of the mineral resources lying below the surface of a roadway, the defendant excavated a portion of the land over which the plaintiffs held an easement.³⁹ The defendant stripped away the surface, rendering the existing roadway impassible.⁴⁰ Before destroying the old road, the defendant relocated the easement and constructed a new portion of road to reroute around the excavation.⁴¹ As in *Umphres*, the new roadway was not of equal quality with the one destroyed by the servient land holder.⁴² The defendant corporation maintained that it could relocate the easement as it saw fit so long as there was no interference with the plaintiffs' general right of ingress and egress.⁴³ The Missouri Supreme Court, however, did not agree. After commenting on the specific granting language of the easement in question,⁴⁴ the court set out a general statement of the law:

These rules should apply equally whether the easement is acquired by grant, implication, or prescription. JON W. BRUCE & JAMES W. ELY, JR., THE LAW OF EASEMENTS AND LICENSES IN LAND § 7.03[1][a] (1988). But see F.M. English, Annotation, *Relocation of Easements (other than those arising by necessity); rights as between private parties*, 80 A.L.R.2d 743 (1995) (maintaining that easements not acquired by prescription are more in the nature of contracts, and thus must remain subject to mutual consent). The policy arguments favoring the new rule apply equally whether the easement is one by grant, implication, or prescription. See *infra* text accompanying notes 135-62.

For a discussion of how other jurisdictions address the relocation problem, see English, Annotation, *supra*. It should be noted that often, as in Missouri, jurisdictions will follow the old or new rule in different factual situations. For a jurisdictional break down of the case law, see RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 4.8 (Tentative Draft No. 4, 1994) and English, Annotation, *supra*.

37. See, e.g., *Bladdick v. Ozark Ore Co.*, 381 S.W.2d 760, 766 (Mo. 1964). This is the traditional rule followed by most states. See *supra* note 36.

38. *Bladdick*, 381 S.W.2d at 766. While *Bladdick* sets out the rule as to relocation, it, like *Umphres*, is a case involving a damage award instead of injunctive relief to restore the easement in question. For an explanation of the impact of this distinction, see *infra* text accompanying note 131.

39. *Bladdick*, 381 S.W.2d at 762.

40. *Id.*

41. *Id.* at 763.

42. *Id.*

43. *Id.* at 766.

44. The court noted that nothing in the written grant of this easement reserved in the defendant any right to locate or relocate the road. Rather, the court stated that the

As a general rule, in the absence of statutes to the contrary, the location of an easement cannot be changed by either party without the other's consent, after it has been once established either by the express terms of the grant or by the acts of the parties, except under the authority of an express or implied grant or reservation to this effect.⁴⁵

The court commented that this rule applies even if the new route is equal in utility and quality to the original way.⁴⁶

In an earlier case, the Western District Court of Appeals employed similar reasoning when it stated that a servient land holder could not compel an easement holder to seek a new location for the easement by encroaching on the old location.⁴⁷ In *Kansas City Power & Light Company v. Riss*, the servient land owner wished to increase the size of a lake on his property. The power company claimed that the expanded lake impinged upon its easement by covering the area over which several of its poles ran.⁴⁸ The court, in rather stern language, stated that the easement holder had a vested interest in the location of its easement, and that the servient land holder could not make improvements to his land that would force the relocation of the easement.⁴⁹ To prevent this relocation, the court upheld the judgment that an injunction should issue to restrain the interference and restore the easement to its former location and status.⁵⁰ It is noteworthy that, as in *Umphres*, the servient land holder made the proposed improvements with knowledge of the easement holder's disagreement.⁵¹

grant called for a right of way over the "established roadway." *Id.* As to a prescriptive easement, the location is initially determined by the character of the prescriptive use. *Cf. Curran v. Bowen*, 753 S.W.2d 940, 943 (Mo. Ct. App. 1988) (no greater or different use may be made of a prescriptive easement than that under which it was gained).

45. *Bladdick*, 381 S.W.2d at 766 (quoting 28A C.J.S. *Easements* § 84 (1996) (current citation); 17A Am. Jur. *Easements*, §§ 103, 134 (1957)).

46. *Id.*

47. *K.C.P. & L. Co. v. Riss*, 319 S.W.2d 262, 264 (Mo. Ct. App. 1958).

48. *Id.* at 263.

49. *Id.* at 264.

50. *Id.* at 265.

51. *Id.* In *Umphres*, the fact that Mayer proceeded in the face of disagreement did not justify injunctive relief. In this case, however, such a willful act resulted in the issuance of an injunction. For a resolution of this apparent conflict, see *infra* notes 124-27 and accompanying text.

*B. The Traditional Remedy for
Interference With an Easement*⁵²

When a servient tenement holder interferes with an easement, as by relocation, Missouri courts have traditionally granted injunctive relief.⁵³ This rule governed, whether the servient tenement holder altered the location of the easement completely or merely obstructed the use of an existing easement.⁵⁴

For later reference,⁵⁵ it should be noted that courts following the traditional rule on relocation of easements make no mention of balancing the equities in determining whether an injunction should issue.⁵⁶ The balancing of the equities doctrine tends to show up only in cases adopting the modern approach to relocation.⁵⁷ When employing the traditional rule, Missouri

124-27 and accompanying text.

52. For a discussion of how the selection and evaluation of remedy in relocation cases is the key to understanding which rule is being applied by the court, see *infra* note 131 and accompanying text.

53. See, e.g., *Patterson v. Wilmont*, 245 S.W.2d 116 (Mo. 1952); *Robins v. Wright*, 53 S.W.2d 1046 (Mo. 1932); *Cook v. Ferbert*, 46 S.W. 947 (Mo. 1898); *Downing v. Dinwiddie*, 33 S.W. 470 (Mo. 1895); *Denning v. Manley*, 610 S.W.2d 51 (Mo. Ct. App. 1980); *M.H. Siegfried Real Estate v. Renfrow*, 592 S.W.2d 488 (Mo. Ct. App. 1979); *Moschale v. Mock*, 591 S.W.2d 415 (Mo. Ct. App. 1979); *Kelly v. Schmelz*, 439 S.W.2d 211 (Mo. Ct. App. 1969); *K.C.P. & L. Co. v. Riss*, 319 S.W.2d 262 (Mo. Ct. App. 1958); *Winslow v. Sauerwein*, 285 S.W.2d 21 (Mo. Ct. App. 1955).

54. See *Bladdick v. Ozark Ore Co.*, 381 S.W.2d 760 (Mo. 1964); *K.C.P. & L. Co. v. Riss*, 319 S.W.2d 262 (Mo. Ct. App. 1958).

55. See *infra* notes 67-75 and accompanying text.

56. See *Patterson v. Wilmont*, 245 S.W.2d 116 (Mo. 1952); *Robins v. Wright*, 53 S.W.2d 1046 (Mo. 1932); *Cook v. Ferbert*, 46 S.W. 947 (Mo. 1898); *Downing v. Dinwiddie*, 33 S.W. 470 (Mo. 1895); *Denning v. Manley*, 610 S.W.2d 51 (Mo. Ct. App. 1980); *M.H. Siegfried Real Estate v. Renfrow*, 592 S.W.2d 488 (Mo. Ct. App. 1979); *Moschale v. Mock*, 591 S.W.2d 415 (Mo. Ct. App. 1979); *Kelly v. Schmelz*, 439 S.W.2d 211 (Mo. Ct. App. 1969); *K.C.P. & L. v. Riss*, 319 S.W.2d 262 (Mo. Ct. App. 1958); *Winslow v. Sauerwein*, 285 S.W.2d 21 (Mo. Ct. App. 1955). None of these cases balance the benefit to the easement holder against the hardship on the servient land holder before stating that injunction would be the proper remedy. But see *infra* notes 66-75 and accompanying text for a group of Missouri cases that take the opposite view.

57. See *infra* note 66-75 and accompanying text. This could be a reflection of the fact that, in cases where an injunction does not issue, the relocation has been otherwise reasonable and in conformity with the modern doctrine. The reasonableness analysis of the modern approach could be roughly characterized as "balancing the equities." Perhaps the modern approach will be followed only in those cases where the relocation has been reasonable, and in those cases where the relocation is unreasonable, the balance of the equities language will not appear and the courts will

courts of equity jealously protected easements as early as 1895.⁵⁸ In that year the Missouri Supreme Court stated, "The right to use a passageway . . . is a species of property, the interference of which is very difficult, if not impossible, to adequately compensate with pecuniary damages."⁵⁹ In 1898 the court made an even stronger statement, saying that any interference with an easement that amounted to only a mere decrease in benefit or convenience could not be adequately remedied with damages and that an injunction should issue.⁶⁰ That rule remained largely unchanged throughout the last hundred years.⁶¹ Several cases following this view speak of injunctive relief in such strong terms that it almost seems to be a matter of right for the easement holder.⁶²

resort to the old rule. *See infra* text accompanying notes 163-72.

58. *See, e.g.*, *Downing v. Dinwiddie*, 33 S.W. 470 (Mo. 1895).

59. *Id.* at 472.

60. *Cook v. Ferbert*, 46 S.W. 947, 948 (Mo. 1898).

61. *See Kelly v. Schmelz*, 439 S.W.2d 211, 213 (Mo. Ct. App. 1969); *Winslow v. Sauerwein*, 285 S.W.2d 21 (Mo. Ct. App. 1955). The *Winslow* court set out the three part test for determining when an injunction should issue in easement cases:

The principle is also rather uniformly accepted that injunction is a proper remedy for an interference with a right of way whenever the injury complained of is irreparable, the interference is of a permanent and continuous character, or the remedy at law by an action for damages will not afford adequate relief.

Id. at 25. The court went on to recognize Missouri's long established rule that injunctions were proper remedies to restrain interference with an easement. *Id. See, e.g.*, *Moschale v. Mock*, 591 S.W.2d 415, 418 (Mo. Ct. App. 1979); *K.C.P. & L. Co. v. Riss*, 319 S.W.2d 262, 265 (Mo. Ct. App. 1958).

Many of these cases cited MO. REV. STAT. § 526.030 as authority for this proposition. This statute, first enacted in 1909, provides currently:

The remedy by writ of injunction or prohibition shall exist in all cases where a cloud would be put on the title of real estate being sold under an execution against a person, partnership, or corporation having no interest in such real estate subject to execution at the time of sale, or an irreparable injury to real or personal property is threatened, and to prevent the doing of any legal wrong whatever, whenever in the opinion of the court an adequate remedy cannot be afforded by an action for damages.

MO. REV. STAT. § 526.030 (1994).

But see *infra* notes 66-75 and accompanying text for a discussion of how this rule is sometimes abandoned in favor of the balance of the equities approach.

62. *See Downing v. Dinwiddie*, 33 S.W. 470, 472 (Mo. 1895) (noting that it is almost impossible to compensate such a violation with pecuniary damages); *Denning v. Manley* 610 S.W.2d 51, 57 (Mo. Ct. App. 1980) (finding that the trial court was obligated to issue an injunction requiring the removal of obstructions from a right of way); *M.H. Siegfried Real Estate v. Renfrow*, 592 S.W.2d 488, 493 (Mo. Ct. App.

In one case typical of this area the court stated that when an easement holder expressed a desire to continue use of an easement for ingress and egress, the servient land holder's interference with the roadway meant that an injunction was "not only proper but necessary if [easement holders] are to be afforded beneficial relief."⁶³ In another case in which permanent improvements had been constructed over the path of the easement, the court held that the trial court was *obligated* to order the removal of the obstacles and to enjoin any future violations.⁶⁴

*C. Missouri's Experimentation With Balancing
the Equities in Easement Interference Cases*

A handful of notable Missouri cases have strayed from the rigid traditional rule that any interference with an easement will be restrained no matter what the hardship on the servient land holder.⁶⁵ In these cases courts continue to speak of interference with an easement as a legal wrong, but after balancing the equities,⁶⁶ deny the traditional injunctive relief and instead relegate the easement holder to an action for damages.⁶⁷ Other cases that do not directly address the balance of the equities doctrine confirm that Missouri may be at least sympathetic to the idea that servient landholders should be able to maximize the efficient use of their land.⁶⁸ As previously noted, while

1969) (finding that obstructions of a private roadway by cables and posts were wrongful acts that ought to be enjoined); *Kelly v. Schmelz*, 439 S.W.2d 211, 214 (interference with an easement entitled the easement holder to injunctive relief); *K.C.P.&L. Co. v. Riss*, 319 S.W.2d 262, 264-65 (Mo. Ct. App. 1958) (explaining that a suit for damages could not fully protect the easement holder from the servient land holder's attempts to force relocation of the easement by encroachment and injunction should issue); *Winslow v. Sauerwein*, 285 S.W.2d 21, 25-26 (Mo. Ct. App. 1955) (finding an injunction not only proper but necessary to protect the easement holder from interference).

63. *Winslow v. Sauerwein*, 285 S.W.2d 21, 26 (Mo. Ct. App. 1955).

64. *Denning v. Manley*, 610 S.W.2d 51, 57 (Mo. Ct. App. 1980).

65. See *infra* note 66-75 and accompanying text.

66. For a general discussion of balancing the equities and hardships in injunction cases, see 1 DAN B. DOBBS, *LAW OF REMEDIES: DAMAGES—EQUITY—RESTITUTION* § 2.9(2) (2d ed. 1993).

67. See, e.g., *Hubert v. Magidson*, 243 S.W.2d 337, 343 (Mo. 1951), *Hanna v. Nowell*, 330 S.W.2d 595, 603 (Mo. Ct. App. 1959). As has been noted, the choice of remedy in these cases really determines the degree of protection to be afforded the easement holder, and hence, the rule that is actually being followed by the court in its analysis.

68. Cf. *Fenster v. Hyken*, 759 S.W.2d 869, 870 (Mo. Ct. App. 1988) (upholding an injunction that restrained interference, except that interference which was reasonably

many of these cases do not deal specifically with relocation questions,⁶⁹ they set forth the doctrines that have served as the foundation upon which the courts have fashioned the relocation rules. In fact, in its decision, the *Umphres* court cited *Hubert v. Magidson*, one of the notable balance of the equities/easement opinions.⁷⁰

Like *Umphres*, *Hubert* involved interference with an easement for a right of way across the servient land.⁷¹ The defendant corporation erected permanent improvements that the court recognized as encroachments upon the boundaries of the easement in question.⁷² The court, however, strayed from the stern language of earlier opinions and refused to order removal of the obstructions.⁷³ The court stated that it had to consider "the relative benefits to the plaintiff as against the injury to the defendants," and that equity will not grant injunctive relief for injuries that are "small or technical."⁷⁴ In refusing to protect the easement, the court departed from the strong position of *Cook*⁷⁵—that a mere decrease in convenience should warrant injunction—and took an important first step toward changing Missouri's approach to easement cases.

D. The Proposed Restatement (Third) of Property (Servitudes) Approach

On April 5, 1989, the American Law Institute issued Tentative Draft Number Four of the Restatement of the Law (Third) of Property (Servitudes)

necessary to maintain existing facilities); *Beiser v. Hensic*, 655 S.W.2d 660, 662 (Mo. Ct. App. 1983) (stating that the owner of a servient estate has the right of full dominion and use so long as he or she does not substantially interfere with the reasonable use of the easement).

See *infra* notes 145-47 and accompanying text (discussing the efficient use of servient land as one possible policy justification for the modern approach to relocation of easements by servient landholders).

69. For a discussion of how general easement rules affect the specific area of relocation of easements by servient land holders, see *supra* notes 35-36 and accompanying text.

70. *Umphres v. J.R. Mayer Enterprises, Inc.*, 889 S.W.2d 86, 90 (Mo. Ct. App. 1994).

71. *Hubert v. Magidson*, 243 S.W.2d 337, 339 (Mo. 1951).

72. *Id.* at 339-41.

73. *Id.* at 343. For cases which more strictly enforced the old rule, see *supra* notes 36-64.

74. *Hubert*, 243 S.W.2d at 343-44.

75. See *supra* note 60 and accompanying text.

dealing with the Interpretation of Servitudes.⁷⁶ Section 4.8 covers location and dimension of servitudes.⁷⁷ It provides:

Except where application of the rules stated in section 4.1⁷⁸ leads to a different result, the location and dimension of a servitude are determined as follows:

(1) The owner of the servient estate has the right to specify the location of an easement, profit, or other servitude that requires location, but the location must be reasonably suited for the intended purpose and be designated within a reasonable time.

(2) The dimensions of a servitude are those reasonably necessary for the enjoyment of the servitude for its intended purpose.

(3) *The holder of the servient estate is entitled to make reasonable changes in the location or dimensions of an easement when necessary to permit normal use or development of the servient estate if the changes*

(a) *do not significantly lessen the utility of the servitude, or*

(b) *increase the burdens on the holder of the servitude benefit, or*

(c) *frustrate the purpose for which the servitude was created, and*

(d) *the holder of the servient estate bears the expenses of making the changes.*⁷⁹

The comments to subsection three indicate that this rule should apply only to affirmative easements and not to negative easements or affirmative covenants.⁸⁰

Illustration Four of this section outlines a factual situation very similar to *Umphres*.⁸¹ In that example, a roadway giving access to Whiteacre runs across Blackacre within ten feet of a house located on Blackacre.⁸² The owner of Blackacre, O, wishes to relocate the road along the boundary of the property to reduce traffic near the house and to increase the usability of the remainder of the property.⁸³ Under the rule stated, O would be entitled to

76. RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 4.8 (Tentative Draft No. 4, 1994).

77. *Id.*

78. Section 4.1 sets forth general rules of construction in interpreting servitudes. RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) (Tentative Draft No. 4, 1994).

79. *Id.* (emphasis added).

80. *Id.* This makes perfect sense because negative easements and restrictive covenants generally have no tangible location on the servient land.

81. RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 4.8 cmt. f, illus. 4 (Tentative Draft No. 4, 1994).

82. *Id.*

83. *Id.*

relocate the easement to the new location so long as O bears the expense.⁸⁴ The similarity to the result in *Umphres* is striking.⁸⁵

IV. THE INSTANT DECISION

In *Umphres v. J.R. Mayer Enterprises, Inc.*, the Eastern District of the Missouri Court of Appeals first addressed Mayer's cross appeal on the validity of the Umphres' prescriptive easement across the lots in question.⁸⁶ The court then set out Missouri's requirements to obtain a valid easement by prescription.⁸⁷ To obtain such an easement, the claimant must show that the use of the property has been "open, adverse, visible, continuous and uninterrupted under a claim of right for ten years or more."⁸⁸ The court affirmed that the Umphres met these requirements by reason of their use between 1950 and 1987.⁸⁹ According to the court, it was of no consequence that the land used as a roadway did not fall exactly within the description of the 1948 deed.⁹⁰ A visible, actual use was enough to put the owner of the servient estate on notice.⁹¹ The court also noted that the Umphres' use of the strip was under a claim of right due to the 1948 deed that attempted to grant an easement in the same vicinity.⁹² As to the adversity requirement, the court noted that an intention to violate the rights of the owner of the servient estate is not required, but rather use without regard to any right of the owner to prohibit the use suffices.⁹³ Noting that the Umphres' used the roadway in question for several decades without any regard for respondent's right, the court found that the use was adverse.⁹⁴ As to Mayer's claim that the use had

84. *Id.*

85. It should be noted that the Restatement selection of remedies in the event of *unreasonable* relocation favors injunction and, thus, diverges from the panoply of remedies available in Missouri courts. See *infra* text accompanying notes 163-72.

86. *Umphres v. J.R. Mayer Enterprises, Inc.*, 889 S.W.2d 86, 89. (Judge Pudlowski wrote for Division Two of the Court, with Smith, P.J., and White, J., concurring).

87. *Id.*

88. *Id.* (quoting *Hermann v. Lynnbrook Land Co.*, 806 S.W.2d 128, 131 (Mo. Ct. App. 1991)).

89. *Id.*

90. *Id.* Since the Umphres claimed the strip by prescription, the description of the roadway did not matter. Had they claimed an easement by grant, this location would have been relevant.

91. *Umphres*, 889 S.W.2d at 89.

92. *Id.*

93. *Id.*

94. *Id.*

been permissive and could not ripen into a prescriptive easement,⁹⁵ the court found no evidence of permissive use due to the attempted grant in the 1948 deed.⁹⁶ First, the alleged permission came from the previous owner of the dominant estate through the 1948 deed.⁹⁷ As stated above, the dominant land owners had no property rights in the land in question, and, hence, could grant no valid permission for its use. Second, the court found no evidence that the purported easement granted in 1948 was permissive.⁹⁸ As such, the court held that the Umphres acquired a valid easement over the old roadway by prescription.⁹⁹

Moving on to the remedy granted by the trial court, the court outlined the law on relocation of easements.¹⁰⁰ The court first recognized that movement of the roadway constituted a legal wrong against the Umphres.¹⁰¹ The court then recited the historical rule that the boundaries of an easement defined by use cannot be changed absent the consent of all parties.¹⁰² Since a prescriptive easement is defined completely by use,¹⁰³ the court concluded that the boundaries of a prescriptive easement may not be altered without the consent of all parties.¹⁰⁴ The court noted the undisputed fact that the old roadway had been blocked with fences and hedges, altered in shape, and moved several feet to the west without the Umphres' consent.¹⁰⁵

95. *Id.* at 89-90. The respondent cited *Johnston v. Bates*, 778 S.W.2d 357, 362 (Mo. Ct. App. 1989) for this rule, and *Homan v. Hutchison*, 817 S.W.2d 944, 948 (Mo. Ct. App. 1991) for the rule that the presumption of adversity does not apply when there is evidence of prior permission.

96. *Umphres*, 889 S.W.2d at 90.

97. *Id.* The court noted the obvious but essential distinction that permission, for purposes of defeating adversity, can only be granted by an owner of servient land. *Id.*

98. *Id.* The court noted that the easement was equally likely to have been bargained for, prescriptive, or even a fabrication by the seller. *Id.* In addition, since the easement fell outside the land described in the 1948 deed, its language would not grant permission to use the roadway.

99. *Umphres*, 889 S.W.2d at 90.

100. *Id.*

101. *Id.*

102. *Id.* (quoting *Bladdick v. Ozark Ore Co.*, 381 S.W.2d 760, 765-66 (Mo. 1964)). For a discussion of the importance of the *Bladdick* decision, see *supra* notes 38-46 and accompanying text.

103. *Umphres*, 889 S.W.2d at 90 (quoting *Curran v. Bowan*, 753 S.W.2d 940, 943 (Mo. Ct. App. 1988)).

104. *Id.* But see *infra* note 131 and accompanying text (noting that the remedy allowed by the court makes this a hollow rule and, in effect, allows servient tenement holders to relocate the easement as they wish, provided that the relocation is reasonable and they are willing to bear the cost of the relocation).

105. *Umphres*, 889 S.W.2d at 90. By recognizing this as a legal wrong but

The court then addressed the Umphres' request for injunctive relief—the issue central to the evolution of Missouri's rule of relocation. The court upheld the trial court's determination that equitable relief was inappropriate to the Umphres' case.¹⁰⁶ Following the modern break with prior case law,¹⁰⁷ the court noted that equitable relief is "discretionary, extraordinary, and should not be applied when an adequate legal remedy exists,"¹⁰⁸ or "the injury is small."¹⁰⁹ The court explained that, in making these determinations, Missouri courts will balance the benefits to the party seeking the injunction against the burdens to the other parties,¹¹⁰ and also will consider the willfulness of the parties' wrongful actions.¹¹¹ The court noted that the injury to the Umphres appeared to be small,¹¹² and that the \$7,500 damage award would either compensate them or leave them with the resources to repair the new roadway.¹¹³

In regard to the costs to the respondents, the court found a substantial burden. The court noted that, should an injunction to restore the old roadway issue, the respondents now living on the lots in question would have to remove improvements and lose large portions of their yards.¹¹⁴ Even so, the court agreed with the Umphres that much of this hardship was self-imposed due to the fact that the roadway was moved and the improvements made while the instant case was pending.¹¹⁵ While agreeing that intentional acts

failing to award injunctive relief, the court is showing its abandonment of the old rule that interference with easements by a servient land holder will not be tolerated. Since the relative utility of the easement remained the same, the court adopted the modern rule. See *infra* note 163 and accompanying text.

106. *Id.*

107. See *supra* note 53 and accompanying text.

108. *Umphres*, 889 S.W.2d at 90 (quoting *Harris v. Union Elec. Co.*, 766 S.W.2d 80, 86 (Mo. 1989)).

109. *Id.* (quoting *RFS, Inc. v. Cohen*, 772 S.W.2d 713, 718 (Mo. Ct. App. 1989)).

110. *Id.* (quoting *Hubert v. Magidson*, 243 S.W.2d 337, 343 (Mo. 1951)). For a discussion of the importance of the *Hubert* decision in the development of Missouri's approach to relocation of easements, see *supra* note 67 and accompanying text.

111. *Umphres*, 889 S.W.2d at 90 (quoting *Hanna v. Nowell*, 330 S.W.2d 595, 603 (Mo. Ct. App. 1959)).

112. *Id.* The court noted that nothing about the old roadway appeared to be unique or valuable, and that the Umphres had not shown any diminution in the value of their land due to the change in location.

113. *Umphres*, 889 S.W.2d at 90. As an interesting aside, Missouri cases seem fixated upon the \$7,500 figure in easement cases. In addition to *Umphres*, *Hubert* and *Bladdick* also involved \$7,500 damage amounts. It is strange but true!

114. *Id.*

115. *Id.*

weighed against the defendants in the balance of the equities,¹¹⁶ the court refused to allow this one factor to control the outcome.¹¹⁷ The court noted that Mayer deliberately moved forward in the face of an injunction, but nonetheless declined to reverse the denial of injunctive relief based upon this defiance, believing Mayer's actions to be colorably legal under the 1948 deed.¹¹⁸ The court outlined several reasons for this refusal: the new road more exactly conformed to the 1948 deed,¹¹⁹ the new road was substantially similar to the old road,¹²⁰ and the new road remained totally upon the servient estate.¹²¹

V. COMMENT

A. Comparing Missouri's Rule to the Proposed Restatement (Third) of Property (Servitudes)

When one compares *Umphres* with the proposed Restatement (Third) of Property (Servitudes) rule on relocation of easements, the similarities are striking. Subsections (a), (b), and (c) of the Restatement require that the change in location not: i) significantly lessen the utility of the servitude, ii) increase the burden on the easement holder, or iii) frustrate the purpose of the servitude.¹²² In some form, each of these considerations falls under *Umphres*'s rubric of "balancing the equities."¹²³ *Umphres*, however, seems to take the test further by also considering the amount of reliance expended on the relocation by the servient land owner.¹²⁴ Apparently, this reliance need not even be reasonable in nature, at least where the change in location is not overly burdensome on the easement holder.¹²⁵ *Umphres* allowed

116. *Id.* at 91 (quoting *Hanna*, 330 S.W.2d at 603).

117. *Id.* The court thus refused to allow any one factor to tie the hands of Missouri courts in balancing the equities.

118. *Umphres*, 889 S.W.2d at 91.

119. *Id.*

120. *Id.*

121. *Id.*

122. RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 4.8 (Tentative Draft No. 4, 1994).

123. In the Missouri cases relying upon balancing the equities, the courts have spoken in terms of relative burdens which encompass these factors. See, e.g., *Hanna v. Nowell*, 330 S.W.2d 595, 603 (Mo. Ct. App. 1959).

124. *Umphres*, 889 S.W.2d at 90.

125. In *Umphres*, the improvements were made in the face of pending litigation, but the court did not characterize them as sufficiently unreasonable to justify an injunction. *Id.* at 90.

Mayer and the lot owners to get away with making improvements not only in the face of opposition by the easement holder, but also with knowledge of pending litigation and possible injunction.¹²⁶ At first glance, one must assume that reliance expended by the servient land holder will perhaps influence a Missouri court's decision. Closer scrutiny of the cases, however, indicates that the discussion of reliance by courts faced with situations similar to *Umphres* is likely a make-weight argument, and that what is really being evaluated is the reasonableness of the relocation.¹²⁷

As to the requirement that the servient land owner bear the costs of relocation,¹²⁸ *Umphres* similarly falls into step with the proposed Restatement. In *Umphres* the damages awarded were neither compensation for the fact that a legal wrong had been committed nor to compensate the Umphres for their lost property interest in the location of the old roadway, but rather to allow them to make repairs to maintain and correct the new roadway to make it of comparable quality with the old one.¹²⁹ Under the proposed Restatement, such an action for damages would be the remedy for a servient land owner that failed to bear the costs of a reasonable unilateral relocation.¹³⁰

126. Even if they did not have actual knowledge, the current owners of the lots in question should be charged with constructive knowledge of the dispute since the Umphres filed suit immediately after the dispute, but before Mayer had sold the land to them. The dispute would then have been a matter of public record.

127. In cases where an injunction issued under the traditional rule, the servient land owner often expended significant reliance. See *supra* notes 53-54. Reliance, then, must not be a pivotal issue. Viewed in light of the Restatement, the reasonableness of the relocation is the real issue, and the remedy awarded will reveal a court's determination of this issue. A reasonable relocation will not be enjoined, but an unreasonable one will. See *infra* note 129 and accompanying text.

If the deliberate acts of Mayer and the lot owners during the pendency of this action were not unreasonable reliance, it is hard to imagine what would qualify as unreasonable. Basing the holding of *Umphres* upon a reliance theory makes little sense.

When compared with the language of *Bladdick*, which squarely refused to consider either the utility or the quality of the new location, this reasoning shows a marked departure from the old rule. See *supra* note 46 and accompanying text.

128. RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 4.8 (Tentative Draft No. 4, 1994).

129. *Umphres*, 889 S.W.2d at 90.

130. This remedy is implied by Illustration Four, allowing a reasonable relocation so long as the servient land holder "bears all the expense" of the relocation. RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) (Tentative Draft No. 4, 1994). Presumably, if the servient land holder is responsible for bearing all expenses of a reasonable relocation, the easement holder would be entitled to bring an action for damages for any of the costs of the relocation that the servient land holder failed to

The selection of a remedy, then, reveals which approach the deciding court is actually following. By refusing to award injunctive relief, *Umphres* and comparable cases allow, in effect, servient land owners to relocate an easement to any reasonable new location, provided that they pay for this relocation. Missouri is caught up in a semantic limbo between the old approach and the new—still labeling the act of relocation a "legal wrong"¹³¹ but then failing to correct that wrong. If changing the location truly is a legal wrong, then the only solution to restore the status quo is to order a return to the old location or to award damages for the injury to the easement holder's *property rights*,¹³² not merely damages to provide a *new easement* of equal quality to the old one. By balancing the equities, the courts are, without saying so, determining whether the servient land holder acted reasonably, or, at the very least, whether requiring a return to the status quo would be unreasonable.¹³³

By this analysis, Missouri apparently is experimenting with a minority approach that only a few other states have adopted. Kentucky, Maryland, New Jersey, New Mexico, Colorado, Minnesota, Illinois, Virginia, and Florida, for example, have all either allowed relocation when equitable considerations required or refused to order a return to the original location when to do so would be inequitable.¹³⁴ In the coming years, should Missouri choose to stick with its new approach, the evolution of the relocation doctrine in these states may be persuasive in refining Missouri's rule.

bear.

131. *Umphres*, 889 S.W.2d at 90.

132. For a discussion of the multifaceted nature of the property rights involved in easement cases, see *The Right of Owners*, *supra* note 4, at 1705-08.

These types of property rights include both economic and intangible values (like aesthetics or emotional attachment) to the parties involved. While some argue that the new rule ignores the intangible side of property rights, these concerns can quite easily be taken into account by courts in subparts (a) and (c) of the Restatement test. See *supra* text accompanying note 79.

133. The difference between these two statements is subtle, but important. See *infra* notes 163-72. *Umphres* is a case of the second variety, where the actions of the servient land holder were not reasonable, but a return to the status quo would be even more unreasonable.

134. JON W. BRUCE & JAMES W. ELY, JR., *THE LAW OF EASEMENTS AND LICENSES IN LAND* § 7.03[1][d] (1988 and Supp. 1991).

Louisiana also follows the same rule, but under statute. LA. CIV. CODE ANN. art. 748 (West 1980).

*B. Is Change a Good Thing?: Weighing the Advantages
and Disadvantages of the Traditional and Modern
Approaches to Relocation of Easements*

There are advantages and disadvantages to both the traditional rule and the modern approach of the proposed Restatement.¹³⁵ Before finally choosing between the two forms, Missouri courts should examine these considerations.

The traditional rule's strengths lie in uniformity and fairness. Courts universally recognized that an easement holder has no unilateral right to relocate the servitude. Out of symmetry and fairness, courts have felt obligated to find that the servient land holder not have this right either.¹³⁶ In addition, the traditional rule seems to comport with traditional notions of property rights. Historically, property rights begin with an assumption of absoluteness that may be tempered as needed to protect public policy concerns.¹³⁷ Under such a regime, an economic analysis alone should not allow interference based upon efficiency or other justification.¹³⁸

Commentators have criticized the traditional rule, however, pointing out that the reasons for denying the easement holder a right to relocate should not

135. For a commentary taking the opposite view of this Note on the wisdom of the Restatement view, see *The Right of Owners*, *supra* note 4.

There is some debate regarding whether the same rules should apply to easements by grant where the location has been agreed upon by the parties in the nature of a contract. See *supra* note 36 and accompanying text. Given the nature of the policy arguments in support of the new rule, however, the origins of the easement should make little difference. See *infra* text accompanying notes 136-62.

136. RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 4.8 cmt. f (Tentative Draft No. 4, 1994).

137. See, e.g., *State v. Shack*, 277 A.2d 369, 373 (N.J. 1971) ("A man's right in his real property is of course not absolute. . . . [W]hile society will protect the owner in his permissible interests in land, yet ' . . . such an owner must expect to find the absoluteness of his property rights curtailed by the organs of society, for the promotion of the best interests of others for whom these organs also operate as protective agencies. . . .'"); Felix S. Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357, 362 (1954) ("Blackstone refers to property as the 'sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.'").

138. This argument, however, breaks down when one considers the law by which the Umphres attained their property rights. Since they in effect took a property right from the owner of the servient estate by prescription—a doctrine that goes directly against the idea of absolute property rights—the absolute property rights rule seems unpersuasive in this context.

operate against a servient land holder's right to relocate an easement.¹³⁹ Essentially three main points support the rule that *easement holders* should not be allowed to relocate. First, allowing an easement holder to relocate would decrease the value of the servient estate by making it subject to the whim of a third party.¹⁴⁰ Second, allowing an easement holder to relocate would discourage improvement of the servient estate because the servient land holder would be unable to rely upon the location of the easement.¹⁴¹ Finally, such a rule would invite conflict and litigation between the parties.¹⁴² Of these, only the last applies with the same force to a *servient land owner's* ability to move an easement.¹⁴³ Granting the servient owner a limited right of relocation, in fact, would actually increase the value and development of servient land by making the easement a more flexible burden.¹⁴⁴

To its advantage, the modern rule offers the benefits of efficiency and fairness. The flexibility of the modern rule increases the value and development potential of the servient estate.¹⁴⁵ The requirement under the

139. RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 4.8 cmt. f (Tentative Draft No. 4, 1994).

140. *Id.*

141. *Id.*

142. *Id.* Cf. *The Right of Owners*, *supra* note 4, at 1693 n.12 (Under the old rule, each party clearly understands his rights with respect to the other party, making the rule easy to administer).

143. This, however, may not be the case in practice. With this new rule, the servient land holder now may bargain from a more equal position. Under the traditional rule, the easement holder had no economic incentive to be reasonable. Consent could be flatly denied, or an unreasonable price could be put on cooperation since interference of any kind would be enjoined. Under the new rule, a servient land holder can relocate without the consent of the easement holder, so the easement holder has an incentive to be reasonable in order to retain at the very least some input in the relocation, if not some remuneration. At the same time, the servient land holder must likewise be reasonable in relocation, or face the possibility of the court reverting to the traditional rule. Under this regime, it is entirely likely that the landowners will be more willing to work out these problems outside the courtroom—the easement holder due to the power of the servient estate owner to unilaterally relocate and the servient estate holder due to the uncertainty of the reasonableness standard. See *infra* note 172 and accompanying text.

Some opponents also argue that community norms may be at work, overriding economic and legal concerns. The difficulty with this argument, however, is its assumption that these forces work in all, or even a majority, of easement relocation cases. In most cases, these forces are either weak or absent. See, e.g., *The Right of Owners*, *supra* note 4, at 1703-05.

144. RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 4.8 cmt. f (Tentative Draft No. 4, 1994).

145. *Id.*

modern rule that utility of the easement not be diminished ensures that the easement holder would not be adversely affected by a relocation.¹⁴⁶ From a fairness standpoint, given that advances in technology or increases in use may subject the servient estate to ever increasing burdens, it seems only fair to allow the servient land holder to relocate the easement to a new and equally useful location to avoid the unforeseen strains of such evolutions.¹⁴⁷

Opponents of the new approach, however, point to faults in the rule. Arizona rejected the new rule, finding that a variable location of an easement would tend only to incite litigation.¹⁴⁸ The court believed that although the value of the servient estate might be increased, the value of the dominant land would decrease correspondingly because of the uncertainty of location.¹⁴⁹ Citing similar reasons, the Supreme Judicial Court of Maine added that the rule would discourage reliance on the easement by the easement holder and decrease improvement of the dominant estate.¹⁵⁰ These arguments, however, fail to recognize the limitations that the modern approach places upon relocation. For a relocation to be proper, it must not adversely affect the utility of the easement, increase the burden on the easement holder, or otherwise frustrate the purpose of the easement.¹⁵¹ So long as the relocation meets these requirements, there should be no decrease in the value of the easement or the dominant estate. Because the new approach assures the easement holder of continued utility, the concerns regarding lack of development are unfounded.

Opponents argue, however, that the rule would confer a windfall upon servient land owners since the value of their land would increase due to the flexibility of the new rule despite the fact that they purchased subject to a fixed easement location.¹⁵² Similar windfalls, however, occur in other areas

146. *Id.*

147. *Id.* This evolution could be either in form of use (horse traffic to cars, for example) or in volume of traffic (should the dominant estate be subdivided or developed, for example). See *Lacy v. Schmitz*, 639 S.W.2d 96, 100 (Mo. 1982); 28A C.J.S. *Easements* § 176 (1996); Theodore H. Hellmuth, 18 MISSOURI PRACTICE § 313 (1985); Y.F. Chiang, Annotation, *Extent of, and Permissible Variations in, Use of Prescriptive Easements of Way*, 5 A.L.R.3d 439 (1995); Annotation, *Scope of Prescriptive Easement for Access (Easement of Way)*, 79 A.L.R.4th 604 (1995).

148. *Stanis v. Johnson*, 224 P.2d 201, 203 (Ariz. 1950), *modified*, 231 P.2d 956 (Ariz. 1951).

149. *Id.*

150. *Davis v. Bruk*, 411 A.2d 660, 665 (Me. 1980).

151. RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 4.8(3)(a-c) (Tentative Draft No. 4, 1994). In fact, it seems that when a servient land holder oversteps the limitations of the new rule in selection of a new location, the harsh protections of the old rule remain in force. See *infra* notes 166-71 and accompanying text.

152. RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 4.8(3) cmt. f. See

of property law.¹⁵³ The presence of a windfall for a limited class of current easement holders should not discourage a rule that otherwise increases overall utility. Such an argument would prevent the progression of any rule of law upon which parties had previously relied.

Finally, opponents argue that the old rule forces cooperation between landowners.¹⁵⁴ On closer examination, however, the new rule fosters *more* cooperation between landowners. The problem of the recalcitrant easement holder is dealt with by putting the power of unilateral relocation in the hands of a previously powerless servient landholder. Thus, easement holders should be willing to negotiate and retain some input into the relocation. Servient estate owners, on the other hand, will be reluctant to wield their new found power only to be faced with the uncertainty of what a court might determine to be reasonable in their situation. Thus, a servient land owner would rather procure permission before relocation and avoid the "reasonableness roulette" that they would later face in court.¹⁵⁵

Courts have yet to address several other arguments that favor the adoption of the Restatement approach. Under the old rule, certainty came at the price of heavy burdens on the servient land owner. The traditional rule treats the location of an easement as a property right, or entitlement.¹⁵⁶ In a traditional relocation situation, the servient land holder's only option is to approach the easement holder to purchase the "entitlement" (or right to relocate). The easement holder is then in a position either to name an

also The Right of Owners, supra note 4, at 1695 (discussing how a windfall would be conferred upon current servient estate holders by the adoption of a new rule).

153. One example occurs when changes in condition cause the extinguishment of covenants. See 21 C.J.S. *Covenants* § 33 (1990); Theodore H. Hellmuth, 18 MISSOURI PRACTICE § 349 (1985).

154. *The Right of Owners, supra* note 4, at 1708-09.

155. Opponents of the new rule cite this uncertainty as a reason for avoiding the new rule in favor of the old bright line standard. See *The Right of Owners, supra* note 4, at 1694. The opponents fail to grasp, however, that this uncertainty is an essential ingredient in the new scheme. Contrary to their arguments, this uncertainty will increase negotiation and should discourage actions by servient landholders that could otherwise lead to litigation.

156. For an explanation of the entitlement concept, see Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

Under the entitlement (or property right) concept, a person wishing to remove that entitlement must purchase it from its holder in a voluntary transaction. In a case involving only two participants, a buyer and a seller, market value principles break down and a bilateral monopoly takes hold. In such a situation, the seller has no other market, but neither does the buyer. Thus, the seller may name a prohibitively high price, and the buyer must accept that price or abstain from any action at all.

unreasonably high price or to arbitrarily refuse, regardless of the reasonableness of the request or the increase in total efficiency that the transaction would create. Thus, a bilateral monopoly is created.¹⁵⁷ Should an easement become burdensome, the servient land holder has no remedy against a recalcitrant easement holder since the traditional rule strictly forbids unilateral relocation.

The Restatement rule, on the other hand, grants the servient land holder a right to reasonable relocations. The benefits of this approach are twofold. First, the bilateral monopoly of the traditional approach is broken. The right of the servient land holder to relocate unilaterally reintroduces market forces into negotiations. Easement holders have an incentive to be reasonable in consenting to relocations since servient land holders may simply break off negotiations and relocate unilaterally.¹⁵⁸ Second, the rule, while allowing relocation, nevertheless encourages servient land holders to seek permission first.¹⁵⁹ Reasonableness is a judicial determination made after the fact. Should a court find the servient land holder's relocation unreasonable, the servient land holder faces the easement holder's remedies.¹⁶⁰ As such, the safest course of action for the servient land holder is to negotiate in advance to prevent a judicial determination of reasonableness that will bring the remedial measures to bear.¹⁶¹ Thus, the modern rule will encourage voluntary negotiations and fairness between the parties. Although this rule imposes upon the easement holder the burden and risk of bringing suit against an unreasonable relocation, it far surpasses in utility and fairness the traditional rule that left the servient land owner remediless against an unreasonable easement holder. The Restatement rule takes the huge burden placed on the servient land by the traditional rule and redistributes some of the weight to the easement holder, thus equalizing the relative position of both parties.

On balance, the new rule, if applied evenly and cautiously, generates the maximum utility for all parties. If Missouri continues on this course, the new rule should be applied in cases where the servient land owner has acted reasonably and has attempted to leave the easement holder in approximately the same position in which he or she was found. The idea is consistent with

157. See *The Right of Owners*, *supra* note 4, at 1701. For a discussion of other forces that may be at work, see *supra* note 143.

158. See *supra* note 155 and accompanying text.

159. See *infra* note 155 and accompanying text.

160. See *infra* text accompanying notes 163-72. These remedies include damages, injunction, or a combination of both.

161. For a discussion of the possible remedies in a case of unreasonable relocation, see *infra* text accompanying notes 163-72.

other property concepts that encourage maximum efficiency and improvement while keeping a watchful eye on property rights.¹⁶²

*C. Synthesizing the Old and New: What to Do
When a Relocation is Unreasonable*

Under the new approach, there are three possible outcomes in any relocation case. First, a court could find a relocation to be completely reasonable under the Restatement factors. Second, a court could find that the relocation was more reasonable than unreasonable and award damages to bring the relocation fully into compliance.¹⁶³ In situations like *Umphres* where the reasonableness factors tip the balance in favor of the relocation, the only remedy provided under the new rule is damages to bring the new easement fully into compliance with the factors that constitute reasonableness.¹⁶⁴ Finally, a relocation could be generally unreasonable.¹⁶⁵

The Restatement is clear on the rule regarding reasonable relocations, and *Umphres* suggests the logical result in cases of a primarily reasonable relocation. The question remains as to what a court will do when faced with a case of unreasonable relocation based upon the factors set out in section 4.8.¹⁶⁶ Although not directly addressing the point, the Restatement may be hinting at an answer in Illustration Five.¹⁶⁷ In that illustration, O, the servient land owner, relocates an easement appurtenant for a roadway.¹⁶⁸ The new location passes through swampy ground that is subject to flooding.¹⁶⁹ Because of the unreasonableness of this relocation, the Restatement concludes that O is not entitled to relocate without the consent of

162. Adverse possession law and prescriptive easement law can be viewed as examples of this concept. Both of these doctrines recognize that property rights must yield at some point to efficiency. In adverse possession, the inattentive owner loses land to another that has put it to use. With covenants, changes in conditions that destroy the initial utility of the covenant can wipe it out.

163. *Umphres* falls into this category. The Restatement does not specifically provide for the remedy awarded here, but such an award would be the logical implication of the rule.

164. *Umphres v. J.R. Mayer Enterprises, Inc.*, 889 S.W.2d 86, 90 (Mo. Ct. App. 1994). The court implied, in ruling on sufficiency of the damage award, that the money represented the amount needed to put the new easement in a state of repair comparable to the old location.

165. *Umphres* does not address this problem.

166. RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 4.8 (Tentative Draft No. 4, 1994).

167. *Id.* cmt. f, illus. 5.

168. *Id.*

169. *Id.*

the owner of the dominant estate.¹⁷⁰ This result echoes the traditional rule against unilateral relocation. This suggests that the drafters of the Restatement believe that the new rule only applies when a relocation is reasonable. This illustration implies that the old rule remains in effect in cases where the relocation is deemed unreasonable by a court. The courts must then determine what remedy should be awarded.¹⁷¹

Logically, there are three avenues a court could choose in remedying an unreasonable relocation. First, a court could issue an injunction requiring the servient land holder to restore the easement to its former location and pay damages caused to the easement holder due to the trespass. Second, the court could strike a middle ground and issue an injunction requiring relocation to some part of the servient estate that the court finds to be reasonable under the Restatement factors. Third, the court could award damages equal to the loss in value to the dominant estate due to the relocation, leaving the easement in the unreasonable location chosen by the servient land holder. Based upon the Restatement, it is unclear which method courts might favor.

Missouri cases clearly indicate that its courts favor the first approach. The traditional line of cases routinely grant injunctive relief to remedy interference with an easement.¹⁷² While not directly addressing the issue, Missouri's analysis seems to parallel the Restatement's. In Missouri, then, a servient land owner must face the risk that his or her unilateral relocation will be deemed unreasonable by a court and, thus, face an injunction under traditional relocation principles. While the courts have not announced that the traditional rule will be followed in cases of unreasonable relocation, in effect, this has been the result. A more coherent approach, however, might be to follow the second alternative. Since the new rule focuses on increasing utility and fairness, it might be best for the court to settle on an appropriate location for the easement, thus insuring compliance with the Restatement reasonableness factors and preventing future conflict.

D. Possible Directions for the Future

In addressing the relocation issue in the future, Missouri courts should consider abandoning the "balance of the equities" language and should address the issues in more direct terms. Missouri's reasonableness analysis has evolved out of this equitable doctrine, but the equitable terminology has

170. *Id.*

171. But note that even if a relocation is unreasonable, a dominant estate holder may lose his rights to complain by reverse prescription. *Cf. McCarty v. Walton*, 27 Cal. Rptr. 792, 796 (Cal. Ct. App. 1963) (noting that when a dominant estate holder wrongfully relocates an easement it may ripen into a new easement by prescription).

172. *See supra* notes 36-51 and accompanying text.

outstripped its usefulness in easement law, and continued use can only lead to confusion in the future in both equity and property law.

Umphres illustrates the pitfalls of this confusion. While Mayer acted in defiance of the *Umphres*' rights and in the face of court action, the court apparently ignored this, stating only that equitable considerations should be flexible.¹⁷³ One can hardly imagine what type of action would justify an injunction if this type of intentional conduct does not. Through the lens of the Restatement, however, it is clear that the *Umphres* court was more concerned with the reasonableness of the relocation than it was with actually "balancing the equities." While balancing of the equities implies a host of considerations, from the good faith of the parties to the reasonableness of the new location, in reality the courts are looking almost entirely at the reasonableness of the new location. Should the courts continue to speak of relocation in these terms, the evolution of a valuable new rule could be unintentionally derailed by other equitable doctrines. The other factors traditionally used in balancing the equities could become more prominent and perhaps sidetrack a court faced with a relocation question. In addition, the language of the easement cases will surely begin to be cited in injunction cases, outside the context for which the new rule was created. In the end, Missouri courts run the risk of practitioners confusing two distinct areas of law, possibly misleading and confusing courts as well.

VI. CONCLUSION

Missouri, over the past fifty years, has slowly shifted toward the modern rule on relocation of easements. While paying lip service to the strict protection of easements, the courts, through equitable doctrines, have fashioned remedial rules that force a different practical result, focusing on the reasonableness of the relocation. With the impending release of the Restatement (Third) of the Law of Property, Missouri stands poised to distinguish itself by recognizing and more fully examining its stance on the servient land owner's right to relocate an easement. While the traditional rule has its own advantages, the modern approach offers a more efficient and just alternative for all parties. If *Umphres* gives any indication of things to come, Missouri should be one of the first among a handful of progressive states to embrace the new rule. Only time will tell if Missouri courts will have the conviction to recognize and embrace the progressive rule that they have created.

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173. *Umphres*, 889 S.W.2d at 91.

