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Exceeding the Scope of an Easement: "Expanded Use" Within a Single Cable

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NOTE

Exceeding the Scope of an Easement: "Expanded Use" Within a Single Cable

Barfield v. Sho-Me Power Elec. Coop., 852 F.3d 795 (8th Cir. 2017)

Matthew Neuman[*]

I. INTRODUCTION

Most people likely do not give a second thought to the manner in which utilities reach their homes. Water, gas, electricity, cable, and internet service must all make their way from source to faucet, stove, light fixture, television, and entertainment device. A complex infrastructure system exists both below ground in pipes and conduits and above ground on utility poles. In cities, utility poles within generic utility easements are often adorned with a multitude of wires – of varying dimensions, levels, types, and ownership – constantly delivering electricity and information.

At the core of this delivery system is the inconvenient fact that, in the journey from point *A* to point *B*, the pipe or wire must cross a vast parcel network of differentiated ownership often composed of owners who either do not want the intrusion or want to be fairly compensated for sharing their property with the intrusion. And in the famous "bundle of rights" that is property, "the right to exclude" gives the owner the prerogative to protest any invasion.[1]

It is in this context that easements, the necessary envelope in which those critical utilities may pass across private ownership, come into existence primarily through negotiations or condemnation proceedings. In the end, the holder of the easement compensates the servient estate and a strip of land becomes burdened by the easement. As technology develops and companies evolve, a critical question emerges: to what extent may that easement holder use its easement?

As developed in detail below, the facts of this case, despite intricacies when examined in detail, present a scenario that is rather straightforward. A utility, operating an expansive system of infrastructure, provides electrical service to rural areas. A change in operation requirements prompts the utility to add to its easement a new piece of infrastructure – a fiber-optic cable – for

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1. Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979).

internal communication purposes. This event complies wholly with the terms of the easement. That piece of equipment may also be used in an additional commercial manner that does not impose any further burden on the servient estate than if the equipment is used only for internal communication purposes. The utility seizes the opportunity. Not only does the utility defray costs for the installation and upkeep of the necessary fiber-optic cable, but also the resulting commercial telecommunications service benefits an expanded audience of users. From the perspective of the landowner, despite a philosophical query concerning the forfeiture of a theoretical "stick" from the "bundle of rights," there is no physical difference within the easement.

Part II of this Note explores the previous hypothetical in the facts of *Barfield v. Sho-Me Power Electric Cooperative*,[2] a class action lawsuit involving the scope of easements under Missouri law. Part III provides a brief overview of the legal background of the case and the concept of "expanded use" of easements. Part IV analyzes the court's reasoning in the case. Part V illustrates how the outcome of the case is perhaps a stricter interpretation of "expanded use" under Missouri law than previous cases and proposes that considering "expanded use" in such a manner may be contrary to public policy.

II. FACTS AND HOLDING

Sho-Me Power Electric Cooperative ("Sho-Me") traces its roots back to its formation in 1941 as an agriculture cooperative.[3] In 1947, Sho-Me incorporated as a public utility and provided wholesale and retail electric service; in 1992, the corporation converted into a rural electric cooperative ("REC").[4] The purpose of a REC is to supply, promote, and facilitate expansion of electric energy in rural areas.[5]

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2. 852 F.3d 795 (8th Cir. 2017).

3. SHO-ME POWER ELEC. COOP., 2016 ANNUAL REPORT 1 (2016), http://shomepower.com/media/1071/2016annualreport.pdf.

4. *Id.*

5. MO. REV. STAT. § 394.030 (2016). A REC has power to

> generate, manufacture, purchase, acquire, accumulate and transmit electric energy, and to distribute, sell, supply, and dispose of electric energy in rural areas to its members, to governmental agencies and political subdivisions, and to other persons not in excess of ten percent of the number of its members . . . . [It has the power to] construct, purchase, take, receive, lease as lessee, or otherwise acquire, and to own, hold, use, equip, maintain, and operate, and to sell, assign, transfer, convey, exchange, lease as lessor, mortgage, pledge, or otherwise dispose of or encumber, electric transmission and distribution lines or systems . . . and any and all kinds and classes of real or personal property whatsoever, which shall be deemed necessary, convenient or appropriate to accomplish the purpose for which the cooperative is organized[, and] . . . to exercise the power of eminent domain in the manner provided by the laws of this state for the exercise of that power by corporations constricting or operating electric transmission and distribution lines or systems.

Prior to 1992, Sho-Me obtained easements within thousands of parcels of land in the southern portion of Missouri.[6] The language of the easements gave Sho-Me the privilege to construct and operate electric transmission lines across these tracts.[7] The grants of these easements varied, but the district court determined the easements of interest in this dispute to be those that were either easements for an electric transmission line only, grants for an electric transmission line with unspecified appurtenances, or appurtenances including specific references to communications equipment.[8]

Sho-Me initially communicated with distant power substations along its network of electric transmission lines using microwave radio frequencies, but the Federal Communications Commission ("FCC") directed in 1995 that utilities could no longer continue this practice.[9] As a result, Sho-Me installed fiber-optic cables[10] adjacent to its electrical cables for internal communications.[11] Sho-Me also established a subsidiary, Sho-Me Technologies, LLC,[12] to sell commercial telecommunications to the public utilizing the excess capacity on its fiber-optic cable.[13]

MO. REV. STAT. § 394.080.1(4), (7), (11) (2016) (amended 2018).

6. *Barfield*, 852 F.3d at 798.

7. *Id.*

8. *Id.* The district court grouped the easements into three categories; Category 1A, Category 2A, and Category 3A, were at issue upon appeal. Category 1A consisted of "[e]asements for electric transmission line only or for electric transmission line with unspecified appurtenances." *Id.* Category 1B included "[e]asements for electric transmission lines and appurtenances which include specific references to communications equipment," and Category 1C contained "[c]ourt orders condemning easements limited to electric transmission lines and generic appurtenances or specifying related communications equipment." *Id.* Category 1A had 1972 easements, Category 1B had 653 easements, and Category 1C had 22 easements. Barfield v. Sho-Me Power Elec. Coop., 10 F. Supp. 3d 997, 1010 (W.D. Mo. 2014). Summary judgment was granted in favor of Sho-Me on other categories of easements referencing external telephone/communication purposes. *Id.* at 1017–19, 1028.

9. *Barfield*, 852 F.3d at 798. The frequencies that utilities used previously were sold to cellular telephone providers. *Barfield*, 10 F. Supp. 3d at 1004.

10. A fiber-optic cable consists of glass fibers; electric signals are converted to light and transmitted through these fibers at speeds exceeding those provided by DSL or cable modem. *Types of Broadband Connections*, FCC, https://www.fcc.gov/general/types-broadband-connections (last visited Aug. 22, 2018).

11. *Barfield*, 852 F.3d at 798.

12. Future references to "Sho-Me" include Sho-Me Power Electric Cooperative and its subsidiary, Sho-Me Technologies, L.L.C. *See generally* SHO-ME POWER ELEC. COOP., *supra* note 3, at 1 ("Sho-Me Technologies, L.L.C. . . . is a wholly owned subsidiary of Sho-Me Power Electric Cooperative.").

13. *Barfield*, 852 F.3d at 798; *see* SHO-ME POWER ELEC. COOP., *supra* note 3, at 1 ("What began as an upgrade to the extensive internal communications network has now grown to encompass over 8,000 miles of fiber optic connectivity."). Per the limited powers enumerated in the REC statute, this REC was required to form the subsidiary to conduct the telecommunications business. MO. REV. STAT. § 394.080 (amended 2018).

The landholders subject to the Sho-Me easements filed a class action lawsuit against Sho-Me, alleging that the easements' language did not allow the use of the fiber-optic cable for commercial telecommunication.[14] Of the categories of easements recognized as lacking a reference to commercial telecommunications, the district court entered summary judgment in favor of the landowners and held Sho-Me liable for trespass and unjust enrichment.[15] A jury trial, pursued solely on the unjust enrichment claim, resulted in an award for the landowners in excess of $79,000,000.[16] Sho-Me appealed.[17] The U.S. Court of Appeals for the Eighth Circuit ultimately held that Sho-Me's use of the easements for public-serving telecommunication purposes exceeded the scope of its easements, so the trespass liability was affirmed; however, unjust enrichment was not an available remedy for a utility exceeding the scope of its easement.[18]

III. LEGAL BACKGROUND

Section A of this Part provides a summary of the legal framework regarding easements in general. Section B then transitions into a discussion of how Missouri courts have treated expanded use – the use beyond the scope of an easement.[19] Expanded use is analyzed in the development of case law, in a 2006 statutory provision, and in the sparse application of that statute. Section C delves into an example where a Missouri court permissively allowed a more expansive use of an easement and a second example of when it did not. Finally, Section D examines the consequences of trespass in the context of the holder of an easement misusing his or her rights.

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14. *Barfield*, 852 F.3d at 798. The case found its way to federal district court by way of diversity jurisdiction because one of the named plaintiffs was from Florida. Barfield v. Sho-Me Power Elec. Coop., No, 11–4321–NKL, 2012 WL 2368517, at *1 n.1 (W.D. Mo. June 21, 2012). The instant case found the district court did not abuse its discretion in certifying the class of landowners. *Barfield*, 852 F.3d at 806.

15. *Barfield,* 852 F.3d at 799.

16. *Id.* The jury verdict equaled $1.88 per foot per year for the ten-year period in which Sho-Me utilized the fiber-optic cable for commercial-telecommunication purposes. Barfield v. Sho-Me Power Elec. Coop., 309 F.R.D. 491, 496 n.4 (W.D. Mo. 2015). The jury was instructed to find the fair market rental value of Sho-Me's use of the fiber-optic cables for the telecommunication use based off the ten-year period from the first unauthorized use up to the time of trial. *Id.* at 496. In terms of unjust enrichment, this was the amount in which Sho-Me was unjustly benefitted by not obtaining proper easements from the landowners. *See id.* at 502.

17. *Barfield*, 852 F.3d at 798.

18. *Id.* at 804–05.

19. *See infra* text accompanying notes 73–74 (further defining the expanded use easement).

A. A Primer on Missouri Easement Law

Any legal discussion of an easement necessarily begins with the rights associated with the creation of that easement and its resulting characteristics. An easement is "a right only to one or more particular uses" of land.[20] Easements are of two varieties: appurtenant or in gross.[21] In the case of an easement appurtenant, the servient estate gives a benefit arising from the use of real property to the dominant estate receiving that advantage.[22] In other words, the dominant estate is the piece of land that is benefitted by the easement, and the servient estate is the piece of land that is burdened by the easement. Alternatively, an easement in gross exists without a dominant tenement; the right to use a piece of land is not dependent on the possession of any other tract of land.[23] An easement in gross is simply an easement that benefits another party. Easements in gross of a commercial nature are assignable or capable of transfer.[24]

The traditional affirmative easement, an easement allowing some particular use of land, is created by grant.[25] The easement's conveyance, or granting language, is crucial in defining the scope for which the easement may be used.[26] The interpretation of an easement created by a deed is a question of law, treated similar to the interpretation of any contract, and the intention of the grantor must be discerned from the instrument.[27] That intention should come from the entirety of the instrument in accord with the common-sense meaning of the language present in the document.[28] If there is any uncertainty about an easement's scope, "[a]ny doubt . . . should be resolved in favor of the servient owner's free and untrammeled use of the land."[29]

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20. Farmers Drainage Dist. v. Sinclair Ref. Co., 255 S.W.2d 745, 748 (Mo. 1953).

21. Burg v. Dampier, 346 S.W.3d 343, 353 (Mo. Ct. App. 2011).

22. *Id.* An easement appurtenant essentially involves two tracts of land. *See id.* One tract of land is benefitted to the detriment of the other. *Id.* For example, if Landowner *A* conveys a strip of land for ingress/egress over his tract as an easement appurtenant to a neighboring tract owned by Landowner *B*, that easement will benefit whoever owns the neighboring tract – the easement runs with the land. So, when Landowner *B* deeds the tract to Landowner *C*, Landowner *C* now has the right of ingress/egress over the easement and Landowner *B* has the right no more.

23. *Id.* An easement in gross benefits a party irrespective of his ownership of any tract of land. *Id.* For example, utility, railroad, and pipeline easements are common easements in gross. *See, e.g.*, Henley v. Cont'l Cablevision of St. Louis Cty., Inc., 692 S.W.2d 825, 827 (Mo. Ct. App. 1985). The benefit is not to a specific tract of land but to a person or company.

24. Kan. City Area Transp. Auth. v. Ashley, 485 S.W.2d 641, 645 (Mo. Ct. App. 1972).

25. R. WILSON FREYERMUTH ET AL., PROPERTY AND LAWYERING 520, 529 (3d ed. 2011).

26. *See, e.g.*, Maasen v. Shaw, 133 S.W.3d 514, 518–19 (Mo. Ct. App. 2004).

27. Erwin v. City of Palmyra, 119 S.W.3d 582, 584–85 (Mo. Ct. App. 2003).

28. Blackburn v. Habitat Dev. Co., 57 S.W.3d 378, 386 (Mo. Ct. App. 2001).

29. *Maasen*, 133 S.W.3d at 519.

Although an easement is typically created by formal grant, that is not the only manner in which an easement may come into existence.[30] In some cases, a generic grant has no use restrictions; the result of such a grant is an easement "of unlimited reasonable use."[31] An easement by prescription is a separate means of establishing an easement, which occurs when "use . . . is shown to have been continuous, uninterrupted, visible and adverse for a period of ten years."[32] Easements may also be created through condemnation by certain entities for specific public uses when an agreement on compensation cannot be reached.[33]

An easement may be either exclusive or nonexclusive.[34] These terms denote the ability of the servient owner to use the easement.[35] In an exclusive easement, the servient owner – the owner of the burdened estate – is excluded "from participation in the rights granted to the dominant owner," but a nonexclusive easement allows the servient owner "the privilege of sharing the benefits conferred by the easement."[36] Put another way, an exclusive easement is one in which the owner of the easement holds all of the rights to use the easement to the exclusion of the owner of the land burdened by the easement and all others without the authorization of the easement holder. But, if an easement is non-exclusive, the owner of the land burdened by the easement may still grant the use of the easement to others.

B. The Development of "Expanded Use"

The remainder of this Part discusses how Missouri courts have addressed the use of easements that are supposedly inconsistent with the terms of their grant because of an expanded use. In *St. Louis, Iron Mountain, & Southern Railway Company v. Cape Girardeau Bell Telephone Company*, an early opinion, Cape Girardeau & Chester Railway Company ("Railroad *A*") acquired an easement through condemnation across the existing easement of the St. Louis,

30. Jacobs v. Brewster, 190 S.W.2d 894, 896 (Mo. 1945).

31. *Maasen*, 133 S.W.3d at 518. In *Maasen*, the conveyance was merely for "[a] non-exclusive easement [fifty] feet wide." *Id.* (alteration in original).

32. Guerin v. Yocum, 506 S.W.2d 46, 47 (Mo. Ct. App. 1974).

33. *See* MO. REV. STAT. § 523.010 (2016); Kamo Elec. Coop., v. Baker, 287 S.W.2d 858, 861 (Mo. 1956). This discussion does not cover all manners of creation of an easement but only those necessary for the analysis in the remainder of this Note. There are other manners of creating easements. *See, e.g.*, Rosenbloom v. Grossman, 351 S.W.2d 735, 738 (Mo. 1961) (agreement); Litchfield v. Boogher, 142 S.W. 302, 303 (Mo. 1911) (reservation); King v. Jack Cooper Transp. Co., 708 S.W.2d 194, 196–97 (Mo. Ct. App. 1986) (necessity); Allee v. Kirk, 602 S.W.2d 922, 924–925 (Mo. Ct. App. 1980) (estoppel); Causey v. Williams, 398 S.W.2d 190, 197 (Mo. Ct. App. 1965) (implication).

34. *See Maasen*, 133 S.W.3d at 518.

35. *Id.*

36. *Id.*

Iron Mountain, & Southern Railway Company ("Railroad *B*").[37] Railroad *A* then contracted with Cape Girardeau Bell Telephone Company, allowing the telephone company the right to construct and operate a system of telephone lines within the easement.[38] The purpose of installing the lines was to serve the railroad, but the telephone company planned to use the lines to serve the public as well.[39] Railroad *B* brought suit to enjoin the construction of the line across its right of way absent consent or compensation and alleged the use of the telephone lines for public service "amount[ed] to an additional burden on the plaintiff's right of way."[40] Although the pertinent analysis needed to focus on the rights of an existing easement holder, the St. Louis Court of Appeals nevertheless set out an explanation of the rights between a fee owner[41] and an easement holder in dicta that would be relied upon verbatim in future decisions.[42] The court explained:

> [W]here the adjacent owner of the fee has asserted a right, it is declared that, in so far as the telegraph company serves the purpose of the railroad, its occupancy of the right of way easement is not an additional servitude or burden upon the fee of which he may complain. The right of the adjacent fee owner is precluded on the theory that such use is a legitimate development for railroad purposes essentially contemplated in the grant of the easement and for which he received compensation at the time. Nevertheless, in so far as the telegraph or telephone company thus rightfully occupying the right of way serves the general public as a commercial enterprise, distinct from the avocation of the railroad, it constitutes a use of the right of way easement other than for railroad purposes, and it is therefore a servitude not contemplated in the original grant and a burden upon the fee of which the adjacent owner may rightfully complain. It is obvious the transmission of intelligence by means

37. 114 S.W. 586, 586 (Mo. Ct. App. 1908).

38. *Id.*

39. *Id.*

40. *Id.* at 586–87. The factual setup of the case is unique because it is the easement holder, not the landowner, complaining of an additional burden. *Id.* at 587. Although the case does not discuss consent from the landowner, this is likely because of the unique position of the railroad holding its right of way: "the law excludes the owner of the fee and all other persons from any occupancy of the surface within the confines of the right of way at all places other than at crossings, public or private, or other consistent uses accorded by the statute." *Id.* at 589.

41. The owner of the fee, or fee simple, is what a person would normally associate with ownership of land. 63C AM. JUR. 2D *Property* §12, Westlaw (database updated Aug. 2018). Black's Law Dictionary defines fee simple as "[a]n interest in land, that being the broadest property interest allowed by law, endures until the current holder dies without heirs." *Fee Simple*, BLACK'S LAW DICTIONARY (10th ed. 2014).

42. *Cape Girardeau Bell*, 114 S.W. at 588; *see, e.g.*, Barfield v. Show-Me Power Elec. Coop., 852 F.3d 795, 801 (8th Cir. 2017); Kan. City v. Ashley, 406 S.W.2d 584, 592 (Mo. 1966); Eureka Real Estate & Inv. Co. v. S. Real Estate & Fin. Co., 200 S.W.2d 328, 332 (Mo. 1947).

> of electricity to all the world who may be willing to pay for the service is not a railroad use, and such service is certainly not contemplated within the grant of the railroad right of way, for it is entirely disassociated therefrom.[43]

Because the complaining Railroad *B* possessed only an easement, the court, while acknowledging that the fee owner's interest was not at issue, held "that the mere commercial use of the telephone under the circumstances mentioned" by Railroad *A* did not constitute any additional burden on Railroad *B*.[44]

Cape Girardeau, in its explanation of a fee owner's "high proprietary rights" to complain of "a servitude not contemplated in the original grant" relied, in part, on three main sources:[45] *Western Union Telegraph Company v. Rich*,[46] *American Telegraph and Telephone Company v. Pearce*,[47] and a treatise on telegraph and telephone companies.[48] *Rich* involved a landowner suing a telegraph company for cutting down trees on a railroad right-of-way, but evidence that the telegraph company was acting in concert with the railroad company was excluded.[49] The case acknowledged that a railroad is allowed to have additional infrastructure beyond its tracks that "reasonably tends to facilitate its business of transporting freight and passengers, and by such use in no manner transcends the purposes and extent of the easement."[50] Furthermore, the court in *Rich* found that the telegraph company was not liable for damages because those damages arose from an undertaking that the railroad could have

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43. *Cape Girardeau Bell*, 114 S.W. at 588.

44. *Id.* at 590.

45. *Id.* at 588–89. A legal encyclopedia is referenced as well. *Id.* at 589. The encyclopedia entry explains:

> A telegraph or telephone line upon the right of way of a railroad company is, generally, an additional burden, for which the original owner of the land, if he retains the fee, is entitled to compensation; but where the line is constructed by the railroad company in good faith, for its own use, and is reasonably necessary for its operation, there is no additional servitude, but merely a legitimate development of the easement originally acquired.

THE AMERICAN AND ENGLISH ENCYCLOPAEDIA OF LAW 1011–12 (James Cockcroft et al. eds., 2d ed. 1904), https://babel.hathitrust.org/cgi/pt?id=coo1.ark:/13960/t2c82vn9g. The citations for the entry overlap with other sources cited by the *Cape Girardeau Bell* court. *Compare id.* at 1012, *with Cape Girardeau Bell*, 114 S.W. at 589.

46. 19 Kan. 517 (1878).

47. 18 A. 910 (Md. 1889) (consolidating ten cases, including American Tel. & Tel. Co. v. Pearce).

48. S. WALTER JONES, A TREATISE ON THE LAW OF TELEGRAPH AND TELEPHONE COMPANIES § 147 (1906).

49. *Rich*, 19 Kan. at 519–20.

50. *Id.* at 520.

exercised without liability.[51] Essentially, *Rich* stands for the proposition that "every additional burden cast upon the land outside of the purpose and scope of the original easement, no matter in whose behalf, gives to the land[owner] a new claim for compensation," but its holding allows for physical modification within a railroad easement where necessary for a telegraph "so convenient if not indispensable" to the railroad's operation.[52]

In *Pearce*, a railroad company granted a telegraph and telephone company the right to erect and operate telephone and telegraph lines along its right of way.[53] The telephone and telegraph company constructed a new, larger system of poles, arms, and lines for its own business.[54] The resulting infrastructure was of such significant character that the court described it as "not being put up in order to subserve or promote the business purposes of [the] railroad, and in no sense of the term can it be regarded as necessary, or reasonably necessary."[55] The court determined that whether a new structure created an additional servitude, or a burden beyond the scope of the original easement, was a question of fact and found that the new line was an additional servitude.[56] In analyzing the motive of the defendant telephone company in its construction of the new line, the court found that "the main object in constructing it . . . [was] not reasonably necessary for the purposes of the railroad."[57]

The final basis for the passage from *Cape Girardeau* comes from an early treatise concerning telegraph and telephone companies.[58] The relevant sections in the treatise reference *Rich* and *Pearce*.[59] Section 147 of the treatise further explains that a "telegraph line may have been originally constructed by the railroad company for its own use but upon a transfer, of such a line by the railroad company to a telegraph company, the owner of the fee may claim compensation."[60] However, this statement is derived from a case in which a railroad assigned the ownership of its telegraph poles and lines to a telegraph company.[61] That company in turn erected a new, larger line offset from the original line.[62] Again, the court found that the new construction of the line was not

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51. *Id.* at 520–21 ("Whatever it could do and would have done for its own use and benefit, and was so done, was, so far as the land–owner is concerned, *damnum absque injuria*, no matter who bore the expense; or perhaps more correctly, it was damages already paid for.").

52. *Id*.

53. American Tel. & Tel. Co. v. Smith, 18 A. 910, 911 (Md. 1889) (consolidating ten cases, including American Tel. & Tel. Co. v. Pearce).

54. *Id.* at 915.

55. *Id.*

56. *Id.* at 913, 916.

57. *Id.* at 913.

58. St. Louis, I.M. & S. Ry. v. Cape Girardeau Bell Tel. Co., 114 S.W. 586, 587–89 (Mo. Ct. App. 1908).

59. JONES, *supra* note 48, § 147.

60. *Id.*

61. Hodges v. W. Union Tel. Co., 45 S.E. 572, 573 (N.C. 1903).

62. *Id.* at 574.

"reasonably necessary for the enjoyment of the easement granted to the railroad company."[63]

Eureka Real Estate & Investment Company v. Southern Real Estate & Financial Company extends the logic applied in *Cape Girardeau.*[64] In *Eureka*, a railroad company with an easement across a fee holder's land licensed an electric company to construct poles and lines on its right of way as part of operating the company's streetcars.[65] After partial abandonment of the tracks, the power line – used to supply power to streetcars on other sections of the track – was still a "necessary incidental purpose" of the easement.[66] However, the construction of an additional line over the existing right of way – a line with "no connection whatever with the electric lines or purposes of the street railway except that some of its poles are used as guys for the streetcar company's poles" – was held to be "an additional servitude and an interest in the land."[67] As in *Cape Girardeau*, the Supreme Court of Missouri found that the owner of an easement could not impose an additional burden upon the servient estate.[68]

Early in the twenty-first century, a new Missouri statute, largely arising out of a legislative response to the United States Supreme Court decision in *Kelo v. City of New London*,[69] sought to rein in the ability of private entities to engage in "expanded use" of easements.[70] In 2006, the Missouri legislature created a statutory provision confining newly created easements of utilities to be "fixed and determined by the particular use for which the property was acquired."[71] Under section 523.283, for a utility to make "expanded use of the property," the utility must either condemn the property or make new contractual arrangements with the landowner.[72]

"Expanded use" is defined as "[t]he exclusion of use by the current owner of the burdened property from an area greater than the area originally described" or "[a]n increased footprint or burden greater than the footprint or burden originally described in the instrument of conveyance or condemnation

63. *Id.* at 576.

64. 200 S.W.2d 328, 332 (Mo. 1947).

65. *Id.* at 329.

66. *Id.* at 330.

67. *Id.* at 332.

68. *Id.*

69. 545 U.S. 469 (2005). In *Kelo*, a private nonprofit, on behalf of the City of New London, Connecticut, sought to condemn, through eminent domain, the property of holdouts within an area of land planned for economic development. *Id.* at 473–75. The primary issue in the case was whether the economic development plan served a "public purpose," a requirement under the Fifth Amendment for any taking. *Id.* at 472, 478–80. The Court held that economic development could be a public purpose and that the property could be taken. *Id.* at 485–86.

70. Dale A. Whitman, *Eminent Domain Reform in Missouri: A Legislative Memoir*, 71 MO. L. REV. 721, 723, 751 (2006).

71. MO. REV. STAT. § 523.283.1 (2016).

72. *Id.*

petition."[73] The statute further clarifies that "increased footprint or burden" equates to "*a different type of use* or a use presenting an unreasonably burdensome impact on the property, the landowner, or the activities being conducted on the property by the landowner."[74] Case law interpreting the statute is limited.

Carroll Electric Cooperative Company v. Lambert applies section 523.283 in the context of a proposed electric transmission line.[75] In *Carroll Electric*, a REC sought to condemn a right of way for an electric distribution line.[76] In the REC's offer letter to the landowners, it proposed easement language that specified the ability "to license, permit, or otherwise agree to the joint use or occupancy of the line or system by any other person, association or corporation for electrification or communication purposes."[77] At trial, the court dismissed the condemnation petition partly because the REC included the language pertaining to communication use; the court held that use beyond the authority of the REC in its eminent domain power.[78] In the REC's appeal of the trial court's dismissal of the condemnation petition, the landowners argued that the use of the easement by other parties for communication purposes exceeded the electric cooperative's authority.[79] However, an engineer working on the project testified that the company was only condemning for electric purposes and that third-party telecommunication companies would have to obtain their own easement.[80]

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73. *Id.* § 523.283.2. In the introduced version of HB 1944, "expanded use" was defined as:

> (1) The exclusion of use by the current owner of the burdened property from an area greater than the area originally contemplated at the time of acquisition by the condemning authority; (2) An increased footprint greater than the footprint originally contemplated at the time of acquisition by the condemning authority; (3) An attempt to confer property rights of any nature whatsoever to another entity other than a successor-in-interest; or (4) Any altered use which substantially changes the ability of the current owner of the burdened property to operate farm machinery in the area of the property interest originally acquired by the condemning authority.

H.B. 1944, 93d Gen. Assemb., 2d Reg. Sess. (Mo. 2006) (as introduced), https://house.mo.gov/billtracking/bills061/hlrbillspdf/4100L.04I.pdf; *see also* Whitman, *supra* note 70, at 751. "Increased footprint" was defined as "a different use or a use that has greater impact on the property, the landowner, or the activities being conducted on the property by the landowner." H.B. 1944; *see also* Whitman, *supra* note 70, at 753.

74. MO. REV. STAT. § 523.283.2(2) (2016) (emphasis added).

75. 403 S.W.3d 637, 644–45 (Mo. Ct. App. 2012).

76. *Id.* at 639.

77. *Id.* at 641.

78. *Id.* at 639.

79. *Id.* at 644.

80. *Id.* at 642.

The Missouri Court of Appeals for the Southern District agreed with the REC that lines for internal communication were essential to the operation of the electric system and that the power of eminent domain extended to that use.[81] Citing section 523.283, the REC conceded, and the court agreed, that "any use other than for electricity is an expanded use of the proposed easements which would be prohibited . . . without a new condemnation action or a negotiated expansion of the existing easement."[82] Based on the evidence in the record, there was no indication that the easements would be used for anything other than electric service.[83] However, the REC's power of eminent domain did extend to essential provisions, including communications between substations using a fiber-optic cable.[84]

C. A Different Type of Use for Utility Easements Prior to Section 523.283

The use of an easement need not remain stagnant over time, but there are restrictions on how far from the original use the future use may be. *Henley v. Continental Cablevision of St. Louis County, Inc.*[85] demonstrates how the court can interpret older easements to allow for changes in technology over time. In *Henley*, an easement granted in the early 1920s created the right to use a specified area across tracts in a subdivision for the purpose of constructing and maintaining electric, telephone, and telegraphic systems.[86] Then, in the 1980s, a cable television company received a license from the easement holder to install cabling "for the purpose of transmitting television programs."[87] The landowners argued that the cable constituted an extra burden.[88] The Missouri Court of Appeals for the Western District disagreed.[89]

By interpreting the original easement with the broader purpose of "bringing electrical power and communication into the homes of the subdivision," the court allowed for "scientific and technological progress."[90] The court stated the issue was one of first impression in the state and cited opinions from

81. *See id.* at 646. Simply put, eminent domain refers to the power of government to take private land for public use following reasonable compensation. *Eminent Domain*, BLACK'S LAW DICTIONARY (10th ed. 2014). Certain private entities, including RECs, may also be granted the power of eminent domain by statute. MO. REV. STAT. § 523.262.1–2 (2016).

82. Carroll Elec. Coop. Corp. v. Lambert, 403 S.W.3d 637, 645 (Mo. Ct. App. 2012).

83. *Id.* at 646.

84. *Id.* at 644.

85. 692 S.W.2d 825 (Mo. Ct. App. 1985).

86. *Id.* at 827.

87. *Id.*

88. *Id.* at 828.

89. *See id.* at 829.

90. *Id.*

other jurisdictions; those other jurisdictions reasoned that adding a coaxial cable, as opposed to a telephone wire, imposed no greater burden.[91] The court referenced "the general rule that easements in gross for commercial purposes are particularly alienable and transferable."[92] The court also found that "it is in the public interest to use the facilities already installed for the purpose of carrying out this [broadly defined original] intention to provide the most economically feasible and least environmentally damaging vehicle for installing cable systems."[93]

In determining the rights of the easement holder, the characteristics of the easement play a pivotal role. For example, courts are less likely to find that an expanded use of a prescriptive easement is reasonable and valid. In *Ogg v. Mediacom*,[94] a REC held a prescriptive easement[95] across the landowner's property and authorized – without the landowner's consent – a license to utilize the REC's existing poles to hang a fiber-optic cable six feet lower than the electric cables, which were installed eighteen-to-twenty feet high.[96] In an action for trespass by landowners against the cable company, the trial court granted summary judgment in favor of the cable company after focusing on the issue of whether the additional fiber-optic cable "would create an unreasonable additional burden or servitude" on the landowner.[97] The Missouri Court of Appeals for the Western District determined that this was not the proper analysis because the prescriptive easement held by the REC effectively limited the rights of any license that it may grant.[98]

The court reasoned that "the rights of the holder of an easement acquired *by prescription* are defined solely by the character and extent of the use made thereof during the prescriptive period."[99] The court specified that "no different or greater use could lawfully be made of that portion of the [landowner's] property by [the REC] or [the cable television company], neither of whom had the legal right to unilaterally expand, in character or extent, the prior prescriptive use."[100] This definitive statement does not delve into the difference in character between the use of cables by the REC and the use of cables by the cable television company, but rather it seems to rely more on the proposition that "prescriptive easements 'are no favorites of the law'" and are thus strictly confined.[101]

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91. *Id.* at 828–29.
92. *Id.* at 829.
93. *Id.*
94. 142 S.W.3d 801 (Mo. Ct. App. 2004).
95. *See* discussion *supra* Section III.A.
96. *Ogg*, 142 S.W.3d at 804–05.
97. *Id.* at 808.
98. *Id.* at 810.
99. *Id.* at 809 (emphasis added).
100. *Id.* at 810.
101. *See id.* at 809 (quoting Cook v. Bolin, 296 S.W.2d 181, 187 (Mo. Ct. App. 1956)). In holding that the REC could not license the cable company rights that it did not have, a footnote also acknowledges that "to the extent the purported license . . .

D. Trespass and Remedies

The tort of trespass is commonly recognized as every unauthorized, and therefore unlawful, entry on to the property of another.[102] In the context of easements, a trespass occurs when the user "exceeds his rights, either in manner or extent of use."[103] A change in the degree of use is allowed, but a change in the quality of an easement – "a substantial new burden on the servient estate" – will be a trespass.[104] The issue boils down to whether or not there is a change in the character of the easement. The landowner has the right to control changes in the character of any easement.[105]

A trespasser is liable for all damages resulting from the trespass.[106] The distinction between permanent and temporary injury is essential to determining damages. Traditionally, these measures were based on actual physical damages; an early case sets out the Missouri rule, stating, "Where the destruction of the thing includes but a temporary injury to the land, . . . the true measure of damages is the cost of replacing it and the rental value of the land until it is replaced."[107] However, "where the destruction of the thing inflicts more than a temporary injury to the land, or the replacement would be impossible or tedious and uncertain both in cost and result, the criterion is the damage inflicted

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plac[ed] an unreasonable additional burden or servitude upon the . . . fee simple title, it was also unlawful under . . . Eureka." *Id.* at 810 n.13.

102. *See* Crook v. Sheehan Enters., 740 S.W.2d 333, 335 (Mo. Ct. App. 1987) ("[A t]respass is the unauthorized entry by a person upon the land of another, regardless of the degree of force used, even if no damage is done, or the injury is slight.").

103. Macios v. Hensley, 886 S.W.2d 749, 752 (Mo. Ct. App. 1994).

104. *Id.*

105. *See* Kavanaugh v. St. Louis Traction Co., 105 S.W. 278, 282 (Mo. Ct. App. 1907) ("The owner of a dominant estate can neither increase the servitude imposed on the servient tenement or change its character. This rule is a recognition of the right of the owner of property to control its use, and is pushed to the extent of holding that, although the proposed change in the character of the servitude would prove beneficial, rather than injurious, to the servient estate, it is for the owner of the latter to say whether or not he will tolerate the change."). *Kavanaugh* approved of the outcome of a case where a pipe and subsequent fill was not allowed in an easement granted to carry water through an open ditch. *See id.*; *cf.* Maasen v. Shaw, 133 S.W.3d 514, 520 (Mo. Ct. App. 2004) (parking vehicles is a change in the quality of use in an easement for ingress and egress); *Macios*, 886 S.W.2d at 752 (docking boats is a change in the quality of use in an easement for ingress and egress). The landowner's control is restricted to controlling how the servient owner may change the easement; the landowner may not unilaterally change the character of the easement outside what was granted. *See* Gerber v. Appel, 173 S.W.2d 90, 93–94 (Mo. Ct. App. 1943) ("There is certainly nothing in [the easement] that allows the owner of a fee to change a walkway into a vehicular roadway.").

106. *See* Smith v. Woodard, 15 S.W.3d 768, 773 (Mo. Ct. App. 2000) ("[W]ith trespass no actual damages must be proven; the claimant is entitled to at least nominal damages.").

107. Adam v. Chi., B. & Q. Ry. Co., 122 S.W. 1136, 1136–37 (Mo. Ct. App. 1909).

on the market value of the land."[108] If a landowner has been deprived of the land in the absence of other damage, fair rental value is an appropriate remedy.[109] If no actual damage results from a trespass, a court may still award nominal damages.[110] Punitive damages are available "where the use is in reckless disregard of or indifference to the rights of a property owner."[111] Any intentional trespass satisfies submission of punitive damages to a jury.[112] A good-faith belief that one's actions are legal removes punitive damages from consideration.[113]

In *Sterbenz v. Kansas City Power and Light Company*,[114] the Missouri Court of Appeals for the Western District analyzed the consequences of trespass by an entity endowed with eminent domain.[115] Of the available remedies, the court explained that a "landowner 'may proceed by way of injunction to restrain the installation; or he may sue in ejectment; or he may avail himself of [section 523.090]; or he may maintain a common law action for damages.'"[116] If a suit for damages is chosen, the method for determining damages varies based on whether the trespass injury is temporary or permanent, as previously discussed.[117] With a new permanent utility across a property, actual damages would be the same as condemnation.[118] This would be calculated as the loss in the fair market value of the entire piece of property before and after the taking.[119] The court posited that a "'trespassing' condemning authority would be required to bring a separate eminent domain action . . . to secure 'title' to the

108. *Id.* at 1137.

109. Kitterman v. Simrall, 924 S.W.2d 872, 879 (Mo. Ct. App. 1996); *see also* S. Mo. Dist. Council of Assemblies of God v. Hendricks, 807 S.W.2d 141, 147 (Mo. Ct. App. 1991).

110. *Woodard*, 15 S.W.3d at 773 (Mo. Ct. App. 2000); *see also* Crooks v. Sheehan Enters., 740 S.W.2d 333, 336 (Mo. Ct. App. 1987).

111. Ogg v. Mediacom, L.L.C., 142 S.W.3d 801, 807 (Mo. Ct. App. 2004).

112. Wright v. Edison, 619 S.W.2d 797, 803 (Mo. Ct. App. 1981).

113. Tamko Asphalt Prods., Inc. v. Arch Assocs., 830 S.W.2d 434, 441 (Mo. Ct. App. 1992).

114. 333 S.W.3d 1 (Mo. Ct. App. 2010).

115. *Id.* at 7–10.

116. *Id.* at 7–8 (alteration in original) (quoting Beetschen v. Shell Pipe Line Corp, 248 S.W.2d 66, 70 (Mo. Ct. App. 1952)); *see* discussion *supra* Section III.D. An injunction would halt the installation. An action in ejectment would be for the recovery of possession for the land in question. *See* MO. REV. STAT. § 524.010 (2016). Section 523.090 provides that any person may have damages ascertained in condemnation proceedings when their property has been damaged for public use. MO. REV. STAT. § 523.090 (2016).

117. *Sterbenz*, 333 S.W.3d at 8. *See supra* notes 106–13 and accompanying text.

118. *Sterbenz*, 333 S.W.3d at 9.

119. *Id.* Condemnation proceedings are set out in chapter 523. MO. REV. STAT. § 523 (2016).

appropriated tract, though presumably, no further compensation for the 'taking' would be awarded given the equivalently measured permanent trespass damages."[120]

Unjust enrichment, an alternate theory of recovery, refers to "the effect of the failure of a party to make restitution where it ought to be made."[121] Recovery under the theory of unjust enrichment requires a benefit to the defendant from the plaintiff and retention of that benefit by the defendant; above all else, the defendant's retention of the benefit must be inequitable.[122] The Restatement (Third) of Restitution and Unjust Enrichment allows restitution for the conferment of a benefit stemming from a trespass and provides that damages in the form of rental value may be appropriate under certain circumstances when the defendant uses the property without authorization and receives "saved expenditure."[123]

IV. INSTANT DECISION

The Eighth Circuit held that Sho-Me's use of the easements for public-serving telecommunication purposes exceeded the scope of its easements and constituted a trespass; however, the court found that unjust enrichment was not an available remedy.[124] The court reached its conclusion by first analyzing whether the easements authorized Sho-Me to utilize the fiber-optic cables for commercial telecommunications.[125] Finding that the easements did not allow this use, the court next analyzed whether exceeding the rights of those easements constituted a trespass.[126] Confirming the trespass liability, the court then looked to whether unjust-enrichment liability was a proper remedy against an entity capable of exercising eminent domain and held that it was not.[127]

Because the parties agreed on Sho-Me's authorization to install and use the fiber-optic cables for internal communication associated with supplying electricity, the court began with an analysis of whether the easements gave Sho-

120. *Sterbenz*, 333 S.W.3d at 9.

121. Graves v. Berkowitz, 15 S.W.3d 59, 61 (Mo. Ct. App. 2000).

122. Green Quarries, Inc. v. Raasch, 676 S.W.2d 261, 264 (Mo. Ct. App. 1984).

123. RESTATEMENT (THIRD) RESTITUTION AND UNJUST ENRICHMENT § 40 (AM. LAW INST. 2011) (finding saved expenditure often comes about because "the defendant has made a valuable use of the defendant's property without paying for it."). The Restatement's illustration on this point involves a developer selling a piece of land and then, while the purchaser owns the land but delays building on it, using the land to store and subsequently dispose of dirt from grading projects elsewhere in the development. *Id.* There is no injury or interference with the landowner, but rental value of the land during the time the dirt was present is the proper measure of restitution. *Id.*

124. Barfield v. Sho-Me Power Elec. Coop., 852 F.3d 795, 804–05 (8th Cir. 2017).

125. *Id.* at 799–802.

126. *Id.* at 802–04.

127. *Id.* at 804–05.

Me the right to utilize the fiber-optic cables for commercial telecommunications.[128] After looking to section 523.283 and prior Missouri case law as a basis for interpreting "expanded use," the Eighth Circuit concluded that the easement did not allow use of the cable for commercial telecommunications.[129] The court reached this position after analyzing *Carroll Electric* to extract the meaning of expanded use in Missouri in similar circumstances of a REC attempting to place fiber-optic cables for commercial telecommunication in an easement for an electric line.[130] *Carroll Electric*, relying on the statutory definition of "expanded use" in section 523.283, held that communication lines within an easement authorizing electric power transmission lines do not allow for any non-electric uses.[131]

In the instant decision, the court concluded that section 523.283 made no change to existing law for understanding expanded use – a crucial fact because the statute applies only to post-2006 easements.[132] The court then relied on *Eureka*, *Ogg*, and *Cape Girardeau* for the proposition that the easement would not authorize commercial telecommunication use.[133] Dicta from *Cape Girardeau* – that a use "distinct from the avocation of" or "entirely disassociated" with the original grant of the easement is not permitted – served as the determinative rationale of the court.[134]

The court summarily rejected Sho-Me's remaining arguments of "same general character" and "unlimited reasonable use" to justify the use beyond what is specifically granted in the easement.[135] Sho-Me argued that the use of the easement could change to a use of a similar character, but the court held that only an increased degree of use of the easement was authorized and not a new, unauthorized use – even one that was physically similar.[136] Sho-Me also argued that the original terms of the easements were general enough that Sho-Me could make unlimited reasonable use of the easements.[137] However, the court held that the use of the easements must still be limited to the original purpose of their creation.[138]

In concluding its discussion on expanded use, the court addressed *Henley* in response to Sho-Me's argument that the easement should not be restricted to

128. *Id.* at 799–800.
129. *Id.* at 800–03.
130. *Id.* at 800.
131. *Id.*
132. *Id.* at 800–01.
133. *Id.* at 801–02 (citing Eureka Real Estate & Inv. Co. v. S. Real Estate & Fin. Co, 200 S.W.2d 328 (Mo. 1947); Ogg v. Mediacom, 142 S.3d 801 (Mo. Ct. App. 2004); St. Louis, I.M. & S. Ry. v. Cape Girardeau Bell Tel. Co., 114 S.W. 586 (Mo. Ct. App. 1908)).
134. *Id.* at 801.
135. *Id.* at 802.
136. *Id.*
137. *Id.*
138. *See id.* at 802–03.

its "original purpose."[139] The court explained that *Henley*, which held that a coaxial cable for television purposes was within the scope of an easement granted for telephone and electricity, was inapposite to the easements at issue in Sho-Me's case.[140] The court looked at the assumed intention of the grantors of the easement in *Henley* and the framing of the old easement as broadly covering communications to note that the new coaxial cable was still within the original grant.[141] Finding no intention of Sho-Me's easement to authorize commercial telecommunication use, the court ultimately concluded that the easements in *Carroll Electric*, rather than *Henley*, were more analogous to Sho-Me's easements.[142]

The court next affirmed Sho-Me's trespass liability.[143] Although Sho-Me maintained a position that "invisible light pulses" could not constitute a trespass, the court held that Sho-Me's unauthorized use itself constituted trespass.[144] Sho-Me referenced, to no avail, an Arkansas case with nearly identical circumstances where the Eighth Circuit found that Arkansas law did not recognize a trespass claim for mere light signals, but the court found that decision inapplicable to Missouri law.[145] The court held that the unauthorized use was enough to hold Sho-Me subject to trespass liability, regardless of whether there was a further physical invasion of land.[146]

After affirming Sho-Me's liability for trespass, the court next discussed the trial court's damages award, which was granted on a theory of unjust enrichment.[147] Using the *Sterbenz* case as a model for remedies available in a case where an entity with eminent domain power ignores that power and trespasses, the Eighth Circuit found a plaintiff limited to only four remedies.[148] *Sterbenz* provided for "an *election* of remedies": (1) an injunction to stop installation, (2) an ejectment, (3) a proceeding for condemnation, or (4) "a common law action for damages."[149] Finding no possibility for an alternative remedy to a list specifying an *election* of remedies and recognizing that the landowners could point to no Missouri cases allowing unjust enrichment under similar circumstances, the court held that unjust enrichment was not a proper remedy for an unauthorized use of land.[150] This proposition was supported by an early Missouri case that held a suit for use and occupation without a landlord-

139. *Id.*
140. *Id.* at 803.
141. *Id.*
142. *Id.*
143. *Id.* at 804.
144. *Id.* at 803.
145. *Id.* at 803–04.
146. *Id.*
147. *Id.* at 804.
148. *Id.* (citing Sterbenz v. Kan. City Power & Light Co., 333 S.W.3d 1, 7–8 (Mo. Ct. App. 2010)).
149. *Id.* (emphasis added) (quoting *Sterbenz*, 33 S.W.3d at 7–8).
150. *Id.*

tenant relationship was not proper.[151] The existence of section 523.283, with references only to an action for trespass or expanded use, further bolstered the court's holding that unjust enrichment was not a proper remedy in this case.[152]

V. COMMENT

The court held that Sho-Me's use of the fiber-optic cable for commercial telecommunications made it liable under Missouri law for trespass based on the theory of "expanded use" presented in section 523.283, which the court determined was identical to earlier law.[153] The statute's definition of "increased footprint or burden" to "mean a different type of use *or* a use presenting an unreasonably burdensome impact of the property" is instructive, although the meaning of "a different type of use" is not explicit.[154] This Part first argues that, based on Missouri cases, a proper understanding of a different type of use should be construed as requiring an actual additional physical imposition. Next, this Part claims that the Sho-Me court should have placed greater emphasis on *Henley* and then contrasts Sho-Me's easements with those in *Ogg*. A policy argument against the Sho-Me court's holding is then advanced, along with a discussion of the implications of that holding. Finally, a proper trespass remedy is considered, assuming a court finds trespass liability in contradiction of the other arguments presented here.

A. A "Different Type of Use" Should Entail a Different Type of Use with an Additional Physical Imposition

In this case, the argument that the coextensive transmission of information for commercial use, along with the admittedly allowable use for internal communications, could possibly present an increased footprint or an unreasonably burdensome impact on the property would be baseless. The nature of light signals carrying information within the glass strands of a fiber-optic cable for commercial use, as opposed to internal use, clearly does not impact the underlying property in a burdensome manner. Both parties acknowledged the right-

151. *See id.* at 804–05 (citing Young v. Home Tel. Co., 201 S.W. 635, 636 (Mo. Ct. App. 1918)).

152. *Id.* at 805. On remand for trespass damages, the jury was instructed to "award Plaintiffs such sum as you may find from the evidence to be the fair market rental value of Defendants' use of the fiber optic cable on Plaintiffs' land for commercial-telecommunications purpose from January 21, 2005[,] until February 2, 2015." Jury Instructions at 20, *Barfield*, 852 F.3d 795 (No. 11CV04321), 2015 WL 1305552. The jury awarded $129,211,337 pursuant to that instruction and an additional $1,300,000 in punitive damages. Judgment in a Civil Case, *Barfield*, 852 F.3d 795 (No. 11-04321-CV-C-NKL), 2017 WL 3972429. However, the judgment was vacated as being against the weight of the evidence. Order at 3, *Barfield*, 852 F.3d 795 (No. 888).

153. *Barfield*, 852 F.3d at 800–05.

154. MO. REV. STAT. § 523.283.2(2) (2016) (emphasis added).

ful placement of the cable within the easement for internal communication purposes;[155] thus, the installation of the cable cannot be a source of complaint. Therefore, the keystone of the dispute is whether use of the fiber-optic cable for commercial telecommunications constitutes a different type of use.

Cape Girardeau is the sensible starting point of discussion for discerning the critical question of what exactly constitutes a different type of use. *Cape Girardeau* frames the point of diversion as "a commercial enterprise, *distinct from* the avocation of" and "*entirely dissociated*" from the original grant.[156] *Eureka* echoes this sentiment in that construction of a new line with "no connection *whatever*" with the original grant equated to a new burden.[157] Sho-Me's commercial telecommunication use of the fiber-optic cable is not an entirely separate undertaking.

The reasoning in *Cape Girardeau* appears to be directly applicable in Sho-Me's case. The cable is "a legitimate development" when used for Sho-Me's electrical transmission purposes, but, in the language of *Cape Girardeau*, "[when] serv[ing] the general public as a commercial enterprise, distinct from the avocation of [Sho-Me's electrical transmission], it constitutes . . . a servitude not contemplated in the original grant."[158] This conclusion necessarily presupposes that use for commercial telecommunications cannot be "a legitimate development" for Sho-Me.[159]

It is imperative to note that the line of cases used as support in *Cape Girardeau* involved a new *physical* imposition on the servient estate.[160] *Rich* involved a physical impact that was nevertheless approved by the court because of its relevance to the purpose of the easement.[161] *Pearce* involved the finding of an additional servitude due to a dramatic expansion of telegraph/telephone infrastructure within a railroad easement that would have affected the land in a manner unanticipated within the grant for railroad purposes.[162] The treatise referenced in *Cape Girardeau* also referred to another case involving the construction of larger infrastructure than would have been needed for the original railroad use.[163] Whether an additional use is a "legitimate development" depends on whether such use was contemplated within the grant, which, in turn, seems to depend on the impact the use imposes.

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155. *Barfield*, 852 F.3d at 799.

156. St. Louis, I.M. & S. Ry. v. Cape Girardeau Bell Tel. Co., 114 S.W. 586, 588 (Mo. Ct. App. 1908) (emphasis added).

157. Eureka Real Estate & Inv. Co. v. S. Real Estate & Fin. Co., 200 S.W.2d 328, 332 (Mo. 1947) (emphasis added).

158. *Cape Girardeau Bell*, 114 S.W. at 587–88 (original language from *Cape Girardeau Bell* with insertions for Sho-Me).

159. *Id.* at 587.

160. *See supra* text accompanying notes 45–63.

161. W. Union Tel. Co. v. Rich, 19 Kan. 517, 520 (1878).

162. Am. Tel. & Tel. Co. v. Smith, 18 A. 910, 916 (Md. 1889) (consolidating ten cases, including Am. Tel. & Tel. Co. v. Pearce).

163. JONES, *supra* note 48.

In the context of a railroad, the grantor would anticipate the infrastructure necessary for the operation of a railroad, such as tracks and telegraph lines required for support of the railroad. The infrastructure necessary for a different use – infrastructure geared specifically to support telecommunications at a commercial level – would require a level of infrastructure not anticipated in the original railroad grant. For Sho-Me, no additional infrastructure was required to support the commercial telecommunication use. The transmission occurred within the admittedly authorized single cable. Because the underlying estate was not burdened in any additional manner, unlike the expansion of telephone and telegraph lines and poles in the early railroad cases, the different type of use here should not rise to the level of being considered an expanded use.[164]

B. The Sho-Me Court Downplayed the Direct Relevance of Henley *and* Ogg *is Not Instructive*

Although the court analogized Sho-Me's situation to *Carrol Electric* and dismissed its similarity to *Henley*,[165] the context of *Henley* is immensely relevant. The court reasoned that *Henley* was not on point because Sho-Me's easements "d[id] not indicate any intention to allow use for public-serving telecommunication purposes."[166] However, *Henley* more broadly requires consistency with the principal use; the court allows "purposes *not inconsistent* with the principal use granted."[167] In *Henley*, easements from 1922 permitting electric, telephone, and telegraphic service, were construed to cover additional new cables and wiring for transmitting television programming.[168] This broad reading of an easement, one that takes the approach of allowing a reasonable evolution of the use of an easement where no additional actual burden is created, is directly applicable to Sho-Me's use of sending additional information through the fiber-optic cable that is otherwise rightfully within the scope of the easement.

Moreover, the "dispositive issue" in *Henley* turned on the exclusivity of the easements – "the exclusion of the owner and possessor of the servient tenement from participation in the rights granted."[169] The court in *Henley* looked to other jurisdictions to reach the conclusion that the addition of a coaxial cable for television added to existing electric and telephone poles without the

164. In June 2018, an addition to section 394.080.1(7) expanded the definition of "electric transmission and distribution lines or systems" to include "cooperative-owned or cooperative subsidiary-owned copper and fiber optic cable, facilities and technology, or any combination thereof, that carries, or has the capacity to carry, light signals and data beyond or in addition to the light signals and data necessary for the transmission and distribution of electricity." H.B. 1880, 99th Gen. Assemb., 2d Sess. (Mo. 2018).

165. Barfield v. Sho-Me Power Elec. Coop., 852 F.3d 795, 802–03 (8th Cir. 2017).

166. *Id.* at 803.

167. Henley v. Cont'l Cablevision of St. Louis Cty., Inc., 692 S.W.2d 825, 828 (Mo. Ct. App. 1985) (emphasis added).

168. *Id.* at 827.

169. *Id.* at 828.

owner's consent created no additional burden where the easements were exclusive and thus apportionable.[170] The landowners subject to Sho-Me's easements cannot anticipate to use the structures installed by the REC. The landowners cannot expect to use that portion of Sho-Me's easement wherein the existing electrical cables and the fiber-optic cable reside.

Although *Ogg* is similar to the current case in that it involves a REC and fiber-optic cables, it is notably different because the easements acquired by the REC in *Ogg* were prescriptive.[171] In considering the holdings of other cases involving easements, the characteristics of those easements and their similarities to the case at hand is of the utmost importance. Sho-Me's electrical easements in dispute were express easements created through grants.[172] *Ogg*'s outcome relies on the rationale that prescriptive easements should be strictly confined to their nature as developed during the prescriptive period.[173] The decision in *Ogg* detailed the specifications of the REC's prescriptive easement and held that without the running of another ten-year prescriptive period, "no different or greater use could lawfully be made of that portion of the [landowner's] property."[174] Sho-Me's easements should be analyzed not under the narrow constraints of expanded use in a prescriptive easement, but rather as an express, exclusive easement more similar to *Henley*.

C. Policy Implications of the Sho-Me Court's Holding

The "expanded use" threshold for easements advanced in Missouri cases demonstrates that developments necessary to the purpose of the easement within the physical confines of the easement are acceptable. Thus, as in the line of cases relying on *Cape Girardeau*, as in *Carroll Electric*, and as agreed upon by the parties in the instant decision, it is clear that the fiber-optic cable for *internal* communication purposes is rightfully within the scope of the easement.[175] From a policy standpoint, requiring the REC to either renegotiate easements or condemn the entire network of infrastructure for what amounts to a change in capacity on a fiber-optic cable to add the *external* commercial telecommunication use seems an absurd result. The cost will be passed on to users of the electricity and commercial telecommunications while the landowners, who have already been compensated for the physical space of the easement, will be compensated again.

As in *Henley*, where the court broadly construed the language of the easement to achieve a result in line with the original intention that would also allow

170. *Id.* at 828–29.

171. Ogg v. Mediacom, L.L.C., 142 S.W.3d 801, 807 (Mo. Ct. App. 2004). *See* discussion *supra* Section III.A for a comparison of the types of easements.

172. Barfield v. Sho-Me Power Elec. Coop., 852 F.3d 795, 798 (8th Cir. 2017).

173. *Ogg*, 142 S.W.3d at 809–10.

174. *Id.* at 810. That use was specifically recognized by the court in *Ogg* to be of one "to operate and maintain electrical power cables on poles at a height of approximately eighteen to twenty feet." *Id.*

175. *Barfield*, 852 F.3d at 799; *see* discussion *supra* Section III.B.

"the most economically feasible and least environmentally damaging vehicle for installing cable systems,"[176] the outcome of the present case should be addressed in an equally utilitarian manner. The disallowed "different type of use" in section 523.283 and prior case law should be interpreted as requiring a different type of *physical* use of the easement. If the court in Sho-Me had interpreted the phrase "different type of use" in this manner, the case's outcome would have resembled the practical and non-wasteful outcome reached in *Henley*.[177] There would be no "expanded use" and thus no trespass.

The Eighth Circuit's decision in *Barfield v. Sho-Me Power Electric Cooperative*[178] is illustrative on two major points. First, the granting language of the easement is of paramount importance. This is true from the perspective of the landowner wanting to limit any potential undesired outcomes for a piece of property and from the perspective of a utility contemplating the nature of potential uses for the easement. It would be revealing to know the acquisition price that Sho-Me negotiated for those easements that fortuitously included some reference to communications compared to those that created the dispute in this case. In terms of considering compensation for what would be considered a perpetual easement in either case, it would be reasonable to conclude the value demanded by the holder of the servient estate may be similar. After all, there is no impact to the underlying property based on a change in degree alone. Regardless, the drafter of the easement has an incentive to add inclusive language; the potential servient estate has an incentive to diligently review and negotiate, if possible.

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176. Henley v. Cont'l Cablevision of St. Louis Cty., Inc., 692 S.W.2d 825, 829 (Mo. Ct. App. 1985).

177. In June 2018, the Missouri legislature added section 394.085 to the chapter concerning RECs and made the policy statement that "expanding and accelerating access to high speed broadband communications services throughout the entire state of Missouri is necessary, desirable, [and] in the best interests of the citizens of this state . . . ." H.B. 1880, 99th Gen. Assemb., 2d Sess. (Mo. 2018). While not "diminishing the rights of property owners under the laws of this state," the general assembly set forth the following intent:

> In recognition that the high capital cost of deploying fiber optics technologies to provide broadband communications services impedes access to such services, and the rural electric cooperatives deploy fiber optics technologies for use in the operation of their electric system infrastructure, it is the intent of the general assembly to facilitate and to encourage rural electric cooperatives and their affiliates, either collectively, or individually, to continue to enter into and establish voluntary contracts or other forms of joint or cooperative agreements for the use of rural electric cooperative infrastructure in providing access to broadband services.

Id.

178. 852 F.3d 795.

Second, although railroad and telegraph easement cases of a century ago are certainly analogous to the case at hand, the disconnect between transportation of people and freight on railroad tracks and transmission of information in telegraph and telephone lines in those cases is substantially more attenuated than the transmission of electricity and information across outwardly similar wires that can be situated on the same poles. The former seems to truly be a different type of use, where the commercial communication aspect eclipses the railroad usage by demanding greatly expanded infrastructure of a separate nature, but the latter is a much more subtle distinction. Section 523.283's "different type of use" is a nebulous concept intended to protect landowners, but, as discussed above, a different type of use that actually has some sort of physical impact is a justified interpretation of the concept.[179]

D. Measuring a Trespass Remedy Under These Circumstances

Assuming, for the sake of argument, that trespass liability is proper through the "expanded use" analysis, the determination of whether Sho-Me's unauthorized use of the fiber-optic cable is a temporary or permanent trespass will have significant consequences on the resulting damages. The trespass should be categorized as permanent. A trespass of a permanent nature will result in the award of a difference in the market value of the land.[180] Applied to Sho-Me's use of the fiber-optic cable for commercial telecommunications, the resulting change in market value would be negligible, although nominal damages would still be applicable. The alternative – a temporary trespass – would result in the cost of replacement and rental value until replaced.[181] Applying this measure of damages to an "expanded use" trespass presents the query of what damages exist in terms of justifying rental value in the absence of any physical imposition.

In a case involving a trespass based on an addition of a fiber-optic cable to a REC's poles, in the context of cable company installing the wire on a REC's prescriptive easement, the Missouri Court of Appeals for the Western District approved the difference between fair market value of the property before and after the trespass as "the proper measure of damages."[182] This outcome seems more in line with a traditional trespass remedy than allowing fair market rental value of the use of the fiber-optic cable. The alternative would be equivalent to an unjust enrichment claim – an outcome that, although possibly consistent with the Restatement (Third) of Restitution and Unjust Enrichment, seems to be at odds with the specified remedies mentioned in *Sterbenz*.[183]

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179. MO. REV. STAT. § 523.283.2(2) (2016); *see* discussion *supra* Part IV.

180. Sterbenz v. Kan. City Power & Light Co., 333 S.W.3d 1, 9 (Mo. Ct. App. 2010).

181. *Id.* at 8.

182. Ogg v. Mediacom, L.L.C., 382 S.W.3d 108, 118 (Mo. Ct. App. 2012).

183. *Compare* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 40 (AM. LAW INST. 2011), *with Sterbenz*, 333 S.W.3d at 7–8.

Allowing for rental value – a value equivalent to loss of use of the cable – seems to invite an erroneous result.[184] If Sho-Me had licensed a company vested with the power of eminent domain to add a *new* cable for telecommunication purposes, the result, absent landowner permission, would be a trespass of a permanent nature and condemnation value would be appropriate.

VI. CONCLUSION

Development by utilities as a reaction to improvements in technology is inevitable, but there must be a balance between that development and the rights of landowners. Where an easement transects a landowner's property, the easement holder should carefully implement changes in accordance with the grant of the original easement. *Barfield v. Sho-Me Power Electric Cooperative* demonstrated how the Eighth Circuit interpreted and provided a remedy for a nonphysical "expanded use" of an easement in Missouri.[185]

As developed in this case, the "different type of use" branch of the definition of "expanded use"[186] encompassed a nonphysical expansion of a use that was related to the purpose granted in the original easement language – the use of the fiber-optic cable for internal communications was critical to the purpose of the easement. The result is that trespass liability will apply in excessive use cases of easements where there is no physical difference to the servient estate; this is an outcome perhaps expanding traditional Missouri easement trespass doctrine.

The practical result of this will currently affect few categories of easements because the class of easements where an expanded use is feasible with no physical difference is limited. Those holding the easements impacted by the result will face the cost of bringing the easements into compliance through negotiations or condemnation, and the expense will likely pass to the consumer and delay further expansion of the infrastructure. The outcome may also be influential with the emergence of new technologies and where there is a desire

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184. In June 2018, the Missouri legislature fixed this problem with an addition to section 394.080.1(11) that states, in part:

> If a property owner prevails against a rural electric cooperative or a cooperative subsidiary in a suit in trespass or in inverse condemnation filed after August 28, 2018, the trespass shall be deemed permanent and the actual damages awarded shall be the "fair market value" . . . . In no case filed after August 28, 2018, may evidence of revenues or profits derived, nor the rental value of an assembled communications corridor, be admissible in determining "fair market value." Such actual damages shall be fixed at the time of the initial trespass, shall not be deemed to continue, accumulate, or accrue, and upon payment of damages the defendant shall be granted a permanent easement for the trespass litigated.

H.B. 1880, 99th Gen. Assemb., 2d Sess. (Mo. 2018).

185. 852 F.3d 795, 802–03 (8th Cir. 2017).

186. MO. REV. STAT. § 523.283.2(2) (2016).

to use existing easements in an efficient manner because of the practical difficulties and negative impacts of developing new corridors for similar easements.