

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 1, 2003

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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**Appeal No. 02-1942
STATE OF WISCONSIN**

Cir. Ct. No. 01-CV-67

**IN COURT OF APPEALS
DISTRICT III**

**POLK-BURNETT ELECTRIC COOPERATIVE, A WISCONSIN
COOPERATIVE ASSOCIATION,**

**PLAINTIFF-APPELLANT-CROSS-
RESPONDENT,**

v.

**GARY A. PAVLICEK, ACG, INC., PROFIT SHARING
TRUST, EDR, LTD., AND JOSEPH G. PAVLICEK,**

**DEFENDANTS-RESPONDENTS-CROSS-
APPELLANTS.**

APPEAL and CROSS-APPEAL from judgments of the circuit court for Burnett County: EUGENE D. HARRINGTON, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 HOOVER, P.J. Polk-Burnett Electric Cooperative appeals an amended summary judgment denying it the right to clear-cut land that is subject to an easement the Co-op holds over property owned by Gary Pavlicek and others (collectively, Pavlicek). Pavlicek cross-appeals the part of the original summary judgment allowing the Co-op to cut or trim, regardless of its health, any tree tall enough to strike an electric line in falling. We agree with the trial court that there is a valid easement. However, based on our interpretation of the easement grant, we reject Pavlicek's cross-appeal and disagree with the trial court's interpretation of the Co-op's rights. We also conclude, as detailed below, that a factual issue exists. Thus, we affirm in part, reverse in part, and remand to the trial court for further proceedings.

Background

¶2 In 1945, the Co-op obtained and recorded a perpetual right-of-way easement for an electric line over land now belonging to Pavlicek. The easement grants the Co-op

the right to enter upon the lands ... and to place, construct, operate, repair, maintain, relocate and replace thereon and in or upon all streets, roads or highways on or abutting said lands an electric transmission or distribution line or system, and to cut and trim trees and shrubbery to the extent necessary to keep them clear of said electric line or system and to cut down from time to time all dead, weak, leaning or dangerous trees that are tall enough to strike the wires in falling.

Sometime after acquiring the easement, the Co-op constructed a power line across the property subject to the easement.

¶3 In September 2000, the Co-op's line clearing subcontractor contacted Pavlicek before beginning clearing operations. In subsequent

conversations through November 2000, Pavlicek blocked the Co-op's access to the easement property, threatened to damage the subcontractor's equipment, and threatened legal action against the Co-op.

¶4 In November 2000, Pavlicek sought an injunction to prevent the Co-op's line clearing operations. The court granted a temporary injunction, but dismissed it when the dispute was apparently resolved by stipulation. Pavlicek nonetheless continued to hamper the Co-op's efforts to clear the electrical line. In April 2001, the Co-op sought a declaration of its rights.

¶5 The primary dispute is whether the Co-op can clear-cut a forty-foot swath around the line or whether the cutting should be limited to fifteen feet as Pavlicek insists. There is also a dispute as to whether the Co-op should be allowed to cut healthy trees outside the clear-cut area if those trees would be tall enough to strike the power line in falling.

¶6 The trial court initially granted summary judgment to the Co-op, finding it had a permanent easement, the right to "cut and trim trees and shrubbery to the extent necessary to keep them clear" of the electric lines, the right to "cut down from time to time all dead, weak, leaning or dangerous trees that are tall enough to strike the (electric) wires when falling," and the right to "cut or trim any tree, healthy or otherwise, that is tall enough to strike the power line when falling." The court also enjoined Pavlicek from interfering with the Co-op's exercise of its easement rights.

¶7 Because the trial court did not settle whether a forty-foot or a fifteen-foot clear-cut was appropriate, Pavlicek sought supplementation of the judgment. The result was an amended judgment stating that the Co-op does not have the right to clear-cut the easement, but affirming the rest of the original judgment. The

Co-op appeals the portion of the amended judgment declaring it has no right to clear-cut. Pavlicek cross-appeals the provision of the original judgment allowing the Co-op to cut healthy trees.

Discussion

¶8 We review summary judgment decisions de novo, applying the same methodology as the circuit court. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315-17, 401 N.W.2d 816 (1987). We will affirm a summary judgment only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *M&I First Nat'l Bank v. Episcopal Homes Mgmt.*, 195 Wis. 2d 485, 497, 536 N.W.2d 175 (Ct. App. 1995).

¶9 An easement is an interest in land that is in the possession of another. *Atkinson v. Mentzel*, 211 Wis. 2d 628, 637, 566 N.W.2d 158 (Ct. App. 1997). “An easement creates two distinct property interests: the dominant estate, which enjoys the privileges granted by the easement; and the servient estate, which permits the exercise of those privileges.” *Id.* We look to the instrument creating the easement to ascertain the relative rights of the estates. *Id.* “The use of the easement must be in accordance with and confined to the terms and purposes of the grant.” *Hunter v. McDonald*, 78 Wis. 2d 338, 343, 254 N.W.2d 282 (1977). Construction of the deed to determine the grant’s terms and purpose is a question of law unless an ambiguity requires us to resort to extrinsic evidence. *Atkinson*, 211 Wis. 2d at 638. Whether ambiguity exists is a question of law. *Id.*

Whether the Co-op Can Clear-Cut

¶10 We note initially that it is not always, as a matter of law, reasonably necessary for a power company to clear-cut within its right-of-way to maintain its

line. See *Gallagher v. Grant-Lafayette Elec. Coop.*, 2001 WI App 276, ¶19, 249 Wis. 2d 115, 637 N.W.2d 80. Instead, each case must be evaluated on the language and scope of the easement grant.

¶11 Because the easement was granted by a recorded transfer of the property rights, we examine the document itself rather than the customary use of the land as Pavlicek suggests. See *McDonald*, 78 Wis. 2d at 342-43. Here, the easement grants the Co-op the right to “place, construct, operate, repair, maintain, relocate and replace” the electric line or system. It also grants the Co-op the right to cut and trim the trees to the extent necessary to keep them clear of the system, as well as the right to remove trees tall enough to strike the lines in falling.

¶12 A dominant estate has the right to enjoy its easement fully and without obstruction. *Id.* at 343. Given the number of different uses for which the easement was granted, we conclude that clear-cutting is implied as a matter of law. For instance, it does not appear the Co-op would be able to construct, place, or relocate lines without first clear-cutting a tract of land.

¶13 Keeping trees “clear” of the system does not simply mean preventing the plants from touching the wires. According to WEBSTER’S THIRD NEW INT’L DICTIONARY 419 (unabr. 3rd ed. 1993), “clear” may mean “free from anything that impedes movement or action.” Thus, the electric lines and system must be free from plants, trees, or other items that would not only endanger the lines but would otherwise impede the Co-op’s access to the lines and system that it is permitted to “place, construct, operate, repair, maintain, relocate and replace”

¶14 “Clear” as a verb may mean “to free, rid or empty ... of accumulated, intruding, or encumbering things” *Id.* at 420. Again, this does

not necessarily require the plant life to be touching the lines or system. Rather, the Co-op may clear out brush or other plants that might encumber its access to the line it is charged with maintaining. Although historically less space may have been required for the Co-op to access its lines because of smaller or less equipment, the dominant estate is entitled to vary its mode of enjoying its rights. *See Atkinson*, 211 Wis. 2d at 640. From time to time, it may avail itself of modern inventions if by doing so it can more fully exercise and enjoy the object for which the right-of-way was granted. *Id.*¹

¶15 Moreover, the easement places no restrictions on how the Co-op may “cut and trim” trees. To place a restriction where none exists is contrary to the rules preventing obstruction of an easement. *See McDonald*, 78 Wis. 2d at 343. Clear-cutting is a permissible option for the Co-op under the easement, and the part of the judgment to the contrary is reversed.

Whether the Co-op Can Clear-Cut Forty Feet

¶16 Having determined that clear-cutting is an option available to the Co-op, the next question is whether it can cut a forty-foot swath or must be limited to something smaller, such as the fifteen feet Pavlicek requests.² This is a question of fact for the trial court to decide because the issue is whether the forty-foot

¹ Again, we need not examine the historical uses of the easement because construction in this case is governed by the written grant. We merely point out that newer equipment may necessitate different needs from originally contemplated, but that this is acceptable under the law.

² The sizes are cumulative—the Co-op really argues to cut twenty feet on either side of its line while Pavlicek wants to limit the Co-op to seven-and-one-half feet from either side of the center of the line.

swath is reasonably necessary.³ Contrary to the Co-op's implicit argument, however, the trial court is not required to defer to an electric company's judgment as to what is reasonably necessary. See *Gallagher*, 2001 WI App 276 at ¶20. What is necessary depends on the facts and circumstances of each case. *Id.* at ¶22.

¶17 On remand, we make the following observations. First, as the trial court appreciates, an owner of the servient estate may make all proper use of the land, including making changes, but may not unreasonably interfere with the land's use by the dominant estate. *Figliuzzi v. Carcajou Shooting Club*, 184 Wis. 2d 572, 588, 516 N.W.2d 410 (1994). The servient estate cannot make any use of the property that obstructs the easement or is incompatible with its existence or materially impairs the dominant estate's use and enjoyment of its rights. 28A C.J.S. *Easements* § 165 (1996).

¶18 Additionally, unlike other cases that specify the size of the right-of-way, see, e.g., *McDonald*, 78 Wis. 2d at 344, or otherwise delineate a boundary, there is no such specification here. Rather, the right-of-way appears to extend to the entire plat. This does not, however, grant a right to cut the entire plat. See *Atkinson*, 211 Wis. 2d at 641-42 (when the location of the easement is not defined by the grant, a reasonably convenient way is presumed to be intended, and that right cannot be exercised over the whole of the land).

³ Although the language of the easement allows cutting trees "to the extent necessary," the standard of review has become reasonable necessity. See *Atkinson v. Mentzel*, 211 Wis. 2d 628, 640, 566 N.W.2d 158 (Ct. App. 1997) ("Every easement carries with it by implication the right ... of doing whatever is reasonably necessary for the full enjoyment of the easement itself.") (citation omitted).

¶19 It is therefore appropriate for the trial court to determine (1) what the Co-op plans to do under the easement⁴ and (2) whether its plans are reasonably necessary under the terms of the easement. We stress that the question is not whether something more pleasing to Pavlicek would also qualify as reasonably necessary. If the trial court determines that the Co-op's plan is unreasonable under the easement, it is free to make supplemental findings as to what would be reasonable and delineate the boundaries of the easement. *See id.* at 641-42 (if the parties cannot agree upon a location (or other boundary) the court has the power to affirmatively and specifically determine the easement's location).

Whether the Co-op Can Cut Healthy Trees

¶20 Pavlicek also challenges the trial court's interpretation of the easement as permitting the Co-op to cut healthy trees, outside the ultimately determined clear-cut swath, that are tall enough to strike the line if they were to fall. Pavlicek argues that the easement allows the Co-op to remove only "dead, weak, leaning or dangerous" trees that are tall enough to hit the wire. We, however, agree with the trial court. The word "dangerous" refers to healthy trees that are tall enough to strike the wire. Unhealthy trees are already specified as "dead" and "weak" trees.

¶21 We understand Pavlicek's concern to be that the Co-op will arbitrarily cut trees. While we sympathize with Pavlicek's concern over losing trees not perceived by the servient estate as a threat to the electric line, the land

⁴ We presume the answer to this will be that the Co-op wants to clear-cut on the easement to twenty feet on both sides of its line. This is implied by the record, but there is no explicit finding.

was purchased subject to the easement. The fact that the properly recorded easement grants the Co-op broad rights should have been evident when the land was purchased. Pavlicek's dissatisfaction with the terms of the easement is not grounds for us to rewrite it. *Cf. Hunter v. Keys*, 229 Wis.2d 710, 718, 600 N.W.2d 269 (Ct. App. 1999) (a narrow easement prohibiting the dominant estate from laying utility cables does not redefine the scope of the easement).

¶22 The portion of the amended judgment stating that the Co-op cannot clear-cut is reversed. The remaining portions of both judgments are affirmed. The cause is remanded for a determination of what action is reasonably necessary for the Co-op to fully enjoy its rights in the easement, guided by the instructions in ¶¶17-19 of this opinion.

By the Court.—Judgments affirmed in part; reversed in part and cause remanded with directions. No costs on appeal.

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