IN THE COURT OF APPEALS OF IOWA

No. 0-709 / 09-1918
Filed December 22, 2010

LINDA S. GIBSON,
Respondent-Appellant,

vs.

DAVID E. HATFIELD,
Petitioner-Appellee.

Appeal from the Iowa District Court for Dallas County, Darrell Goodhue, Judge.

Linda Gibson appeals the district court's denial of her request to confirm an easement by implication over the land of her neighbor, David Hatfield. **AFFIRMED.**

James S. Blackburn of Williams, Blackburn and Maharry, P.L.C., Des Moines, for appellant.

George A. LaMarca and Christopher J. Langpaul of LaMarca & Landry, P.C., Des Moines, for appellee.

Considered by Sackett, C.J., and Potterfield and Tabor, JJ.

TABOR, J.

Plaintiff Linda Gibson appeals the district court's denial of her request to confirm an easement by implication over the land of her neighbor, David Hatfield. Because the record reveals nothing about the activities giving rise to beneficial enjoyment of what is now Gibson's land before the property was severed into two parcels, the type of access provided by the road at issue, or the necessity of using the road to attain the beneficial enjoyment before severance, we affirm the district court's finding that no easement by implication exists.

I. Background Facts and Procedures

Gibson and Hatfield own adjoining parcels of property. A steep, wooded bluff runs across the Gibson lot and divides the northern and southern portions of that property. For nearly thirty years, Gibson has used a gravel road that runs across Hatfield's property to access the rear portion of her lot. She alleges that land is inaccessible by a vehicle without the use of the gravel road and asks the court to confirm she has an easement by implication in the gravel lane.

The properties now owned by Gibson and Hatfield were previously owned as one parcel by Harvey Florer, who purchased the unified property in 1950. He separated the properties in 1955 when he sold the five-acre Gibson land (the now-claimed dominant estate), to Bob and Annabelle Smith. In 1967, the Smiths sold the property on contract to Lyman and Lola McKee, who later

sold the property to Jon and Linda Gibson in 1978. In 1995, title was transferred to Linda Gibson.[1]

Florer retained the Hatfield property (the now-claimed servient estate) until 1956, when he sold the land to Cecil and Claire Drew.[2] In 1988, the property was sold to John and Marilyn Scaglione and, in 2007, Marilyn Scaglione sold the land to Hatfield. When Hatfield purchased the property in 2007, he was represented by a realtor who specifically told him there were no easements. Hatfield inspected the property himself, updated the abstract and had an attorney review it, ordered a title opinion, and reviewed the sellers' disclosure statement. None of those activities disclosed an easement. In 2008, Hatfield placed a chain across the roadway, preventing Gibson from using the drive. Both properties are bordered on the south by Maffitt Lake Road and the larger Hatfield property borders the Gibson property on both the north and east.

Gibson submits that her property consists of "three distinct topographical sections." The front section sits atop a bluff. Gibson's home, garage, and storage shed are located there. The middle section consists of a steep, wooded bluff that extends nearly the entire width of the property and comprises approximately one acre of land. The rear section, access to which is at issue in this case, is flat and lies below the wooded bluff. The Gibsons use this portion for gardening and recreational purposes. The Gibsons testified that engaging in "land stewardship" on the rear portion of their property provides them with

[1] The parties transferred title to Linda Gibson for estate planning purposes.

[2] After Cecil Drew passed away, First Interstate Bank held title, as trustee, until 1988, when the property was sold to John and Marilyn Scaglione.

enjoyment and that they need to use motor vehicles when performing some of these activities.

Jon Gibson testified they used the gravel road across the Hatfield property on average of once per week for thirty-one years to access the rear portion of the property. The gravel road begins at Maffitt Lake Road, proceeds through the Hatfield property, turns west after passing the bluff and, Gibson contends, leads to a pair of gateposts on the Gibson-Hatfield property line. Jon Gibson testified that he believes "the road is meant to allow access to the rear portion of the Gibson property through the gateway that exists there." Hatfield argues the road is located entirely on the Hatfield property, never runs into the Gibson property, but instead turns and extends far north providing access to the northern fields on the Hatfield property. Marilyn Scaglione, the prior owner of the Hatfield property, stated the road approaches but never crosses onto the Gibson property.

The road at issue existed in 1955 when Florer divided the unified property by selling the Gibson parcel and retaining the Hatfield land. Florer testified that at the time he separated the unified properties, he told Smith (to whom he sold the Gibson land) that Smith could use the road running across the property Florer retained (the Hatfield parcel) and that Smith did use the road to access the rear section of his property. Florer testified that when he sold the Hatfield property to Drew, he told Drew he "wouldn't sell [the property] to him unless he agreed to let the . . . neighbors use it." Florer testified that Drew let the Smiths, and later the McKees, use the road.

Hatfield testified that both before and after Gibson filed suit against him, he made written and verbal offers to the Gibsons to let them use the road if they would make a reasonable effort to call him first, and that in the event they could not reach him or it was an emergency, they would have access to a key in a lockbox.

Gibson filed a petition for declaratory judgment on January 15, 2009, seeking an easement by implication over the gravel road running across Hatfield's property. The matter was tried in equity on October 29–30, 2009. The district court denied Gibson's request to impose an easement over Hatfield's land and granted Hatfield's counterclaim, declaring Gibson had no legal right to an easement. The court concluded Gibson's preexisting right to use the driveway was "best termed a 'license' rather than an 'easement,'" reasoning the "language used, and the history, suggests usage was permissive only."

The district court assessed Florer's testimony—which the court described as confusing—to resolve whether he intended to create an easement when he conveyed Gibson's land. The court concluded Florer's testimony fell short of establishing the requisite intent. The court noted Florer was a real estate agent when he conveyed the plaintiff's property, that he "undoubtedly knew what it meant to have an easement and how generally to create one," and yet conveyed the plaintiff's land and retained the defendant's property without expressly granting an easement over the defendant's parcel. Moreover, Florer used the term "permission" as to the rights of the parties using the driveway.

The court also noted the prior owner of Hatfield's land, Marilyn Scaglione, thought Gibson used the driveway by permission only and that Gibson acted consistently with such permissive use while the Scagliones owned the property.

Finding no express intent to create an easement, the court addressed the four-prong test for easements by implication. The court concluded the first element was met—there was a separation of title. The court stated there was some evidence the second condition was met—a showing that before the separation took place, the use giving rise to the easement was so long, continued, and obvious, that it was manifestly intended to be permanent—and that no evidence to the contrary was offered. The court found the third condition—that the easement appear continuous rather than temporary—"more problematic," stating the "implication that both [the Scagliones and Gibson] treated the use of the driveway as permissive only flies in the face of a 'continuous rather than temporary use' of the driveway."

The district court found the fourth element dispositive and concluded Gibson failed to satisfy her burden of showing the disputed easement was essential to the beneficial enjoyment of the land, and explained "[t]he driveway access plaintiff wants is simply not necessary to the beneficial use of the property. It simply makes access more convenient."

The court examined prior case law and explained that cases supporting an easement by implication did "not depend so much upon the actual use or existence of the access route" itself, but rather, depended upon the purpose for which the route was being used at the time the ownership was separated. The

court explained that easements by implication were granted where the disputed easement was used "prior to the separation of ownership to provide access . . . or entry to some other building or improvement." That is, "[i]n each case the improvements were in place and an access route was developed prior to the separation of ownership." The court noted that here, the only improvement in the area is a well, and that no evidence demonstrated the well was in the same location when the two parcels were under common ownership. The court concluded: "[a]ll we know is that an unimproved area existed." Moreover, the court found no evidence that any of the beneficial uses Gibson now claims for the north end of the property were present when the separation of title took place.

The court further concluded that the type of access Gibson requested—motor vehicle access—was not essential to Gibson's beneficial enjoyment of the land. The court stated that a three- to four-foot wide path currently exists, which is wide enough for a four-wheeler or an all-terrain vehicle. The court found "not one of [the] designated benefits requires access by motor vehicle" and explained that "if the plaintiff feels that motor vehicle access is desirable, they can remove some of their trees and do some grading and create a drive on their own land. The plaintiff admitted as much."

The court reasoned as follows:

> It would be creating new law to provide that an easement by implication can be created to service a beneficial use which did not exist or which if it existed did not require the type of access which is now being demanded. Every preexisting farm drive or path and entrance could be the basis for an easement after development takes place.

Gibson filed a motion under Iowa Rule of Civil Procedure 1.904, suggesting that the district court consider applying the Restatement (Third) of Property, Servitudes section 2.12 (2000) to the facts at issue. Hatfield resisted the rule 1.904 motion, arguing Gibson had not previously relied on the Restatement. The district court responded to the motion, noting "the restatement section cited is a legal argument that could have been included in the plaintiff's brief. It is not a request for a modified finding." The court went on to find that even under the framework outlined in the Restatement, Gibson could not show an easement by implication.

Gibson appeals, arguing the trial court misunderstood the layout of the alleged easement and erred in making the following factual determinations: a three-to-four foot path existed, which was wide enough for a four-wheeler; the claimed benefits do not require access by motor vehicle; Gibson could remove trees and grade to create her own drive; no evidence that the beneficial uses now claimed existed at the separation of title; Gibson's use is a license rather than an easement; and that the district court erred in failing to consider the equities. Gibson also argues we should adopt the Restatement (Third) of Property and conclude she satisfied the standard set forth therein. Hatfield resists, arguing the district court's factual findings were accurate; evidence does not demonstrate a long, continued use prior to the separation of title; use of the disputed drive is not reasonably necessary for the beneficial enjoyment of the Gibson property; Gibson's use of the drive is best considered permissive rather than an easement; and the equities favor Hatfield. Hatfield also urges us not to

adopt the Restatement (Third) of Property or, in the event that we do, asks us to determine that Gibson does not meet the standard set forth therein.

II. Standard of Review/Error Preservation

Because this case was tried in equity, we engage in de novo review. *Brede v. Koop*, 706 N.W.2d 824, 826 (Iowa 2005). We examine the facts and the law and decide the issues anew. *Id.* We accord weight to the district court's factual findings, but are not bound by them. *Id.* Although this standard of review contemplates review of the entire case, such review is confined to propositions relied upon by each party for reversal or affirmance; "errors or propositions not assigned will not be considered on appeal." *United Properties, Inc., v. Walsmith*, 312 N.W.2d 66, 70 (Iowa Ct. App. 1981).

III. Analysis

A. Easement By Implication

"'[A]n easement by implication exists when the owner of two parcels employs one so as to create a servitude on the other and then transfers one parcel without a specific grant or reservation of easement in the conveyance.'" *Nichols v. City of Evansdale*, 687 N.W.2d 562, 569 (Iowa 2004) (citation omitted). We determine whether the requisite intent to create an easement by implication existed "as of the time of the severance of the unity of ownership." *Bray v. Hardy*, 248 Iowa 794, 801, 82 N.W.2d 671, 675 (1957). When an easement is not expressly conveyed, as was the case here, we analyze four factors to determine whether the parties intended to create an easement.

An easement by implication arises when the following four conditions are present: (1) separation of title; (2) a showing that, before the separation took place, the use giving rise to the easement was so long, continued, and obvious, it was manifest the use was intended to be permanent; (3) it appears the easement is continuous rather than temporary; and (4) the easement is essential to the beneficial enjoyment of the land granted or retained. *Brede*, 706 N.W.2d at 830; *Nichols*, 687 N.W.2d at 569.

The first and second requirements make clear that an easement by implication arises only where the now separate estates were previously owned as one property and where the owner of the unified property used one portion, prior to the separation of title, in a way that continuously benefitted the now-claimed dominant estate. *Wymer v. Dagnillo*, 162 N.W.2d 514, 517 (Iowa 1968) ("That is where the owner of an entire tract uses it so a part [of the property] derives from the other a benefit or advantage of a continuous, permanent and apparent nature, and [then the owner of the unified parcel] sells the part in favor of which such benefit or advantage exists, an easement, being necessary to the reasonable enjoyment of the property granted, will pass to the grantee by implication.").

With respect to the fourth prong, which our supreme court has concluded is the "most essential requirement" for an easement by implication, "[a]n easement is 'essential' when it is reasonably necessary, as distinguished from being merely convenient." *Brede*, 706 N.W.2d at 830; *Nichols*, 687 N.W.2d at 570 ("[T]he most essential requirement for an easement by implication is [that]

the easement would . . . be necessary to the beneficial enjoyment of" the alleged dominant tenement.). That is, "the easement must be reasonably essential to the use and enjoyment of the dominant estate [here, Gibson's estate] as it existed at the time of the conveyance of the servient portion [here, Hatfield's estate]." *Bray*, 248 Iowa at 799, 82 N.W.2d at 674; *Starrett v. Baudler*, 181 Iowa 965, 980, 165 N.W. 216, 220 (1917) (explaining that "[t]he most that can be required" to establish an implied easement "is that it be . . . essential to use and enjoyment of the premises as permanently improved at the time of the conveyance of the servient estate"). This test looks back in time and analyzes whether the easement was essential at the time the property was divided. Also, a remote grantor or grantee may claim an easement by implication so long as the right existed in their predecessor in interest. *Schwob v. Green*, 215 N.W.2d 240, 244 (Iowa 1974).

With respect to the fourth prong, Gibson argues the gardening and recreational activities in which she engages on the rear portion of her land provide her with substantial beneficial enjoyment. She makes the following contention:

> Since the time the unified property was separated in 1955, families before the Gibsons obtained beneficial enjoyment from the use of the rear of the property and every one of those prior owners solely accessed the rear section of their property via the easement road.

She also alleges the district court incorrectly believed the land needed to have an artificial improvement to find beneficial enjoyment.

Because we accord weight to the district court's credibility determinations when assessing witnesses' testimony, and because Florer's testimony was ambiguous with respect to his intent to create an easement or to merely secure a license, we agree with the district court's conclusion that his testimony fell short of establishing an intent to create an easement. *See In re Marriage of Vrban*, 359 N.W.2d 420, 423 (Iowa 1984). We therefore turn to the four-pronged test to ascertain whether an easement by implication exists in this case. Because Gibson did not present evidence establishing the disputed easement was essential to the beneficial enjoyment of the rear property at or before separation, we conclude an easement by implication does not exist. Further, because Gibson's alleged factual errors do not alter the outcome of this analysis, we do not address each charge individually, though each has been considered.

Although we have no doubt that the Gibsons' "land stewardship" activities provide them with personal enjoyment, we must measure the necessity of the easement to beneficial enjoyment at the time of separation. *See Bray*, 248 Iowa at 799, 82 N.W.2d at 674 ("[T]he easement must be reasonably essential to the use and enjoyment of the dominant estate as it existed at the time of the conveyance of the servient portion."); *see also Starrett*, 181 Iowa at 980, 165 N.W. at 220 ("The most that can be required [to establish an implied easement] is that it be . . . essential to use and enjoyment of the premises as permanently improved at the time of the conveyance of the servient estate."). Here, there is no evidence regarding the activities giving rise

to beneficial enjoyment on the rear portion of Gibson's land nor evidence establishing the necessity of the easement prior to the separation or Florer's conveyance of Hatfield's property. Gibson's argument that families have received beneficial enjoyment from the rear of the property *since* the separation cannot cure the lack of evidence regarding the beneficial use and necessity existing *before* the separation.

Assuming, arguendo, easements by implication are available for access to one portion of a contiguous lot, we decline to recognize such an easement here. Absent evidence of the type of use giving rise to beneficial enjoyment on the rear portion before separation of title, and the relative necessity of the easement to the beneficial enjoyment of the rear portion at the time of separation, we cannot imply an easement. We agree with the district court that:

> [I]t would be creating new law to provide that an easement by implication can be created to service a beneficial use which did not exist or which if it existed did not require the type of access which is now being demanded. Every preexisting farm drive or path and entrance could be the basis for an easement after development takes place.

If we were to imply an easement here, without evidence of the beneficial enjoyment, the type of access provided by the road, and the necessity of using the road to attain the beneficial enjoyment existing before separation, we could not be certain we were effectuating the parties' intent at the time of separation or that we were imposing an easement of the same scope that existed at the time of separation.

We need not decide whether access to an improvement is a necessary element of beneficial enjoyment as such a conclusion would not alter the

outcome here. There is no evidence Gibson's well was located on the rear portion of the property before separation of title and there is no evidence of any beneficial enjoyment, unrelated to an artificial improvement, existing before separation. The cases discussed by the district court, which granted easements by implication when artificial improvements existed, all involved a more general showing of the beneficial enjoyment which existed before the separation of title, as well as use of the disputed access to reach the beneficial use. We do not have the same showing here and, therefore, cannot find an easement by implication.

B. Restatement (Third) of Property

Gibson argues we should adopt the approach to easements by implication set forth in the Restatement (Third) of Property: Servitudes section 2.12 at 159-60 (2000). Hatfield resists, arguing Gibson failed to preserve error on this issue. Although we question whether Gibson preserved error on this claim when she raised it for the first time in her rule 1.904 motion, because the district court nevertheless considered her argument and analyzed this case under the Restatement (Third)'s framework in its ruling on her motion, we will review the district court's analysis.

Section 2.12 of the Restatement (Third) of Property: Servitudes addresses situations, like the one at issue here, where an owner of land severs their parcel into two or more parts by conveying a portion of the land to another. The section provides that an implied easement will arise in that situation if one portion of the land was used to benefit the other prior to the conveyance

severing unity of ownership, and if, "at the time of the severance, the parties had reasonable grounds to expect that the conveyance would not terminate the right to continue the prior use." The section then lists the following three factors, relevant to the case at hand, that

> tend to establish that the parties had reasonable grounds to expect that the conveyance would not terminate the right to continue the prior use: (1) the prior use was not merely temporary or casual, and (2) continuance of the prior use was reasonably necessary to enjoyment of the parcel . . . previously benefitted by the use, and (3) existence of the prior use was apparent or known to the parties.

The district court addressed the Restatement (Third) issue by stating:

> [T]he [Restatement (Third)] section cited requires a finding that continuance of the prior use was reasonably necessary to enjoyment of the parcel. The benefits the plaintiff claims for the use of the back of her lot can almost in their entirety be enjoyed without the use of the disputed drive. The drive is merely a convenience but not a reasonable necessity . . . . Furthermore, there is no evidence that the uses of the back of her lot that she is now enjoying were uses existing at the time that the five acres [were] severed from the 40-acre tract. The plaintiff wants the easement so she can use and enjoy the property in a manner that she has developed and in a manner that the evidence did not establish existed prior to the severance of the five-acre parcel.

We agree with the district court's conclusion that application of the Restatement (Third) provision would not compel a different outcome on the facts presented here. The district court was correct in finding that an implied easement did not exist under either our current framework, or the Restatement (Third)'s framework because the record did not reflect the evidence required to establish an implied easement under either approach. This conclusion is supported by an illustration to section 2.12, which suggests the gravel drive at

issue here was not "necessary to the use and enjoyment" of Gibson's land,[3] and by the observation that our supreme court cited the Restatement (Third) provision with approval in *Nichols* while still applying our traditional four-factor test in its implied-easement analysis. *Nichols*, 687 N.W.2d at 569.

C. Attorney Fees & Costs

Gibson requests that Hatfield pay the attorney fees and costs incurred while trying this case, as well as her appellate attorney fees and costs. Hatfield alleges there is no basis for awarding Gibson attorney fees and contends all costs of this appeal should be taxed to Gibson. We find no basis for awarding trial or appellate attorney fees.

"Attorney fee awards are a special kind of compensatory damage." *Hockenberg Equip. Co. v. Hockenberg's Equip. & Supply Co. of Des Moines, Inc.*, 510 N.W.2d 153, 159 (Iowa 1993). "[A] plaintiff seeking common law attorney fees must prove that the culpability of the defendant's conduct exceeds the 'willful and wanton disregard for the rights of another'; such conduct must rise to the level of oppression or connivance to harass or injure another." *Id.* at 159–60. Here, Hatfield's conduct cannot be construed as "harsh, cruel, or

[3] The illustration provides as follows:

> O, the owner of Blackacre and Whiteacre, which are adjacent city lots fronting on a public street, conveys Whiteacre to A. O lives in a house on Blackacre, and prior to the conveyance used Whiteacre for a garden. At the time of the conveyance there was no house on Whiteacre. Prior to the conveyance, O used the drive on Blackacre to haul materials to the garden on Whiteacre. There is no physical impediment to building a driveway giving Whiteacre access to the public street. The conclusion is justified that use of the driveway on Blackacre is not necessary to the use and enjoyment of Whiteacre.

Restatement (Third) of Property: Servitudes § 2.12 cmt. e, illus. 7 at 163 (2000).

tyrannical." *Id.* at 160. Because Hatfield did not engage in "oppressive or conniving behavior," we decline Gibson's request for attorney fees. *Id.*

Costs of this appeal are taxed to Gibson. Iowa Code § 625.1 (2009).

AFFIRMED.