IN THE COURT OF APPEALS OF IOWA

No. 1-984 / 10-1226
Filed February 29, 2012

CRAIG CUTTING and ELLEN CUTTING,
Plaintiffs-Appellees,

vs.

JAY DANSDILL and SUSAN DANSDILL,
Defendants-Appellants.

Appeal from the Iowa District Court for Winneshiek County, Margaret L. Lingreen, Judge.

Jay and Susan Dansdill appeal a district court order granting a prescriptive easement to Craig and Susan Cutting. **AFFIRMED.**

Erik W. Fern of Putnam Law Office, Decorah, for appellants.

Marion L. Beatty of Miller, Pearson, Gloe, Burns, Beatty & Parrish, P.L.C., Decorah, for appellees.

Heard by Vogel, P.J., and Potterfield and Doyle, JJ.

VOGEL, P.J.

Jay and Susan Dansdill appeal a district court order granting a prescriptive easement to Craig and Susan Cutting. Because we find the Cuttings met the requisite elements to establish a prescriptive easement to a field drive that traverses the Dansdills' property and provides ingress and egress to the Cuttings' property, we affirm the district court.

I. Background Facts and Proceedings

In 1982, Craig and Ellen Cutting purchased approximately 128 acres of land in Winneshiek County, Iowa. The Trout River stream runs through the eastern portion of the property. The property also has crop land and a pasture area. In 1988, Jay and Susan Dansdill purchased approximately nineteen acres of land from Jay's great-grandfather, Clem Dinger.

The far northeast corner of the Cuttings' property meets the southwest corner of the Dansdills' property. The Dansdills' property is crossed by 133rd Avenue, which runs from the northwest to the southeast, and cuts off a small, triangular piece of property on the southwest corner of the Dansdills' property from the main acreage. Situated on the small triangular portion of the Dansdills' property is a forty foot by twenty foot "field drive," which the Cuttings, the Iowa Department of Natural Resources (DNR), and the Cuttings' farm tenant, Michael Sersland, as well as others, have used for ingress and egress from 133rd Avenue to the Cuttings' property. The field drive runs southwest from 133rd Avenue, first crossing the Dansdills' property, then property owned by Joel and

Dianne Borowski,[1] and ending in the northeast corner of the Cuttings' property. The field drive has been in existence for decades and is visible on aerial maps dating back to 1940, 1952, and 1964.

From 1982 to 2008, the Cuttings used the field drive to access their land for personal use including camping, swimming, and having campfires. The Cuttings cleared a hillside in 1982, and utilizing the field drive, hauled out 35,000 board feet of trees; they hauled more timber out in a logging operation in 2008. Since 1982, the Cuttings have rented some of their land to Mike Sersland, who accessed the crop land through the field drive for tilling, planting, spraying, and harvesting, as well as tending to cattle Sersland kept from time to time on the Cuttings' land. Others who used the field drive included the local co-op for spraying and other farmers who sub-let from Sersland. From the fall of 1982 or spring of 1983, to 2008, the Cuttings allowed the DNR onto their property through the field drive, to stock the trout stream every week from April to October. The DNR erected a cable gate, equipped with a padlock, at the top of the field drive on 133rd Avenue after it began stocking fish on the Cutting property, but before the Dansdills purchased their property.[2] Craig Cutting received a key to the padlock from the DNR. In 1999 and 2008, the DNR completed habitat improvement projects on the Cuttings' property, spending roughly $30,000 to enhance fishing for those who utilized the stream. The Cuttings also rocked the

[1] The Borowskis agreed to sell the Cuttings an easement for the portion of the field drive that crosses their property, and as of the date of trial had not cashed the $200 check. According to Craig Cutting, the Borowskis "didn't want anything, that that was just neighborly."

[2] The date the cable gate was erected is disputed. At trial, Craig Cutting stated the cable gate was erected in 1982. Jay Dansdill, however, alleged the cable gate was erected in 1990. We agree with the district court the evidence in the record supports the gate was erected no later than 1985, well before the Dansdills purchased their property.

field drive in 1982 for their use and allowed the DNR to rock it in 1999 and 2008 as part of the stream-improvement project.

In September 2008, Jay Dansdill tore out the cable gate previously erected by the DNR and installed his own gate, equipped with his own padlock. On February 9, 2009, the Cuttings filed a petition in equity requesting the district court establish an easement for the field drive located on the triangular section of the Dansdills' property. On November 9, 2009, the Dansdills moved for summary judgment; the Cuttings resisted this motion. The motion for summary judgment came on for hearing on December 22, 2009, and the district court overruled the motion as it found a factual dispute existed as to whether the Cuttings had an easement by prescription across the Dansdills' land.

The matter came on for trial on May 26 and 27, 2010. On June 25, 2010, the district court granted the Cuttings' request for an ingress/egress easement, appurtenant to their real estate.

On July 7, 2010, the Dansdills filed a motion to amend and enlarge the findings and conclusions; the Cuttings resisted. On July 13, 2010, the district court declined to amend its ruling as requested by the Dansdills. The district court did, however, supplement the earlier ruling to provide that the Cuttings, as well as their heirs, assigns, and successors in interest to the easement, would be responsible for the maintenance and repair of the easement. The Dansdills appeal.

II. Standard of Review

Our review of cases in equity is de novo. Iowa R. App. P. 6.907. We examine the facts and the law, and decide the issues anew. *Brede v. Koop*, 706

N.W.2d 824, 826 (Iowa 2005). While we accord weight to the district court's factual findings, they are not binding on us. *Id.*

III. Framing the Issue

We believe some of the difficulty and confusion in this case is derived from the district court's order, which reads:

> Plaintiffs Craig Cutting and Ellen Cutting are awarded an area for ingress/egress easement, which shall be appurtenant to their real estate. . . . *The easement is granted for purposes of ingress and egress for agricultural purposes, and for the Department of Natural Resources of the State of Iowa to stock fish and allow for fishing, and to allow for personal and family access across and through the easement*.
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> . . . .
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> This easement shall run with the land and shall be binding on all heirs, assigns, and successors in interest of the parties' properties.

(Emphasis added). In its order, the district court found the Cuttings had established a prescriptive easement over the Dansdills' property and ordered one easement be legally established—not three separate easements to the Cuttings, the farm tenant, and the DNR. The district court then identified the three general purposes for which the ingress/egress easement could be used. We therefore focus our analysis on whether the use of the field drive satisfied the requisite elements to support the finding of a prescriptive easement.

IV. Prescriptive Easement

A. Law

"An easement by prescription is akin to adverse possession. Yet, instead of acquiring title to the property, the putative easement-holder acquires the right to legally use the property." *Nichols v. City of Evansdale*, 687 N.W.2d 562, 568 (Iowa 2004). Under Iowa law, an easement by prescription is created when a

person uses another's land under a claim of right or color of title, openly, notoriously, continuously, and hostilely for ten years or more. *Johnson v. Kaster*, 637 N.W.2d 174, 178 (Iowa 2001). The Dansdills argue the district court erred in finding the Cuttings had proven the elements of a prescriptive easement and granting such to the Cuttings for ingress and egress on the field drive.

B. Open and Notorious

Under Iowa law, a property owner is required to have "express notice" of any claim of possession. Iowa Code § 564.1. "The notice must either be actual or from known facts of such nature as to impose a duty to make inquiry which would reveal the existence of an easement." *Collins Trust v. Allamakee County Bd. of Supervisors*, 599 N.W.2d 460, 465 (Iowa 1999). The determination of whether the Cuttings complied with the express notice requirements under Iowa Code section 564.1 turns on the particular facts of the case. *Johnson*, 637 N.W.2d at 180.

At trial, the Cuttings testified regarding their family's understanding as to ownership of the field drive from 1982 to 2008. Craig Cutting testified that when he and Ellen purchased the property, the realtor had told them the field drive was their only road access to the lower portion of their land. The Cuttings each testified that the family used the field drive to reach the portions of their property they utilized for camping, swimming, and having campfires. Craig stated that around 1999, the Cuttings' son and a neighbor boy spent a summer living in a camper by the stream, using the field drive as ingress and egress, while working in town. Craig also noted the field drive was used twice when logging the property—in 1982 and 2008. The Cuttings both testified that in 2003, Ellen, a

teacher, allowed her students to perform monthly water quality testing on the stream, and used the field drive to walk from the main road to the stream. Craig testified that he used the field drive to bring cattle onto his property a couple of times—as well as bringing the vet to them, delivering salt blocks, and other related maintenance that goes along with raising cattle. Craig also testified that after deer hunting, deer carcasses had been hauled off his property, via the field drive, three times since 1982.

The Dansdills refuted the Cuttings' testimony with Jay Dansdill claiming he only saw the Cuttings on his property "about twelve times," and by having their two sons, four neighbors, and two friends testify they had never seen the Cuttings on the Dansdills' property.

In addition to personal use of the field drive, the Cuttings rented their cropland to Mike Sersland. At trial, Sersland testified he started farming the Cuttings' property in 1982, and accessing it, with Cuttings' permission, by use of the field drive, ten to twelve times per year. Sersland stated that he never sought permission from Jay for use of the driveway, and the only time he talked with Jay was when the Dansdills first bought the property. Sersland recalled Jay made a "brief reference to some ownership he had of the driveway" but "[h]e didn't say I didn't have any right [to use it], and I went on my way and did—did my normal farming." Moreover, Jay admitted he knew that Sersland was using the field drive to access the Cuttings' property, establishing that such use by Sersland was in fact open and notorious.

Since the spring of 1983, the Cuttings have also worked with the DNR to stock trout in the stream that runs through their property. The stocking occurred

on a weekly basis, from April to October, from the fall of 1982 or spring of 1983, to 2008. The DNR used the field drive that crossed the Dandsdills' property to access the stream located on the Cuttings' property. At trial, Jay Dansdill acknowledged that since the mid-1960s, his great-grandfather used the field drive to access the stream on the Cuttings' property and there had always been "kind of a free-and-easy access to the stream." He also noted he did not have a problem with the fishermen using the drive to access the Cuttings' property.

We agree the Cuttings' use of the field drive, and their granting permission for others to use the drive, was open and notorious such that it provided express notice to the Dansdills.

C. Hostile and Under Claim of Right

"A party claiming an easement by prescription must prove, independent of use, the easement was claimed as a matter of right." *Collins Trust*, 599 N.W.2d at 464.

> [T]he permissive use of land is not considered to be hostile or under a claim of right. Thus, mere use alone, without attendant conduct showing that such use is pursuant to a claim of right or is adverse to the owner, does not establish an easement by prescription.

28A C.J.S. *Easements* § 43, at 243 (2008). Hostility is closely related to claim of right, and "does not impute ill-will, but refers to declarations or acts revealing a claim of exclusive right to the land." *Collins Trust*, 599 N.W.2d at 464.

As part of their work with the DNR, the Cuttings opened their property to the public for fishing. Craig Cutting testified that after he began working the with DNR, but before the Dansdills purchased their property, he requested the DNR erect a gate at the top of the field drive as a measure to keep members of the

public from blocking the driveway when they came to fish, or from pulling down into the driveway. Dennis Ostwinkle of the DNR testified that typically, a landowner received a key to any gate placed on his property, and that Craig received a key for the cable gate erected on the top of the field drive. William Kalishek of the DNR further testified that no one had ever given Jay Dansdill a key to the gate's lock. However, Jay entered into evidence a key that he claimed he requested from the DNR in 1990—the year he believed the gate was erected.

Such conduct illustrates that independent of using the field drive, the Cuttings made a claim of right that was adverse to the Dansdills. The cable gate, while originally erected for purposes relating to the DNR, was a clear manifestation of the Cuttings claim of right. Whether the cable fence was erected before or after the Dansdills purchased their property, and whether or not the Dansdills received a key, the placement of the padlocked gate alone, at the top of the field drive, was a declaration on behalf of the Cuttings that they claimed an exclusive right to the field drive, which was adverse to the Dansdills.

In addition to a claim of right based on their work with the DNR, farm tenant Sersland's conduct was also hostile to the Dansdills. Sersland explained at trial that he had never sought, nor had the Dansdills given him permission, to use the field drive. His testimony further revealed:

> Q: Did [the Dansdills] come to you and try to get you to sign something before you came to court that would say they gave you permission? A: Yeah, I'm—I talked to Jay once, and he—that's when the thing started and he—Yeah, he did call me; and he said he wanted me to sign something but I—nothing doing.
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> Q: That wouldn't have been accurate; would it have? A: Yeah.

> Q: So if I understand your testimony correctly, the only permission you've ever had for use of that driveway was through Craig Cutting? A: That's true.

Jay testified, "I talked to [Sersland] when I first bought the property, told him that it was my property and as long as he didn't do anything there was no problem."

"[P]ermissive use of land is not considered to be hostile or under a claim of right," and therefore precludes a party from attaining a prescriptive easement. *Brede*, 706 N.W.2d at 828. On our review of the record and the testimony above, it is apparent that Sersland received permission to use the field drive from the Cuttings, not from the Dansdills. Therefore, Sersland's open use of the field drive was hostile to the Dansdills.

Finally, independent of use, the Cuttings also maintained the field drive by rocking it on their own in 1982, and allowing the DNR to rock it as part of the stream-improvement projects in 1999 and 2008. Our supreme court has held that the occasional placement of gravel and grading, which simply ensures a road is usable, is not by itself independent use of land to support a prescriptive easement. *See id.* at 829–30 (discussing maintenance as it supports a claim of right). We, however, believe the Cuttings' claim of right is bolstered when the acts of maintaining the field drive are considered concurrently with the open and notorious use, which was hostile to the Dansdills.

We agree the Cuttings proved the easement was claimed as a matter of right, and use of the field drive was hostile to the Dansdills.

D. Continuous and Ten-Year Period

To establish an easement by prescription, use must also be continuous, for at least ten years. *Johnson*, 637 N.W.2d at 178.

The Cuttings testified as to activities they carried out on their property while using the field drive for ingress and egress from 1982 to 2008. While Ellen Cutting testified they likely used the field drive more frequently from 1982 to 1995—at least twenty times per year—and then dropped to six or seven times per year with the exception of 2003, when she was there with her class from school, we recognize that "constant use" is not required for a prescriptive easement. *Id.* at 179. Instead, the claimant's possession "'need only be of a type of possession which would characterize an owner's use.'" *See id.* (quoting 2 C.J.S. *Adverse Possession* § 54, at 727 (1972)). The Cuttings use of the field drive was manifested such that it was consistent with an owner's use. Not only did the Cuttings use the field drive for their personal use, believing they had the authority to do so, they also permitted their farm tenant and the DNR continuous access to their land via the field drive.

Sersland's use of the field drive to access the Cuttings' property for agricultural purposes began in 1982, when Sersland began renting from the Cuttings. As we noted above, the conversation between Jay Dansdill and Sersland, when the Dansdills first purchased their property, did not confer permission on Sersland to use the field drive. Therefore, the prescriptive period, which began in 1982 or at the very latest 1985 as the district court found, was never interrupted and ran through 2008. *See* 28A C.J.S. *Easements* § 38, at 237 (2008) ("Generally, the continuity of the use is interrupted or broken, so as to stop the running of the prescriptive period in favor of claimant of the easement, only where there is a physical interruption of the use or some unequivocal act of ownership on the part of the owner of the servient tenement.").

Finally, the DNR's use of the property, having been given access by the Cuttings, was also continuous for at least the ten-year prescriptive period, as the DNR began stocking fish in the fall of 1982 or spring of 1983, and continued stocking on a weekly basis from April to October, until 2008.

Although the district court found that the prescriptive period began running "at least by" 1985, it could have begun in 1982, when the Cuttings bought the property and began using the drive to clear some of their land. By 1983, the Cuttings had been on their property for at least one year and had been using the field drive for personal, agricultural, and recreational purposes. The prescriptive period was not cut off until 2008 when the Dansdills erected their own gate across the field drive. Nonetheless, the duration of the Cuttings' use of the field drive exceeded the required, ten-year prescriptive period as the district court found.

V. Conclusion

Because the Cuttings used the field drive under a claim of right, openly, notoriously, continuously, and hostilely for ten years or more, the elements for a prescriptive easement were met, and we affirm the district court's order granting a prescriptive easement to the Cuttings.

AFFIRMED.