IN THE COURT OF APPEALS OF IOWA

No. 6-157 / 05-0704
Filed July 12, 2006

CORY WILCOX,
Plaintiff-Appellee,

vs.

CHARLES GRIMM and DEBRA JENSEN,
Defendant-Appellant.

Appeal from the Iowa District Court for Linn County, William L. Thomas, Judge.

Charles Grimm and Debra Jensen appeal the district court's order finding that no easement exists across Cory Wilcox's property and prohibiting them from entering Wilcox's property. **AFFIRMED.**

Gregory Epping of Terpstra, Epping & Willett, Cedar Rapids, for appellant.

Wallace Taylor, Cedar Rapids, for appellee.

Heard by Sackett, C.J., and Huitink and Miller, JJ.

PER CURIAM

I. Background Facts & Proceedings.

At issue is an alleged easement that provides access to five parcels of land located along the north bank of the Wapsipinicon River and east of Dix Road in Linn County, Iowa. Cory Wilcox owns one of the parcels east of Dix Road through which this alleged easement passes. The Wapsipinicon River is the southern border of Wilcox's property. The property to the west of his property is presently owned by Linn County, but leased to Charles Grimm and Debra Jensen. To the north of Wilcox's property is farmland owned by Sally Fruechte. To the east of Wilcox's property is land owned by Grimm and Jensen. Grimm and Jensen use the alleged easement through Wilcox's property to get to their property on the east side of Wilcox's property. Wilcox claims the alleged easement is not an easement and he wants Grimm and Jensen enjoined from using this alleged easement.

For Wilcox to access his property from Dix Road, he turns east onto the alleged easement also referred to as Chesmore Beach Lane. Wilcox must travel on the alleged easement through property owned by Frank McCarty and property leased by Grimm and Jensen. For Grimm and Jensen to access their property on the east side of Wilcox's property, Grimm and Jensen turn east off of Dix Road onto the alleged easement and travel through property owned by Frank McCarty, property they have leased from Linn County, Wilcox's property and, because the alleged easement angles northeast out of Wilcox's property, Grimm and Jensen must traverse property owned by Sally Fruechte before it reaches their property east of Wilcox's property.

Originally all of this property was owned by Dorin and Hazel DeLancey in 1947. In 1955 the DeLanceys began splitting up the property along the river and conveying these parcels to different parties. The first parcel east of Dix Road along the north bank of the river was deeded to Lyle Frank in 1955. The deed referenced an easement. The easement it referenced was not on the property conveyed to Lyle Frank but across the southern portion of the property retained by the DeLanceys and along the north border of Lyle Frank's property. This parcel is now owned by Richard McCarty. He bought it in 1992 from the Armstrong Trust on contract. There is no easement referenced in either the deed or the contract.

The second parcel of property, which is to the east of Richard McCarty's property, was deeded to Inez Frank in August 1955. The legal description in the deed referenced an easement, and this easement was not on the property deeded to Inez Frank but located over and across the property retained by the DeLanceys along the north border of the property deeded to Inez Frank. Richard McCarty also purchased this property from the Armstrong Trust in August of 1992. McCarty sold this property to Linn County in January 2002, and Grimm and Jensen began leasing this property in March of 2002. There is no easement referenced in any contract or deed subsequent to the deed from the DeLanceys.

The third parcel is the property owned by Wilcox. This property was sold by the DeLanceys to Marvin and Matilda Kuba in November 1955. The deed referenced an easement. The described easement was not on the property conveyed to the Kubas, but over and across the property retained by the DeLanceys immediately to the north of the property deeded to the Kubas. The

Kubas conveyed the property to Connie and Judith Peal in February of 1992. The Peals conveyed the property to Wilcox in August 1995. The abstract of title given by the Peals to Wilcox does not include an easement in the chain of title. The easement is also not included in the title opinion prepared by Wilcox's attorney. In 1995 when Wilcox bought the property the only access to his lot was a "grass path" from Dix Road. This "grass path" is the alleged easement at issue. To use this "grass path," Wilcox had to go through a gate which extended across the "path." The gate had a chain of locks on it. The gate itself is actually on the property leased by Grimm and Jensen. Wilcox received a key from the Peals to one of the locks on the gate when he purchased the property.

The fourth parcel of land is owned by Grimm and Jensen and located to the east of Wilcox's property. This parcel of land extends further north than that of Wilcox's property. This parcel was deeded by the DeLanceys to Robert and Gladys Jensen (no relation to the defendant Debra Jensen) in November of 1958. The deed also referenced an easement not on the property but across the property retained by the DeLanceys. Robert Jensen died in 1955, and Gladys Jensen died in May of 1999. Ray Fountain inherited the property and sold it to Grimm and Jensen in June of 2000. Grimm and Jensen began using their land in 2000 and accessed it by using the "grass path" from Dix Road across Wilcox's property. Grimm and Jensen also had a key to a lock on the gate. In 2000, 2001, and 2002 Grimm and Jensen continued to use the alleged easement, which became more than a "grass path."

The fifth parcel is the land retained by the DeLanceys north of all of the property deeded. The DeLanceys sold this land to Roger and Patricia Bach, who

in turn sold it to Michael Ohsman. Ohsman sold it to Sally Fruechte in September of 1987. The conveyance by the DeLanceys and subsequent conveyances of this property were by warranty deeds, and they were silent as to any easement rights in favor of the property along the river.

On November 12, 2003, Wilcox filed his petition seeking to prohibit Grimm and Jensen from crossing his property to access their property and to recover damages for their trespass on his land. By this time, Wilcox had obtained a survey. Grimm and Jensen filed an answer on December 10, 2003, and on December 12, 2003 sought dismissal of his claim. On April 13, 2004, Grimm and Jensen filed an application to amend their answer to assert a claim to establish easement rights over Wilcox's property.

On January 10 and 11, 2005, the trial court equitably tried the claim for injunctive relief and establishment of an easement. The court found for Wilcox on his claim of express easement and entered an injunction prohibiting access over the Wilcox property. Grimm and Jensen brought a motion to enlarge and amend on January 28, 2005, which the trial court overruled. On March 28-31, 2005, Wilcox's claim for damages was heard by a jury. No damages were awarded, and the court entered judgment in favor of Grimm and Jensen. Grimm and Jensen appeal the equitable issues, arguing as follows:

I. Express easement was extinguished by adverse possession.
II. An easement by implication was established to access the eastern most parcel.
III. An easement by prescription was established over the Wilcox property.

II. Standard of Review.

This case is in equity. As such, our review is de novo. *Brede v. Koop*, 706 N.W.2d 824, 826 (Iowa 2005). Accordingly, we examine "the facts as well as the law." *Id*. Although the district court's findings of fact are given weight, they are not binding. *Id*.

III. Merits.

"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.'" *Brede*, 706 N.W.2d at 828 (quoting *Johnson v. Kaster*, 637 N.W.2d 174, 178 (Iowa 2001)). The record shows that Grimm and Jensen have used the alleged easement since they purchased the property in June 2000. Grimm and Jensen have used the easement continuously and openly since that time. Even though this time period does not equal ten years, there does not have to be constant or exclusive use of the easement for the adverse possession to be continuous. *Johnson*, 637 N.W.2d at 179. The record shows the alleged easement had been used by the Nemecks and the Koniceks to access the most easterly parcel at different periods after 1970. Donald Wayne Nemeck testified that he used the property at least a couple of weekends a month beginning in 1986. He testified that he maintained the lane by mowing the length of it from the gate just west of the Wilcox property to the easterly end. He testified that his family sold the property to Louie Konicek in April 1991. However, the record is void of evidence of how frequently the Koniceks used the lane.

Even accepting this evidence as a showing that there was continuous use of the alleged easement, there must also be evidence that the use was hostile for

an easement by prescription to exist. *Brede*, 706 N.W.2d at 828. "Hostility refers to declarations or acts that show the declarant or actor claims a right to use the land." *Id*. The servient owner must have had "express notice of the claim of right, not just the use of the land." *Id*. (citing *Phillips v. Griffin*, 250 Iowa 1350, 1355, 98 N.W.2d 822, 825 (1959)). "This notice may be actual or established by 'known facts of such [a] nature as to impose a duty to make inquiry which would reveal [the] existence of an easement.'" *Id*. (citing *Anderson v. Yearous*, 249 N.W.2d 855, 861 (Iowa 1977)). "A claim of right must be shown by evidence independent of the use of the easement." *Id*. (citing *Collins Trust v. Allamakee County Bd. of Supervisors*, 599 N.W.2d 460, 464 (Iowa 1999); *Simonsen v. Todd*, 261 Iowa 485, 496, 154 N.W.2d 730, 736 (1967)). "Permissive use of land is not considered to be hostile or under a claim of right." *Id*. "Continued use does not, by mere lapse of time, become hostile or adverse." *Id*. (quoting *Mensch v. Netty*, 408 N.W.2d 383, 387 (Iowa 1987)).

Nothing in the record shows that the use of this alleged easement was hostile for ten years. There was merely use of the alleged easement by Grimm and Jensen. There was no express notice given to Wilcox that Grimm and Jensen had a right to use the land. Moreover, there is no evidence that indicates Louie Konicek's use of the alleged easement was hostile. Accordingly, the trial court was correct in finding that Grimm and Jensen did not have an easement by prescription.

Grimm and Jensen also argue that they have an easement by implication. "An easement by implication is one which the law imposes by inferring the parties to a transaction intended that result, although they did not express it." *Brede*,

706 N.W.2d 824, 830 (Iowa 2005) (quoting *Schwob v. Green*, 215 N.W.2d 240, 242-43 (Iowa 1974)). An easement by implication requires the four following conditions:

> (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 that it was manifest it was intended to be permanent; and (3) it must appear that the easement is continuous rather than temporary, and (4) that it is essential to the beneficial enjoyment of the land granted or retained.

Brede, 706 N.W.2d at 830 (quoting *Bray v. Hardy*, 248 Iowa 794, 797, 82 N.W.2d 671, 673 (1957)). To be an "essential" easement, it must be reasonably necessary rather than merely convenient. *Id*. (quoting *Bray*, 248 Iowa at 799, 82 N.W.2d at 674). At the time of the severance of title, there must have been an "intent to grant or reserve an easement by implication." *Id*. (citing *Bray*, 248 Iowa at 801, 82 N.W.2d at 675).

The evidence shows that at the time the parcels were separated and deeded, an express easement was given in the south edge of the remaining parcel retained by the DeLanceys. Therefore, the alleged easement is not essential to the beneficial enjoyment of the land, and there is no easement by implication.

Grimm and Jensen first argue that the easement expressed in the deed which passes through the property currently owned by Sally Fruechte has been lost by adverse possession because it was never used as an easement. To establish ownership by adverse possession, the party claiming ownership must prove hostile, actual, open, exclusive and continuous possession, under claim of right or color of title, for at least ten years. Iowa Code § 614.1(5) (2003); *I-80*

Assocs., Inc. v. Chicago, Rock Island & Pacific R.R. Co., 224 N.W.2d 8, 10 (Iowa 1974). To show adverse possession, the possession must be "such open dominion as ordinarily marks the conduct of owners in general in holding, managing, and caring for property of like nature and condition." *I-80 Assocs., Inc*., 224 N.W.2d at 10. "The intention to claim adversely may be manifested either by words or by acts." *Id*. at 11. Using the property open and notoriously to the exclusion of the true owner is the "ordinary mode of asserting a claim of title." *Id*.

Sally Fruechte and her family bought the property in 1987 and have always believed they owned the alleged easement. Fruechte maintains that she was told that she owns the alleged easement and a portion on the south side of the alleged easement when she and her family purchased the property. She admits that she was told that she had to grant use of the south boundary of her land for access to the cabins along the river. She acknowledges the existence of the grant of the easement for as long as she and her husband have owned the property. Her acknowledgement of the existence of the easement defeats the proposition that the express easement is lost by adverse possession. Therefore, for Grimm's and Jensen's theory that the express easement no longer exists to succeed, they must show it was abandoned. *Polk County v. Brown*, 260 Iowa 301, 306, 149 N.W.2d 314, 316 (1967). However, they are unable to show that the express easement was abandoned because there is no evidence that Wilcox intended to abandon the easement. Merely failing to use an express easement does not equal abandonment of that easement. *Krogh v. C*lark, 213 N.W.2d 503, 505 (Iowa 1973) (quoting *Harrington v. Kessler*, 247 Iowa 1106, 1109, 77 N.W.2d

633, 634 (1956)). Abandonment must be accompanied by other evidence of intent to abandon. *Allamakee Co. v. Collins Trust*, 599 N.W.2d 448, 452 (Iowa 1999). Even if the property is put to a use inconsistent with that of an easement for the full statutory period of time required by adverse possession, the easement is not abandoned unless it appears that the owner had an intention to abandon the easement. *Harrington*, 247 Iowa at 1109, 77 N.W.2d at 634. No evidence of that intention exists in the record. Consequently, we affirm the district court's ruling.

AFFIRMED.