IN THE COURT OF APPEALS OF IOWA

No. 6-380 / 05-1488
Filed October 11, 2006

DONALD E. BOWN and GINA K. OTTE,
Plaintiffs-Appellants,

vs.

CITY OF STATE CENTER, NACIN PROPERTIES, L.L.C., ALAN J. NACIN, and PARTNER COMMUNICATIONS COOPERATIVE ,
Defendants-Appellees.

Appeal from the Iowa District Court for Marshall County, Michael J. Moon, Judge.

Plaintiffs appeal an adverse ruling from the district court on various claims related to adjacent parcels of land. **AFFIRMED.**

Reyne L. See and Bethany J. Currie of Johnson, Sudenga, Latham, Peglow & O'Hare, P.L.C., Marshalltown, for appellants.

Robert W. Goodwin of Goodwin Law Office, P.C., Ames, for appellees Nacin Properties, L.L.C. and Alan J. Nacin.

Heard by Huitink, P.J., Mahan, J., and Hendrickson, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2005).

MAHAN, J.

Donald E. Bown and Gina K. Otte[1] appeal from an adverse ruling by the district court in a property dispute. We affirm.

I. Background Facts and Proceedings

Defendant Nacin Properties, L.L.C.[2] purchased property in State Center, Iowa, from Norris and Cecile Baie on May 28, 2002. The Baies had owned the property and operated a salvage yard on it since 1991. The property housed a creamery from 1891 to 1991.[3] Nacin purchased the property to develop a housing subdivision. In July 2002 Nacin constructed a fence around the property, at the insistence of its liability insurance carrier, and began clearing the premises.

The Bowns purchased the property to the north of and adjacent to Nacin's property from the Sokol estate on October 21, 2003. The property had been the Sokol family home for more than fifty years.

This case involves a dispute over two separate parcels of land: a twenty-three-foot-wide strip ("twenty-three-foot strip") running east and west, located directly south of the Bowns' property;[4] and a forty-four-foot-wide strip ("forty-four-

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[1] Bown and Otte were married during the pendency of this case; therefore, we will refer to them collectively as the Bowns.

[2] Alan J. Nacin is the manager and sole member of Nacin Properties, L.L.C. We will refer to Nacin and Nacin Properties collectively as Nacin.

[3] The State Center Farmer's Creamery Association, later called the State Center Farmer's Cooperative Creamery Association, owned the property until 1980, when Mid-American Dairymen, Inc. purchased it.

[4] In a 1909 deed, a predecessor in title to the Bowns conveyed to the creamery the twenty-three-foot strip, with the following reservation of right: "as long as said strip is used as a driveway first party reserves the right to use the same also for that purpose."

foot strip"), also running east and west, located directly south of the twenty-three-foot strip.[5] The forty-four-foot strip includes a private road that was the access to the creamery, and later the salvage yard, from a city street directly west of the property. The twenty-three-foot strip separates and lies between the forty-four-foot strip and the property purchased by the Bowns. To access the garage located on their property,[6] the Sokols used the private road along the forty-four-foot strip and crossed the twenty-three-foot strip. The sole means of access to the garage was over these two strips of land.

When the Bowns purchased their property, Nacin had already installed the fence around the salvage yard. The fence blocked all access to Nacin's property from the garage on the Sokol property. The real estate agents involved in the transaction between the Sokol estate and the Bowns were unsure whether there would ultimately be access to the garage on the Sokol property over Nacin's property. The counter offer by the Sokol estate to the Bowns stated, "Seller reiterates the obsolete driveway situation." The price of the property was discounted because the estate did not want to pursue litigation with Nacin over the driveway.

The City approved a subdivision plat of the Nacin property in May 2004. A four-plex townhome has been built on Lot 1 of the subdivision, which includes the

[5] The forty-four-foot-wide strip is identified in an 1891 warranty deed to the creamery as being "carried with this conveyance only as a right of way for street purposes for use of contracting parties, their heirs, and assigns."

[6] The garage faces south. A driveway runs north and south, directly north of the twenty-three-foot strip.

twenty-three-foot strip and forty-four-foot strip. Two other four-plex townhomes have been built on the Nacin property.

The Bowns filed a seven-count petition in May 2004, naming Nacin, Partner Communications Cooperative, and the City of State Center as defendants.[7] In pertinent part, the petition (1) sought to quiet title in the twenty-three-foot strip against Nacin, (2) sought a declaratory judgment that the Bowns have easement rights against Nacin over the twenty-three-foot strip, (3) sought a declaratory judgment that the Bowns have easement rights against Nacin over the forty-four-foot strip, and (4) alleged Nacin trespassed on the twenty-three-foot strip and another small parcel to the north. Nacin filed an answer, raising affirmative defenses, and a counterclaim. The district court granted the City's motion for summary judgment,[8] but denied motions for summary judgment filed by Nacin and the Bowns, and the matter proceeded to trial.

Following a bench trial, the district court dismissed the petition. The Bowns appeal, arguing the district court erred in determining (1) the Bowns do

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[7] Partner Communications Cooperative and the City were later dismissed by the Bowns and are not parties to this appeal.

[8] Count II of the Bowns' petition asked the court to declare the forty-four-foot strip a public street and order the City to comply with Iowa Code chapter 306 and pay the plaintiffs for damages. In the alternative, the Bowns asked the court to declare that the City's approval of Nacin's subdivision plat was illegal and void. The summary judgment ruling addressed only the Bowns' allegations related to the public street issue. In its ruling following the bench trial, the court concluded the Bowns' claim that the City's approval of the subdivision plat was illegal and void was barred due to the Bowns' failure to file a writ of certiorari within thirty days of the city council's approval of the subdivision. On appeal, the Bowns contend the district court's conclusion was in error, arguing the issue was moot because the City had been dismissed from the case. Although it appears from the court's ruling that the Bowns raised the issue of the legality of the subdivision at trial, we agree the issue is moot, and will not address it further in this opinion.

not have title to the twenty-three-foot strip under a theory of boundary by acquiescence; (2) the Bowns do not have an easement by grant or, alternatively, an easement by prescription, to the twenty-three-foot strip; (3) Iowa Code sections 614.17 and 614.17A bar the Bowns' easement claims; (4) the Bowns do not have an easement by grant over the forty-four-foot strip; (5) Nacin did not trespass upon the Bowns' property; and (6) the Bowns are not entitled to punitive damages and common law attorney fees.[9]

II. Standard of Review

The district court tried this matter in equity. Therefore, our review is de novo. Iowa R. App. P. 6.4; *see also Brede v. Koop*, 706 N.W.2d 824, 826 (Iowa 2005).[10] We examine the facts and the law and decide the issues anew. *Brede*, 706 N.W.2d at 826. We accord weight to the district court's factual findings, but they are not binding. *Id.*

III. Boundary by Acquiescence

Iowa Code section 650.14 (2003) permits a suit to establish title by acquiescence:

> If it is found that the boundaries and corners alleged to have been recognized and acquiesced in for ten years have been so recognized and acquiesced in, such recognized boundaries and corners shall be permanently established.

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[9] We note the Bowns' failure to state how each issue raised on appeal was preserved for our review, as required by our rules of appellate procedure. *See* Iowa R. App. P. 6.14(1)(*f*).

[10] We recognize that we generally review claims seeking to establish a boundary by acquiescence pursuant to Iowa Code section 650.14 on assigned errors of law. *See Ollinger v. Bennett*, 562 N.W.2d 167, 170 (Iowa 1997). Because the present action was tried in equity, however, our review on appeal is de novo. *See Sille v. Shaffer*, 297 N.W.2d 379, 380-81 (Iowa 1980) (reviewing de novo a section 650.14 proceeding tried by the court in equity).

See also Iowa Code § 650.6 (providing that either party may "put in issue the fact that certain alleged boundaries or corners are the true ones, or such have been recognized and acquiesced in by the parties or their grantors for a period of ten consecutive years . . . .").

> We have defined "acquiescence" under section 650.14 as
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> > the mutual recognition by two adjoining landowners for ten years or more that a line, definitely marked by fence or in some manner, is the dividing line between them. Acquiescence exists when both parties acknowledge and treat the line as the boundary. When the acquiescence persists for ten years the line becomes the true boundary even though a survey may show otherwise and even though neither party intended to claim more than called for by his deed.

Sille v. Shaffer, 297 N.W.2d 379, 381 (Iowa 1980). "Knowledge by both parties is a condition precedent for the existence of acquiescence." *Ashton v. Burken*, 403 N.W.2d 52, 55 (Iowa Ct. App. 1987). Each of the adjoining landowners or their grantors "must have knowledge of and consented to the asserted property line as the boundary line." *Tewes v. Pine Lane Farms, Inc.*, 522 N.W.2d 801, 806 (Iowa 1994). Knowledge may be shown by conduct, words, or even silence. *See Harvey v. Platter*, 495 N.W.2d 350, 352 (Iowa Ct. App. 1992) ("Acquiescence may be inferred from the silence or inaction of one party who knows of the boundary line claimed by the other and fails to take steps to dispute it for the ten-year period."). However, "there must . . . be something in the record to show that the party, charged with acquiescence, consented to the act of the other in establishing the line and assuming possession." *Ashton*, 403 N.W.2d at 55 (citation omitted).

"Determining whether acquiescence has been established requires an inquiry into the factual circumstances of each case." *Ollinger v. Bennett*, 562 N.W.2d 167, 171 (Iowa 1997). The party claiming a boundary line other than the legal description as disclosed by survey has the burden to establish mutual acquiescence by clear proof. *Ashton*, 403 N.W.2d at 55.

Essentially, the Bowns argue that the Sokols' use and maintenance of the twenty-three-foot strip for more than fifty years establishes a boundary by acquiescence. We disagree.

Acquiescense requires "more than a mere establishment of a line by one party, and the taking of possession by him." *Id.* (citation omitted). The evidence presented at trial shows nothing more than the fact that the Sokols mowed and maintained the twenty-three-foot strip. Mowing the grass is not "definitely marking" a line within the meaning of section 650.14. *Cf., e.g., Ollinger*, 562 N.W.2d at 171 (holding fence and tree line established boundaries by acquiescence); *Drake v. Claar*, 339 N.W.2d 844, 847 (Iowa Ct. App. 1983) (holding parties acquiesced in fence as a boundary line); *Dart v. Thompson*, 261 Iowa 237, 243, 154 N.W.2d 82, 85 (1967) (holding cement block wall established boundary by acquiescence). Moreover, lilac bushes, trees and other shrubs planted by the Sokols along the original survey boundary line, along with testimony from numerous witnesses at trial, support the conclusion that the Sokols never claimed the boundary should be at any other location.

Even if the Sokols had "definitively marked" a boundary other than that of the original survey boundary, the Bowns failed to present clear evidence that the creamery, Baie, or Nacin had "knowledge of or consented to the asserted

property line as the boundary line." *Tewes*, 522 N.W.2d at 806. The Bowns argue the creamery's failure to object to the Sokols' use of the twenty-three-foot strip implies consent. There is nothing in the record, however, to show the creamery consented to the Sokols' establishment of a line and assuming possession. *See Ashton*, 403 N.W.2d at 55. To the contrary, the creamery filed an affidavit of possession in 1980, stating it had maintained "complete actual and sole possession" of the twenty-three-foot strip since at least 1940.

The evidence clearly demonstrates Baie and Nacin did not have knowledge of or consent to a boundary other than the original surveyed boundary line. Numerous witnesses testified Baie placed salvage and vehicles on the twenty-three-foot strip. Sokol complained to Baie and the city council about the salvage and vehicles placed in close proximity to his house. On more than one occasion, Baie told Sokol he had no right to complain because he (Baie) could place salvage in front of the drive and block off access to the garage any time he wanted. When Nacin purchased the property from Baie, Baie advised Nacin that the Sokols' use of the lane across the salvage yard was permissive and could be revoked at any time. Nacin installed a fence around the salvage yard, including the twenty-three-foot strip, shortly after purchasing the property.

We affirm the district court's conclusion that the Bowns failed to present clear evidence of a boundary by acquiescence pursuant to section 650.14.

IV. Easement – Twenty-Three-Foot Strip

An easement is

> a liberty, privilege, or advantage in land without profit, existing distinct from ownership of the soil, and because it is a permanent

> interest in another's land, with a right to enter at all times and enjoy it, it must be founded upon a grant by writing or upon prescription.

Maddox v. Katzman, 332 N.W.2d 347, 350 (Iowa Ct. App. 1982). In a deed recorded February 28, 1909, Lousiana and H.H. Center, predecessors in title to the Bowns, conveyed the twenty-three-foot strip to the creamery with the following reservation of right: "As long as said strip is used as a driveway first party [Center] reserves the right to use the same also for that purpose." The Bowns contend this language created an easement by grant over the twenty-three-foot strip. In the alternative, the Bowns argue an easement by prescription exists.

Nacin argues the easement by grant over the twenty-three-foot strip has been extinguished by the terms of the original grant, and the Bowns have no easement by prescription. Nacin further argues any claim to the twenty-three foot-strip arising from the 1909 deed is barred by the statute of limitations in Iowa Code sections 614.17 and 614.17A.

A. Easement by Grant

In the construction of easement grants, we apply the same rule of construction as in the construction of contracts: "the intention of the parties must control; and except in cases of ambiguity, this is determined by what the contract itself says." *Wiegmann v. Baier*, 203 N.W.2d 204, 208 (Iowa 1972). We construe reservations in a conveyance most strongly against the grantor. *Mikesh v. Peters*, 284 N.W.2d 215, 218 (Iowa 1979).

The district court concluded the provision of the 1909 deed was a self-extinguishing reservation of right, contingent on the creamery, or its assigns or

successors, continuing to use the twenty-three foot strip as a driveway. We agree with the court's interpretation. The language is unambiguous; therefore, we need not look beyond the terms of the grant. The continued use of the strip as a driveway depended upon its continued use as a driveway by the creamery and its successors in interest.[11] Once the strip was no longer used as a driveway, the easement was extinguished. *See* 25 Am. Jur. 2d *Easements and Licenses* § 97, at 595 (2004) ("Where an easement has been created until the happening of a specific event or contingency, the easement will terminate ipso facto on the happening of the specified event or contingency."). We affirm the district court's ruling on this issue.

B. Easement by Prescription

An easement by prescription is similar to the concept of adverse possession; it 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 (citations omitted). The facts relied upon to establish a prescriptive easement "cannot be presumed"; they "must be strictly proved." *Id.* (citations omitted).

The "hostility" and "claim of right" requirements are closely related. *Id.* "Hostility refers to declarations or acts that show the declarant or actor claims a right to use the land." *Id.* A claim of right requires evidence showing an easement is claimed as a right. *Id.* Mere use of land does not, by lapse of time,

[11] As the district court noted, an unconditional reservation of right would have stated, "The first party reserves the right to use said strip as a driveway." A conditional reservation whereby the *grantor* determines when the use ceases would have stated, "As long as first party uses said strip as a driveway it will be used for that purpose."

ripen into an easement. *Johnson v. Kaster*, 637 N.W.2d 174, 178 (Iowa 2001). A party claiming an easement by prescription must prove, independent of use, the easement was claimed as a matter of right. Iowa Code § 564.1; *Collins Trust v. Allamakee County Bd. of Supervisors*, 599 N.W.2d 460, 464 (Iowa 1999).

Our appellate courts have "relaxed the traditional requirements for a prescriptive easement 'in those situations in which the party claiming the easement has expended substantial amounts of labor or money in reliance upon the servient owner's consent or his oral agreement to the use.'" *Brede*, 706 N.W.2d at 828 (quoting *Simonsen v. Todd*, 261 Iowa 485, 489, 154 N.W.2d 730, 733 (1967)). Under this exception, an easement by prescription may arise

> in those instances in which the original entry upon the lands of another is under an oral agreement or express consent of the servient owner and the party claiming the easement expends substantial money or labor to promote the claimed use in reliance upon the consent or as consideration for the agreement.

Id. (quoting *Simonsen*, 261 Iowa at 495, 154 N.W.2d at 736).

The Bowns contend they used the twenty-three-foot strip under a claim of right because their predecessors in title "actually occupied, used and maintained the entire twenty-three foot parcel for more than fifty years." The Bowns further argue Sokols' expenditure of money and labor to maintain and improve the driveway and the entire twenty-three-foot strip evidence hostile use of the land.

As mentioned, mere use of land does not ripen into an easement after a lapse of time. *Johnson*, 637 N.W.2d at 178. The Bowns offer no further proof, independent of use, that the easement was claimed as a matter of right. Therefore, the Bowns must prove hostility and claim of right by the expenditure of "substantial amounts of labor or money in reliance upon the servient owner's

consent or his oral agreement to the use." *Brede*, 706 N.W.2d at 828. We find no evidence that the Bowns or their predecessors expended substantial amounts of labor or money to maintain and improve the twenty-three foot strip. In fact, it appears the Sokols' use of the twenty-three-foot strip saved them from expending substantial amounts of labor and money on constructing a driveway around the east and north side of the house to the public street on the west side of the property, as originally planned.

The Bowns have failed to prove hostility and claim of right. Accordingly, we conclude they have failed to establish a prescriptive easement, and we need not address the remaining requirements of an easement by prescription.

C. Iowa Code sections 614.17 and 614.17A

The district court concluded the Bowns' claims regarding the twenty-three-foot strip arising from the 1909 deed were further barred by the statute of limitations in Iowa Code sections 614.17 and 614.17A (barring claims against a record titleholder in the chain of title in possession of the property). Because we have concluded the Bowns failed to establish their claims of an easement by grant or by prescription, we need not address this issue.

V. Easement - Forty-Four-Foot Strip

The Bowns claim of an easement over the forty-four-foot strip is based solely on a provision in an 1891 deed from the Bowns' predecessor in title to the creamery, which provides the forty-four-foot strip is "carried with this conveyance only as a right of way for street purposes for use of contracting parties, their

heirs, and assigns."[12] The forty-four-foot strip is parallel with and directly south of the twenty-three-foot strip.

We have determined the Bowns have no right to use the twenty-three-foot strip. Without the twenty-three-foot strip, the Bowns' property connects to the forty-four-foot strip only by a very small tip, which both parties agree is too small for vehicular traffic. Thus, the purpose for which the easement was created—a right of way for street purposes—has become impossible. A "grant of an easement for particular purposes having been made, the right thereto terminates as soon as the purposes for which granted cease to exist or are abandoned or are impossible." *Chicago & N.W. Ry. Co. v. Sioux City Stockyards Co.*, 176 Iowa 659, 668, 158 N.W. 769, 772 (1916); *see also* 25 Am. Jur. 2d *Easements and Licenses* § 96, at 594 (2004). Accordingly, we conclude the express easement granted in the 1891 deed has terminated.

VI. Trespass

The Bowns claim Nacin trespassed on their property by erecting a fence encroaching on a parcel of their property described as Lot 3 of 1 of 1 of 7 ("the lot"). This small triangular-shaped parcel is adjacent to and directly east of the twenty-three-foot strip.

"The gist of a claim for trespass on the land is the wrongful interference with one's possessory rights in property." *Robert's River Rides, Inc. v. Steamboat Dev. Corp.*, 520 N.W.2d 294, 301 (Iowa 1994), *abrogated on other*

[12] The issue of title to the forty-four-foot strip is the subject of litigation in a separate case pending in Marshall County. Nacin's brief asserts the creamery trustees conveyed title to Nacin in July 2005, after trial in this case.

grounds by Barreca v. Nickolas, 683 N.W.2d 111 (Iowa 2004). A party is subject to liability to another for trespass if that party intentionally (a) enters land in possession of the other, or (b) remains on the land. *Id.* (citing Restatement (Second) of Torts § 158 (1964)). A person who is "in possession" of land for purposes of a trespass claim is defined as one who

> (a) is in occupancy of land with intent to control it, or
> (b) has been but no longer is in occupancy of land with intent to control it, if, after he has ceased his occupancy without abandoning the land, no other person has obtained possession as stated in Clause (a), or
> (c) has the right as against all persons to immediate occupancy of land, if not other person is in possession as stated in Clauses (a) and (b).

Id. (quoting Restatement (Second) Torts § 157). Possession may be actual or constructive. *Id.* Actual possession "'may be shown by [public] acts of ownership or dominion.'" *Id.* (quoting 75 Am. Jur. 2d *Trespass* § 38, at 36-37 (1991)). "If defendant is in actual possession, constructive possession is excluded." *Id.* (citation omitted).

At trial, Nacin testified there was salvage on the lot when he purchased Baie's property in 2002. The Sokols apparently acquiesced in or gave permission to Baie's placement of salvage on the lot. Thus, the Sokols were no longer "in possession" of the lot when Nacin purchased the Baie property and placed a fence on the north side of the lot, before removing salvage from the property. As mentioned, the fence was installed at the insistence of Nacin's liability carrier, to enclose the hazards inherent in a salvage yard. Once the salvage had been removed, and the property line verified by a surveyor, the fence was removed. Although the Bowns, and not Nacin, actually removed the

fence, Nacin made no claim to the lot. The Bowns have failed to prove Nacin intentionally remained on the land.

We conclude the Bowns have failed to prove trespass under the circumstances in this case.

VII. Conclusion

Based on our holdings in this case, we need not address the Bowns' claims for punitive damages and common-law attorney fees. We affirm the district court's ruling dismissing the Bowns' petition.

AFFIRMED.