IN THE COURT OF APPEALS OF IOWA

No. 6-436 / 05-1850
Filed January 18, 2007

STEPHEN GRAY and SHELLY GRAY,
Husband and Wife,
Plaintiffs-Appellants,

vs.

JAMES R. OSBORN, III,
Defendant-Appellee,

TAMRA RANDALL,
Intervenor-Appellee.

TAMRA RANDALL,
Cross-Claim Plaintiff-Appellee,

vs.

STEPHEN GRAY and SHELLY GRAY,
Cross-Claim Defendants-Appellants,

JOAN K. PECK and MARJORIE A. THIRKETTLE,
Intervenors-Appellees.

Appeal from the Iowa District Court for Benton County, Kristin L. Hibbs, Judge.

Plaintiffs-appellants appeal the district court ruling finding an express easement over their property. **REVERSED AND REMANDED.**

Gregory J. Epping of Terpstra, Epping & Willett, Cedar Rapids, for appellants.

William McCarten, Cedar Rapids, and Mark Mossman of Mossman & Mossman, L.L.P., Vinton, for appellee Osborn and intervenor-appellee Randall.

Vernon P. Squires of Bradley & Riley PC, Cedar Rapids, for intervenors-appellees Peck and Thirkettle.

Considered by Sackett, C.J., and Mahan and Eisenhauer, JJ.

SACKETT, C.J.

Plaintiffs-appellants, Stephen and Shelly Gray, appeal the district court ruling that found adjoining property owners had an express fifty-foot easement over their land. The Grays contend the finding was in error, for while the plat of their subdivision had markings showing an easement on their lot, there was no showing that any incident of ownership had ever been created in a dominant estate, consequently, the requirements necessary to establish an express easement were not met. We agree and reverse and remand.

BACKGROUND FACTS

The following facts are not disputed. Plaintiffs own Lot 5 in Maple Ridge Estates I (MREI). Defendant-appellee, James R. Osborn III, owns Lot 4 in Maple Ridge Estates II (MREII). Intervenors-appellees, Joan K. Peck and Marjorie A. Thirkettle, own Lot 3 in MREII. Both estates were platted by the then owner and intervenor-appellee, Tamra Randall.

MREI was platted in 1996, and MREII was platted in January of 2000. Lots 3 and 4 in MREII adjoin Lot 5 in MREI on their western and eastern boundaries respectively.

When MREI was platted, sketched on the plat was a fifty-foot easement across the north part of Lot 5. Other than the sketch, the only reference on the plat to the easement were the words “ingress and egress.” Aside from this bare reference, there is no other writing concerning the easement nor is there any conveyance, covenant, or reference to a dominant estate. There is no evidence in writing of any grant or reservation of an easement, nor is there evidence of an easement by prescription nor is there a claim of a presumptive easement. There

is no showing of any attempt made to use the easement until the spring of 2003, some seven years after the platting, when Osborn constructed a partial driveway on the fifty-foot strip marked on the plat of Lot 5.[1] Prior to that time, Osborn, Peck, and Thirkettle accessed their lots by use of a gravel lane to the north of Grays' property and west of the Osborn and Peck/Thirkettle property. This gravel lane has always been used to access these properties and at the time of trial was still used for that purpose.

The Grays, upset by Osborn's alleged encroachment, filed this action against him contending he trespassed and encroached on their property. Grays asked for money damages as a result of the trespass and also sought injunctive relief restraining Osborn from further trespassing or encroaching on their property. Osborn answered, asking the court to declare the existence of a fifty-foot easement for ingress and egress on Lot 5 MREI. Randall who contended the disposition of the claims would impact her property and Peck and Thirkettle, who also owned property that would be impacted by the easement were allowed to intervene.

EXPRESS EASEMENT

Defendant and Intervenors, as those who assert there is an express easement, have the burden of proving that it gives them a right-of-way through the defendant's property. *Goss v. Johnson*, 243 N.W.2d 590, 594 (Iowa 1976). They must show that the requisites for an easement by grant or reservation were satisfied. *Id*.

[1] There also is a question which we need not address as to whether the driveway encroached upon the Grays' land beyond the strip.

An easement is defined as "a liberty, privilege, or advantage in land without profit, existing distinct from ownership of the soil." *Maddox v. Katzman*, 332 N.W.2d 347, 350 (Iowa Ct. App. 1982) (quoting *Indep. Sch. Dist. of Ionia v. De Wilde*, 243 Iowa 685, 692, 53 N.W.2d 256, 261 (1952)). An instrument creating an easement must use words that clearly show an intention to confer an easement and should describe with reasonable certainty the easement created and the dominant and servient tenements and as a general rule requires the same accuracy of description as other conveyances. *See* 28A C.J.S. *Easements* §§ 53-54 at 230-34 (1996). Because an express easement is a permanent interest in another's land with a right to enter at all times and enjoy it, the easement must be founded upon a grant in writing or upon prescription. *Indep. Sch. Dist. of Ionia*, 243 Iowa at 692, 53 N.W.2d at 261. As an interest in real estate an express grant must satisfy the requirement of an interest in real estate. Furthermore, Iowa Code section 622.32 (2005)[2] applies.

The defendant and intervenors claim the two plats are sufficient to form a valid easement as they demonstrate an intent to create the easement and give notice to the plaintiffs of the existence of the easement. The plats were made at different times and while instruments that are part of the same transaction are to be read together, the language in the second plat cannot create an easement

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[2] Iowa Code section 632.32 provides:

> Except when otherwise specifically provided, no evidence of the following enumerated contracts is competent, unless it be in writing and signed by the party charged or by the party's authorized agent:
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> . . . .
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> 3. Those for the creation or transfer of any interest in lands, except leases for a term not exceeding one year.

across the Grays' land. *See* 28A C.J.S. *Easements* § 57 at 235-38. We reverse the district court's finding an express easement exists over Lot 5 of MREI.

Because we find no express easement exists, we remand to the district court to address plaintiffs' trespass action and claim for injunctive relief. Additionally, the Grays' assert that we should find an easement by implication over the gravel lane. However, this claim was not addressed by the district court and is therefore not preserved for appellate review.

REVERSED AND REMANDED.