IN THE COURT OF APPEALS OF IOWA

No. 7-503 / 07-0020
Filed August 22, 2007

LEO SIMON and DEANN SIMON,
Plaintiffs-Appellants,

vs.

DUBUQUE COUNTY BOARD OF SUPERVISORS, DUBUQUE COUNTY, IOWA, MARGARET A. FELDMAN, CHARLES I. MCDERMOTT, IRENE A. MCDERMOTT, PETER J. SIMON, and LAURIE J. SIMON,
Defendants-Appellees.

Appeal from the Iowa District Court for Dubuque County, George L. Stigler, Judge.

Property owners appeal from a decision establishing that Dubuque County has a prescriptive easement across their property. **AFFIRMED AS MODIFIED.**

Dale Putnam, Decorah, for appellants.

Ralph Potter, County Attorney for appellees Dubuque County Board of Supervisors and Dubuque County, Iowa.

Nathan Moonen, Epworth, for appellees Peter J. Simon and Laurie J. Simon.

Anthony Quinn, Dubuque, for appellees Charles I. McDermott, Irene A. McDermott, and Margaret A. Feldman.

Considered by Sackett, C.J., and Vogel and Miller, JJ.

SACKETT, C.J.

Plaintiffs brought this action seeking to quiet title to a road that passes through their property. The defendants, Dubuque County and other residents living along the road, contend the road is owned by the county. The district court held the county had acquired a prescriptive easement to use the road. It found the easement spanned the roadway surface width of twenty-two feet and an additional five feet on each side of the roadway. The court held the county's prescriptive easement right includes the right to maintain the easement. The plaintiffs appeal each of these findings. We affirm as modified.

BACKGROUND. The road at issue traverses approximately two miles through a rural area of Dubuque County and provides ingress and egress to residents who live along the road. It was most likely constructed in the late 1800s. The public has used the road from the 1930s to present. The road was originally known as Simon Road. In the 1990s, the county named the road "Dry Hollow Road" as it was establishing its 911 emergency dispatch system. At that time, the county posted a sign at the road identifying it as "Dry Hollow Road."

The road passes through several parcels of property and varies in width. At its northwest intersection with Heisler Road, it passes through plaintiffs', Leo and Deann Simons' property. To the south and east, the road travels through parcels owned by defendants, Margaret Lehmann, Charles and Irene McDermott, and Peter and Laurie Simon. These defendants contend that the county owns the road and has historically provided maintenance such as laying gravel, blading, snow removal, and mowing along the road. In June of 1998, the defendants petitioned the county to classify a portion of the road as Class C.

This classification allows the county to gate off the road, restrict public access, and provide minimal maintenance. The residents sought this classification out of concern that people were damaging the roadway by driving "mudders" through the area and illegally dumping material along Dry Hollow Road. In response to the petition, the county classified most of the road through the McDermott and Peter and Laurie Simon properties as Class C. However, the county continued to provide gravel and standard maintenance to the rest of Dry Hollow Road, including the portion that crosses plaintiffs' property.

Plaintiffs acquired their property in September of 1998 with knowledge of the roadway and the public's use of Dry Hollow Road. Between 1999 and 2002, Leo Simon sought four right-of-way permits from the county to do work that would affect or disturb the roadway, such as digging a waterline or shaping ditches and culverts. Each permit was granted. In 2004, a land survey revealed that the actual path of Dry Hollow Road varies from its platted route and therefore, the county does not own the property containing the roadway. At some point after the survey, plaintiffs laid sod to narrow the road, began demanding the county cease maintenance of the road, and filed suit to establish their fee simple ownership of the road free of any easements or claims of right by defendants. The county and neighboring resident defendants contend that even if the county does not own the property, the road remains a public road because the county acquired a prescriptive easement to use the road. The district court held the county had acquired a prescriptive easement to twenty-two feet of the graveled roadway surface and five feet on each side of the road. The court concluded that rights to this easement included the county's right to perform

regular maintenance on the roadway. The plaintiffs appeal the findings. We affirm as modified.

SCOPE OF REVIEW. Actions to quiet title are equitable proceedings. Iowa Code § 649.6 (2005). Our scope of review of actions in equity is de novo. Iowa R. App. P. 6.4. We examine the law and facts anew although we give weight to the trial court's fact findings and deference to their credibility assessments. *Johnson v. Kaster*, 637 N.W.2d 174, 177-78 (Iowa 2001); Iowa R. App. P. 6.14(6)(g). We are not bound by the trial court's factual determinations on our de novo review. *Id.*

PRESCRIPTIVE EASEMENT. The plaintiff-appellants claim the district court erred in finding the county acquired an easement to use the road as a public thoroughfare through prescription. An easement by prescription is established "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." *Collins Trust v. Allamakee County Bd. of Supervisors*, 599 N.W.2d 460, 463 (Iowa 1999). The fact the party used the land for the statutory period is not sufficient proof they had the requisite claim of right or color of title purpose behind their use. Iowa Code § 564.1; *Collins Trust*, 599 N.W.2d at 464 ("mere use of land does not, by lapse of time, ripen into an easement"). A party must provide independent evidence to establish his or her use was under a claim of right. Iowa Code § 564.1.

Proof that a party used the land under a claim of right also tends to prove the hostility element. *Collins Trust*, 599 N.W.2d at 464. "Hostility of possession does not imply ill will, but only an assertion of ownership by declarations or acts

showing a claim of exclusive right to the land." *Johnson*, 637 N.W.2d at 178. Thus, "[a]lthough mere use does not constitute hostility or claim of right, some specific acts or conduct associated with the use will give rise to a claim of right." *Collins Trust*, 599 N.W.2d at 464. Acts of maintaining and improving the land may prove the claim of right and hostile elements. *Id.*

The open and notorious elements required to establish a prescriptive easement are designed to give the true owner notice that the claimant's use is adverse rather than permissive. *Id.* at 465. Iowa law requires express notice to the owner. Iowa Code § 564.1. Express notice is proved by evidence showing the claimant gave actual notice of the adverse use to the owner or by "known facts of such [a] nature as to impose a duty to make inquiry which would reveal [the] existence of an easement." *Brede v. Koop*, 706 N.W.2d 824, 828 (Iowa 2005). Buyers of property are expected to inspect for easements prior to purchase. "The law imputes to a purchaser such knowledge as he would have acquired by the exercise of ordinary diligence. Thus, where the easement is open and visible, the purchaser of the servient tenement will be charged with notice." *Johnson*, 637 N.W.2d at 180.

In applying these principles to the facts, we find the district court did not err in finding the county acquired a prescriptive easement to Dry Hollow Road. Dubuque County has maintained and the public has used the road for decades under claim of right and color of title. Residents along the road, familiar with the area for forty-five years, testified they have always believed the road was a public right-of-way. Residents made complaints regarding obstructions or disturbances on the road directly to the county. In the 1990s, the county officially named the

road “Dry Hollow Road” and posted a street name sign at the road’s northwest corner. The county has also posted a stop sign, speed limit warning, and dead end notice on the roadway in dispute. Some of the signs were posted over twenty-five years ago. Past the disputed section of Dry Hollow Road appear other warning signs and gates posted by the county. The posting of public traffic signs are specific acts directed to warn road users that the county controls the right-of-way. The county’s conduct goes beyond mere use of the roadway. Decades of maintaining the surface, renaming the roadway, and responding to plaintiffs’ and other area resident’s complaints about the road’s condition or hazardous drivers, prove the county’s use was under claim of right and hostile to any private ownership claims to Dry Hollow Road.

The plaintiffs were also provided actual notice of the county’s adverse use. The plaintiffs appear to be closely acquainted with the area since family members have owned land along the road since the sixties. The plaintiffs had been on the road prior to buying the property, saw the signs, and understood that the county maintained the road. Indeed, the plaintiffs acknowledged the county’s right to the roadway was superior. On four occasions since the plaintiffs purchased the property in 1998, plaintiff Leo Simon has sought permission from the county to do work on or near Dry Hollow Road. Each permit was granted. In one letter accompanying the permit, the county engineer warned the plaintiff to, “please remember that no matter what work you do in the right-of-way, you need to get a permit from our office.”

The Iowa Supreme Court has previously found that an owner is charged with notice that the public has a claim of ownership when the owner knows that

public expenditures are being used to repair or maintain a road. *Collins Trust*, 599 N.W.2d 406, 465. This is because it is generally known that public bodies do not have authority to use public funds toward private property. *Id.* The county's use of Dry Hollow Road has been under claim of right, hostile, open, notorious, and continuous for much longer than the requisite ten-year statutory period. Although the plaintiffs acquired the property less than ten years ago, the county's adverse use established the prescriptive easement against plaintiffs' predecessors in title. *See Schwenker v. Sagers*, 230 N.W.2d 525, 528 (Iowa 1975) (finding transfer of servient estate within statutory period does not bar prescriptive easement when claimant asserted adverse use for statutory period against prior owners). We affirm the district court's finding Dubuque County acquired a prescriptive easement to Dry Hollow Road through the Simon property.

SCOPE OF THE EASEMENT. The plaintiffs contend the district court erred in finding the scope of the county's easement extended twenty-two feet for roadway surface plus five additional feet on each side for keeping the roadway clear. The scope of an easement is only that which "is reasonably necessary and convenient for the purpose for which it was created." *Flynn v. Michigan-Wisconsin Pipeline Co.*, 161 N.W.2d 56, 61 (Iowa 1968). When a highway is acquired by prescriptive easement the actual use defines the easement boundaries. *Bangert v. Osceola County*, 456 N.W.2d 183, 188 (Iowa 1990) (citing *Davis v. Town of Bonaparte*, 137 Iowa 196, 204, 114 N.W. 896, 899 (1908)).

The relative rights of the parties affect the scope of a prescriptive easement as well. Under Iowa law,

> The easement holder has the right to use the [easement] in the manner and for the purposes it was intended to serve. He cannot use it in a way which imposes additional burdens on the owner of the land through which it runs. The easement holder's rights are not exclusive, and servient owners may use the easement strip for any purpose not inconsistent with the easement. Neither may use the [easement] in violation of the rights of the other.

Schwenker, 230 N.W.2d at 527 (quoting *Schwartz v. Grossman*, 173 N.W.2d 57, 59-60 (Iowa 1969)). The servient owner's rights may be used to prevent expansion of a prescriptive easement but are not to be used "to erase or erode rights to such uses after they have been established by prescription." *Schwenker*, 230 N.W.2d at 527.

The parties at hand dispute the boundaries of Dry Hollow Road through the Simon property. Dry Hollow Road varies in width along its path. Testimony regarding the width of the road surface through the Simon property was inconsistent. Plaintiff Deann Simon testified that when she took possession of the property in 1998 the width was fifteen to sixteen feet. She testified that the road's current width varies between thirteen and sixteen feet. The county claimed it tries to maintain a width of twenty feet. The county engineer's recent measurements show the width varies between fourteen and nineteen feet. He also testified that the county also mows and maintains a ten foot strip on either side of roadways to keep a clear zone. There was also testimony that the road has narrowed in recent years. Witnesses testified that plaintiff Leo Simon laid sod near the road and demanded the county stop performing maintenance

through his property, which allowed weeds and grass to grow onto the graveled surface.

The district court held the county's prescriptive easement consisted of twenty-two feet of road surface and five feet on each side for a clear zone. On our de novo review of the facts and applicable law, we find the twenty-two foot road surface easement exceeds what is necessary and actually used by the public. A sufficient amount is needed to permit dairy trucks and large farm equipment to safely pass as they are frequent users of the roadway. We believe the neighboring residents and county engineer testimony that the Simons have purposely narrowed the roadway by three to four feet. Considering the actual use of the road and relative rights of the parties, we find an eighteen-foot road surface easement will allow large vehicles enough road surface and remediate the Simons' narrowing of the road. We agree that a five-foot clear zone easement on each side of the surface was also acquired by prescription. The county regularly maintained this zone on an as needed basis until this litigation began.

RIGHT TO MAINTAIN THE EASEMENT. The plaintiffs last contend, contrary to the district court's holding, the county does not have the authority to do maintenance on the roadway even it has an easement. Easement holders have all rights necessary to ensure the reasonable enjoyment of the easement. *Koenigs v. Mitchell County Bd. of Supervisors*, 659 N.W.2d 589, 594 (Iowa 2003). In addition, "easement holders not only have the right but an obligation to repair and maintain their easement as necessary." *Id.* The district court correctly held the county has a right to maintain the prescriptive easement.

CONCLUSION. We affirm the finding Dubuque County has a prescriptive easement over Dry Hollow Road which includes the right to maintain the road. We modify the scope of the easement to eighteen feet of road surface and five feet on each side of the surface for maintaining a clear zone. Plaintiffs have challenged the admission of an exhibit showing road width. We have not considered this evidence in our de novo review; therefore, we need not address this issue.

AFFIRMED AS MODIFIED.