

**IN THE COURT OF APPEALS OF IOWA**

No. 8-089 / 07-1140

Filed May 14, 2008

**PATRICK KOSMAN and LYNDA  
KOSMAN,**  
Plaintiffs-Appellees,

**vs.**

**STEVE WIGNALL and SHERRI WIGNALL  
and JOHN DVORAK and LINDA DVORAK,**  
Defendants-Appellants.

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Appeal from the Iowa District Court for Monroe County, James Q.  
Blomgren, Judge.

Defendants appeal from the district court's ruling granting the plaintiffs'  
petition to establish an easement and entering an injunction. **AFFIRMED AND  
REMANDED WITH INSTRUCTIONS.**

John A. Pabst of Pabst Law Firm, Albia, for appellants.

Rodney L. Janssen of Beving, Swanson & Forrest, P.C., Des Moines, for  
appellees.

Heard by Vogel, P.J., and Zimmer and Baker, JJ.

**PER CURIAM**

Steve and Sherri Wignall and John and Linda Dvorak appeal from the district court's ruling granting Patrick and Lynda Kosman's petition to establish an easement and entering an injunction. We affirm the judgment of the district court and remand with instructions.

***I. Background Facts and Proceedings***

In 1962 John and Mary McDonald purchased forty-five acres of land south of Highway 34 in Monroe County, Iowa. When they purchased the land, there was an existing unpaved road running south off of Highway 34 through the middle of five acres in the northwest portion of their land. In 1964 the McDonalds purchased forty acres immediately east of their land, and in 1965 they purchased an additional sixty-one acres east of those forty acres. There is a steep hill with a creek at the bottom located in the middle portion of the land, which makes accessing the westernmost forty acres from the east difficult.

In 1977 the McDonalds sold the five acres in the northwest portion of their property to Timothy Simmons by warranty deed. The deed stated:

The grantee will fence and maintain fence along the West side of the County Road and the grantors that on the East side of the County Road of the above premises, separating other lands of the grantors from the above description.

Simmons recalled that when he bought the five acres with the road running through it, John McDonald told him "there would be . . . people going through that property . . . because . . . as far as he knew, he thought that that road had never

been closed.”<sup>1</sup> John, however, did not remember having such a conversation with Simmons. Instead, he recalled that he did not need to use the road to access the west forty acres after he sold the five acres to Simmons. He was able to reach that land from the east by crossing the creek in a tractor at a “ditch there with a crossing in it.”

The Dvoraks purchased a portion of the eastern half of the five acres in 1990 and the remainder in 1992. The deed from the 1990 transaction refers to an “established road” and grants them “the right to use the established roadway as now located and adjoining the above described property.” The Wignalls purchased the western half of the five acres in 1997. Their deed likewise refers to an “established road” and grants them “the right to use the established roadway as now located and adjoining the above described property.” The road runs between the property owned by the Dvoraks and the property owned by the Wignalls. The defendants accordingly share responsibility for maintaining the road.

The remaining 141 acres owned by the McDonalds were eventually purchased by Swine Graphics Enterprises, L.P. in 1993. Swine Graphics operated a hog confinement facility on the sixty-one acre tract of land. They used the other eighty acres to spread manure. In order to reach the western portion of those eighty acres, employees of Swine Graphics used the road between the defendants’ properties on the northwest five acres. There is a

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<sup>1</sup> The road is depicted on a plat map for Monroe County from 1930 and on an unofficial plat map created by the Monroe County Engineer’s Department. Later plat maps do not show the road. The Monroe County Engineer does not know whether the road is an abandoned county road or a private lane due to discrepancies in the plat maps.

public road on the northeast corner of the eighty acres. However, Swine Graphics could not access the westernmost forty acres from the east with its manure tanks due to the creek and the steep hill located in the middle of the eighty acres. The landowners preceding Swine Graphics likewise used the road to access the west forty acres.

The Kosmans rented the eighty acres Swine Graphics used to spread manure on from 1996 through 2002. In 2002 they entered into a contract with Swine Graphics to purchase those eighty acres. Their contract provided for a "Manure Application Easement Agreement," which allowed Swine Graphics to continue to enter the eighty acres for the purpose of applying manure. Swine Graphics transferred title to the eighty acres to the Kosmans in January 2005.

The Kosmans planted hay on the eighty acres and used it as pastureland for their cattle. Like their predecessors in title, the Kosmans used the road running between the defendants' properties to access the west portion of the eighty acres. Swine Graphics also continued to use the road to access the west portion of the eighty acres when it spread manure, although it notified the defendants before it did so.

Sometime after October 2004, the Dvoraks built a barn in the middle of the road in the southwest corner of their property. The Kosmans were able to continue to access the west forty acres by driving around the barn. In March 2006 the Dvoraks built a fence next to the barn. Since that time, the Kosmans have been unable to access the west portion of their land.

The Kosmans filed a petition in equity requesting the court to “declare the roadway through the Defendants’ property a valid and enforceable easement.” They claimed they had a prescriptive easement, an implied easement, and an easement by necessity over that road. The Kosmans additionally sought an order “requiring the Defendants to (a) remove the barn and all other obstructions to the established roadway and easement, and (b) refrain from blocking the use of the established roadway and easement.”

Following a trial, the district court entered a ruling finding the Kosmans established they had an easement by necessity and an easement by implication over the road located between the defendants’ properties. The court rejected the Kosmans’ claim that they had an easement by prescription. The court entered a permanent injunction enjoining the defendants from denying the Kosmans access to their property across the established easement. The court also ordered the defendants to “remove any fencing or other barriers which would interfere with, impede, or obstruct the access by [the Kosmans] over the established roadway to their property.”

The defendants appeal, raising the following issues:

- I. THE COURT ERRED IN FINDING AN EASEMENT BY NECESSITY.
- II. THE COURT ERRED IN GRANTING A MANDATORY INJUNCTION.

**II. Scope and Standards of Review**

Our scope of review in this equity action is de novo. Iowa R. App. P. 6.4; *Nichols v. City of Evansdale*, 687 N.W.2d 562, 566 (Iowa 2004). We give weight

to the district court's findings of fact, especially in matters of credibility, but are not bound by them. Iowa R. App. P. 6.14(6)(g).

### **III. Discussion**

#### **A. Easement**

In general, a roadway easement may be established in one of four ways: (1) by express written grant; (2) by prescription; (3) by necessity; and (4) by implication. *Kahl v. Clear Lake Methodist Camp Ass'n*, 265 N.W.2d 622, 624 (Iowa 1978). The district court in this case determined the Kosmans established an easement by necessity and an easement by implication.

"An easement by necessity is a form of implied easement, but it 'is separate, and we have always recognized it as such.'" *Nichols*, 687 N.W.2d at 568 (internal citation omitted). "One significant difference is that an easement by implication requires a showing the parties intended such a right to exist. An easement by necessity involves no such intent." *Schwob v. Green*, 215 N.W.2d 240, 244 (Iowa 1974); see also *Nichols*, 687 N.W.2d at 568-69 (listing the elements required to establish an easement by necessity and the elements required to establish an easement by implication). "Perhaps the most important distinction" between the two doctrines is that "an easement by implication may be claimed by either a remote grantor or a remote grantee if such a right existed in favor of a prior party from whom they take an interest," whereas an easement by necessity "ordinarily may not be claimed by any except the immediate parties to the transaction." *Schwob*, 215 N.W.2d at 244. The defendants claim the district

court erred in finding an easement by necessity because such an easement “can only be claimed by the immediate parties to the transaction.”

We need not and do not decide this issue because, in addition to finding an easement by necessity, the district court also found an easement by implication. In their brief to this court, the defendants limit the first issue on appeal to whether “the court erred in finding an easement by necessity.” Although our scope of review in this case is de novo, “such review is confined to those propositions relied on by each party for reversal or affirmance; errors or propositions not assigned will not be considered on appeal.” *United Props., Inc. v. Walsmith*, 312 N.W.2d 66, 70 (Iowa Ct. App. 1981); see also *Hylar v. Garner*, 548 N.W.2d 864, 870 (Iowa 1996) (“[O]ur review is confined to those propositions relied upon by the appellant for reversal on appeal.”). Because the defendants do not challenge the district court’s finding that the Kosmans established an easement by implication, we do not need to decide whether the court erred in finding they also established an easement by necessity. See *Nichols*, 687 N.W.2d at 568 (recognizing an easement may be created by necessity or by implication); *Schwob*, 215 N.W.2d at 244 (stating the doctrine of easement by necessity is separate and distinct from the doctrine of easement by implication).

### **B. Injunction**

We turn next to the defendants’ claim regarding the mandatory portion of the injunction entered by the district court.<sup>2</sup> The district court’s order required the defendants to “remove any fencing or other barriers which would interfere with,

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<sup>2</sup> The defendants do not challenge the prohibitory portion of the court’s injunction enjoining them from denying the Kosmans access to their property across the established easement.

impede, or obstruct” the Kosmans’ access to their property. The defendants claim the court erred in entering that portion of the injunction if by “other barriers” it intended for them to remove the barn the Dvoraks erected. See *Iowa Natural Res. Council v. Van Zee*, 261 Iowa 1287, 1292, 158 N.W.2d 111, 115 (1968) (stating mandatory injunctions are disfavored and granted with caution in cases of great necessity).

In response, the Kosmans assert “the only way to preserve the easement” protected by the prohibitory portion of the court’s injunction is to remove the barn, which they believe is a barrier within the meaning of the court’s injunction. See *Falcon v. Boyer*, 157 Iowa 745, 752, 142 N.W. 427, 430 (1913) (“[T]he court may grant an injunction, the essential nature of which is to restrain, although, in yielding obedience to the restraint, the party may be required to perform some affirmative act. Otherwise often the injunction would be ineffectual.”); *Robbins v. Archer*, 147 Iowa 743, 746, 126 N.W. 936, 937 (1910) (“That a mandatory injunction will lie to protect a license or easement over the land of another is well settled by authority.”).

The district court did not address whether removal of the barn is necessary to protect the plaintiffs’ easement and give effect to the prohibitory portion of the injunction. A mandatory injunction must be clear and unambiguous. *Lynch v. Uhlhopp*, 248 Iowa 68, 72-74, 78 N.W.2d 491, 494-95 (1956). This injunction does not meet this standard. We therefore remand the case to the district court to determine the scope of the mandatory portion of the injunction it entered.



**IV. Conclusion**

Because the defendants did not challenge the district court's finding that the Kosmans established an easement by implication, we need not and do not decide whether the court erred in additionally finding an easement by necessity. We remand this case to the district court to determine the scope of the mandatory portion of the injunction it entered. We accordingly affirm the judgment of the district court but remand with instructions.

**AFFIRMED AND REMANDED WITH INSTRUCTIONS.**

All judges concur, except Zimmer, J., who concurs specially.

**ZIMMER, J.** (concurring specially).

I agree with the majority opinion with one exception. After the trial court granted the plaintiffs injunctive relief, the defendants filed a detailed motion for enlargement or amendment of the court's order pursuant to Iowa Rule of Civil Procedure 1.904(2). In their motion, the defendants did not contend that any clarification of the scope of the injunction entered by the court was necessary. On appeal, the defendants contend for the first time that an issue exists regarding the character of the "barriers" that the court ordered removed. Because the defendants did not raise this claim in their rule 1.904(2) motion, the district court did not have the opportunity to address this issue. For that reason, I do not believe error was preserved regarding the language of the court's order granting injunctive relief. I would decline to address this issue on appeal.