

IN THE COURT OF APPEALS OF IOWA

No. 9-579 / 08-0739
Filed September 2, 2009

MILES M. MILLS JR.,
Plaintiff-Appellant,

vs.

KAYNE ROBINSON, DONNA ROBINSON,
KIRBY SMALL and SHERRY SMALL,
Defendants-Appellees.

Appeal from the Iowa District Court for Polk County, Karen Romano,
Judge.

Plaintiff appeals the district court ruling on his petition to quiet title under a
theory of adverse possession. **AFFIRMED.**

Peter Cannon, West Des Moines, for appellant.

Meghan Hanson of Sporer & Flanagan, P.C., Des Moines for appellees
Robinsons.

Kirby and Sherry Small, Des Moines, appellees pro se.

Considered by Vogel, P.J., and Potterfield, J., and Beeghly, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

BEEGHLY, S.J.**I. Background Facts & Proceedings**

Miles Mills Jr. and his late wife purchased 3110 St. Johns Road, Des Moines, in 1965. At the time he moved in, Mills purchased a “notch” of land to the east to expand his garage. He began regular use of the land to the east of the garage, the disputed property, at that time. While the adjoining owners and Mills shared use of a portion of the disputed area, Mills’s use was exclusive in the area awarded by the trial court.

In 1979 Kayne and Donna Robinson moved into the property to the east of Mills at 3100 St. Johns Road. In 1980, Mills had eleven tons of dirt hauled in and put in the area to the east of his driveway in order to level that area. He planted groundcover to prevent erosion in the area. Mills testified he spent between \$12,000 to \$20,000 for plants. Mills tended to the area and accessed it several times each week. The Robinsons did not object to Mills’s use of the property. On November 14, 2005, the Robinsons entered into a real estate contract to sell 3100 St. Johns Road to Kirby and Sherry Small. The Smalls disputed Mills’s use of the land and an acrimonious relationship developed.

On October 24, 2006, Mills filed a petition to quiet title, and claimed the Smalls had engaged in trespass. On November 17, 2006, the district court granted Mills’s motion for a temporary injunction prohibiting the Smalls from entering the disputed area during the term of the action or from contacting Mills. On May 18, 2007, Mills filed a motion to show cause, claiming Kirby Small had intentionally violated the terms of the temporary injunction by shouting profanities

at Mills and threatening bodily harm. Additionally, the Smalls filed a cross-claim against the Robinsons, claiming they failed to deliver possession of the entire property.

The district court issued a ruling on January 22, 2008. The court found the testimony of Mills was credible, while the testimony of Kirby was not credible. The court found “Mills clearly maintained and improved the land at the northern end of the disputed property.” The court also found, however, “The disputed area south of the plantings, that is, the area from the north edge of Mills’s garage to the back fence, was not entirely treated in the same manner.” The court noted that while Mills used the southern part of the disputed property to store mulch, the Robinsons also used the area for storage and snow removal. The court determined Mills had acquired, by adverse possession, an area 8.5 feet by 39.87 feet in the northern end of the disputed property, and 2.53 feet by 59.88 feet in the southern end of the disputed property.

The court found Kirby had willfully cut and damaged trees on Mills’s property and awarded Mills damages of \$15,000. Also, Kirby had willfully destroyed a gate and Mills was awarded damages of \$580. The court found the Smalls had not established their cross-claim against the Robinsons. Furthermore, the court found Kirby guilty of two counts of contempt for violating the temporary injunction. Kirby was ordered to pay \$940 in Mills’s attorney fees and court costs.

Mills and the Smalls filed motions pursuant to Iowa Rule of Civil Procedure 1.904(2). The court denied the motions. The court granted Mills’s request for a

permanent injunction prohibiting Kirby from having any contact whatsoever with Mills, or from entering the land awarded to Mills. Mills appeals the district court's decision failing to grant him the total amount of the disputed area.

II. Standard of Review

An action to quiet title is heard in equity, and our review is de novo. *Barks v. White*, 365 N.W.2d 640, 643 (Iowa Ct. App. 1985). In equity cases, especially when considering the credibility of witnesses, we give weight to the fact findings of the district court, but are not bound by them. Iowa R. App. P. 6.14(6)(g).

III. Adverse Possession

A party claiming title to property under the doctrine of adverse possession must show hostile, open, exclusive, and continuous possession, under a claim of right or color of title, for at least ten years. *Carpenter v. Ruperto*, 315 N.W.2d 782, 784 (Iowa 1982). The doctrine of adverse possession is strictly construed. *Garrett v. Huster*, 684 N.W.2d 250, 253 (Iowa 2004). A claim of adverse possession must be established by clear and positive evidence. *Mitchell v. Daniels*, 509 N.W.2d 497, 499 (Iowa Ct. App. 1993).

The elements of hostility and claim of right are closely related. *Brede v. Koop*, 706 N.W.2d 824, 828 (Iowa 2005). A party must show an assertion of ownership by declarations or acts establishing a claim of exclusive right to the land. *Johnson v. Kaster*, 637 N.W.2d 174, 178 (Iowa 2001). Continued use does not, by the mere lapse of time, become hostile or adverse. *Mensch v. Netty*, 408 N.W.2d 383, 387 (Iowa 1987).

“Although mere use does not constitute hostility or a claim of right, some specific acts or conduct associated with the use will give right to a claim of right.” *Collins Trust v. Allamakee County Bd. of Sup’rs*, 599 N.W.2d 460, 464 (Iowa 1999). “Thus, acts of maintaining and improving land can support a claim of ownership and hostility to the true owner.” *Id.* Whether a party has established a claim of right must be determined on a case-by-case basis. *Johnson*, 637 N.W.2d at 179.

We agree with the district court’s assessment that Mills satisfied the elements of adverse possession for the front part of the disputed property. The facts are different, however, regarding the back part of the property. There was testimony that the Robinsons used the back part to store items. Thus, as to the back part of the property, Mills has not shown an exclusive use of the disputed property. See *Johnson*, 637 N.W.2d at 179 (noting a party must show “an assertion of ownership by declarations or acts showing a claim of exclusive right to the land”).

Also, Mills did not maintain the back part of the property to the same extent as the front part. Mills had brought in dirt to level off the front part, expended between \$12,000 to \$20,000 on plants, and spent several hours each week maintaining the area. In the back part of the property he stored mulch. The trial court found the testimony of Kayne Robinson persuasive that Mills made little use of the disputed property outside of the area adjoining his driveway and garage. From that the trial court could infer that Mills use was inconsistent with a claim of ownership, not only during Robinson’s ownership, but also for the period

from 1965 through 1979. We agree with the district court's conclusion that Mills did not engage in sufficient maintenance and improvement on the back part of the disputed area to establish a claim of ownership. See *Collins Trust*, 599 N.W.2d at 464 (finding "acts of maintaining and improving land can support a claim of ownership").

IV. Prescriptive Easement

In the alternative, Mills asks that he be granted an easement by prescription over the total area of the disputed property. This issue was raised for the first time in Mills's motion under rule 1.904(2). A motion pursuant to rule 1.904(2) is not properly used as a method to introduce a new issue not previously raised before the court. See *In re Marriage of Bolick*, 539 N.W.2d 357, 361 (Iowa 1995) (finding a rule 1.904(2) motion permitted the court to enlarge or modify its findings based on the evidence in the record, the motion was not a vehicle for parties to retry issues based on new facts). We conclude this issue was not properly preserved for our review.

V. The Smalls' Claims

In their pro se brief on appeal, the Smalls ask that the decision of the district court be overturned. They assert Mills did not adequately demonstrate a claim of adverse possession. The Smalls did not cross-appeal. A party that neither appeals nor cross-appeals is entitled to no greater relief than it was accorded by the district court. *Federal Land Bank v. Dunkelberger*, 499 N.W.2d 305, 308 (Iowa Ct. App. 1993). We conclude the Smalls are not entitled to any relief on appeal.

We affirm the decision of the district court.

AFFIRMED.