

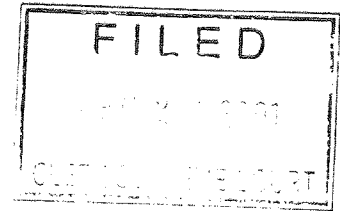
IN THE COURT OF APPEALS OF IOWA

No. 1-554 / 00-1740
Filed December 28, 2001

CHARLES RYAN, Plaintiff-Appellant,

vs.

RON SEIBERT, SR.,
Defendant-Appellee.



Appeal from the Iowa District Court for Polk County, Robert J. Blink (temporary injunction) and George W. Bergeson (declaratory judgment and permanent injunction), Judges.

Plaintiff appeals from a district court ruling denying his petition for declaratory judgment regarding the existence of a roadway easement and denying his request for a permanent injunction to prevent the defendant from erecting a fence over the purported easement. **AFFIRMED.**

Larry Handley of Handley, Block, Lamberti & Moore, P.C., Ankeny, and Jeanne K. Johnson, Des Moines, for appellant.

Thomas M. Werner, Des Moines, for appellee.

Heard by Huitink, P.J., and Zimmer and Vaitheswaran, JJ.

ZIMMER, J.

Charles Ryan appeals from a district court ruling denying his petition for declaratory judgment regarding the existence of a roadway easement and denying his request for a permanent injunction to prevent Ron Seibert, Sr., his next-door neighbor, from erecting a fence over the purported easement. Ryan contends the district court erred in ruling that he had not presented sufficient evidence of a roadway easement over a portion of Seibert's property. We affirm.

I. BACKGROUND FACTS.

The record reveals that a factfinder could have found the following facts. Glen Drake and Pearl Drake (now Pearl Breese) purchased a home in Des Moines in 1961. At that time, Ralph and Inez Gardner owned and were living in the residence next door. The property line between the two tracts of land is on a gravel driveway. The driveway has a width of approximately seventeen to eighteen feet. Ryan acquired the Drakes' property in 1991. Ralph Gardner died in 1968. After that, Inez did not have an automobile. Seibert purchased Inez's property in 1996. Ryan and his predecessors have encroached on Seibert's property with vehicles following Ralph's death.

Seibert sought to erect a fence on his own property that would separate the driveway. Ryan filed a petition, requesting the court enjoin Seibert from constructing the fence and enter a declaratory judgment finding Ryan possessed an easement right onto Seibert's driveway so as to provide a shared driveway between the parties. He alleged the parties have certain easement rights to use the driveway as established by adverse possession. The court granted a temporary injunction, ordering Seibert not to construct the fence until further court

order. Ryan filed an amended petition, which the district court dismissed following an evidentiary hearing and a personal visit to the disputed property. The court found Ryan failed to prove an easement by prescription. It also overruled his requests for an injunction and for easement rights and lifted the prior temporary injunction. Ryan appeals.

II. STANDARD OF REVIEW.

Our scope of review in this equity action is de novo. Iowa R. App. P. 4. We give weight to the trial court's findings of fact, especially in matters of credibility, but are not bound by them. Iowa R. App. P. 14(f)(7). The appeal in an equity case is not a trial de novo, but is limited to de novo review of identified and preserved error. *Hylar v. Garner*, 548 N.W.2d 864, 870 (Iowa 1996).

III. MERITS.

Ryan argues that the district court erred in finding that he did not present sufficient evidence of a roadway easement over the disputed property. He contends he established a prescriptive easement by establishing (1) the Gardners and Ryan and the Drakes had an oral agreement that the disputed property was a shared driveway and Ryan and the Drakes expended substantial money or labor to promote the use in reliance upon the agreement and consent of the Gardners, and (2) the Drakes' and his use of the disputed property under a claim of right, openly, notoriously, continuously, and hostilely for ten years or more. He also maintains he established he was entitled to a permanent injunction preventing Seibert from building a fence which would substantially interfere with Ryan's easement rights.

Iowa Code section 564.1 (1999) states:

In all actions hereafter brought, in which title to any easement in real estate shall be claimed by virtue of adverse possession thereof for the period of ten years, the use of the same shall not be admitted as evidence that the party claimed the easement as the party's right, but the fact of adverse possession shall be established by evidence distinct from and independent of its use, and that the party against whom the claim is made had express notice thereof; and these provisions shall apply to public as well as private claims.

Iowa Code § 564.1. One of our recognized methods to establish an easement is by prescription. *Mensch v. Netty*, 408 N.W.2d 383, 387 (Iowa 1987). An easement by prescription is created under Iowa law 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. *Larman v. State*, 552 N.W.2d 158, 161 (Iowa 1996). The hostility and claim of right requirements of a prescriptive easement are closely related. *Collins Trust v. Allamakee County Bd. of Supervisors*, 599 N.W.2d 460, 464 (Iowa 1999). Hostility does not impute ill will, but refers to declarations or acts revealing a claim of exclusive right to the land. *Id.* Similarly, a claim of right requires evidence showing an easement is claimed as a right. *Id.* A party claiming an easement by prescription must prove, independent of use, the easement was claimed as a matter of right. *Id.* Mere permissive use of an easement, without claim of right to such use, no matter how long continued, can never ripen into a permanent easement so as to run with the land. *Heald v. Glentzer*, 491 N.W.2d 191, 193 (Iowa Ct. App. 1992).

We conclude Ryan has failed to establish an easement by prescription in this manner because he has failed to prove that his use of the alleged easement was hostile and under a claim of right. The use of the disputed property was merely permissive, and thus it could not ripen into a permanent easement. Pearl

testified that Inez never told her not to use the driveway. Pearl admitted that Inez told her that they (Ryan's predecessors) could use her part of the driveway as needed. Inez put out buckets to designate the property line on at least one occasion so her guests would be able to use her driveway. The buckets were not meant to be permanent. One of Seibert's witnesses testified that Inez complained to Pearl of the vehicles on Inez's property, and they were moved. Prior to Ralph's death, Inez had no problems with encroachments on their property. We find there was no hostility or claim of right to the disputed property. Instead, Ryan has merely shown permissive use.

We also find that Ryan's maintenance of the driveway does not support a claim of ownership and hostility to the true owner. *See Collins Trust*, 599 N.W.2d at 464. In *Collins Trust*, the Iowa Supreme Court found that annual maintenance of a road for several decades and the installation and maintenance of a culvert in the curve of the road to promote drainage showed more than mere use, and was sufficient to support a finding that the county claimed the curve in the road as a right. *Id.* at 464-65. In the case before us, Ryan and his predecessor removed snow for Inez, which she appreciated. Ryan also helped Seibert remove snow for one or two winters, and Ryan testified, "[I]t was just a neighborly thing to do that we've been doing." Pearl testified that Glen and Ralph put in the approach to the driveway. After that, Glen put the gravel down and spread it, apparently because Ralph was so sickly. After Ralph passed away, Glen and Pearl continued to take care of the driveway. Ryan has also graveled the entire driveway. We do not believe this evidence shows Ryan or his predecessors were claiming Seibert's land as a matter of right.

Ryan argues his use of the disputed property was permissive until Seibert moved in. He claims that the use then became adverse because there was no evidence that his continued use of the property was permitted by Seibert as a mere favor. *See Simonsen v. Todd*, 261 Iowa 485, 496, 154 N.W.2d 730, 736-37 (1967) (stating that a use permissive in its inception may become adverse upon transfer of the servient property in the absence of evidence the continued use was permitted as a mere favor). We find that even if Ryan's use became adverse after Seibert moved onto his property, no easement has been created in this manner. Under Iowa law, Ryan must prove adverse possession for a period of ten years. Iowa Code § 564.1; *see Loughman v. Couchman*, 242 Iowa 885, 889, 47 N.W.2d 152, 154 (1951) (stating that there may be an easement by prescription where the original use was with the consent of the servient owner *and use as of right has continued for more than ten years*)(emphasis added). Because Seibert moved onto his property in 1996 and this suit was filed in 2000, Ryan has failed to show he has used the disputed property as of right for ten years.

A prescriptive easement may be created under Iowa law when

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

Heald, 491 N.W.2d at 193-94 (citations omitted). We find Ryan has failed to establish an easement in this manner. Though Ryan and his witnesses testified they were told the disputed property was a shared driveway, we note there is evidence contradicting this assertion. Inez placed five-gallon buckets down the

lot line of the driveway and complained to others about Ryan's encroachment onto her side of the driveway. Furthermore, Inez showed one witness where her property line was, and she said, "This is my driveway, and I'd like to be able to use it." Despite Ryan's contentions to the contrary, we believe the evidence indicates there was no agreement that the driveway was shared. In reaching this conclusion, we note that the trial judge is in the best position to consider the witnesses' credibility and resolve any conflicts in the evidence. In addition, the trial judge actually visited the site of the disputed property to facilitate his understanding of the evidence. As mentioned above, we give weight to the trial court's findings of fact, especially in matters of credibility. Iowa R. App. P. 14(f)(7).

IV. CONCLUSION.

We conclude Ryan has failed to establish an easement by prescription. Accordingly, we affirm the district court's judgment.

AFFIRMED.