

IN THE COURT OF APPEALS OF IOWA

No. 7-288 / 96-0864

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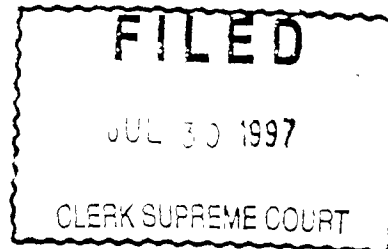
FRANK STALLMAN,

Appellant,

vs.

**MICHAEL FOSSUM and
PATRICIA FOSSUM,**

Appellees.



Appeal from the Iowa District Court for Linn County, David M. Remley,
Judge.

Plaintiff appeals from the district court's ruling granting mandamus and
injunctive relief to defendants. **ANNULLED IN PART AND AFFIRMED IN
PART.**

Kenneth F. Dolezal of Dolezal, Lindeman & Davison, Cedar Rapids, for
appellant.

~~Leve Eells~~ of Eells & Sovern Law Offices, Cedar Rapids, for appellees.

~~Considered by~~ Sackett, P.J., Huitink, J., and Hayden, S.J.

*Senior judge from the Iowa Court of Appeals serving on this court by order
of the Iowa Supreme Court.

HAYDEN, S.J.

This is a suit between adjacent landowners over the scope of a driveway easement. Frank Stallman owns property described as Lot 2, Mollenhauer's First Addition to Center Point, Iowa. Michael and Patricia Fossum own property described as Lot 3, Mollenhauer's First Addition to Center Point, Iowa. Both lots are roughly rectangular, with Lot 2 lying to the north of Lot 3. Both lots have driveways running along the north side of each lot, with the driveway of Lot 3 abutting the lots' common boundary. Each lot has a house that faces west, where Palo Road runs in a north-south direction at the edge of the lots.

In February of 1983, the Fossums purchased Lot 3. Before the closing, their mortgage lender conducted a survey and discovered a portion of the driveway and concrete paving encroached on Lot 2. The survey revealed the driveway encroached 2.5 feet at Palo Road and gradually narrowed to a width of 0.9 feet at a distance of 85.6 feet from the road. The lender retained an attorney to prepare a driveway easement conveyance. The easement provided the parties sought to resolve "any problem regarding the encroachment of the driveway for Lot 3 and the right of present and future owners of Lot 3 to have adequate access." The easement granted the Fossums "the right to maintain the existing driveway as it presently exists and [the Stallmans] further grant an easement over the southwesterly 2.5 feet of the southwesterly 46 feet of Lot 2 . . . for driveway purposes." The easement was

recorded ~~after~~ it was signed by the Stallmans, the Fossums, and the previous owners of both lots.

The Fossums later replaced crumbling concrete and narrowed the width of a portion of the driveway by 2 to 2.5 inches. The Fossums also removed a section of concrete approximately twelve feet long beyond the rear of the house and replaced it with sod. They intend to repave that section when their finances allow it, and eventually hope to build a garage behind the house.

Some hostility developed between the parties because Stallman began to erect fences close to the Fossums' driveway. Stallman installed a chain link fence a few inches away from the pavement forming the Fossums' driveway. Stallman did not place a support bar on the top of the fence, but instead spread tar on top of the fence. Later, he replaced this fence with posts and a greased cable. Finally, Stallman put up a steel I-beam and wood posts at the east end of the Fossums' driveway and across from their house. This new fence reduced the Fossums' access to their backyard by almost ten inches. The fence narrowed the concrete portion of the driveway by almost eight inches. After Stallman erected this fence, the distance between the steps to the Fossums' house and the edge of the driveway was reduced from 86.5 to 78.5 inches. The Fossums' car is 80 inches wide. It is difficult for them to drive to the rear of their property.

Stallman began parking one of his vehicles on the southeast corner of his lot. He had adequate paved areas on his property for parking. Stallman parked the vehicle

in a way that blocked the Fossums' view of approaching traffic when they exited their driveway. The Fossums considered the manner of parking and construction of fences as harassment by Stallman.

Stallman instituted an action for declaratory judgment to resolve conflict over the dimensions of the easement. The Fossums counterclaimed for a writ of mandamus to direct Stallman to remove a portion of the fence. The Fossums voluntarily dismissed their counterclaim for a writ of mandamus. The district court granted the Fossums' application to add a counterclaim for injunction. The Fossums sought an injunction to prevent Stallman from maintaining the portion of the fence that narrowed their access and from parking adjacent to their driveway.

The district court determined the easement was 2.5 feet wide at Palo Road and gradually narrowed to a width of 0.9 feet at a distance of 85.6 feet from the road. The court reasoned the driveway easement conveyance provided for these dimensions and, alternatively, the Fossums proved a prescriptive easement by adverse possession. The court found Stallman's construction of the steel I-beam and posts obstructed the Fossums' free use of the easement and constituted a nuisance. The court directed the clerk of court to issue a writ of mandamus, directed to Stallman, instructing him to remove the obstructions. The court found Stallman's manner of parking vehicles next to the Fossums' driveway constituted a public and private nuisance and ordered Stallman to abate the nuisance. The court provided a willful violation of this order would subject Stallman to contempt of court proceedings.

~~Stallman~~ makes the following arguments on appeal: (1) The district court lost jurisdiction over the counterclaim for mandamus and mandamus was an improper remedy; (2) the driveway easement conveyance only granted rights to a parcel forty-six feet long; (3) any use of the driveway beyond fifty-six feet was not open and hostile to support a prescriptive easement by adverse possession; (4) the court's finding Stallman created a public nuisance by his manner of parking is contrary to law because a public nuisance is a criminal offense; and (5) Stallman's manner of parking did not constitute a private nuisance.

I. Scope of Review

Our review of this equity action is de novo. Iowa R. App. P. 4. We review the entire record and adjudicate anew rights on issues properly presented. *State ex rel. Blackwell v. Blackwell*, 534 N.W.2d 89, 90-91 (Iowa 1995). We give respectful consideration to the district court's findings of fact, but are not bound by them. *Sun Valley Lake Ass'n v. Anderson*, 551 N.W.2d 621, 629 (Iowa 1996).

II. Easement Dimensions

~~The parties~~ dispute the dimensions of the easement conferred in the driveway easement ~~conveyance~~. Stallman argues the intention of the parties to the easement conveyance, and the conveyance itself, reveal the length of the easement was 46 feet. The Fossums argue the purpose of the agreement was to ensure the owners of Lot 3 could continue using the then-existing driveway. At that time, the driveway was 85.6 feet long.

In construing an express grant of an easement, the cardinal principle is that the intention of the parties must control. *Riverton Farms, Inc. v. Castle*, 441 N.W.2d 405, 407 (Iowa App. 1989) (citing *Wiegmann v. Baier*, 203 N.W.2d 204, 208 (Iowa 1972)). Absent ambiguity, the intention of the parties is determined by what the contract itself says. *Wiegmann*, 203 N.W.2d at 208. If the terms of the agreement are ambiguous, the manner in which the parties have construed them is persuasive evidence of their intention. *Id.*

The parties executed the easement conveyance because “a portion of the existing driveway for Lot 3” was “presently encroaching upon a portion of Lot 2.” The conveyance indicated the parties sought “to resolve any problem regarding the encroachment of the driveway for Lot 3 and the right of present and future owners of Lot 3 to have adequate access.” The agreement granted the Fossums “the right to maintain the existing driveway as it presently exists and [the Stallmans] further grant an easement over the southeasterly 2.5 feet of the southwesterly 46 feet of Lot 2 . . . for driveway purposes.”

At the time the conveyance was executed, the Fossums’ driveway was 85.6 feet long. The language allowing the Fossums “to maintain the existing driveway as it presently exists” suggests the length of the easement was 85.6 feet. The remaining language of a “further grant” of an easement over the “southwesterly 46 feet of Lot 2” suggests the length of the easement was 46 feet. The terms of the conveyance are

ambiguous, so we look to the manner in which the parties have construed them as persuasive evidence of their intention.

The Fossums bought their property on February 7, 1983. Stallman bought his property on February 17, 1983. Between February of 1983 and the spring of 1988, the Fossums used the entire length of their 85.6 foot driveway. In 1988, the Fossums replaced a section of the driveway with new concrete, but shortened the overall length by approximately twelve feet. The Fossums continued to use the full length of the driveway with no objection by Stallman until August of 1993.

We determine this conduct of the parties is persuasive evidence that at the time they executed the conveyance the parties intended the length of the easement to be that of the existing driveway, to wit 85.6 feet. Our decision on this issue renders unnecessary a ruling on the Fossums' argument they proved a prescriptive easement by adverse possession.

III. Writ of Mandamus

Stallman argues the district court lost jurisdiction over the counterclaim for writ of mandamus when the Fossums voluntarily dismissed their counterclaim. Iowa Rule of Civil Procedure 215 provides, in part, "A party may, without order of court, dismiss that party's own petition, counterclaim, cross-petition or petition of intervention, at any time up until ten days before the trial is scheduled to begin." Iowa R. Civ. P. 215. A plaintiff has an absolute right to dismiss his cause of action. *Witt Mechanical Contractors, Inc. v. United Bhd. of Carpenters & Joiners Local 772*,

237 N.W.2d 450, 451 (Iowa 1976). When the defense pleadings are solely defensive, a voluntary dismissal of an action by a plaintiff terminates the court's jurisdiction. *Smith v. Lally*, 379 N.W.2d 914, 916 (Iowa 1986).

The cases cited above addressed dismissals by plaintiffs and the effect of the dismissals on the court's jurisdiction. Rule 215 is not limited to dismissals by plaintiffs, however, and allows a "party" to dismiss counterclaims. Nothing in the case law of this state suggests the jurisdictional rule should be any different when a defendant dismisses a counterclaim. When the Fossums exercised their absolute right to dismiss their counterclaim for writ of mandamus, the court lost jurisdiction over the counterclaim. The district court's issuance of a writ of mandamus is annulled. We note the district court ordered Stallman to abate the private nuisance by removing the steel I-beam and wooden posts. The district court is empowered to enforce this order (see Part IV, below).

IV. Abatement of Nuisances

The district court found the erection of the steel I-beam and wood posts constituted a private nuisance. The court found Stallman's manner of parking constituted a public and private nuisance. The court ordered the nuisances abated. Stallman contends the finding of a public nuisance is contrary to law because such a finding could only be made in a criminal proceeding. He argues his manner of parking was not a continuous and substantial interference so as to constitute a private nuisance.

We determine a finding of a public nuisance is not confined to a criminal proceeding. A person convicted of erecting, causing, or continuing a public nuisance is guilty of an aggravated misdemeanor. Iowa Code § 657.3 (1995). Stallman was not convicted of maintaining a public nuisance, and section 657.3 does not address the issue of whether a court may order a public nuisance abated in a civil action. Section 657.4 provides a court may order a nuisance abated when a person is found guilty of erecting, causing, or continuing a nuisance upon indictment, complaint, or civil action. *Id.* § 657.4. The district court had the authority to find a public nuisance and order it abated.

“The essence of a private nuisance is an interference with the use and enjoyment of land.” *Guzman v. Des Moines Hotel Partners, Ltd.*, 489 N.W.2d 7, 10 (Iowa 1992). Nuisance itself refers to the result of the interference. *Id.* at 11. Iowa statutory law defines a nuisance generally as “[w]hatever is injurious to health, indecent, or offensive to the senses, or an obstruction to the free use of property, so as essentially to interfere with the comfortable enjoyment of life or property.” Iowa Code § 657.1 (1995). The statutory provisions under chapter 657 do not supersede the common law of nuisance. *Guzman*, 489 N.W.2d at 10. Parties must use their own property in a manner that does not unreasonably interfere with or disturb their neighbor’s reasonable use and enjoyment of the neighbor’s property. *Weinhold v. Wolff*, 555 N.W.2d 454, 459 (Iowa 1996).

000472

The Fossums' reasonable use and enjoyment of their property includes safely exiting their driveway onto Palo Road. For at least three months, Stallman parked one of his vehicles at the southwest corner of his lot, parallel to the Fossums' driveway and abutting Palo Road. On some occasions, Stallman parked the vehicle partially on the Fossums' easement. Stallman continued this manner of parking until drifting snow prevented him from parking in this corner of his lot.

Because Palo Road meets Lots 2 and 3 at an angle, the district court found Stallman's manner of parking posed a safety risk to the Fossums, other motorists, and bicyclists. The Fossums' photographic and videotape evidence supported their claim of blocked visibility when exiting their driveway. The court also relied on the speed of traffic on Palo Road to support its finding of a safety hazard. Stallman declined to change his manner of parking when asked to do so by the Fossums' attorney. The district court found Stallman parked his vehicle as he did to aggravate the Fossums and make use of their driveway more difficult and dangerous. Stallman's conduct unreasonably interfered with the Fossums' reasonable use of their driveway and enjoyment of their property. We affirm on this issue.

Costs on appeal are taxed to Stallman.

ANNULLED IN PART AND AFFIRMED IN PART.

Huitink, J., concurs; Sackett, P.J., concurs in part and dissents in part.

SACKETT, P.J. (concurring in part; dissenting in part)

000473

I concur in part and dissent in part. I would affirm the trial court.