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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

CHESTER L. BROWN and ELTA M. BROWN, husband and wife, Appellants, vs. KEITH L. FRIESTH and DORIS J. FRIESTH, husband and wife; MICHAEL L. MILLER and KONNIE S. MILLER, husband and wife; CURTIS M. CARTER, and MILDRED A. CARTER, husband and wife; WILLIAM L. DAVIS and FREIDA A. DAVIS, husband and wife. Appellees.	Filed January 31, 1978 309 2-59694

Appeal from Webster District Court - Newt Draheim, Judge.

Plaintiffs appeal judgment denying reformation of a quitclaim deed granting easements on their property. REVERSED.

William S. Burnquist, of Johnson, Burnquist, Erb, Latham & Gibb, of Fort Dodge, counsel for appellants.

Tito Trevino, of Kersten, Opheim, Carlson & Estes, of Fort Dodge, counsel for appellees.

Heard by Allbee, C. J., Donielson, Snell, Oxberger and Carter, JJ.

DONIELSON, J.

Plaintiffs-Chester and Elta Brown appeal from a judgment denying their request for reformation of a quitclaim deed which granted easements on their property. In denying plaintiffs' requested equitable relief, the district court ruled that they had failed to sustain their burden of proof.

Louis Rabiner had been the owner of a large tract of land in Webster County outside the city limits of Fort Dodge, the south line of which abutted a county road. After having the land surveyed and broken down into smaller tracts, Rabiner sold a tract which was adjacent to the county road on the east to defendants-William and Freida Davis and one on the west to defendants-Curtis and Mildred Carter. He also sold one tract at the extreme north end to defendants-Keith and Doris Friesth and another to one Jordison, predecessor to defendants-Michael and Konnie Miller. Plaintiffs also bought a tract along the east side of the Rabiner property.

Thereafter, the balance of the Rabiner property was sold to plaintiffs. At that time there was no dedicated road anywhere on the property, and Rabiner, plaintiffs, and some of the defendants, the Davises in particular, deposited gravel and did preliminary grading in order to construct a makeshift road running north from the county road through the center of the Rabiner property to the Friesth tract at the northern extreme.

The record also contains some evidence indicating the existence of an intended roadway running in an east-west direction along the southern boundary of the Friesth tract. Although some of the defendants claim they have deposited gravel on this roadway and otherwise maintained it, plaintiffs dispute this and also deny the existence of any semblance of a roadway along the east-west portion discussed herein. There was also evidence in the record, and the trial court found, that at the time the Friesths purchased their property from Rabiner, it was understood that Rabiner would maintain an east-west roadway along the southern boundary of their property and would grant an easement for said roadway. However, that understanding was never recorded in the form of an easement in a deed, nor was it ever reduced to writing.

In 1973, Jordison employed a local realtor who had previously dealt with Rabiner and was familiar with the property, to sell his tract. After a sale was negotiated with

the Millers, the parties discussed the fact that there were no valid legal means of ingress and egress to the premises from the county road. A legal means of access was especially critical to the Millers inasmuch as it was a prerequisite to their obtaining a loan which would enable them to purchase the property. The Millers consequently refused to accept title until a legal easement was provided which would solve this problem.

Subsequently, the realtor approached the plaintiffs, the legal owners of all property except the sold lots, about the situation and they offered to grant an easement for a roadway running north to south through the center of the property, not only to the Miller tract but also to any other tract which had previously been sold. They then informed their attorney and the realtor that a document containing this easement was to be prepared, although it was to be limited in scope to the north-south road and was to exclude the portion running east to west in the northern part of the property.

A quitclaim deed containing the easement was executed by plaintiffs and the Rabiner estate, record owner of the property involved. However, an easement dealing with the strip running in an east to west direction was also included by the draftsman in the deed. Plaintiffs, unable to understand legal descriptions of real estate, assumed that their instructions regarding the easement had been carried out and executed the instrument in reliance upon that assumption.

All defendants except the Millers acquired their properties more than one year before the granting of the disputed easement or any request therefor, and none of them furnished any consideration for the easement contained in the deed. Although plaintiffs later submitted to each defendant for his or her approval a deed releasing any interest in the east-west strip accompanied by a check for $2.50, all of the deeds were returned unexecuted along with the checks. Plaintiffs then began the instant equitable action in an attempt to reform the deed and delete the reference to an easement dealing with the east-west strip of land.

Our review in equity cases is **de novo.** Rule 4, Rules of Appellate Procedure. Although we give weight to the findings of fact of the trial court, we are not bound by them. Rule 14(f)(7), R. App. P. The law is well settled in Iowa that a court of equity may reform an instrument resulting from a contractual relationship when it fails to

express the agreement of the parties either because of fraud, accident, inadvertence, or mutual mistake, King v. Good, 205 Iowa 1203, 1208, 219 N.W. 517 (1928); Rankin v. Taylor, 204 Iowa 384, 387, 214 N.W. 725 (1927); Costello v. Stokely Grain Co., 193 Iowa 203, 205, 186 N.W. 842 (1922), an error by the scrivener in reducing the agreement to writing, Coleman v. Coleman, 153 Iowa 543, 552, 133 N.W. 755 (1911), or any other thing that prevents expression of the true agreement. Miller v. Martin, 246 Iowa 910, 915, 70 N.W.2d 141 (1955).

Evidence required in such an instance must be clear, satisfactory and convincing. Wilden Clinic, Inc. v. City of Des Moines, 229 N.W.2d 286, 289 (Iowa 1975). This means that the proof must be established so that no reasonable uncertainty or doubt as to the truth confronts the trier of fact. Miller v. Martin, supra. Before a reformation can be had, it must clearly appear that the minds of the contracting parties did not meet upon the proposition expressed in the writing. Allemang v. White, 230 Iowa 526, 530, 298 N.W. 658 (1941).

Defendants initially contend that the foregoing legal principles are applicable in the instant case since a contractual relationship is involved. Their assertion of such a relationship is based upon their belief that the quitclaim deed served as a written expression of the prior understanding between Rabiner and the Friesths. In response, plaintiffs assert that because of the land transaction involved, only the Millers are arguably in a contractual relationship with them and then, only to the extent of the north-south access road which was a condition precedent to the Millers' obtaining desired financing.

We agree with plaintiffs' analysis and conclude that the legal principles dealing with contractual arrangements are generally inapplicable here. Although such a relationship may exist with regard to the Millers, their interest in it, for purposes of the present appeal, is limited to the easement dealing with the north-south roadway. With regard to the other defendants, this north-south roadway easement granted by plaintiffs was in the nature of a voluntary conveyance, since none of them furnished any consideration for it, either valuable or meritorious. 76 C.J.S. Reformation of Instruments § 10d (1952). With regard to all defendants, any east-west roadway easement constituted a voluntary conveyance since plaintiffs had no obligation to honor

any "understanding" entered into by Rabiner. [1]

In Westcott v. Westcott, 259 N.W.2d 545, 548 (Iowa Ct. App. 1977), this court stated:

> "The grantor in a voluntary conveyance will be aided by the court, as where, by mistake a larger estate or more land has been granted than was intended to be conveyed. It is immaterial that the grantee is not cognizant of the mistake. Insofar as voluntary conveyances are concerned, they are unilateral and the court has the power to reform the deed to express the intentions of the grantor even though, strictly speaking, the mistake is not mutual. 66 Am. Jur.2d, Reformation of Instruments, § 45."

From a review of the record, we conclude that the north-south access easement is generally a voluntary conveyance and the east-west easement is a completely voluntary one. Since any voluntary conveyance or easement of a voluntary nature may be reformed at the request of the grantor, 66 Am. Jur.2d Reformation of Instruments §§ 45 and 52 (1973), 76 C.J.S. Reformation of Instruments, supra, this court, sitting in equity, will reform the deed pursuant to plaintiffs' request. Consequently, we reverse the district court.

REVERSED.

All judges concur except Oxberger, J., and Carter, J., who dissent.

[1] Although defendants may attempt to argue that the prior agreement or understanding between Rabiner and the Friesths regarding the east-west strip constituted an implied easement which is binding upon plaintiffs, we are unpersuaded. In order for this court to find an implied easement as a matter of law, defendants must demonstrate, among other things, that an east-west strip easement is necessary to the beneficial enjoyment of their property and that its use is permanent, apparent and continuous. See Farmer and Mechanics Savings Bank v. Campbell, 258 Iowa 1238, 1248-1250, 141 N.W.2d 917 (1966); Wymer v. Dagnillo, 162 N.W.2d 514, 516-518 (Iowa 1968); Schwob v. Green, 215 N.W.2d 240, 242-244 (Iowa 1974); 25 Am. Jur.2d Easements and Licenses §§ 27-33 (1966). See generally, Feilhaber v. Swiler, 203 Iowa 1133, 212 N.W. 417 (1927). The record is totally devoid of any evidence which would lend support to an implied easement theory. Consequently, we reject such an argument.

CARTER, J. (dissenting)

I dissent. The trial court correctly stated the rules concerning avoidance of instruments affecting real estate for mutual mistake, fraud, and misrepresentation, and held that plaintiffs failed to establish a right to relief under any of said theories. Plaintiffs do not seriously contest these findings and conclusions on this appeal but rather contend that they are entitled to avoid the transaction based upon a showing of unilateral mistake on the part of their scrivener because the conveyance of the easement was gratuitous.

I recognize the rule applied in our decision in Westcott v. Westcott, 259 N.W.2d 545, 548 (Iowa Ct. App. 1977) that a gratuitous conveyance may be avoided upon a showing of unilateral mistake on the part of the grantor. But this clearly is not an appropriate case for the application of that doctrine. I believe the record demonstrates that the catalyst which produced the quit claim conveyance of the subject easement was not only the Millers' loan problems but also the threat of suit by the Carters and the Friesths. Plaintiffs' exhibit 3 is a letter from the attorney for the Carters and the Friesths stating their position in this regard and objecting to the plowing up of a roadway. A review of the entire record reveals that this reference can only relate to the east-west segment of the easement sought to be reformed. The response from plaintiffs' attorney to the attorney for Carters and Friesths denied that the east-west segment of the disputed easement was intended to be a roadway.

For all that the record reveals, this was the posture of the dispute at the time of the disputed conveyance, viz., one side claiming a right to the east-west segment of the easement as well as the north-south segment and threatening suit, and the other side offering only the north-south segment. The letter from the attorney for Carters and Friesths was dated November 26, 1973. The quit claim conveyance which is the subject of this dispute is dated November 30, 1973. Under such circumstances I cannot conclude, in the absence of more evidence than appears in the present record, that the conveyance of the questioned easement was gratuitous. Rather, it appears to be the resolution of a dispute between the parties made under threat of legal action.

The foregoing view is fortified by the fact that the record with respect to plaintiffs' grantor, Rabiner, strongly preponderates in favor of a finding that he promised at least certain of the defendants the use of the east-west roadway when they

acquired their property. Under Iowa law, plaintiffs could avoid Rabiner's obligation only if they were without knowledge thereof.[1] The record shows that plaintiff Chester Brown had discussed the roadways with Rabiner when he bought the property and was somewhat concerned about the cost of maintaining same, although the details of such discussion do not appear.

The burden of proof was on plaintiffs to establish that the conveyance was gratuitous by clear, satisfactory and convincing evidence. I agree with the trial court that plaintiffs failed to carry their burden of proof and would affirm the judgment below.

OXBERGER, J., joins in this dissent.

[1] Gilmore v. New Beck Levee District, 212 N.W.2d 477, 479 (Iowa 1973). Such knowledge may be either actual, constructive, or inquiry notice. See id. at 479.