IN THE COURT OF APPEALS OF IOWA

No. 1-444 / 91-54

FILED
FEB 25 1992
CLERK SUPREME COURT

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PAMELA J. JAESCHKE,
Plaintiff-Appellant,

vs.

FRANCIS LONG and BARBARA JEAN LONG, d/b/a LONG'S TREE FARM,
Defendants-Appellees,

FRANCIS LONG and BARBARA JEAN LONG, d/b/a LONG'S TREE FARM,
Counterclaim Plaintiffs,

vs.

PAMELA J. JAESCHKE,
Counterclaim Defendant.

Appeal from the Iowa District Court for Webster County, Gary L. McMinimee, Judge.

Plaintiff appeals a district court order determining defendants' tree farm does not violate any local zoning ordinance or any restrictive covenant. **AFFIRMED.**

Jeane W. Pearson of Price, Breen & Pearson, Fort Dodge, for appellant.

William H. Habhab, Fort Dodge, for appellees.

Considered by Donielson, P.J., and Hayden and Sackett, JJ. Habhab, J., takes no part.

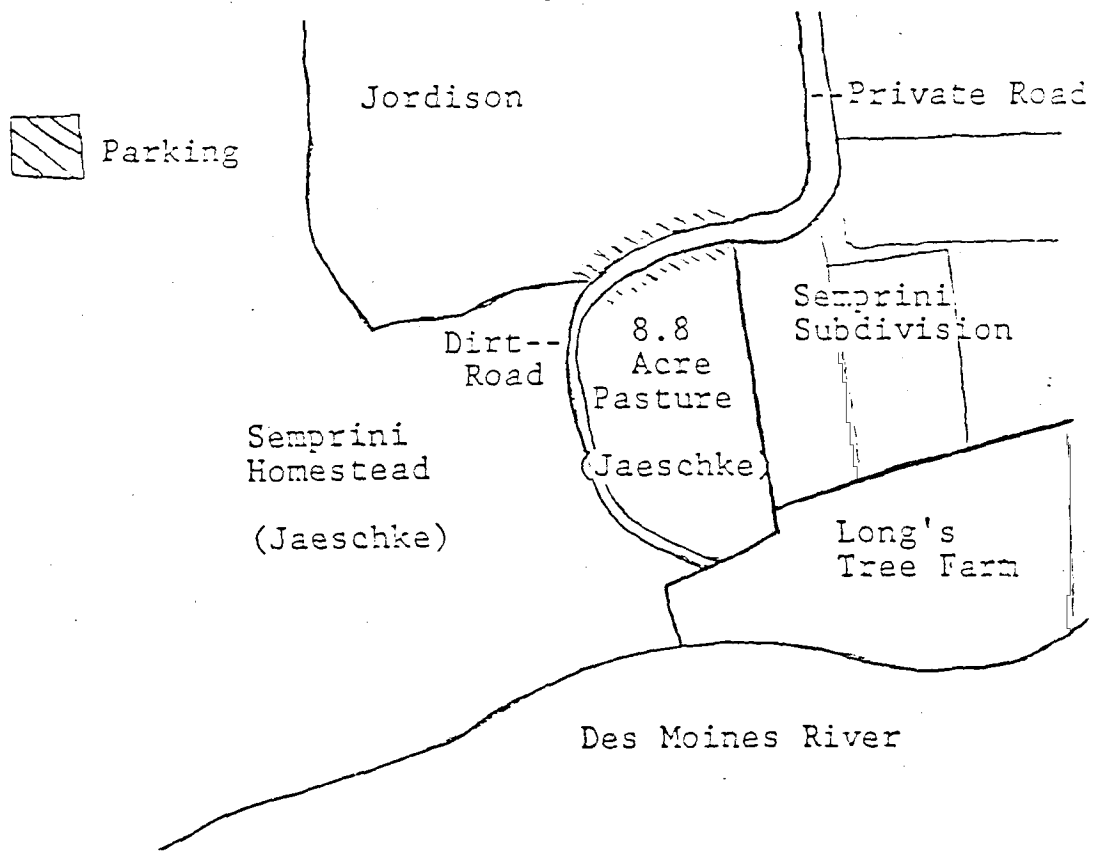
HAYDEN, J.

Defendants, Francis and Barbara Long, doing business as Long Tree Farm, have an easement on property owned by plaintiff, Pamela Jaeschke. Jaeschke claims Longs have overburdened their easement. The district court found for the Longs. We affirm.

All of the land involved in this case was formerly owned by the Semprini family in Webster County. In 1980 Semprinis platted and dedicated a portion of their land as the Semprini Subdivision. Part of this land was set aside as a private road. The lots within the Semprini Subdivision may not be used for commercial activity. Semprinis also owned three parcels of land south and west of the subdivision. The only access to these parcels is over the private road.

In June 1981 Longs purchased the southern-most parcel of land. The southern boundary of this 10.4-acre parcel is the Des Moines River. To access the property, it is necessary to travel on the private road, then west on a dirt road along the northern boundary of an 8.8-acre pasture, and then south along the western border of the pasture. The Semprini homestead is to the west of the dirt road. These areas are shown on the map.

Longs informed Semprinis they intended to use their property for a choose-and-cut Christmas tree farm. The written contract between the parties granted Longs a perpetual easement in the dirt road. Longs also informed



Semprinis they intended to have customers park on the east-west portion of the dirt road. Longs have spent about $2,000 and considerable labor improving the dirt road.

In 1986 Longs began selling Christmas trees from their property. Longs' business is only open to customers five days a year. Customers park along the east-west portion of the dirt road. Wagons then transport customers to the farm where they may cut their own Christmas trees. Longs' tree farm business has increased every year. About 100 trees were sold in 1986, 200 in 1987, 300 in 1988, and 425 in 1989.

Jaeschke purchased the Semprini homestead in June 1987. She was aware of Longs' easement and tree farm operation. Jaeschke additionally purchased the 8.8-acre pasture in September 1988.

In order to reduce parking on the dirt road, Longs rented some land north of the dirt road from Jordison in 1989. However, shortly before the 1989 sale season, Jaeschke erected a fence on the north side of the east-west portion of the dirt road, which prevented Longs from using the rented area for parking.

Jaeschke filed a petition for declaratory judgment and injunction in May 1990. She had several complaints about Longs and their customers using the dirt road. The district court found the tree farm was not a commercial activity, and thus, the operation of the tree farm did not violate any zoning ordinance or the Semprini Subdivision building restrictions. The court also found the scope of the easement permitted parking by the Longs' customers, so long as the parking does not interfere with Jaeschke's reasonable use of the land. The court enjoined Jaeschke from blocking access to Longs' rented parking area. Jaeschke now appeals.

I. In an equity matter such as this our review is de novo. Tamm, Inc. v. Pildis, 249 N.W.2d 823, 828 (Iowa 1976). Where the credibility of witnesses is a consideration in an equity case we give weight to the fact findings of the trial court although we are not bound by them. Id.

II. Jaeschke contends the district court erroneously considered parol evidence in order to alter the express terms of the easement. The deed between Semprinis and

Longs provided Longs would use their property solely for farming and raising trees. Terry Semprini and Francis Long were allowed to testify they had agreed the scope of the easement would allow customers of the tree farm to park their cars on the dirt road.

In the construction of an easement grant, the cardinal principle is that the intention of the parties must control; and except in cases of ambiguity, this is determined by the terms of the grant itself. Wiegmann v. Baier, 203 N.W.2d 204, 208 (Iowa 1972). The parol evidence rule forbids the use of extrinsic evidence to vary, add to, or subtract from the written agreement. Montgomery Properties Corp. v. Economy Forms Corp., 305 N.W.2d 470, 475 (Iowa 1981). The parol evidence rule does not come into play until by interpretation the meaning of the writing is ascertained, and, as an aid to interpretation, extrinsic evidence is admissible which sheds light on the situation of the parties, antecedent negotiations, attendant circumstances, and the objects the parties were striving to attain. Tamm, Inc. v. Pildis, 249 N.W.2d 823, 831 (Iowa 1976).

We agree with the district court the circumstances surrounding the grant of the easement should be considered in determining the scope of the easement. In particular, Semprinis' construction of the easement prior to Jaeschke's purchase of the 8.8-acre pasture area shows an agreement to allow Longs' customers to park along the dirt road. We hold Longs are permitted use of the easement.

III. Jaeschke also contends Longs' use of the dirt road as a customer parking lot overburdens the easement.

An easement gives a party the right to use the land in the manner and for the purposes it was intended to serve. Schwartz v. Grossman, 173 N.W.2d 57, 59-60 (Iowa 1969). The easement may not be used in a way which imposes additional burdens on the owner of the land through which it runs. Id. at 60.

Generally, where an easement is given for purposes of ingress and egress, a mere increase in the frequency of use will not constitute an additional burden. Schwob v. Green, 215 N.W.2d 240, 243 (Iowa 1974). However, an additional burden on the land may be created where an easement is used for a purpose totally different than that for which it was granted. Id.

As discussed above, when the easement in this case was granted the parties agreed the land could be used for parking. We determine, under the facts of this case, the increase in customers over time did not create an additional burden on the land. While the number of customers may have increased, Longs' tree farm is still only open to the public for five days out of the year. Furthermore, we are satisfied Longs have taken adequate care to keep the dirt road in good repair. We hold Longs have not overburdened the easement.

IV. Jaeschke contends the district court erred in finding the easement should be construed to require her to

provide access to the land Longs rented in order to park additional cars.

A person having the right to use an easement has the right to remove obstructions unlawfully placed thereon, as well as natural obstructions interfering with the use of the easement, so long as there is no breach of the peace. Krogh v. Clark, 213 N.W.2d 503, 506 (Iowa 1973). Neither party to an easement may interfere with the rights of the other. Id. The one who enjoys the easement must use it according to its terms; the one who granted it must not interfere with the rights conferred. Id.

As the district court concluded, giving Longs access to the Jordison property for parking does not increase the burden on Jaeschke's property, but relieves the burden. We hold Jaeschke may not obstruct Longs' access to the area they rented on Jordison's property.

V. Jaeschke contends Longs' use of their land for retail sales violates the conservation zoning ordinance in effect for that area. The zoning ordinance expressly authorizes agricultural and non-profit recreational uses.

A zoning ordinance should not be extended by implication to prevent a use not clearly prohibited. Livingston v. Davis, 243 Iowa 21, 26, 50 N.W.2d 592, 596 (1951). A person is entitled to make any lawful use of his or her property not prohibited by a zoning ordinance and not a nuisance. Id. Agriculture, as an occupation, includes more than the elemental process of planting, growing, and harvesting crops. Helmke v. Board of

Adjustment, City of Ruthven, 418 N.W.2d 346, 351 (Iowa 1988). The question is whether the activity in question is carried on as part of the agricultural function or is separately organized as an independent productive activity. Id.

We hold the sale of Christmas trees, grown on Longs' property, is part of the agricultural function. Longs' use of their land does not violate the conservation zoning ordinance.

VI. Finally, Jaeschke contends the district court should have awarded her attorney fees. When Longs purchased their property from Semprinis, they agreed to join the Semprini Subdivision Property Owners' Association and to pay their pro rata share of expenses for road maintenance. The Association agreement prohibits any business or commercial activity. The agreement also provides for recovery of attorney fees for a member who acts to enforce the agreement.

The district court held the restrictions on use in the agreement do not apply to Longs' property because their property is outside the subdivision. The agreement does not purport to restrict use of property outside the subdivision. We agree with the district court's decision on this issue.

We affirm the district court on all issues. Costs on appeal are taxed to appellants.

AFFIRMED.

Donielson, P.J., concurs; Sackett, J., dissents.

SACKETT, J. (dissenting)

I dissent. I cannot agree with the majority that the testimony of plaintiffs' grantor should be considered to expend an easement given by the grantor and to which plaintiffs were not a party. I would not consider the testimony of the grantor and would determine the easement did not carry with it parking privileges.