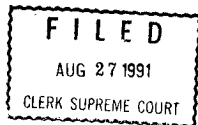


IN THE COURT OF APPEALS OF IOWA

No. 0-665 / 90-623



ARTHUR MORRIS,

Appellant,

370

vs.

DEAN PARIS, MARY JANE PARIS, and Defendants who are unknown
and their unknown heirs, et al.,

Appellees.

Appeal from the Iowa District Court for Buchanan
County, William G. Klotzbach, Judge.

Plaintiff appealed the district court ruling denying
his claim to an easement by prescription entitling him to
use a neighbor's land to gain access to his farm. **REVERSED
AND REMANDED.**

James T. Peters of Ristvedt & Peters, Independence, for
appellant.

James L. Chipokas, Cedar Rapids, for appellee.

Considered by Hayden, P.J., and Sackett and Habhab, JJ.

HAYDEN, P.J.

The plaintiff, Arthur Morris, and the defendants, Dean and Mary Jane Paris, are the owners of adjacent farms. Morris has owned and operated his farm since 1947; the Parises have owned their farm since 1964.

In 1957 the county vacated a gravel road lying between the two farms. After the road was vacated, the property line dividing the two farms passed down the middle of the road land; therefore, one-half of the former road land reverted to each of the two tracts of property.

Since 1957 Morris has used the vacated road for access to his property. It appears the Parises made no objection to this for some years after purchasing their property in 1964. However, in 1989 the Parises offered to sell Morris the one-half of the vacated road land which was located inside the Paris property. When Morris refused to pay for the former road land, the Parises erected a fence on their property line; the fence was so located that Morris was unable to use the half of the former road land which was located inside the Paris property.

Morris then filed the present "petition to quiet title," seeking to establish an easement by prescription over the Paris portion of the former road land. The district court denied Morris's request. The district court held Morris had occupied the Paris portion of the former road land as a mere "squatter" because he had been aware he had neither title to the property nor any basis for

claiming an interest or right to enter the property. Morris has appealed.

This case was heard in equity. Boundary line disputes may be considered in equity. Mensch v. Netty, 408 N.W.2d 383, 385 (Iowa 1987). Our review is de novo. Iowa R. App. P. 4. We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

Morris contends the evidence was sufficient to establish he had an easement by prescription allowing him to use the Paris portion of the former road land for access to his property. Morris contends the evidence established both (1) open and notorious use of the subject property for a period of over ten years, and (2) hostile and adverse use of the subject property pursuant to a claim of right for a period of over ten years.

An easement is a liberty, privilege or advantage in land without profit, existing distinct from the ownership of the soil, and because it is a permanent interest in another's land, with a right to enter at all times and enjoy it, it must be founded upon a grant by writing or upon prescription. Webb v. Arterburn, 67 N.W.2d 504, 513, 246 Iowa 363, 379 (1954). In general, an easement may be created in three ways: (1) express written grant; (2) prescription; and (3) implication. Loughman v. Couchman, 47 N.W.2d 152, 153-54, 242 Iowa 885, 888 (1951).

Prescription is defined as the process of acquiring rights by uninterrupted assertion of the right over a long period of time. Phillips v. Griffin, 98 N.W.2d 822, 824, 250 Iowa 1350, 1354 (1959). A prescriptive easement may be created by adverse possession under claim of right or color of title, openly, notoriously, continuously, and hostilely asserted for ten years or more. Mensch v. Netty, 408 N.W.2d 383, 387 (Iowa 1987).

Permissive use is not adverse or under claim of right. Id. Continued use does not, by mere lapse of time, become hostile or adverse. Schwenker v. Sagers, 230 N.W.2d 525, 527 (Iowa 1975). A plaintiff must show he claimed an easement as his right, and this must be established by evidence distinct from and independent of its use, and the party against whom the claim is made must have express notice thereof. Webb v. Arterburn, 67 N.W.2d 504, 515, 246 Iowa 363, 383 (1954).

There may also be a prescriptive easement where the original use was with the consent of the servient owner and use as of right has continued for more than ten years. Anderson v. Yearous, 249 N.W.2d 855, 861 (Iowa 1977). "Use as of right" has been applied only in those situations in which the party claiming the easement has expended substantial amounts of labor or money in reliance upon the servient owner's consent or his oral agreement to the use. Simonsen v. Todd, 154 N.W.2d 730, 733, 261 Iowa 485, 489 (1967)

In this case we believe Morris established an easement by prescription. Dean Paris testified he gave Morris permission in 1964 to use the drive for that year in order to haul corn. Paris believed Morris was supposed to put in a fence on the true property line within the next year. Morris did not put in the fence but continued to use the drive. Therefore, Morris's continued use of the drive for the next twenty-five years was adverse. Paris knew Morris was using the drive but had no complaint until 1988.

The district court found Morris was a mere squatter. A mere squatter cannot have a good faith claim of right to the property. Carpenter v. Ruperto, 315 N.W.2d 782, 785 (Iowa 1982). When knowledge of lack of title is accompanied by knowledge of no basis for claiming an interest in the property, a good faith claim of right cannot be established. Id. A good faith claim of right may be based on confusion or mistake. Id. at 786.

Morris testified he believed he had an easement for the use of the drive. Paris himself testified he had given Morris a temporary easement to use the drive. While Morris's belief he received a permanent easement from Paris was a mistake, he used the drive under a good faith claim of right. Clearly, Morris's use of the drive was open, notorious, continuous, and hostile.

Morris has established all of the elements for an easement by prescription. We reverse the district court

and remand to the district court to enter an order in favor of Arthur Morris. Costs of appeal are taxed to appellees.

REVERSED AND REMANDED.

Sackett, J., concurs; Rabhab, J., dissents.

HABHAB, J. (dissenting)

I respectfully dissent. I agree with the majority that if the plaintiff has an easement, it must be an easement by prescription. However, I disagree with the majority that the plaintiff has met the proof necessary to establish such an easement. I would affirm the trial court.

There is not much question that the defendants own the land in question and have been in actual possession for many years. If the plaintiff has an easement as he claims, it must be an easement by prescription, or, as otherwise stated, by adverse possession, under color of right or color of title, openly, notoriously, continuously, and hostilely asserted against defendants for ten years or more. Webb v. Arterburn, 67 N.W.2d 504, 513 (Iowa 1954).

As against the possession and title of the defendants, plaintiff has a heavy burden in seeking to have a court establish by decree the servitude of the easement. In this respect, the plaintiff must establish his right to an easement by evidence that is clear, convincing, and satisfactory, and as the supreme court has said on occasions that it must be conclusive. Id.

Our supreme court in Nichols v. Kirchner, 241 Iowa 99, 103-04, 40 N.W.2d 13, 16 (1949), stated:

. . . the doctrine (adverse possession) is to be taken strictly. There are usually no equities in favor of one who claims property of another by adverse possession and his acts are to be strictly construed. The law presumes the possession of land is under the regular title.

I do not believe the proof here rises to the level of clear, convincing, and satisfactory evidence necessary to establish an easement by prescription.

Section 564.1 provides as follows:

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.

It is clear under section 564.1 that mere proof of use of the land under dispute is not sufficient to establish an easement by prescription. This is so for the use may be through the permission of the owner of the land. Under the statute, the plaintiff must show that he claimed the easement as his right, and this claim must be established by evidence distinct from and independent of its use.

The plaintiff must also prove that the defendants against whom the claim is made had express notice of the plaintiff's claim that he has as his right an easement. The express notice requirement under the statute is not satisfied by evidence of the plaintiff's use, but there must be clear and convincing evidence plaintiff's claim of right of use is against the objections or protests of the defendants. I find no clear and convincing evidence that the plaintiff's use was over the objections or protests of the defendants for the period of time required to establish

an easement by prescription. I would affirm the trial court.