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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

WILLIAM J. FREEBURG and **MARGARET L. FREEBURG,**	)	
	)	Filed January 26, 1983
Plaintiffs-Appellees,	)	
	)	2-303
vs.		2-67539
	)	
CRAIG E. SWEET and **LORETTA L. SWEET,**	)	
Defendants-Appellants.	)	

Appeal from Iowa District Court, August F. Honsell, Jr., Judge.

Defendants appeal from the trial court's judgment in plaintiffs' action for injunctive relief and damages, finding that an easement existed on defendant's property providing access to plaintiffs' property by a driveway, and ordering defendants to refrain from interfering with plaintiffs' use of the driveway. AFFIRMED.

James W. Affeldt of Eells, Blackstock, Affeldt & Harms, Cedar Rapids, for defendants-appellants.

Keith D. Collins, Belle Plaine, for plaintiffs-appellees.

Heard en banc.

DONIELSON, J.

Defendants appeal from the trial court's judgment in plaintiffs' action for injunctive relief and damages, finding that an easement existed on defendant's property providing access to plaintiffs' property by a driveway, and ordering defendants to refrain from interfering with plaintiffs' use of the driveway. We affirm.

Since it was tried below as an equitable proceeding, our review of this case is de novo. Iowa R. App. P. 4; see Atlantic Veneer Corporation v. Sears, 232 N.W.2d 499, 502 (Iowa 1975); Mosebach v. Blythe, 282 N.W.2d 755, 758 (Iowa Ct. App. 1979). Our responsibility is to review the entire record and determine anew those rights properly presented and preserved. While we give weight to the findings of the trial court, particularly when the credibility of witnesses is a consideration, we are not bound by them. Tamm, Inc. v. Pildis, 249 N.W.2d 823, 828 (Iowa 1976) (quoting Hansen v. Chapin, 232 N.W.2d 506, 509 (Iowa 1975)).

I.

In 1964 defendants Craig and Loretta Sweet purchased a lot in Hillhaven First Addition to the City of Cedar Rapids. At the time of purchase, the lot had a frontage of fifty feet on Hillhaven Court, which provided access for an eleven-feet-wide concrete driveway extending westerly from the house to the curb. The house that was located on the lot was subsequently sold to plaintiffs, Bill and Peggy Freeburg, who currently reside there.

In 1967 defendants moved a second house, which was and still is their personal residence, onto an unplatted area they owned immediately adjacent to and north of that subsequently purchased by plaintiffs. Mr. Sweet then constructed a second one-lane driveway from this house to Hillhaven Court, joining with the then existing driveway leading to the home now owned by plaintiffs. In the process, the driveway leading to the home now owned by plaintiffs was altered so

as to comply with City ordinances which required the driveways to be contained within a 20-foot approach off of Hillhaven Court.

In 1969 defendants replatted the lot together with the land they owned to the north of the lot. This replat, which became known as Sweet's First Addition to Cedar Rapids, contained three lots. Lot 2, the lot upon which the Sweet home is now located, encompassed all of defendants' personal residence driveway as well as part of the driveway leading to the house on the adjoining Lot 3. Lot 3, the lot upon which the Freeburg home is now located, was left with a frontage of approximately thirty feet after the replatting.

From 1967 through October of 1972, defendants rented out the property which is now owned by plaintiffs. During this time the tenants used the driveway on the premises for ordinary ingress and egress purposes, traversing as much of the driveway on defendants' lot numbered 2 as was necessary.

In the fall of 1972 defendants listed the property now owned by the plaintiffs with Tommy Tucker Realty Co. through its agent William McLavish, for a sale price of $21,950. The plaintiffs viewed the premises several times and on January 22, 1973, made an offer to purchase the property for $21,000. Plaintiffs testified that they met defendants one time while viewing the premises and indicated that defendants pointed out the boundary line at that time. They assert that no mention was made of defendants' desire to have the purchasers move their driveway. The transaction was closed on March 30, 1973. Nothing in the offer and acceptance agreement executed by the parties, the warranty deed, or any closing documents contained any reference to an easement or reflected any unusual circumstances regarding the driveway.

During the first six years after the sale was completed, plaintiffs used the driveway uneventfully. In the summer of 1979, plaintiffs removed a Russian olive tree from their yard which had been planted there many years earlier by Mrs.

Sweet when the Sweets owned the property. This act prompted a disintegration of the previously amicable relationship between the parties. In the summer of 1980, Mr. Sweet erected a wooden fence extending across his property and across the driveway which had been shared by the parties for the previous six years. Defendants then constructed a new two-lane driveway on their property at an elevation higher than the portion of the driveway remaining on plaintiffs' property. The plaintiffs could no longer use that portion of the driveway on defendants' land due to the increased elevation and the resulting jagged edges of concrete. The plaintiffs were forced to either park in the street or drive over a portion of their yard to reach the carport area.

Plaintiffs subsequently instituted this action seeking an easement over defendants' land for driveway purposes. On July 3, 1980, plaintiffs filed a petition claiming that defendants had interfered with their use of their driveway easement and had caused them injury to the value of their property and emotional distress. Plaintiffs requested temporary and permanent injunctions and compensatory and punitive damages against defendants.

Finding that plaintiffs had successfully established the elements of an easement by implication, the court entered a ruling giving plaintiffs permanent injunctive relief. The court concluded, however, that plaintiffs had failed to establish their entitlement to compensatory or punitive damages. Defendants were ordered to dismantle and remove the portion of their fence that interfered with plaintiffs' use of the driveway easement and to provide for the necessary paving or repair so that the two driveways would connect on a gradual incline and thus be available for plaintiffs' use. Defendants appealed, and plaintiffs cross-appealed with respect to the rulings denying compensatory and punitive damages and attorney fees.

II.

If an easement exists in this case, as plaintiffs claim, it must have been created in one of the three ways recognized under Iowa law: (1) by express agreement, (2) by prescription, or (3) by implication. Tamm, 249 N.W.2d at 835; Farmers & Mechanics Savings Bank v.Campbell, 258 Iowa 1238, 1248, 141 N.W.2d 917, 923 (1966). Clearly the first two are inapplicable here. None of the documents surrounding the sale of the property to plaintiffs contained any mention of an easement or reflected any unusual circumstances regarding the driveway. The prescription theory is likewise inapplicable because neither the requisite hostile assertion of possession or ten-year duration have been met. See Anderson v. Yearous, 249 N.W.2d 855, 861 (Iowa 1977); Phillips v. Griffin, 250 Iowa 1350, 1355, 98 N.W.2d 822, 825 (1959). In addition, although plaintiffs alleged in their petition the existence of several of the necessary elements of a prescriptive easement, they are precluded from relying on this theory in support of their easement claim because they neglected to state, argue, or cite authority in support of the theory in their briefs. See Iowa R. App. P. 14(a)(3); In re Estate of Dull, 303 N.W.2d 402, 407 (Iowa 1981).

We focus on plaintiffs' contention that an easement was created by implication. Implied easements are recognized under Iowa law in situations in which it is appropriate to infer that the parties to a transaction intended to create an easement, even though they did not so express. Schwob v. Green, 215 N.W.2d 240, 242-43 (Iowa 1974). Such an easement arises when each of the following three factors appear:

> (1) a separation of title;
> (2) a showing that, before the separation took place, the use giving rise to the easement was so long continued and obvious that it was manifest it was intended to be permanent;
> (3) it must appear that the easement is continuous rather than temporary, and that it is essential to the beneficial enjoyment of the land granted or reserved.

Tamm, 249 N.W.2d at 838; Wymer v. Dagnillo, 162 N.W.2d 514, 517 (Iowa 1968). The Restatement of Property suggests a similar test, although the factors it enumerates are phrased slightly differently;

> (a) whether the claimant is the conveyor or the conveyee, (b) the terms of the conveyance, (c) the consideration given for it, (d) whether the claim is made against a simultaneous conveyee, (e) the extent of necessity of the easement to the claimant, (f) whether reciprocal benefits result to the conveyor and the conveyee, (g) the manner in which the land was used prior to its conveyance, and (h) the extent to which the manner of prior use was or might have been known to the parties.

We agree with the trial court that the facts in the instant case support a finding that an easement exists by implication. The separation of title occurred on March 30, 1973, when the property was sold to plaintiffs. Both prior to and after this separation, the common use of the driveway was so long continued and obvious that it was manifest it was intended to be permanent. The defendants argue that they had an understanding with plaintiffs that plaintiffs would be allowed to use the driveway only temporarily. Such an agreement would constitute a "license" which is not a legal interest in land and thus, is revocable at the will of the licensor. Paul v. Blakely, 243 Iowa 355, 358, 51 N.W.2d 405, 407 (1952). However, the facts that would give rise to such an understanding are very much in dispute in the instant case. The defendants claim that they told the plaintiffs where the property line was and that the driveway would have to be moved eventually. The plaintiffs deny that they were told anything about having to move the driveway. The fact that defendants may have pointed out where the boundary line exists would not preclude the finding of an easement by implication; only if defendants had informed plaintiffs that the use was permissive would the easement analysis be inappropriate.

The resolution of this issue turns on whether we believe the testimony of defendants or of plaintiffs. Thus, this issue is one of credibility of the witnesses.

The trial court did not find that defendants had informed plaintiffs, as prospective purchasers, about the temporary nature of the driveway. On the contrary, the court found that:

> [t]he events culminating in the sale of this property were not unusual; that is: plaintiffs had viewed the premises on several occasions observing a house with a concrete driveway leading to the street; the driveway had been used for that purpose for some time; the Uniform Offer and Acceptance Agreement executed by the parties did not reflect any unusual circumstance in regard to the driveway; nor did the Warranty Deed, Title Opinion or closing transaction reflect any peculiar circumstances in regard to the driveway; and the consideration paid was in excess of 95 percent of the amount asked by sellers.

While we are not bound by them, we give weight to the trial court's findings especially when the credibility of witnesses is a consideration. Tamm, 249 N.W.2d at 835. We agree with the trial court that the plaintiffs viewed the property with the understanding that the dirveway leading to the house had been used for that purpose for some time and would continue to be available for their use. There was absolutely nothing in the negotiations, the title opinion, the deed, or the closing transaction, which would indicate to plaintiffs that defendants did not intend to allow them to use the driveway for ingress and egress purposes. These factors are sufficient to meet the second prong of the test to establish an easement by implication, namely, that it was manifest that the use of the driveway was intended to be permanent. Id. at 838.

Finally, we believe the third prong of the test is satisfied. By driving over the land, plaintiffs would destroy the lawn. If they are required to put in a new driveway, plaintiffs will lose a good portion of the yard. This prong should be read to require plaintiffs in a situation such as this to expend additional money to pave a portion of their front yard. The requirement that the easement be "essential to

the beneficial enjoyment of the land granted" must refer to the use of the land in the condition in which it is granted; one should not be required to alter the land dramatically to obtain the same beneficial enjoyment. This is especially true in the instant case since the front footage of plaintiffs' property had been reduced substantially and was only approximately 30 feet. If plaintiffs are required to put in a new driveway over their front yard, they will have very little front yard left. This would be an interference with their beneficial enjoyment of the land.

III.

We further conclude that the trial court was correct in ruling that plaintiffs have failed to demonstrate their entitlement to compensatory damages or to punitive damages under the theory of intentional infliction of emotional distress. The following elements are necessary to present a prima facie case for this tort in Iowa:

> (1) Outrageous conduct by the defendant;
> (2) The defendant's intention of causing, or reckless disregard of the probability of causing, emotional distress;
> (3) The plaintiff's suffering severe or extreme emotional distress; and
> (4) Actual and proximate causation of the emotional distress by the defendant's outrageous conduct.

Wambsgans v. Price, 274 N.W.2d 362, 365-66 (Iowa 1979); Meyer v. Nottger, 211 N.W.2d 911, 918 (Iowa 1976). The evidence presented at trial does not support a finding that defendant intended to cause, or even recklessly disregarded the probability of causing, emotional distress; or that plaintiffs suffered such distress.

Accordingly, the decision of the trial court is affirmed. Each party shall pay his own fees on appeal.

AFFIRMED.

All judges concur except Snell and Johnson, JJ., who dissent.

SNELL, J., (dissenting in part).

I respectfully dissent with respect to the majority's conclusion that an implied easement existed.

The party claiming the existence of an implied easement bears the "heavy burden" of proving that the parties intended an easement by implication to exist over the designated area. Tamm, Inc. v. Pildis, 249 N.W.2d 823, 839 (Iowa 1976). I cannot agree that the plaintiffs have sustained their burden in this case.

Focusing on the three elements necessary to prove an implied easement, there is no dispute that a separation of title occurred on March 30, 1973. However, I do not believe that the evidence supports a finding of the second factor—that, prior to this separation, the use was so long continued and obvious that it was manifest it was intended to be permanent. On the contrary, uncontroverted testimony was admitted at trial to the effect that defendants had informed the various tenants who rented the property prior to plaintiffs' purchase of it that they could use the driveway to the rented house on a temporary basis only. The entire period of intermittent use—between the time the driveway was constructed and the date of purchase by the plaintiffs—was only five and one-half years. I believe that, when considered in light of defendant's statements to tenants and the other circumstances present in this case, this period was "insufficient to constitute the long and continued use required by this condition." See Farmers & Mechanics Savings Bank v. Campbell, 258 Iowa 1238, 1249, 141 N.W.2d 917, 924 (1966)(period of four and one-half years of use of roadway held insufficient to create easement). Furthermore, any apparent "manifestations" that a permanent easement was intended would have been contradicted and rebutted by defendant's explicit statement to the plaintiffs that they intended to widen their driveway and that plaintiffs consequently would have to move theirs. Although some of this testimony was disputed at trial by the plaintiffs, my

examination of the record leads me to the conclusion that the predominating evidence corroborates the testimony of the defendants. Consequently I do not agree with the majority that the resolution of the dispute turns solely on the credibility of the witnesses.

This testimony also demonstrates the absence of the first prong of the third factor—the requirement that it appear that the easement is continuous rather than temporary. It is unreasonable for plaintiffs to claim, after being shown the boundary lines and being warned that they would have to move their driveway, that they thought they were purchasing, along with the house, the precise driveway that existed when they examined the premises. No consideration was paid by plaintiffs for an easement on the property they purchased; in fact, defendants accepted a lower price for the property than they had originally requested, and Mr. Sweet testified that this was with the understanding that plaintiffs would have to bear the costs of moving and replacing their driveway. This testimony was corroborated by the testimony of William McLavish, the defendants' real estate agent, who stated that he heard Mr. Sweet tell Mr. Freeburg that he would have to use some of the driveway space leading to the Freeburg house for a future driveway of his own, and that Mr. Freeburg would have to "modify" his own driveway at that time. Mr. Freeburg admitted that he and Mr. Sweet discussed the necessity of redoing the two driveways because the Sweets' driveway was beginning to heave, and that the project had been delayed several times because the Freeburgs did not feel that they were financially capable of undertaking it. Under these circumstances, I do not agree that the evidence supports the conclusion that a "continuous" easement has been shown.

Neither am I persuaded by plaintiffs' argument that the "easement" was essential to the beneficial enjoyment of the land granted. Evidence introduced at

trial by the plaintiffs themselves demonstrated that an easement was not essential to their use of their property. Plaintiffs continued to utilize their driveway even at the time of trial by driving over a small portion of their lawn. Although this or the other alternative available to plaintiffs of constructing a new driveway across their property might have been less convenient to them than the granting of an easement across defendants' property, the Iowa Supreme Court has stated that "mere inconvenience or expediency is not the sort of 'necessity' which permits a finding the parties must therefore have intended to grant such an easement." Schwob v. Green, 215 N.W.2d 240, 244 (Iowa 1974). I believe that plaintiffs' use of an easement in this case is simply a matter of convenience and does not rise to the level of "reasonable necessity" required by Iowa case law. See Farmers & Mechanics Savings Bank, 258 Iowa at 1250, 141 N.W.2d at 924.

Accordingly, I would reverse the decision of the trial court finding an easement by implication and awarding injunctive relief to the plaintiffs. I, too, would affirm the finding that plaintiffs have failed to demonstrate their entitlement to compensatory damages or punitive damages.

Johnson, J., joins this dissent.