

FILED

AUG 26 1982

CLERK SUPREME COURT

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IN THE COURT OF APPEALS OF IOWA

NORWEGIAN-AMERICAN MUSEUM,)

Plaintiff-Appellee,)

vs.)

JOHN O. HEGG, NORMA HEGG, and)
JOHN M. HEGG,)

Defendants-Appellants.)

Filed August 26, 1982

2-187
2-67362

Appeal from Winneshiek District Court - William G. Klotzbach, Judge.

Defendants appeal from the trial court's adverse order in plaintiff's action seeking to establish an easement for a driveway over defendants' property. The defendants claim the trial court erred in ruling that there was such an easement by implication and oral contract, and that the actual and proposed use of the easement by the plaintiff did not place an additional burden on the easement.

AFFIRMED.

Donald H. Gloe of Miller, Pearson, Gloe, Barnes & Beatty, P.C., Decorah,
for defendants-appellants.

Calvin Anderson of Strand, Anderson & Larson and John S. Sproat, Decorah,
for plaintiff-appellee.

Considered by Oxberger, C.J., and Donielson, and Johnson, JJ.

DONIELSON, J.

Defendants appeal from the trial court's adverse ruling in plaintiff's action seeking to establish an easement for a driveway over defendants' property. The defendants claim the court erred in ruling that there was such an easement by implication and oral contract, and that the actual and proposed use of the easement by the plaintiff did not place an additional burden on the easement. We affirm, but for reasons different than those relied upon by the trial court.

Plaintiff filed this action in equity and thus, our scope of review is de novo. Iowa R. App. P. 4.

I.

The plaintiff in this action is a non-profit Iowa corporation involved in the preservation of Norwegian heritage in the United States. Plaintiff purchased a farmstead from Carl Jacobson with the intention of opening it as a museum so the public could observe actual farm operations. Defendants own property which abuts the plaintiff's land on three sides. The fourth side abutting plaintiff's farmstead is owned by a third party not involved in this action.

Both plaintiff and defendants acquired their respective property interests in 1977. Prior to their acquisitions, the properties involved were owned by Carl Jacobson and Isabelle Hegg. The Hegg and Jacobson properties were adjacent, the Jacobson property being the larger of the two. Each property had a farmstead which was served by a private driveway. In 1948, when these driveways became eroded and unusable, Hegg and Jacobson agreed to construct a common drive to administer both farmsteads. There was no written agreement between them but both owners contributed to the building of the driveway which extended the approximate 1/2 mile distance from their respective homes to the county road. The driveway was built in a winding fashion over land owned exclusively by Hegg and continued over land owned exclusively by Jacobson. Fences were erected on

each side of the driveway with the average distance between them being 47.5 feet. Both Hegg and Johnson contributed to the driveway maintenance costs.

In 1977 plaintiff negotiated with Jacobson for the purchase of that part of the property upon which the farmstead was located. At the same time, defendants, who had already acquired the Hegg property, negotiated the purchase of the rest of the Jacobson farm. They had previously leased the property from Jacobson and, on March 15, 1977, they purchased it with full knowledge of the plaintiff's negotiated purchase and intended use. The plaintiff's sale was finalized shortly thereafter and the public was invited to view the farming operations.

In May 1979, the defendants interfered with plaintiff's use of the driveway by blocking the road with heavy equipment and by constructing an electric fence across it. This left plaintiff virtually landlocked and without access to the county road.

The plaintiff subsequently filed this action seeking to establish an easement for a driveway over defendants' land. The defendants denied the existence of an easement and asserted that, even if there were an easement, it would be limited to access for farming and residential purposes and not to facilitate the museum. The trial court ruled that a 33 foot easement for driveway purposes existed by implication and express oral contract. The court further held that there had been no additional burden placed on the defendants' land by the plaintiff's use of the easement. The defendants appeal from this decision.

II.

An easement can be created by express written grant, by implication, by necessity, or by prescription. Webb v. Arterburn, 246 Iowa 363, 378, 67 N.W.2d 504, 513 (1954). In the instant case there was no express written grant creating an easement. An easement by implication is created by operation of law where a common grantor transfers a parcel of land which was subject to, or benefitted by,

a servitude existing at the time of the severance; the easement being presumed to be within the contemplation of the parties. McKeon v. Brammer, 238 Iowa 1113, 1120, 29 N.W.2d 518, 521 (1947). Recently, the court has additionally required a showing that the easement appear continuous, rather than temporary; be essential to the beneficial enjoyment of the land granted or retained; and that, before separation of title, the use was so obvious that the grantor's intent to create a permanent use was manifest. Farmers & Mechanics Savings Bank of Minneapolis v. Campbell, 141 N.W.2d 917, 923 (Iowa 1966). The term 'necessity' is applied to the easement where the land conveyed by the common grantor is entirely enclosed by the retained land or by the land of others and there would be no other way to enjoy the land granted without use of the easement. Webb, 246 Iowa at 379, 67 N.W.2d at 513. The grantee in such case is entitled to a right of way over his grantor's land as a way of necessity for access to and from the nearest public roadway. Id.

Under these definitions, it is apparent that only that portion of the driveway extending over the land transferred to defendants by Jacobson himself would be subject to an easement by implication or necessity. The full easement sought to be established in the instant case could not have been similarly created. The property originally owned by Isabelle Hegg, now owned by defendants, was not united in title at any time during or after 1948 when the driveway was built. Accordingly, that portion of the driveway on the defendants' property acquired from Isabelle Hegg would not meet the separation of title requirement of either an easement by implication or by necessity. To the extent that the trial court found the entire driveway constituted an easement by implication, it was in error. The easement exists, however, under an alternative analysis.

III.

Defendants challenge the trial court's ruling that an easement was created

in 1948 by an oral agreement between Jacobson and Isabelle Hegg. Defendants assert that this theory was improperly considered by the court since it wasn't pled or, in the alternative, if properly pled and considered, the agreement would be barred under the Statute of Frauds.

Our rules of "notice pleading", Iowa R. Civ. P. 69(a), do not require the plaintiff to specify a particular legal theory. Solke v. Evan Matthews and Co., 302 N.W.2d 841, 842 (Iowa 1981). Plaintiff is, however, required to give fair notice to defendant by stating the prima facie elements of its claim. Id. Defendant need only be informed of the events giving rise to plaintiff's claim and of the general nature of the cause of action. Id. In the instant case, plaintiff informed defendants of the pertinent facts in its amended and substituted petition. The plaintiff alleged that there was a shared access road and that there was no formal agreement as to its use. It set forth the location of the roadway, its right to use it, how it was maintained, and the manner in which it was used. Plaintiff gave defendants fair notice of its cause of action by pleading that an easement had been created under various theories. While plaintiff did not set forth the oral contract theory in a separate division, this does not mean that it cannot argue this theory or that the court cannot consider it. Plaintiff's petition in equity comes within our 'notice pleadings' requirements and thus, was properly addressed by the court below. Accordingly, we must consider whether the Statute of Frauds bars enforcement of the interest created by the agreement.

The Iowa Real Property Statute of Frauds requirement, Iowa Code § 622.32(3) (1981), requires any agreement creating or transferring an interest in land—except leases for a term not to exceed one year—to be in writing and signed by the party to be charged. Any evidence of such creation or transfer is incompetent as proof of such interest unless it falls within the Statute of Frauds exception, Iowa Code § 622.33 (1981):

The provisions of subsection (3) of section 622.32 do not apply where the purchase money or any portion thereof, has been received by the vendor, has taken and held possession of the premises under and by virtue of the contract, or when there is any other circumstance which, by the law heretofore in force, would have taken the case out of the Statute of Frauds.

The court below found that Jacobson and Hegg, the original owners of the properties involved, had entered into an oral contract to create an easement in 1948. Plaintiff's petition recites that no formal agreement had been entered between them. The record is unclear as to the language used or of the specific terms of their agreement, but it is clear that the road was constructed and used pursuant to some discussion between Hegg and Jacobson giving each other permission to do so. Whether these discussions resulted in an oral contract based on mutual promises or on reciprocal licenses, we find that Iowa Code § 622.33 (1981), the exception to the Statute of Frauds rule applies.

In Stouder v. Dashner, 242 Iowa 1340, 1353, 49 N.W.2d 859, 866 (1952), the court found that a valid and enforceable easement was created when plaintiff expended money and time in constructing a drainage ditch pursuant to an oral agreement with defendants' predecessor in interest to create such easement. Using a similar analysis, the court has found an interest in the nature of an easement to be created when a license granting permission to use land in the possession of the licensor is fully executed. Sisters of Mercy v. Lightner, 223 Iowa 1049, 1063, 274 N.W. 86, 94 (1937). The general rule is that a license is merely an agreement permitting an act on another's land; it 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, if the licensee can show that he has detrimentally relied on the faith of the agreement, then a court of equity regards the license as executed, and the licensor will be estopped from revoking the authority conferred by the license. Sisters of Mercy, 223 Iowa at 1063, 274 N.W.

at 94. This rule is based on an estoppel theory under which an expenditure constituting detrimental reliance on the part of the licensee serves as consideration for the use and thus is valid as part performance under the Statute of Frauds exception. Ruthren v. Farmer's Co-Op Creamery Co., 140 Iowa 570, 575, 118 N.W. 915, 917 (1908). The result is that once executed, the license becomes a permanent and enforceable interest. Hatton v. Cale, 152 Iowa 485, 498, 132 N.W. 1101, 1106 (1911).

The record in the instant case shows there was some agreement between Hegg and Jacobson in 1948 to build and share the driveway. The Heggs contributed \$350.00 towards construction of the driveway while the Jacobsons contributed \$636.00, the majority of the driveway being located on their property. Both shared equally in the costs of maintenance. These expenditures were sufficient detrimental reliance to constitute part performance and, therefore, made the agreement to build the common driveway irrevocable and enforceable under the exception to the Statute of Frauds. This detrimental reliance also provides the basis for our finding that a valid easement was created by prescription.

A prescriptive easement may be created by adverse possession under claim of right or color of title, openly, notoriously, and hostilely asserted for ten years or more. Anderson v. Yearson, 249 N.W.2d 855, 861 (Iowa 1977). This rule is codified in Iowa Code § 564.1 (1981), Adverse Possession—"Use" as evidence:

In all actions hereinafter brought, in which title to an easement 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 his right, but the fact of adverse possession shall be established by evidence distinct from and independent of its use, and that party against whom the claim is made had express notice thereof, and these provisions shall apply to public as well as private claims.

Defendants contend that since the creation and use of the driveway was

permissive in nature the hostility requirement is absent. We disagree.

Following the doctrine of detrimental reliance and part performance, the court in Simonsen v. Todd, 261 Iowa 485, 489, 154 N.W.2d 730, 736 (1967), indicated that a claim of adverse use could be established in those cases where the licensee has expended substantial amounts of labor and money on the permission given him by the owner of the servient estate. This is a modification of the rule established in Iowa that mere permissive use will not serve to establish the adverse claim necessary to establish an easement by prescription. Webb v. Arterburn, 246 Iowa 363, 382, 67 N.W.2d 504, 511 (1954). Thus, permissive use plus detrimental reliance will suffice to establish hostile, adverse use under Iowa Code § 564.1 (1981). In addition, the court has recently articulated a good faith requirement in order to assert a claim of right. Carpenter v. Ruperto, 315 N.W.2d 782, 786 (Iowa 1982). Since the Jacobsons expended money and labor in good faith reliance on the agreement, the record need only show that the use was continuous and uninterrupted for the ten-year statute of limitations period. To meet this requirement, it is enough that the claimant exercise acts of dominion over the use or property. Clear Lake Amusement Corporation v. Lewis, 236 Iowa 132, 138, 18 N.W.2d 192, 195 (1945). Here, the Jacobsons, without interruption or objection, used the driveway and contributed to its maintenance for the entire period from 1948 to 1977 when it was sold. The easement by prescription was, therefore, clearly established as between the Jacobsons and Heggs when the ten-year period of limitations expired in 1958.

The easement is also binding on defendants as successors to the Jacobsons' and Heggs' interests in the properties. The general rule is that a purchaser of a servient estate is bound by the easements which exist on the premises where a reasonable inspection would disclose the existence of the easement. Gilmore v. New Beck Levee District, Harrison County, 212 N.W.2d 477, 479 (Iowa 1973). The

defendants here rented the property before they purchased it from Jacobson. They were also well aware of the negotiated sale to plaintiffs. They make no claim, nor could they, that they didn't know the driveway would be used to service plaintiff's museum farmstead. At the very least, they had constructive notice of this fact. Accordingly, we hold defendants are bound by the easement created between their predecessors in interest.

IV.

Finally, we consider defendants' contention that the court erred in ruling that the easement was 33 feet wide and was not unduly burdened by the increased travel to and from the museum. The scope of an easement by prescription is measured by the use upon which it was established; if the owner of the dominant estate exceeds this use, or uses the easement for an unauthorized purpose, then the owner of the servient estate may bring an action for trespass. Hagenson v. United Telephone Co. of Iowa, 209 N.W.2d 76, 82 (Iowa 1973). Nevertheless, the holder of an easement may do what is reasonably necessary to maintain and enjoy the use obtained by the easement. Pitsenbarger v. Northern Natural Gas Co., 198 F.Supp. 665, 668 (1961). The holder may not, however, use it so as to cause an additional burden on the servient estate. Weigmann v. Bair, 203 N.W.2d 204, 209 (Iowa 1972). While increased use alone will not constitute an unlawful burden, a use different in purpose from that originally granted will often be found to constitute such a burden. Schawb v. Green, 215 N.W.2d 240, 243 (Iowa 1974).

The driveway in the instant case was always used for ingress and egress. Originally, it served Jacobson's large scale farming operations and thus, was traveled by heavy farming equipment and trucks used to pick up the farm's dairy produce. Since its purchase, plaintiff has maintained a small scale farming operation. The character of the farm has not changed and the plaintiff's intention is to preserve it. Although persons traveling the easement are now using it to

observe a farm rather than work it, the purpose of the easement has not really changed; it still provides access to and from the county road. The testimony that four additional cars travel to the farm daily does not persuade us that an increased and undue burden has been placed upon the easement.

The original owners' intent determines the scope and width of the easement created pursuant to their agreement. See Flynn v. Michigan-Wisconsin Pipeline Company, 161 N.W.2d 56 (Iowa 1968). In the instant case, the owners constructed fences on either side of the driveway when it was built. We agree with the court below that these fences, rather than the traveled portion of the drive, were intended to mark the boundaries of the easement. While the width between the fences varies at different points, we also agree with the trial court's finding that the shortest distance of 33 feet is adequate to serve the easement purposes.

For the reasons set forth above we affirm the trial court's conclusion that an easement was created and that no undue burden was placed thereon.

AFFIRMED.