IN THE COURT OF APPEALS OF IOWA

No. 1999-480 (9-737) / 98-2236
Filed February 9, 2000

RUBEN CLOKE, CURTIS CLOKE, AND LISA CLOKE,
Plaintiffs-Appellants,

vs.

RICHARD PFADENHAUER,
Defendant-Appellee.

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CLERK SUPREME COURT

Appeal from the Iowa District Court for Des Moines County, John G. Linn, Judge.

Plaintiffs appeal from the district court's judgment denying the existence of an easement over Defendant's property. **AFFIRMED.**

James W. Miller of Cray, Goddard, Miller & Taylor, L.L.P., Burlington, for appellants.

Ronald D. Ellerhoff, Burlington, for appellee.

Heard by Huitink, P.J., and Mahan and Hecht, JJ.

HECHT, J.

Ruben, Curtis, and Lisa Cloke appeal from the district court's judgment denying the existence of an easement over Richard Pfadenhauer's property. We affirm.

I. Factual and Procedural Background. Richard Pfadenhauer ("Pfadenhauer") and Ruben, Curtis, and Lisa Cloke ("the Clokes") are adjoining landowners in rural Des Moines County, Iowa. At one time, Clayton and Barbara Kerr owned all of the land affected by this litigation, including Pfadenhauer's and the Clokes'. Throughout the years, the Kerrs sold portions of their land to various purchasers.

Currently, the Clokes own Lots A, B, C, and D in the northeastern portion of the land involved in this case. Pfadenhauer owns Tract 2 located in the northwestern portion of the affected area. South of Tract 2 is Kerrwood Court, consisting of several smaller parcels of land. The Clokes have access to their property by a small, poorly constructed lane thirty feet in width, which runs west from the county road and leads to the east through the southern portion of Kerrwood Court. Immediately south of the Clokes' property, this lane turns to the north and then turns back to the west ending at the boundary between the Clokes and Pfadenhauer's properties. The Clokes claim an easement running west from their western boundary line point along the southern border of Pfadenhauer's land and ultimately connecting with the county road to the west.

The Kerrs platted Kerrwood Court subdivision. To comply with county subdivision requirements, each lot in Kerrwood Court needed to have access to a sixty-six foot roadway. The existing private lane to the south of the subdivision is

not sixty-six feet wide. Therefore, in order to comply with county zoning rules, the Kerrs created an easement along the south boundary line of Tract 2. The Kerrwood Court subdivision plat filed by the Kerrs shows an unconstructed roadway sixty-six feet in width following the southern border of Tract 2 going from the east to the west.

Pfadenhauer purchased Tract 2 at an auction of the Kerr Farms Subdivision on May 20, 1988. Pfadenhauer attended the auction, reviewed the posted plat and written auction information, and looked over the property. Thus, Pfadenhauer was aware of the prospect of a future roadway on the property when he purchased it.

In 1994, the Clokes became interested in purchasing Lots A and B from Arthur and Leona Kenney who had purchased the lots from the Kerrs. Before purchasing the land, Curtis Cloke met with Pfadenhauer to discuss the possibility of building a road across Tract 2 as shown on the plat. The testimony of Pfadenhauer and Curtis Cloke differs as to what occurred at this meeting. Pfadenhauer testified he expressed his belief, if an easement existed, it presumably was for the benefit of all adjoining landowners. Curtis Cloke claims Pfadenhauer never denied the existence of the easement. Consistent with Cloke's version of the conversation, Pfadenhauer testified at trial in this case, "I know there is an easement there. It's a matter of record."

During negotiations with Curtis Cloke for the sale of the lots, Arthur Kenney told Curtis Cloke he believed an easement for the establishment of a road existed through adjacent Lots C and D and running to the west along the southern border of Tract 2. Kenney also told Cloke he believed all landowners in the area had a right to use the easement for a road. Kenney testified Clayton Kerr told him he could use

the easement for a new road. No written easement was ever prepared by the Kerrs. The Clokes purchased Lot A on May 20, 1994, and Lot B on May 16, 1994.

In 1995, the Clokes became interested in purchasing Lots C and D from Donald Campbell who had purchased them from the Kerrs. These lots border Tract 2 on its east side and are west of Lots A and B. Campbell also believed an easement existed over Tract 2 and he had the right to use it. While the Clokes were considering the purchase of Lots C and D, their interest in building a road on Tract 2 increased. In furtherance of their goal to establish a suitable road, the Clokes' attorney drafted a proposed road development and maintenance agreement. In June of 1995, Curtis sent a copy of the proposed agreement to Pfadenhauer. In July of 1995, Pfadenhauer and Curtis discussed the document and Pfadenhauer indicated his disagreement with some provisions.

On July 21, 1995, Pfadenhauer's attorney sent the Clokes a letter outlining some of Pfadenhauer's concerns about construction and use of the proposed roadway, but did not deny the existence of the easement. In the next several months, the relationship between the parties deteriorated. The parties met with their respective attorneys on August 2, 1995. Pfadenhauer continued to object to the Clokes' plans to build a road but did not question the existence of an easement for the construction of a roadway. On August 3, 1995, the Clokes' attorney sent a letter to Pfadenhauer's counsel indicating the Clokes planned to purchase Lots C and D and suggested further discussions regarding the easement. No further discussion of the easement or the proposed road occurred prior to the Clokes' purchase of Lots C and D on August 18, 1995.

During the fall of 1995 and the spring of 1996, the Clokes consulted several individuals regarding construction of the road including the county engineer, contractors, and builders. Curtis Cloke purchased several cement river culverts to be used in the project. On June 18, 1996, the Clokes received a letter from Pfadenhauer's attorney. This correspondence contained the first indication Pfadenhauer questioned the validity of the claimed easement over his property. In a subsequent letter, the Clokes suggested several options to resolve the situation. Pfadenhauer rejected all of them.

With no resolution of the dispute in sight, the Clokes filed an action against Pfadenhauer on August 15, 1996. The petition alleged entitlement to the easement on theories of express easement, easement by implication, and estoppel. The case was tried in equity to the district court. The district court issued its order on November 16, 1998, holding the Clokes failed to establish the existence of an easement under any of their alleged theories and dismissing the petition.

On appeal, the Clokes contend they have an express easement over Pfadenhauer's property. In the alternative, if there is no express easement, they claim: (1) an easement by implication; (2) an easement by promissory estoppel; and (3) Pfadenhauer is equitably estopped from asserting there was not a clear and definite oral agreement to create an easement for a road. Clokes also claim they are entitled to an award of attorney fees under the circumstances.

II. Standard of Review. This case was tried in equity. Our review is de novo. Iowa R. App. P. 4. In equity cases, especially when considering the credibility of witnesses, we give weight to the fact-findings of the trial court, but are not bound by them. Iowa R. App. P. 14(f)(7).

III. Express Easement. In Iowa, we have defined an easement as "a liberty, privilege, or advantage in land without profit, existing distinct from ownership of the soil." *Maddox v. Katzman,* 332 N.W.2d 347, 350 (Iowa App. 1982). The Clokes claim ownership of the dominant estate that gives them the privilege to enter Pfadenhauer's property, the servient estate, for the purposes of building and using a private roadway. *See* 25 Am. Jur. 2d *Easements & Licenses* § 1, at 570 (1996). When an easement is created, and the owners intend it to be an incident of the ownership of the dominant estate, and it directly benefits the dominant estate, then the easement is appurtenant. *Rank v. Frame,* 522 N.W.2d 848, 852 (Iowa App. 1994). Appurtenant easements run with the land and pass with the description of the property to which they are appurtenant without specific designation and purchasers of the servient property take subject to the easement without express reservation. *McKeon v. Brammer,* 238 Iowa 1113, 1128, 29 N.W.2d 518, 526 (1947). The Clokes claim an appurtenant easement was created between the Kerrs, Kenneys, and Campbells.

Because it is a permanent interest in another's land, with a right to enter at all times and enjoy it, an easement must be founded upon a grant by writing or upon prescription.[1] *Indep. Sch. Dist. of Iowa v. DeWilde,* 243 Iowa 685, 692, 53 N.W.2d 256, 261 (1952). As an interest in land, the statute of frauds applies to easements as follows:

> Except when otherwise specially provided, no evidence of the following enumerated contracts is competent, unless it be in writing and signed by the party charged or by the party's authorized agent:

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[1] The Clokes do not allege easement by prescription, nor can the elements be proved in this case.

> 3. Those for the creation or transfer of any interest in lands, except leases for a term not exceeding one year.

Iowa Code § 622.32 (1997).

To show a writing, the Clokes rely on language contained in their deeds to Lots A, B, C, and D and on Pfadenhauer's deed for the purchase of Tract 2. Lot A was sold by the Kerrs to the Kenneys on January 3, 1978. The deed in that transaction states, "[s]ee Grant of nonexclusive Easement for roadway purposes and maintenance thereof, attached to this Deed and marked EXHIBIT 'A'." Exhibit A to the deed indicates Lot A is subject to an easement but it is for the presently existing roadway or lane (thirty feet in width) the Clokes and area landowners are currently using for ingress and egress. The Clokes purchased Lot A from the Kenneys on May 20, 1994. No language in that deed indicates the existence of the easement claimed by Clokes in this case.

The Kerrs sold Lot B to the Kenneys on May 15, 1981. The deed for that transaction states, "SUBJECT to Easements of record." The Kenneys, in turn, sold the lot to the Clokes on May 16, 1994. The deed for that transaction also indicates the conveyance is "SUBJECT to Easements of record." No other language evidencing the intention to create the easement claimed by Clokes appears in that deed.

The Johnson Estate sold Lot C to the Campbells. There is no deed in the record evidencing that sale. The Campbells subsequently deeded the lot to the Clokes on August 18, 1995. Exhibit A to the deed from Campbells to Clokes

indicates the tract is subject to easements of record. No language appears in this deed evidencing the intent to create the easement claimed by the Clokes.

The Kerrs sold Lot D to the Campbells in two separate deeds. One of those deeds states it is subject to easements of record, but the other is silent as to easements. The Campbells sold Lot D to the Clokes by a single deed on August 18, 1995. Exhibit A to that deed indicates the property is subject to easements of record. As is the case with the other conveyances to the Clokes, no language in the deed evidences the intent to create the easement claimed by the Clokes.

The Clokes assert the language contained in these deeds indicates they hold an appurtenant easement that will permit them to build a road across Pfadenhauer's land. They argue the deeds by which title was transferred to them from the Campbells and the Kenneys were clearly premised upon the existence of the easement claimed in this case. However, the language contained in the Clokes' deeds refers to the easement on the Clokes' property -- the existing roadway, and not the claimed easement across Tract 2. In addition, the Clokes' claim of express easement based upon the language in the deeds must confront the principle that an acknowledgment in a deed of the existence of an easement is not equivalent to an intent to create an easement. 25 Am. Jur. 2d *Easements & Licenses* § 18, at 586-87 (1996). The words "subject to" refer to an existing easement which the grantor wishes to exclude from warranties of title. They do not create an easement. *Id.* at 587.

Pfadenhauer purchased Tract 2 from the Kerrs at auction on May 20, 1988. Exhibit B to this deed indicates the property is "subject to a 66.0 foot wide private roadway easement as platted for Kenwood Court Subdivision." Language

("centerline of 66' wide private roadway easement") on the Kerrwood Court Subdivision plat indicates Tract 2 is subject to an easement. The Kerr Farm Subdivision plat also refers to the existence of the claimed roadway easement with the following language: "refer to Kerrwood Court subdivision plat - County Recorder's Office for existing 66' wide roadway easement for Kerrwood Court subdivision. This roadway not constructed."

The Clokes claim the Kerrs, Kenneys, and Campbells intended to create the easement by the various writings on plats and deeds and verbal understandings between the parties. We may consider the intent of the grantor when trying to determine whether an easement exists and look to all of the documents including the plats. *See Maddox,* 332 N.W.2d at 349. However, *Maddox* is inapposite because language on the plat in that case was clear and specific as to location and use of the easement in question. *See id.* at 348. The plats in the present case do not contain any express declaration granting the right to an easement in favor of the owners of Lots A, B, C, or D. If any express grant was created by this language, it was created for the benefit of the owners of the Kerrwood Court Subdivision and not the Clokes or their immediate predecessors in title.

The district court found, and the record confirms, no document signed by all the parties created an easement on Tract 2 claimed by the Clokes. Although it is clear all parties believed an easement for the establishment of a road existed, there is no writing signed by the parties indicating an easement was created. The district court correctly concluded the Clokes did not meet their burden to prove an express easement.

IV. Easement by Implication. In the alternative, the Clokes claim they have an easement by implication. An easement by implication arises where the parties clearly intend to create an easement but do not put it in writing. *See Schwob v. Green,* 215 N.W.2d 240, 242-43 (Iowa 1974). The factors giving rise to an easement by implication are: (1) separation of title; (2) the intent of permanency was manifest because the use giving rise to the easement was long continued and obvious before separation occurred; and (3) the easement is continuous rather than temporary, and essential to the beneficial enjoyment of the land granted or retained. *Bray v. Hardy,* 248 Iowa 794, 797, 82 N.W.2d 671, 673 (1957); *Rank*, 522 N.W.2d at 850.

The greatest obstacle for the Clokes in asserting this claim is showing continuous use of the easement before separation of title. The planned roadway, which engendered the need for the claimed easement, was never built, and therefore was never used. The Kerrs, original owners of all the property potentially served by the claimed easement, did not use the easement along the south boundary of Lot 2 for a roadway. They apparently made reference to a proposed roadway on the plat to comply with zoning regulations and to complete conveyances of lots in the Kenwood Court subdivision. The Kenneys and Campbells likewise never used the easement but believed it existed for their benefit. To this date, the easement has not been used as a roadway by any party.

The Clokes contend we should define "use" as the prospective opportunity to "enjoy, hold, occupy, or have some manner of benefit thereof." A plain meaning definition of "use" is "to convert to one's service, to employ, to avail oneself of, to utilize, to carry out a purpose or action by means of, to put into action or service . . .

that enjoyment of property that consists in its employment, occupation, exercise, or practice." *Black's Law Dictionary* 1541 (6th ed. 1990). While the Clokes, Campbells, Kenneys, and Kerns may have received some value from the prospect of a roadway over the easement across Tract 2, they did not use it as a roadway. Having never used the easement for a roadway, the Clokes' claim of an easement by implication must fail.

V. Promissory Estoppel. The Clokes next contend they are entitled to an easement by promissory estoppel. *Miller v. Lawlor,* 245 Iowa 1144, 66 N.W.2d 267 (1954), recognizes application of promissory estoppel in the context of a land-use restriction. *Id. at* 1154, 66 N.W.2d at 273. In *Miller*, the court found a specific, oral agreement by a landowner not to construct a house in such a way as to block his neighbors' view. *Id.* The court found reliance on that agreement and held the defendant was estopped from asserting the statute of frauds. *Id.* The Iowa Supreme Court has noted "in applying this doctrine [of promissory estoppel] each case must be decided in the light of its surrounding facts and circumstances. There can be no hard and fixed rule for determining when it is appropriate." *Johnson v. Pattison,* 185 N.W.2d 790, 795 (Iowa 1971).

Proof of the elements of promissory estoppel will remove an oral contract involving an interest in real estate from the statute of frauds. *Johnson,* 185 N.W.2d at 795; *Miller,* 245 Iowa at 1152-53, 66 N.W.2d at 272. This exception is based on the language in Iowa Code section 622.33 making the statute of frauds inapplicable to a real estate contract upon proof of "any other circumstance which, by the law heretofore in force, would have taken the case out of the statute of frauds."

Pollmann v. Belle Plaine Livestock Auction, Inc., 587 N.W.2d 405, 407 (Iowa 1997); *Miller*, 245 Iowa at 1152-53, 66 N.W.2d at 272.

The essential elements of promissory estoppel are well-established: (1) a clear and definite promise; (2) proof the party urging the doctrine acted to its detriment in reasonable reliance on the agreement; and (3) a finding the equities support enforcement of the agreement.[2] *In re Estate of Graham*, 295 N.W.2d 414, 418 (Iowa 1980); *Johnson*, 185 N.W.2d at 795; *Miller*, 245 Iowa at 1154, 66 N.W.2d at 273. The burden of proving estoppel is on the party asserting it and strict proof of all elements is required. *Nat'l Bank of Waterloo v. Moeller*, 434 N.W.2d 887, 889 (Iowa 1989).

The Clokes first must show Pfadenhauer made a clear and definite promise to them. The Iowa Supreme Court has recently defined "clear and definite promise:"

> A "promise" is "[a] declaration . . . to do or forbear a certain specific act." *Black's Law Dictionary* 1213 (6th ed. 1990). A promise is "clear" when it is easily understood and is not ambiguous. *See Webster's Third New International Dictionary* 419 (unab. ed. 1993). A promise is "definite" when the assertion is explicit and without any doubt or tentativeness. *See id.* at 592.

Schoff v. Combined Ins. Co., ___ N.W.2d ___, ___ (Iowa 1999). Before Curtis Cloke purchased Lots A and B, he went to Pfadenhauer to confirm what he had been told. Pfadenhauer told Cloke the easement did exist but he [Pfadenhauer] did

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2 The Iowa Supreme Court has recently addressed the elements of promissory estoppel. *See Schoff v. Combined Ins. Co.*, ___ N.W.2d ___, ___ (Iowa 1999). The court interpreted the first element, a clear and definite promise, to include the concept the promise was made with the promisor's clear understanding the promisee was seeking an assurance upon which the promisee could rely and without which he would not act. *Id.* at ___. Finding no clear and definite promise, we do not reach that issue in this case.

not want to be responsible for the roadway and did not want to share in any of the costs. Pfadenhauer also expressed the concern the roadway would be started but would not be finished. He testified at trial, "I told him that if anybody builds a road on my property, it is going to be something commensurate with . . . the easement. It is a sixty-six foot easement." Pfadenhauer also testified, "I know there is an easement there. It's a matter of record." Pfadenhauer purchased Tract 2 at auction. Before purchasing it, he reviewed the posted plat of the property that clearly shows an easement across the southern border of the land. All interested parties, including Pfadenhauer, agreed to the existence of the easement.

However, acknowledgement of the existence of the easement does not prove Pfadenhauer promised the Clokes they had a right to use the easement or they could build a road over it. Pfadenhauer's statements "merely conveyed an impression or understanding of a certain fact" – that an easement exists over his property. *Id.* at ___. As a matter of law, statements such as these do not constitute a promise. *Id.* Pfadenhauer's testimony and the record indicate unequivocally there is an easement across Tract 2. It does not necessarily follow, however, he promised the Clokes they could build a road over it or they had any right to use it. We require strict proof of a promise to do or not to do a specific act. *Id.* We cannot imply a promise from a mere statement of fact. Consequently, we conclude there was not a clear and definite promise establishing the easement for the construction of a road in this case. We affirm the district court's determination the Clokes have failed to establish their claim of promissory estoppel.

VI. Equitable Estoppel. The Clokes also rely upon the doctrine of equitable estoppel. The elements of equitable estoppel are: (1) false representation or

concealment of material facts; (2) lack of knowledge of the true facts on the part of the person to whom the misrepresentation or concealment is made; (3) intent of the party making the representation that the party to whom it is made shall rely thereon; (4) reliance on such fraudulent statement or concealment by the party to whom made resulting in that party's prejudice. *Farmers & Mechanics Sav. Bank of Minneapolis v. Campbell,* 258 Iowa 1238, 1247, 141 N.W.2d 917, 922 (1966).

The Clokes claim Pfadenhauer concealed material facts when he failed to promptly disclose his belief the Clokes had the right to use and develop the easement. Pfadenhauer testified several times at trial he believed an easement existed over his land. He questioned, however, whether the Clokes had the right to develop a narrow private road over the easement and expressed concerns about whether the roadway they proposed would be well built, properly maintained, and suitable for use as road. He expressed the same concerns during pretrial communications between his counsel and the Clokes' attorney. We conclude Pfadenhauer, who was apparently not trained in the law, made only representations of his understanding at the time the representations were made. When he acknowledged the existence of the easement in his conversations with the Clokes, his understanding supported those representations. Later, after conferring with counsel as to the controlling law, Pfadenhauer came to understand the easement might not exist, and he disclosed this through his counsel to the Clokes. There is no evidence Pfadenhauer misrepresented or concealed any facts in his dealings with the Clokes. Therefore, the Clokes' claim of equitable estoppel must fail.

VII. Attorney's Fees. The Clokes request an award of attorney fees. A party generally has no claim for attorney fees as damages in the absence of a

statutory or written contractual provision allowing such an award. *Suss v. Schammel*, 375 N.W.2d 252, 256 (Iowa 1985). Courts have recognized a rare exception to this general rule, however, "when the losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons." *Alyeska Pipeline Serv. v. Wilderness Soc'y*, 421 U.S. 240, 258-59, 95 S. Ct. 1612, 1622, 44 L. Ed. 2d 141, 154 (1975). Because we have decided this case in Pfadenhauer's favor, we find the Clokes' claim for attorney's fees to be without merit.

VIII. Conclusion. We affirm the decision of the district court denying the existence of an easement over Pfadenhauer's land in favor of the Clokes.

AFFIRMED.