

IN THE COURT OF APPEALS OF IOWA

No. 5-669 / 94-2130

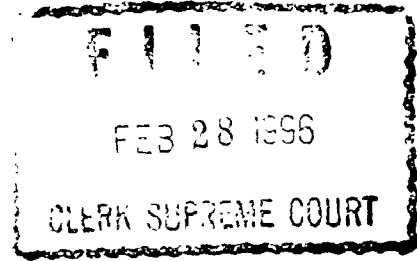
DAVID and RITA SMITH,

Plaintiffs-Appellees/Cross-Appellants,

vs.

CITY OF BURLINGTON, IOWA,

Defendant-Appellant/Cross-Appellee.



Appeal from the Iowa District Court for Des Moines County, Harlan W. Bainter, Judge.

The City of Burlington appeals, and the Smiths cross-appeal, from a district court judgment in the Smiths' mandamus action. **AFFIRMED.**

Wm. Scott Power of Aspelmeier, Fisch, Power, Warner & Engberg, P.L.C., Burlington, for appellant.

Timothy D. Roberts of Anderson, Roberts & Porth, P.L.C., Burlington, for appellee.

Heard by Hayden, P.J., Cady and Huitink, JJ.

CADY, J.

The City of Burlington appeals a district court's condemnation of certain real estate owned by David and Rita Smith. The Smiths cross appeal contending the district court should have condemned more property, ordered the police officials' actions resulted in an additional taking, and awarded attorney fees. We affirm the condemnation and reject the Smith's contentions on their cross appeal.

The Smiths own land in Burlington, Iowa which houses the Bluff Harbour Marina. The land was formerly owned by Carpenter Oil. In 1988, the City of Burlington began plans to reconstruct a segment of State Highway 99 in the area adjacent to the Bluff Harbour Marina. The City entered into an agreement with Carpenter Oil for them to relinquish access from the marina to Highway 99. The City agreed to give Carpenter Oil \$55,000 and provide alternative access to the marina through Front Street. Later in 1988, Carl and Dorothy Parrot purchased the land from Carpenter Oil. The Smiths purchased the marina on contract from the Parrots in 1990.

In order to accomplish the roadway access for the marina, the City negotiated a twenty-two feet access through the parking lot of "Big Muddy's", a popular restaurant next to the marina. The access prohibits parking on the public right-of-way and is marked with white lines and signs. However, often on weekends night, vehicles parked within right of way, blocking the access to the marina. The City also condemned certain land for a twenty-two foot easement closer to the marina. The

route provides a somewhat circuitous yet permanent access to the marina, with occasional spots of a narrowing width of sixteen feet.

The City also constructed a retaining wall on portions of land which was not condemned. Both the Smiths and the Parrotts used that portion of the land to store timbers, boat trailers, and boat cradles prior to the construction of the wall. Prior to the new construction, the City had not used the land, but a sloping embankment supporting Highway 99 was present.

In September 1993, the Smiths filed for a writ of mandamus seeking condemnation of a strip of property adjacent to the Highway 99 construction where the concrete retaining wall was placed. The Smiths also sought to widen the access to Front Street and claimed an infringement of their right to free and convenient access. The City asserted for the first time at trial it possessed an easement by prescription due to the presence of a larger supporting embankment on the property many years prior to the reconstruction project.

At trial the City agreed the parking at Big Muddy's blocked access to the marina at times. David Smith testified he called the police department on numerous occasions with no relief and was told to not call anymore. He stated the vehicles were only ticketed on one occasion and the City only recently placed signs and markings in the area. A police officer testified the department responds to all calls. The Smiths asked for attorney fees due to the City's bad faith in failing to condemn the property, failing to respond to the Smiths' requests, and other conduct.

The district court entered its decree of mandamus holding the City failed to establish an easement by prescription since no express notice was given to the Smith or their predecessors independent of a use as required by Iowa Code section 546.1 (1993). The district court also ruled the Smiths were not entitled to mandamus relief on their claims for a wider road because access is provided. It also rejected the Smiths' bad faith claim. The district court directed the City to condemn the Smiths' property which lies between Highway 99 and a railroad right-of-way, which it had earlier stated to be 8.6 feet wide by 150 feet long. Both parties filed rule 179(b) motions, which the district court denied, except to clarifying the dimensions of the property to be condemned to be approximately 20 feet by 150 feet.

The City appeals contending the district court erred in requiring proof of express notice of a claimed easement by prescription to an embankment adjacent to a state highway and in sustaining the portion Smiths' 179(b) motion allowing more land to be condemned than set forth in the original decree. The Smiths cross-appeal arguing the district court should have found the limited access to the marina and the lack of police enforcement of the continuous blockage of the access resulted in an additional **taking** by the City requiring the Smiths to be compensated, and the trial court should have awarded attorney fees due to the City acting in bad faith.

I. Standard of Review

In this equity action, our review is de novo. Iowa R. App. P. 4; *Murrane v. Clarke County*, 440 N.W.2d 613, 615 (Iowa App. 1989). We have a duty to examine

the entire record and adjudicate anew rights on the issues properly presented. 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).

II. Prescriptive Easement

An easement may be established by express written grant, implication, or prescription. *Cline v. Richardson*, 526 N.W.2d 166, 169 (Iowa App. 1994). An easement by prescription is created by adverse possession under claim of right or color of title, openly, notoriously, continuously, and hostilely asserted against another for ten years or more. *Anderson v. Yearsous*, 249 N.W.2d 855, 861 (Iowa 1977); *Heald v. Glentzer*, 491 N.W.2d 191, 193 (Iowa App. 1992); *Murrane*, 440 N.W.2d at 615. As well, the mere use of the property will not suffice to establish a prescriptive easement. *Mensch v. Netty*, 408 N.W.2d 383, 387 (Iowa 1987) (party claiming easement by prescription must prove, independent of use, easement was claimed as a matter of right). A claimant of a prescriptive easement may not merely rely on the failure of a landowner to object to the use of the disputed property, but must specifically claim the right to use the property and provide landowner with express notice of such claim. *Young v. Ducil*, 188 Iowa 410, 416, 176 N.W. 272, 274 (1920).

The notice requirement is written into Iowa Code section 564.1 (1993), which specifically requires a person claiming the existence of the prescriptive easement to give express notice of such a claim. *Mensch*, 408 N.W.2d at 387 (Iowa 1987);

Heald, 491 N.W.2d at 193. Moreover, section 564.1 states its provisions “apply to public as well as private claims.”

Prescriptive easements involving roadways, however, have been established by evidence the public has traveled over a certain course for more than ten years under a claim of right, recognized and improved by public authorities, with acquiescence of the owners of the land. *Cohen Brothers Iron & Metal Co. v. Shackelford Brick Co.*, 197 Iowa 674, 684, 192 N.W. 264, 270 (1924). The claimed right of travel, together with the public recognition and owners' acquiescence, constitutes more than a mere use of the property. *Id.* Thus we must decide if the facts of this case amount to express notice of the City's claim.

State Highway 99 was built in 1910, with a portion of a highway embankment built on the property now owned by the Smiths. Under the new construction, a concrete retaining wall replaced the old embankment on the Smiths' property. The Smiths do not contest the City's right to the land upon which Highway 99 runs, but object to the encroachment of the retaining wall on their property.¹ Consequently, the public's use and recognition of Highway 99 over the years has little bearing on the

¹ The City has long enjoyed a right to Highway 99. The highway itself does not encroach upon any portion of the Smiths' property. The encroachment approaching the Highway, replaced currently by the retaining wall, lies on property owned by the Smiths. No testimony presented indicated the embankment was essential to the maintain the Highway 99 structure. Instead of merely slopes off the highway.

City's claim of a prescriptive easement concerning the Smiths' property. We focus on the land which occupies the retaining wall.

We agree with the trial court the City gave no express or implied notice to the Smiths or any of their predecessors in title of its claim of a prescriptive easement. Even in its answer to the Smiths' mandamus to compel condemnation, the City never asserted its right to use the property under a prescriptive easement, but rather merely denied the City took more property than agreed by Smiths' predecessors for the construction of the highway. The City informed the Smiths just prior to the mandamus proceeding of its claim of the prescriptive easement. The City never made any construction work to the land prior to the new highway construction. The use of the land by the Smiths, the Parrots, and Carpenter Oil to store timber, trailers, and boat cradles further evidences the City provided no notice of its claim of a prescriptive easement. We affirm the trial courts condemnation of the Smiths' property.

III. Rule 179(b) Motion

The district court, in its original decree, ordered the City to condemn all of the Smiths' property located between Highway 99 and the railroad right-of-way. The evidence clearly indicated Smiths' property between Highway 99 and the right-of-way measured approximately 20 by 150 feet. The City contends, however, the district court should have only condemned the portion of the Smith's land upon which the retaining wall was placed and not the entire property.

The area of Smith's property following the construction project between the new cement retaining wall and the railroad right-of-way was approximately 6 feet by 150 feet. David Smith testified this area does not provide adequate room for storage of marina equipment. The Smiths' use of the entire area of the land has been affected by the highway reconstruction. The small parcel of land is of no economic use to the Smiths. We find the district court correctly determined the Smiths were entitled to compensation for the entire 20 by 150 foot portion of land. *See Twin-State Engineering and Chemical Co. v. Iowa State Highway Comm'n*, 197 N.W.2d 575, 577-78 (Iowa 1972) (appropriate measure of damages is full market value of the entire property before and after the condemnation).

IV. Access Road and Police Enforcement

The Smiths seek mandamus relief claiming a taking resulted from the loss in value of the marina property as a result of an inadequate access path provided by the City and the failure of police officials to keep the roadway clear. We recognize a property owner is entitled to reasonable or free and convenient access to his or her property. *See Mulkins v. Board of Supervisors*, 374 N.W.2d 410, 415 (Iowa 1985). Here, **however**, the City provided access to the marina through negotiations with a previous landowner of the Smiths.

Mandamus cannot be granted where there are no exceptional circumstances warranting extraordinary relief. *Hewitt v. Ryan*, 356 N.W.2d 230, 233 (Iowa 1980). Mandamus relief can only be granted where the right involved or duties sought to be

enforced are clear and certain, and no other specific or adequate mode of relief is available. The plaintiff seeking mandamus bears the heavy burden of showing the lack of an alternative remedy and their right to the issuance of the writ is clear and undisputable. *Mallard v. United States District Court*, 490 U.S. 296, 109 S. Ct. 1814, 104 L. Ed. 2d 318 (1989); *Technitrol, Inc. v. McManis*, 405 F.2d 84, 85 (8th Cir. 1968). We agree with the district court the Smiths have not met their burden.

The Smiths must establish a clear and certain right to a wider access road as necessary for free and convenient access to their marina property. Here, the City complied with the specifications of the access road as required by their contractual obligation with the Smiths' predecessors. This twenty-two foot access road to the marina was provided as specified by the contract prior to the Smiths' purchase of the land and appeared on the deed.

We agree with the district court the Smiths had not established a clear and certain right to a wider access road. As such, we find their mandamus relief must be denied.

We also find the Smith have not established a clear and certain right to compensation for the police enforcement of the no parking area in Big Muddy's parking lot. Clearly, vehicles parked within the access area and blocked the path to the marina, causing problems. However, the Smiths failed to show the frequency of the access problems and the use of the road by patrons.

The City presented evidence police officers have ticketed illegally parked vehicles, frequently checked the area, responded to any complaint lodged to the department. As well, the City has placed signs and markers on the area of Big Muddy's in an effort to alleviate some of the access problems.

We agree with the district court mandamus relief cannot be granted concerning the Smiths' request for compensation for the City's alleged taking of a free and reasonable access to the marina.

VI. Attorney fees

Absent statutory or contractual provisions, a party generally has no claim for attorney fees as damages. *Hockenberg Equipment Co. v. Hockenberg's Equipment and Supply Co.*, 510 N.W.2d 153, 158 (Iowa 1993). However, a narrow exception to the general rule against attorney fees exists where the defendant "acted in bad faith, vexatiously, wantonly, or for oppressive reasons." *Id.* A plaintiff seeking attorney fees under this narrow exception must prove the culpability of the defendant's conduct rose to the level of oppression or connivance to harass or injure another. *Id.* at 159-60. The Smiths contend the City, through its refusal to condemn the property and other actions, acted in bad faith. We disagree.

Here, the evidence does not show the City's acted in ^{bad} faith to the level of oppression or connivance to harass or injure the Smiths. Only David Smith and Carl Parrot testified as to the City's alleged name calling. The City's refusal to condemn the land was based upon its genuinely mistaken belief it possessed a prescriptive

easement on the land. We find the Smiths are not entitled to attorney fees or costs.

AFFIRMED.