**IN THE COURT OF APPEALS OF IOWA**

No. 6-761 / 95-1799

**GEORGE M. GLAHN** and **JOHN M. GLAHN,**
Appellees,

000157

vs.

FILED
JUL 30 1997
CLERK SUPREME COURT

**MARGARET McGINN,**
Appellant.

---

**MARGARET McGINN,**
Cross-Petitioner-Appellant,

vs.

**LORAN BURKEN** and **MICHAEL BURKEN,**
Defendants to Cross-Petition-Appellees.

---

Appeal from the Iowa District Court for Clinton County, Bobbi M. Alpers, Judge.

The defendant appeals the district court's declaratory judgment ruling recognizing a continued existence of an easement over the defendant's property providing access to the plaintiffs' property. **AFFIRMED.**

Mark R. Lawson of Mark R. Lawson, P.C., Maquoketa, for appellant.

Christopher L. Farwell and Richard W. Farwell of Farwell & Bruhn, Clinton, for appellees.

Considered by Habhab, C.J., Streit, J., and Perkins, S.J.*

*Senior judge from the Fifth Judicial District serving on this court by order of the Iowa Supreme Court.

**PERKINS, S.J.**

The defendant, Margaret McGinn, is appealing the district court's judgment recognizing the existence of an easement over her property providing access to the plaintiffs, the Glahns, property. McGinn claims the court erred in determining the easement was not terminated by the plaintiffs' conduct of failing to erect a fence and to use the property as required by the easement agreement. McGinn also claims the district court erred in dismissing her trespass claim against the Glahns and their contract workers.

In 1952, an easement right-of-way was created on farmland presently owned by the defendant, McGinn, for the purposes of providing access to adjoining farmland presently owned by the plaintiffs, George M. Glahn and Jon M. Glahn. George owns the adjoining property but his son, Jon, controls the property under a power of attorney. The easement bisects the McGinn property in a north-south line. The easement is approximately thirty-three feet in width and one-half mile long. The easement follows a railroad right-of-way which has been abandoned.

The easement agreement provided the owner of the McGinn property would fence the southern portion of the easement and the owner of the Glahn property would fence in the northern portion of the easement and provide a gate at its northern end. The agreement stated the owner of the McGinn property could seek enforcement of the fencing requirement by giving a ten-day notice to the owner of the Glahn

property and if the fencing requirement was not met, the easement would revert to the owner of the McGinn property. Prior to 1994 this requirement was never enforced

Until the present dispute, the actual use of the easement was controlled by the parties' tenants. Upon the abandonment of the railroad right-of-way, the McGinn tenant, Harry Wiese, began to farm the entire McGinn property, including the easement, with the acquiescence of the Glahn tenant, Paul Hanson. This farming caused the dirt lane on the easement to be plowed and planted with crops, but the tenants continued to recognize the existence of an easement providing access to the Glahn property. Hanson also apparently allowed another adjoining property owner, Costello, to use the easement for access to his property. This use was permitted without the knowledge of McGinn or the Glahns.

The present dispute between the parties arose in the spring of 1994 when Jon Glahn complained to McGinn about her tenant's farming on the easement, thereby interfering with his access to his property. McGinn then reviewed the easement document, and decided to enforce the fencing requirement of the easement agreement. On May 23, 1994, McGinn sent a letter to the Glahns seeking enforcement of the fencing requirement. The Glahns interpreted the McGinn demand as requiring them to survey the property for the easement. Until June 9, 1994, the parties, through their legal representatives, engaged in negotiations attempting to resolve the dispute without construction of a fence. During these discussions, the Glahns said it would

be impossible or at least difficult to survey the property and construct the fence within the ten-day period.

In June 1994, McGinn sent a letter to the Glahns stating the easement had been terminated on the basis of noncompliance with the fencing requirement and the use of the easement by the Costellos was in violation of the easement agreement. The letter was received while the Glahns were obtaining a survey and making arrangements for construction of the fence.

After the declaration of termination of the easement, contract workers for the Glahns, Loran and Michael Burken, were seen on the easement portion of the McGinn property. They used the easement to obtain access to the Glahn property for harvesting crops. The workers continued to use the easement although they were informed by McGinn's tenant, Wiese, such conduct constituted trespassing on the McGinn property.

In November 1994, the Glahns filed a declaratory judgment action seeking injunctive relief and a declaration of the parties' rights regarding the easement. McGinn responded by filing a counterclaim against the Glahns seeking injunctive relief and damages for trespass. McGinn also filed a cross-petition against the Burkens seeking damages for trespass.

After a trial, the district court entered a ruling determining it would be unjust to enforce the fencing requirement of the easement agreement. The district court determined it would be unfair to enforce the fencing requirement in light of the

parties' settlement negotiations. The court also determined that because the Glahns had no knowledge of the use of the easement by another property owner, such use could not be the basis for termination of the easement. The court also dismissed the trespass claims by McGinn against the Glahns and the Burkens, determining they acted in good faith and McGinn had not been damaged.

In September 1995, the Glahns filed an Iowa Rule of Civil Procedure 179(b) motion seeking clarification of the parties' fencing obligations. The district court filed a ruling on the motion regarding such obligations.

In October, McGinn filed a notice of appeal. In November, this court stayed the fencing obligations of the parties under the district court order.

The case was filed and tried as an equitable action. Our review is de novo. Iowa R. App. P. 4. 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).

**Division I.**

The issue presented is whether the trial court erred in finding the easement between McGinn and the Glahns was not terminated. The appellant, McGinn, asks that we find:

> **A. The easement was properly terminated by Mrs. McGinn upon the appellee Glahn's failure to fence the easement within ten days in accordance with the terms of the easement.**

000162



**B.** The trial court erred in it's finding that it would be "unjust" to declare this easement reverted.

**C.** The trial court erred in failing to find the easement was properly terminated due to the unauthorized use of the easement by Costallos.

In Division II, appellant McGinn claims the trial court erred in dismissing her claims against Glahns and Burkens for trespass.

We rule as follows:

**A.** We agree with the district court's ruling that the easement was not properly terminated by McGinn. Not every breach of a contract affords a ground for recision of that contract. *Maytag Co. v. Alward*, 253 Iowa 455, 464, 112 N.W.2d 654, 659 (1962). A recision will not be granted for a mere breach not so substantial as to defeat the object of the parties in making the contract. *Id.*, 112 N.W.2d at 659. In this case, the Glahns not erecting the fence within the ten-day period is not such a substantial part of the easement agreement that it would defeat the whole purpose of the easement. The easement was entered into to allow the Glahns entrance to their land. The Glahns are now ready to continue the easement agreement by completing the fencing requirement.

**B.** In finding that termination would be "unjust" the trial court, in great detail, listed the circumstances which led to that conclusion. We agree with the trial court for the reason that it would be "unjust" to terminate the easement given the facts of this case. McGinn is claiming the easement should be declared terminated due to

the Glahns not completing the fencing requirement. McGinn claims this is a forfeiture of the agreement. Forfeitures of a contract are disfavored and the party claiming forfeiture must show the equities are clearly on their side. *Van Hosen v. Bankers Trust Co.*, 200 N.W.2d 504, 507 (Iowa 1972). In the case of a forfeiture provision, the enforceability of such a provision necessitates a balancing of interests. *Id.* In this case, McGinn cannot show the equities are clearly on her side. The trial court found that in balancing the equities, McGinn was not harmed by the failure to fence the easement with the ten-day period. The easement had been used since 1952 without a demand for fencing.

The law does not favor forfeiture, and forfeiture of an easement because of misuse thereof or violation of its conditions of enjoyment requires that acts of dominant owners must have been willful and substantial, and not merely technical. *Paul v. Blakely*, 243 Iowa 355, 360, 51 N.W.2d 405, 408 (1952). In the present case, the fencing requirement is merely technical, the original purpose for the fencing requirement no longer exists. The purpose of the fencing was to contain livestock, but there is no livestock gleaning or pasturing on the land, nor has there been in recent years.

**C.** The Costellos were farmers of a tract of land adjoining that owned by the Glahns. The Costellos used the easement without the permission of the tenants of McGinn and the Glahns. McGinn argues this unauthorized use as a ground for

termination of the easement because it is a clear violation of the specific terms of the agreement.

Where there is a right-of-way over land, it is pertinent to every part of the land and a grantee of any part is entitled to use it, provided no additional burden is created. *Riverton Farms, Inc. v. Castle*, 441 N.W.2d 405, 407 (Iowa App. 1989). The use of the easement by the Costellos imposed no additional burden on McGinn. The Costellos used the easement to have access to their farmland which bordered that of the Glahns, the same purpose the easement was intended for. The Glahns had no participation in this use of the ground and nothing in the record proves they even knew of such use by the Costellos. The use by the Costellos does not constitute a proper reason for terminating the easement.

**Division II.**

McGinn brought a cross-claim against the Burkens for entering upon the terminated easement. McGinn also brought a trespass claim against the Glahns. The trial court found no trespass occurred on the McGinn property during 1994 and dismissed this claim. The court was not able to find any damages as the result of the Glahns or the Burkens using the easement to reach the planted crops.

While a person is ordinarily not liable for the action of an independent contractor, when a trespass is committed under the direction of the employer, there is liability. *White v. Citizens National Bank of Boone*, 262 N.W.2d 812, 818 (Iowa 1978). The Burkens entered the McGinn property under direction from the Glahns.

Once McGinn declared the easement terminated, the Glahns were faced with the prospect of losing the crop they had planted or entering the easement without causing any damage. The Glahns were able to enter the easement without causing damage to the property. Both the Glahns and Burkens were acting in good faith and committed no trespass. We affirm the trial court's dismissal of the cross-petition.

**AFFIRMED.**