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CLERK SUPREME COURT

IN THE IOWA COURT OF APPEALS

RONALD D. SIMS and JUDY A. SIMS,)

Plaintiffs-Appellees,)

vs.)

GEORGE V. MARCHANT and)

SOPHIE MARCHANT,)

Defendants-Appellants.

Filed May 26, 1981

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2-63920

Appeal from Polk District Court - Ray Hanrahan, Judge.

Defendants appeal from the trial court's judgment in favor of plaintiffs in their action seeking to establish their right to use a common driveway and to enjoin defendants from interfering with their use of the driveway. AFFIRMED.

Philip F. Miller of Haugan & Miller, Des Moines, for defendants-appellants.

Michael J. Miller, of Dreher, Wilson, Adams, Jensen, Sayre & Gribble, Des Moines, for plaintiffs-appellees.

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

DONIELSON, J.

Defendants George and Sophie Marchant appeal from the trial court's judgment in favor of plaintiffs Ronald and Judy Sims in their action seeking to establish their right to use a common driveway and to enjoin defendants from interfering with their use of the driveway. We affirm the judgment in favor of the plaintiffs.

Our review of this equitable proceeding is de novo. Iowa R. App. P. 4.

I.

Plaintiffs and defendants own adjoining residential lots with a common driveway situated on the boundary line between the lots. The plaintiffs bought their lot in 1966; the defendants purchased theirs in 1977. The parties and their grantors had used the common driveway for at least thirty years. The plaintiffs, as well as previous owners and occupants of both lots, had performed maintenance and repairs on the driveway. One of the plaintiffs admitted at trial that they had never been told that they had an easement to use defendants' half of the common driveway. It was also admitted that the plaintiffs had given no notice to the defendants of a claim of an easement. However, when the defendants moved onto their lot in 1977, they continued to observe the already-established practice of the common driveway.

In the early 1970's, plaintiffs constructed a concrete retaining wall on land adjoining the driveway on their side. Plaintiffs also inserted a metal pole that sits on the edge of the driveway area. As a result of these actions, the defendants allegedly experienced difficulty in using the common driveway and they built a new driveway on the other side of their lot. They also threatened to erect a fence on the boundary line that would prevent the plaintiffs from using the common driveway.

On October 28, 1978, plaintiffs filed a petition in equity asserting the existence of a common driveway and seeking to enjoin defendants from interfering with the plaintiffs' use thereof. Defendants filed an answer and counterclaim, asserting that plaintiffs' use of the driveway had been permissive and that the plaintiffs by misuse and abuse of the privilege had abandoned the use. On July 17, 1979, the trial court entered a decree concluding that the plaintiffs had established a prescriptive easement for driveway purposes on the defendants' property and enjoining the defendants from interfering with the easement. Defendants now appeal from that decree.

II.

Defendants first contend that the trial court erred in finding that the plaintiffs

had established a prescriptive easement over defendants' one-half of the common driveway. We find no merit in this contention.

Generally speaking, a prescriptive easement involves the process of acquiring an easement by the uninterrupted assertion of rights over a long period of time. Phillips v. Griffin, 250 Iowa 1350, 1354, 98 N.W.2d 822, 824 (1959). Such an easement is based on the principle of estoppel. McKeon v. Brammer, 238 Iowa 1113, 1121, 29 N.W.2d 518, 523 (1947). In order for an easement to be created by prescription, there must be an adverse possession, under claim of right or color of title, openly and continuously asserted for ten years or more. Anderson v. Yearous, 249 N.W.2d 855, 861 (Iowa 1977); Schwenker v. Sagers, 230 N.W.2d 525, 527 (Iowa 1975); Simonsen v. Todd, 261 Iowa 485, 489, 154 N.W.2d 730, 732 (1967). By "under claim of right," it is meant that the party claiming the prescriptive easement must use the land in question without recognition of the rights of the owner of the land. Andrzejczyk v. Advo System, Inc., 146 Conn. 428, 432, 151 A.2d 881, 883 (1959). That the use must be "adverse" refers to the requirement that it be inconsistent with the rights of the owner of the land, such as to constitute an actual invasion or infringement of those rights. Simmons v. Perkins, 63 Idaho 136, 144, 118 P.2d 740, 744 (1941). See generally 25 Am. Jur. 2d Easements and Licenses § 51 (1966). Both requirements give rise to the principle that a permissive use will not suffice for creation of a prescriptive easement. Schwenker, 230 N.W.2d at 527-28. See also Webb v. Arterburn, 246 Iowa 363, 382, 67 N.W.2d 504, 515 (1954); Gerdts v. Mulford, 230 Iowa 647, 652, 298 N.W. 873, 875 (1941); see Chicago, Milwaukee, St. Paul & Pacific Railroad Co. v. Cross, 212 Iowa 218, 224, 234 N.W. 569, 571 (1931). Defendants contend that a prescriptive easement was not created in the instant case because plaintiffs' use of defendants' half of the common driveway was merely permissive; the trial court concluded, however, and we agree, that the use was not permissive. For one thing, if a use is permissive, it is exercised in subordination to the other's claim of ownership; such use involves acknowledgement of a superior right in the other party. Scoville v. Fisher, 181 Neb. 496, 499-500, 149 N.W.2d 339, 342 (1967). See generally Restatement of the Law of Property § 458, at 2924-27; 25 Am. Jur. 2d Easements and Licenses § 51, at 460 (1966); 28 C.J.S. Easements § 14, at 655 (1941). The record reveals no evidence to suggest that the plaintiffs' use of the common driveway was exercised in subordination to that of the defendants. Moreover, our review of the evidence indicates that this case involves not a question of permission but of acquiescence. In the context of claims of

easement by prescription, "acquiescence" means passive conduct on the part of the owner of the servient estate consisting of failure to assert his superior right against invasion thereof by the user claiming the easement. Rice v. Miller, 306 Minn. 523, 525, 238 N.W.2d 609, 611 (1976); Alstad v. Boyer, 228 Minn. 307, 312, 37 N.W.2d 372, 376 (1949); Dozier v. Krmpotich, 227 Minn. 503, 507-08, 35 N.W.2d 696, 699 (1949); Svoboda v. Johnson, 204 Neb. 57, 68, 281 N.W.2d 892, 900 (1979); Hopkins v. Hill, 160 Neb. 29, 41, 68 N.W.2d 678, 685 (1955). "Permission" denotes more than mere acquiescence; it denotes the grant of a permission in fact or of a license. Dozier, 227 Minn. at 508, 35 N.W.2d at 699. While a prescriptive easement will not arise where the use is merely permissive, Schwenker, 230 N.W.2d at 527-28, acquiescence by the owner of the servient estate in the acts relied on to establish the prescriptive right is "[t]he very foundation of the establishment of a right to an easement by prescription." Dozier, 227 Minn. at 507, 35 N.W.2d at 699. See generally 28 C.J.S. Easements § 14 (1941). There is nothing in the record in the instant case to indicate that the plaintiffs ever sought defendants' permission to use their half of the common driveway or that the defendants ever granted such permission. In fact, nothing in the record reveals that anything was ever said by either party about the plaintiffs' right to use the driveway. From all appearances, plaintiffs' use of the driveway was without objection or protest from the defendants, although the defendants did ask the plaintiffs to remove the alleged obstructions to the driveway. We therefore agree with the trial court that this was not a permissive use and conclude that the elements of a prescriptive easement in favor of the plaintiffs have been established.

III.

Defendants contend that if a prescriptive easement was in fact created, it was extinguished by plaintiffs' abuse and misuse of the easement. We are not persuaded by this argument. Furthermore, we would be extremely reluctant to extinguish this easement, since the common driveway provides the only means of access to the plaintiffs' garage. Instead, we think equity requires that the plaintiffs remove the metal pole from the driveway area and that the defendants be enjoined from erecting a fence on the boundary line between the two lots.

AFFIRMED.