

IN THE COURT OF APPEALS OF IOWA

FILED

APR - 8 1983

CLEAR SUPREME COURT

NEVELLE BURLESON and HAZEL L. BURLESON.

Plaintiffs-Appellees,

vs.

CLYDE A. DAVISON and DOROTHY DAVISON,

Defendants-Appellants.

) Filed April 8, 1983

$$\begin{array}{r} 2-392 \\ \hline 2-68039 \end{array}$$

Appeal from Hardin District Court, Russell J. Hill, Judge.

Defendants appeal trial court's judgment declaring that an easement be established in favor of plaintiffs across a portion of defendants' real estate contiguous to plaintiffs' lot. **AFFIRMED.**

John L. Butler and James C. Ellefson of Lundy, Butler and Lundy, Eldora, for
defendants-appellants.

Lynn J. Wiese of Barker, McNeal, Wiese & Holt, Iowa Falls, for defendants-appellants.

Considered en banc.

PER CURIAM

Defendants appeal trial court's judgment declaring that an easement be established in favor of plaintiffs' real estate contiguous to plaintiffs' lot. We affirm.

The parties are owners of adjoining residential lots. The west wall of plaintiffs' house is the property line between the lots in question. The west roof hangs over defendants' property. When the defendant bought the lot in 1975, rain running off of the plaintiffs' roof was caught by eave troughs. The collected water was released onto plaintiffs' property. The trough fell down in the fall of 1975. There was a garage which was on defendants' property when the plaintiffs bought their property and which remained there until after June 1977. The east wall of the garage was also on the property line. The garage was removed prior to trial. During the time that the garage was on defendants' property, a driveway connected the garage with the street to the north of the lot. There was a space of two to three feet between the plaintiffs' house and the driveway. Flowers and bushes grew in this space.

One of the plaintiffs testified that at the time the house was purchased, he thought the flowers to the west of his house were on his land and that defendants' garage encroached onto his lot. He did not realize that the house and the garage were on the line until a survey was done in 1977. The defendants were also unaware of the property line until the survey.

Sometime after November 1979, a retaining wall was placed along the property line against the west wall of plaintiffs' house. A fence was also constructed along the property line.

The plaintiffs filed an action for declaratory judgment in 1978, praying that easement be established in their favor across a part of defendants' real estate contiguous to plaintiffs' lot. The easement prayed for was for overhang, drainage, and maintenance to the west end of plaintiffs' house.

On December 9, 1981, the trial court filed its findings of fact, conclusions of law and decree. The court found that the plaintiffs had established an easement by prescription and ordered that such an easement would exist in favor of the plaintiffs' property for the limited purposes of maintenance and water run-off.

Because this proceeding was conducted below in equity, our review on appeal is de novo. Anderson v. Yearous, 249 N.W.2d 855, 858 (Iowa 1977); Mosebach v. Blythe, 282 N.W.2d 755, 758 (Iowa Ct. App. 1979). We give weight to the trial court's findings but are not bound by them. Iowa R. App. P. 14(f)(7); Tamm, Inc. v. Pildis, 249 N.W.2d 823, 828 (Iowa 1976)(quoting Hansen v. Chapin, 232 N.W.2d 506, 509 (Iowa 1975)). Because of plaintiff's failure to file an appellees' brief, we confine our review to the theory relied upon by the trial court and to the issues raised in appellants' brief. (quoting County of Jefferson v. Barton-Douglas Contractors, Inc., 282 N.W.2d 155, 157 (Iowa 1979)). We therefore consider only whether an easement by prescription was created.

A party claiming the existence of an easement by prescription must establish it by evidence which is clear, convincing, and satisfactory. Webb v. Arterburn, 246 Iowa 363, 380, 67 N.W.2d 504, 514 (1954). The criteria for establishing a prescriptive easement are the same as for establishing adverse possession: it must be accomplished under claim of right or color of title, and it must be openly, notoriously, continuously, and hostilely asserted for ten years or more. Anderson v. Yearous, 249 N.W.2d 855, 861 (Iowa 1977).

On our de novo review we reach the same conclusion as the trial court—that plaintiffs have established the existence of an easement by prescription for the limited purposes of maintenance and water run-off. Plaintiffs and their predecessors exhibited a claim of right to the strip of land in question by planting flowers on it and otherwise maintaining it. This activity was distinct from and independent of mere use of the land. See Iowa Code § 564.1 (1981); Webb v. Arterburn, 246 Iowa 363, 382-83, 67 N.W.2d 504, 515 (1954). We further think that the requirement that defendants had express notice of this claim of right was met, see Iowa Code § 564.1; the law imputes to them such knowledge as they would have acquired by ordinary diligence, i.e. by inspecting their property at the time of purchase and remodeling. We agree with the trial court that the plaintiffs have proved that their use was adverse and was for the requisite prescriptive period of ten years.

Because the issues in the brief filed by the additional defendants-appellants regarding tacking were not preserved below, we refuse to address them for the first time on appeal. See Wiles v. Myerly, 210 N.W.2d 619, 626 (Iowa 1973).

AFFIRMED.