IN THE COURT OF APPEALS OF IOWA

No. 9-060 / 96-1612
Filed March 31, 1999

ROBERT D. McREYNOLDS and SHERRI G. McREYNOLDS,

Appellees,

vs.

RONALD E. MULLEN and JANET MULLEN,

Appellants.

Appeal from the Iowa District Court for Jefferson County, Robert Bates, Judge.

The Mullens appeal a district court ruling establishing an easement by implication over a portion of their residential property in favor of the McReynolds.

REVERSED.

Terri Finkbine Arnold, Fairfield, for appellants.

Craig R. Foss of Foss, Kuiken & Gookin, P.C., Fairfield, for appellees.

Heard by Streit, P.J., and Vogel and Zimmer, JJ.

VOGEL, J.

The Mullens appeal a district court ruling establishing an easement over a two-foot strip of driveway on their residential property in favor of the McReynolds. As we find the elements of easement by implication were not proven, we reverse.

Background facts. From 1929 until 1948, the properties known as 601 and 603 South Second Street in Fairfield, Iowa, were owned by Mary Buchanan. The Buchanans lived in a home at 601 South Second, and 603 South Second was merely an empty lot. In 1948, the Buchanans sold the lot to the Harrisons, who then built a home there. The two homes were only twelve to thirteen feet apart at the narrowest point, where a bay window extended from the Buchanans' home; there was approximately eight feet between the bay window and the property line. At the time of the sale, a gravel driveway ran between the two lots, leading to a single-car detached garage at the rear of the Buchanan property. As the properties changed hands over the years, most of the owners of 601 South Second used the garage or the driveway to some extent.

Sherri McReynolds purchased the home at 601 South Second in 1979. At that time the garage and driveway were still in existence, but the garage had not been used since about 1976 and was in such a dilapidated condition that the McReynolds tore it down in 1984. The Mullens purchased the home at 603 South Second in 1987. Until 1994, the McReynolds mainly parked on the old driveway between and in front of the two houses, just past the street curb. Their use of the entire driveway and

garage, while it still existed, was sporadic at best, and the back portion of the original gravel driveway mostly returned to grass. In 1993 the McReynolds added an air conditioning condenser to the south side of their home between the two lots, reducing the distance to the property line to just under seven feet at that point. In April of 1994 the McReynolds poured a concrete slab in their backyard to be used as the floor for a new two-car garage, added gravel to the driveway, and started driving between the two houses to their backyard. The Mullens objected to this use and in June of 1994 placed two posts and a fence just inside their property line. The McReynolds claim that the posts and fence substantially interfered with and prevented them from using their driveway because their full-sized van could no longer safely pass between their house and the fence without taking off the side mirrors. In April of 1995 the McReynolds filed a petition alleging they were entitled to an easement over a two-foot strip of the Mullens' property. The Mullens filed a counterclaim seeking damage for the alleged nuisance created by the McReynolds' use of the driveway. Following trial, the district court entered its judgment rejecting the Mullens' claim and finding that the McReynolds had established an easement by implication. The Mullens appeal.

Scope of review. The McReynolds assert that this case was incorrectly filed as an action at law instead of equity, and should therefore be reviewed de novo. However, as the case was tried at law we will review for correction of errors at law. *See* Iowa R. App. P. 4; *see also Davis-Eisenhart Marketing Co., Inc. v. Baysden*, 539

N.W.2d 140, 142 (Iowa 1995) (citations omitted) (noting that cases are ordinarily heard on appeal in the manner in which they were treated in district court); *Howard v. Schildberg Const. Co., Inc.*, 528 N.W.2d 550, 552 (Iowa 1995).

Easement by implication. An easement by implication is one which the law imposes by inferring the parties to a transaction intended that result, although they did not express it. *See Schwob v. Green*, 215 N.W.2d 240, 242-43 (Iowa 1974) (citations omitted). The Iowa Supreme Court set out the following standard for establishing an easement by implication in *Bray v. Hardy*, 248 Iowa 794, 82 N.W.2d 671 (1957):

> An easement by implication, upon severance of the unity of ownership in an estate, arises when these factors appear: (1) a separation of the title; (2) a showing that, before the separation took place, the use giving rise to the easement was so long continued and obvious that it was manifest it was intended to be permanent; and (3) it must appear that the easement is continuous rather than temporary, and that it is essential to the beneficial enjoyment of the land granted or retained.

Id. at 248 Iowa 794, 797, 82 N.W.2d 671, 673 (quoting 17 Am.Jur. Easements § 34 (1938)); *see also Rank v. Frame*, 522 N.W.2d 848 (Iowa App. 1994).

In this case, we find that the latter two elements are lacking. Although the current graveled driveway encroaches onto the Mullens' property, there was no clear showing that the original grassy driveway and garage extended onto the 603 South Second property. Furthermore, there was scant evidence regarding whether the use of the driveway prior to the separation of title was "so long and continuous that it was manifest it was intended to be permanent." The use of the driveway has not been continuous for the various owners of 601 South Second. Ten years passed between

the destruction of the old garage by the McReynolds and the start of construction for a new one. During that time the McReynolds mainly parked on the front part of the driveway and rarely drove between the two houses all the way to their backyard.

Nor can we find that an easement is essential to the beneficial enjoyment of the land. While the driveway itself is wide enough for most vehicles, the McReynolds' large bay window and air conditioner which extend into the driveway make it impossible for their largest vehicle, a van, to pass safely through without removing the side mirrors.[1] There was no testimony regarding the width of Mrs. Buchanan's car as compared with the width of the McReynolds' van to support the McReynolds' claim that the original driveway necessarily encroached on the adjoining property.

The McReynolds alternatively urge that the trial court erred in failing to find that they had established ownership by boundary acquiescence or by prescriptive easement. However, there was no evidence of a clearly defined boundary outside of the existing property line and no clear evidence of a ten-year period of acquiescence. *See Tewes v. Pine Lane Farms*, 522 N.W.2d 801, 806 (Iowa 1994); Iowa Code §§ 650.6, 650.14. Furthermore, there was no evidence of an oral agreement or express consent to an encroachment, nor evidence of substantial money or labor to promote the McReynolds' claim. *See Simonsen v. Todd*, 154 N.W.2d 730, 736 (1967) (outlining the elements for the establishment of a prescriptive easement by consent).

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[1] The Mullens conceded at oral argument that they could allow the McReynolds a "couple of inches" easement in the area of the bay window which may accommodate the size of the McReynolds' van and allow them to store it in their garage.

The McReynolds' claims under these theories must also fail. For these reasons, we hereby reverse the finding of the district court.

REVERSED.