IN THE COURT OF APPEALS OF IOWA

No. 2-1001/ 12-0301
Filed January 9, 2013

JP MORGAN CHASE BANK, as Trustee, by RESIDENTIAL FUNDING CORPORATION, Attorney-in-Fact,
Plaintiff-Appellee,

vs.

DIMAGGIO NICHOLS, Individually and as Trustee of the DIMAGGIO NICHOLS REVOCABLE TRUST and LIZZIE S. NICHOLS, Individually and as Trustee of the LIZZIE S. NICHOLS REVOCABLE TRUST,
Defendants-Appellants.

Appeal from the Iowa District Court for Warren County, David L. Christensen, Judge.

Adjoining landowners appeal the district court's ruling granting an easement by necessity in favor of property owned by a bank through foreclosure. **AFFIRMED.**

Thomas G. Fisher Jr., of Parrish, Kruidenier, Dunn, Boles, Gribble, Parrish, Gentry & Fisher, L.L.P., Des Moines, for appellants.

Kermit B. Anderson, of Finley, Alt, Smith, Scharnberg, Craig, Hilmes & Gaffney, P.C., Des Moines, for appellee.

Heard by Doyle, P.J., and Mullins and Bower, JJ.

MULLINS, J.

Dimaggio and Lizzie Nichols, individually and as the trustee for their respective trusts (the Nicholses), appeal the district court's decree granting an easement by necessity over their land in favor of land owned by JP Morgan Chase Bank (the Bank). The Nicholses assert the district court erred in granting the easement because (1) the Bank was on notice of the lack of access to the road when it issued the mortgage on the property in question, (2) the original grantee to the property intended to obtain a different access easement, (3) the Bank was not a party to the initial land transaction, and (4) the Bank failed to prove unity of title. For the reasons stated herein, we affirm the judgment of the district court.

I. BACKGROUND FACTS AND PROCEEDINGS.

Prior to 1999, the Nicholses owned land in Indianola, Iowa, known as Lot 2. At that time, they decided to gift a two-acre section of that land, known as Parcel "C," to Dimaggio's brother and sister-in-law, Fredrick and Linda. Fredrick and Linda intended to build a house on this land, and in January 1999, the parties signed an "Easement Agreement" whereby Fredrick and Linda agreed, "As a condition for [the Nicholses] gifting us two (2) acres of land, we will have to obtain our own easement in order to build our home. Should we not be able to obtain an easement, [the Nicholses] will sell us an easement at the current market value." This agreement was never recorded. Parcel "C" was platted, and the description filed with the county recorder's office on February 1, 1999. On

April 13, 1999, the Nicholses conveyed the property to Fredrick and Linda via a warranty deed, recording the transfer on the same day.

Parcel "C" was completely landlocked. The property bordering Parcel "C" on three sides belonged to the Nicholses, and abutting the fourth side was property owned by a local church. Fredrick and Linda never obtained an express access easement from the Nicholses or the church. The construction crews, hired by Fredrick and Linda to build their house, used the gravel driveway the Nicholses used to access their own home, along with an additional driveway which ran across the front of the Nicholses' property. This same route was used by Fredrick and Linda to access their home once it was built. Later the Nicholses constructed a second concrete driveway directly from the road to their home and put a remote access gate across the entrance to the driveway. If the gate was open, Fredrick and Linda could use the new driveway. If the gate was closed, they had to use the old gravel drive. Fredrick and Linda also asphalted the gravel access drive, which led from the new concrete driveway to their home on Parcel "C."

Fredrick and Linda continuously lived on Parcel "C" from 1999 until 2006. They gave a mortgage on the property to secure a loan in the amount of $400,000. The loan was eventually assigned to the Bank. Fredrick and Linda subsequently defaulted on the loan, the property was foreclosed on, and the Bank obtained a Sheriff's deed to the property on September 7, 2007.

The Bank hired a local real estate agent to list the property for sale. The agent employed the services of a land surveyor to identify the boundary lines of

the property and describe the easement for ingress and egress. The surveyor identified the new concrete driveway in conjunction with the asphalt driveway as the most practical, logical, and economical location for an access easement across the Nicholses' property because the route was already paved and no new ground needed to be disturbed.

The Bank filed a petition in equity in district court seeking for the court to issue a declaratory judgment proclaiming that it was entitled to an easement across the Nicholses' land for ingress and egress to connect Parcel "C" to a public roadway. The case was tried on December 22, 2010, and the district court issued its ruling on January 27, 2011, granting the Bank an easement by necessity. The court ordered the Nicholses to choose between one of the two routes previously used by Fredrick and Linda to get to their home or offered the Nicholses the opportunity to select a different location for the easement so long as it was reasonable. The parties agreed to a new location for the easement, and the court filed its final decree on January 13, 2012, describing the location of the easement across the Nicholses' property. The Nicholses appeal.[1]

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[1] The Nicholses assert the issue is not whether the Bank is entitled to some access to its property. Instead the Nicholses claim that what the Bank really seeks is the ability to select its preferred access without paying for it. The Nicholses claim the Bank has an alternative means of obtaining access to the landlocked property by way of Iowa Code section 6A.4(2) (2009)—the eminent domain chapter. Section 6A.4 provides:

> The right to take private property for public use is hereby conferred:
>
> . . . .
>
> 2. Owners of land without a way to the land. Upon the owner or lessee of lands, which have no public or private way to the lands, for the purpose of providing a public way which will connect with an existing public road.

We are unable to find any indication in the appendix or in the district court record demonstrating that the applicability of section 6A.4(2) was ever raised in or decided by the district court. Therefore, we find this issue of the application of section 6A.4(2) is not

II. SCOPE AND STANDARD OF REVIEW.

As this case was tried in equity, our review is de novo. Iowa R. App. P. 6.907. We give weight to the factual findings of the district court, especially its determinations of credibility, but we are not bound by those findings. Iowa R. App. P. 6.904(3)(g).

III. EASEMENT BY NECESSITY.

While there are four ways to create an easement,[2] only an easement by necessity is at issue in this case. To establish an easement by necessity, the easement holder must prove: "(1) unity of title to the dominant and servient estates at some point prior to the severance, (2) severance of title, and (3) necessity of the easement." *Nichols*, 687 N.W.2d at 568. "The doctrine of easement by necessity is most commonly applied when a landowner parcels out a landlocked portion of his or her land and conveys it to another." *Id.* We determine whether an easement by necessity exists at the time the landlocked parcel is severed from the parcel with access. 25 Am. Jur. 2d *Easements and Licenses* § 30, at 528 (2004). An easement by necessity results from the presumption that "a party who conveys property intends to convey whatever is necessary for the beneficial use of that property and to retain whatever is necessary for the beneficial use of the land he or she still possesses." *Id.* § 31, at 529.

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preserved for our review. *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) ("It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal.").

[2] The four ways to create an easement include: "(1) by express grant or reservation, (2) by prescription, (3) by necessity, and (4) by implication." *Nichols v. City of Evansdale*, 687 N.W.2d 562, 568 (Iowa 2004).

The easement by necessity is also "supported by the rule of public policy that lands should not be rendered unfit for occupancy or successful cultivation." *Id.* An easement by necessity is appurtenant, meaning the easement runs with the land, because it benefits a particular parcel of land and not a particular person. *Id.* § 8, at 504–05. The easement will last until such time as it is no longer necessary in order to gain access to and utilize the dominant land. *Id.*; *see also* Restatement (Third) of Property: *Servitudes* § 4.3(1), at 524 (2000) ("A servitude by necessity lasts as long as the necessity that gave rise to its creation continues.").

A. Notice of the Lack of Access. For their first claim on appeal, the Nicholses assert the district court erred in granting the easement because the Bank was on record notice of the lack of access to the property when it granted the mortgage. They assert the Bank cannot show necessity here because it could have required Fredrick and Linda to obtain an easement when they applied for the mortgage, and if the easement was not obtained by Fredrick and Linda, the Bank could have refused to underwrite the loan.

Assuming without deciding that the Bank could have been on record notice of the lack of easement to the property at the time the mortgage was issued, we find no law in Iowa to support the proposition that notice of the lack of access defeats a claim of easement by necessity. The only case the Nicholses cite in support of their contention is *Shive v. Schaefer*, an opinion from the Illinois Appellate Court, wherein the court stated: "[P]laintiff's irresponsible action created his own necessity, and [defendant] should not be deprived of the full use

and enjoyment of his property." 484 N.E.2d 394, 396 (Ill. App. Ct. 1985). However, we find the *Shive* case inapplicable to the case currently before the court.

In *Shive*, the party seeking the easement sold the surrounding property to various parties. *Id*. at 395. It was not until later that he discovered his retained portion of land was landlocked. *Id.* The court found no necessity because when the property at issue was conveyed, there existed numerous means of access to the property retained, and the plaintiff created his own necessity by subsequently selling off all the other means of access. *Id*. at 396. In this case, neither the Bank nor Fredrick and Linda took any action subsequent to obtaining Parcel "C" that cut off or eliminated an existing point of access. Parcel "C" never had any access to a public road except that which the Nicholses permissively allowed.

Where there is a conveyance of a landlocked portion of a larger tract of land, which has access to a public road, the courts find there was implied in the conveyance an easement by necessity so as to permit the owner of the landlocked portion access to his or her land. *See Nichols*, 687 N.W.2d at 568 ("[C]ourts may imply an easement by necessity across the seller's land to provide the purchaser of the landlocked parcel with access to a public road."); 25 Am. Jur. 2d *Easements and Licenses* § 30, at 527–28 ("A way of necessity is an easement founded on an implied grant or implied reservation."). The Bank's notice, if any, of the lack of access to the property at the time it issued its mortgage on the property does not defeat its claim for an easement by necessity,

which was implied in the conveyance of Parcel "C" from the Nicholses to Fredrick and Linda.

B. Intent of the Grantee/Grantor. The Nicholses next assert that the district court erred in granting the easement because the evidence supported the conclusion that the parties to the transaction, the Nicholses and Fredrick and Linda, intended not to create an easement. While intent to create an easement is not an element of an easement by necessity, *Nichols*, 687 N.W.2d at 568, an intent not to create an easement can defeat such a claim. Restatement (Third) of Property: *Servitudes* § 2.15, cmt. e, at 208–09.

> [S]ervitudes by necessity will be implied unless it is clear that the parties intend to deprive the property of rights necessary to its enjoyment. Thus, servitudes for rights necessary to enjoyment of the property will be implied unless it affirmatively appears from the language or circumstances of the conveyance that the parties did intend that result. Mere proof that they failed to consider access rights, or incorrectly believed other means to be available, is not sufficient to justify exclusion of implied servitudes for rights necessary to its enjoyment.

Id. The Nicholses assert the "Easement Agreement" signed by them and Fredrick and Linda demonstrate a clear intent that they deliberately intended not to create an easement.

The agreement was signed four months before the conveyance and a month before Parcel "C" was platted and recorded. The agreement provided that a condition of the gift of the property from the Nicholses to Fredrick and Linda was that Fredrick and Linda obtain their own easement in order to build their home. It also provided that in the event Fredrick and Linda were unable to obtain an easement, the Nicholses would sell them one at the current market value.

This agreement does not indicate an intent to deprive Parcel "C" of an easement. To the contrary, this agreement specifically acknowledges the need for Parcel "C" to have an easement for Fredrick and Linda to build a house. The land in question was subsequently platted and conveyed by the Nicholses by warranty deed, and the deed has no indication that the parties intended no easement to be created. Fredrick and Linda subsequently began building their home and used the Nicholses' driveways throughout the time they lived on the property.

The Nicholses assert there was no necessity at the time of the conveyance because they acquiesced to Fredrick and Linda's use of their driveways. However, permissive use of the servient land is irrelevant to whether an easement by necessity will be deemed to exist. 25 Am. Jur. 2d *Easements and Licenses* § 32, at 530 ("The fact that any existing use is permissive is irrelevant to the question of whether a way or easement of necessity will be deemed to exist."); *see also* 28A C.J.S. *Easements* § 119, at 323–24 (2008) ("Claimant who has a right-of-way over the land of another, unless the right to use such way is merely permissive, or is subject to closure at any time, may not acquire a way of necessity."). There is no indication in the conveyance or in the circumstances surrounding the conveyance to indicate the parties to the transaction intended to deprive Parcel "C" of a way to access the property. While the unrecorded "Easement Agreement" might have been enforceable as between the signatories, the agreement, which did not run with the land and which was not by its terms binding on successors and assigns, cannot negate the Bank's rights to an easement by necessity.

C. Remote Grantee. Next, the Nicholses assert the district court erred in granting an easement by necessity to the Bank because the Bank is a remote grantee and thus unable to make a claim for an easement by necessity. In support of their position, the Nicholses cite *Schwob v. Green*, 215 N.W.2d 240, 244 (Iowa 1974), wherein the court stated, "An easement by necessity ordinarily may not be claimed by any except the immediate parties to the transaction."

We begin by noting the statement made in *Schwob* was dicta. The case had not been tried or submitted on the theory of an easement by necessity, and therefore, the court did not decide the question of the remoteness of the parties to the transaction. *Schwob*, 215 N.W.2d at 244 ("However, since the case does not appear to have been tried or submitted on that theory, we pass the question.") In addition, the court had already found earlier in the opinion that an easement by necessity could not exist because the property in question had access to the public road on two sides. *Id.* Thus, there was no need to establish an easement by necessity. *Id.* ("The evidence in this case discloses defendant's property is bordered on two sides by public roads. Admittedly it would be both inconvenient and expensive to provide access in either case; but mere inconvenience or expediency is not the sort of 'necessity' which permits a finding the parties must therefore have intended to grant such an easement."). Therefore, we find the statement in *Schwob* is not controlling in this case.

In support of the statement it made, the *Schwob* court cited the case of *Black v. Whitacre*, 221 N.W. 825, 827 (Iowa 1928). The *Black* court, quoting from *Cassens v. Meyer*, 135 N.W. 543, 544 (Iowa 1912), stated, "Generally

speaking, [easements by necessity] arise only in favor of a grantee as against his grantor and consist of a right to the grantee of outlet over the lands of his grantor, if the grantee has no other outlet." The *Cassens* court cited *Rater v. Shuttlefield*, 125 N.W. 235, 237 (Iowa 1910), in support of this statement.

In *Rater*, a dispute arose over whether an easement by necessity should be granted more than fifty years after the severance of the property when the land conveyed had no access to the public road. 125 N.W. at 236. Neither the dominant nor servient land was still owned by the parties to the original transaction but was instead held by the original parties' heirs. *Id.* During the intervening fifty years, the owners of the dominant land had used a path across the servient land to access the public road. *Id.* A dispute arose after a gate on the servient land was left open, and the servient land owner revoked his "permission" for the dominant landowner to use the access to the public road. *Id.* The court found an easement by necessity existed in favor of the dominant land owner, specifically stating:

> [T]the parties to said transaction *and their grantees* recognized the right of the [dominant landowner] to the use of said way for a period of more than 50 years; that said way is not a mere way of convenience, but a way of necessity to the use and enjoyment of the land so conveyed.

Id. at 237 (emphasis added).

The *Rater* court clearly recognized that those in the chain of title from the original transaction could assert an easement by necessity even fifty years after the initial transaction. In addition, fifty years of permissive use between the parties to the original transaction and their subsequent heirs did not defeat the

claim for an easement by necessity. Thus, we find it inconsistent with *Rater* to interpret the statement originally made in *Cassens*—"Generally speaking, [easements by necessity] arise only in favor of a grantee as against his grantor"—to mean that only the two parties to the initial transaction may claim an easement by necessity. Instead the quote in *Cassens* can be, and should be, interpreted to mean only those in the chain of title of the original grantor and grantee may claim an easement by necessity, as opposed to a stranger to the chain of title. Such an interpretation is consistent with *Rater*, the common law, and the law of other jurisdictions. *See* 28A C.J.S. *Easements* § 112, at 316 ("Easements of necessity can be implied only for the benefit of or against parties to a particular conveyance and their successors in title and not for the benefit of or against strangers to the chain of title. . . . The common source of title need not be the immediate grantor of the claimant of the easement, but may be a remote grantor in the chain of title."); *see also Murphy v. Burch*, 205 P.3d 289, 293 (Cal. 2009) ("Remote grantees in the chain of title may assert the easement long after its creation by the original common grantor, and despite the failure of a prior grantee to exercise the right.").

To hold otherwise would be contrary to the rule that easements by necessity are appurtenant—running with the land and benefitting a particular parcel of land and not a particular person. The Bank was a proper party to claim an easement by necessity because it was within the chain of title of the common grantor, the Nicholses, by way of the original grantees, Fredrick and Linda.

D. Unity of Title. Finally, the Nicholses contend the district court erred in granting an easement by necessity because they assert the Bank could not establish unity of title. The Nicholses claim that at the time they conveyed Parcel "C" to Fredrick and Linda, temporary, permissive access was provided; therefore, there was no need for the easement by necessity. They then argue that when Fredrick and Linda entered into the mortgage with the Bank, there was no unity of title, and therefore, no easement of necessity could arise at that time. This argument fails.

As stated above, permissive use of the servient land will not defeat a claim for easement by necessity. *See* 25 Am. Jur. 2d *Easements and Licenses* § 32, at 530 ("The fact that any existing use is permissive is irrelevant to the question of whether a way or easement of necessity will be deemed to exist."). The relevant time to determine whether an easement by necessity exists is at the time the dominant land was severed from the servient land. *Id.* § 30, at 528 ("Whether an easement by necessity exists is determined by examining the circumstances existing at the time the landlocked parcel is severed from the parcel with access."); 28A C.J.S. *Easements* § 112, at 316 ("To establish unity of ownership of the dominant and servient estates, the claimant claiming an implied easement by necessity must show that prior to severance the grantor owned the estates as a unit or single tract."). At the time Parcel "C" was severed from the rest of the Nicholses' property, there was unity of title in the Nicholses. It was the severance of Parcel "C" from the rest of the Nicholses' property that gave rise to the need for the easement by necessity. Restatement (Third) of Property:

Servitudes § 2.15, cmt c., at 206 ("Servitudes will be implied only in conveyances that cause the necessity to arise.").

The district court correctly concluded the Bank had established (1) unity of title prior to severance in the Nicholses, (2) severance of title to Parcel "C," and (3) the easement across the Nicholses property was necessary. Assuming without deciding the Bank had notice of the lack of access at the time it issued its mortgage, this does not prevent the establishment of an easement by necessity. The unrecorded "Easement Agreement" did not affirmatively establish an intent to not create an easement. The fact the Bank was not a party to the initial transaction did not prevent its claim for an easement by necessity as it was within the chain of title to the dominant land and was not a stranger to the transaction. Finally, the relevant time period to analyze in determining whether unity of title existed is the time the property was severed. We therefore affirm the judgment of the district court.

AFFIRMED.