IN THE COURT OF APPEALS OF IOWA

No. 6-669 / 05-1233
Filed November 30, 2006

THOMAS K. NEWPORT, STEPHANIE NEWPORT, GERALD NEWPORT AND NEWPORT'S FLOWERS, INC.,
Plaintiffs-Appellees,

vs.

JUDITH M. DULIN,
Defendant-Appellant.

Appeal from the Iowa District Court for Linn County, David M. Remley, Judge.

The defendant appeals from the district court's order granting a permanent injunction. **AFFIRMED.**

Thomas J. Viner of Hallberg, Jacobsen, Johnson & Viner, P.L.C., Cedar Rapids, for appellant.

Richard F. Mitvalsky of Gray, Stefani & Mitvalsky, P.L.C., Cedar Rapids, for appellees.

Heard by Huitink, P.J., and Vogel and Eisenhauer, JJ.

VOGEL, J.

Judith Dulin appeals from the district court's order granting a permanent injunction in favor of Newport's Flowers, Inc., Thomas, Stephanie, and Gerald Newport. Dulin purchased land from Newport Flowers, Inc. and after some years, erected a fence to block use of a private road on the land, preventing the plaintiffs from accessing their properties via the road. Because we agree with the district court's findings that the Newport plaintiffs have an access easement on the private road in question, we affirm the grant of the permanent injunction.

I. Background Facts and Proceedings.

The Newport family has owned the real estate in question since 1898, operating a greenhouse and wholesale and retail flower business from the location at 2125 Wilson Avenue SW in Cedar Rapids, Iowa. The property is bordered by Wilson Avenue SW on the north, Newport Drive SW on the east, and Lori Drive SW on the west. In 1961, the easterly portion of the Newport property adjacent to Newport Drive SW was platted into Newport's First Addition to the City of Cedar Rapids and subsequently developed into residential lots. Newport's Second Addition, also adjacent to Newport Drive SW, was platted into Lots 24, 25, and 26 in 1978, and Newport's Third Addition to Cedar Rapids was platted into Lots 1 and 2 in 1989. Newport's Flowers, Inc. has owned all of the land located west of Newport's First, Second, and Third Additions and east of Dorale's First, Second, Third and Fourth Additions since June 1968. Gerald Newport's parents, Leonard and Edith, deeded this land to the corporation, while retaining ownership of Lots 1 and 2 of Newport's Third Addition. Following Leonard's death, Gerald eventually came to own the entirety of Newport's Third

Addition Lots 1 and 2 through testamentary and inter vivos transfers.

Access to the residential property Lots 1 and 2 of Newport's Third Addition has been along a curbed and partially asphalted driveway measuring approximately twenty feet in width and running south from Wilson Avenue SW along the length of the westerly boundary of Newport's First and Third Additions. The Newport's alleged the roadway has been in existence since 1898, long preceding construction of the residence on Lot 1. It appears from the record that the parties do not dispute that the Newport family has continually used the road for ingress to and egress from their various properties along the roadway. There has never been a driveway that connects either Lot 1 or Lot 2 to Newport Drive SW directly to the east of the property, as the elevation of the lots is four to five feet higher than that of the street, with a steep precipice. The access road and rights of usage by the Newport family and Newport Flowers, Inc. is the source of the parties' controversy.

Gerald and his wife, Jeanne, resided in a house on Lot 1 until 1989, when they sold it on contract to their son, Thomas Newport, and his wife Stephanie. The warranty deed in fulfillment of the contract for Lot 1 was given on April 1, 2001. The home faces north toward Wilson Avenue SW, rather to the adjoining Newport Drive SW on the east, and the house is configured for access from the private road in question in this case. Gerald and Jeanne constructed a four-stall garage on Lot 2 of Newport's Third Addition in the early 1970's. The garage faces the west towards the access roadway. Gerald and Jeanne also deeded to Thomas and Stephanie Lot 2 in February 2004.

The business known as Newport Flowers is located immediately west of

the residential property, to which access has also historically been from the private roadway going south from Wilson Avenue SW. The private road splits about 300 feet from Wilson Avenue SW, with the east portion of the road continuing south along Newport's First, Third, and Second Additions, toward and beyond the residential property. The portion of the road south of the split contains cemented curbs on each side, a grass strip in the middle, and asphalt along the sides. At the split, the westerly portion of the private road loops into a teardrop-shaped driveway in front of the Newport Flowers building.

There are also several buildings, including an unoccupied house, a metal shed, and greenhouses, located west and south of the Newport Flowers building on land retained by the corporation Newport Flowers, Inc. after the subdivision and sale of Lot 1 of Newport's Fourth Addition. Pursuant to agreement on the sale, one driveway to these structures accessed by crossing in front of the Newport Flowers building at the northwest corner was closed; thereafter, the only means of access has been on the private roadway on the eastern edge of Newport's Fourth Addition. Immediately south of all of these buildings is an open field used for agricultural purposes by Gerald's brother, Dale. There are two remaining ways to enter into the field and other lands retained by Newport Flowers, Inc.: a gravel road from Lori Drive SW to the west that turns into a dirt pathway leading up the west side of the field and is impassable in wet or snowy weather; or the access driveway from Wilson Avenue SW in dispute in this case.

Judith Dulin began working at Newport Flowers in 1995, following the destruction by fire of her flower business located in Iowa City. Dulin had previously expressed an interest in purchasing the business and a portion of the

real estate owned by the corporation Newport's Flowers, Inc., to which Gerald had been the sole shareholder since 1989. Following negotiations, the parties signed a "Sale Agreement" for the business and a portion of the land, which provided among other things, a closing date of June 30, 1997, and a subdivision of the land to be completed and approved by the City of Cedar Rapids (Newport's Fourth Addition).

To complete the subdivision of the property, Brain Engineering prepared a preliminary plat to Lot 1, Newport's Fourth Addition, including all of the property owned by Newport's Flowers, Inc. The preliminary plat, dated October 1996, extended Hughes Drive SW south of Wilson Avenue SW into a proposed cul-de-sac known as Hughes Court SW, with the eastern half of the cul-de-sac providing access to the flower shop. The plat also showed the existing private roadway with the notation "existing drive" and "20' access easement" adjacent to the road in two locations on the plat. The plat shows the twenty-foot access easement running south from Wilson Avenue SW to the southern boundary of Lot 1, Newport's Fourth Addition. Dulin was provided with a copy of the preliminary plat and instructed Gerald that she preferred not to have half of the cul-de-sac created by Hughes Court SW on her property at Lot 1, Newport's Fourth Addition. A second preliminary plat was prepared and submitted, showing the Hughes Court SW cul-de-sac offset and located mostly on the property being retained by Newport Flowers, Inc. The revised preliminary plat also contains the same notation regarding "existing drive" and "20' access easement" in two locations along the private roadway. The final plat was prepared in June 1997, and contains the words "20' access, utility, and priv. drain easement" or "20'

access, priv. drain, and utility easement" in two locations along the roadway in question in the location where the previous preliminary plat had read "20' access easement" and "existing drive."

Dulin took over the business effective January 1, 1997, and leased the premises and business for $1500 per month. Dulin paid rent up through May 1997, but as the closing date approached, the parties realized that Gerald needed more time to complete required clean up of the premises. The sale was closed in September or October 1998, and Newport's Flowers, Inc. conveyed title by warranty deed to Dulin, which described the property as "Lot 1, Newport's Fourth Addition to the City of Cedar Rapids, Linn County, Iowa." Prior to the closing, Dulin's attorney reviewed the abstract of title and prepared a title opinion which noted the utility easement for the "easterly twenty feet (20') of the lot [Dulin] was purchasing," but failed to mention the access easement. The attorney cautioned that "I can give no report on the location of boundary lines, rights of parties in possession or easements existing by virtue of usage, as the same do not appear on the abstract." Dulin also received copies of the plats, including the final plat attached to the attorney's title opinion, but she denied reviewing them or the title opinion. The district court found to the contrary, that she had in fact reviewed the plats and her husband had reviewed the title opinion.

As the closing approached, Gerald and Jeanne claimed that they spoke with Dulin regarding their ability to access the remaining property by using the private roadway. Dulin testified that she did not recall this particular conversation, but that she was aware prior to the sale that Gerald, Jeanne,

Thomas, and Stephanie used the private roadway along the flower shop business land to access their property south of Wilson Avenue SW. The closing occurred in September 1998, and the various Newports continued to use the private access road. Several years passed without incident between the parties and use of the road. Then sometime in the summer of 2002, Dulin met with Gerald and expressed her concern regarding the traffic over the east portion of the road and her intention to construct a fence. She asserts that Gerald did not oppose this, and a contractor erected a chain-link fence along the north portion of Dulin's east property line along the private roadway and a six-foot wooden privacy fence between Thomas and Stephanie's residence on Lot 1 (Newport's Third) and the private roadway up to the north end of the garage on Lot 2 (Newport's Third). Also, two east-west chain link gates were placed across the private roadway, controlling driveway access: one at the south boundary of Dulin's property and the other at the north end of Thomas and Stephanie's property at Lot 1 (Newport's Third). The gates were left open most of the time, although Dulin admitted closing both sets of gates occasionally, but not locking them.

With the construction of the fencing, the plaintiffs filed suit against Dulin in June 2003 seeking to enjoin her from restricting the plaintiffs' access to and use of the private roadway. A temporary injunction was granted on June 6, 2003, preventing Dulin from shutting the gates or otherwise blocking access to the east roadway and from communicating with the plaintiffs or others that their access easement was denied. Following trial, the district court entered a permanent injunction in June 2005 against Dulin and those acting on her behalf from

erecting any fence or gate or otherwise blocking access to the private east roadway and from communicating to the plaintiffs or their agents and invitees that access was denied.

II. Scope of Review.

Because this case was tried in equity, our review is de novo. *Owens v. Brownlie*, 610 N.W.2d 860, 865 (Iowa 2000).

III. Existence of an Easement.

Dulin appeals arguing that the plaintiffs failed to demonstrate an express easement, implied easement, or easement by necessity with the evidence presented at trial. In granting the permanent injunction, the district court ruled that Newport's Flowers, Inc. holds an express access easement over the easterly twenty feet of the private road running the length of Lot 1, Newport's Fourth Addition, by virtue of the unambiguous language contained in the plats. The court also ruled that Thomas and Stephanie hold easements both by necessity and implication over the twenty foot access from the north boundary of Lot 1, Newport's Fourth Addition to the south boundary of Lot 2, Newport's Third Addition.

An easement has been defined in Iowa as

> a liberty, privilege, or advantage in land without profit, existing distinct from ownership of the soil, and because it is a permanent interest in another's land, with a right to enter at all times and enjoy it, it must be founded upon a grant by writing or upon prescription.

Independent Sch. Dist. v. DeWilde, 243 Iowa 685, 692, 53 N.W.2d 256, 261 (1952) (citations omitted). In general, a roadway easement may be established in one of four ways: (1) by express written grant, (2) by prescription, (3) by

necessity, and (4) by implication. *Kahl v. Clear Lake Methodist Camp Ass'n*, 265 N.W.2d 622, 624 (Iowa 1978).

Express Easement—Newport Flowers, Inc. The district court ruled that as the grantor in the real estate transaction, Gerald's corporation Newport's Flowers, Inc. holds an access easement by virtue of the deed, with reference to the language on the recorded plats. Since an easement is an interest in real estate, an express grant to create an easement must satisfy the requirements of a conveyance of an interest in real estate and must be in writing to satisfy the statute of frauds. *See* Iowa Code § 622.32 (2003). Dulin argues that the language on the plat is not sufficient to reserve an express easement for Newport's Flowers, Inc. We note that Dulin's brief argument on the finding of an express easement fails to cite any case law in support of her position. Although the requirements of Iowa Rule of Appellate Procedure 6.14 allows us to deem waived any arguments not properly supported, *see Phone Connection, Inc. v. Harbst*, 494 N.W.2d 445, 449 (Iowa Ct. App. 1992), we choose to address the merits. Despite Dulin's contentions to the contrary, Iowa law observes that an easement may also be granted in a plat and has the same legal effect as if it had been explicitly granted in every subsequent deed or other instrument of conveyance. *Maddox v. Katzman*, 332 N.W.2d 347, 351-52 (Iowa Ct. App. 1982). The language contained on the plats is unambiguous that an access easement exists on twenty feet of Lot 1, Newport's Fourth covered by the private roadway.

Furthermore, we observe that the obligation to repair an easement generally rests with the party holding the easement, and the owner of the

servient estate through which another party has a right of travel is under no obligation to repair. *Kepler v. Border*, 179 Iowa 318, 161 N.W. 302 (1917). Thomas testified that he for many years maintained and repaired the private roadway in question since moving into the house in 1989, and either he or Gerald routinely removed snow. This consistent maintenance did not change following the sale to Dulin and she did not contradict this testimony. We also note the following finding by the district court:

> Since the warranty deed from Newport's Flowers, Inc. to [Dulin] conveyed the property by reference to the plat, it is not fatal to Newport's Flowers, Inc.'s claim of an express easement that the warranty deed did not specifically refer to the access easement. The notation of the access easement on the plat is sufficient.

We agree with the district court that the record supports the existence of an express easement in favor of Newport's Flowers, Inc. for use of the private roadway and conclude that Dulin has failed to show how the record does not support this conclusion. We affirm on this issue.

Easement by Implication or Necessity. Dulin also contends the district court's finding of an easement by implication and necessity in favor of Thomas and Stephanie is not supported by the record. An easement by implication is imposed "by inferring the parties to a transaction intended the result, although they did not express it." *Schwob v. Green*, 215 N.W.2d 240, 242-43 (Iowa 1974). It arises with the following conditions: (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 (4) that it is essential to the beneficial enjoyment of the land granted or

retained. *Brede v. Koop*, 706 N.W.2d 824, 830 (Iowa 2005). An easement is "essential" when it is reasonably necessary, as distinguished from being merely convenient. *Id*. "The intent to grant or reserve an easement by implication must be determined as of the time of the severance of the unity of ownership." *Id*. (quoting *Bray v. Hardy*, 248 Iowa 794, 797, 801, 82 N.W.2d 671, 675 (1957)). An easement by implication may be claimed by either a remote grantor or a remote grantee if such a right existed in favor of a prior party for whom they take an interest. *Schwob*, 215 N.W.2d at 244.

To establish an easement by necessity, a claimant must prove: (1) unity of title to the dominant and servient estates at some point prior to severance; (2) severance of title; and (3) necessity of the easement. *Nichols v. City of Evansdale*, 687 N.W.2d 562, 568 (Iowa 2004). In contrast to the easement by implication, no showing of intent of the parties to create a right of easement is required to prove an easement by necessity. *Id*. Strict necessity need not be proven, but showing mere inconvenience is not enough to establish the easement. *Schwob*, 215 N.W.2d at 245. When the use of an alternative involves disproportionate expense and inconvenience, the necessity requirement may be satisfied. *Id*. at 244.

Dulin asserts there was not a clear intent to create an easement and that it was not reasonably necessary. In addition to finding the required separation of title and the continuous use, the district court made the following findings:

> Lots 1 and 2, Newport's Third Addition, owned by Tom and Stephanie, are located on Newport Drive. However, there is no existing driveway from Newport Drive to Tom and Stephanie's garage. While the construction of such a driveway would not be impossible, it would be very costly. The difference in elevation from

> Newport Drive to the garage is four to five feet. Retaining walls or extensive grading would be required, and installation of city sidewalks may be required. William Crary, [Dulin's] engineer, declined to give a cost estimate for the installation of a driveway, retaining walls, or grading the lot. The location of the garage doors on the west side of the garage rather than the east side and the location of the garage very close to the property line between [Dulin] and Tom and Stephanie would make it very difficult and extremely inconvenient to access the garage, particularly if [Dulin] should choose to extend her existing fence southerly past the garage. Approaching the existing garage doors from Newport Drive involves an additional obstacle, which is a large tree depicted in Exhibit EE-3, which would prevent the construction of driveway from Newport Drive to the garage with a gradual turning radius. I conclude that access to the garage from Newport Drive would involve disproportionate expense and inconvenience. Therefore, it is necessary that Tom and Stephanie use the 20-foot access depicted along the east side of lot 1 on the final plat, Newport's Fourth Addition, for access to their home and garage.
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> Before the separation of title, the driveway was used by Tom and Stephanie's predecessors in interest (Leonard and Edith and their tenants) for many years prior to 1968. The driveway was improved, clearly defined and used on a very regular basis. Therefore, the driveway easement was so long continued and obvious, that it was intended by Leonard and Edith in 1968 when the separation of title occurred that the driveway easement be permanent. The driveway was essential to the beneficial enjoyment of the land owned by Tom and Stephanie's predecessors in interest. For the reasons stated in section 2 above, I conclude that the driveway easement is essential to Tom and Stephanie's beneficial enjoyment of lots 1 and 2, Newport's Third Addition.
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> Tom and Stephanie have an easement by implication and an easement by necessity over the "20' access" which runs along the east side of lot 1, Newport's Fourth Addition, from Wilson Avenue to the south boundary line of lot 2, Newport's Third Addition.

These findings fully support an easement by necessity and by implication in the record, and Dulin fails to assert a compelling argument based on law and the facts of this case that would alter this conclusion.

We affirm the district court's grant of a permanent injunction against the defendant.

AFFIRMED.