IN THE COURT OF APPEALS OF IOWA

No. 3-217 / 12-1127
Filed June 26, 2013

RANSON FAMILY FARM, INC.,
Plaintiff-Appellant,

vs.

THOMAS J. WALLESER,
Defendant-Appellee.

Appeal from the Iowa District Court for Allamakee County, Margaret L. Lingreen, Judge.

Ransom Family Farm, Inc. appeals a district court's ruling refusing to enjoin neighboring landowner Thomas Walleser from crossing Ransom's farm field to access his own pasture. **REVERSED.**

Craig S. Shannon of Grefe & Sidney, P.L.C., Des Moines, for appellant.

Jed J. Hammell of Rippe, Hammell & Murphy, P.L.L.P., Caledonia, Minnesota, for appellee.

Considered by Vaitheswaran, P.J., and Tabor and Mullins, JJ.

TABOR, J.

Ransom Family Farm, Inc. challenges the district court's refusal to enjoin neighboring landowner Thomas Walleser from crossing Ransom's property to access his own pasture. Ransom disputes the court's conclusion that Walleser claimed a prescriptive easement. Ransom also maintains it satisfied the burden to obtain injunctive relief.

Because Walleser did not claim a prescriptive easement in his pleadings or any time during the proceedings, and Ransom objected to Walleser's evidence suggesting an easement, we find Ransom did not consent to litigate whether Walleser held an easement to the property. In our de novo review, we believe Ransom proved an injunction is the appropriate remedy to prevent continued infringement of its property rights and reverse the district court.

I. Background Facts & Proceedings

Woodbury (Woody) Ransom is the president and majority shareholder of Ransom Family Farm, Inc., an Iowa corporation engaged in the business of farming. In 1987, the company purchased land located in Allamakee County, Iowa. Dolores Walleser is the titleholder of land that adjoins Ransom's property. She sold that adjoining property to Thomas Walleser through a real estate contract.

Thomas Walleser leased the disputed land from Ransom from the early 2000s until 2008, when Leslie Colsch began renting the property. In August 2008, Colsch noticed tracks exiting off Moore Hill Road, passing through the gated entrance to the Ransom property, and crossing over the land to reach a

roughly ten-acre parcel Walleser owned. The grass was worn to dirt along the route between the gate and the ten-acre parcel.

Ransom began padlocking the gate to prevent Walleser's passage. But Walleser repeatedly cut the locks to access the land, which he used as pasture for his cattle.[1] Fencing marks the Ransom-Walleser property line, with a steel gate to allow Walleser access to his property. Ransom removed the gate between their properties and strung five strands of barbed wire across the gateposts to block Walleser. But Walleser tore out the fence and rehung the gate.

On January 15, 2010, Ransom's attorney sent Walleser a letter advising that Walleser did not hold an easement over the land and was not welcome to cross Ransom's property. In a follow-up letter on May 12, 2010, Ransom's attorney reiterated Walleser did not have prior approval to enter Ransom's land. Ransom notified authorities that someone was trespassing on his property. The sheriff's department installed a camera for surveillance, but did not record any trespassers.

On August 19, 2011, Ransom filed a petition to enjoin Walleser from entering the Ransom land without permission. In Walleser's answer, he did not include an affirmative defense that he had an easement on the property, nor did he counterclaim that he had an easement.

---

[1] Walleser previously used his land for an annual family squirrel hunt as well, until Colsch reported he found the gate left open. Parties dispute whether cattle actually escaped through the gate, but Walleser testified that as a result of the uproar, his family no longer uses the property for the hunt.

The district court held trial on May 11, 2012. To achieve injunctive relief, Ransom offered the testimony of Woody Ransom; tenant Colsch; and Mathew Mann, a professional farm manager who identified two other routes Walleser could use to access his property. Walleser testified on his own behalf and called his mother, as well as Jim Strub, who formerly owned the Ransom property and Glen Reed, one of his part-time employees. On May 30, 2012, the court found because Walleser "claim[ed] a prescriptive easement" across Ransom's land, Ransom failed to establish it was entitled to an injunction, and accordingly dismissed Ransom's petition. Ransom challenges that ruling here.

II. Scope and Standard of Review

We review actions for injunctive relief de novo. *Harder v. Anderson, Arnold, Dickey, Jensen, Gullickson & Sanger, L.L.P.*, 764 N.W.2d 534, 536 (Iowa 2009). While we give weight to the district court's findings of fact, especially regarding witnesses, credibility, we are not bound by them. *City of Okoboji v. Okoboji Barz, Inc.*, 717 N.W.2d 310, 313 (Iowa 2006).

III. Analysis

Ransom argues the district court erred in ruling he is not entitled to permanently enjoin Walleser from traversing his property. Ransom contends Walleser did not claim an easement in his pleadings or at trial, and that evidence does not support the existence of an easement. Ransom asserts the record shows injunctive relief is the appropriate remedy.

"Permanent injunctive relief is an extraordinary remedy that is granted only when there is no other way to avoid irreparable harm to the plaintiff." *Lewis*

Investments, Inc. v. City of Iowa City, 703 N.W.2d 180, 185 (Iowa 2005). It should be granted with caution and only when required to avoid irreparable damage. *Skow v. Goforth*, 618 N.W.2d 275, 277–78 (Iowa 2000). The party seeking an injunction must show: (1) a threatened or actual invasion of a right, (2) without granting the injunction, substantial injury or damages will result, and (3) no adequate legal remedy is available. *In re Estate of Hurt*, 681 N.W.2d 591, 595 (Iowa 2004).

We exercise our discretion when determining whether to issue an injunction based on traditional principles of equity applied to the specific circumstances of a case. *Nichols v. City of Evansdale*, 687 N.W.2d 562, 572 (Iowa 2004). The following factors aid in our determination:

> (a) the nature of the interest to be protected,
> (b) the relative adequacy to the plaintiff of injunction and of other remedies,
> (c) any unreasonable delay by the plaintiff in bringing suit,
> (d) any related misconduct on the part of the plaintiff,
> (e) the relative hardship likely to result to defendant if an injunction is granted and to plaintiff if it is denied,
> (f) the interests of third persons and of the public, and
> (g) the practicability of framing and enforcing the order or judgment.

Id. (quoting Restatement (Second) of Torts § 936(1)).

Ransom first contends the district court wrongly determined that because Walleser introduced evidence of his alleged prescriptive easement over Ransom's land, Ransom consented to the claim. Ransom argues the determination was without merit because Walleser did not refer to a prescriptive easement in his pleadings or during the trial. Ransom asserts any reference to

an easement during the case involved an express easement rather than a prescriptive easement.

Walleser acknowledges none of his pleadings raise the issue of an easement. He asserts he previously claimed a right to an easement when Woody Ransom first approached him about using the property. Walleser argues because he offered evidence supporting a claim of easement and Ransom was on notice of his claim, Ransom consented to allowing the issue before the court.

A defendant who does not plead an affirmative defense normally waives the defense, unless both parties consent to trying the issue. *Dutcher v. Randall Foods*, 546 N.W.2d 889, 893 (Iowa 1996). When the record shows both parties try an issue, though not raised by the pleadings, the issue is generally deemed to be properly raised and included in the case. *Folkers v. Britt*, 457 N.W.2d 578, 580 (Iowa 1990).

If a party submits evidence without objection on the issue, the district court may consider all parties consented to the matter. *Dutcher*, 546 N.W.2d at 893. But offering evidence also admissible on a different issue raised in the pleadings does not constitute consent. *Id.* (reasoning, in part, "a party cannot be expected to object to evidence on the basis that it goes to an issue not raised in the pleadings when the evidence is otherwise admissible on an issue properly raised"). Therefore, to determine whether the parties presented evidence relevant to establishing the existence of an easement, separate from Ransom's claim for injunctive relief, we review the law regarding prescriptive easements.

An easement by prescription is similar to adverse possession. *Brede v. Koop*, 706 N.W.2d 824, 828 (Iowa 2005). A person creates a prescriptive easement by using another's property "under a claim of right or color of title, openly, notoriously, continuously, and hostilely for ten years or more." *Id.* (quoting *Johnson*, 637 N.W.2d at 178). The facts relied upon for a prescriptive easement cannot be presumed, but must be strictly proven. *Id*.

Simply using the land is not enough to establish a prescriptive easement. *Id.* The landowner must receive notice of a claim of right by the person seeking to create an easement. *Id*. The notice may be actual or may be expressed by known facts that impose a duty on the landowner to inquire whether an easement existed. *Id.* Continuous use of the land does not become hostile by a mere lapse of time, or by permission from the owner to use the land. *Id.*

After Ransom rested its case in chief, Walleser testified he is the third-generation owner of his property, and all three generations have crossed the property now owned by Ransom to reach their acreage. Walleser said he's used the path as long as he can remember, never asked permission, and never before was denied access. He admitted cutting locks on the property and removing the barbed wire erected by Ransom. Walleser testified his father told him he had a right to cross the property.

When Walleser's mother testified she also had crossed the Ransom land, Ransom's attorney objected on the basis that "why or whether Mrs. Walleser walked on this property" was irrelevant to the injunction claim. The court allowed the answer subject to the objection since the case was being heard in equity.

Jim Strub testified he purchased the property now owned by Ransom in 1972 and sold it to Ransom in 1987. He knew the Wallesers used the route, and never objected to them traveling along the path, but never expressly permitted them to use it.

Glen Reed, who occasionally works for Walleser, was called to testify to whether he had traveled the path. Ransom's trial lawyer again objected:

> Q. When was the first time that you would have [traveled on the property]? A. Oh, that was probably –
> MR. SHANNON: Your Honor, I'm going to object. I'm not sure why Mr. Reed traveled on this disputed portion in question.
> A. Well, dad and –
> THE COURT: Excuse me, sir. Any response to the relevancy objection, Mr. Hammel?
> MR. HAMMELL: Yes, Your Honor. It goes to the claims whether or not Mr. Walleser has a right to travel on the property in question.
> THE COURT: Any further response?
> MR. SHANNON: Your Honor, Mr. Walleser has not claimed a right to travel on the property in any pleadings.
> THE COURT: Okay. Well, again, we're in equity. So to allow for a full record, I am going to allow the witness to answer, subject to the objection.

Reed then testified he had used the path in the early 1950s.

The nature and timing of these objections show Ransom did not consent to litigate the issue of an easement. Because testimony from Walleser and Strub was relevant to the issue of trespass, as well as an easement, we do not interpret Ransom's failure to object as its consent to try the easement issue. *See Gibson Elevator, Inc. v. Molyneux*, 668 N.W.2d 565, 568 (Iowa 2003). With no express mention of a prescriptive easement, and well-placed objections by Ransom's counsel, we cannot conclude from this record that Ransom consented to try the easement issue. *See Stew-MC Dev., Inc. v. Fischer*, 770 N.W.2d 839,

848 (Iowa 2009) (finding issues beyond whether easement was unlimited "were simply not explored with sufficient intensity to characterize them as litigated by consent"). Accordingly, the question of an easement was not properly raised before the district court.[2]

The district court found Ransom failed to meet its burden of proof on the injunction because Walleser claimed to have a prescriptive easement. Because we find Walleser did not effectively urge an easement before the district court, we analyze Ransom's request for injunctive relief as a matter separate from any claim of right by Walleser.

It is undisputed that Ransom owns the property at issue; Ransom offered evidence of the warranty deed. Likewise, it is uncontested that Walleser repeatedly crossed the Ransom land to reach his own. Walleser admitted traversing Ransom's property without permission ten to twelve times per year, to cutting locks, and to removing barbed wire fencing. Ransom therefore established a threatened or actual invasion of its property rights.

Ransom claims it has incurred substantial injury or damages because of the worn path and the potential liability incurred by others using the property. Ransom contends Walleser's trespass also interferes with the rights of its tenants to full use of the property, and alleges Walleser or his guests have left the gate open and allowed livestock to escape. Ransom cites expert Mann's testimony that Walleser can reach his property from two other directions (across property

---

[2] Our finding that Walleser did not claim a prescriptive easement does not presuppose whether Walleser could have satisfied the elements of an easement by prescription if he had properly raised the matter before the district court.

owned by his siblings) and concludes enjoining Walleser from using the Ransom route would cause Walleser relatively little harm.

Walleser denies his actions resulted in stray livestock and contends a few ruts on the land do not justify injunctive relief. He characterizes Ransom's hardship as relatively minimal compared to his own, since, after fifty years of use, he would lose the most convenient access route to his pasture.

To underscore the gravity of its injury, Ransom cites the Iowa Constitution's declaration relating to our inalienable rights to "acquiring, possessing and protecting property." *See* Iowa Const. art. I, § 1. Our supreme court has acknowledged this provision is more than "a mere glittering generality without substance or meaning." *Gacke v. Pork Xtra, L.L.C.*, 684 N.W.2d 168, 176 (Iowa 2004) (recognizing purpose of provision is to secure individual's pre-existing common law rights from unwarranted government restrictions) (quotation marks omitted).

Because infringement by a private party also treads on these rights, "[g]enerally, an injunction will lie to restrain repeated trespasses so as to prevent irreparable injury and a multiplicity of suits." *Planned Parenthood of Mid-Iowa v. Maki*, 478 N.W.2d 637, 639–40 (Iowa 1991). When a violator threatens repeated misconduct, the party seeking an injunction has proven the lack of an adequate remedy at law. *Hockenberg Equip. Co. v. Hockenberg's Equip. & Supply Co.*, 510 N.W.2d 153, 158 (Iowa 1993).

The evidence shows Walleser will continue to trespass on the Ransom property absent injunctive relief. The injury caused to Ransom is not a mere

trampling of the grass, as Walleser suggests, but a repeated infringement on his property rights. Ransom sought assistance from the sheriff's department, which set up surveillance equipment. Ransom repeatedly communicated to Walleser he was not welcome on the property. Yet Walleser continued to remove Ransom's barriers and cross the private property. Without a court order to stay off, it is not likely Walleser would honor Ransom's wishes.

Mann identified two other routes Walleser could use to approach his property. One passage is through his brother's property, and one is through his sister's property. Wallser testified he is on good terms with both of his siblings. But Walleser claims on appeal that Mann's assessment he could clear alternative paths underestimates both the steepness of the paths and the work required to make them passable for farm equipment.

Because Walleser did not claim an easement, he can profess no right to continually cross the Ransom property. Although the alternative routes sketched by Mann may be less convenient and require more preparation, their availability means the injunction does not cut off access to his property. We find greater hardship would be visited on Ransom in the absence of an injunction. Walleser could continue to infringe upon Ransom's right to the enjoyment and peaceful possession of his property.

Ransom's petition presents the precise circumstances for which a court in equity should issue an injunction. *See Kamrar v. Butler*, 145 N.W. 879, 879 (Iowa 1914) ("That an injunction will issue to restrain repeated trespasses and threatened injury to real property is elementary."). A suit for damages or other

remedy could not provide adequate relief from Walleser's continuing trespass. Because Ransom has shown injunctive relief is necessary to protect its rights cognizable in equity, we reverse the district court and grant Ransom's petition to enjoin Walleser from entering onto its property without permission. *See Planned Parenthood*, 478 N.W.2d at 639.

REVERSED.