IN THE COURT OF APPEALS OF IOWA

No. 7-973 / 07-1067
Filed January 16, 2008

ROBERT CHALUPA and LAURILEE CHALUPA,
Plaintiffs-Appellants,

vs.

KEVIN R. KLEOPFER and TERESA L. KLEOPFER,
Defendants-Appellees.

Appeal from the Iowa District Court for Washington County, James Q. Blomgren, Judge.

Plaintiff appeals the district court's dismissal of her petition to establish a prescriptive easement. **AFFIRMED.**

Douglas Tindal of Tindal & Kitchen, P.L.C., Washington, for appellant.

Michael Pitton of Martinek & Pitton, Iowa City, for appellee.

Considered by Sackett, C.J., and Vaitheswaran and Baker, JJ.

BAKER, J.

Laurilee Chalupa appeals the district court's dismissal of her petition to establish a prescriptive easement over an alley segment. Because Chalupa did not expend substantial amounts of time or money on the alley and this was, at best, a cooperative effort in conjunction with the other landowners that did not exhibit either hostility or claim of right, we affirm the court's dismissal.

I. Background and Facts

Robert and Laurilee Chalupa purchased their residence at 827 West Madison Street in Washington in 1969. Kevin and Teresa Kleopfer purchased their residence at 902 West Monroe Street in 2003. In 2005, the Kleopfers purchased an empty lot at 816 West Monroe Street (lot 19), which is located two lots to the east of their 902 West Monroe residence.

Running along the boundary line between the properties facing West Madison Street and West Monroe Street is a gravel surfaced alley. Although the City of Washington had contributed gravel and graded the alley over the years, it is not owned by the City. At times neighbors have maintained the alley, including pooling money to buy gravel. Since 1969, the Chalupas have used the alley as a back entrance to their property, although they neither explicitly requested nor received permission to use the alley. There is also evidence that the Chalupas occasionally maintained the alley by putting gravel on it and plowing snow.

In April 2006, the Kleopfers constructed a garage on lot 19. They also parked vehicles and put up barricades in the area which was being utilized as an alley by the Chalupas. The Kleopfers also plan to build a fence which would permanently prevent Chalupa's use of the disputed alley segment.

On May 3, 2006, the Chalupas filed a petition for declaratory judgment and temporary injunction, asking the court to establish their rights in the alley segment, obtained by prescription, and to issue an injunction restraining the Kleopfers from obstructing the alley. (Robert died on February 8, 2007, leaving Laurilee as the remaining plaintiff.) On May 17, 2006, the court granted Chalupa an injunction which temporarily restricted the Kleopfers from constructing a fence across the alley. Following an April 11-12, 2007 trial, the district court dismissed Chalupa's petition to establish a prescriptive easement.

II. Merits

Chalupa appeals, asserting the district court erred in finding she had failed to prove a prescriptive easement. Because this case was tried in equity, our review is de novo. Iowa R. App. P. 6.4; *Owens v. Brownlie*, 610 N.W.2d 860, 865 (Iowa 2000).

Chalupa first asserts the district court's decision is contrary to public policy, but cites no authority to support this argument. By failing to cite any authority, Chalupa has waived this issue, and we decline to consider it on appeal. *See* Iowa R. App. P. 6.14(1)(*c*) ("Failure in the brief to state, to argue, or to cite authority in support of an issue may be deemed waiver of that issue.").

Easements may be created by: (1) express written grant, (2) prescription, or (3) implication. *Wymer v. Dagnillo*, 162 N.W.2d 514, 516 (Iowa 1968). Chalupa has not claimed an easement by express written grant or by implication. The issue, therefore, is whether she has an easement by prescription.

> Under Iowa law, an easement by prescription is created when a person uses another's land under a claim of right or color of title, openly, notoriously, continuously, and hostilely for ten years or

> more. It is based on the principle of estoppel and is similar to the concept of adverse possession. We consider principles of adverse possession when determining whether an easement by prescription has been created. However, the concepts of adverse possession and easement by prescription are not one and the same. Rather, easement by prescription concerns the use of property and adverse possession determines acquisition of title to property by possession. For [a party] to claim a right to continued use of the disputed property, they must show something more than use for the statutory period. They must also show they claimed an easement as of right, and this must be established by evidence distinct from and independent of their use.

Johnson v. Kaster, 637 N.W.2d 174, 178 (Iowa 2001) (internal citations omitted).

"Hostility refers to declarations or acts that show the declarant or actor claims a right to use the land. Similarly, a claim of right requires evidence showing an easement is claimed as a right." *Brede v. Koop*, 706 N.W.2d 824, 828 (Iowa 2005) (internal citations and quotations omitted). "The facts relied upon to establish a prescriptive easement 'must be strictly proved. They cannot be presumed.'" *Id.* (quoting *Simonsen v. Todd*, 261 Iowa 485, 495, 154 N.W.2d 730, 736 (1967)). Ultimately, we determine on a case-by-case basis whether the evidence supports the prescriptive easement. *Johnson*, 637 N.W.2d at 179.

"[M]ere use of land does not, by lapse of time, ripen into an easement." *Collins Trust v. Allamakee County Bd. of Sup'rs*, 599 N.W.2d 460, 464 (Iowa 1999). Similarly, "[c]ontinued use does not, by mere lapse of time, become hostile or adverse." *Mensch v. Netty*, 408 N.W.2d 383, 387 (Iowa 1987).

Although "mere use" is insufficient to establish hostility or claim of right, certain acts, including substantial maintenance and improvement of the land, can support a claim of ownership and hostility to the true owner. *Johnson*, 637 N.W.2d at 179; *Simonsen*, 261 Iowa at 489, 154 N.W.2d at 733.

> Under this exception to the strict rules governing prescriptive easements, an easement by prescription may arise in those instances in which the original entry upon the lands of another is under an oral agreement or express consent of the servient owner and the party claiming the easement expends substantial money or labor to promote the claimed use in reliance upon the consent or as consideration for the agreement.

Brede, 706 N.W.2d at 828 (citations omitted).

Although somewhat unclear, it appears that the district court based its decision on the failure of the Chalupas to prove hostility or claim of right. The court noted that hostility or claim of right may be shown by expending substantial amounts of time or money in maintaining the land. It then found that "there was no indication of substantial investment of time or money by the Chalupas."

The issue is not solely whether the Chalupas expended substantial amounts of time or money, but also whether their efforts were "conduct which an owner of land would perform." *Collins*, 599 N.W.2d at 465. Cooperative maintenance, however, is insufficient to put the landowner on notice that a party claims an easement as such efforts are consistent with permissive use. *Brede*, 706 N.W.2d at 829.

We agree with the district court that the Chalupas did not expend substantial amounts of time or money on the alley. We further find that, at best, this was a cooperative effort in conjunction with the other landowners that did not exhibit either hostility or claim of right. We therefore affirm the district court's dismissal of Chalupa's petition to establish a prescriptive easement.

AFFIRMED.