STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2412

Todd S. Pickthorn, et al.,
Respondents,

vs.

James H. Schultz, et al.,
Appellants,

Mortgage Electronic Registration Systems, Inc.,
Defendant,

River Funding Corporation,
Defendant.

Filed December 23, 2008
Reversed
Minge, Judge

Lyon County District Court
File No. CV-07-92

Rene Diebold, Diebold Law Firm, LLC, 507 Jewett Street, Marshall, MN 56258 (for respondents)

Matthew L. Fling, 4018 West 65th Street, Suite 100, Edina, MN 55435 (for appellants)

Considered and decided by Minge, Presiding Judge; Schellhas, Judge; and Larkin, Judge.

U N P U B L I S H E D O P I N I O N

MINGE, Judge

Appellants challenge the district court's grant of an easement by necessity to respondents over appellants' land. Because we conclude the record does not establish that an easement was in use at the time common ownership ended or that the easement was necessary, we reverse.

FACTS

Appellants James and Michelle Schultz and respondents Todd and Sherri Pickthorn own neighboring property on the south shore of Cottonwood Lake in the city of Cottonwood. The Pickthorn property is west of the Schultz property. The improvements on the Pickthorn property include a house facing the city street south of the property with an attached two-car garage on the eastern (Schultz) side. This combined structure occupies almost the entire width of the lot. Directly behind the garage is a shed which is also near the eastern boundary. The Pickthorns' paved driveway runs from the street to the garage. As it approaches the garage, the driveway widens to the east to include a third paved parking spot.

On appeal, the parties dispute an approximately 122 x 12-foot strip. The strip starts at the third parking spot, runs north toward the lake, parallel or next to the garage and shed, extends past the shed, and angles back to the west to return to the Pickthorn lot. Since 1993, the Pickthorns have used the disputed strip to transport boats and material to the lake and to park their boat and trailers along the east side of their garage. In 2006, a land survey disclosed that the widened portion of the Pickthorns' driveway, the third

parking spot, and the part of the 12-foot strip that extends along the garage and shed are on the other side of the boundary and encroach on the lot owned by the Schultzes.

In January 2007, the Pickthorns sued the Schultzes, claiming that they had acquired the encroaching paved driveway, the third parking space, and the approximately 122 x 12-foot strip. The Pickthorns asserted that they own the driveway and third parking space by adverse possession. With respect to the strip, they claimed in the alternative: ownership by practical location of the boundary line, a prescriptive easement, or an easement by necessity. After a bench trial, the district court found: (1) that the Pickthorns had obtained, by adverse possession, ownership of the portion of the Schultz land on which their encroaching driveway and third parking space are located; (2) that, because the facts do not involve a dispute as to the location of the boundary lines, the doctrine of practical location of a boundary line does not apply to this dispute; and (3) that the Pickthorns were entitled to an easement by necessity over the portion of the Schultz land that was within the approximately 122 x 12-foot strip running parallel to the Pickthorns' garage and shed. The district court did not consider the Pickthorns' prescriptive-easement claim or any right to the strip by adverse possession.

This appeal follows.

D E C I S I O N

The issue on appeal is whether there was sufficient evidence in the record to support the district court's judgment that the Pickthorns hold an easement by necessity for the approximately 122 x 12-foot strip. On appeal, neither party raises the question of

whether the Pickthorns are entitled to the strip based on a prescriptive easement.[1] The Pickthorns do not appeal the adverse district court ruling on their claim based on the doctrine of practical location of the boundary. The Schultzes do not appeal the judgment that the Pickthorns acquired ownership of the encroaching driveway and the parking area for a third car through adverse possession.

We will reverse the district court's findings of fact only if clearly erroneous because they are "manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole." *N. States Power Co. v. Lyon Food Prod., Inc.*, 304 Minn. 196, 201, 229 N.W.2d 521, 524 (1975); *see also Jasper v. Comm'r of Pub. Safety*, 642 N.W.2d 435, 440 (Minn. 2002) (holding findings of fact as "clearly erroneous only when we are left with a definite and firm conviction that a mistake has been committed." (citations omitted)). A district court determination whether its findings of fact warrant an easement is a question of law, which we review de novo. *Gabler v. Fedoruk*, 756 N.W.2d 725, 730 (Minn. App. 2008) (reviewing de novo whether the district court's determination that a boundary by practical location was a proper consequence of its findings of fact); *see Ebenhoh v. Hodgman*, 642 N.W.2d 104, 108 (Minn. App. 2002). The record on appeal includes "[t]he papers filed in the trial court, the exhibits, and the transcript of the proceeding . . . ." Minn. R. App. P. 110.01; *see also*

[1] A prescriptive easement differs from an easement by necessity. *Romans v. Nadler*, 217 Minn. 174, 181, 14 N.W.2d 482, 486-87 (1944). The elements required to establish a prescriptive easement and adverse possession are the same. *Id.* at 177, 14 N.W.2d at 485. Because Pickthorns only claimed to have used the strip starting in 1993, it does not appear that at the time the litigation commenced, they had usage long enough for adverse possession. *See* Minn. Stat. § 541.02 (2006).

Thiele v. Stich, 425 N.W.2d 580, 582-83 (Minn. 1988) (appellate court may not consider "matters not produced and received in evidence below").

An easement by necessity is an implied easement "which arise[s] only in specific fact situations." *Niehaus v. City of Litchfield*, 529 N.W.2d 410, 412 (Minn. App. 1995). The factors that create an implied easement of necessity are: (1) a common title to the benefited and servient parcels at the time the easement arose; (2) a severance of the common title; (3) a use which has been so long and continued and apparent as to show that it was intended to be permanent; and (4) the necessity of the easement for the beneficial use of the benefitted land. *Nunnelee v. Schuna*, 431 N.W.2d 144, 148 (Minn. App. 1988), *review denied* (Minn. Dec. 30, 1988). The record must indicate that the necessity of the easement existed at the time of severance. *Clark v. Galaxy Apartments*, 427 N.W.2d 723, 726 (Minn. App. 1988); *Kleis v. Johnson*, 354 N.W.2d 609, 611 (Minn. App. 1984). The necessity that must be shown does not mean indispensible need, but reasonable necessity at the time the parcels in question were severed. *Clark*, 427 N.W.2d at 726. "Obstacles such as topography, houses, trees, zoning ordinances, or the need for extensive paving, may create conditions where an easement is necessary." *Magnuson v. Cossette*, 707 N.W.2d 738, 745 (Minn. App. 2006). Changes after the time of severance cannot serve as a basis for creating an easement by necessity. *Olson*, 244 Minn. at 41, 68 N.W.2d at 647. "The party asserting the easement has the burden of proving necessity." *Clark*, 427 N.W.2d at 726.

The Schultzes argue that there was no evidence in the record of severance of title or that the two parcels were ever under common ownership. Although the record

indicates the Pickthorns purchased their property in 1993 and the Schultzes purchased their property in 1994, there is no evidence in the record of prior common ownership. The district court appears to have assumed that, as neighboring parcels, they were once under common ownership and were severed. The Pickthorns assert that the abstract of title establishes this fact. However, the abstract is not in the record. The Pickthorns urge that, if the common ownership requirement is determinative of the appeal, we remand to allow proof of common ownership to be added to the record. The Schultzes also argue that, assuming common ownership, there was not adequate proof in the record that the desired easement was necessary or that the necessity existed at the time of severance.

We recognize that the law does not require the Pickthorns to prove indispensible need. The Pickthorns do assert that the house itself and that the trees on the west side of the house preclude vehicle access. However, we note that the Pickthorns do not claim that a strict necessity exists. They do not allege and did not prove that without the easement they lack access to Cottonwood Lake or lacked it when the easement allegedly arose. It is clear that they have pedestrian access to the lake from their lot by going around the west side of their house or the east side of their garage or out any door on the north side of the house. They claim the easement is necessary to move boats and materials and provide vehicle access to Cottonwood Lake. The record does not disclose whether there is a public boat launch site on Cottonwood Lake. Without a claim or evidence that it is not practically possible for the Pickthorns to use watercraft on the lake and to generally enjoy the amenities of the lake lot without the claimed easement, there is not the type of necessity that can ripen into an easement of necessity.

Equally troublesome, assuming past common ownership of the two lots, there is nothing in the record that could establish that the claimed easement or need for the easement existed at the time of severance. As the claiming party, the Pickthorns had the responsibility for establishing the basis for an easement. If the Pickthorns' lot was unimproved at the time of severence, presumably a boat could be transported across the lot. Unfortunately, the width of their house and garage precludes vehicle access within the Pickthorns' lot lines. It is likely that the location and construction of these improvements by Pickthorns or their predecessors in title created the need to use the approximately 122 x 12 foot strip on the east side of the garage and shed. Allowing the claimant to create the claimed condition of necessity is incompatible with the very rationale for the easement. Our inquiry on this point is complicated by not knowing when the alleged severance occurred or the circumstances at the time of severance. Absent such information, we assume that the Pickthorns' house and garage were built after their lot was severed from a larger parcel.

In sum, we conclude that the record does not establish the elements for an easement by necessity and therefore reverse the decision of the district court. Based on the lack of evidence of the presence of other easement-by-necessity factors, we decline to remand to establish a history of common ownership.

Reversed.

Dated: