

ARKANSAS COURT OF APPEALS

DIVISION III
No. CV-13-343

BEN S. BRANN III, TRUSTEE OF THE
BEN S. BRANN III REVOCABLE
TRUST, AND ELWANDA M. BRANN,
TRUSTEE OF THE ELWANDA M.
BRANN REVOCABLE TRUST
APPELLANTS

V.

BUDDY HULETT AND SANDRA
HULETT

APPELLEES

Opinion Delivered November 20, 2013

APPEAL FROM THE JACKSON
COUNTY CIRCUIT COURT
[NO. CV-2009-41]

HONORABLE PHILIP G. SMITH,
JUDGE

REVERSED AND REMANDED

ROBIN F. WYNNE, Judge

Appellees Buddy and Sandra Hulett filed a complaint in Jackson County Circuit Court alleging in part that appellants¹ were encroaching on their property and seeking ejectment.² The trial court found that the boundary line between the properties was established by a 2004 survey by Kenny Fletcher, which the Huletts had submitted was the

¹Appellants are equal tenants in common: Ben S. Brann III, Trustee of the Ben S. Brann III Revocable Trust and Elwanda M. Brann, Trustee of the Elwanda M. Brann Revocable Trust.

²This is the second time this case has been before this court. The previous appeal was dismissed for lack of a final order because the Huletts' claim for damages was not addressed by the trial court's order. *Brann v. Hulett*, 2012 Ark. App. 574. In an amended judgment filed January 7, 2013, the trial court held that the Huletts were not entitled to any monetary damages.

true boundary line. Appellants make the following arguments on appeal: (1) the trial court erred in basing its decision on Buddy Hulett's hearsay testimony about the statements of Ben Brann Jr.; (2) the trial court erred in not establishing the boundary line as drawn in the Lemley survey; and (3) alternatively, the court erred in not establishing a boundary line by acquiescence or adverse possession as located by the Lemley survey. We find merit in the second point and reverse.

The Huletts and appellants are adjoining landowners who share an approximately one-half-mile boundary running north and south. The Huletts' property is to the west; the Brann property is to the east.³ The Hulett property was acquired in 1972; the Brann property was purchased in 1916 by Brann's grandfather and passed to Brann Jr., then appellants.

In March 2009, the Huletts filed a complaint in which they alleged that the Branns were encroaching on their property by building a roadway; that the Huletts and the prior owner of the Brann property, Ben Brann Jr., agreed on a boundary line in the early 1970s, marked by an existing fence row, which is identical to the line as determined by a survey (with only a six-foot variation at the southern end of the line); and that the Huletts had acquired title to the lands directly west of the agreed line by adverse possession. The Branns answered, denying an encroachment and claiming entitlement to the disputed land under the doctrine of adverse possession or, alternatively, boundary by acquiescence.

At trial, Eddie Wheeler testified that he had been working at Miller-Newell Surveying of Newport under a licensed surveyor in 1980. He stated that, while he did not have much

³The Huletts own the South Half of the SW Quarter of Section 5, and the North Half of the NW Quarter of Section 8, both in Township 13N, Range 1W in Jackson County, Arkansas. The Brann property includes the land immediately to the east.

personal recollection of a survey on the Hulett farm in 1980, his field notes indicated that he located the northeast corner of the property by using a metal detector to find a one and one-half inch pipe that had been previously placed there. This pipe was the kind of marker that surveyors use. Wheeler conceded that he could not say if the pipe actually marked the corner of the property or who put the pipe there.

Appellee Buddy Hulett testified that he bought the property in February 1972, when the eastern third of his property and all of the Brann land was wooded. In 1977, Hulett decided to clear his farm; there was no marked boundary line. At this point in the testimony, there was an objection to Hulett testifying to anything that Ben Brann Jr. said, and the trial court sustained the objection. The following testimony was then proffered:

Ben Brann Jr. told me that he was going to clear his property. He suggested that we take a tree line north of our property, give a dozer driver a compass, and have him drive south one-half mile to the south line of our property. The dozer driver then did that.

Hulett testified that the path was ten to twelve feet wide, and he and Brann took the line to be the center of the strip. They each farmed their respective sides, but no fence or other permanent marker was ever made. Hulett testified that they did not farm to the same line every year; it was “just whoever got to the area first.” This worked satisfactorily until 1999, when Donnie Renck, who was farming the Brann property, built a road that Hulett maintained encroached on his property. In 2004, Hulett commissioned a survey by Kenny Fletcher.

Kenny Fletcher testified that he has been a licensed professional land surveyor in Arkansas since 1984 and in 2002 acquired the books and records of Miller-Newell Surveying. Fletcher stated that he conducted a survey at Hulett’s request in 2004. He started by locating

the 1980 Miller-Newell survey. Fletcher testified that he located existing iron pipes in the northeast, northwest, and southwest corners of the Hulett property, and he used bearings and distances to tie these monuments to the Miller-Newell survey. Fletcher was also able to locate the rebar that Mr. Newell had set in 1980 in what he found to be the southeast corner. Fletcher concluded, based on his investigation and the monuments in the area, including a tree line to the north, that the Miller-Newell survey from 1980 was correct.

Fletcher testified that he did not accept the General Land Office survey and instead located the monuments on the Miller-Newell survey, resulting in a survey showing that the Huletts owned 155.21 acres rather than the 148.58 acres reflected in the tax and land-office records.

Patrick Lemley testified that he was a licensed surveyor and that Brann hired him to do a survey. Lemley testified that the original GLO plat of this area is from November 1854. He testified that he conducted his survey according to the guidelines set out in the Bureau of Land Management's manual, meaning that his survey was as close to the original government survey as modern science would allow. Lemley testified at length regarding the procedures that are used in conducting a GLO survey. According to Lemley, the difference between his survey and Fletcher's occurred because Fletcher divided the distance between the section corners in half, rather than the correct method of measuring a forty-chain first half mile and leaving the deficiency for the last half-mile. The line that Lemley found was approximately 110 feet west of Fletcher's line on the north end and 96 feet to the west on the south end. Lemley acknowledged that he ignored monuments that did not agree with the GLO survey.

Ben Brann testified, as did several people who had farmed the Hulett and the Brann land over the years, about where the perceived boundary had been located.

In an order entered on June 15, 2011, the circuit court found that neither party had introduced sufficient evidence to prove a claim of boundary by acquiescence or adverse possession. The court further found that the true and correct eastern boundary line of the Hulett's property was that set out in the Kenny Fletcher survey dated November 22, 2004.

In an incorporated and attached memorandum of decision, the circuit court wrote:

In 2004, Hulett hired surveyor Kenny Fletcher to locate the four corners of his property. Fletcher did so, setting the southeast corner after finding the other three. The Fletcher survey verified that much of the field road built in 1999 encroached on Hulett's land. Interestingly, Fletcher also projected a line along Hulett's east boundary with reference to the existing tree line lying to the north upon which Hulett testified he and Brann's father had based an agreed line, and found the projected line to be just seven feet off the survey line.

....

In 2009, Brann commissioned a survey by Patrick Lemley, a licensed surveyor, to locate the parties' common boundary along Hulett's east side. He did so, finding the line to be well to the west of the Fletcher survey, varying from 110.05 feet on the north end to 95.96 feet on the south end.

However, Lemley also testified he was hired to base his location of the boundary on the original General Land Office surveys, which made slight adjustments based on the Earth's curvature and the lie of the land. In locating the Hulett-Brown [sic] boundary line, Lemley said he relied only on the G.L.O. surveys, ignoring any monuments, prior surveys, agreements, and similar evidence. He said it is important for land descriptions to stay close to the G.L.O. survey lines because small variations can, over time, become large.

Lemley acknowledged a surveyor's principle that "proportional measurement cannot be used to change long-standing corners" and stated that he had not been hired to find the east line of Hulett's land, but rather to produce a G.L.O. survey of the line. He did not dispute testimony by Fletcher that numerous surveys, established monuments, and existing corners vary from the G.L.O. surveys.

It is from this order that appellants appealed.

We address appellants' second argument first: that the trial court erred in finding that the Fletcher survey, rather than the Lemley survey, was the true and correct boundary between the parties' property. Regarding the significance of General Land Office surveys, this court has written:

At the time of the Louisiana Purchase this area was a vast wilderness, sparsely populated and with no integrated system of land descriptions. Early in the nineteenth century Congress authorized the General Land Office to survey and plat the entire area in order to give each parcel of land in the public domain a specific and identifiable location which would be subject to relocation by survey at any time. The field notes and plats of those surveys are carefully preserved and with few exceptions all lands in this area were disposed of by the Federal Government with reference to these surveys. Due to errors which were bound to occur, these surveys did not always result in perfect square mile sections of 640 acres with parallel boundaries. Survey parties did not always meet at the point previously calculated and some of the established section corners did not coincide with adjoining ones.

These approved GLO surveys formed the basis for the description of lands when disposed of by the government and any errors, including variances from prescribed courses, distances of acreages, were merged into the government grants. A patent or other original conveyance made with reference to a subdivision conveyed those lands which the General Land Office Plat showed it to contain. *Little v. Williams*, 88 Ark. 37, 113 S.W. 340 (1908) aff'd 231 U.S. 335, 34 S.Ct. 68, 58 L.Ed. 256 (1913). The purpose of subsequent surveys in locating corners and boundaries is not to correct any error or variance of the original surveyor but is to retrace his steps by use of his field notes and plats and to locate the corners where he located them.

Morrow v. White, 12 Ark. App. 16, 19, 670 S.W.2d 459, 461 (1984). In other words, the original United States Government survey is prima facie correct and surveys must conform as nearly as possible with the original survey. *McWilliams v. Schmidt*, 76 Ark. App. 173, 184, 61 S.W.3d 898, 907 (2001) (citing *Dicus v. Allen*, 2 Ark. App. 204, 619 S.W.2d 306 (1981)).

We agree with appellants' basic argument that, where the court explicitly found that boundary by acquiescence and adverse possession were not proved, the survey based on the original GLO survey and guidelines should prevail over a survey that does not reference the

original lines. According to the official survey from the state land surveyor, the Hulett land contains 37.11 plus 37.13 acres in Section 5 and 37.16 plus 37.16 acres in Section 8, for a total of 148.56 acres. This is the amount of land that Hulett purchased in 1972 and has been paying taxes on since. Without some reason to deviate from this prima facie evidence (e.g., boundary by acquiescence or adverse possession), this is the amount of land that Hulett owns today. Here, the testimony showed that Lemley attempted to recreate the boundary line according to GLO principles, and Fletcher did not. On this record, we hold that the trial court's finding that the boundary line between the parties' property is that shown in the Fletcher survey, which was not based on GLO survey lines, is clearly erroneous. Therefore, we reverse and remand for entry of an order consistent with this opinion. Because we reverse on this point, it is unnecessary to address appellants' remaining arguments.

Reversed and remanded.

PITTMAN and HARRISON, JJ., agree.

Mixon Law Firm, by: *Donn Mixon*, for appellants.

Timothy F. Watson, Sr., for appellees.