

ARKANSAS COURT OF APPEALS

DIVISION IV
No. CA 09-115

BILLY JOE BROWN and JULIA
BROWN

APPELLANTS

V.

STANLEY E. STEPHENS and
BARBARA DEANNA STEPHENS

APPELLEES

Opinion Delivered September 23, 2009

APPEAL FROM THE WHITE
COUNTY CIRCUIT COURT
[NO. CV-07-716]

HONORABLE BILL MILLS, JUDGE

AFFIRMED

COURTNEY HUDSON HENRY, Judge

Appellants Julia and Billy Joe Brown appeal the order of the White County Circuit Court granting a petition to quiet title filed by appellees Barbara and Stan Stephens. For reversal, the Browns argue that the Stephenses failed to prove adverse possession or a boundary by acquiescence with regard to a disputed tract of 14.96 acres. We affirm the trial court's decision.

The Browns own the north one-half of the northeast fractional quarter of Section 6, Township 10 North, Range 6 West in White County. They purchased the property in June 2005 from the heirs of Wilson Arnold. Stan Stephens owns the southern half of this quarter section. Stephens's parents conveyed the property to him in October 1997, reserving a life estate, which expired at the death of Stephens's father in 2004. In May of 2006, the Browns engaged the services of Kenny Fletcher to survey their property. The survey revealed that

the section in which the parties' properties are located does not have the standard acreage for a section. Fletcher calculated the Browns' property as consisting of 113.78 acres and the Stephenses' property as having 80.46 acres. The survey identified an old fence running east and west on the southern portion of the Browns' property that is north of the true boundary line shown on the survey. The area between the old fence and the actual boundary line comprises 14.96 acres. Sometime after the survey, the Browns constructed a fence on the boundary line established by the survey.

In December 2007, the Stephenses filed a quiet-title petition asking the court to declare that they owned the 14.96 acres. They alleged that they had acquired ownership of the property to the old fence line either by adverse possession or under the theory that the old fence had become the boundary by acquiescence. The Browns answered the complaint, asserting that they held record title to the property and that any use by the Stephenses and their predecessors in title had been permissive.

The trial court conducted a hearing on June 23, 2008. Kenny Fletcher, the surveyor, testified that he placed the old fence on the survey because he preferred his surveys to reflect all types of possessory lines. Although he did not track the fence through the woods, he said that he examined each end of the fence and verified that it was fairly straight. Fletcher testified that the fence was an effective boundary between the two properties.

Appellee Stan Stephens testified that his parents purchased the property in 1960 from Irma and Jack Stephens (no relation to appellees) and that they lived on the property until

their deaths. Stan Stephens was born in 1957 and grew up on the property, and he said that the old fence had always been there. Stan Stephens stated that his father maintained the old fence and that his father bush-hogged, sowed grass, and ran cattle up to the fence line. Stephens recalled that one of his father's bulls broke through the old fence into Wilson Arnold's property and that Arnold shot the bull. Stan Stephens said that this was the only problem that ever arose between the neighbors and that there was never any dispute about the fence. He further testified that the old fence was in fair condition and adequate to contain his cattle. He said that he had also maintained the fence, trimmed trees, and cut firewood on the property in dispute. Stephens testified that there was an old pond on the 14.96 acres that he had used to water his cattle before he dug a new pond. He believed that the old fence marked the boundary of his property.

Dean Staggs, age seventy-two, testified that he had lived within a half mile of the properties since he was a young boy. As a child, he hunted on the property, and it was on his route to the post office during World War II. Staggs recalled that he baled hay around a pond excavated by Jack Stephens. Staggs said that the fence was built before he was born and that the fence was old even then. He testified that he always believed that the old fence was the boundary line between the two properties.

Roy McAdams, age eighty-one, testified that he had lived in the area most of his life and that he was familiar with the old fence. He said that the old fence had been the boundary line between the properties of Jack Stephens and Arnold. Imogene McAdams, Roy's wife,

testified that she picked berries and cotton in the area when she was a child. She did not know when the fence was built but said that it had been there when she was a young girl. Ms. McAdams stated that she was aware that Stan Stephens's father ran cattle all the way to the old fence line.

Carolyn Fergus, one of Arnold's daughters, testified that her father bought the property in 1949. She said that she lived on the property as a child and that the old fence had been there all of her life. Fergus said that her father doubted that the old fence was on the boundary line and that she told the Browns when they bought the property that she did not know if the fence was the legal boundary. She said that Jack Stephens knew that the old fence was not the boundary because, when Jack Stephens dug the pond, her father told Stephens, "Well, you dug me a pond." Fergus said, however, that her father never moved the fence.

Appellant Billy Joe Brown testified that he investigated the tax records and found that he purchased 113 acres. He requisitioned the survey because he did not believe he had enough acreage if the fence was the boundary. He said that the old fence was not continuous in that it "zig-zagged" in places from tree to tree, it was down in other places, and in some areas, there was no fence at all. Brown said that he telephoned Stan Stephens after the survey and advised that he would like to erect a fence on the boundary line. Brown said that Stephens offered to pay the taxes for the use of the property.

The trial court ruled that the Stephenses proved that the old fence had become the boundary by acquiescence. The court found that the old fence had existed for as long as anyone could remember and that it was clear that the fence was the boundary line between the two properties. The trial court was particularly persuaded by Fergus's testimony that the fence remained in place after Jack Stephens dug a pond on the disputed area, despite her father's belief that the fence was not the true boundary.

The Browns argue on appeal that the trial court's findings are clearly against the preponderance of the evidence. They contend that the evidence does not support a finding of a boundary by acquiescence or a finding of adverse possession.

The standards governing appellate review of an equity matter are well established. Although this court reviews equity cases de novo on the record, we do not reverse unless we determine that the trial court's findings of fact were clearly erroneous. *Robertson v. Lees*, 87 Ark. App. 172, 189 S.W.3d 463 (2004). In reviewing a trial court's findings of fact, we give due deference to the trial court's superior position to determine the credibility of the witnesses and the weight to be accorded their testimony. *Id.*

Boundaries are frequently found to exist at locations other than those shown by an accurate survey of the premises in question and may be affected by the concepts of acquiescence and adverse possession. *Summers v. Dietsch*, 41 Ark. App. 52, 849 S.W.2d 3 (1993). When adjoining landowners silently acquiesce for many years in the location of a boundary and thus apparently consent to that line, the result is a boundary by acquiescence.

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McWilliams v. Schmidt, 76 Ark. App. 173, 61 S.W.3d 898 (2001). A boundary by acquiescence is usually represented by a fence, a turnrow, a lane, a ditch, or some other monument tacitly accepted as visible evidence of a dividing line. *Clark v. Casebier*, 92 Ark. App. 472, 215 S.W.3d 684 (2005). An express agreement to treat a fence as the dividing line is not required. *Summers, supra*. Instead, a boundary line by acquiescence is inferred from the landowners' conduct over many years so as to imply the existence of an agreement about the location of the boundary line. *Hedger Bros. Cement & Materials, Inc. v. Stump*, 69 Ark. App. 219, 10 S.W.3d 926 (2000). Acquiescence need not occur over a specific length of time, although it must be for a long period of time. *McWilliams, supra*. When a boundary by acquiescence can be inferred, a fence line, whatever its condition or location, is merely the visible means by which the acquiesced boundary is located. *Jennings v. Burford*, 60 Ark. App. 27, 958 S.W.2d 12 (1997).

It is also well settled that a boundary by acquiescence may exist without the necessity of a prior dispute. *Walker v. Walker*, 8 Ark. App. 297, 651 S.W.2d 116 (1983). Nor is there any requirement of adverse usage up to a boundary fence to establish a boundary by acquiescence. *Myers v. Yingling*, 372 Ark. 523, 279 S.W.3d 83 (2008). When the adjoining landowners occupy their respective premises up to a line they mutually recognize and acquiesce in as the boundary for a long period of time, they and their grantees are precluded from claiming that the boundary thus recognized and acquiesced in is not the true one, although it may not be. *Clark, supra*.

Applying these principles to the present case, we hold that the trial court's finding of a boundary by acquiescence is not clearly erroneous. The fence in question has been in existence for at least eighty years. Neighbors in the community recognized the old fence as the boundary between the two properties. Although the parties' predecessors in title may not have known the location of the true boundary, it is clear that their predecessors respected the old fence as the boundary line. Stan Stephens's father maintained the fence and utilized the property to the old fence for many years. One of the Stephenses' predecessors in title even dug a pond on the disputed area, and the fence was not dismantled or moved even though there was a question as to who owned the property with the pond. On this record, the trial court did not err in finding that the old fence was accepted as the boundary line for a period of many years. We, therefore, affirm the trial court's order.

In light of our decision affirming the trial court's finding of a boundary by acquiescence, we need not determine whether the Stephenses also proved adverse possession.

Affirmed.

GLADWIN and GLOVER, JJ., agree.