ARKANSAS COURT OF APPEALS

DIVISION III
No. CA 08-989

	Opinion Delivered APRIL 1, 2009
THEO JOHNSON APPELLANT	APPEAL FROM THE SCOTT COUNTY CIRCUIT COURT, [NO. CV2005-16]
V.	HONORABLE ELIZABETH DANIELSON, JUDGE
HARRY LAWTON APPELLEE	AFFIRMED

JOHN B. ROBBINS, Judge

This is a property line dispute between appellant Theo Johnson and appellee Harry Lawton. In February 2005, Mr. Lawton filed a complaint against Mr. Johnson, alleging that in 2004 Mr. Johnson tore down a fence that had stood for more than forty years and had acted as a boundary between the parties' respective pieces of property. It was alleged that Mr. Johnson erected a new fence that encroached on Mr. Lawton's property thirty-six feet in one direction and fifteen feet in another. Mr. Lawton alleged that Mr. Johnson was trespassing on his land and asked that Mr. Johnson be ejected. Mr. Johnson denied Mr. Lawton's allegations in his answer, and filed a counterclaim for quiet title to property described in his attached warranty deed.[1]

[1]Because Mr. Johnson's deed contained an error in the legal description, the trial court entered an order reforming the deed and directing a survey of the property to be

After a bench trial, the trial court issued a letter opinion finding that Mr. Lawton met his burden of proving a boundary line by acquiescence. The trial court ordered Mr. Lawton to obtain a survey of the property boundary represented by the old fence that had been on the west and south sides of Mr. Johnson's property. After the survey was completed, the trial court entered a decree quieting title to Mr. Lawton in the disputed property as particularly described by the survey, which was attached to the decree.

Mr. Johnson now appeals from the decree quieting title in favor of Mr. Lawton. He argues on appeal that the trial court clearly erred in finding that Mr. Lawton had established a boundary line by acquiescence. We affirm.

Although equity cases are reviewed de novo on appeal, we will affirm a trial court's finding of fact with regard to the location of a boundary line unless the finding is clearly erroneous. *Clark v. Casebier*, 92 Ark. App. 472, 215 S.W.3d 684 (2005). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed. *Summers v. Dietsch*, 41 Ark. App. 52, 849 S.W.2d 3 (1993). Whether a boundary line by acquiescence exists is to be determined upon the evidence in each individual case. *Hedger Bros. Cement & Materials, Inc. v. Stump*, 69 Ark. App. 219, 10 S.W.3d 926 (2000). In reviewing a trial court's finding of fact, we give due deference to the trial court's superior

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obtained before trial.

position to determine credibility of the witnesses and the weight to be accorded to their testimony. *Riddick v. Streett*, 313 Ark. 706, 858 S.W.2d 62 (1993).

Ricky Hill, a registered land surveyor, testified that he conducted a survey pursuant to the previous order of the trial court reforming Mr. Johnson's deed. Mr. Hill indicated in his testimony that the new fences that had been erected by Mr. Johnson were mostly in line with the legal description of the property.

Mr. Lawton testified that he purchased his tract of property from LaGrande Ballard in 1987. Mr. Lawton stated that he was familiar with the property before then because he had bought and baled hay on it for the previous twenty-five years. He testified that his property is on the south side and the west side of Mr. Johnson's property. Mr. Lawton stated that there was an old fence line that Mr. Johnson tore down, and he claimed that to be the boundary.

Mr. Lawton testified that the old fence had been there for fifty years, and he understood it to be the line separating the parties' respective tracts. According to Mr. Lawton, Mr. Johnson never told him that the old fence line was not the line or made any claim of ownership to the property on Mr. Lawton's side of the fence before 2004. Mr. Lawton stated that he does not live on his property, but that he fertilized, mowed hay, and brush hogged it up to the old fence with no complaints from Mr. Johnson. Mr. Lawton indicated that Mr. Johnson tore the old fence down in 2004, after a gas company's survey crew had placed stakes in the vicinity of where Mr. Johnson then built the new fence.

Mr. Lawton's nephew, Kenneth Reese, testified that he helped Mr. Lawton cut hay on the property for a few years around the year 2000. Kenneth Reese described the fence as a barbed wire fence on some posts, near lots of trees. He stated that when he cut hay he could only get within about ten feet of the fence because of the brush and trees. Mr. Lawton's great nephew, Michael Reese, testified that he had helped Mr. Lawton cut, rake, and bale hay on the property since 1997. Michael Reese stated that trees had grown up in the fence line, and that he would mow right up to the tree line. Mr. Lawton's nephew by marriage, Ricky McDaniel, also mowed the property and stated that he would get as close as he could to the fence line while mowing. Each of these witnesses testified that Mr. Johnson never stopped them from mowing.

LaGrande Ballard, Mr. Lawton's predecessor in title, testified on his behalf. He stated that he moved to the property in 1945, where he was raised by his grandparents. Mr. Ballard testified that during his childhood, his grandfather owned all of the property now owned by Mr. Lawton and Mr. Johnson. Mr. Ballard said that they would run cattle on both properties and would keep the fence patched. He stated that the old fence row had been in the same place all his life. Mr. Ballard testified that he thought the fence line was the boundary when he sold it to Mr. Lawton.

Mr. Johnson testified on his own behalf, and stated that he purchased his piece of property in 1989. He stated that he did not have a survey done and that boundaries were never discussed. Mr. Johnson acknowledged the presence of a fence on the south and west

sides of his property, but stated that it was not a continuous fence, and that, "It doesn't look like a fence, it just looks like a bunch of brush and scrubs." Mr. Johnson testified that due to the surrounding tree limbs and underbrush, it was impossible to get within forty or fifty feet of the old fence line. Mr. Johnson acknowledged seeing Mr. Lawton and his relatives baling hay, but denied that they would come within thirty or forty feet of the hedge row. Mr. Johnson maintained that he had continuously paid taxes on his property since he bought it in 1989, and in his mind there was never a fence row to which anyone could claim a boundary line. Mr. Johnson stated that after the gas company's survey crew marked the property line in 2004, he started doing work in that area to address flooding and dust problems. Mr. Johnson asked the trial court to find that his property boundaries are as described in his deed that was reformed by the trial court in its prior order.

Mr. Johnson's wife, Linda Johnson, has lived with him on their property ever since they bought it. She testified:

> The fence that Mr. Lawton keeps talking about didn't exist. They had one or two strands, and weren't all there. It was so grown up, I never could get a good look at it. You couldn't get within twenty or thirty feet of the fence. I am referring to the west fence, that's by the shed. The fence that was down the south side was in the same condition. It was all grown up and the fences were never kept up. We never ran any cattle on the property. We had sheep at one time and the miniature horses, but we kept them in cow panels. These fences would not have held the cattle in. When the gas company came and built the road, it caused a water problem. They put in a great big culvert, and it would just wash out. That's when we took down the hedge rows, and put up our new fence, in order to alleviate the water problem. We paid taxes on our property ever since we owned it. The people who testified about baling hay never came within twenty or thirty feet of the hedge row. They couldn't.

Mr. Johnson's friend, Basil Wooten, testified that he occasionally visited the property and he recalled that over the years Mr. Johnson cleaned up the area of the hedge rows on the other side of the fence. Another friend, Roger Jackson, testified that he came to the property about a dozen times a year, was familiar with the overgrown fence line, and had never seen anyone working on the fence or cleaning up the area. Mr. Johnson's daughter, Tammy Johnson, testified that she knew there was a fence somewhere in the brush line but it was so overgrown you could not get close to it. She said that she had seen her father cut trees and brush on both sides of the hedge row.

In this appeal, Mr. Johnson argues that the trial court clearly erred in finding the old fence row to be a boundary by acquiescence. He contends that the fence line in question was, at most, an overgrown hedge row, very thick with underbrush. Mr. Johnson asserts that the testimony showed that you could not get near the fence line due to the overgrowth, and notes that Mr. Lawton acknowledged that he did not maintain the fence line or keep it clean. Conversely, there was testimony from Mr. Johnson's witnesses that at times he had cleaned up the area on both sides of the fence. Moreover, the undisputed evidence showed that Mr. Johnson continuously paid taxes on all of his property described in his deed, as reflected by Mr. Hill's survey. Mr. Johnson asserts that the fence was not continuous, that he was at all times in open possession of the property at issue, and that the only activity conducted by Mr. Lawton on his property was to bale hay and occasionally brush hog. Considering these

factors, Mr. Johnson contends that the finding of a boundary line by acquiescence should be reversed and title to the disputed property quieted in him.

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*, *supra*. 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*, *supra*. A fence, by acquiescence, may become the accepted boundary line even though contrary to the surveyed line. *Adcock v. Deaton*, 253 Ark. 189, 485 S.W.2d 203 (1972). When adjoining land owners silently acquiesce for many years in the location of a fence as the visible evidence of the division line and thus apparently consent to that line, the fence line becomes the boundary by acquiescence. *Tull v. Ashcraft*, 231 Ark. 928, 333 S.W.2d 490 (1960). It is also settled law that a boundary line by acquiescence may well 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. *Id*. Instead, whenever adjoining land owners tacitly accept a fence line or other monument as the visible evidence of their dividing line and thus apparently consent to that line, it becomes the boundary by acquiescence. *Clark v. Casebier*, *supra*.

Applying the above principles to the evidence in this case, and deferring to the credibility determinations of the trial court as we must, we hold that the trial court's finding of a boundary line by acquiescence was not clearly erroneous. While the old fence may have been in disrepair and overgrown with trees and brush, it had been in existence for many years before these parties bought their properties, and it continued to exist until removed by Mr. Johnson in 2004. Mr. Lawton and his family mowed and brush hogged as close to the fence line as was possible with no complaints from Mr. Johnson. By Mr. Johnson's admission, neither party surveyed the property to determine the exact boundaries, and Mr. Lawton as well as his predecessor in title testified that they understood the boundary line to be the old fence. Mr. Johnson did not remove the fence or make any claim that it was not the boundary until fifteen years after he bought his land, which was after a survey had been performed by a gas company indicating different boundary lines. The trial court committed no error in ruling that a boundary line by acquiescence had been created pursuant to its finding that the parties tacitly accepted the old fence line as the boundary line for a period of many years.

Although not argued under a separate point on appeal, we recognize that Mr. Johnson also requests reimbursement for half of the cost of the survey completed by Mr. Hill, for which he paid $702. Mr. Johnson correctly asserts that the trial court originally ordered each party to split the cost of this survey. However, in the final decree now being appealed the trial court reasoned that, rather than ordering Mr. Lawton to pay half of Mr. Young's survey

costs, Mr. Lawton would be solely responsible for the costs of obtaining the survey represented by the old fence lines, which was necessary for entry of the decree quieting title. The trial court thus ordered each party to be responsible for his own survey expenses, and we hold that this did not constitute error.

Affirmed.

KINARD, J., agrees.

BAKER, J., concurs.