

# ARKANSAS COURT OF APPEALS

DIVISION I  
No. CA 10-819

JERRY EVANS AND DIANE C. EVANS  
APPELLANTS

V.

AUBREY MOBLEY

APPELLEE

Opinion Delivered April 13, 2011

APPEAL FROM THE RANDOLPH  
COUNTY CIRCUIT COURT  
[NO. CV-2006-85]

HONORABLE PHILIP SMITH,  
JUDGE

AFFIRMED

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## DOUG MARTIN, Judge

Appellants Jerry and Diane Evans appeal from the Randolph County Circuit Court's ruling upon remand that they failed to establish title by acquiescence to a four-acre tract of land and that the disputed property is owned by appellee Aubrey Mobley. Appellants argue that the trial court clearly erred in its ruling. We disagree and affirm.

On June 5, 2000, Mobley and his wife acquired a warranty deed to 240 acres from Kenneth R. Powell and Jackie L. Powell, along with a separate legal description containing the following language:

[A]ll of the NW 1/4 SW 1/4 EXCEPT that 4 acres, more or less North of the creek described in Deed from Dan F. Kirk to Fred Hawkins recorded in Randolph County Deed Record Book 58 Page 165, and all of said land being in Section 34, Township 20 North, Range 1 West. . . .

The Evanses purchased forty acres previously owned by Tony Hand and his wife in November 2004, and they subsequently received a commissioner's deed filed December 3, 2004, to an additional forty acres with the following description:

The Southeast Quarter of the Northwest Quarter (SE 1/4 NW 1/4) of Section Thirty-four (34), Township Twenty (20) North, Range One (1) West, and 4 acres, more or less in the Northwest Quarter of the Southwest Quarter (NW 1/4 SW 1/4) of Section Thirty-four (34), Township Twenty (20) North, Range One (1) West, being a strip of land North of the creek.

Tony Hand testified that he acquired a forty-acre tract of land in 1992. He erected a fence "somewhere between 2000 and 2002."<sup>1</sup> Hand testified that he did not know where the property lines were but that he fenced an area so that his cattle could get to the creek for water. Hand stated that, at that time, Kenneth Powell owned the neighboring land and that Powell told Hand that he did not know where the lines were either. Hand asked Powell "if the fence was wrong or if we needed to have that surveyed or whatever, and [Powell] said it wasn't a problem."

When Mobley discovered Mr. Evans bulldozing trees on the four-acre tract at issue, the two men quarreled over the land that had been cleared. According to Mobley, Mr. Evans informed him that he (Evans) had the land surveyed and that he (Evans) owned the four-acre tract. Following the argument, Mobley consulted his deed and saw language suggesting that there were four acres excepted. Mobley subsequently called and spoke with Mrs. Evans and

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<sup>1</sup> This fence apparently did not enclose the entire disputed area but, according to other testimony and exhibits, enclosed approximately 2.7 acres.

apologized to her for being rude in arguing with her husband. Mobley testified that he had simply accepted Mr. Evans's word about having conducted a survey.

Mobley testified that, a few weeks after the telephone call, Mr. Evans approached him asking for a deed to the four acres, explaining that his deed "was all messed up" and that there was no legal description of the four-acre tract. Mobley testified that he told Mr. Evans that the survey should have cleared up any discrepancies. It was then that Mr. Evans told Mobley that he did not have the property surveyed, as he previously claimed. According to Mobley, Mr. Evans admitted that he did not know where his property was located but that the disputed area was the best place to graze his cows. Mobley testified that Mr. Evans said, "Wherever you think it's at will be fine." According to Mr. Evans, Mobley did not want to "help [him] fix the deed to where it would either read for what was fenced at the time, or like it was stated on the deed." Mr. Evans testified that Mobley told him, "If you don't have a deed, you don't have a deed."

Thereafter, Mr. Evans erected a new fence and gate after positioning the corner of his land where he thought it was supposed to be. According to Mobley, this new barbed-wire fence covered a much larger area than the original fence. Mobley testified that the old fence was not standing at the time he bought the property but that what was left of the old fence was still there. Eventually, Mobley fenced the Evanses out of the area they were accessing and moved and destroyed a deer stand and feeder belonging to Mr. Evans.

In 2006, the Evanses had the disputed area surveyed and brought suit against Aubrey and Bertha Mobley<sup>2</sup> seeking to quiet title to the four acres of land. Mobley counterclaimed to quiet title to same.

The trial court granted the Evanses' petition, but on appeal, this court reversed, holding that the putative landowners' deed was void in that it was impermissibly vague in its description of the disputed four acres. Accordingly, this court reversed the trial court's decision quieting title to same and remanded the matter for the trial court to consider whether appellants established title to the four acres by acquiescence, a claim that was not previously ruled on by the trial court. Upon remand, the Randolph County Circuit Court denied the Evanses' petition and claim of title by acquiescence upon finding that the facts do not rise to the level of acquiescence necessary to establish title. In its order, the trial court found:

d) It is apparent that Hand's purpose in building the fence was to enclose his cattle and give them access to the creek, rather than to mark boundaries, as he "had no clue" as to the location of the boundaries. Hand offered no testimony that he and Powell had any specific discussion about marking the boundary lines.

e) Powell's statement that the location of the fence "wasn't a problem" does not help. It is unclear whether he was acquiescing to a boundary line, or simply was allowing Hand's cattle access to the creek.

On appeal, the Evanses argue that the trial court clearly erred in ruling that they did not establish title by acquiescence to a 2.73-acre tract within the disputed four acres. According to the Evanses, Powell tacitly accepted the fence as a boundary line when he told

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<sup>2</sup>Mrs. Mobley subsequently died on June 22, 2007.

Hand he did not have a problem with where Hand placed the fence. The Evanses further argue that Mobley, as successor in title from Powell, is bound by the boundary established. The Evanses also contend that Mobley acquiesced to the boundary fence built by Hand and later rebuilt by the Evanses, “if only for a short period of time.” The Evanses rely on the telephone call Mobley placed to Mrs. Evans and argue that “Appellee then told Mrs. Evans that after looking at the deeds he recognized that Appellants did have ‘some land down there.’” The Evanses argue that they were clearly in possession of and doing work on the 2.73-acre tract at the time Mr. Evans and Mobley argued. The Evanses contend that, because Mr. Evans had just told Mobley that he owned the disputed tract, Mobley could only have been referring to the 2.73-acre tract enclosed by the fence originally erected by Hand.

Because the location of a boundary is a disputed question of fact, we will affirm unless the trial court’s finding is clearly against the preponderance of the evidence. *Myers v. Yingling*, 372 Ark. 523, 279 S.W.3d 83 (2008). Whether a boundary line by acquiescence exists is to be determined from the evidence in each individual case. *Boyette v. Vogelpohl*, 92 Ark. App. 436, 214 S.W.3d 874 (2005). A fence, by acquiescence, may become the accepted boundary even though it is contrary to the survey line. *Summers v. Dietsch*, 41 Ark. App. 52, 849 S.W.2d 3 (1993). When adjoining landowners occupy their respective premises up to the line they mutually recognize and acquiesce in as the boundary line 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 v. Casebier*, 92 Ark. App. 472, 215

S.W.3d 684 (2005). 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. *Brown v. Stephens*, 2009 Ark. App. 614. Acquiescence need not occur over a specific length of time, although it must be for a long period of time. *Id.* The mere existence of a fence without evidence of mutual recognition cannot sustain a finding of boundary by acquiescence. *Warren v. Collier*, 262 Ark. 656, 559 S.W.2d 957 (1978). It is the intention of the parties and the significance that they attach to the fence, rather than its location, that matters. *See Camp v. Liberatore*, 1 Ark. App. 300, 615 S.W.2d 401 (1981).

We cannot say the trial court's decision is clearly against the preponderance of the evidence presented. This court gives due regard to the opportunity of the trial court to judge the credibility of the witnesses and the weight to be given to their testimony. *Jennings v. Burford*, 60 Ark. App. 27, 958 S.W.2d 12 (1997). The evidence indicates that Hand and Powell did not reach an agreement that the fence on the four acres represented a boundary line; rather, their discussion appears to have been limited to Hand's gaining access to the creek in order for his cattle to reach the water. Thus, no boundary line was ever established by the parties' predecessors in title. To the extent the Evanses argue that Mobley acquiesced to a boundary line, albeit for a short period of time, Mobley was operating under the mistaken belief that the Evanses owned the land, a belief fostered by Mr. Evans's claims, which were soon found to be false when Mr. Evans requested a deed to the four acres from Mobley only

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a few weeks later. Under these circumstances, we affirm the trial court's decision that the Evanses failed to establish title to the disputed land by acquiescence.

Affirmed.

VAUGHT, C.J., and GLADWIN, J., agree.