ARKANSAS COURT OF APPEALS
JUDGE DAVID M. GLOVER
NOT DESIGNATED FOR PUBLICATION

DIVISION II

CA06-98

October 25, 2006

LTB LAND & TIMBER COMPANY, INC. APPELLANT	APPEAL FROM THE NEVADA COUNTY CIRCUIT COURT [CV-2004-42-2]
V.	HONORABLE DUNCAN M. CULPEPPER, JUDGE
MILDRED WREN EGGLESTON APPELLEE	AFFIRMED

This is a property case in which appellee, Mildred Wren Eggleston, as trustee of the Mildred Wren Eggleston Revocable Trust, brought an action against appellant, LTB Land & Timber Co., Inc., seeking judgment for possession of disputed lands and for damages for the value of timber cut by LTB. The trial court found in appellee's favor, and judgment was entered on August 22, 2005, declaring ownership of the disputed property to be in appellee and awarding $15,625.51, plus interest, in damages for the timber that appellant cut from the disputed property. Appellant raises two points of appeal: 1) the trial court's conclusion that the trees marked with white paint constituted a boundary by acquiescence is clearly erroneous, and 2) the trial court's conclusion that

appellee had proven title to the disputed strip of land by adverse possession is clearly erroneous. Finding no error, we affirm.

David Webb, who conducted the survey for appellant that revealed the property line problems in this case, testified about how he conducted his survey of the property. He stated that he was employed by Larry Carlton, on behalf of LTB, in March 2004 to survey the NW ¼ of Section 22, Township 13 S, Range 22 W in order to establish the east line of the NW ¼, which would also be the west line of the NE ¼. He explained that he did not accept a 3/8 inch rod that he found to be the NE corner of the NW ¼ because it was out of position as far as distance between the two section corners, the NW corner and the NE corner. Having acknowledged that the rod was already there when he did his survey, he testified that the only thing for which it could have been set was the North quarter section of 22. He further stated that after he "ran the section out and when we got to what we computed to be the center of 22, some 21 feet to the east, we noticed a pine knot that appeared to be a corner set for Potlatch"; that he could not accept it as the SE corner because it was too far away from where he found that the corner should be; and that the last time pine knots were used to mark corners was thirty to forty years ago. Finally, he testified that a line from the 3/8 inch rod he found to the pine knot would follow a white painted line that he saw, off and on.

Webb explained that he had referred to some previous surveys but that he did not find any surveys that said the 3/8 inch rod was set by any registered surveyor. He acknowledged seeing the white line painted on some trees, but stated that he had no idea

who had painted it. He stated that based upon his experience as a surveyor, the line that he established as the east line of the NW ¼ is the dividing line between the NW ¼ and the NE ¼.

Webb testified that appellee's son, John Eggleston, was present when he marked the surveyed line and that the painted line was on one side of his line on part of it and on the other side of his line on part of it. He said that Mr. Eggleston told him that he believed the white line was "the line." Webb stated that the property was wild and unimproved with no fences.

Daniel Glaze testified that he had been a forester since 1976 and that he had been familiar with the property owned by appellee since that time. He stated that his knowledge of the white line came from timber cutting that he had noticed over the past ten years, even though he had not actually been involved in the cutting. He stated that the most recent cutting occurred in 2004; before that it was five to seven years earlier; and then about five years before that. He stated that the first two times were selective cut and the last time all that was merchantable was cut. He explained that the timber was cut on the NW ¼, which is opposite the Eggleston land; that the party cutting on the adjacent property stopped cutting at basically the same place each time; and that he was not aware of the white line at the time, but that he has been told by the Egglestons that the white line was the line. He explained that the last cutting crossed the painted line but that the previous ones did not.

On cross-examination, Glaze stated that the first time he saw the white line was in 2000 or 2001, before the last cutting in 2004. He said that the pine knot shown on the survey would be the corner but that he had no reason to know of any other corners Webb might have run from. He acknowledged that he had had no conversations with anyone from LTB and that he did not actually know why the cutting stopped before the white line.

Charles Pennington testified that he is a forester; that he had managed timber land for Mildred Eggleston at various times since 1968; and that he was familiar with the land appellee owns in the W ½ of the NW ¼ of 22-13-22, south of Hwy. 278. He stated that while he was managing timber on that land, there was an iron pin just south of Hwy. 278, and a white line to a corner on the southwest side. He stated that he did not remember if he saw anything at that corner but that he has seen the stob at the north line and the white painted line. He stated that he was reasonably sure that "Mr. Boswell painted that line when he was looking after it for Mrs. Eggleston." Pennington also explained that he thought the line was there the first time that he saw the property and that he knew it was there in the mid to upper seventies. He stated that he did not repaint the line.

Pennington stated that he knew timber was cut on the other side of the white line more than one time and that one time was in the late 70s or early 80s, and that it was clear-cut about two years ago. He stated that both times the timber was cut the party cutting on the adjacent property did not cross the white line. He stated that he has helped selectively cut appellee's timber and that appellee did not cut across the white line. He

stated that when appellee cut up to the line no one ever complained. He acknowledged that he had never had any discussions with any of the owners of the land on the other side of the boundary line. He stated that he had cut some timber for Potlatch on the south side of this property a couple of years ago and that the white line was still there. He said that he never noticed anyone cutting over the white line and that if they had he would have noticed it. He explained that you could tell from looking at one of the photo exhibits where the line is because there were big trees on appellee's side and only small trees on the other side.

On cross-examination, Pennington stated that he did not know who set the pin that is south of the highway; that he did not recall seeing a pin or a pine knot at the south end; and that he knew it was at the corner but that he did not recall seeing a pine knot. He acknowledged that he had never had any conversations with anyone having an interest in the party opposite appellee's land about the white line being the dividing line. He said that Mr. Boswell painted the line in the 1970s.

Appellee, Mildred Wren Eggleston, testified that she had owned the property since 1965 and that she deeded it to her trust in 2000. She stated that she has people who manage her land; that she was not acquainted with the people who own the adjoining land; that she had not had any discussions with them; and that she did not know of any prior disputes as to the lines. She stated that she cut saw logs off her land in 1990 up to the white-painted line; that a survey had not been done at that time; that the white line

was the established line since her parents owned the land in 1952; and that no one complained when she cut the timber in 1990.

Appellee testified that the owners on the other side of the line had cut timber three times to her knowledge and that they had never cut across the painted line, always adhering to that line as the common line. She stated that the clear cut occurred one or two years before it was sold. She stated that the white line is the established line; that she did not know when it was painted white but that it was that way in the 1970s because she would look at it; and that she knows where all of her property lines are but that she could not say that any of them would stand up under a survey.

On cross-examination, Ms. Eggleston stated that her first knowledge of the painted line was in the 1970s; that she has been back down there since 1975 full time; that she would not know if the painted line was there prior to 1976; that she had never had the land surveyed; that she had never had conversations with the other landowners about the property lines; that she had not enclosed her property with fences; and that the land was timberland.

John Eggleston, appellee's son, testified that he was familiar with the land involved in the dispute and had been familiar with it since the mid-1970s; that he had been involved in managing the property since that time and that he had been in sole charge since 1983. He stated that the white painted line was there when he first became familiar with the property; that there was a pin just off Hwy. 278, a 3/8 inch rod; that he first saw the rod in 1978; that there was a pine knot on the very south end; that once you

run that half-mile leg where it goes to Potlatch's corner, there was a pine knot out there; that he found the pine knot in 1986 or 1987; that Mr. Boswell painted the line in 1975; and that he (Eggleston) repainted it in 1987, 1992 or 1993, and again in 2003. He stated that he painted the same trees over and over. He stated that the log cutting appellee did in 1990 stopped at the white line, and that no one ever complained that appellee had cut over the line.

John Eggleston stated that the timber on the adjoining land had been cut three times – first in 1975 or 1976, second in 1992 or 1993, and the last time, it was clear-cut in 2003. He stated that appellee did not cut across the white line but rather up to it. He stated that he had not had any discussions with the adjoining landowners about the property line; that in the past when he noticed that someone was cutting the adjoining lands he would go out and flag the line; and that he did that on two occasions. He stated that when the adjacent property owners cut the last time, which was the clear cutting, Curt Bean Lumber did it and they placed blue flags along the white painted line. He stated that he took photos of the area in early March 2004 when the survey was done before LTB cut the timber. He went through the photo exhibits and explained what each one depicted. In addition, he stated that the trees were marked with purple paint for hunting leases; the first time the land was leased to Larry Carlton and Robert Martin and that it was then leased to RBL Hunting Club. He stated that he considered the white painted line as the west line of the property and that had never been challenged.

On cross-examination, John Eggleston testified that the white line was first painted by Mr. Boswell in 1975 or 1976; that he knew of no painted line prior to that time; that Mr. Boswell worked for his family; and that the first survey was done by Mr. Webb, who found the true line to be some feet east of the white painted line on the north end and some feet west of the pine knot on the south end. He acknowledged that he had never talked to or met any of the prior owners of the property about the boundary line. He stated that appellee did not establish the line, she just kept up what was there; that he understood there was a line there before it was painted; that whenever some cutting was going on, a representative of his family would be there to tell them where the line was; that he had no conversations with the owners of the other property; that prior to LTB buying the property, the owners did not live around the property and he never met them; that both properties suffered substantial damage from blown down trees in 2004; and that when those blown down trees were cut, there was no cutting past the survey line established by Webb in 2004.

In addition to the testimony presented at the hearing in this matter, the parties stipulated, *inter alia*, to the following facts:

- Mildred Wren Eggleston Revocable Trust ... owns the Northeast Quarter of Section 22, Township 13 South, Range 22 West in Nevada County, Arkansas.

- Mildred Wren Eggleston obtained title to the Northeast Quarter from her parents in 1965.

- Eggleston Trust obtained title to the Northeast Quarter from Mildred Wren Eggleston, et ux in 2000.

- LTB Land & Timber Co., Inc. ... owns the Northwest Quarter of Section 22, Township 13 South, Range 22 West in Nevada County, Arkansas ....

- LTB obtained title to the Northwest Quarter from John Robert Blackeby in 2003.
- LTB and its predecessors in title have had record title to the Northwest Quarter since 1929 when the property was deeded to Cora Epps. This chain of title is unbroken.

- The two tracts join and each party or its predecessors have paid the taxes on its tract.

Adverse Possession

Whether possession is adverse to the true owner is a question of fact. *Robertson v. Lees*, 87 Ark. App. 172, 189 S.W.3d 463 (2004). 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. *Id.* A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite conviction that a mistake was committed. *Id.* In reviewing a trial court's findings of fact, we give due deference to the trial judge's superior position to determine the credibility of witnesses and the weight to be accorded to their testimony. *Id*.

In order to establish title by adverse possession, appellee had the burden of proving that she had been in possession of the property in question continuously for more than seven years and that the possession was visible, notorious, distinct, exclusive, hostile, and

with the intent to hold against the true owner. *McWilliams v. Schmidt*, 76 Ark. App. 173, 61 S.W.3d 898 (2001). In addition, Arkansas Code Annotated section 18-11-106 (Supp. 2005) provides that in order for a person to establish title by adverse possession, the person must have actual or constructive possession of the property *and* have *either* held color of title to the property for at least seven years and during that time paid *ad valorem* taxes on the property *or* held color of title to real property that is contiguous to the property being claimed by adverse possession for a period of at least seven years, and during that time have paid *ad valorem* taxes on the contiguous property to which the person has color of title.

Here, the parties stipulated that appellee held color of title to, and had paid *ad valorem* taxes on, property that was contiguous to the land that appellee claimed by adverse possession for more than the statutory period. Consequently, the only real issue was whether appellee had been in possession of the lands to which she claimed title by adverse possession. The trial court determined that appellee had been in possession of the lands, and we find no clear error in that finding. The property at issue is primarily located east of a white line painted on trees, and the white painted line roughly approximated that which would be formed by drawing a straight line from the 3/8 inch rod found by David Webb, the surveyor, to a pine knot also found by Webb. In addition, there was testimony that the white line had been there approximately thirty years. Other persons familiar with the property also testified about the white line. Appellee's acts of possession included re-painting the white line on at least three occasions; making it a point to be present and

to flag the area when the owners of the contiguous property were cutting timber so that timber was not cut beyond the white line; and leasing the land, including the disputed portion, for hunting purposes as shown by purple paint markings that followed the white line in the disputed area. We hold that the trial court was not clearly erroneous in finding that appellee's possession satisfied the requirements for establishing adverse possession.

Boundary by Acquiescence

When adjoining landowners silently acquiescence 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. *McWilliams, supra*. It is not required that there be an express agreement to treat a fence, or by analogy a white painted line, as a dividing line; such an agreement may be inferred by the actions of the parties. *Id*. Acquiescence need not occur over a specific length of time, although it must be for a long period of time. *Id*. A boundary line may be established by acquiescence whether or not it has been preceded by a dispute or uncertainty as to the boundary line. *Id*. When a boundary line by acquiescence can be inferred from other facts presented in a particular case, a fence line, whatever its condition or location, is merely the visible means by which the acquiesced boundary line is located. *Id*.

The standard of review regarding boundaries by acquiescence is the same as that for adverse possession. As with the trial court's finding that appellee established the elements of adverse possession, we hold that the trial court was not clearly erroneous in finding that the white line represented a boundary by acquiescence.

Although Webb rejected as inaccurate the notations that the rod marked the NE corner of the NE ¼ of the NW ¼ and that the pine knot marked the SE corner of the SE ¼ of the NW ¼, the trial court concluded that "[t]he white painted line, the 3/8ths inch rod found by David Webb, surveyor, and the pine knot found by David Webb all are evidence of what the owners of the two tracts of land believed was the true property line prior to the Webb survey." There was evidence that the white line had existed for more than thirty years; that it corresponded with the 3/8 inch rod and the pine knot; and that appellant's predecessors in title had honored the white line in cutting timber on at least three occasions over twenty-five years, with appellee's representatives present at the scene to make certain the line was not crossed in cutting timber.

Finally, we note that appellant also contended that the trial court's findings of both adverse possession and boundary by acquiescence were contradictory. However, appellant cited no legal authority for its position and made no compelling argument that the trial court had erred in that regard. Moreover, in *Vaughan v. Chandler*, 237 Ark. 214, 372 S.W.2d 213 (1963), our supreme court utilized both theories. Accordingly, without authority and more convincing argument from appellant, we are not convinced that appellant's position in this regard provides a basis for reversal.

Affirmed.

CRABTREE, J., agrees.

HART, J., concurs.