ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
LARRY D. VAUGHT, JUDGE

DIVISION I

CA06-1166

September 26, 2007

WILLIAM SNOW and LETA SNOW
APPELLANTS

v.

MICHAEL CAMP, et al.
APPELLEES

AN APPEAL FROM BAXTER COUNTY CIRCUIT COURT
[No. DR-00-242-1]

HONORABLE ROGER V. LOGAN, JR.
CIRCUIT JUDGE

AFFIRMED

Appellants William and Leta Snow brought this action claiming adverse possession of a 1.5-acre tract, to which appellees Michael Camp and the Michelle J. Camp Trust hold legal title, and seeking reformation of an easement crossing appellees' property. The trial court ruled in favor of appellees on all issues. We find no error in that decision and affirm.

When appellants purchased an undivided one-half interest in a forty-acre tract in Baxter County in 1967, an old barbed-wire fence crossed the property. In 1969, the property was divided and appellants received a deed to the tract they now own. What the parties refer to as the Mehlburger Line was used by a surveyor, John Ed Isbell, in 1969 to delineate the boundary between appellants' property and that now owned by the Camps. When Isbell surveyed the property in 1969, he used a stone shown to him by the property owners as the

forty corner and went east 621 feet to find the center line. The next corner located by Isbell was 621 feet to the east of the center line, making the 1242 feet between the two corners, the Mehlburger Line, approximately eighty feet short of a true forty. In 1970, appellants, the purchasers of another tract, and the grantor signed a right-of-way easement agreement. The legal description for the fifty-foot easement agreement was based upon the 1969 survey and used its center line as the midpoint of the easement. Appellants constructed a fifteen-foot gravel driveway that was mostly within, but was not in the center of, the fifty-foot easement.

In 1995, Robert Williams and his wife purchased the tract now owned by appellees. During his eighteen months' ownership of the property, Williams became aware that appellants claimed the 1.5-acre portion lying south of the old fence line and north of appellants' boundary line. When he sold ten acres in 1997 to appellees, he conveyed 8.5 acres north of the old fence by warranty deed and 1.5 acre south of it by quitclaim deed. Appellees later constructed a concrete driveway to the easement, which displeased appellants.

In May 2000, appellants sued appellees for adverse possession of the 1.5-acre tract and for an injunction preventing appellees from interfering with the easement. They also alleged that the boundary line between the parties' property was established along the fence line by acquiescence. As a result of the error in the survey on which the easement's legal description was based, appellants asked for reformation of the easement as they had actually used it.[1]

---

[1]In an amended complaint, appellants added as defendants Randel Butler, Jr., Laureen Butler, Hershel Perry, Clara Perry, James Grant, and Betty Grant, who owned land abutting the easement. Roger Harrod and Olivia Harrod were substituted as parties for the Grants and settled their dispute with appellants. After Hershel Perry died, Thomas Perry and Kenneth Perry, his co-executors, were substituted as parties. The Harrods and the Perry estate settled their differences in an agreed order. Michael Camp's ex-wife, Kathy Camp, was dismissed as a party in the final order.

At trial, Isbell admitted that the 1969 survey was incorrect because he ignored the true corner. He testified that the true western corner was actually forty feet west of the one shown to him in 1969 and that, today, he would do the survey differently. Noting a ten-foot path along the south side of the fence, Isbell stated that appellants have exercised control of the property up to the fence line, which is in the same location as it was in 1969. He stated that, although the property owners to the north and south of the fence told him in 1969 that the fence was the property line, he did not describe the boundary line as the fence line in his survey because the fence was not in a straight line.

Ramona McDonald, who was a party to the easement agreement, testified that they had intended for the road to be in the middle of the easement.

Leta Snow testified that appellants had exercised control of the 1.5-acre tract by cutting cedar up to the fence line and mowing for a fire break; that, when appellants purchased the property, the land was so heavily wooded that the area in question could only be accessed on foot; and that some of the fence's old cedar posts have been replaced by steel posts. She stated that Williams was aware of appellants' claim to the 1.5-acre tract south of the fence.

William Snow testified that the old fence was represented as the property line when appellants bought the property; that appellants had always maintained possession up to the fence, which he had repaired; that they had cleared along the fence for a fire break; that they had put out food for wild animals and birds in the area; and that he had bush-hogged the area. He stated that, except where the road is, the fence completely encompasses appellants' property.

Williams testified that he had understood that he owned property north and south of the fence; that he maintained his yard to the fence line; and that on the other side of the fence were dense woods, which he was unaware had been mowed. He said that, once, when he had discovered some young men, hired by appellants, cutting sprouts close to the easement, he informed them that it was his land. He stated that the fence was completely down on the ground for about twenty feet in at least two places; that it did not surround appellants' property; and that no one kept animals on either side of the fence. He acknowledged knowing that appellants claimed the land, having discussed the issue with them. He said that neither he nor the Snows had used the area, which he called "just a vacant, barren strip of woods."

Michael Camp testified that Williams had informed him, after giving him the two separate deeds, that appellants claimed the 1.5-acre tract. He also stated that, when he first looked at his property, he "noted run-down remnants of a fence line with large gaps between that you could drive dump trucks through. . . ." He said that the old fence did not completely enclose the property and that there was "no way" that it would hold an animal. Also, he said, it did not appear as if anyone had cleared or maintained the area on either side of the fence and that both sides were heavily wooded. He further testified that the only indications that appellants had maintained the fence line had occurred after this lawsuit was filed. He stated that he had never considered the old fence to represent the boundary line.

In the final order, the trial court ruled that appellants failed to establish adverse possession of the area in dispute, which it found to be unenclosed, because they did not continuously occupy or use the property for more than seven years and they never excluded

any record owner from it. The trial court also rejected appellants' claim of a boundary by acquiescence, noting William's encounter with the workmen and stating that appellants' actions were not of the type that would place a landowner on notice that the fence was being treated as a boundary.

The trial court also refused to reform the legal description of the easement, finding that it was accurately described and located by a survey performed by James Lewis; that there was no proof as to what the grantor of the easement had intended, except through the testimony of the grantees; and that reformation, if granted, would affect the rights of neighboring landowners, all bona fide purchasers, who had taken title to their land since the 1970 easement was placed of record. Appellants then took this appeal.

Appellants first argue that the trial court erred in failing to consider the significance of the Mehlburger Line in deciding the claim for adverse possession, although the old fence line to which they claim adverse possession is considerably north of the Mehlburger Line. They argue that they proved that they exercised control of the 1.5-acre tract since 1969 by clearing a fire break around and making repairs to the fence, cutting trees and bushes, harvesting rocks, mowing, parking equipment, and feeding forest animals there.

We will not reverse a trial court's findings regarding adverse possession unless they are clearly erroneous. *Dillard v. Pickler*, 68 Ark. App. 256, 6 S.W.3d 128 (1999). In reviewing a trial court's findings with regard to adverse possession, due deference is given to the court's superior position to determine the credibility of the witnesses and the weight to be accorded their testimony. *Belcher v. Stone*, 67 Ark. App. 256, 998 S.W.2d 759 (1999).

Adverse possession is governed by both common and statutory law. To prove the common-law elements of adverse possession, a claimant must show that he has been in possession of the property continuously for more than seven years and that his possession has been visible, notorious, distinct, exclusive, hostile, and with the intent to hold against the true owner. *Trice v. Trice*, 91 Ark. App. 309, 210 S.W.3d 147 (2005). It is ordinarily sufficient proof of adverse possession that the claimant's acts of ownership are of such a nature as one would exercise over his own property and would not exercise over the land of another. *Id*. For possession to be adverse, it is necessary that it be hostile only in the sense that it is under a claim of right, title, or ownership as distinguished from possession in conformity with, recognition of, or subservience to the superior right of the holder of title to the land. *Fulkerson v. Van Buren*, 60 Ark. App. 257, 961 S.W.2d 780 (1998). There is every presumption that possession of land is in subordination to the holder of the legal title. *Id*. The intention to hold adversely must be clear, distinct, and unequivocal. *Id*. Whether possession is adverse to the true owner is a question of fact. *Id*.

In 1995, the General Assembly added, as a requirement for proof of adverse possession, that the claimant prove color of title and payment of taxes on the subject property or contiguous property for seven years. *See* Ark. Code Ann. § 18-11-106 (Supp. 2005). However, if the claimant's rights to the disputed property vested before 1995, he need not comply with the 1995 statutory change. *See Schrader v. Schrader*, 81 Ark. App. 343, 101 S.W.3d 873 (2003).

A landowner has a duty to keep himself or herself informed as to the adverse occupancy of his or her property. *Welder v. Wiggs*, 31 Ark. App. 163, 790 S.W.2d 913

(1990). A landowner's knowledge that another person is in hostile possession of his land may consist of either actual knowledge or constructive notice. *Id.* Constructive notice is that which would reasonably indicate to the landowner, if he visits the premises and is a person of ordinary prudence, that another person is asserting a claim of ownership adverse to his own. *Id.* Fencing the disputed area is an act of ownership evidencing adverse possession. *Boyd v. Roberts*, ___ Ark. App. ___, ___ S.W.3d ___ (Apr. 25, 2007). The fact that the fence may have deteriorated does not necessarily mean that the property is not enclosed; the question is whether the enclosure is sufficient to put the record title owner on notice that his land is held under an adverse claim of ownership. *Id.*

We hold that the evidence easily supports the trial court's decision on appellants' adverse-possession claim. The sporadic, inconsequential use that appellants made of portions of the area between the boundary line and the fence line could not, in any way, be called exclusive.

We also reject appellants' argument that the parties acquiesced to the fence line as the boundary. Whenever adjoining landowners tacitly accept a fence line or other monument as the visible evidence of their dividing line and apparently consent to that line, it becomes a boundary by acquiescence. *Clark v. Casebier*, 92 Ark. App. 472, 215 S.W.2d 684 (2005). A boundary line by acquiescence may be inferred from the landowners' conduct over many years so as to imply the existence of an agreement about the location of the boundary line. *Id.* This is a question of fact. *Id.* Here, there was clearly a dispute and simply no evidence of a tacit recognition by appellees or their predecessors in title that the old fence line is the boundary.

For their second point, appellants challenge the trial court's refusal to reform the written easement to conform to the actual location of the gravel road, which is somewhat outside the easement in a few places. They contend that reformation was warranted because of the landowners' mutual mistake in 1970, which resulted in the road's not being located in the center of the easement.

Reformation is an equitable remedy that is available when the parties have reached a complete agreement but, through mutual mistake, the terms of their agreement are not correctly reflected in the written instrument purporting to evidence the agreement. *Lambert v. Quinn*, 32 Ark. App. 184, 798 S.W.2d 448 (1990). A mutual mistake is one that is reciprocal and common to both parties, each alike laboring under the same misconception in respect to the terms of the written instrument. *Id.* A mutual mistake must be shown by clear and decisive evidence that, at the time that the agreement was reduced to writing, both parties intended their written agreement to say one thing and, by mistake, it expressed something different. *Id.* Through reformation, a court may correct the legal description of the property to be conveyed in an instrument. *Statler v. Painter*, 84 Ark. App. 114, 133 S.W.3d 425 (2003). However, a party cannot obtain reformation if that remedy would prejudice a subsequent bona fide purchaser. *Id.* Whether a mutual mistake warranting reformation occurred is a question of fact. *Id.*

Obviously, the trial court did not believe that there was clear and decisive evidence that a mutual mistake occurred, and it recognized how unfair to the other landowners reformation would be. Given the evidence, we cannot say that its findings on this issue are clearly erroneous.

Affirmed.

GLADWIN and GRIFFEN, JJ., agree.