

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
WENDELL L. GRIFFEN, JUDGE

DIVISION III

CA06-1478

September 19, 2007

DAVID R. CLAY and KAREN A. CLAY
APPELLANTS

AN APPEAL FROM SEVIER
COUNTY CIRCUIT COURT
[CV2003-50]

V.

HON. CHARLES A. YEARGAN, JUDGE

STEPHEN LEE COLE, ET AL.
APPELLEES

AFFIRMED

This is the second appeal in this boundary-dispute case. The property at issue is primarily a roadway, known as Cole Road. Appellants Randall and Karen Clay (the Clays) own the property to the west of Cole Road; appellees Stephen Lee Cole, Joey Allen Cole, Willis Harrison and Gloria Harrison (collectively, the Coles) own the property to the east of Cole Road. Cole Road is a private road that runs to the Cole home and to a pasture owned by the Clays. Previously, the Coles filed suit against the Clays when Mr. Clay removed the fence that ran west of Cole Road and attempted to erect a fence along the east side of Cole Road. Although the suit was filed as an injunction, the trial court treated it as a boundary-by-acquiescence suit and essentially split the property between the parties.

All parties appealed to this court and, in an unpublished decision, we reversed and remanded the order, finding no basis in the record for the trial court's award, which seemed to conflict with its credibility findings. *See Cole v. Clay*, No. 05-528 (June 14, 2006). On remand, the trial court determined that a boundary by acquiescence had been established

along the western fence. Thus, it determined that Cole Road belonged to the Coles but awarded the Clays an easement over the road by which to access their property.

The Clays now appeal, arguing that the trial court erred in finding that the issue of boundary by acquiescence was tried by implied consent, in finding that the Coles established acquiescence to the western fence as the recognized boundary, and in finding that the Clays failed to establish that the eastern fence served as the true property line. We hold that the trial court did not err in determining that the western fence constituted a boundary by acquiescence and in awarding Cole Road to the Coles.

II. Testimony

The testimony of the various parties was recounted in our previous opinion, in relevant part, as follows:

The Clay property is west of the Cole property. Both parcels are bordered along the north side by Highway 317. A roadway known as “Cole Drive” runs in a southerly direction from Highway 317, in the general vicinity of the borderline where each neighbor believed they owned the land. Clay and Cole used and sporadically assisted in the maintenance of Cole Drive over the years. There was no dispute until the spring of 2003, when Clay took down the fence on the west side of Cole Drive and sought to erect a fence along the east side of Cole Drive. Clay believed that a survey showed his property line to lay just to the east of Cole Drive and that another fence had existed at that east-side location for many years past. Cole objected and filed suit, petitioning for a temporary restraining order to prohibit Clay from fencing across the existing road or taking possession of Cole's land. Clay counter-petitioned for a temporary restraining order prohibiting Cole from harming or threatening Clay while re-constructing the east-side fence on Clay's property....

...

The first witness to be called to testify at the trial was ... Randall Clay. He testified that there had been a fence on each side of the roadway for many years but that the east-side fence fell down in the early 1980s, although there were still remnants of it. Clay was in his early fifties at the time of the trial. Clay believed he owned all the land including the roadway up to the old east fence line because it comported with the survey rods. Explaining his actions in April 2003, Clay said he intended to erect a fence back along the east side of the road and take down the west side fence so that he could use the entirety of his pasture land. Clay said he had given appellant Stephen Cole permission to use the road as long as he helped maintain it. Clay explained that the road was named Cole Drive by the 911 operators.

Clay said that he wanted to re-fence the property and place a new gate along the road so that his cows would not wander onto the highway. Clay said he had paid

taxes on the land, which he believed would include the road and three feet to the east side of the road, in line with the eastern fence. Clay did not believe that Cole Drive had ever been a county road. He said he bush-hogged the property to the east of the road, and he graded the road for years. He agreed that Cole told him not to drive heavy trucks on the road, but he did not think Cole owned it. Clay testified that the issue was not with the road but with the fence.

Clay testified that the fence on the west side had been there since the 1960s, and it was "redone" in 1982. Even though the western fence was in existence, Clay did not think that this suggested that he was relinquishing his rights to the property over the roadway and to the east.

Karen Clay, Randall Clay's wife, testified that she helped reconstruct the west-side fence back in 1982, which was only erected for safety, not to establish a boundary line. Herman Clay, who sold the property to Randall Clay, testified that he had long remembered there being fences on either side of the roadway. Ronnie Clay, Randall Clay's brother, testified that he remembered there being two fences, one on either side of the road, for many years.

Stephen Cole testified that his family had owned the land at issue east of Clay for at least two generations, back to the 1920s, and he was well familiar with the history of its use. Cole said that Cole Drive had been in existence his whole life. Cole remembered that his family used the road to access their homes and still did. He recalled that the fence on the west side of the road was there his whole life; he did not ever remember a fence on the east side of the road. He said he never asked permission to use the road; he and his family just used it. Cole brought a home movie to trial, showing him as a child riding a horse along the road, and the fence on the west side was visible. Cole wanted the western fence put back where it was and for Clay to remove the posts he had placed on the east side of the road because he believed it to be his family's land. Cole said he regularly mowed and bush-hogged the area up to the road and was hampered by Clay's interference. Cole had not seen the surveys that Clay said he had performed, but Cole believed his family owned the land all the way up to the road and that he had paid taxes on his land, which he thought included the road. Cole believed the surveys were faulty. Cole agreed that he had suggested to Clay that Clay not use heavy equipment on the road so as not to cause damage to it.

Robin Cole, Stephen's wife, testified that she had lived in the area for fifteen years and that there had always been a full fence on the west side of the road. She said that the Cole family and their relatives had always exercised control over all the property east of the roadway. Although there was a newer, more cosmetic road installed further east on the Cole property to access the houses, it flooded easily, such that the old Cole Drive was the most reliable means of ingress and egress.

Delores Cole, Stephen's mother, testified that she was presently sixty-four years old. She recalled that her parents moved there when they married in the late 1920s, and the fence on the west side of Cole Drive had been there ever since. Delores remembered that at one time there was part of a fence on the east side of the road, but she did not think it was a complete fence but rather bits and pieces that her father had put in place many years before near their home. This house was the one she was raised

in, and it sat in the northwestern corner of the land, nearest the highway.

Willie Harrison, Delores Cole's brother, testified that he and his wife owned five acres on the family land, and it was in the southwestern corner, abutting Cole Drive and lying east of Clay's land. Willie was seventy years old and remembered that Cole Drive was originally a county road that went further back, but it was abandoned in the depression. Willie recalled that his father and Clay's predecessor in title erected the western fence and a partial fence on the east side of the road. He thought that the eastern fence deteriorated in the mid-1960s. Willie said he had always used Cole Drive as virtually the only access to his property. Willie believed that the boundary line was the road itself. Willie said that the western fence was there for as long as he could remember. Willie did not deny that he had hit Clay with his cane when they were arguing about Clay's building a fence on the east side.

The final witness was Gaylan Alexander, who testified that he helped Mr. Clay bush-hog the property for three or four years and also helped him to build the fence in 2003 that began this litigation.

II. Trial Court's Order

Despite two surveys depicting the eastern fence as the boundary between the parties' property, the trial court concluded that the Coles proved that the western fence formed the properties' boundary by acquiescence.¹ The trial court specifically found that the Coles's witnesses were more credible than the Clays's witnesses regarding the issue of whether a boundary had been established by acquiescence.

The court carefully laid out the basis for its conclusion as follows:

[N]ine of the ten witnesses stated there had always been a fence on the west side of the road.² There was testimony by Mr. Harrison stating at one time there were fences on both sides of the road and [that] a fence had always been on the west side since 1964. His father and Mr. Green built that fence. The remaining witnesses indicate there was never a full or complete fence on the east side. Stephen Cole said the west fence had been there all of this life and Robin Cole testified that a fence had

¹The court also concluded that there was insufficient proof of adverse possession, but none of the parties appeal from that finding. The trial court further denied the Clays's counterclaim for damages and injunctive relief but they do not appeal from those findings.

²This appears to be an error, as only nine witnesses testified. Of these nine, all but Alexander testified regarding the presence of the western fence.

been on the west side since 1992. Delores Cole stated the west fence had been there from 1978 to the present. Karen Clay said they tore down the fence in 1982 and then constructed the west fence. David Clay said the east fence fell down and he then removed it and built the west fence in 1982. At one time the fence was in the middle of the road but was moved to the west side.

[The Clays] deny the west fence was ever represented to be the boundary line of the parties, but Delores Cole, a previous owner of [the Coles's] tract, stated the fence was the boundary line and had been for the past seventy five years.... [I]t was of no consequence that the fence line was not originally erected to serve as the boundary line, but rather it was the conduct of the parties that determined whether there was a boundary by acquiescence. Here the [Clays] in 1982 had an opportunity to move or construct a fence on the east side but chose to tear down the east fence and put up a new fence only on the west side. This Court must infer that [the Clays] tacitly accepted the west fence as the boundary line as a result of their conduct....

Even though there is no express or mutual agreement concerning the dividing line of the parties' respective tracts, this Court must and does find the west fence to be the boundary line inferred by the action of the parties.

The court awarded the Clays an easement for ingress and egress to their property and ordered that the Clays and Coles should be equally responsible for the maintenance of the roadway.

III. Whether the Issue of Boundary by Acquiescence Was Tried by Implied Consent of the Parties

The Clays first argue that the issue of boundary by acquiescence was not tried by the implied consent of the parties. However, this argument is barred by the law of the case because the Clays did not raise it in the prior appeal.

The law-of-the-case doctrine provides that the decision of an appellate court establishes the law of the case for the trial court upon remand and for the appellate court itself upon subsequent review and is conclusive of every question of law and fact previously decided in the former appeal, as well every issue that could have been, but was not, decided on the first appeal. See *Jones v. Double "D" Props., Inc.*, 357 Ark. 148, 161 S.W.3d 839 (2004); *Turner v. Northwest Arkansas Neurosurgery Clinic, P.A.*, 91 Ark. App. 290, 210 S.W.3d 126 (2005).

In the previous appeal, we recognized that none of the parties presented the theory of

boundary by acquiescence in their pleadings. We concluded, as the trial court did, that the boundary-line issue appeared to have been tried by the implied consent of the parties and that the pleadings have been amended to conform to the proof. We further decided to address the issue on the merits because neither party contended on appeal that the trial court tried issues not pleaded. To the contrary, both parties argued the merits of the trial court's decision. See *Cole v. Clay*, *supra*, fn. 1. Thus, because the implied-consent issue was addressed in the previous appeal, we will not revisit that issue.³

IV. Standard of Review

The real issue in this case is whether the trial court erred in finding that the western fence constituted a boundary by acquiescence. Although boundary line 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. See *Hedger Bros. Cement & Materials, Inc. v. Stump*, 69 Ark. App. 219, 10 S.W.3d 926 (2000). A finding is clearly erroneous when, although there is evidence to support it, after considering all of the evidence, we are left with the definite and firm conviction that a mistake has been committed. *Id.* Whether a boundary line by acquiescence exists is to be determined upon the evidence in each individual case. *Id.*

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. *Id.* 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. *Id.*

Boundaries are frequently found to exist at locations other than those shown by an

³Even if we had not reached a decision on the issue, we would still be precluded from reviewing it because the time to raise the issue of implied consent was during the initial appeal.

accurate survey of the premises in question and may be affected by principles of acquiescence and adverse possession. *See Summers v. Dietsch*, 41 Ark. App. 52, 849 S.W.2d 3 (1993). A fence, by acquiescence, may become the accepted boundary even though contrary to the survey line. *Id.*

Even if there never was an express agreement to treat a fence as the dividing line between the two parcels of land, such an agreement may be inferred by the action of the parties. *See Kittler v. Phillips*, 246 Ark. 233, 437 S.W.2d 455 (1969). Thus, tacit acceptance of a fence line or other monument as the visible evidence of the dividing line for a long period of time manifests apparent consent. *See Summers, supra.* The property owners and their grantees are then precluded from claiming that the boundary line thus recognized and acquiesced in is not the true one, although it may not be on the survey line. *Id.*

V. Discussion

The Clays argue that the Coles failed to prove that the western fence formed the boundary by acquiescence, and argue that they (the Clays) proved that the eastern fence was the true boundary. The Clays's argument that the western fence does not constitute a boundary by acquiescence is purely based on *their own conduct* as follows: 1) Mr. Clay never represented the old west fence to be the boundary line; 2) he exhibited control over the roadway by his extensive use of it; 3) Cole Road leads to Mr. Clay's pasture and he used the road to access that pasture; 4) Mr. Clay paid taxes on the road; 5) he spread gravel over the road, bush-hogged the road, and maintained the road; 6) Mrs. Clay never represented the fence to be the boundary.

The fatal flaw in the Clays's argument is that it is premised on their own acts of ownership over the property, as if this were an adverse possession case, and completely ignores the other evidence which supports the fact that the western fence has long been treated as the western boundary of the Coles's property. What is dispositive is the evidence that, regardless

of what the surveys indicated, the fence that lies to the west of Cole Road has been treated as the western boundary since the 1960s, if not before. Each witness who testified regarding the existence of the western fence identified it as the western boundary, although the testimony varied regarding the timing of its placement. Even Mrs. Clay admitted that the western fence had existed since the 1960s and Mr. Clay, who was fifty-two, admitted that the western fence had been in place all of this life. The testimony also established that, whereas the eastern fence had always been a partial fence that had fallen into “remnants” by 1981, the western fence was always “whole.”

However, the mere existence of a fence between adjoining landowners is not in itself sufficient to establish a boundary by acquiescence; there must be mutual recognition of the fence as the dividing line. *See Warren v. Collier*, 262 Ark. 656, 559 S.W.2d 927 (1978). Yet, the Coles were not required to show that the fence was erected for the purpose of establishing the true boundaries, only that it was thereafter treated as such. *See Kittler, supra*, and *Summers, supra*. Here, the trial court was also correct in finding evidence of mutual recognition of the western fence as the dividing line in this case.

Clearly, both the Clays and the Coles, without disagreement, exercised similar acts of ownership over the property up to the western fence and both maintained it for many years. Notably, Mr. Clay removed the western fence in 1982 but rebuilt it in the same general location, west of Cole Road. He said that he constructed the new fence to better follow the road. After Mr. Clay rebuilt the western fence, Mr. Cole asked him not to use heavy equipment on the road and claimed ownership of the road. At this time, Mr. Clay placed posts on the eastern side of the road to indicate his true property line. Yet Mr. Clay never attempted to rebuild the *eastern* fence on what he calls the true boundary line – based on the surveys – until April 2003. As properly noted by the trial court, the fact that Mr. Clay rebuilt the fence on the western side of the road in 1982 seems to acknowledge his tacit acceptance

of the fence as the true boundary. *See Summers, supra.*

Further, neither the Clays nor their predecessor-in-interest objected to the road being named “Cole Road” when the 911 system was installed, further evidencing their acquiescence to the western fence as the boundary. The subsequent surveys did not negate the parties’s longstanding treatment of the western fence as their boundary. While the Clays assert that the Coles did not refute their evidence that the boundary lies along the eastern fence because the Coles offered only conclusory statements, no evidence was needed to refute the Clays’s acquiescence in this case.

VI. Conclusion

In sum, the Clays’s single belated attempt in 2003 to establish the eastern boundary of their property pursuant to the surveys is not sufficient to negate at least thirty–forty years of the Clays, the Coles, and their respective predecessors-in-interest treating the western fence as the parties’s true boundary. Such a lengthy period of acquiescence is easily sufficient to establish that the western fence became the parties’ boundary by acquiescence. *See, e.g., Hattabaugh v. Housley*, 93 Ark. App. 167, 217 S.W.3d 132 (2005) (reversing and remanding a finding that a boundary by acquiescence had not been established where all of the evidence indicated that the parties treated the fence as their boundary line for over twenty years, notwithstanding the fact that the fence was not placed on the true property line). *See contra Avington v. Newborn*, 271 Ark. 648, 609 S.W.2d 678 (Ark. App. 1980) (noting the evidence failed to establish that a fence, which was placed five feet off of the true boundary line to accommodate a lane, became the boundary either by agreement of adjoining landowners or by acquiescence); *Robertson v. Lees*, 87 Ark. App. 172, 189 S.W.3d 463 (2004) (affirming a finding that the evidence was insufficient to establish that a boundary by acquiescence by a fence that the landowner's predecessor-in-title erected on his neighbor's property where there was no testimony that the neighbor's predecessors-in-title considered the fence to be the

boundary).

Affirmed.

GLADWIN and VAUGHT, JJ., agree.