NOT DESIGNATED FOR PUBLICATION

ARKANSAS COURT OF APPEALS

DIVISION III
No. CA07-1019

	Opinion Delivered October 1, 2008
GORDON TARTER SR. APPELLANT	APPEAL FROM THE LONOKE COUNTY CIRCUIT COURT, [NO. CV-2006-401]
V.	HONORABLE PHILLIP THOMAS WHITEAKER, JUDGE
BILL WEBB, CHARLENE HALE, WILLIAM GLASCO and MRS. WILLIAM GLASCO APPELLEES	AFFIRMED

EUGENE HUNT, Judge

Appellant Gordon Tarter Sr., appeals the order of the Lonoke County Circuit Court that granted the appellees' motions to dismiss his quiet title action. Tarter argues that (1) there was sufficient evidence to show his boundary by acquiescence and (2) the trial court erred in finding that he failed to describe the disputed property sufficiently to defeat a motion for directed verdict based on Ark. Code Ann. § 18-50-502. We disagree and affirm.

The parties are adjacent landowners in Lonoke County, with the appellees' properties located north of appellant's. Appellant, who acquired title to his property in 1968, filed suit against appellees on August 22, 2006, to quiet title. William Glasco and Mrs. William Glasco (the Glascos) filed their response on August 29, 2006; Bill Webb's and Charlene Hale's response was filed on September 5, 2006. The appellees subsequently filed counterclaims for ejectment. The appellees filed motions to dismiss on September 14, 2006. The motions alleged that the property to which

appellant sought to quiet title was appellant's rightfully owned property and any property in addition to appellant's property could not be ascertained by the description contained in the quiet title action. Appellant filed his response to appellees' motions to dismiss on September 25, 2006. Appellant filed an amended petition to quiet title on October 24, 2006. Appellant's amended petition described the land as:

> Northeast Quarter (NE 1/4) of the Southwest Quarter (SW 1/4) and the Northwest Quarter (NW 1/4) of the Southwest Quarter (SW 1/4) of Section Twenty-Seven (27), Township Two (2) North, Range Seven (7) West. And a part of the Northwest Quarter (NW 1/4), Section 27, Township 2 North, Range 7 West. Being situated in Lonoke County, Arkansas.

According to the amended petition, appellant sought to quiet title to "*any portion of property* north of the north property line of the southwest quarter *which might lie* between the Southwest Quarter and a fence line *which might lie* in the Northwest Quarter, Section 27, Township 2 North, Range 7 West." (Emphasis added.) The Glascos filed their response to the amended petition on October 25, 2006; Webb's and Hale's response was filed on October 30, 2006. Both of the responses asked that the amended petition be dismissed because appellant had not sufficiently pled the description of the property.

At the March 20, 2007, hearing appellant testified that when he purchased his property in 1968 from Delbert D. Howard, the fence was already there. According to appellant, he and Mr.Wade, the Glascos' predecessor, never had any problems about the boundary line. Appellant testified that he had always claimed the fence as his north property line, however, he admitted that he never had the land surveyed and never discussed the location of the property line with any of his neighbors. Appellant stated that he did not have problems with Mr. Glasco until Mr. Webb talked to Mr. Glasco about the land. Mr. Webb inherited his property from the Wilcoxes in 1999.

Mr. Webb approached appellant about having the property surveyed and appellant told Mr. Webb that there was no need for a survey. According to appellant, the lines were the same as they were in 1968 when he purchased his land. In 2000, Mr. Webb attempted to cut timber on the side of the fence claimed by appellant. Appellant told Mr. Webb that the land was not Mr. Webb's, and Mr. Webb subsequently had his land surveyed. Following the survey, Mr. Webb marked a line by blazing trees.

Appellant's son, Gordon Tarter, Jr., (Gordon) testified: "During the time the Wilcox's [sic] were alive everybody agreed on the property line." According to Gordon, appellant had always treated the fence as his north property line. Gordon stated that he and his brother-in-law, Mike Pasley, maintained the fence and bushhogged the property up to the fence. Pasley testified that he had been familiar with the disputed property since 1975. He stated that he helped maintain the property up to the fence. He also testified about the new fence they put up in 2005, which was the subject of the appellees' petitions for ejectment.

At the conclusion of appellant's case, appellees moved to have the action dismissed. The trial court granted the motion. In its ruling from the bench, the trial court stated that it was unsure what theory appellant was proceeding under. The court stated that there was no testimony from appellant's predecessors or anyone else showing that there was acquiescence. The court also stated that appellant did not allege acquiescence in his pleadings. This was error on the court's part because a close look at appellant's petitions clearly shows he was alleging ownership by acquiescence. However, this error was harmless. The court further stated: "There is no description of what it is that he's claiming. Even if I were to go forward, how could I give a decree of quieting title because I don't know to what extent I'm supposed to quieting [sic] title to." The June 21, 2007,

order stated that appellant had not sustained his burden of proof and that appellant failed to comply with Ark. Code Ann. § 18-60-502. This appeal followed.

Quiet title actions have traditionally been reviewed de novo as equity actions. *City of Cabot v. Brians*, 93 Ark. App. 77, 216 S.W.3d 627 (2005). However, we will not reverse the circuit court's findings in such actions unless the findings are clearly erroneous. *See id.* A finding of fact is clearly erroneous when, although there is evidence to support it, we are left with the definite and firm conviction that a mistake has been committed. *Id*. In reviewing the circuit court's findings, we give due deference to the circuit court judge's superior position to determine the credibility of the witnesses and the weight to be accorded to their testimony. *Conner v. Donahoo*, 85 Ark. App. 43, 145 S.W.3d 395 (2004).

Whenever adjoining landowners tacitly accept a fence line as the visible evidence of their dividing line and thus apparently consent to that line, it becomes the boundary by acquiescence. *See Rabjohn v. Ashcraft*, 252 Ark. 565, 480 S.W.2d 138 (1972). A boundary by acquiescence may be established without the necessity of a prior dispute or adverse use up to the property line. *Id*. However, the mere existence of a fence between adjoining landowners is not alone sufficient to establish a boundary by acquiescence; there must be a mutual recognition of the fence as the dividing line. *See Warren v. Collier*, 262 Ark. 656, 559 S.W.2d 927 (1978); *Carney v. Barnes*, 235 Ark. 887, 363 S.W.2d 417 (1963). The party that contended that the boundary is other than that described in the deed, here, Mr. Tarter, had the burden to prove that the parties agreed on a boundary other than that described. *See Council v. Clark*, 246 Ark. 1110, 441 S.W.2d 472 (1969). The mere subjective belief that a fence is the boundary line is insufficient to establish a boundary between two properties. *Webb v. Curtis*, 235 Ark. 599, 361 S.W.2d 87 (1962).

This court has confirmed the importance of ascertaining the intent of the parties: "It is the agreement and acquiescence, not the fence itself, that controls. The intention of the parties and the significance that they attach to the fence rather than its location or condition, is what is to be considered." *Camp v. Liberatore*, 1 Ark. App. 300, 303, 615 S.W.2d 401, 404 (1981). The fact that a landowner puts a fence inside his boundary line does not mean that he is acquiescing in the fence as the boundary, thereby losing title to the strip on the other side. *Carney v. Barnes*, *supra*; *Webb v. Curtis*, *supra*. The loss of title occurs only if the neighbor takes possession and holds it for the requisite number of years. *Carney*, *supra*.

In the instant case, appellant and his son testified that appellant had always considered the fence to be his north boundary line; however, the subjective belief that a fence is the boundary is insufficient. *Webb*, *supra*. Appellant offered no testimony that anyone had ever told him that the fence was the boundary. There was also no testimony as to how or why the fence was erected. Additionally, the evidence presented by appellant did not reflect an intent on the part of the appellees or their predecessors to recognize the fence as the boundary. Thus, there was sufficient evidence to support the trial court's finding that appellant failed to prove his boundary by acquiescence.

Appellees argued, and the trial court agreed, that appellant failed to sufficiently describe the property that he sought to quiet title thereto. The trial court granted the appellees' motions to dismiss due to appellant's failure to comply with Ark. Code Ann. § 18-60-502. The pertinent part of that statute states, "A claimant shall file in the office of the clerk of the circuit court of the county in which the land is situated a petition describing the land and stating facts which show a prima facie right and title to the land in himself. . . . " *Id*. § 18-60-502(a).

Appellant gave a sufficient description of the property for which he was the titled owner. However, appellant referenced the property to which he sought to quiet title as "any portion of property north of the north property line of the southwest quarter which might lie between the Southwest Quarter and a fence line which might lie in the Northwest Quarter, Section 27, Township 2 North, Range 7 West." Appellant argues that the trial court erroneously read the statute to mean that he was required to give a legal description of the property. However, there is no evidence of this. The trial court merely stated that there was no description of the land to which appellant was claiming title. A close look at the description contained in appellant's petitions reveals that the trial court was correct. Therefore, the trial court did not err in ruling that appellant failed to sufficiently plead the description of the property. Accordingly, we affirm.

Affirmed.

HART and GRIFFEN, JJ., agree.