Not designated for publication.

ARKANSAS COURT OF APPEALS

DIVISION IV
No. CA08-283

EDWARD E. PEARSON, JR. and MARIETTA M. PEARSON, Husband and Wife APPELLANTS V. CLIFTON HICE and LEISA HICE, Husband and Wife, and JAMES E. MOORE and BARBARA MOORE, Husband and Wife APPELLEES	**Opinion Delivered** OCTOBER 8, 2008 APPEAL FROM THE LOGAN COUNTY CIRCUIT COURT, [NO. CV-2003-95] HONORABLE DAVID McCORMICK, JUDGE AFFIRMED

ROBERT J. GLADWIN, Judge

Appellants Edward E. Pearson, Jr., and Marietta M. Pearson (Pearsons) appeal the Logan County Circuit Court's decree quieting title to two certain parcels of disputed property claimed by appellees Clifton Hice and Leisa Hice (Hices) and James E. Moore and Barbara Moore (Moores). On appeal, appellants argue that the circuit court erred in awarding property to appellees to their claimed southern boundaries at the township line rather than up to a northern boundary of existing monuments and fence line. Appellants also argue that the circuit court erred in holding that a letter agreement between Mr. Pearson and Mr. Hice was binding. We affirm.

Facts

The Hices purchased certain property[1] by deed dated May 16, 1995. In 2003, they hired Bland Surveying to perform a survey of their property, and the survey plat indicated new and different markers for the southwest corner and the southeast corner of the Hice property than those indicated on a survey performed by Perkins & Associates in 1986 on behalf of Larry Rice. Rice was the predecessor in interest to the adjacent property that was purchased by the Pearsons by deed dated September 17, 1996. On April 24, 1997, Mr. Pearson and Mr. Hice entered into an agreement not to do any bulldozer work or removal or repair of an old fence on the north/south boundary between their properties until they could come to a written agreement as to the boundary line, and further, that any brush hogging or other work by either party would not concede boundary adjustments either north or south. They also agreed that, if at such time as a survey was done on the Hices' property, the survey showed the Hices to own 121 acres, then no dispute would be made on the boundary line; however, if the survey showed more than 121 acres, then Mr. Hice and Mr. Pearson would split the acreage in dispute fairly and evenly.

The Hices filed a complaint against the Pearsons on October 7, 2003, claiming ownership of 121 acres lying north of property owned by the Pearsons, asserting that a fence separated the parties' property, and requesting that the circuit court establish the south boundary line between the two properties. The Pearsons filed an answer and a counterclaim

[1]The Hices' property is described as: The South Half of the SW 1/4; and all that part of the North Half of the SW 1/4 lying South of the County Road, containing in all 121 acres, more or less. All in Section 34, Township 7 North, Range 27 West.

on October 17, 2003, claiming ownership of 168.06 acres by legal title and regardless, by adverse possession up to certain previously set survey monuments and markers. The Hices answered the counterclaim on October 20, 2003, and on October 22, 2003, the circuit court entered an order stating that the parties had reached an agreement that

> their agents servants, or employees or any other person in active concert or participation with them shall be restrained and enjoined from doing any bulldozer work, removing any fences or survey monuments or making any alterations to the strip of disputed property which is generally described as that property lying North of the fence depicted at the South line of the tract in the enclosed survey and lying South of the three boundary markers depicted as lying North of said fence. . . .

Logan County Surveyor Kenneth Tilley was hired by the parties to perform a third survey of the boundary in question. The survey was conducted on January 30, 2004, and it depicts all points set by all three surveyors of the properties and shows the majority of fences involved in the dispute. However, the Tilley survey rejected the points set or accepted by either the Perkins or Bland surveys. The Hices, and later the Moores, claim property south to the south boundary established in the Tilley survey, while the Pearsons claim, on their western tract, a north boundary established by the Perkins survey, and on their eastern tract a north boundary established by the fence separating his property from the Moores' property extending from the stone monument discovered by Perkins and along an east running fence depicted in the Tilley survey.

Subsequently, an order was entered by which the Moores were joined as plaintiffs to the action on January 30, 2006, regarding their property described as: The South Half of the SE 1/4; All in Section 34, Township 7 North, Range 27 West. That property is adjoined to the Pearsons' eastern-most tract of 169 acres to the south, a tract which they purchased in

1991. An amendment to the answer to counterclaim was filed on January 12, 2007. The amendment stated that the parties, specifically Mr. Hice and Mr. Pearson, entered into an agreement on April 24, 1997, whereby the Pearsons waived any and all claim of adverse possession to said property, or alternatively, that the Pearsons should be estopped from any and all claims of adverse possession pursuant to the agreement, which specifically states as follows:

> To whom it may concern that on this day I[,] Clifton Hice and Edward E. Pearson agree not to do any dozer work or old fence removal or repair on the north, south boundary between our properties, until we can come to an written agreement as to the boundary line. Also that any brush hogging or other work by either party does not concede boundary adjustments either north or south. Also that when a survey is done on Clifton Hice's property if he has his 121 acres then no dispute will be made on the boundary line, if it is more than 121 acres then Clifton Hice and Edward E. Pearson will split the acreage in dispute fairly and evenly.

The Pearsons filed a counterclaim against the Moores on January 24, 2007, claiming they had obtained a survey that conflicted with the true and accurate survey and recognized boundaries for the Pearsons' property on the north and the Moores' property to the south, and asking that the circuit court determine the boundary line between the parties' properties. The Hices and Moores filed an amended complaint on January 24, 2007, again asking the circuit court to determine the south boundary line of their respective properties and the north boundary of the Pearsons' property which adjoins their properties, as well as to restrain and enjoin the Pearsons from damaging or otherwise doing anything to any of the land in dispute or their property to the north thereof. Also on that date, the Moores filed a reply to the separate counterclaim filed against them by the Pearsons.

The circuit court issued a letter ruling, dated July 11, 2007, but filed for record on July 25, 2007, finding that the survey performed by Mr. Tilley on January 30, 2004, correctly located the boundary line between Section 6 and Section 7 of Township 7 North, Range 27 West, the parties' respective properties. The letter ruling also stated that the petitions to quiet title filed by the Hices and Moores were granted with respect to their properties. A decree consistent with the letter ruling was filed of record on November 20, 2007, and appellant Edward Pearson, Jr., filed a timely notice of appeal on December 6, 2007.

Standard of Review

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 Robertson v. Lees*, 87 Ark. App. 172, 181, 189 S.W.3d 463, 469 (2004). A finding of fact is clearly erroneous when the reviewing court is left with a definite and firm conviction that a mistake has been committed. *Id.* In reviewing the lower court's findings, this court gives due deference to the circuit judge's superior position to determine the credibility of the witnesses and the weight to be accorded to their testimony. *Id.*

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. *Robertson, supra.* The proof required as to the extent of possession and dominion may vary according to the location and character of the land in question. 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.*

(A) *Establishment of boundary line*

The Pearsons argue that there was insufficient evidence to establish the boundary line along the Tilley survey line rather than upon the line further to the north, as was established by the previous Perkins survey and a fence line. They contend that, even with the establishment of a new location for the township line, they have owned and possessed the property in their western-most tract of 168.06 acres up to the points set by the Perkins survey and the stone monument discovered by Perkins marking the northeast corner of the property. The Pearsons claim that this was the boundary line not only claimed by them, but also by their predecessor, Larry Rice, from the time of the initial survey in 1986 up to the date of the trial.

The Pearsons argue that the Hices and the Moores claimed that they had adversely possessed their respective properties up to a southern boundary fence that was not in line with

any of the previous surveys. The circuit court awarded the Hices and Moores property up to an imaginary line established by the Tilley survey, which was not in existence and had no physical markings until such time as this case was pending. The Pearsons assert, with respect to both the Hices and the Moores, that neither has shown any possession or acts of ownership or notice of their intent to claim the disputed property.

The circuit court accepted the testimony of Logan County Surveyor, Kenneth Tilley, the only surveyor to testify at the trial regarding the boundary line between the various properties. Although the Pearsons would have preferred the circuit court to have accepted the earlier Perkins survey, we hold that the circuit court's findings are supported by substantial evidence. Along with the survey, Mr. Tilley's testimony accounts for more than half of the abstract before us, and it provides a vast amount of information regarding procedures followed, technology advances, standards and requirements of the governing board, and how his findings discredit the findings of the previous surveys. Mr. Tilley did not ignore or disregard the information from the two previous surveys, including much of it on his most recent survey; rather he addressed the inadequacies of those surveys. Under our standard of review, and particularly the deference accorded to the circuit court with respect to determining weight and credibility, we cannot say that the circuit court's findings with regard to the establishment of the township line in question was clearly erroneous.

(1) 168.06 acre tract - disputed area with the Hices

The Pearsons assert that their acts of ownership and those of their predecessor, Mr. Rice, were substantial. There is evidence before us that Rice had the property in question

surveyed, cleared, blazed, and flagged, with the intention of selling timber. He instructed timber harvesters to stay twenty feet back from the original Perkins survey lines. A trail was blazed in the woods along the Perkins survey lines. Pine timber was harvested in 1986 and 1987, and hardwood timber was harvested and sold from 1988-1990. Rice indicated that during the years of logging, and thereafter, there were no objections to the ribbon markers that had been set up, and no one ever made use of the clearing located in the disputed area. The Pearsons reviewed the Perkins survey prior to purchase, and they point out that they have consistently paid taxes on that 168.06 acres, as did Rice, and that they provided the circuit court with records consistent with that assertion. Additionally, the Pearsons point out that the Perkins survey was filed of record in 1986, and claim that this filing put the Hices and their predecessors in interest on notice that the land was held under an adverse claim of ownership by Rice and then the Pearsons.

Subsequent to their purchase of the 168.06 acres, Mr. Pearson bulldozed a grown-up field located within the disputed area within his western-most tract. He disced and planted the field for use as a wildlife food plot in 1997. He acknowledges asking and receiving permission from the Hices to drive his tractor through the Hices' property coming from the north and traveling south to the disputed area in order to get his equipment to the food plot area. Mr. Pearson points out that the Hices did not object to the clearing of the area and planting of the food plot, and further, Mr. Hice even asked Mr. Pearson's permission to hunt the food plot. Additionally, Mr. Hice once requested permission from Mr. Pearson to hold a camp out for a group of boys on an area of the clearing that lies within the disputed area.

Finally, the Pearsons indicate that they sold timber off the property in 2000 pursuant to a contract with Travis Lumber Company. The Pearsons argue that if the Hices had believed these actions were taking place on their property, they would have taken action at that time. Instead, they waited until June 10, 2003, to have a survey conducted on the property, and waited even longer to file an action in circuit court — October 7, 2003.

The circuit court relied upon the signed agreement of Mr. Hice and Mr. Pearson, as a valid agreement, and interpreted it to stand for the proposition that if the survey showed the Hices to own 121 acres, no dispute would be made about the boundary. The circuit court also specifically found that, in order for the Hices to have 121 acres, as contemplated by the parties, the Tilley survey would have to prevail. Finally, the circuit court determined that the acts of the Pearsons and their predecessor were insufficient to establish adverse possession of the land claimed by them. In so finding, the circuit court made the following observations:

> (1) Most of the timber cut by Rice (the predecessor to Pearson's title) was over the southern portion of the tract claimed by him and away from the disputed northern boundary;
>
> (2) No specific testimony was presented concerning the number of trees cut from the disputed area - as might be indicated by a "stump count;"
>
> (3) No other activities of Rice rose to the level of even being asserted as adverse;
>
> (4) All other acts by Pearson occurred after the April 24, 1997 agreement of the parties, and therefore under the acknowledgment that he did not know whether he owned the disputed area, and further, that any such actions would not be relied upon by the parties to accede to adverse possession. This amounted to consent to the activities so that they could not be said to be adverse.

Upon review of the evidence before us, and in consideration of the written agreement between Mr. Hice and Mr. Pearson, we hold that the circuit court's findings with respect to the Hices' property were not clearly erroneous.

(2) 169 acre tract - disputed area with Moores

With regard to the 169 acres in the eastern-most tract, which adjoins the Moores' property at its north boundary, the Pearsons state that they were shown the boundary markers of the property at the time of purchase in 1991 by an elderly gentleman, Floyd Yancey. Mr. Yancey lived in the area and was familiar with the property. The Pearsons claim as their northern boundary for this tract an existing fence extending from the stone in the four-way corner and to the east to a survey stone monument previously discovered by him. Subsequent to the purchase, the Pearsons built a road up to the north fence. Mr. Pearson and his guests have hunted on that property up to the fence that Mr. Yancey informed him was his north boundary. The fence was also used as the boundary up to where they had timber cut in 2000, and apparently also the boundary up to where the Moores' predecessor in interest, Mr. Collins, had timber cut from the north approximately one year earlier. The hunting activities prompted Mr. Moore to put up a no trespassing sign on his side of the fence, but he testified to no acts of ownership that had occurred in the disputed area south of the fence.

Mr. Tilley opined that the fence was one of convenience, probably for cattle grazing, rather than an actual boundary marker. The Pearsons state that it simply does not make sense that Mr. Moore believed that he owned property past the fence to some imaginary line without any physical markings. The Pearsons acknowledges that, while the construction of

a fence is not necessary to constitute adverse possession, fencing the disputed area is an act of ownership evidencing adverse possession. *See Boyd v. Roberts*, 98 Ark. App. 385, 255 S.W.3d 895 (2007). The fact the fence may be degraded does not necessarily mean that the property is no longer enclosed. The question becomes whether the enclosure, like other acts of possession or claim of ownership, is sufficient to "fly the flag" over the land and put the true owner upon notice that his land is held under an adverse claim of ownership. *Id.* In *Boyd*, this court noted that the parties undisputedly treated the fence as the boundary line and held the person against whom adverse possession was being claimed to have notice of the adverse claim.

The Pearsons reiterate that Mr. Moore testified that he knew of no other boundary markers until the Tilley survey was done. They ask whether that admission, in conjunction with the Pearsons other alleged acts of ownership, should have been sufficient to put the Moores on notice. The Pearsons claim it was, as evidenced by Mr. Moore's installation of a no trespassing sign north of the fence. The Pearsons remind us that the proof required regarding extent of possession and dominion may vary according to the location and character of the land. *See Robertson*, *supra*. He explained that the land in question is rural property, consisting of timber and brush, and bounded by long-time existing fences of diminished quality, and they maintain that their treatment constitutes typical acts of ownership of that type of property.

Additionally, as further proof of the claim of adverse possession of the disputed area, the Pearsons assert that they have continuously paid taxes on the property since the date of

purchase. *See Schrader v. Schrader*, 81 Ark. App. 343, 101 S.W.3d 873 (2003); Ark. Code Ann. § 18-11-106(1)(A). They maintain that this fact establishes that they have color of title to the land in question.

The circuit court specifically found that based upon the testimony at trial, any activities that might be considered adverse had occurred since 2001, and therefore had not occurred over a substantial enough time, seven years, to rise to adverse possession. Regarding the fence that the Pearsons rely upon as the boundary between their property and the Moores' property, the circuit court found that there was no testimony as to who erected the fence, when it was built, or by whom it was maintained. Likewise, there was no testimony that the fence was relied upon by anyone as the proper boundary between the two tracts of land or that the fence was recited in any of the deeds to the respective parcels of land.

Mr. Tilley, a disinterested third party, provided the most useful testimony regarding the fence. He testified that he observed that the fence was very random, running from tree to tree with pronounced bends in it. He also explained that the barbed wire was fastened on the north side of the trees as it meandered from tree to tree. He drew upon his experience as both a surveyor and a farmer when he used the term "fence of convenience" to describe the fence, one likely utilized for the running of cattle, on the northern tract of land. The circuit court weighed the evidence and chose to give Mr. Tilley's explanation greater weight than the claims of the Pearsons. Under our standard of review, we cannot say that the circuit court was clearly erroneous.

(B) Handwritten agreement between Mr. Hice and Mr. Pearson

For their second point on appeal, the Pearsons challenge the circuit court's findings with respect to the hand-written document signed by Mr. Hice and Mr. Pearson on April 24, 1997. The circuit court found that the document bound Mr. Pearson to the location of a later survey line and that Mr. Pearson thereby agreed that the Hices were entitled to 121 acres. It is the Pearsons' position that the document merely established that neither party would disturb fences or any other part of the real property in the disputed area until a survey could be performed, and further, that the Hices would not raise any further dispute if they had a survey indicating that they owned 121 acres. The Pearsons claim that a plain reading of the document clearly indicates that Mr. Pearson did not agree that any survey obtained by Mr. Hice would be the established line or that the number of acres depicted in the survey obligated him in any manner.

The Pearsons point out that the Hices did not have a survey done on their property until June 2003, which resulted in the Bland survey. That survey indicated that the Hices had 121 acres to the south boundary line established by the survey. In the initial complaint, the Hices indicated that the Bland survey was correct; however, they later rejected that survey in favor of the Tilley survey. The Tilley survey does not indicate the number of acres within the Hices' tract, which, according to the Bland survey, is not quarter, quarter sections with straight boundary lines on its northern edge.

The Pearsons remind the court that the first rule of interpretation of a contract is to give the language employed the meaning that the parties intended. *See Wal-Mart Stores, Inc. v. Coughlin*, 369 Ark. 365, 255 S.W.3d 424 (2007). In construing a contract, we must

consider the sense and meaning of the words used by the parties as they are taken and understood in their plain and ordinary meaning. It is also well settled that the intention of the parties is to be gathered, not from particular words and phrases, but from the whole context of the agreement. *Id.* The Pearsons assert that the plain meaning of this agreement indicates that if the Hices had received 121 acres per the survey, then Mr. Hice would not raise a dispute on the boundary line. However, the Pearsons maintain that there were no such conditions placed upon them as to whether they would raise a dispute, such as whether they had 168.06 acres within their property to the south. To conclude otherwise would require the insertion of language into the written document that simply does not exist.

Despite the Pearsons' assertion that the circuit court determined that the written agreement was a contract, the Hices contend that the circuit court really only went so far as to say that the written agreement estopped the Pearsons from claiming lands north of the township line to be established by a survey so long as they had 121 acres. Although Mr. Pearson claims that a plain reading of the agreement shows that no conditions were placed upon him, only Mr. Hice, we note that the document contains the express provision "then no dispute will be made on the boundary line" without designation of only one of the parties. The Hices assert that it was the clear intent of the parties that neither of them would dispute the findings of the future survey. Once more, we cannot say the circuit court was clearly erroneous in its interpretation of the written agreement.

Affirmed.

HART and HEFFLEY, JJ., agree.