

ARKANSAS COURT OF APPEALS

DIVISION III

No. CA11-807

JASON R. LASTER

APPELLANT

V.

PERRY WILLIAMS

APPELLEE

Opinion Delivered April 25, 2012

APPEAL FROM THE GRANT
COUNTY CIRCUIT COURT
[NO. CV-2010-57-2]HONORABLE PHILLIP H.
SHIRRON, JUDGEAFFIRMED IN PART; REVERSED IN
PART**JOHN MAUZY PITTMAN, Judge**

This is an appeal from an order that dismissed appellant's complaint for trespass and quieted title to a disputed tract in appellee. Appellant argues that the trial court erred in finding that he failed to prove trespass, in finding that appellee established title by adverse possession or acquiescence, in overruling appellant's objection to hearsay testimony, and in awarding appellee attorney's fees. We reverse as to the attorney's fee award and affirm in all other respects.

The central issue in this case is whether appellee acquired title to the disputed tract. An action to quiet title sounds in equity. *Thurkill v. Wood*, 2010 Ark. App. 319. On appeal, equity cases are tried de novo on the record made in the trial court with respect to questions of both law and fact. *Ferguson v. Green*, 266 Ark. 556, 587 S.W.2d 18 (1979). However, deference is given to the superior position of the trial court to judge the credibility of

witnesses, *Holaday v. Fraker*, 323 Ark. 522, 915 S.W.2d 280 (1996), and we do not reverse a finding of fact made by the trial court unless we conclude that the finding is clearly erroneous. *Conagra, Inc. v. Tyson Foods, Inc.*, 342 Ark. 672, 30 S.W.3d 725 (2000). A finding is clearly erroneous when, although there is evidence to support it, the appellate court is left with the definite and firm conviction that a mistake has been made. *Id.*

In *Rabjohn v. Ashcraft*, 252 Ark. 565, 480 S.W.2d 138 (1972), our supreme court set out the principles governing the law of boundary lines by agreement and by acquiescence:

The proprietors of adjacent lands may establish a binding arbitrary boundary line, by agreement, which may be parol. Such an agreement becomes binding if the location of the true line is in doubt or dispute, and the parties enter into possession pursuant to it, even though their possession does not extend for the full statutory period of seven years. The agreement need not be express, but it may be inferred from long-continued acquiescence of the parties and occupation according to such line, or from other actions of the parties. Quite apart from the inference of some parol agreement, a boundary may also be established by adjoining owners by acquiescence in a clearly established line as the boundary over a period in excess of seven years, whether preceded by a dispute or uncertainty as to the line or not and without the necessity of adverse user to the line. Whenever adjoining landowners tacitly accept a fence line or other monument as the visible evidence of their dividing line and thus apparently consent to that line, it becomes the boundary by acquiescence. When the adjoining owners occupy their respective premises up to the line they mutually recognize and acquiesce in as the boundary for a long period of time, they and their grantees are precluded from claiming that the boundary thus recognized and acquiesced in is not the true one, although it may not be.

Id. at 570–71, 480 S.W.2d at 141 (internal citations omitted).

The present case arose out of a boundary dispute between a new owner and a long-time resident of adjoining rural property. The new owner, the appellant, purchased his property in August 2009 from James H. Moore, Trustee of the James H. Moore Revocable Trust. In October 2009, appellant had a survey performed that indicated that the current

boundary fence deviated from the property description. The disputed tract was a triangular wedge extending approximately twenty-five feet at its greatest extent. Appellant had begun to move the boundary fence to conform with the survey when the long-time neighboring resident, appellee, objected. Appellee testified that he bought the property in 1985 and, when inspecting the boundaries soon thereafter, met James Moore at the fence line. They talked about the boundary, and Moore told appellee that it was the fence line. Moore and appellee agreed to help one another in maintaining the fence and keeping their respective cattle in their proper pastures. Moore's son-in-law, who had accompanied Moore at the time of the boundary meeting, corroborated appellee's testimony concerning the discussion. Moore and appellee treated the fence line as the boundary for approximately twenty-five years, each grazing their cattle on his own side of the fence, until Moore sold the property to appellant. We hold that the evidence clearly shows that appellee and Moore had an agreement concerning a fixed and certain property line that was recognized by both of them for decades.

Appellant argues that Moore, although the occupier of the premises, was not the owner, but was instead trustee of the James H. Moore Revocable Trust, and that appellee failed to show that Moore was acting in his capacity as trustee in dealing with appellee. We note that this argument was not developed at trial. Nevertheless, it is clear from the record that Moore was in fact the actual occupier and proprietor of the property, as well as being a beneficiary and trustee of the trust that held legal title to the property. Our courts have held that the actions of persons in possession of property under a contract of sale could constitute acquiescence even though their title was equitable rather than legal, *see Rabjohn v. Ashcraft*,

supra, and have rejected the argument that acquiescence in a boundary line by a tenant with an interest in the subject property cannot bind the landowner. *Stadler v. Warren*, 2012 Ark. 65. Under these circumstances, where the record shows that Moore occupied the land for the entire twenty-five-year period; was Trustee of the James H. Moore Revocable Trust, which held legal title to the land; and held a proprietary interest in the land as a beneficiary under the trust, we hold that his acquiescence in the boundary line was binding insofar as the parties to the present dispute were concerned. The trial court did not clearly err in finding that appellee acquired title to the disputed tract by acquiescence. Given our holding on this point, appellant's argument relating to adverse possession and trespass are moot, and we need not address them.

We next address appellant's hearsay arguments. We will reverse a trial court's ruling on the admission of evidence only if there has been an abuse of discretion and a showing of prejudice with respect to the evidentiary ruling. *Robertson v. Lees*, 87 Ark. App. 172, 189 S.W.3d 463 (2004). Appellant argues that appellee's testimony concerning a fence-line conversation with Moore twenty-five years earlier was inadmissible hearsay. We do not agree. Hearsay is a statement made by an out-of-court declarant that is repeated in court by a witness and is offered into evidence to prove the truth of the matter asserted in the out-of-court statement. Ark. R. Evid. 801(c). Here, Moore's statement that the fence line was the actual boundary line was not offered to prove the truth of the matter asserted; it is uncontested that the survey line was the actual boundary described in the deed. Appellant also argues that the trial court erred in excluding on hearsay grounds the testimony of

Moore's widow that Moore told her that he never intended to give any property to appellee. However, this testimony was offered to prove the truth of the matter asserted, and was therefore hearsay. We find no error on these points.

Appellant next argues that the trial court erred in awarding appellee attorney's fees under Ark. Code Ann. § 16-22-309(a)(1) (Repl. 1999), which authorizes an award of attorney's fees in civil actions where there is a complete absence of a justiciable issue of either law or fact raised by the losing party if it is shown that the claim was baseless and brought in bad faith with intent to harass. Our review as to whether there was a complete absence of a justiciable issue is de novo on the record of the trial court alone. *Adams v. Atkins*, 97 Ark. App. 328, 249 S.W.3d 166 (2007). Although appellant did not prevail, his claim to the disputed tract was supported both by a survey result and by the testimony of the surveyor, and by evidence that appellee entered upon the disputed area and damaged the survey materials and fence posts erected to conform to the survey. Under these circumstances, we cannot say that there was a complete absence of a justiciable issue, and we hold that the trial court erred in ordering appellant to pay attorney's fees.

Affirmed in part; reversed in part.

ABRAMSON and BROWN, JJ., agree.