

RENDERED: APRIL 14, 2006; 10:00 A.M.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2003-CA-002770-MR

ANNA HURT

APPELLANT

v.

APPEAL FROM KNOTT CIRCUIT COURT  
HONORABLE JOHN ROBERT MORGAN, JUDGE  
ACTION NO. 98-CI-00282

DELZA YOUNG; and  
EULANDA YOUNG

APPELLEES

OPINION  
AFFIRMING

\*\* \*\* \* \* \* \*\*

BEFORE: McANULTY, SCHRODER, AND VANMETER, JUDGES.

VANMETER, JUDGE: Anna Hurt appeals from a judgment entered by the Knott Circuit Court after a jury found for appellees Delza Young and Eulanda Young in a boundary dispute proceeding. For the reasons stated hereafter, we affirm.

Hurt and her late husband, Henry Hurt, and the Youngs purchased adjacent parcels of land in Knott County in the late 1940's. They peacefully resided as neighbors for some fifty years, and no boundary line issues arose until timber was cut on a certain section of land which the Hurts and the Youngs then

each claimed as their own. In October 1998, the Hurts filed the underlying action<sup>1</sup> alleging that the Youngs had trespassed, cut timber, and inflicted damages on the disputed area.

The issue before the jury was whether a common boundary between the parties' properties, which the Youngs' deed described as being at the "main bench of [the] mountain," was located at the mountain's "upper bench" or at its "lower bench." The parties agreed that the disputed property was owned by Hurt if the main bench was located at the upper bench, but that it was owned by the Youngs if the main bench was located at the lower bench. After the jury found by interrogatory that the main bench was situated at the lower location, a judgment was entered for the Youngs. The court subsequently denied Hurt's motion for a new trial, and this appeal followed.

Hurt first contends that she is entitled to a new trial because the trial court erroneously permitted the Youngs' expert witness to testify regarding several calls which were listed in prior deeds in the Youngs' chain of title, but which were missing from their deed. We disagree.

As noted above, the parties agreed both that ownership of the disputed area turned on pinpointing the location of the main bench of the mountain, and that the main bench was whichever of the two benches was wider. Further, there were no

---

<sup>1</sup> After Henry Hurt's death, no steps were taken to revive his claim and this matter proceeded in Anna Hurt's name alone.

objections to the jury's consideration of a sole interrogatory which required the jurors to determine from the evidence whether the main bench was the upper bench as contended by Hunt, or the lower bench as contended by the Youngs.

The trial transcript shows that Hurt's survey witness testified that he researched the pertinent deeds and "walked the property to determine what [he] felt like" was the main or widest bench. After observing the two benches and the relevant contour map, the witness concluded that the wider or main bench was the higher bench located "almost to the top of the ridge." However, the witness admitted that he had not surveyed the benches and that survey measurements would more accurately measure the benches' widths.

The Youngs' survey witness, who had trained and supervised Hurt's witness for some ten years, testified that he also had researched the deeds and walked the property. After his crew surveyed both benches, he concluded that the lower bench was "much wider" than the higher bench. More specifically, he testified that the flat areas on the lower bench were twenty-five to forty-five feet wide, while the flat areas on the upper bench were perhaps fifteen feet wide. The witness concluded that the lower bench was the main bench referenced in the Youngs' deed for the following reasons:

[F]irst off, the description refers to running up the hollow to the head of the hollow then to the main bench. This little drain, once you get to this bench here there is no drain apparent up hill of that, so that was very important. The second things [sic] was that the fence turned and went to the right when it hit this main bench. And then the third thing is that the bench is larger than any bench that was found up hill from it.

Given the fact that Hurt's witness testified only as to his visual observations of bench widths, while the Youngs' witness testified regarding not only visual observations but also survey measurements of the two benches, we cannot say that the jury's finding in favor of the Youngs was clearly erroneous.<sup>2</sup> Hence, the judgment may not be set aside on appeal.<sup>3</sup>

Moreover, we are not persuaded by Hurt's contention that the trial court erred by failing to grant her motion for a new trial after permitting the Youngs' survey witness to testify regarding several boundary calls which allegedly were present in predecessor deeds but missing from the Youngs' deed. Even if we were to assume, *arguendo*, that the court erred by permitting such testimony, the error was harmless since it was never disputed that the jury's location of the main bench and property line would be based on a determination of whichever bench was

---

<sup>2</sup> See CR 52.01.

<sup>3</sup> See *Croley v. Alsip*, 602 S.W.2d 418 (Ky. 1980); *Webb v. Compton*, 98 S.W.3d 513 (Ky.App. 2002).

wider, rather than on a survey location of the calls of the boundary line.

Next, Hurt contends that she is entitled to a new trial because the Youngs allegedly provided perjured testimony at trial. We disagree.

An accusation of perjury must be supported by an allegation that the defendant knew that his or her statement was false when the statement was made.<sup>4</sup> Here, Hurt's motion for a new trial contained no such allegation. Instead, it relied on the posttrial affidavits of nonparties and a surface usage agreement between the Youngs and a coal company. Regardless of whether the Youngs may have provided inaccurate testimony regarding the locations of a pond, a garden, timbered property, or mined property in relation to the lower bench, there is nothing in the record which indicates that they knowingly made false statements. In any event, the accuracy of the testimony was not relevant to the jury's determination of the ultimate issue of which bench was the wider "main bench" which divided the two properties. The trial court therefore did not err by failing to grant the requested relief.

The court's judgment is affirmed.

ALL CONCUR.

---

<sup>4</sup> *Williams v. Commonwealth*, 287 Ky. 659, 154 S.W.2d 728 (1941).

BRIEF FOR APPELLANT:

Joe F. Childers  
Lexington, Kentucky

BRIEF FOR APPELLEES:

Ronald G. Combs  
Hazard, Kentucky