COURT OF APPEAL FOR ONTARIO

CITATION: Armstrong v. Moore, 2020 ONCA 49
DATE: 20200127
DOCKET: C66333

Strathy C.J.O., MacPherson and Jamal JJ.A.

BETWEEN

William John Armstrong and Teresa Jesus Armstrong

Plaintiffs (Appellants/Respondents by Cross-Appeal)

and

Howard Moore, Laureen Margaret Moore, Larry Joseph Edwards, Colleen Elizabeth Edwards, Wayne Cartwright, Janet Cartwright, Julie Edwards, Lawrence Henry Hierlihy, Jeannette Theodora Hierlihy, Gloria Mae Edmunds, Carolee Stacey Hofman, Donald Demers and Robert William Moore

Defendants (Respondents/Respondents and Appellants by Cross-Appeal)

Stuart R. Mackay, for the appellants/respondents by way of cross-appeal William John Armstrong and Teresa Jesus Armstrong

Shawn J. O'Connor, for the respondent/appellant by way of cross-appeal Robert William Moore

Joseph W.L. Griffiths and Matthew G. T. Glass, for the respondent/appellant by way of cross-appeal Howard Moore and for the respondent Laureen Margaret Moore

No one appearing for the self-represented respondent Lisa Coutu (written submissions only)

No one appearing for the respondents Larry Joseph Edwards and Colleen Elizabeth Edwards

Heard: January 13, 2020

On appeal from the judgment of Justice Calum U.C. MacLeod of the Superior Court of Justice, dated November 27, 2018, with reasons reported at 2018 ONSC 7056, 5 R.P.R. (6th) 316.

REASONS FOR DECISION

A. OVERVIEW

[1] This appeal, involving claims for adverse possession and damages, arose in connection with the placement of an outhouse by one cottager on another cottager's property, with permission, for over 40 years. The dispute arose when renovation activities on one property resulted in a washout of dirt that allegedly rendered unusable the outhouse and the cottage it serviced.

[2] After a seven-day trial, the trial judge dismissed the appellants' claim for adverse possession of a small area of land surrounding the outhouse but awarded them nominal compensatory and punitive damages, for a total of $15,000. The parties now appeal and cross-appeal that decision to this court.

[3] At the conclusion of the oral argument we dismissed the appeal and cross-appeal, with reasons to follow. These are our reasons.

B. BACKGROUND FACTS

[4] In 2003, the appellants William and Teresa Armstrong bought a cottage on the Ottawa River near Pembroke, Ontario. The cottage, purchased for $38,000,

had no indoor plumbing and is accessible only via an access road along a deeded right of way on the property of the respondents Howard and Laureen Moore. The only toilet servicing the Armstrong property was an outhouse located on a non-travelled portion of the right of way, where it had been for over 40 years. A shed stood next to the outhouse and both were sheltered by mature cedar trees. Although the outhouse and shed were on the Moores' land, the Armstrongs treated them as part of their cottage.

[5] In 2006, Howard and Laureen's son, the respondent Robert Moore, acquired property uphill from the Armstrong's property and began renovations. In 2007, Robert placed a large amount of fill on his land. When William Armstrong raised concerns with Robert and Howard Moore that the fill might seep onto his property, he was rudely rebuffed: Robert told him that it "sucks to be at the bottom of the hill" and suggested he get some sandbags, while Howard told him to get a lawyer if he was dissatisfied.

[6] Later in 2007, a washout on Robert's property caused mud and water to surround and enter the Armstrongs' outhouse. The Armstrongs alleged that this rendered their cottage unusable because they now had no toilet and they believed they could not get a permit to build a new one. They retained an engineer in 2008 who advised them that they were at risk of future washouts and recommended that they install a retaining wall.

[7] The Armstrongs did not use their cottage again.

[8] In 2009, the Armstrongs sued Robert Moore for $250,000 in compensatory and punitive damages, claiming that his negligence resulted in the loss of the use and enjoyment of their cottage.

[9] Also in 2009, Howard Moore learned of potential claims for adverse possession in connection with his property. He cut down the cedars sheltering the outhouse and shed, removed the tree stumps, and posted signs warning other residents that they might lose their right of way if the adverse possession claims succeeded. Later, the shed and outhouse were destroyed when someone dumped snow and gravel on them.

[10] In 2011, the Armstrongs began a second action claiming adverse possession of the lands involving the outhouse, shed, and surrounding cedars, and $100,000 in damages against Howard, Laureen, and Robert Moore and others for the destruction of their outhouse and shed, for the loss of the use of their cottage, and for promoting animosity against them.

[11] Most of the other defendants in the second action were property owners whose property was accessed by the right of way. While most did not participate in the action or appeal, Lisa Coutu filed written submissions with this court explaining that she and Deric Coutu had contributed to the maintenance and improvement of the right of way since buying their property in 2012 and that losing

the right of way would impede service vehicles from accessing homes to the south of the Armstrongs' cottage.

C. THE TRIAL JUDGE'S DECISION

[12] Both actions were heard together in a joint trial. The trial judge rejected the adverse possession claim because he concluded that the Armstrongs had not established that their predecessors in title had intended to permanently exclude the rights of the registered owners of the fee or of the right of way.

[13] The trial judge found Robert Moore negligent in placing fill on his land in a way that unreasonably interfered with the rights of his neighbours. However, he found that the Armstrongs had failed to prove the quantum of their damages and had not mitigated their loss by cleaning up, repairing, or rebuilding their outhouse. He therefore awarded only nominal damages of $5,000 for the cost of cleanup, repair, and reconstruction, and $2,000 for the interruption in the use of the cottage.

[14] The trial judge also found Howard Moore liable for aiding, abetting, and encouraging the destruction of the outhouse. He found that Howard knew that the Armstrongs depended on the outhouse and that it would be difficult to use their property without it. He also found that Howard's conduct in removing the cedars without advising the Armstrongs contributed to the destruction of the outhouse and shed and that Howard encouraged vandalism and engaged in intimidation. Since by then the outhouse had already been damaged by Robert's negligence and there

were frailties in the Armstrongs' evidence as to their damages, the trial judge assessed nominal damages against Howard at an additional $3,000.

[15] Finally, the trial judge found Howard liable for $5,000 in punitive damages for exacerbating the conflict between the parties, exposing the outhouse to further damage by removing the cedars, encouraging vandalism, engaging in intimidation, and for spoliation of evidence to impede the adverse possession claim by removing the cedars and their stumps so that their age could not be verified.

D. ISSUES

[16] The Armstrongs appeal on the issues of adverse possession, abandonment of the rights of way by other property owners, and the quantum of compensatory and punitive damages. Robert and Howard Moore cross-appeal on the issues of compensatory and punitive damages.

[17] The four issues are thus: (1) adverse possession; (2) abandonment of rights of way; (3) compensatory damages; and (4) punitive damages.

E. ANALYSIS

(1) Did the trial judge err in rejecting the Armstrongs' claim for adverse possession?

[18] To succeed on a claim for adverse possession, a claimant must establish possession that is open, notorious, constant, continuous, peaceful and exclusive of the right of the true owner throughout a ten-year period: *Real Property*

Limitations Act, R.S.O. 1990, c. L.15, s. 4. The claimant must prove: (i) actual possession of the land in issue; (ii) an intention to exclude the true owner from possession of their land; and (iii) effective exclusion of the true owner from possession of their land: *Barbour v. Bailey*, 2016 ONCA 98, 345 O.A.C. 311, at paras. 35-36; *McKay v. Vautour*, 2020 ONCA 16, at para. 7. The ten-year period of possession must have occurred entirely before the land was placed under the land titles system. Adverse possession cannot arise after that time but is preserved if already acquired: *Land Titles Act*, R.S.O. 1990, c. L.5, s. 51; *McKay*, at para. 6.

[19] Here, because the disputed land was placed under the land titles system in August 1998, the Armstrongs had to establish that their claimed right to adverse possession had crystallized before then.

[20] The trial judge found that the Armstrongs easily met the first requirement for adverse possession: their predecessors in title had actual possession of the disputed land and used it “as if it was a part of the cottage”. He found “clear evidence of continuous use for at least 30 years prior to 1998 and quite likely longer.”

[21] However, the trial judge concluded that the Armstrongs had not established the second and third requirements: an intention to exclude and effective exclusion of the true owner from possession. For adverse possession, “[t]he element of

adversity means that the claimant is in possession without the permission of the true owner": *Teis v. Ancaster (Town)* (1997), 35 O.R. (3d) 216 (C.A.), at p. 221. Or, as the trial judge stated, in a claim for adverse possession "permission is fatal". He noted that the outhouse had been moved by one of the Armstrongs' predecessors in title at the request of another landowner to whom Howard and Laureen Moore had sold property on which the outhouse had formerly been located. The trial judge found that this "raises an inference that the outhouse was originally put in the new location with the consent of the Moores." He also found it troubling that the Armstrongs had not called evidence from their predecessors in title or explained why such evidence could not be adduced.

[22] The Armstrongs assert that the evidence did not permit the trial judge to infer that the outhouse was placed in its current location with the Moores' consent or permission and that he conflated permission with acquiescence.

[23] We do not accept this submission. Absent palpable and overriding error or an extricable error of law, this court must defer to a trial judge's findings of fact, inferences drawn from the facts, and the inference-drawing process itself: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 6, 10, 19, 23; *Nelson (City) v. Mowatt*, 2017 SCC 8, [2017] 1 S.C.R. 138, at para. 38.

[24] The Armstrongs have not met this exacting standard. There was an evidentiary basis for the inference that the Moores gave permission as to the placement of the outhouse on their land. The Moores were involved in the decision as to where to relocate the outhouse when it was moved from one part of their property to another part, such that the trial judge could infer that they did not merely acquiesce in but rather gave their permission as to where it was placed. In our view, on the evidence the trial judge was entitled to infer permission. There is no basis for this court to intervene.

(2) Did the trial judge err in rejecting the Armstrongs' claim that the other property owners had abandoned their rights of way?

[25] The Armstrongs assert that the trial judge also erred in finding that the other property owners had not abandoned their rights of way. The Armstrongs contend that the trial judge "conflated the test for adverse possession with the test for abandonment of easement".

[26] We do not accept this submission. The trial judge found on the evidence that the Armstrongs' predecessors in title did not intend to exclude permanently the rights of way of the other property owners, and that the use actually made of the land "was not obviously inconsistent with their rights." As the trial judge noted, as a matter of law those property owners did not have to prove use of their rights of way in order to avoid losing them; indeed, the intention to abandon an expressly

granted right of way cannot be presumed merely as a result of non-use: *Bison Realty Ltd. v. Athersych* (1998), 19 R.P.R. (3d) 48 (Ont. C.J.), at para. 82, aff'd (2000) 135 O.A.C. 226 (C.A.). In our view, the trial judge correctly identified the applicable legal principles and his application of those principles is entitled to deference. We therefore have no basis to intervene.

(3) Did the trial judge err in awarding the appellants nominal compensatory damages against Robert and Howard Moore?

[27] Both the Armstrongs and the Moores impugn the trial judge's decision to award the Armstrongs nominal compensatory damages for Robert Moore's negligence in causing damage to and loss of use of the outhouse and for Howard Moore's aiding, abetting, and encouraging the destruction of the outhouse. The Armstrongs complain that the trial judge awarded too little; the Moores complain that he awarded too much.

[28] We reject both positions.

[29] The plaintiff bears the burden of proving their damages on the balance of probabilities. Where damages are difficult to assess, the court must do the best it can in the circumstances. But where the absence of evidence makes it impossible to assess damages, the court may award nominal damages: *TMS Lighting Ltd. v. KJS Transport Inc.*, 2014 ONCA 1, 314 O.A.C. 133, para. 61, citing *Martin v.*

Goldfarb (1998), 41 O.R. (3d) 161 (C.A.), at para. 75, leave to appeal refused, [1998] S.C.C.A. No. 516.

[30] Once the applicable legal principles are correctly identified, a trial judge's assessment of damages attracts considerable deference before this court. Appellate interference is justified "only where the trial judge made an error in principle, misapprehended the evidence, failed to consider relevant factors, considered irrelevant factors, made an award without any evidentiary foundation, or otherwise made a wholly erroneous assessment of damages": *TMS Lighting Ltd.*, at para. 60.

[31] Here, the trial judge correctly identified the applicable legal principles. We do not accept the Armstrongs' submission that the trial judge erred by improperly assessing the Armstrongs' damages in 2018, with the benefit of hindsight that there had been no further washouts of their property, rather than from the perspective of 2008, when it was reasonably foreseeable based on their engineer's report that there might be further washouts. This was only one factor, among several, for the trial judge's conclusion that the Armstrongs were entitled to damages for only a short-term interruption of use of their cottage.

[32] We also disagree with the Moores' submission that they could not be liable for damage to the outhouse because Howard and Laureen owned the land on

which the outhouse was situated. The trial judge correctly concluded that the outhouse was a chattel that the Armstrongs owned, rather than a fixture forming part of the land, because it had been moved on occasion and was purchased with the Armstrongs' cottage. The trial judge found that the outhouse was located on the Moores' land with their permission, and that Howard Moore was "reckless if not deliberate and negligent if not intentional" in taking actions that exposed it to foreseeable harm.

[33] Having correctly identified the applicable legal principles, the trial judge's decision to award only nominal damages is entitled to deference. He awarded modest nominal compensatory damages ($10,000 in total) because he was persuaded that the Armstrongs had "suffered damage that has a measurable cost", but he was "hampered by the absence of specific evidence" as to the quantum of their damages, and he was satisfied that any further inquiry into the quantum would be disproportionate given the low amounts of damages potentially recoverable. We see no basis for this court to intervene with this decision.

(4) Did the trial judge err in awarding the appellants nominal punitive damages against Howard Moore?

[34] Lastly, the Armstrongs appeal and Howard Moore cross-appeals the nominal ($5,000) punitive damages awarded. The Armstrongs say the amount should have been $40,000, while Howard Moore says that none were justified.

[35] Appellate deference is owed to a trial judge's decision to award punitive damages, provided that they are a rational response to the facts, that is, where the misconduct of the defendant is so outrageous that punitive damages are rationally required to act as deterrence: *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595, at paras. 76, 100; *Pita Royale Inc. (Aroma Taste of the Middle East) v. Buckingham Properties Inc.*, 2019 ONCA 439, 1 R.P.R. (6th) 1, at para. 27, leave to appeal refused, [2019] S.C.C.A. No. 307.

[36] In our view, there was a rational basis for the trial judge's decision to award nominal punitive damages given his findings that Howard Moore exacerbated the conflict between the parties, exposed the outhouse to further damage by removing the cedars, encouraged vandalism, and engaged in intimidation. The trial judge was entitled to find these acts justified a punitive award as malicious, oppressive, and high-handed misconduct that offends the court's sense of decency: *Whiten*, at para. 36, citing *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at para. 196. It was open to the trial judge to conclude that punitive damages in this amount were rationally required.

[37] However, we defer to another day whether a court is entitled to rely on spoliation of evidence as providing a basis for awarding punitive damages. Ontario jurisprudence has yet to resolve definitively whether spoliation is a cause action: See *Spasic Estate v. Imperial Tobacco Ltd.* (2000), 49 O.R. (3d) 699 (C.A.), at

paras. 12, 22; leave to appeal refused, [2000] S.C.C.A. No. 547. In our view, that issue need not and should not be resolved in this appeal.

F. CONCLUSION

[38] The appeal and cross-appeal are dismissed. As agreed by the parties, given the divided success there shall be no order as to costs.

"G.R. Strathy C.J.O."
"J.C. MacPherson J.A."
"M. Jamal J.A."