C.A. No. 129916

NOVA SCOTIA COURT OF APPEAL

Chipman, Hart and Pugsley, JJ.A.

Cite as: MacKinnon v. MacDonald, 1997 NSCA 22

BETWEEN:

ANN FRANCES MacKINNON, GREGORY MacKINNON, PATRICIA MacNEIL and BRIAN MacNEIL Appellants - and - **ALAN MacDONALD, KATHLEEN MacDONALD and DANIEL W. ALMON** Respondents	)	Daniel J. MacIsaac, Esq. for the Appellants Michael R. Brooker, Esq. for the Respondents Appeal Heard: February 12, 1997 Judgment Delivered: February 24, 1997

THE COURT: The appeal is allowed in part, per reasons of Pugsley, J.A.; Hart and Chipman, JJ.A. concurring.

Pugsley, J.A.

The appellants, Ann MacKinnon, Father Gregory MacKinnon and Patricia MacNeil, are siblings and were the original defendants in an action brought by the respondents, for the determination of the southern boundary of the respondents' property at Mahoney's Beach, as well as for damages for trespass on the respondents' lands. The appellant Brian MacNeil is the son of the appellant Patricia MacNeil.

The appellants have resided at, or had an association with, Mahoney's Beach since the 1920's. It is located eight miles from Antigonish on the north side of Antigonish Harbour. The trial judge described it as an "idyllic spot where the waves of St. George's Bay lap silver sands . . . a spot for Antigonish people to enjoy the salt water and beach during the summer months".

The respondents, Alan and Kathleen MacDonald, are brother and sister, and the respondent Daniel Almon is their brother-in-law. The respondents, and the parents of Alan and Kathleen MacDonald before them, leased initially and subsequently owned property at Mahoney's Beach.

After hearing three days of evidence, the trial judge reserved judgment and subsequently concluded that the southern boundary of the respondents' property was determined by the northern boundary of the Mahoney Farm Road as it was in 1946, and as depicted on a plan of Brian Cameron, a surveyor employed by the Department of Natural Resources, who was called on behalf of the respondents.

The appellants set forth a number of grounds of appeal which are, in my opinion, essentially complaints respecting findings of fact, or the assessment of credibility made by the trial judge.

The trial judge, for example, emphatically rejected the evidence of a surveyor called by the appellants, characterizing him as a "hired gun", whose evidence was unacceptable, preferring the evidence of Mr. Cameron.

We are not satisfied that the trial judge made any palpable or overriding error in his assessment of the evidence, or that he wrongly applied any principle of law, or that there was a total lack of factual foundation respecting any of his conclusions in determining the boundary of the respondents' lands (**Stein Estate v. Ship "Kathy Kay"**, [1976] 2 S.C.R. 802).

We would accordingly dismiss the first nine grounds of appeal.

After the evidence was concluded, and counsel had made their submissions, the trial judge stated:

> . . . I want to take some time to consider what my comments about Brian MacNeil's conduct in this matter has been. His attitude disturbs me greatly and it certainly seems at variance with his uncle's but I think I will reserve my comments until I'm able to put them in writing and consider them a little more fully.

The foregoing prompted counsel for the respondents to seek leave to amend the Statement of Claim to join Mr. MacNeil "as a party defendant alleging trespass only". Counsel prefaced his remarks with these words:

> "I guess I'm a little late in the day in this respect."

Counsel for the original defendants objected to the joinder of Mr. MacNeil.

The trial judge, in his reserved decision, filed some three weeks later, commented on this issue as follows:

> At the conclusion of the evidence, counsel for the plaintiff submitted that Brian MacNeil be added as a defendant to this action pursuant to s.504(2)(b) **Nova Scotia Civil Procedure Rules** which provides:
>
> 5.04 . . .
> (2) At any stage of a proceeding the court may, on such terms as it thinks just and either of its own motion or on application, . . .
>
> (b) order any person, who ought to have been joined as a party or whose participation in the proceeding is necessary to ensure that all matters in the proceeding

> may be effectually adjudicated upon, be added as a party; . . .

Brian MacNeil by his testimony indicates he is a teacher, 36 years old, living at home with his mother, Patricia MacNeil, and a brother, Andrew. He was the spokesman for the defendants, acquired the documents from the Registry, (Exhibit 17), consulted MacPhee, cut the branches from MacDonald's hedge, applied the herbicide to the property of the plaintiffs, and without authorization, had the culvert dug up on the right-of-way of the plaintiff. The culvert, which has been covered with gravel over the years had, according to Brian MacNeil, afforded a place for someone to hide nails which punctured his and his brother's car tires, which is conjecture.

Brian MacNeil is a bitter, angry and arrogant young man with little regard for the rights of others. One example: he stated the reason for cutting the limbs off the trees, "safety of the children". There was no evidence of children in December. His evidence cannot be relied upon. It is calculated to further what he perceives as a good cause.

The defendants submit the Wournell case [**P.A. Wournell Contracting Limited** and **Wournell v. Allen** (1980), 37 N.S.R. (2d) 125] as authority against granting the order. I am not of that opinion.

Granting the order would not create a new cause of action. It has already been pleaded and the defendants have been able to make full answer and defence.

Rule 1.03 states:

> 1.03 The object of these Rules is to secure the just, speedy and inexpensive determination of every proceeding.

Therefore, I would grant the order adding Brian MacNeil as a defendant to these proceedings.

The defendant Brian MacNeil during the course of this litigation has trespassed and damaged property of the plaintiffs, and I award damages punitive and general in the amount of $5,000

. . .

> I would find the defendant Brian MacNeil's conduct during the course of litigation vindictive, reprehensible and malicious in nature.

I am, with respect, of the opinion that the trial judge failed to exercise his discretion on judicial grounds when he joined Mr. MacNeil as a party and assessed damages against him.

While **Civil Procedure Rule** 5.04(2)(b) may literally be interpreted to authorize such a joinder, it can only be exercised on judicial grounds. It is only in an exceptional case where the trial judge would be justified in adding a defendant to an action after a trial was concluded. This is not one of those cases.

Brian MacNeil could not reasonably have appreciated that he was in jeopardy at any time prior to, or during, the trial. He had no opportunity to prepare any response that might have been available to him to assist in defending a claim for damages, let alone a claim for punitive damages. He had no opportunity to avail himself of the avenues contained in the **Civil Procedure Rules** to assist a named defendant to determine the extent, or validity, of claims advanced against him, or her, and to prepare a strategy in response.

In **Wournell**, the trial judge in a reserved decision, added Mr. Wournell as a party plaintiff and awarded him general damages in the amount of fifteen hundred dollars ($1,500). The facts in the present case are, of course, different, but the following comments of Macdonald, J.A. on behalf of this Court, at 130 are apposite:

> It is my opinion that once the trial judge added Mr. Wournell as a party the right should have been given the appellant to contest this new claim by, amongst other procedures, filing a defence, conducting discovery examination, instigating settlement negotiations, cross-examining him at trial as to his claim, leading evidence to counter it and making submissions why it should not be entertained. All these, of course, after Mr. Wournell had filed a statement of claim. In short, the appellant was denied the right to make full answer and defence to the claim of Mr. Wournell . . .

There is one further issue that requires consideration. Sopinka and Gelowitz write (*The Conduct of an Appeal*, Butterworths (1993) at p. 4):

> It is a fundamental premise in the law of appellate review that an appeal is taken against the formal judgment or order, as issued, and entered in the court appealed from, and not against the reasons expressed in the court for granting the judgment or order. Although the appellate court will frequently discover in the reasons for judgment errors of law that ultimately ground the reversal of the judgment or order, it is the correctness of the judgment or order that is in issue in the appeal, and not the correctness of the reasons.

The **Civil Procedure Rules** of this province permit an appeal to be brought by filing with the Registrar a notice of appeal within certain proscribed periods from the date of order, or from the date of decision.

In this case, the decision of the trial judge was issued on July 4, 1996, the notice of appeal filed on July 18, 1996, and the order taken out on November 24, 1996.

The order recites:

> Now upon hearing Michael R. Brooker on behalf of the plaintiffs and Daniel J. MacIsaac on behalf of the defendants, consenting as to form.

Mr. MacIsaac did not, however, append his consent to the order.

In addition to the provisions respecting the determination of the contested boundary of the respondents' lands, the order taken out by counsel for the plaintiffs, provides:

> 4. That Brian MacNeil be and is hereby made a defendant to this proceeding pursuant to Nova Scotia **Civil Procedure Rule** 5.04(2)(b).
>
> 5 That the Defendants shall forthwith pay to the plaintiffs the amount of $5,000 as punitive and general damages.

The reference to "the Defendants" in paragraph 5 is not responsive to the decision of July 4th. No claim for punitive damages against the original defendants was included in the statement of claim, nor was any amendment to that effect sought. An

examination of the reasons of the trial judge, as well as the evidence, does not suggest any claim for

damages, either punitive or general, is justified against the original defendants. Indeed, the comments of the trial judge at the end of the trial, as well as the reasons expressed in his reserved decision, lead to the inescapable conclusion that both punitive and general damages, were assessed against Brian MacNeil alone. Counsel for the Respondent, at the hearing of this appeal, did not take issue with this conclusion.

The taking out of the order, subsequent to the filing of the notice of appeal, explains the absence of any ground of appeal raised by the original defendants to the award of damages against them.

In conclusion, I would:

- dismiss the first nine grounds of appeal, and affirm the first three paragraphs of the order of November 24, 1996;;
- allow the appeal of Brian MacNeil, and set aside the joinder of Brian MacNeil as a defendant, as well as the award of damages, both punitive and general, and costs, assessed against him;
- set aside the award of damages, both punitive and general, made against the original defendants, in the order of November 24, 1996;
- affirm against the original defendants the award of costs at trial;
- award costs of the appeal to the respondents against the original defendants in the amount of forty percent (40%) of trial costs of five thousand eight hundred and fifty dollars ($5,850), together with disbursements;
- award costs of the appeal to the appellant Brian MacNeil in the amount of one thousand dollars ($1,000) including disbursements.

Pugsley, J.A.

Concurred in:

Hart, J.A.

Chipman, J.A.

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ANN FRANCE MacKINNON

GREGORY MacKINNON, PATRICIA MacNEIL and BRIAN MacNEIL
Appellants

- and -

ALAN MacDONALD, KATHLEEN MacDONALD and DANIEL W. ALMON

Respondents

REASONS FOR JUDGMENT BY:

Pugsley, J.A.