NOVA SCOTIA COURT OF APPEAL
Citation: ***Rafuse v. Swinimer***, 2010 NSCA 10

Date: 20100217
Docket: CA 314264
Registry: Halifax

Between:

Lena Rafuse, Glenn Rafuse and Wendall Rafuse

Appellants

v.

Craig Donald Swinimer and Shelly Lynn Rafuse

Respondents

Judges:	Saunders, Oland and Fichaud, JJ.A.
Appeal Heard:	February 16, 2010, in Halifax, Nova Scotia
Held:	Appeal dismissed per reasons for judgment of Saunders, J.A.; Oland and Fichaud, JJ.A. concurring.
Counsel:	Michael K. Power, Q.C., for the appellants G. F. Philip Romney, for the respondents

Reasons for judgment:

[1] After hearing counsels' submissions we recessed and then returned to court to announce our unanimous decision that the appeal was dismissed with costs to the respondents and reasons to follow. These are our reasons.

[2] This appeal follows a three-day trial involving a dispute between neighbours over a right-of-way, which led to wrecked gardens; torn up rose bushes; access blocked by boulders and steel girders; and emergency calls to the RCMP. The principal issues were a determination of the mode of usage of the right-of-way, and entitlement to damages.

[3] In a decision now reported at 2009 NSSC 179, Justice Arthur W. D. Pickup:

(i) found that the original grant of right-of-way described in the appellants' 1942 deed was intended for pedestrian use only, and that the appellants' evidence fell short in establishing that the intended use or practice had changed over the years to permit the operation of motor vehicles,

(ii) awarded the appellants general damages of $2,200 as compensation for the respondents' callous, planned and deliberate interference with their known right-of-way,

(iii) held that while the respondents had destroyed bushes and shrubs in the appellants' garden, the appellants had not presented sufficient evidence to prove actual pecuniary loss and accordingly were only entitled to nominal damages of $500, and

(iv) determined that because the appellants had used another road to access their property, they had failed to establish any loss of enjoyment, and therefore this particular claim for damages was dismissed.

[4] The appellants ask that Justice Pickup's decision and confirmatory order be reversed in two respects. First, they say he was wrong to conclude that the mode of usage of the right-of-way was limited to pedestrian traffic only. Second, they

say he erred in awarding "unreasonably low general damages for loss of quiet enjoyment and loss of use" and they ask this court to substitute "general damages of at least $15,000".

[5] We see no merit to the appellants' submissions. Their complaints are really nothing more than an invitation to retry the case or substitute our view of the facts, for Justice Pickup's. With respect, that is not our role.

[6] The trial judge's analysis, reasoning and conclusions all involve questions of fact, or mixed law and fact with a heavy factual component. They are immune from appellate interference absent any palpable and overriding error**. Housen v. Nikolaisen**, [2002] 2 S.C.R. 235; **McPhee v. Gwynne-Timothy**, 2005 NSCA 80; and **McCormick v. MacDonald**, 2009 NSCA 12. We find no such error in this case.

[7] As for damages, the appellants have not accurately characterized Justice Pickup's findings. As noted earlier, they challenge his decision for awarding "unreasonably low general damages for loss of quiet enjoyment and loss of use in the circumstances of the case". They ask us to substitute general damages "of at least $15,000". The record makes it clear that Pickup J. awarded general damages of $2,200 for the callous and deliberate actions of the respondents. By contrast he refused to order <u>any damages</u> for the alleged loss of enjoyment and use of the property, because the appellants had failed to produce sufficient evidence to meet their civil standard of proof.

[8] In any event, Justice Pickup's assessments under certain heads of damage, and rejection of others, find ample support in the record. There is no error in principle, nor calculation of damages so high or so low as to warrant our intervention. **Vorvis v. Insurance Corp. of British Columbia**, [1989] S.C.J. No. 46; **Whiten v. Pilot Insurance Co.**, 2002 SCC 18; **Kern v. Steele**, 2003 NSCA 147; and **McNaughton v. Ward**, 2007 NSCA 81, leave to appeal dismissed with costs [2007] S.C.C.A. No. 488.

[9] We are not persuaded that the trial judge ignored or misapprehended material evidence. Justice Pickup's comprehensive reasons reflect a clear understanding of the issues, a careful assessment of the evidence, and a proper application of the law and burden of proof to the facts as he found them.

[10] The appeal is dismissed with costs of $2,000.00 to the respondents, plus disbursements as agreed or taxed.

Saunders, J.A.

Concurred in:

Oland, J.A.
Fichaud, J.A.