

SUPREME COURT OF NOVA SCOTIA

Citation: *Sjuberg v. Moore*, 2024 NSSC 8

Date: 20240111

Docket: 521052

Registry: Kentville

Between:

Betty Ann Sjuberg and Terry Sjuberg

Applicants

v.

Gary Val Moore

Respondent

Judge: The Honourable Justice Gail L. Gatchalian

Heard: January 2, 2024, in Kentville, Nova Scotia

Counsel: Matthew Moir and Nicole Power, for the Applicants
Mark Bailey, for the Respondent

By the Court:

Introduction

[1] The Applicants, Betty Ann Sjuberg and Terry Sjuberg, and the Respondent, Gary Val Moore, own adjoining properties on East Uniacke Road. The Sjubergs filed an Application against Mr. Moore, claiming that they have a right of way over Mr. Moore's property and that Mr. Moore erected a fence and gate that blocks the Sjubergs' access to the right of way and therefore access to their property. The Sjubergs asked for an injunction requiring Mr. Moore to remove the fence and gate, and an award of damages, including punitive damages, against Mr. Moore.

[2] The Sjubergs purchased their property from Mr. Moore in October of 2018. The language granting the right of way across Mr. Moore's property in favour of the Sjuberg property is contained in the deed executed on October 18, 2018:

Benefit

Together with an easement right of way for ingress and egress and all lawful purposes over Parcel A as shown more particularly on a plan showing Lot 18-1 subdivision of land of Gary Vale Moore, East Uniacke Road, East Uniacke, Hants County, Nova Scotia which plan is filed at the Registry of Deeds for Hants County, Nova [sic] as document #113231360.

[3] The right of way is also described in a survey attached as Exhibit E to the Affidavit of Betty Ann Sjuberg sworn on August 2, 2023.

[4] At the hearing on January 2, 2024, the parties informed the court that they had reached an agreement as follows:

1. Mr. Moore consents to a finding that, in the spring of 2021, he constructed a fence along the boundary between his property and the Sjubergs' property that inhibited the Sjubergs from accessing their property via the right of way.
2. Mr. Moore will consent to an order requiring him to remove the fence, and the gate blocking entry to the right of way from the road, within 60 days of the order.
3. Mr. Moore agrees that he should pay the Sjubergs \$474.38 to reimburse them for the cost of constructing a temporary driveway.
4. Mr. Moore will consent to an order for costs within Tariff C.

[5] The outstanding issue is the assessment of damages. The Sjubergs seek general damages in the amount of \$3500 for the loss of use and enjoyment of their property. Mr. Moore agrees that general damages should be awarded against him, but he says that \$3500 is excessive.

[6] The Sjubergs also seek an award of punitive damages in the amount of \$3500. Mr. Moore says that this is not an appropriate case for punitive damages.

[7] The Sjubergs relied on two affidavits of Ms. Sjuberg. Mr. Moore filed an affidavit. There was no cross-examination on the affidavits.

Substantial Interference with Right of Way

[8] Until Mr. Moore erected the fence and gate, the Sjubergs came to Nova Scotia from Alberta seasonally and stayed in a trailer on their property while vacationing here. When they visited the property in the spring of 2021, they found that Mr. Moore had built the fence and gate, preventing them from accessing the right of way.

[9] Substantial interference with the exercise of the right of way is a nuisance: see *Romkey v. Osborne*, 2019 NSSC 56 at para.140, citing *Anger & Honsberger Law of Real Property* at para.17:20:30(b).

[10] The fence and gate erected by Mr. Moore on his property substantially interfered with the Sjubergs' exercise of the right of way. Mr. Moore's conduct constitutes an actionable nuisance.

Damages

[11] The Sjubergs relied on *Romkey v. Osborne, supra* at paras.151, 167 - 168 and 169, where the Honourable Justice Joshua M. Arnold awarded \$1500 in general damages for trespass and \$1000 in punitive damages against Mr. Osborne, who had cut down a number of trees from his neighbour's property, knowing that there was a dispute over the location, nature and extent of Mr. Osborne's right of

way over the neighbouring property. The right of way gave Mr. Osborne access to the shore. Arnold J. described Mr. Osborne's actions as "arrogant, high-handed and malicious," and "outrageous and deserving of condemnation." Arnold J. held that an award of punitive damages was necessary to denounce Mr. Osborne's conduct, to punish him for his actions, and to deter him and anyone else from engaging in this kind of behaviour in the future. Arnold J. also awarded \$300 in general damages for trespass against Mr. Romkey, who had built a fence, cribwork and rock wall that substantially interfered with Mr. Osborne's right of way.

[12] The Sjubergs also relied on the following cases cited by Arnold J.:

- *McInnis v. Stone*, 2016 NSSC 69:
 - \$1500 in general damages awarded against the respondents for trespass, where the respondents interfered with the applicant's use and enjoyment of his lands for approximately two years: at paras.130-131
 - \$3500 in punitive damages for actions that were "calculated, malicious, inexcusable and a departure from a standard of decent behaviour," which "virtually robbed the applicant of the use and enjoyment of his property from at least 2012": at para.147
- *Burgoyne v. Hutton*, 2016 NSSC 60:
 - \$2500 in general damages for trespass over the plaintiffs' driveway over a period of about three years by roughly 20 people and a dozen or more vehicles on 25 or more separate days, also interfering with the quiet and peaceful enjoyment of the plaintiffs' property: at paras.259-260 and 278
- *Patterson v. Municipal Contracting Ltd.*, [1989] N.S.J. No.108:
 - \$5000 in punitive damages against a contractor who trespassed and caused damage to the plaintiff's property and refused to restore the

damage caused after admitting responsibility and agreeing to do the restoration work: at para.47

- *Hendricks v. Brennan* (1998), 169 N.S.R. (2d) 309 (NSCA), affirming the decision of the trial judge's award of:
 - \$4200 in special damages for trespass
 - \$3000 in punitive damages for constructing a very substantial road on the disputed property surreptitiously, having committed not to do anything further on the disputed property until the litigation was resolved
- *Cantera v. Eller*, 2007 Carswell Ont 3082 (Ont. S.C.J.), affirmed 2008 ONCA 876:
 - \$1000 in general damages for various minor acts of trespass as well as trespass involved in moving a fence: para.64
 - \$5000 in punitive damages against the defendants for removing a fence, knowing that the neighbours claimed title to the property on which the fence was located, actions that were described by the trial judge as "high-handed and arrogant": at para.65

[13] The Sjubergs say that there has been substantial inflation since these decisions.

[14] Mr. Moore did not file a brief or a book of authorities.

[15] Mr. Moore says that the cases relied on by the Sjubergs are distinguishable because the Sjuberg property is a vacation property, which the Sjubergs only use seasonally. However, in a recent decision, Arnold J. awarded \$2500 in general damages against the respondents for "wilful ongoing trespass" for approximately three years, where the respondents had built a dock that impacted the applicant's ability to make use of her shoreline at her cottage property: *Laws v. Wagner*, 2023 NSSC 93 at para.45.

[16] Mr. Moore also says that the Sjubergs were only prevented from accessing their property from the spring of 2021 to October of 2021, when they constructed the temporary driveway.

[17] I find, based on the affidavit evidence, that the Sjubergs were not able to access their property through the temporary driveway by vehicle for the purpose of residing on and enjoying their property during their vacation. After Mr. Moore installed the fence and gate, the Sjubergs were required to remove their sea-can container and fifth-wheel trailer from the property. In order to do this without use of the right of way, they had to hire a contractor to construct a temporary access road to the public highway from their property. The contractor still had difficulty removing the sea-can and trailer from their property via the temporary road and he had to make several attempts before he was successful.

[18] Mr. Moore made two relevant assertions in his affidavit: 1. a general assertion that he was not restricting access to their lot and 2. a statement that the Sjubergs removed their container and trailer via their own land. He does not address the Sjubergs' specific evidence, which I accept, that they have not been able to access their property in a vehicle since the spring of 2021 and therefore have not been able to vacation there due to the blocking of the right of way by Mr. Moore.

[19] Mr. Moore's substantial interference with the right of way has been wilful and ongoing from the spring of 2021 to the present, a period of almost three years, completely preventing the Sjubergs access to and enjoyment of their property for three summer seasons, justifying an award of general damages at the higher end of the damage awards in the cases that I have referred to above. I award the Sjubergs \$2500 in general damages.

[20] An award of punitive damages is only justified in exceptional cases, when the defendant's conduct departs markedly from ordinary standards of decency and is malicious, oppressive or high-handed, and requires punishment. Punitive damages are generally given only where the misconduct would otherwise be unpunished or where other penalties are or are likely to be inadequate to achieve the objectives of retribution, deterrence and denunciation. See *Whiten v. Pilot Insurance Company*, 2002 SCC 18 at para.94.

[21] Mr. Moore knew that, from the time they bought the property, the Sjubergs travelled from Alberta to Nova Scotia every summer, and stayed on their property while visiting. He constructed the fence and gate, knowing that when the Sjubergs came to visit in the summer of 2021, they would not be able to access the right of way. He did not provide the Sjubergs with any notice that he would be blocking

their access. The Sjubergs have been unable to access and enjoy their property since the summer of 2021 because of the fence and gate.

[22] Notwithstanding Mr. Moore's reasonable concessions on the day of the hearing, his conduct from the spring of 2021 departed markedly from ordinary standards of decency, was oppressive and high-handed, and requires punishment. In my view, the award of general damages is likely to be inadequate to achieve the objectives of retribution, deterrence and denunciation. Mr. Moore and others must be deterred from similar conduct in the future. I award the Sjubergs punitive damages in the amount of \$1500. I would have awarded a higher amount of punitive damages had Mr. Moore not made the reasonable concessions he made at the outset of the hearing, whereby he took responsibility for his actions and committed to remove the fence and the gate.

Costs

[23] The Sjubergs seeks costs in the amount of \$1000 pursuant to Tariff C. Mr. Moore says that costs should be closer to \$500.

[24] The general rule is that costs follow the event.

[25] In determining costs, the court's overall mandate is to do "justice between the parties": *Armoyan v. Armoyan*, 2013 NSCA 136 at para.10.

[26] The starting point in determining the amount of costs is the Tariffs of Costs and Fees under Rule 77. Costs of an application in chambers are governed by Tariff C, unless the judge orders otherwise: *Rule 77.05(1)*.

[27] Under Tariff C, the range of costs is \$250 - \$500 for a hearing that lasts less than one hour, and the range of costs is \$750 - \$1,000 for a hearing that lasts more than one hour but less than half a day. The hearing lasted less than an hour because of the parties' last-minute resolution.

[28] Under Tariff C, if the application is determinative of the entire matter at issue in the preceding, the court may multiply the maximum amounts in Tariff C by two, three or four times, depending on the complexity of the matter, the importance of the matter to the parties, and the amount of effort involved in preparing for and conducting the motion.

[29] The application is determinative of the entire matter at issue in this proceeding. The matter was not complex. The matter at issue was very important to the Sjubergs: Mr. Moore's actions deprived them of the benefit of their property for three summers, and they had every reason to believe that the only way to ensure access this coming summer was to pursue legal action against Mr. Moore. The Sjubergs' counsel prepared for the hearing expecting liability to be at issue,

expecting to make objections to Mr. Moore's affidavit evidence, and expecting cross-examination on the affidavits. At the same time, Mr. Moore made reasonable concessions resulting in a much shorter hearing, albeit at the last minute. In these circumstances, the maximum amount in Tariff C should be multiplied by two times.

[30] I award the Sjubergs costs in the amount of \$1000.

Conclusion

[31] The Application is allowed and the Sjubergs are entitled to the following relief:

1. A declaration that Mr. Moore has substantially interfered with the exercise by the Sjubergs of the right of way that benefits the Sjubergs' property located at Lot 18-1, East Uniacke Road, East Uniacke, PID 45408721 and that burdens Mr. Moore's property located at 1025 East Uniacke Road, East Uniacke, PID 45147188, as described in Schedule "A" to the deed dated October 18, 2018 between Mr. Moore and the Sjubergs conveying PID 45408721 to the Sjubergs and in the survey attached as Exhibit E to the Affidavit of Ms. Sjuberg sworn on August 2, 2023.
2. An order that, within 60 days of the Order, Mr. Moore remove the fence and gate erected by Mr. Moore that inhibits the Sjubergs' access to the right of way, specifically, for the purpose of clarity, the fence that runs roughly parallel to the right of way and the boundary between Mr. Moore's property and the Sjubergs' property as well as the gate that is positioned roughly parallel to the public highway.
3. General damages in the amount of \$2500.
4. Punitive damages in the amount of \$1500.

5. \$474.38 as reimbursement for the construction of the temporary access road.
6. Costs in the amount of \$1000, all-inclusive.

[32] Counsel for the Sjubergs are to prepare the draft order.

Gatchalian, J.