SMALL CLAIMS COURT OF NOVA SCOTIA

Citation: *Fletcher v. The Links at Brunello*, 2023 NSSM 14

Date: 20230227
Docket: SCCH 513530
Registry: Halifax

Between:

Julia Fletcher and Anthony Fletcher

Claimants

-and-

The Links at Brunello

Defendant

Reasons for Decision and Order

Adjudicator: Eric K. Slone

Heard: February 8 and 16, 2023 via zoom in Halifax, Nova Scotia

Appearances: For the Claimants, self-represented

For the Defendants, Adam Downie, counsel

BY THE COURT:

Introduction

[1] The Claimants bought their house in Timberlea, Nova Scotia in 2007. At the time their backyard bordered on a large tract of wooded land to the west. There was no indication at that time that this land would eventually become a golf course, namely The Links at Brunello ("the Links").

[2] The Links is a championship-level course that was under development for several years and finally opened for play in 2017. It is apparently in high demand, attracting golfers at all levels of proficiency.

[3] The part of the course that is closest to the Claimants' home is the fairway for the 4th hole.

[4] The issue in this claim is errant golf balls. As soon as the course opened, some balls began showing up in the Claimants' back yard. This was reported to the Defendant. Most often, balls were simply found lying in the grass or in the bushes, with no indication that they had done any damage. However, two incidents occurred that caused the Claimants to take the matter more seriously.

[5] In 2019 a golf ball hit their back wall and cracked some siding. On July 10, 2020, a ball flew over the house into the driveway where it hit the Claimants' truck, leaving a significant dent that has not yet been repaired. The Claimants seek to hold the Defendant responsible for damages.

[6] The Defendant made some changes in 2021 and 2022 to the 4th hole to make it less likely that golfers' errant shots would enter the Claimants' property, but the problem has not completely vanished. No golfer is likely to aim their drive in the direction of the Claimants' property, but a mis-hit shot can end up there.

[7] The Defendant seeks to avoid responsibility on the basis that it has designed and redesigned the course in accordance with high professional standards. It says that the Claimants have not met the test for actionable nuisance or negligence.

[8] The issue of errant golf balls is not limited to the Claimants. Some neighbours have similar problems, including a property bordering on a different hole altogether. Those matters are not before me, though they tend to illustrate that the Defendant is aware that errant balls are an ongoing issue.

[9] A hearing was held on February 8 and 16, 2023 where both sides called witnesses and presented other evidence. Earlier, during the summer of 2022, I was provided with an opportunity to visit the course and the Claimants' property, to give me a visual perspective on what folks would be testifying about. The delay between then and the hearing was due in large measure to the Defendant's efforts to obtain an expert report pertaining to the design of the course. That report was presented by its author, Landscape Architect Rob LeBlanc.

The Law

[10] As the basic facts are not really in dispute, I will first consider the law in order to give a context to my decision. Counsel for the Defendant provided me with several decisions to consider.

[11] Not surprisingly, there has been a fair bit of litigation involving errant balls escaping the boundaries of golf courses. In considering these cases, it is important to note that the question before many of the courts was whether or not to grant an injunction and essentially shut down the operation or impose expensive alterations as a precondition to operating. An example is *Segal v. Derrick Golf & Winter Club*, 1977 CanLII 656 (AB QB) where the court wrote:

> [6] As a result of this sporadic and unpredictable intrusion, the plaintiffs are still unable to use and enjoy their backyard during the golfing season and their children must still be kept out of the backyard for fear of injury. The plaintiffs claim damages for trespass and nuisance and a permanent injunction to restrain the defendant, its members and guests from making use of the 14th tee, fairway and green.
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> [7] The invasion of the plaintiffs' property by golf balls and by golfers is unquestionably a trespass. That it should have occurred was entirely probable and foreseeable having regard to the layout of the 14th hole in relation to the plaintiffs' property. I am, however, unable to find any authority supporting the plaintiffs' contention that the defendant is liable for this trespass by its members or guests, even in the circumstances described.
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> [8] The plaintiffs' real concern is not for physical damages emanating from a series of trespasses, each one of which taken by itself is relatively minor. The plaintiffs' major claim is for private nuisance, which it seeks to have abated. A private nuisance is described as follows in 28 Hals. (3d), vol. 28, 128, para. 158:
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> > "A private nuisance is one which does not cause damage or inconvenience to the public at large, but which does interfere with a

> person's use or enjoyment of land or of some right connected with land".

[12] In the result, an injunction was awarded as well as general damages of $3,000.00 for loss of enjoyment of their property. There was no evidence of specific damages.

[13] In *Carley v. Willow Park Golf Course Ltd.*, 2002 ABQB 813 a similar result was ordered in a case - injunction plus general damages - where the plaintiffs lived near a driving range.

> [46] Finally, it must be remembered that the plaintiffs' complaint and the proposed injunction, is not with respect to every golf ball which comes into the plaintiffs' yard. When one lives adjacent to a golf course one can expect the odd golf ball to trickle into or be shot into one's yard. The concern here, and the proposed injunction, is only with respect to golf balls which fly over or through the 90 foot barrier net. These are the balls which constitute the hazard to the plaintiffs —not balls which trickle underneath the net.

[14] In *Cattell v Great Plains* 2006 SKQB 183, the plaintiff had established that there had been over one thousand golf balls landing on his property, which was sufficient to obtain an injunction and damages. The court remarked:

> 30) Private nuisance is defined as an unreasonable interference with the use and enjoyment of land. "This may come about by physical damage to the land ... or injury to the health, comfort or convenience of the occupier" (see Allen M. Linden, *Canadian Tort Law*, 7th ed. (Markham, Ont.: Butterworths, 2001) at 525.
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> 31) Whether the operation of a golf course adjacent to an individual's land is defined as being an unreasonable interference with the use and enjoyment of that land appears to depend on the nature and frequency of the behaviour complained of.

[15] In *Skobleniuk v. Eaglestar Golf Inc*., 2006 BCPC 377 (CanLII) the court was explicit in its view that the right to compensation might depend on how often it occurred, though no cases were cited where damages were refused when claims of actual loss were presented:

> [17] This is not the first case in Canada, obviously, in which a court must determine whether a golf course is responsible for causing a nuisance. There are a number of cases that consider the issue. They seem to have in common the general view that nuisance is exacerbated and established based on the frequency and seriousness of the interference. In those cases

> where over 200 golf balls, and up to 2,577 golf balls in one case, landed upon a Plaintiff's property that was sufficient to establish compensable nuisance. On the other hand, ten or 20 golf balls per year did not.

[16] In *Lakeview Gardens Ltd. v. Regina (City)* 2004 SKCA 110 the court recognized that specific damage might be compensable as negligence, while finding no actionable nuisance when the number of escaping balls was low. The court also reviewed a number of cases:

> [16] There are many cases where golf courses which permitted balls to escape have been found to be private nuisances. However, a close examination of them discloses in each case much more serious property damage or threat of property damage or injury than here. In *Carley v. Willow Park Golf Course Ltd.*, [2003] 2 W.W.R. 659 (Alta. Q.B.), the plaintiffs, whose house was adjacent to a driving range, found themselves unable to use their yard, counted 30 balls in their yard in one 10 day period, and 174 balls, 88 balls and 176 balls in one year periods. In *Douglas Lake Cattle Co. v. Mount Paul Golf Course (SPM) Inc.*, 2001 BCSC 566, [2001] B.C.J. No. 894 (QL), the plaintiff collected 2,577 balls in a period of one year and five days, and balls frequently damaged equipment and narrowly missed employees and customers. In *Segal v. Derrick Golf & Winter Club* (1977), 76 D.L.R. (3d) 746 (Alta. S.C. (T.D.)), over 200 balls in one year made the plaintiff's yard unusable for family and children. In *Transcona Country Club v. Transcona Golf Club*, 2002 MBQB 113, [2002] M.J. No. 163 (QL), a building was hit by golf balls on almost a daily basis until a fence was built. Although the trial judge found a private nuisance and awarded damages, no injunction was asked for or granted. The respondent in this case was not affected as severely as were the plaintiffs in any of these cases.
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> [22] That does not, however, end the matter. As noted previously, the pleadings are broad enough to encompass an action in negligence. The facts of this case support the respondent's claim in negligence insofar as the broken glass is concerned. The respondent had complained to the appellant about errant balls breaking glass. This put the appellant in a position similar to that found by the Court of Appeal in *Smith v. Bolton*: since it knew that golf balls had been hit onto the greenhouses, and might be again, it was under a duty to take steps to prevent injury or damage to others. Having failed in that duty, it was liable in negligence for the claim for broken glass.

[17] In the one case out of this court, *Norton v. Brightwood Golf & Country Club Ltd.*, 2014 NSSM 75, adjudicator Knudsen declined to award damages when an errant golf ball injured a homeowner's cat:

> In spite of the injury to Benny and my finding that golf balls do enter her yard more frequently than claimed by Brightwood, I find that the Claimant has not discharged the onus upon her to establish an unreasonable interference with the use and enjoyment of her property, such that a finding in nuisance is justified. The claim is dismissed.

[18] The cases cited above are mostly dealing with the question of whether the activity complained of is a nuisance that should be checked by injunction or compensated with significant damages for the loss of enjoyment of the land. In none of those cases, except for *Norton v. Brightwood Golf & Country Club Ltd.*, 2014 NSSM 75 did the court deny a claim for actual damages.

[19] By and large, these cases do not answer the question that is posed here, namely, who should bear the cost of damage from even the infrequent errant golf ball? Must the homeowner accept the risk in the same way that they would for a giant hailstone? Or should the course absorb the expense as part of the cost of doing business?

[20] Since I do not have the power to grant injunctive relief, I do not have to consider whether the number of errant balls meets the threshold to constitute an enjoinable nuisance.

[21] Nor do I have to consider whether the Defendant must compensate the Claimants for loss of enjoyment of their property, in the way of general damages. Such damages are not being sought, and this court's jurisdiction to aware general damages is extremely limited, in any event.

[22] While there are differences, a golf course might be analogized to a shooting range, which has been held to be a nuisance when bullets <u>in any number</u> escape from the land. See e.g. *Milne v. Saltspring Island Rod and Gun Club*, 2014 BCSC 1088 (CanLII). The judge in that case cites a well-recognized text:

> [45] The matter is put as follows in the seventh release of Lewis N. Klar et al., Remedies in Tort, loose-leaf (Toronto: Thomson Reuters Canada, 1987) in chapter 17 at §32:
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> > §32 …Where material damage to the plaintiff's premises or property occurs as a result of the activities of the defendant, the plaintiff is entitled to redress, irrespective of the locality. However, where personal discomfort is at issue, the character of the locality is of importance in determining the standard of comfort that an occupier may reasonably claim, as individuals living in society must be prepared to submit to that amount of discomfort as is necessary

> for the legitimate and free exercise of the trade of their neighbours. The standard against which the plaintiff's discomfort is measured is that expected by the ordinary reasonable and responsible person in the particular area. Accordingly, to establish a nuisance, the plaintiff may be required to show that he has suffered sensible discomfort and inconvenience which exceeds the standard given the nature of the locality.

[23] In my opinion, absent some agreement to the contrary suggesting a conscious assumption of the risk, a homeowner living adjacent to a golf course has a right to be compensated for actual damage by golf balls escaping the course. I believe this to be a matter almost of strict liability, though it is also at least actionable negligence. Clearly the course has a duty to neighbours and no golf course can claim to be totally unaware of the risk of damage being done by an errant shot, so the harm is foreseeable.

[24] It makes sense from a public policy perspective that the golf course should answer for actual damage. This may be seen as part of the cost of doing business. And knowing that there is some responsibility gives courses an incentive to take preventative measures, much as this Defendant has already done.

[25] I disagree with the finding in *Norton v. Brightwood Golf & Country Club Ltd.*, 2014 NSSM 75. I believe that the adjudicator conflated the question of whether there was an ongoing nuisance with the question of whether they should (at least) answer for the injury to the Claimant's cat.

[26] I have also considered whether the case might be brought within the rule in *Rylands v. Fletcher* (1868) L. R. 3 H. L. 330, which was described in the case as follows:

> If a person brings, or accumulates, on his land anything which, if it should escape, may cause damage to his neighbour, he does so at his peril . If it does escape and cause damage, he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent the damage.

[27] It does not appear that any of the reported cases has entertained a *Rylands* argument, but the argument has its attractions. In particular, by imposing absolute liability it avoids the entire question of how many precautions the course has taken to contain golf balls within its property. The focus is on the damage done.

[28] Nevertheless, I do not rely on *Rylands* and leave its consideration to others.

[29] It follows that I find the Defendant liable to pay damages to the Claimant.

Precedent considerations

[30] Counsel for the Defendant candidly admitted that his client is concerned about the precedent that this case may set. To the extent that others may be guided by my decision, let me make clear what I am saying, and what I am not.

[31] It is apparent that the risk of an escaping golf ball can be, and has been, reduced to low numbers but will never be zero. There is no shortage of bad golfers, and even good golfers make bad shots. The risk could probably be reduced to near zero with the use of further and larger nets, but there is a cost to such measures both in terms of the expense and the damage to the aesthetic qualities of the course. By declining to take these steps, the Defendant has made a business decision that exposes its neighbours to a small risk of injury or damage.

[32] Knowing as it must that some damage is foreseeable, I believe the Defendant is liable in negligence and possibly in nuisance for that damage. An injured party should not have to be concerned with how unlikely the injury was. There would be no solace in knowing that it was injured by a one-in-a-million shot. From their perspective, the chance of it happening was 100%.

The liability of the golfer

[33] I believe both parties agree that it is impractical to expect homeowners to look to the offending golfers themselves to take personal responsibility for damage done by their errant shots, though at one time the Defendant was trying to do just that. Whether such individual golfers do bear responsibility is not a question that is before me, and I make no further comment about it.

Damages

[34] There are two items of physical damage. The damage to the car will cost at least $1,044.00 to repair, that being the lower of two estimates obtained. I will allow that amount.

[35] The damage to the siding is more problematic. The Claimants testified that it is impossible to get an estimate for repair because the job is too small for any contractor to quote on. Mr. Fletcher believes that he will have to buy some siding and teach himself how to do the repair himself. They have asked for $1,000.00 for this repair. Counsel for the Defendant argues that this is a high estimate and that it

should be limited to the allowable $100.00 for general damages.

[36] I agree to an extent that the evidence in support of this claim is thin, but the Claimants should not be penalized for attempting to mitigate their damages by finding a cost-effective solution. If Mr. Fletcher were not as capable as he appears to be, they would have to find a contractor and probably pay an inflated amount to have this fixed professionally. It is not fair for the Defendant to profit from Mr. Fletcher's time and effort. Under the circumstances, I am prepared to split the difference and award $500.00 for this item.

[37] In the result, the Claimants shall have damages in the amount of $1,544.00 plus their costs of $99.70.

ORDER

[38] IT IS ORDERED that the Defendant pay to the Claimants the net sum of $1,643.70.

Eric K. Slone, Adjudicator