COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Gokey v. Usher,*
2024 BCCA 344

Date: 20241002
Docket: CA49438

Between:

Edward C. Gokey and Diane B. Gokey

Appellants
(Plaintiffs)

And

Gordon F. Usher and Patricia Ann Parsons

Respondents
(Defendants)

Before: The Honourable Madam Justice Fenlon
The Honourable Justice Dickson
The Honourable Justice Fleming

On appeal from: An order of the Supreme Court of British Columbia, dated July 28, 2023 (*Gokey v. Usher*, 2023 BCSC 1312, Prince Rupert Docket 10740).

Oral Reasons for Judgment

The Appellants, appearing in person:	E.C. Gokey D.B. Gokey
Counsel for the Respondents:	J. Adams D. Redman
Place and Date of Hearing:	Vancouver, British Columbia October 1–2, 2024
Place and Date of Judgment:	Vancouver, British Columbia October 2, 2024

Summary:

The appellants and respondents are neighbours who shared ownership of a well. Disputes over use and maintenance of the well escalated over time, resulting in altercations and an ongoing campaign by one of the appellants to harass and annoy the respondents including by burning offal and waste near the lot line which caused smoke to hang over the respondents' property. The appellants blamed the respondents for invading their privacy and sought an injunction preventing the respondents from recording their activities or entering their property. The respondents counterclaimed. The trial judge dismissed the appellants' claims, granted an injunction against the appellant, and awarded the respondents general, aggravated and punitive damages for assault, battery, trespass, and nuisance totaling $230,000. The appellants say the trial judge erred in assessing Mr. Gokey's credibility, which led him to make errors in his findings of fact. They also contend the damages awarded for nuisance are inordinately high.

Held: Appeal dismissed. The judge's findings, including on credibility, were open to him. Although the trial judge should have determined general and aggravated damages before considering whether punitive damages were necessary, he considered their non-compensatory purpose and the need for overall proportionality. The overall damages award was not inordinately high, and the trial judge did not err in awarding the injunction.

FENLON J.A.:

Background

[1] The background to this dispute is described in detail by the trial judge in reasons indexed at 2023 BCSC 1312. For the purposes of this appeal, the following will suffice.

[2] The appellants, Edward and Diane Gokey, and the respondents, Gordon Usher and Patricia Parsons, own adjoining properties in Sandspit, British Columbia on Haida Gwaii. They became neighbours in July 1997 and were neighbourly towards each other until 2004, when they decided to share a well and water system. The shared well was constructed partly on the Gokeys' property and partly on the respondents' property. Shortly thereafter, a number of issues arose around the use of the well. These conflicts escalated over the years. Actions were commenced and resolved in the Provincial Court, but the conflicts continued.

[3] In the action underlying this appeal, the appellants asserted sole ownership of the well and fee simple ownership of the lands on which the well was located. They brought claims in assault, invasion of privacy, harassment and/or infliction of mental suffering, intimidation, nuisance and trespass. Based on those claims, they sought an injunction to prevent the respondents from coming onto their property and recording their activities.

[4] The respondents counterclaimed, seeking declaratory relief with respect to use and access to the well in accordance with an easement that had been settled in Provincial Court. The respondents also sought a permanent injunction restraining the appellants from having any contact with them, an order respecting removal of structures placed on the easement area and general, punitive and aggravated damages for nuisance, trespass, assault and battery.

At Trial

[5] After a 24-day trial, Justice Punnett delivered lengthy reasons for judgment assessing each of the claims. Those reasons were described by Justice Groberman (in the appellants' application for an extension of time to appeal) as "a meticulous exercise in fact finding." The trial judge made findings about Mr. Gokey's credibility and conduct, which he expressed in part in the following paragraphs of the judgment:

> [112] I find Mr. Gokey in his evidence was disingenuous, lacking in candor, insincere and knowingly sought to give an appearance of frankness when he clearly was not. He tended to provide explanations favourable to his claims instead of answering the questions asked.
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> [113] I note that Mr. Gokey's evidence or characterization about a particular interaction with others generally conflicted with the evidence of the defendants, Ms. Wagner and Ms. Wilson where they were describing the same events. Where that occurs, I accept the evidence of the defendants and their witnesses, not Mr. Gokey. In short, I find the evidence of Mr. Gokey was neither credible nor reliable. It came across as the evidence of an individual who believes he is always right.
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> [223] … Mr. Gokey has engaged in a pattern of overt provocation of the defendants and appears to enjoy doing so. He is deliberately confrontational in his interactions with the defendants.

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> [315] … His behavior was high-handed, arrogant, malicious and a deliberate course of conduct directed at the defendants. Well aware of his actions' effects on the defendants, he deliberately continued them over a period of years.
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> …
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> [333] … It is clear Mr. Gokey has engaged in seriously offensive conduct. He has done so despite being aware of the effect his activities were having on the defendants. His conduct throughout has been high-handed, placing his perception of his rights ahead of those of the defendants.
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> …
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> [349] … the plaintiff Edward C. Gokey views matters from his perspective alone. He has clearly decided to inflict his behavior on the neighbours as he sees fit. He has done so for years and the ongoing litigation has not lessened his behavior.

[6] The judge found this to be an exceptional case, saying:

> [290] Unlike many nuisance cases, in this instance the conduct of the plaintiff is deliberate in the sense it is consciously taken to intimidate the defendants, to taunt them and to make their lives miserable. I am satisfied it is not simply a matter of his use of his property for legitimate purposes creating a nuisance. His use is motivated by an intention to inflict harm on the defendants. His placement of the burning facilities, the nature and frequency of the burning at times with multiple sources producing the smoke, his machinery use (including the use of a wood planer at 5:00 a.m.) and the times at which such is operated, lead me to conclude the plaintiff's activities go beyond legitimately conducting matters which incidentally create nuisances. Rather, Mr. Gokey is specifically targeting the defendants and their property.

[7] The judge found the respondents had proved their claims, including assault and battery, trespass and nuisance (at paras. 245–268). He awarded the following damages to the respondents: $150,000 for nuisance (at para. 307); $2,500 for trespass (at para. 285); $2,500 for assault and battery (at para. 278); $50,000 for punitive damages (at para. 325); and $25,000 for aggravated damages (at para. 339). The judge also awarded the injunctive relief sought by the respondents (at paras. 345–348).

[8] The judge dismissed all of the appellants' claims and accordingly did not grant the injunction they sought.

On Appeal

[9] The appellants raise six grounds of appeal, which I would reframe as follows:

1. The judge erred in assessing Mr. Gokey's credibility and motivation, in part because he erred in law by failing to appreciate that it was lawful for Mr. Gokey to have his wife swear his affidavit.

2. The judge's error in assessing Mr. Gokey's credibility led him to further err by rejecting all of Mr. Gokey's testimony.

3. The judge made palpable and overriding errors of fact because he did not accept that video evidence and photographs tendered by Mr. Gokey proved Mr. Usher assaulted Mr. Gokey using both his F150 truck and his snow clearing truck.

4. The judge erred by granting an injunction to restrain Mr. Gokey's conduct, and by awarding damages that were inordinately high, especially as the respondents' bad behaviour should have been "offset" against the behaviour of the appellants.

[10] In my view, all of these grounds of appeal amount to a challenge to the trial judge's weighing of the evidence and assessment of the credibility of the parties and other witnesses. Mr. Gokey's submissions focused on reviewing the evidence and asking this Court to reweigh that evidence and come to different conclusions about the events in issue. However, as we explained during the hearing, it is not the role of an appellate court to reconsider and reweigh evidence. This Court may interfere with a judge's findings of fact and assessments of credibility only when an appellant establishes a clear and material error of fact, an error of law, or an error of mixed fact and law. Mr. Gokey presented his arguments thoroughly, but I cannot conclude that he has established such errors.

[11] Mr. Gokey submitted the judge made the repeated error of failing to take into account "hard evidence" of videos and photographs. I cannot accept that to be the

case. Quite to the contrary, the judge expressly addressed many of the exhibits Mr. Gokey relied on to demonstrate that the judge had ignored or misunderstood important evidence. In some of those instances, he found the exhibit in question supported the respondents' account or that it did not show what Mr. Gokey claimed it showed. It was open to the judge to interpret the evidence in this way. Further, a judge is not required to discuss in their reasons every piece of evidence put before them.

[12] Many of Mr. Gokey's submissions were to the effect that the judge failed to address his complaints about the conduct of the respondents. For example, in relation to what Mr. Gokey described as the respondents' "grow-op," he said a nuisance was created by the sound of the fan in the greenhouse, the playing of a radio to deter intruders and the smell of the plants drifting onto his property. However, the judge expressly addressed each of those concerns, noting that the only evidence of the nuisance alleged was the testimony of Mr. Gokey. Ultimately, in light of all the other evidence about the growing of the plants, the judge did not accept that the problems were as Mr. Gokey described them to be.

[13] Mr. Gokey placed some emphasis on the judge's finding that Mr. Gokey's credibility was damaged because he admitted to having his wife sign his affidavit. He submits that the "law of signatures" allows others to sign documents on behalf of someone else. The examples relied on by Mr. Gokey involved signing contracts and other documents, not swearing affidavits. More importantly, that incident was but one of many considered by the judge, and one of many reasons given by the judge for concluding that Mr. Gokey was not a credible witness. Accordingly, even if the judge erred in finding that it was misleading for Mr. Gokey to have his wife sign the affidavit (and I stress that I do not agree that it was an error), in my view it would not amount to a material error.

[14] Mr. Gokey's most pressing complaint about the judge's reasons was, as he put it, that the judge should have believed him and that, if he had done so, findings of facts would and should have been different.

[15] Having considered Mr. Gokey's submissions and the record in this case, I am of the view that the findings the judge made, including his credibility findings, were patently open to him.

[16] I turn now to the appeal from the award of damages. There is no doubt that the damages awarded by the judge for nuisance are high. The question before us is whether the judge erred in making the awards he did, and whether they were inordinately high.

[17] I begin by noting that damage awards are reviewed on a deferential standard, absent an error of law.

[18] The appellants submit that the general damages for nuisance were too high given that there was no actual damage to the property of the respondents. However, nuisance does not require proof of physical damage to the neighbouring property. Nuisance can be established, as the judge found, based on interference with the use and enjoyment of property.

[19] In assessing damages, the judge considered a number of cases, including *Deumo v. Fitzpatrick*, [2008] O.J. No. 3015, in which the Ontario Superior Court awarded general damages for nuisance of $80,000. In that case, the defendant's wood stove had caused heavy smoke to hang over the plaintiffs' property intermittently over the course of four years. The Court found the defendant to be indifferent to the impact of the smoke on his neighbours, and also awarded punitive damages of $20,000. In the present case, the judge found the conduct of Mr. Gokey to be more egregious, since the burning served no legitimate purpose, resulted in more significant smoke and continued over the course of eight years. In the unique circumstances of this case, I cannot conclude that the general damages are inordinately high.

[20] Although the judge should have determined both general and aggravated damages before deciding whether punitive damages were necessary to serve the purposes of retribution, deterrence and denunciation (*Whiten v. Pilot Insurance Co*.,

2002 SCC 18 at paras. 123, 129), he was alive to the non-compensatory purpose of such damages and the need to consider the proportionality of punitive damages in the context of the overall award: at paras. 316, 325. He also awarded punitive damages based on assault and trespass as well as the claim in nuisance. In the result, I would not interfere with the punitive damages awarded in this case.

[21] In summary on the issue of damages, I do not find the awards made for general, aggravated or punitive damages to be inordinately high. As the judge observed, the circumstances of this case are exceptional: the nuisance inflicted on the respondents was significant, prolonged, malicious and intentional.

[22] Finally, in my view the judge did not err in awarding the injunctive relief sought by the respondents given the egregious, prolonged, intentional and ongoing behaviour of Mr. Gokey.

Disposition

[23] In conclusion, I would dismiss the appeal. The respondents seek special costs against the appellants, but in my view the appellants' conduct of the appeal does not warrant such costs. I would therefore award ordinary costs of the appeal.

[24] **DICKSON J.A.**: I agree.

[25] **FLEMING J.A.**: I agree.

[26] **FENLON J.A.**: The appeal is dismissed with costs to the respondents.

"The Honourable Madam Justice Fenlon"