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CANADA / JUDGMENT

## Scory v. Krannitz

2011 BCSC 936

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Supreme Court of British Columbia

DECIDED

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2011 BCSC 936 Scory v. Krannitz

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Scory v. Krannitz,

2011 BCSC 936

Date: 20110712

Docket: S21632

Registry: Chilliwack

Between:

Robin Scory

Plaintiff

And

Sian Krannitz, Jack DeWitte and

Glen Valley Watershed Society

Defendants

Before: The Honourable Mr. Justice Joyce

Reasons for Judgment

Counsel for the Defendant DeWitte:

R.S. Brearley

The Plaintiff appearing In Person:

Place and Date of Hearing:

Chilliwack, B.C.

March 24, 2011

Place and Date of Judgment:

Chilliwack, B.C.

July 12, 2011

## INTRODUCTION

- [1] The plaintiff is an owner of lands situated within the Township of Langley (the "Township") located in the agricultural land reserve. He wishes to obtain a permit from the Township to deposit fill on his lands for farming and agricultural purposes.
- [2] The defendants are opposed to the proposal. The defendant Krannitz owns property adjacent to Mr. Scory's property and is a member of the Glen Valley Watershed Society, whose mission is to protect and enhance the ecological integrity of local watersheds in the Langley area. The defendant DeWitte, owns and occupies lands that are located about 250 metres to the north of the plaintiff's lands.
- [3] In or about November 2009, the plaintiff submitted a Notice of Intent to Deposit Soil for agricultural purposes to the Township. The plaintiff alleges that the defendants began a public campaign designed to oppose his application. There have been appearances before the Township's Council at which the parties have made representations for and against the proposal.
- [4] The plaintiff has brought this action against the defendant alleging several causes of actions arising out of the defendants' statements and actions. The defendant DeWitte seeks an order dismissing the claim against him.

## THE LEGAL TEST

- [5] The defendant DeWitte, applies under Rules 9-5(1)(a) and (b) of the Supreme Court Civil Rules, B.C. Reg. 168/2009, which provide:
  - (1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that
    - (a) it discloses no reasonable claim or defence, as the case may be,
    - (b) it is unnecessary, scandalous, frivolous or vexatious.

The test for determining whether an action may be struck for disclosing no reasonable claim under Rule 9-5(1)(a) is as set out in *Hunt v. Carey Canada Inc.*, [1990] S.C.J. No. 93, [1990] 2 S.C.R. 959, where, speaking of the predecessor rule, the Court said at para. 33:

33 ... [A]ssuming the facts as stated in the statement of claim can be proved, is it 'plain and obvious' that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be 'driven from the judgment seat'.

- [6] A pleading is unnecessary or vexatious pursuant to Rule 9-5(1)(b) if it does not go to establishing the plaintiff's cause of action or does not advance any claim known in law [Citizens for Foreign Aid Reform Inc. v. Canadian Jewish Congress, [1999] B.C.J. No. 2160 (S.C.) at para. 47].
- [7] Whether the application is brought under Rule 9-5(1)(a) or (b), the applicant must satisfy the court that it is "plain and obvious that the pleading offends the subrule in question [Xu v. Foo (2006), 62 B.C.L.R. (4th) 132 (C.A.) at para. 54].

### THE ALLEGATIONS AGAINST MR. DEWITTE

- [8] The claim against Mr. DeWitte is based on statements allegedly made by him at the April 26, 2010 Township of Langley Council Meeting. The relevant pleadings are found in paras. 55-68 of the Notice of Civil Claim, which read as follows:
55. Jack DeWitte resides at 7790-264th St in the Township of Langley.
56. Jack DeWitte is not a farmer.
57. The DeWitte residence is in the ALR and is 250 meters north of the Scory farm.
58. Jack DeWitte, on or about April 26, 2010, publicly stated at the Township of Langley (TOL) council meeting that in 2005-2006 his well had been covered 2 feet of rocks and debris allegedly from a farm soil deposit site, approximately 2 kilometers upstream from the DeWitte property.
59. Jack DeWitte presented no evidence, no before and after photos or any relevant documentation to support his statement.
60. In 2005-2006, on or about the time of Jack DeWitte's alleged well damage, the Langley area experienced a record rainfall, with heavy rain falling for an unprecedented 29 out of 30 days. All Lower Mainland streams and creeks experienced major flooding and erosion at that time.
61. Jack DeWitte did not present this fact to the TOL Mayor, Council and public at the April 26, 2010 Township council meeting.
62. Jack DeWitte has personal access to historical weather and rainfall records.
63. It is not physically possible for a farm to generate more water, rocks and debris than naturally present in streambeds or stream banks.

64. The farmer allegedly responsible for the rocks and debris covering Jack DeWitte's well in 2005-2006, does not know Jack DeWitte, has never been contacted by Jack DeWitte and was unaware of Jack DeWitte's accusations.
  65. The farmer became aware of Jack DeWitte's allegations when he saw an interview about Jack DeWitte's well allegations and a photo of Jack DeWitte in the local newspaper, The Aldergrove Star. Jack DeWitte contacted The Aldergrove Star to publicly make his allegations.
  66. Jack DeWitte offered no explanation why he did not report his well damage to the alleged responsible farmer or to the TOL, 5 years ago when the incident occurred.
  67. Jack DeWitte offered no explanation why he chose a public forum, 5 years after the alleged incident to make his accusations.
  68. Jack DeWitte's statements have caused damage and harm to the plaintiff and the plaintiff's farm development. Jack DeWitte's statements have caused the TOL Mayor and Council, TOL residents and the public to associate farms and farm soil deposit with damaging nearby water wells.
- [9] The plaintiff claims, against all defendants, damages based on: loss of farming production; loss of revenue from soil deposit; loss of ability to generate farm revenue; and violation of his rights under sections 7 and 8 of the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11. He also pleads in aid of his claim the Farm Practices Protection (Right to Farm) Act, R.S.B.C. 1996, c.131 [FPPA].

#### POSSIBLE CAUSES OF ACTION

- [10] Mr. DeWitte identifies the following causes of action that the plaintiff might suggest his pleadings, on a liberal reading, support:
- (a) a breach of the FPPA;
  - (b) breaches of sections 7 and 8 of the Canadian Charter of Rights and Freedoms;
  - (c) a claim in negligence;
  - (d) a claim in negligent misrepresentation;
  - (e) a claim in unlawful act conspiracy; and
  - (f) a claim for unlawful interference with economic interests;
  - (g) defamation; and
  - (h) injurious falsehood.

#### DISCUSSION AND ANALYSIS

- [11] I will deal with the potential claims identified above in the order in which the defendant dealt with them.

#### Defamation

- [12] To establish a claim in defamation the plaintiff would have to establish three things:

- (1) that the impugned words were defamatory, in the sense that they would tend to lower the plaintiff's reputation in the eyes of a reasonable person;
- (2) that the words in fact referred to the plaintiff; and
- (3) that the words were published, meaning that they were communicated to at least one person other than the plaintiff.

[See: *Grant v. Torstar Corp.*, 2009 SCC 61, at para 28.]

- [13] I agree with counsel for Mr. DeWitte that to the extent the words spoken by Mr. DeWitte, as set out in para. 58 of his pleading, refer to anyone, they refer to the farmer of the upstream property referred to in paras. 64 and 65 of the pleading. There is no suggestion that the plaintiff is the object of Mr. DeWitte's words.

- [14] I also agree with Mr. DeWitte's submission that the plaintiff does not plead damage to his reputation and that the words spoken do not tend to adversely affect anyone's reputation.

#### Injurious Falsehood

- [15] The plaintiff submitted that the basis of his claim against Mr. DeWitte is the tort of injurious falsehood.

- [16] In *Captain Developments Ltd. v. Nu-West Group Ltd.* (1982), 37 O.R. (2d) 697 (Ont. H.C.), rev'd on other grounds (1984), 45 O.R. (2d) 213 (C.A.) Montgomery J. accepted the formulation of injurious falsehood contained in Fleming's, *The Law of Torts*, 5th ed. (1977) at p. 697:

Injurious falsehood... consists in the publication of false statements, whether oral or in writing, concerning the plaintiff or his property, calculated to induce others not to deal with him ... the falsehood must be communicated to a third person ... falsity is not presumed but must be affirmatively established by the plaintiff.

- [17] Mr. DeWitte submits that the statement attributed to him in para. 58 was not made concerning him but was made concerning the upstream farmer. The plaintiff submits that a person hearing that statement in the context of a town meeting concerned with the plaintiff's application to deposit soil would conclude that Mr. DeWitte was, by necessary implication, making a false statement that if the plaintiff were permitted to deposit soil, wells would be adversely affected and that the statement was, therefore, made "concerning" the plaintiff.

[18] In my view, that is an untenable argument which gives far too broad a meaning to the phrase "concerning the plaintiff or his property". I am satisfied, on the authorities that the false statement must be related to something done by the plaintiff or to some aspect of the plaintiff's property and that the statement alleged falls well short of meeting that requirement.

[19] I agree with Mr. DeWitte that the claim of injurious falsehood is bound to fail.

### **Claim under the Farm Practices Act**

[20] I accept Mr. DeWitte's submission that the Farm Practices Act does not grant positive right to farmers or give rise to a cause of action. The Act establishes defences for farmers who are sued by others. The plaintiff did not make any submissions in an effort to uphold this purported cause of action.

### **Claim under the Canadian Charter of Rights and Freedoms**

[21] Mr. DeWitte argues, and I agree, that there are two reasons why a claim cannot be maintained on this footing. First, the factual allegations said to give rise to the claim, which involve flying over his property and photographing it, are made against the other defendants, not Mr. DeWitte. Second, the Charter does not apply in litigation between private citizens (*Dolphin Delivery Ltd. v. R.W.D.S.U., Local 580*, [1986] 2 S.C.R. 573, 9 B.C.L.R. (2d) 273 at para. 40).

### **Negligent Misrepresentation**

[22] The required elements for a successful claim based on negligent misrepresentation were summarized in *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87 at para. 33:

33 (1) there must be a duty of care based on a "special relationship" between the representor and the representee; (2) the representation in question must be untrue, inaccurate, or misleading; (3) the representor must have acted negligently in making said misrepresentation; (4) the representee must have relied, in a reasonable manner, on said negligent misrepresentation; and (5) the reliance must have been detrimental to the representee in the sense that damages resulted.

[23] The plaintiff does not allege that any representations were made to him by Mr. DeWitte; the representations were made to others. Further, there is no suggestion that he relied on any representations made by Mr. DeWitte. In any event, the relationship between the plaintiff and Mr. DeWitte is not one that, in my view, could possibly give rise to a duty of care in that it cannot be said that in these circumstances Mr. DeWitte could reasonably have foreseen that the plaintiff would rely on anything he said or that reliance by the plaintiff would be reasonable. There is no possibility, in my view, that the plaintiff could succeed on this ground.

## Negligence

- [24] Mr. DeWitte submits that it is plain and obvious that no duty of care was owed by him to the plaintiff in the circumstances which could found an action in negligence.
- [25] The plaintiff's claim is for pure economic loss. I have not been provided with any case in which an individual lobbying in his own interests has been held to owe a duty of care to an individual with adverse interests for economic losses arising from those lobbying efforts.
- [26] Mr. DeWitte says that The Supreme Court of Canada has, to date, recognized five categories of negligence claims for pure economic loss: negligent misrepresentation, negligent performance of a service, defective products or buildings, relational economic loss, and independent liability of statutory public authorities [Martel Building Ltd. v. Canada, [2000] 2 S.C.R. 860, at para 38].
- [27] As the plaintiff's claim does not fit into any of these recognized categories, an analysis must be undertaken in accordance with *Cooper v. Hobart*, [2001] 3 S.C.R. 537, 2001 SCC 79 to determine whether or not a duty of care should be found to exist in this case. This analysis involves two questions: (1) Does the relationship between the plaintiff and the defendant disclose sufficient foreseeability and proximity to establish a *prima facie* duty of care; and (2) If so, are there any residual policy considerations which ought to negate or limit that duty of care? [See *Hill v. Hamilton-Wentworth Regional Police Services Board*, [2007] S.C.J. No. 41 at para. 20.]
- [28] The proximity test involves the question whether the defendant was in a "close and direct relationship" with the plaintiff making it just to impose on him a duty of care towards the plaintiff [Fraser v. Westminer Canada Ltd., [2003] N.S.J. No. 266 (C.A.), 2003 NSCA 76 [Fraser] at para. 78].
- [29] At para. 79 of Fraser, Cromwell J.A. (as he then was) said:
- 79 While there is no precise definition of what constitutes such a close and direct relationship, the gist of the requirement is that there should be "such close and direct relations that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by his careless act.": *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.) at 581. In both *D'Amato v. Badger*, [1996] 2 S.C.R. 1071 at para. 49 and in *McLachlin, J.'s* judgment in *Norsk* [Canadian National Railway Co. v. Norsk Pacific Steamship Co., [1992] 1 S.C.R. 1021] at paras. 48-53, a number of indicators of proximity are referred to. They include the relationship between the parties, physical "propinquity" (nearness in space), assumed or imposed obligations and the existence of a close causal connection between the act and the harm suffered.
- [30] Mr. DeWitte says that the plaintiff has not made express the duty he asserts was owed by Mr. DeWitte, but that considering the nature of the allegations, the duty must be "something in the nature of: a duty to take care in the representations that are made to elected officials so that another citizen's economic interests are not injured".

[31] Mr. DeWitte says that:

- There is no plea of reliance.
- No representations are alleged to have been made to the plaintiff. The allegation is that representations were made to the Township's Council.
- The relationship between Mr. DeWitte and the plaintiff is adversarial in nature. Mr. DeWitte attended a Council meeting to advocate on his own behalf and in his own interests. His efforts were adverse to those who hold a contrary view.

[32] Mr. DeWitte submits, and I agree, that the plaintiff could not reasonably expect that those adverse to his interests would act to take care of his interests. I agree with his submissions that "no credible expectation links these two parties in a proximate relationship".

[33] I also agree with Mr. DeWitte's submission that no "close causal connection" could be proven between Mr. DeWitte's statement and the harm allegedly suffered by the plaintiff. The decision of the Township to deny the permit, if that is its decision, is the cause of the damage. The reasons for its decision will likely never be known.

[34] I am of the view that no prima facie duty of care should be recognized in these circumstances.

[35] Even if a prima facie duty of care were recognized, I am of the opinion that there are compelling policy reasons that negate any such duty upon Mr. DeWitte in respect of the statements made at the Township meeting. First, is the notion of indeterminate liability. All persons who suffered economic injury as a result of a Council's decision stemming from a citizen's advocacy would be able to assert a similar duty against the advocate. The bounds of liability are immeasurable.

[36] Second, such a duty would stifle public participation in the democratic process. I agree with Mr. DeWitte that members of the Township's Council have an interest in receiving the views of their constituents.

[37] I am satisfied, therefore, that the plaintiff has no chance of establishing liability on the basis of negligence.

## Conspiracy

[38] A conspiracy requires that parties act in combination with each other. There is no allegation or suggestion that Mr. DeWitte acted in combination with the other defendants or with other unnamed co-conspirators. In my view, this claim must necessarily fail.

## Unlawful Interference with Economic Interests

[39] In 671122 Ontario Ltd. v. Sagaz Industries Canada Inc., 40 O.R. (3d) 229, [1998] O.J. No. 2194, varied on other grounds [2000] S.C.C.A. No. 141, aff'd [2001] S.C.J. No. 61, 2001 SCC 59 Cumming J. at para. 56, defined the elements of what he called the "emergent tort" of unlawful interference with economic relations as:

- (1) the existence of a valid business relationship or business expectancy between the plaintiff and another party; (2) knowledge by the defendant of that business relationship or expectancy; (3) intentional interference which induces or causes a termination of the business relationship or expectancy; (4) the interference is by way of unlawful means; (5) the interference by the defendant must be the proximate cause of the termination of the business relationship or expectancy; and (6) there is a resultant loss to the plaintiff.

[Emphasis added.]

[40] Having concluded that there is no possibility that the plaintiff can succeed in establishing any of the other alleged torts, and there being no suggestion of any other way in which Mr. DeWitte acted unlawfully, I conclude that it is plain and obvious that the claim cannot succeed on this basis.

[41] In summary, I am satisfied that it is plain and obvious that the plaintiff's claim against Mr. DeWitte cannot succeed. There will, therefore, be an order dismissing the claim against them.

## COSTS

[42] Mr. Dewitte argues that the plaintiff's claim has no merit and is simply intended to intimidate Mr. DeWitte and persons like him with similar interests from participating in public debate. He argues that the action is damaging to the public at large, which depends on free and open discussion as an integral component of its government.

[43] Mr. DeWitte refers to Fraser v. Saanich (District), [1999] B.C.J. No. 3100 (S.C.) [Fraser v. Saanich (District)] as authority for his submission that special costs are warranted. In that case, the plaintiff applied to the District of Saanich for approval to redevelop a nursing home and was denied approval. She commenced an action against the District and a number of neighbourhood residents who signed a petition opposing the proposed redevelopment, alleging negligence, conspiracy, bad faith, breach of fiduciary duty and interference with contractual relations. The defendant applied under what was then Rule 19(24)(a) to strike out the writ and statement of claim as disclosing no reasonable claim.

[44] The learned chambers judge held the claim was without merit and was a Strategic Lawsuit Against Public Participation (SLAPP) that had been used to stifle the democratic activities of the defendants and was deserving of censure by an award of special costs.

[45] In my opinion, the same conclusion can be made with respect to this case. The defendant DeWitte is, therefore, entitled to his costs as special costs.

"B.M. Joyce J."

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