COURT OF APPEAL FOR ONTARIO

CITATION: Upchurch v. Oshawa (City), 2014 ONCA 425
DATE: 20140526
DOCKET: C57357

Weiler, Lauwers and Pardu JJ.A.

BETWEEN

Donald Thomas Upchurch and Carla Pauline Upchurch

Plaintiffs (Appellants)

and

The Corporation of the City of Oshawa

Defendant (Respondent)

Scott R. Fairley, for the appellants

Jasmine T. Akbarali and Nada Nicola-Howorth, for the respondent

Heard: April 7 and 11, 2014

On appeal from the judgment of Justice Bruce A. Glass of the Superior Court of Justice, dated June 7, 2013, with reasons reported at 2013 ONSC 3375, and his costs decision dated July 2, 2013, with reasons reported at 2013 ONSC 4498.

Pardu J.A.:

[1] The appellants sued the City of Oshawa for negligence. They alleged that the City owed them a duty not to prosecute them for relying on the City's advice that they did not need a building permit to construct a deck, and that the City "breached the standard of care and was negligent in its provision of advice and enforcement of the *Building Code*." The trial judge concluded that the City had acted reasonably, and that it had not provided the misinformation alleged by the appellants, and accordingly dismissed the action.

[2] The appellants argue that the trial judge made errors of law and palpable and overriding errors of fact when he concluded that the City met the standard of care and found the City not liable in negligence. They also seek leave to appeal from the trial judge's decision granting substantial indemnity costs to the City.

[3] For the reasons that follow, I would dismiss the appeal. However, I would grant leave to appeal the trial judge's decision on costs, and would allow that appeal.

Factual Background

[4] One of the appellants, Mr. Upchurch, intended to build a new deck at 178 Division Street, in Oshawa. He went to the city offices to inquire whether he needed a building permit for construction of a deck. Mr. Upchurch testified that he brought his construction plans with him to the City offices; the City office employee testified otherwise. Mr. Upchurch was told he did not need a permit as

long as the deck was no higher than 24 inches above the adjacent grade. Mr. Upchurch began construction.

[5] On September 28, 2006, someone complained to the city about construction taking place without a permit, and a building inspector, Mr. Van Vaals, attended at the property to look at the deck. He reported back to his supervisor that Mr. Upchurch had indicated that the deck surface would be less than 24 inches from the adjacent surface. Mr. Upchurch took the position that because he would be installing planters on the perimeter of the deck, the distance from the deck to the top of the planters was less than 24 inches, and he did not need a permit.

[6] Mr. Van Vaals' supervisor instructed him that a permit was required, taking the view that the proper distance to be measured was to ground level and not the top of the planters. Mr. Van Vaals telephoned Mr. Upchurch that same afternoon and left him a voice mail message to the effect that a permit was required. Mr. Upchurch declined to apply for a permit, and did not stop construction. As a result, a No Permit Order was affixed to the front door of the property on October 10, 2006. Notwithstanding the No Permit Order, the Upchurches did not cease construction, but appealed the No Permit Order to the Superior Court of Justice; their appeal was dismissed on May 8, 2007. Subsequently, on June 21, 2007 the City issued an "Order to Uncover" so that it could inspect the work below the deck surface.

[7] On September 5, 2007, the City charged Mr. Upchurch with failing to obtain a building permit, failing to comply with the No Permit Order, and failing to comply with the Order to Uncover, pursuant to the *Ontario Building Code Act, 1992,* S.O. 1992, c. 23.

[8] The appellants appealed to the Divisional Court from the order of May 8, 2007 dismissing their appeal challenging the "No Permit Order". The Divisional Court allowed the appeal on the ground that when installation of the planters was complete, the deck surface would be less than 24 inches from the planters, and that a permit was not required.

[9] Following the release of the Divisional Court decision, the City withdrew the charges under the *Ontario Building Code Act*. The appellants then commenced a claim against the City alleging negligence and malicious prosecution. Their Statement of Claim alleged bad faith on the part of the City, and claimed damages in the amount of $300,000. The appellants withdrew the malicious prosecution claim shortly before trial.

Decision Below

[10] The trial judge rejected the appellants' evidence that Mr. Upchurch brought his deck plans with him when he first visited the City offices, and found instead that he made a cursory oral inquiry about deck construction with or without a building permit, and that under the circumstances, the City employee conducted himself in a reasonable matter and that the information he provided was not

inaccurate. Accordingly, he dismissed the appellants' claim that the City negligently advised him that no permit was required.

[11] With respect to the appellants' other claims in negligence, the trial judge defined the standard of care by indicating that the City was obliged to administer the *Building Code* in an objectively fair and impartial manner, and to act reasonably. He accepted that there had been a grey area as to whether planters would qualify as adjacent grade for the purposes of measuring distance to adjacent grade. He noted that the *Building Code* was later amended to clarify that the distance to ground level was the required measurement.

[12] The trial judge concluded that "the officials were acting reasonably in interpreting that what Mr. Upchurch was doing was not within acceptable limits of constructing a deck without a building permit. They were not negligent in exercising their duties." He rejected the allegation that the City was harassing the appellants, or engaged in a vendetta against them. Therefore, he dismissed the appellants' claims for damages for negligence.

Analysis

[13] The trial judge rejected the appellants' evidence that Mr. Upchurch brought his deck plans with him when he first visited the City offices, and rejected his evidence that he was told he did not need a permit. Given the conflicting evidence before him, this finding was reasonably open to the trial judge and was buttressed by other evidence. This was sufficient to dispose of the appellant Mr.

Upchurch's claim that the City negligently advised him that no permit was required.

[14] The rest of the claims depend on an assessment of the conduct of City officials from the time of their first visit to the property. The essence of the appellants' action is that the City was negligent to issue the orders it did and to prosecute him for offences under the *Ontario Building Code Act*, given the finding of the Divisional Court that no permit was required. He also asserts that the inconsistent advice given to him about the necessity for a building permit amounted to negligence. This latter assertion cannot be sustained given the trial judge's finding that he was not told he did not need a building permit when he first went to the City's building department.

Did the trial judge apply the incorrect standard of care or apply the correct standard of care incorrectly?

[15] The parties proceeded at trial and on appeal on the common assumption that the circumstances of this case gave rise to a duty of care on the part of the city, and that a breach of the standard of care in discharging this duty could give rise to an action for negligent investigation. The plaintiffs abandoned their claim of malicious prosecution.

[16] The elements of the tort of malicious prosecution require a plaintiff to prove:

1. The prosecution was initiated by the defendant

2. The prosecution was terminated in favour of the plaintiff
3. The prosecution was undertaken without reasonable and probable cause. In the context of a public prosecution by the Crown or an individual Crown attorney, this means that there were not objectively speaking reasonable grounds to initiate or continue the prosecution or that subjectively, the prosecutor did not subjectively believe that proof to the required standard could be made in a court of law
4. That the prosecutor acted with malice, that is to say, used the office of prosecution for an improper purpose.

(See *Miazga v. Kvello Estate*, 2009 SCC 51)

[17] Absent these requirements, neither “errors in judgment or discretion or even professional negligence” are sufficient to establish the intentional tort of malicious prosecution. (See *Nelles v. Ontario*, [1979] 2 S.C.R. 170)

[18] Here the appellants brought their action in negligence and argue that there were not objectively speaking reasonable grounds to initiate or continue the prosecution for the offences under *Ontario Building Code Act*. If this is characterized as an “investigation” to which the simple standard of a “reasonable bylaw enforcement officer” applies, then the distinction between an action for malicious prosecution and an action for negligent investigation is obliterated.

[19] In *Hill v. Hamilton-Wentworth Regional Police Service*, 2007 SCC 47, the Court recognized the tort of negligent investigation of a targeted subject by

police. In that case the negligence alleged was publication of the suspect's photograph, conduct of a photo line-up including the aboriginal accused and 11 Caucasians, and interviewing identification witnesses together while a photograph of the accused was displayed on a desk, in circumstances where identification of a robber was in issue. These were investigative steps removed from decisions to initiate or continue prosecution.

[20] What then are the elements in this case which might be characterized as investigatory steps? It is not suggested that the City failed to consider the appellants' interpretation of the *Building Code*, or that it was negligent in responding to a complaint or in the manner in which it inspected the construction project.

[21] It may be difficult in this context to distinguish activities characterized as "investigation" from those amounting to "prosecution". Assuming, without deciding, that thee constellation of facts in this case can be potentially characterized as "investigatory steps", the standard of care required is that of the reasonable building code enforcement officer. In the context of police investigations, the Supreme Court observed in *Hill v. Hamilton Wentworth Police Service v. Hill*, 2007 SCC 41, [2007] 3 S.C.R. 129, at para. 73:

> The standard of care is not breached because a police officer exercises his or her discretion in a manner other than that deemed optimal by the reviewing court. A number of choices may be open to a police officer investigating a crime, all of which may fall within the

> range of reasonableness. So long as discretion is exercised within this range, the standard of care is not breached. The standard is not perfection, or even the optimum, judged from the vantage of hindsight. It is that of the reasonable officer, judged in the circumstances prevailing at the time the decision was made….

[22] In *Rausch v. Pickering*, 2013 ONCA 740, this court indicated that a municipality enforcing a by-law owed a duty of care to persons who were the subject of investigations. This was in the context of a pleading motion where the issue was whether it was plain and obvious that the plaintiff did not have a common law cause of action and whether it was adequately pleaded. Pickering compelled Rausch to get rid of a herd of wild boars. The *Farming and Food Production Protection Act*, 1998, S.O. 1998, c.1 (*FFPPA*) prevented municipal by-laws from restricting a normal farm practice. The plaintiff alleged that the defendant was negligent in taking enforcement proceedings against him, and that it knew or ought to have known that the bylaws could not apply to prohibit his keeping of the herd. While the issue on appeal in *Rausch* was whether the courts below erred in declining to strike a claim under Rule 21 on the basis that no such duty of care existed, rather than what standard of care should be applied, Epstein J.A. suggested that the appropriate standard of care would be that of a reasonable by-law enforcement officer. The Court observed at para. 88:

> Municipalities are presumed to know the law: *Boundary Bay Conservation Committee v. British Columbia (Agricultural Land Commission)*, 2008 BCSC 946, [2008] B.C.J. No. 1369, at para. 71. Further, this court has held that enforcement officers are obliged to (i) act

> in good faith in relation to their decisions as to how a by-law will be enforced, and (ii) act with reasonable care in any steps they take to enforce a by-law: *Foley v. Shamess*, 2008 ONCA 588, 297 D.L.R. (4th) 287, at para. 29; see also *Butterman v. Richmond (City)*, 2013 BCSC 423, [2013] B.C.J. No. 461, at para. 38. The combination of these two factors – presumed knowledge of the law and an obligation to act reasonably and in good faith in enforcing it – and the wording of s. 444 of the *Municipal Act* mentioned above, may be relevant to the determination of the standard of care. Specifically, it may permit a finding that when attending at Mr. Rausch's premises and observing livestock in circumstances that appeared farm-like, the by-law enforcement officer ought to have considered the implications of the *FFPPA* before proceeding with enforcement steps.

[23] The Court did not suggest that the by-law enforcement officer had to necessarily be correct in his interpretation of the *FFPPA* or bylaws, but indicated that he consider the implications of those provisions.

[24] In this case, the trial judge defined the standard of care as requiring the City to administer the *Building Code* in a fair and impartial manner, and to act reasonably. He concluded, "I find that the officials were acting reasonably in interpreting that what Mr. Upchurch was doing was not within acceptable limits of constructing a deck without a building permit. They were not negligent in exercising their duties."

[25] The appellants argue that the trial judge erred in applying the standard of care applicable to an inspector acting under the *Building Code*, because the Divisional Court ultimately found that the *Building Code* did not require a building

permit in this case. The standard of care that they submit is applicable – "that would be expected of an ordinary, reasonable and prudent inspector in the same circumstance" – is identical to that set out by the trial judge, at para. 24 of his reasons.

[26] The appellants do not argue that the trial judge did not accurately define the standard of care, but submit that he misapplied that norm. An exacting standard of appellate review applies to conclusions by a trial judge as to whether a party's conduct met the required standard of care.

[27] In *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, the Supreme Court dealt with the issue of the standard of review of a trial judge's decision as to whether a municipality had met the standard of care required for road maintenance. The Court held, at para. 36, that the general rule is that where the issue on appeal is the trial judge's interpretation of the evidence as a whole, it should not be overturned absent palpable and overriding error. No such error has been demonstrated here.

[28] The appellants argue that, because the Divisional Court ultimately determined that a permit was not required under the *Building Code*, the City's investigation and enforcement actions, and eventual laying of charges under the *Building Code* with respect to the appellants' activities, necessarily constituted a breach of the required standard of care. This is incorrect. Assuming that a claim for negligent investigation is appropriate in these circumstances, it is insufficient

to merely show that the City's interpretation of the *Building Code* was not ultimately sustained. As the trial judge correctly determined, the standard of care in a negligent investigation claim requires that the City representatives exercised their duty reasonably, not that their interpretation of the law was ultimately correct.

Did the trial judge commit palpable and overriding error when he concluded that Mr. Upchurch was the author of his own misfortune?

[29] The appellants also argue that the trial judge committed a palpable and overriding error in fact, and an error in law, in finding that Mr. Upchurch was, in part, the author of his own misfortune. I disagree. This finding was within the trial judge's discretion in light of the evidence before him, and in light of his assessment of the various witnesses' credibility. In any event, as the trial judge did not err in finding that the City's conduct met the relevant standard of care, this finding would not have affected the disposition of this case.

[30] Accordingly, the appeal from dismissal of the action is dismissed. It is therefore not necessary to deal with the issue of damages.

Did the trial judge err in awarding costs to the city on a substantial indemnity basis?

[31] The appellants also seek leave to appeal from the trial judge's decision granting substantial indemnity costs to the City in the amount of $70,000. The trial judge awarded substantial indemnity costs because of the appellants'

vigorous pursuit of the action, their discontinuance of the claim for malicious prosecution on the eve of trial, their unsubstantiated allegations of improper conduct by City officials, the pursuit of claims for aggravated and punitive damages and because the City made an offer to settle. The parties agree that the City's offer did not attract the cost consequences of rule 49.10, although the fact that the City offered to settle for payment of up to $15,000 in exchange for dismissal of the action was a factor which could be considered in assessing costs.

[32] The appellants' pursuit of this action which was ultimately dismissed is not the kind of "reprehensible or egregious" conduct that would justify an award of substantial indemnity costs.

[33] The appellants' conduct of the litigation did not reach the levels described in *Di Battista v. Wawanesa Mutual Insurance Company*, [2005] 78 O.R. (3d) 445, where a losing plaintiff who made unfounded allegations of fraud and dishonesty seriously prejudicial to the character or reputation of the City or its employees was ordered to pay costs on a substantial indemnity basis. Here the refusal to follow counsel's advice to settle the case and the pursuit of claims for aggravated and punitive damages do not by themselves justify costs on a substantial indemnity basis.

[34] Accordingly, I would grant leave to appeal the trial judge's costs decision and would allow this appeal.

[35] This was a four day trial. The trial judge indicated the costs which were claimed at para. 17 of his reasons for his costs order:

> The quantum presented in the bill of costs by the Defendant is shown to be $79,901.80 on a partial indemnity scale and $113,761.54 on a substantial indemnity scale. Ms. Nicola-Howorth shows that the actual account to the client is $137,898.01. These figures include HST. In addition, there are disbursements of $4,003.41 subject to HST of $520.44 and disbursements not subject to HST of $233.74.

[36] I would vary the substantial indemnity costs awarded following trial to an award of partial indemnity costs which I fix at $35,000 plus disbursements inclusive of HST of $4,757.59.

[37] Since success on the appeal was divided, each party shall bear its own costs of the appeal.

Released: May 26, 2014

(K.M.W.) "G. Pardu J.A."

"I agree K.M. Weiler J.A."

"I agree P. Lauwers J.A."