COURT OF APPEAL OF YUKON

Citation: *Senft v. Vigneau,*
2019 YKCA 14

Date: 20190628
Docket: 18-YU840

Between:

Angela R. Senft and Michael E. Senft

Respondents
(Plaintiffs)

And

Audrey Vigneau and Susan Herrmann

Appellants
(Defendants)

Before: The Honourable Madam Justice Fisher
(In Chambers)

On appeal from: An order of the Supreme Court of Yukon, dated February 13, 2019 (*Senft v. Vigneau*, Whitehorse Docket 17-A0120).

Oral Reasons for Judgment

Counsel for the Appellants:	D.F. Sutherland, Q.C. N. Rayani, Articled Student
Counsel for the Respondents (via videoconference):	G.W. Whittle M.É. Whittle
Place and Date of Hearing:	Vancouver, British Columbia June 28, 2019
Place and Date of Judgment:	Vancouver, British Columbia June 28, 2019

Summary:

The respondents won large awards in defamation against each of the appellants, V and H. The appellants apply for the orders to be stayed pending their appeal. Held: application granted on conditions. If forced to abide by the order immediately, the appellants would suffer harm that cannot be quantified in monetary terms. V would lose all of her assets, including her home, and H's ability to manage her business and deal with assets owned by the corporation she controls would be compromised. The stay should be granted on the condition that the respondents may file a certificate of judgment against V's house on the understanding that they are not permitted by statute to execute on the certificate for a year, and that H post security for the full amount of the judgment against her within a specified period of time.

[1] **FISHER J.A.**: The respondents, Angela and Michael Senft, each won large awards in defamation against the appellants, Audrey Vigneau and Susan Herrmann, after trial by judge and jury. On appeal, the appellants seek to set aside the verdict on the ground that the trial judge incorrectly instructed the jury on the circumstances in which malice can defeat the defence of fair comment.

[2] The appellants apply for the orders to be stayed pending their appeal. They submit that, as security, a *lis pendens* can be placed on a property of Ms. Herrmann's or Ms. Herrmann's company's, and Ms. Vigneau can undertake not to transfer any asset until three months after a decision is rendered in the appeal.

Background

[3] Daniele McRae is 81 years old. In 2008, after her husband passed away, she wrote a will that named Angela Senft as her executrix, Michael Senft as her alternate executor, and made Ms. Senft the beneficiary of her assets, including a property she owned. In May 2010, Ms. McRae transferred her property into the names of Ms. Senft, Mr. Senft, and herself, as joint tenants.

[4] Some years later, in June 2017, Ms. McRae had a falling out with the Senfts. She wrote to them seeking a quitclaim deed of the property and a number of her possessions. The Senfts did not agree, and suggested that either they purchase Ms. McRae's interest in the property, or vice versa.

[5] On July 10, 2017, Ms. McRae executed a new will, naming Ms. Vigneau as her executrix and beneficiary. She then advised the Senfts that she did not gift the interest in property to them, but instead intended to transfer her interest to them when she died.

[6] On October 23, 2017, the Senfts filed a statement of claim against Ms. McRae to confirm that their joint tenancy was a gift. I am advised by counsel that that litigation has been settled.

[7] According to the information filed in this application, the statements giving rise to the defamation suit were made in two publications. The first, on November 19, 2017, was a post by Ms. Vigneau on GoFundMe:

> Help Daniele McRae – Save her home!
>
> I am compelled to go to this social funding page to ask for support for my dear friend Daniele McRae. Daniele is a retired senior who has been a long time resident in Dawson City and still maintains her own home on the Dome. After losing her husband about 10 years ago she reached out to find support to manager her affairs and to support her in a difficult time. Daniele trusted the wrong people who it turns out befriended her with ulterior motives than just friendship. These people have managed to get Daniele to put them in her will as she has no heirs to her estate. They were good to her, helped her out with mobility and companionship so she agreed it was a good idea.
>
> Daniele is now in a situation of being verbally abused and threatened by these people who claim to be her friends. They want her out of her home and living in MacDonald Lodge so they can take possession immediately. They are suing Daniele for the rights to use “their” property now! This was not the agreement Daniele signed on for, she is fighting for her home so she can live out her days peacefully. This couple has now forced her into court and she has a legal battle in front of her. As a pensioner she cannot afford a legal battle but has no other option at this time.
>
> I am asking for financial assistance, even the smallest contribution, to support Daniele’s legal costs as she may lose her home. Daniele is a proud woman and self reliant, she is not one to ask for hand outs, but at this time she is overwhelmed and feeling vulnerable. It is hard to imagine you putting trust into someone and having that person turn on you as son as they get what they want. I can only say it is blatant senior abuse and fraudulent.
>
> Daniele will be so thankful for any support she receives even in a kind word. Thank you all for reading my story and I am happy to answer any questions this may have raised.

[8] The second, on November 23, 2017, was a post by Ms. Herrmann to households in Dawson City:

> For those of you who don't know her, Danielle McCrae is a long time resident of Dawson City who lives on the Dome. She lost her husband over 10 years ago and during this sad time, Danielle was befriended by another local couple who helped her through her grief and assisted her with maintaining the property. Seeing as she had no other heirs, she graciously put this couple into her will and added their names to hers on the title of her property. All Danielle wishes to do is remain in her own home until her demise. That's where this happy story ends. Now this couple does not want to wait until she passes away, they want Daniel to move into MacDonald lodge so that they can have possession of her home now! They are trying to evict her from her own home! We cannot let this happen!
>
> All avenues of assistance have been exhausted: Adult Protection, Ministry of Justice, Health Minister, Premier, RCMP. The only option is to retain a lawyer to fight this.
>
> I am willing to front the retainer fee but am seeking contributions to help Danielle with her legal fight. This could potentially amount to between $50 - $100,000.00 if this couple and their lawyer continue with this action.
>
> Please join me in assisting Danielle to stay in her home. Any amount, every little bit helps!
>
> Ways to donate:
>
> - GoFundMe page titled "Help Daniele McRae – Save her home!"
> - mail your donation to Box 1569, Dawson City
> - drop off with Karen at Dawson Hardware.
>
> Come on Dawson, protect our seniors!

[9] The primary defence advanced by both appellants was fair comment.

[10] The jury awarded Ms. Senft $252,207.42 against Ms. Vigneau and $250,707.42 against Ms. Herrmann. It awarded Mr. Senft $125,160.37 against Ms. Vigneau and $153,660.37 against Ms. Herrmann. Those amounts do not include interest.

[11] Ms. Herrmann, according to counsel's information provided today, owes $453,796 including prejudgment interest and post judgment interest to date. She will also be liable for costs. Ms. Herrmann deposes to having some cash, vehicles and a motorhome that are together valued at approximately $94,000. She also owns 51% of the shares in a company called Dawson Hardware Ltd., which owns a Home

Hardware in Dawson City, and 90% of the shares in The Monte Carlo Ltd., a holding company that owns properties in and around Dawson City, including Ms. Herrmann's residence and a laundromat valued at approximately $410,000. Ms. Herrmann's daughter owns the balance of the shares in The Monte Carlo Ltd.

[12] Ms. Herrmann deposes that if a stay is not granted, the only assets that might be seized to satisfy the judgment are her shares in Dawson Hardware Ltd. and The Monte Carlo Ltd. She says that the seizure of her shares would occasion irremediable harm, as the respondents may cause the hardware store to close, or the Monte Carlo properties to be disposed of. She deposes that if the hardware store closed, it would cut off her income and would put employees out of work. She deposes that The Monte Carlo Ltd. holds everything she has saved for her retirement.

[13] Ms. Vigneau owes $396,689 including prejudgment interest and post-judgment interest to date. She will also be liable for costs. She deposes that she owns her home, which is valued at approximately $325,000 but is encumbered by a collateral mortgage that serves as security for a line of credit, apparently in the amount of about $20,000. She has two vehicles together worth approximately $12,000. She has an RRSP worth approximately $110,000. Her monthly income is currently $2,550, but her expenses total $3,042. She currently owes approximately $46,000 to the bank, her counsel, and her credit card company.

Stay pending appeal

[14] Section 13 of the *Court of Appeal Act*, R.S.Y. 2002, c. 47 provides that a stay of execution may be ordered by a single judge of this court:

> 13 Execution of the judgment appealed from shall not be stayed except under order of the judge of the Supreme Court or the Court of Appeal, or a judge thereof, and on those terms that are just.

[15] The test for a stay pending appeal is straightforward and well-settled:

> The three stage test enunciated *in Metropolitan Stores (M.T.S.) Ltd. v. Manitoba Food & Commercial Workers, Local 832,* [1987] 1 S.C.R. 110, 38

> D.L.R. (4th) 321 and re-affirmed in *RJR - MacDonald* has frequently been interpreted as requiring an applicant to show the following:
>
> (1) that there is some merit to the appeal in the sense that there is a serious question to be determined;
>
> (2) that irreparable harm would be occasioned to the applicant if the stay was refused;
>
> (3) that, on balance, the inconvenience to the applicant if the stay was refused would be greater than the inconvenience to the respondent if the stay was granted.

(See *B.C. (Milk Marketing Board) v. Grisnich* (1996), 70 B.C.A.C. 142 (C.A.) at para. 7 (in Chambers)).

[16] Sometimes, particularly where the judgment is for a significant sum, granting the respondent security for costs or for the judgment given below — including interests and an estimate of costs — as a condition of a stay can aid in striking the appropriate balance between the interests of all parties: *Voth Brothers Construction (1974) Ltd. v. National Bank of Canada* (1987), 12 B.C.L.R. (2d) 43 (C.A.); *Bystedt (guardian ad litem) v. Hay*, 2002 BCCA 634 at para. 7 (in Chambers). The full amount need not always be provided; ultimately, the question is what would be in the interests of justice: *Ager v. Canjex Publishing Ltd.*, 2003 BCCA 511 at para. 9 (in Chambers), varied 2003 BCCA 612 [*Ager* review].

Analysis

[17] Ms. Herrmann submits that a stay pending appeal should issue, with a *lis pendens* placed on the laundromat held by The Monte Carlo Ltd. Ms. Vigneau submits that a stay should issue with her undertaking not to transfer any assets until the appeal decision has been rendered.

[18] The respondents submit that the stays should not issue because the appeal has no merit, the seizure of Ms. Herrmann's shares would not cause irreparable harm, and the amount owing by each appellant would not be fully secured by the properties they have proffered.

Merit

[19] The appellants submit that the appeal has merit on the basis of errors of law. They say that the trial judge erred in in failing to instruct the jury that in the circumstances, malice had to be ulterior to the purpose of the defence of fair comment, and that malice must be the "dominant or overriding" motive of the defamatory speech, rather than its "primary" motive. They also say that the trial judge erred in failing to assess whether there was sufficient evidence to raise a probability of malice.

[20] The respondents submit that the appeal has no merit because the jury rendered a unanimous verdict that is entitled to deference, the appellants failed to object to the judge's instructions at trial, and the probability of express malice was made out.

[21] In my view, the appellants have an arguable case of sufficient merit. Regardless of what test I apply, there has to be a serious question to be tried and an arguable case. The jury's verdict is certainly entitled to deference in respect of factual findings, but the grounds raised by the appellants are errors of law made by the trial judge. The appellants' failure to object will be relevant to the division that ultimately hears this appeal, but it is not necessarily fatal to the appeal: *Brophy v. Hutchison*, 2003 BCCA 21 at paras. 49–56.

[22] The judge instructed the jury on malice as follows:

> No comment can be called "fair" if it is primarily motivated by malice. Ask yourself, why did the defendants say what they said? If the defendants made the statement out of spite or ill will or with an intent to injure the plaintiffs, or without any honest belief in the truth of the statement, then you may consider that malice has been established and the defence of fair comment should be dismissed. In this case both defendants say that their purpose was to raise money for legal fees for Daniele McRae. Both Audrey Vigneau and Susan Herrmann contributed their own money to assist Daniele McRae. If you find that there is no malice and the statement amounted to fair comment, you must find in favour of the defendants and dismiss the plaintiffs' case.

[23] The appellants rely on the decision of this court in *Creative Salmon Company Ltd. v. Staniford*, 2009 BCCA 61 to support their argument that the trial judge should

have instructed the jury that malice must be ulterior to the purpose of the defence of fair comment. In *Creative Salmon Ltd.*, Tysoe J.A. stated that malice may either be ill will or an indirect motive that conflicts with the purpose of the defence. Given the evidence of the appellants' purpose for making the statements as noted by the judge in his instruction, there is merit to this argument. Whether or not there is a difference between "primary motive" and "dominant or overriding motive", the trial judge's instructions on malice arguably oversimplify the law on drawing an inference of malice. And, finally, whether the trial judge ought to have instructed the jury on malice at all — i.e. whether there was evidence of a probability of malice — is a matter to be assessed on the evidence. It is not possible for me to do that in the context of this application. However, the evidence referred to by the judge in this instruction lends some support to the appellants' argument on this point. I can say no more than that.

Irreparable harm

[24] Ms. Herrmann submits that she will suffer irreparable harm if the stay is not granted, as her only significant assets are shares in two companies that themselves own other assets. Dawson Hardware Ltd., which has operated the Home Hardware store in Dawson City for many years, is Ms. Herrmann's primary source of income. She owns 51% of the shares and her daughter owns 49%. The business employs five full-time employees. The business is currently operating at a net loss, for whatever reason, and I have no basis to make any further comment on that. Ms. Herrmann also holds a 90% interest in The Monte Carlo Ltd., her daughter holding the remaining 10%. This company owns a number of assets, including Ms. Herrmann's residence and a laundromat.

[25] Ms. Herrmann says that a seizure of the shares in either company would cause her irreparable harm, as it could irrevocably damage the hardware business and could result in her losing her home and interfering with her daughter's interest in the company's assets. She proposes to offer security to the respondents by having a charge registered on the laundromat property, as it is unencumbered and valued at

an amount (about $410,000) that would meet, at least, her most current obligations under the judgment.

[26] Ms. Vigneau has more limited assets. Her main asset is her home, valued at approximately $325,000, which is subject to a collateral mortgage of about $20,000. She also has an RRSP of approximately $110,000. She is semi-retired, receiving a pension as well as a small income from part-time employment. Her monthly income of about $2,500 per month is exceeded by her monthly expenses of about $3,000. Ms. Vigneau says she will suffer irreparable harm if the respondents execute against her assets, as she will lose everything she owns, including her home. She proposes to file an undertaking with the court that she will not transfer any asset until three months after the decision on the appeal on the merits.

[27] The respondents submit that there would be no irreparable harm to Ms. Herrmann, as under the *Executions Act*, R.S.Y. 2002, c. 79, ss. 7, 18, seizure of her shares will not prevent the business from operating, and there would be no irreparable harm to Ms. Vigneau, as her house could not be sold for one year following its seizure. They say that Ms. Herrmann has not provided sufficient information about the value of the assets owned by The Monte Carlo Ltd. and her proposal to register a charge on the laundromat property will not prevent the company from encumbering it or selling it.

[28] In my view, the appellants have satisfied me that they will suffer irreparable harm if a stay is not granted. The seizure of the shares in Ms. Herrmann's companies will cause serious difficulties with her ability to manage the hardware business and deal with the assets owned by The Monte Carlo Ltd. Execution on Ms. Vigneau's house will cause her obvious harm, and execution on any other assets will render her with nothing.

Balance of convenience

[29] The appellants submit that the balance of convenience favours the granting of a stay due to concerns about their ability to recover any amounts paid out to the respondents in the event they are successful on their appeal. They say that their

proposal to provide a form of security to the respondents should be sufficient to address any harm caused by their inability to realize the fruits of their judgment.

[30] The respondents submit that depriving them of the fruits of their judgment is irreparable harm due to the delays in being able to execute on their judgment and the possibility that either appellant may go bankrupt or pass away before the appeal is determined, and that the balance of convenience favours refusing to grant the stay.

[31] With respect to the question of security, the respondents submit that they are entitled to have the full amount owed be secured, and the appellants' proposals fall short of securing that amount. They say that they have available property valued at $300,000, which is the 2/3 interest they own in the property with Ms. McRae, and which can secure any repayment required in the event the appeal is successful.

[32] On balance, it is my view that the inconvenience to the appellants would be greater than the inconvenience to the respondents, provided some form of security is given. I do not consider that depriving the respondents the fruits of their judgment at this time will cause irreparable harm, as the judgment is quantified in monetary terms and they will be entitled to interest on that amount if the appeal is dismissed. The harm to the appellants, on the other hand, is not quantifiable in monetary terms.

[33] While the full amount of the judgment should normally be secured, the authorities recognize that a judge has wide discretion to determine the terms on which to grant a stay: *Ager* review at para. 23. Moreover, a *Voth* order, as proposed by the respondents, is not automatic. The circumstances of this case are rather unique, as the appellants are subject to an unusually large judgment against them in an action for defamation, and the respondents have not demonstrated that the judgment is needed for a specific purpose or expense. Moreover, the property that the respondents offer as their security for drawing on funds is the very property that began this entire affair. I do not consider it appropriate to rely on that property as security in these circumstances.

[34] I consider the granting of a stay, conditional on security to be provided, to be in the interests of justice.

Disposition

[35] I would grant the stay on the following conditions:

- Ms. Vigneau — a stay is granted subject to permitting the respondents to file a certificate of judgment against her one piece of property on the understanding that they are not permitted by statute to execute on the certificate for a period of one year; and
- Ms. Herrmann — a stay is granted subject to Ms. Herrmann's posting security for the full amount of the judgment, not including costs, on or before September 3, 2019, with liberty to apply to extend that date if she is unable to raise the funds by then. If the appeal is dismissed, the respondents will be entitled to the interest earned on the funds paid in court.

"The Honourable Madam Justice Fisher"