COURT OF APPEAL FOR ONTARIO

CITATION: Markowski v. Verhey, 2020 ONCA 472
DATE: 20200722
DOCKET: C67709

Lauwers, Huscroft and Thorburn JJ.A.

BETWEEN

Beth Ann Markowski

Applicant (Appellant)

and

Dwayne David Verhey and Kathleen Anne Verhey

Respondents (Respondents)

Cara Valiquette, for the appellant Beth Ann Markowski

Amber Small and David Delagran, for the respondents Dwayne David Verhey and Kathleen Anne Verhey

Heard: in writing

On appeal from the order of Justice Thomas Wood of the Superior Court of Justice, dated November 6, 2019.

Thorburn J.A.:

1. OVERVIEW

[1] The appellant, Beth Markowski, owns a cottage near Lake Waseosa. Her property is not directly on the waterfront but she has a right-of-way over a beach that leads to Lake Waseosa for “all the usual purposes”.

[2] The respondents, Dwayne and Kathleen Verhey, own two adjoining lots, including the beach over which the appellant has a right-of-way.

[3] The key issue on this appeal is whether the “usual purposes” entitles the appellant to bring boats across the right-of-way using a motor vehicle.

[4] The appellant claims it does.

[5] The respondents accept that the right-of-way allows the appellant to access Lake Waseosa “for various activities such as swimming and boating” but deny that she is allowed to bring boats to and from the shore using a motor vehicle. They take the position that the right to bring boats across is limited to small boats that can be portaged across the right-of-way.

[6] In the originating proceedings, the appellant brought an application seeking a declaration about the extent of her rights pursuant to the right-of-way. The appellant claims she has a right to cross the beach as well as to use the beach for recreational purposes. She claims this includes the right to launch and retrieve watercraft using mechanical power as may be necessary. She challenges the portion of the application judge’s decision holding otherwise.

[7] For the reasons that follow, the appeal is dismissed.

2. THE PROPERTIES IN QUESTION

[8] In 2016, the appellant bought a cottage lot described as Pt Lt 10 Con 12 Chaffey Part 2, RD999. Her lot is not on the waterfront.

[9] In 1997, the respondents, Dwayne and Kathleen Verhey, bought two lots described as Pt Lt 10 Con 12 Chaffey, Parts 3 and 6, RD999. One of those lots, Part 6, is on the waterfront.

[10] None of the parties to the appeal are parties to the original instruments that created the lots or the right-of-way in dispute.

[11] Before 1969, Parts 2 through 6 formed part of a larger parcel of land that was acquired by Frederick Rhoads and used by members of the Rhoads family. The family built four cottages on the parcel and used the beach as a common recreational area.

[12] In 1969, the parcel was formally subdivided into four cottage lots, an access road, and a beach lot over which the cottage lots had a right-of-way. Parts 2 and 3 are two of the cottage lots. Part 6 is the beach lot. The lots were conveyed to the Rhoads children in 1970; all but Dale Rhoads have since sold their lots.

[13] All of the cottage lots, apart from Part 3, have a right-of-way over Part 6. The right-of-way was created in 1970 when the lots were conveyed to the Rhoads

children. The deed to the appellant's property contains a right-of-way "for all the usual purposes, in, over, along and upon" the waterfront property at Part 6.

[14] The appellant's lot (Part 2) and the respondents' lots (Parts 3 and 6) are shown on the reference plan attached to these reasons as Appendix A.

3. THE APPLICATION JUDGE'S DECISION

[15] The application judge reviewed the meaning of the words "the usual purposes" in the right-of-way and the history of how the Rhoads family used what is now Part 6.

[16] He noted that the historical uses of a right-of-way are informative, though not determinative, of the meaning to be attributed to the phrase "the usual purposes". The application judge held that the phrase "for all the usual purposes" should be interpreted to "refer to the purposes of the right of way not … the purposes to which Part 6 was being put at the time of the grant." Otherwise, the grant would confer "an ownership interest in Part 6" when what was conveyed was a right-of-way. He concluded that the uses "must be those appurtenant to the easement, not the land itself. That is to say, the right to gain access to Lake Waseosa over Part 6."

[17] The application judge then attempted to distinguish between the historic uses that would have required permission from the owner of the beach and those that were part of the right-of-way and therefore would not.

[18] He found that launching and retrieving large boats was an activity that would have only been done with the express or implied permission of the owner of the beach and as family members, not as part of the right-of-way:

> I … find that the daily use the owners of Parts 2, 4, and 5 made of their right to cross the beach included swimming, and its related activities such as building sand castles, and sunbathing and perhaps the use of canoes or kayaks. This was done without the express permission of Frederick when he was alive or Paul [Rhoads, who received title to Parts 3 and 6 after Frederick's death]. However other activities such as … launching and retrieving large boats … would have been extended family activities or extraordinary ones that would have been done with the permission of the owner of the beach lot. It was in this context that the grants of easement over Part 6 were made.

[19] He therefore held that the right-of-way included the following uses as part of "the usual purposes":

> A. Regular access to Lake Waseosa for the purpose of swimming or related aquatic activities,
>
> B. Use of that part of the beach directly adjacent to the swimming area during such activities,
>
> > (i) for children's recreational activity.
> >
> > (ii) temporary storage of towels, clothing, beach chairs etc. while the users of such items are present on the beach, and
>
> C. Launch and retrieval of small craft capable of being carried or dragged across the beach without resort to mechanical power, but not the storage of such craft.

4. THE APPELLANT'S GROUNDS OF APPEAL

[20] The appellant's notice of appeal claims the application judge made palpable and overriding errors in Part C of his order by restricting the appellant's right to bring boats across the right-of-way on Part 6 in the following ways:

> a) He limited ingress and egress to "launch and retrieval of small craft capable of being carried or dragged across the beach without resort to mechanical power";
>
> b) He found that historical uses such as launching and retrieving large boats "would have been extended family activities or extraordinary ones that would have been done with the permission of the owner of the beach lot";
>
> c) He limited ingress and egress to "what amounts to pedestrian travel … with no evidence to suggest a limitation to pedestrian travel or to pedestrian travel with small crafts that can be dragged or carried"; and
>
> d) He limited ingress and egress to pedestrian travel notwithstanding uncontradicted evidence that the right-of-way included the launching of boats as of right.

[21] The appellant claims the order unduly limits her use of the right-of-way to pedestrian traffic thereby rendering the basic right of ingress and egress "almost useless".

[22] In her factum, the appellant claims the application judge also erred in Parts A and B of his order by "limiting the right to use of land based on inadequate language, such as 'children's recreation' rather than general recreation". This issue

was not raised in the notice of appeal. The only relief sought in the notice of appeal is that the restriction in Part C be set aside in whole or in part.

[23] Rules 61.08(2) and (3) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, read as follows:

> (2) No grounds other than those stated in the notice of appeal or cross-appeal or supplementary notice may be relied on at the hearing, except with leave of the court hearing the appeal.
>
> (3) No relief other than that sought in the notice of appeal or cross-appeal or supplementary notice may be sought at the hearing, except with the leave of the court hearing the appeal.

See also *Eton Construction Co. v. R.* (1996), 28 O.R. (3d) 321 (C.A.).

[24] The notice of appeal addresses only Part C and the issue concerning the transportation of boats by motor vehicle across the right-of-way. Even after the issue was raised by the respondents, no leave was sought to raise the issues in Part A or B of the order. In any event, there was ample evidence to support the application judge's findings in respect of the use of the right-of-way being restricted to swimming and related aquatic activities and bringing items onto the beach to engage in those activities.

[25] As a result, the appellant is restricted to seeking the relief in her notice of appeal in respect of Part C of the application judge's order.

5. ANALYSIS OF THE ISSUE

[26] A right-of-way created by express grant is an easement that allows the grantee and their successors in title to cross the grantor's land for a purpose related to the better enjoyment of the grantee's land: Anne La Forest, *Anger & Honsberger Law of Real Property*, loose-leaf, 3rd ed. (Carswell, 2006), at §17:20.30(a).

[27] The "nature and extent of a right-of-way depends on the proper construction of the language of the instrument creating it": *Canadian Pacific Ltd. v. Paul*, [1988] 2 S.C.R. 654, at p. 671.

(1) The Words in a Grant

[28] The first step in determining the rights that form part of a right-of-way is to interpret the grant according to the intention of the parties based on the words themselves: *Fallowfield v. Bourgault* (2003), 68 O.R. (3d) 417 (C.A.), at para. 10*; Smith v. Morris*, [1935] 2 D.L.R. 780 (Ont. C.A.), at p. 782.

[29] The grant of an express easement may also include ancillary rights provided they are reasonably necessary to use or enjoy the right-of-way. However, to imply a right ancillary to a right-of-way, "the right must be necessary for the use or enjoyment of the easement, not just convenient or even reasonable": *Fallowfield*, at para. 11.

[30] In *Boone v. Brindley* (2003), 179 O.A.C. 50 (C.A.), at para. 2, this court held that to determine what is reasonably necessary to the enjoyment of a right-of-way, one should also look at:

> the language of the conveyance creating the easement, the purpose and circumstances surrounding the creation of the right of way, the history of its development and the circumstances of its use.

[31] The grant of a right-of-way in this case reads as follows:

> TOGETHER WITH A RIGHT OF WAY, in common with all others entitled thereto, for all the usual purposes, in, over, along and upon ALL THOSE PARTS of Broken Lot 10 in Concession 12 of the said Township of Chaffey, designated Parts 1 and 6 on a plan of survey on deposit in the Registry Office for the Registry Division of the District of Muskoka as RD-999. [Emphasis added.]

(2) Determining the Purpose of the Grant of the Right-of-Way by Examining the Historic Use and Circumstances

[32] Where the words in the grant of the right-of-way are unclear, the historic use and circumstances surrounding the use of the property subject to the easement are particularly important to understand the nature and extent of the rights conveyed: *Square-Boy Limited v. The City of Toronto*, 2017 ONSC 7178, at para. 33; *Laurie v. Winch*, [1953] 1 S.C.R. 49, at p. 56.

[33] As in this case, the court in *Square-Boy Limited* was asked to interpret the meaning of the words “right-of-way in, over, along and upon the lands herein

described … for all purposes". Sanfilippo J. did a thoughtful and comprehensive analysis of the interpretation of the meaning and purpose of such a right-of-way.

[34] In *Square-Boy*, the right-of-way covered a former parking lot Square-Boy sold to the City of Toronto that had previously been used to access Square-Boy's premises.

[35] Sanfilippo J., like the application judge in this case, referred to the purposes of the right-of-way, not the purposes to which the property was being put at the time of the grant. Sanfilippo J. held that:

> The parties disagree about the meaning of the term "*for all purposes*". The parties submit that the phrase "*for all purposes*" can mean one of two things: (i) for *all the purposes* for which the City Property was used at the time the easement was granted in 1971, as is submitted by Square-Boy; or (ii) for *all the purposes* related to a right-of-way which, in the City's submission, does not include a right to park but rather includes only a right to pass over to gain access or egress, otherwise known as a right to "pass and repass".
>
> I do not accept Square-Boys' submission on this point, as to do so would entitle Square-Boy to all the vestiges of ownership that it enjoyed over the Front Parking Lot before it became the City Property. This cannot be the case. Even a robust right-of-way does not provide rights that are tantamount to ownership.
>
> Rather, I accept the City's submission to the extent that "*for all purposes*" was intended to describe the Right-of-Way which always remains a right-of-way. I find, however, that the term "*for all purposes*" means that the Right-of-Way is to be interpreted in a manner that includes all of the purposes for which it was agreed upon, created and granted to encompass which, in the context

> of this case, includes the right to permit parking to access commercial premises of the Property. [Emphasis added.]

[36] In this case, the appellant also brought an application seeking a ruling in respect of the meaning of the words “for all the usual purposes” in the right-of-way.

[37] The parties agree that the application judge properly construed the phrase “all the usual purposes” in the right-of-way to permit access to Lake Waseosa “for various activities such as swimming and boating”.

[38] The application judge accepted that Ernest Norton made an informal arrangement with his friend Frederick Rhoads under which Frederick Rhoads acquired the property without taking title. Frederick Rhoads and his children built four cottages on the parcel. These cottages are located on what are now Parts 2, 3, 4, and 5 in Appendix A.

[39] After Ernest Norton died, his son William subdivided the lots and transferred the lots to Frederick Rhoads’ children in accordance with Frederick Rhoads’ wishes. The deeds to Parts 2, 4, and 5 all came with a right-of-way over Part 6.

[40] In support of her application, the appellant included two affidavits from Dale Rhoads, the son of Frederick Rhoads and owner of Part 4, that described the historical uses of the beach on Part 6.

[41] In his first affidavit, Dale Rhoads described the use of the beach by his family members as follows:

> The beach was the gathering spot for all to recreate together. We swam, built sand castles, sunbathed, launched our boats, had bonfires, etc. The extended Rhoads family have many memories of the wonderful times we spent together at our “family compound”.

[42] He went on to say that the beach was “created for, and used by the entire family”.

[43] While Dale Rhoads referred to launching their family boats, he offered no description of the boats launched, or how they were launched. He did not say whether family members required Frederick's permission to do so. Moreover, the appellant provided no evidence of the use of motor vehicles to cross the right-of-way to launch large boats at the time of the grant.

[44] The respondents note that over time, the various lots surrounding Part 6, except for Part 4, were sold to third parties unrelated to the Rhoads family. The respondents purchased Parts 3 and 6 on March 5, 1997 from Frederick Rhoads’ youngest child, and the appellant purchased Part 2 on January 20, 2016 from a third party, with a right-of-way over Part 6.

[45] The respondents produced a letter written on May 24, 1997, just after they purchased Parts 3 and 6. The letter was sent to the prior owner of the appellant’s lot advising that there was a chain across the right-of-way on Part 6 that was locked. In the letter, Dwayne Verhey said:

> Dale Rhoads … advises that [the chain] is there to prevent the public from launching [and] retrieving boats

> from the beach. He explained that this has been a problem in the past, causing damage [and] erosion due to spinning tires in the sand by inadequate tow vehicles.

[46] This letter is evidence that the restriction on vehicular access existed before the respondents purchased Parts 3 and 6. Their only predecessor on title owned the property since 1970 when the right-of-way was granted until the respondents purchased the lots.

[47] It appears that their predecessor on title exercised control over the beach to restrict vehicles from crossing by placing a chain and lock over the passage. This suggests that this restriction is not inconsistent with the right-of-way granted to him.

[48] Neither the appellant nor her affiant Dale Rhoads disputed the existence of the lock and chain or the stated reasons for putting them across the road.

[49] The statement in the letter that the former owners of Part 2 could be provided a key or cut the chain is evidence of permission in 1997, not a grant pursuant to the right-of-way.

[50] I note that there is no such restriction discussed in respect of pedestrian traffic.

[51] Accordingly, there was uncontradicted evidence upon which the application judge was entitled to rely, that there were restrictions on the right to bring motor

vehicles across the right-of-way by the owner of the right-of-way at the time of the grant in 1970 but no such restriction preventing pedestrian traffic.

[52] Thus, while some family members might have been involved in launching and retrieving large boats, the uncontradicted evidence in the letter suggests this would have been done with the permission of the owner of the beach lot not as a right flowing from the grant of the right-of-way.

(3) Conclusion

[53] The standard of review to be applied to the application judge's findings of fact and mixed fact and law is one of palpable and overriding error. Findings of fact and inferences from those facts should not be disturbed unless they are clearly wrong, unreasonable, or unsupported by the evidence: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 23, 26, and 36.

[54] An easement "for all the usual purposes" is not an ownership right. It is a right to use the property in the way agreed to by the grantor. Any included ancillary rights must be reasonably necessary to use the right-of-way: *Fallowfield,* at para. 11.

(a) Whether the Application Judge's Reasons Preclude Meaningful Appellate Review

[55] I do not accept the appellant's submission that the application judge's reasons preclude meaningful appellate review. The application judge correctly

articulated the law in respect of rights-of-way. He then applied the law to the facts and considered the language of the conveyance creating the right-of-way and history of use, to determine the purpose of the grant of the right-of-way and intention of the grantor.

[56] The application judge accepted that Frederick Rhoads intended to grant a right-of-way to provide regular access to Lake Waseosa to allow the owners of Part 2 to swim and engage in related aquatic activities. He also held that the right-of-way includes the right to transport small boats by foot over the property. However, he held that the right-of-way does not include allowing the owners of Part 2 to drive motor vehicles across Part 6 to tow their boats to and from the water.

(b) Whether the Application Judge Made Palpable or Overriding Errors

[57] Nor did the application judge make any palpable or overriding errors in his decision.

[58] The appellant had the onus of proof but adduced no evidence to support her assertion that the easement includes a right to bring motorized vehicles across the right-of-way to transport boats.

[59] Dale Rhoads' affidavits in support of the appellant's application does not state that the grantor intended to allow motor vehicles to cross the right-of-way to tow boats to water. The appellant acknowledges that "[t]here is nothing specific about boat size or type in any evidence" but states that the reasonable inference

was that all types of boating should be permitted under the right-of-way. Contrary to the appellant's assertion, the fact that the application judge may have been able to draw different inferences from the evidence does not show a palpable and overriding error in his decision.

[60] Moreover, there was uncontradicted evidence before the application judge that a chain with a lock was put over the right-of-way by the owner who had owned the property from the time of the grant. No evidence was offered to respond to and/or refute that evidence or the assertion that this was done to restrict access over the right-of-way by motorized vehicles as there was a concern that they were causing damage to the beach.

[61] The letter in which the former owners of the appellant's property were told they could obtain a key to unlock the chain or take it down, is evidence of permission given to a party in 1997, not a right intended to be bestowed by the grantor or a right flowing from the grant of the right-of-way.

[62] While the application judge did not explicitly refer to the respondents' 1997 letter, there was uncontradicted evidence in the letter to support his conclusion that there were restrictions on motor vehicles driving over the right-of-way on the beach at the time the first grantee owned the property.

[63] Finally, I do not accept that the application judge erred by "caus[ing] the right of way to be limited to pedestrian traffic only" without any argument to that effect

being raised by the parties. The application judge was not asked to, nor did he, rule broadly on the means by which the appellant may travel across the right-of-way. He properly restricted himself to the issue raised in the notice of application – whether the right-of-way included the “use of Part 6 as a beach for recreational purposes”. He accepted that one of these recreational purposes was launching boats but restricted the right to launch large boats that needed to be towed using a motor vehicle.

[64] Deference is owed to the decision of the application judge and there is evidence to support his conclusion that the easement was granted to enable the owners of Part 2 ingress and egress, to engage in swimming and other related activities, to transport boats by foot to and from the water, but not to bring motorized vehicles over the land to transport boats to and from the lake.

6. DISPOSITION

[65] For these reasons, the appeal is dismissed.

[66] On the agreement of the respondents, the order is amended to correct a typographical error in the reference from “the easement over Part 2 Plan RD-999” to “the easement over Part 6 Plan RD-999”.

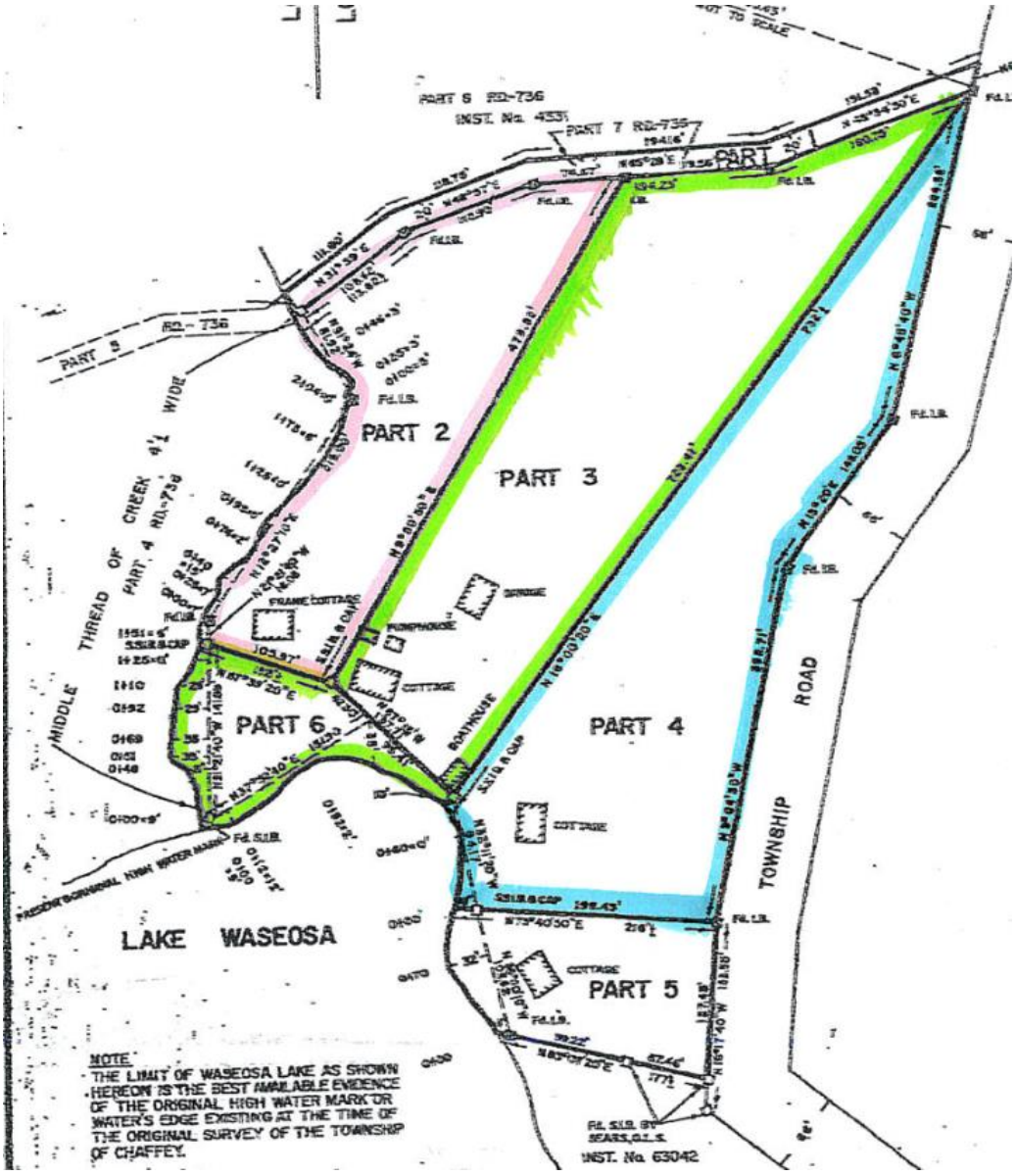
[67] As the successful party on appeal, the respondents may serve and file brief costs submissions of no more than 5 pages within 10 days of this judgment being

released. The appellant may serve and file her submissions within 10 days of receipt of the respondents' submissions.

Released: July 22, 2020 ("P.L")

"J.A. Thorburn J.A."
"I agree. P. Lauwers J.A."
"I agree. Grant Huscroft J.A."

APPENDIX “A”


PART 2
PART 3
PART 4
PART 5
PART 6
LAKE WASEOSA
TOWNSHIP ROAD
MIDDLE THREAD OF CREEK
NOTE
THE LIMIT OF WASEOSA LAKE AS SHOWN HEREON IS THE BEST AVAILABLE EVIDENCE OF THE ORIGINAL HIGH WATER MARK OR WATER'S EDGE EXISTING AT THE TIME OF THE ORIGINAL SURVEY OF THE TOWNSHIP OF CHAFFEY.
INST. No. 63042