Date: 20210608
Docket: CI 18-01-16349
(Winnipeg Centre)
Indexed as: Zeliony v. Dunn et al.
Cited as: 2021 MBQB 136

COURT OF QUEEN'S BENCH OF MANITOBA

B E T W E E N:

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	)	
plaintiff,	)	THOMAS G. FROHLINGER
	)	for the plaintiff
- and -	)	
	)	
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defendants.	)	
	)	
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	)	
	)	
	)	JUDGMENT DELIVERED:
	)	JUNE 8, 2021

PERLMUTTER A.C.J.Q.B.

INTRODUCTION

[1] The plaintiff Tatiana Zeliony moves for summary judgment against both the defendants Jeremy Dunn and Winnipeg Condominium Corporation No. 87 (WCC 87). Ms Zeliony's claim against Mr. Dunn is for damages for invasion of privacy, "intrusion upon seclusion", nuisance, and wilful infliction of nervous shock arising

from Mr. Dunn's installation of two cameras at his condominium unit that captured a shared entryway between his and Ms Zeliony's neighbouring condominium units. Ms Zeliony claims against WCC 87 in negligence for failing to address Mr. Dunn's surveillance. In turn, both Mr. Dunn and WCC 87 move for summary judgment dismissing Ms Zeliony's claim.

BACKGROUND

[2] From 2007 to January 2019, Ms Zeliony and her husband, Alex Tulchinski owned and resided in unit 3, at 602 Kenaston Blvd., in Winnipeg. Since December 2015, Mr. Dunn resided in unit 5. These units share a common entryway that is roughly 30 square feet in size and are the only two units connected to this entryway. Also located in the entryway are the entrances to the storage lockers for units 3 and 5. This entryway is the pathway through which these units and storage lockers are accessed. The door to Mr. Dunn's unit is just over five feet away from the door to Ms Zeliony's unit, and just over eight feet away from the door to Ms Zeliony's storage locker.

[3] Subsequent to Mr. Dunn moving into unit 5, Mr. Dunn's exterior porch light located in the entryway was repeatedly tampered with, rendering it inoperative. In July 2016, Mr. Dunn installed a camera inside his unit viewing outwards towards his light. Shortly after the installation of this camera, someone obstructed its view with a sign and tampered with the light. Later in July 2016, Mr. Dunn installed on his exterior doorframe a "Ring Doorbell" that includes a camera which may be triggered by motion detection and captures part of the entryway. From about

July 30, 2016, over the next week, someone taped over the lens on the doorbell camera.

[4] On August 8, 2016, Tom Keough, who is the owner and operator of the property manager for WCC 87, met with Ms Zeliony and Mr. Tulchinski. It was agreed that Mr. Keough would ask Mr. Dunn to turn off the motion detection feature on the doorbell camera and leave it off as long as no more tape was placed over the lens. Following this meeting, Mr. Dunn agreed and did as requested. On August 9, 2016, someone again placed tape over the doorbell camera and Mr. Dunn reactivated the motion detection feature.

[5] In February 2017, Mr. Dunn reinstalled the camera originally mounted inside his unit above his storage locker. This camera was rendered inoperative as a result of repeated tampering and was not active since about March 2017, but was left up for a period as a deterrent.

[6] Following Mr. Dunn's contact with the Winnipeg Police Service, the police spoke with Ms Zeliony, and since April 30, 2017, the doorbell camera has not been taped over. In November 2017, at Mr. Keough's request, Mr. Dunn deactivated the motion detection feature on the doorbell camera.

[7] Ms Zeliony deposed that the angle and placement of the cameras were such that the cameras captured the front entrance and storage space of her unit and the cameras were able to capture the interior of the storage space of her unit whenever the door was open. Following installation of the cameras, Ms Zeliony or her counsel made requests of Mr. Dunn and WCC 87 to remove the cameras. The

WCC 87 board did not take any action following Ms Zeliony's complaint about the cameras other than through Mr. Keough's involvement. On September 5, 2018, Ms Zeliony's unit was listed for sale and later sold. On January 25, 2019, Ms Zeliony moved out.

PARTIES' POSITIONS

[8] It is Ms Zeliony's position that Mr. Dunn conducted surveillance of her, she asked Mr. Dunn to remove the cameras, and Mr. Dunn failed to do so. As a result, she asked WCC 87 for assistance to have the cameras removed and WCC 87 failed to offer any reasonable assistance, instead supporting Mr. Dunn's position. Ms Zeliony says the surveillance continued from July 2016 to January 2019, and its impact on her ceased only when she was forced to sell her unit. Ms Zeliony denies tampering with Mr. Dunn's porch light and her counsel argues that in any event the surveillance and presence of the cameras wrongfully continued long after Mr. Dunn concluded it was Ms Zeliony or Mr. Tulchinski who were tampering with the light. That is, while Mr. Dunn might have been justified in his acts and conduct prior to concluding it was Ms Zeliony or Mr. Tulchinski who were tampering with his property, after Mr. Dunn formed this conclusion, Ms Zeliony argues that Mr. Dunn kept the cameras in place solely to target her and Mr. Tulchinski.

[9] Ms Zeliony claims Mr. Dunn's constant surveillance and harassment invaded her privacy, constituted nuisance, and meets the test for wilful infliction of nervous shock. It is her position that WCC 87 breached its duties reflected under ss. 94(1) and 94(2) of ***The Condominium Act***, C.C.S.M. c. C170, regarding the WCC 87

board's mandate and duties to act with a view to the best interest of the corporation and as a reasonable and prudent person. In asserting this position, Ms Zeliony says WCC 87 was negligent when it failed to prescribe rules or protocols for occupants' use of cameras and failed to take any measure to prevent or remedy the violation of Ms Zeliony's privacy rights. Ms Zeliony claims the defendants' conduct resulted in her suffering psychiatric illness and forced her to urgently sell her unit at less than its listing price. As such, Ms Zeliony seeks non-pecuniary damages at the higher end of the awards discussed in the case law which is in the range of $20,000, and seeks special damages of $15,000, for the diminished purchase price of her condominium unit.

[10] It is Mr. Dunn's position that Ms Zeliony had no privacy right in the entryway captured by the cameras. If Ms Zeliony had a reasonable expectation of privacy, she has not established her privacy right was violated or her use and enjoyment of her property was interfered with. Mr. Dunn says he was solely motivated by a desire to protect his property and in so doing, he attempted to minimize any effect of his actions on Ms Zeliony. To the extent there was recording of Ms Zeliony or the entrance to her unit, Mr. Dunn asserts it was incidental to the protection of his property. Mr. Dunn also says Ms Zeliony cannot claim in nuisance as she was captured on video in the shared entryway in a common area and not her unit. Mr. Dunn denies harassing Ms Zeliony and argues the evidentiary record does not support her evidence to the contrary. Mr. Dunn also argues that because his sole motivation was the protection of his property, the element of flagrant or

outrageous conduct, which is an element of wilful infliction of nervous shock, is not met. As a result, it is Mr. Dunn's position that Ms Zeliony is not entitled to any damages, and, if she is so entitled, damages have not been proven beyond a nominal amount.

[11] It is the position of WCC 87 that this dispute arose when Ms Zeliony and Mr. Tulchinski unilaterally decided their right to an insect-free entryway (with Mr. Dunn's exterior light attracting insects) trumped Mr. Dunn's right to have a well-lit and secure home. Rather than address their concerns in a courteous and logical manner, Ms Zeliony and Mr. Tulchinski chose to take matters into their own hands and tamper with Mr. Dunn's property. This disagreement between neighbours snowballed out of control. Had Ms Zeliony acted reasonably, the cameras would not have been installed and there would be no litigation. Had Ms Zeliony stayed out of Mr. Dunn's area of the entryway, the cameras would have never captured her image. It is the position of WCC 87 that it did what was reasonable in the circumstances, which included Mr. Keough's good-faith attempt to mediate and resolve this dispute. WCC 87 says Ms Zeliony undermined this attempt.

ANALYSIS

Summary Judgment

[12] All parties agree, as do I, that on the evidentiary record, the summary judgment process allows the court to find the necessary facts and to apply the relevant legal principles, such that a fair and just adjudication can be achieved.

[13] Also of particular significance in the case at hand is the principle of proportionality. In ***Dakota Ojibway Child and Family Services et al. v. M.B.H.***, 2019 MBCA 91 (paras. 81-83 and 119-121), the Manitoba Court of Appeal underscored the principle of proportionality in the context of the summary judgment process. Burnett J.A. provided as follows (paras. 83 and 119):

> The Supreme Court of Canada has considered *Hryniak* on a number of occasions. For instance, in *Association des parents de l'école Rose-des-vents v British Columbia (Education)*, 2015 SCC 21, Karakatsanis J once again wrote for the Court. She stated, "Judges must actively manage the legal process in line with the principle of proportionality, taking into account fair access to the affordable, timely and just adjudication of claims" (at para 78), citing *Hryniak*; see also *Brunette v Legault Joly Thiffault, sencrl*, 2018 SCC 55 at para 48).
>
> …
>
> In terms of assessing proportionality, *Hryniak* proposes a comparative approach. Proportionality is to be assessed in relation to a full trial (see *Hryniak* at para 58), and the question is often simply this: What does a conventional trial offer that cannot be achieved on a summary judgment motion? Given that oral evidence and cross-examination are both available at a summary judgment motion, a conventional trial offers few advantages.

[14] As also emphasized in ***Dakota Ojibway Child and Family Services et al.*** (para. 120):

> The concept of proportionality is not limited to procedural concerns. Rules 1.04(1.1) (in the civil context) and 70.02.1(2) (in the family context) require a court to consider, among other things, the nature and complexity of the proceeding, the interests of any child affected and the importance of the issues in dispute.

[15] For the reasons that follow, I am satisfied there is no genuine issue requiring a trial and the record, the facts, and the law allow a fair disposition on summary judgment. (See ***Business Development Bank of Canada v. Cohen***, 2021 MBCA 41, para. 27; ***Dakota Ojibway Child and Family Services et al.***,

paras. 108-111; and ***Hryniak v. Mauldin***, 2014 SCC 7, paras. 49-51.) As well, the nature and complexity of this proceeding, the interests of the parties, the issues in dispute, the amount at issue, and the likely expense of the proceeding to the parties, when compared to proceeding with a conventional trial, lead me to conclude that the final disposition of this action is appropriately dealt with on summary judgment motion.

Factual Findings

[16] To begin, I make the following findings of fact.

[17] First, I find that Ms Zeliony and her husband Mr. Tulchinski were responsible for tampering with Mr. Dunn's light. I make this finding because of Mr. Dunn's affidavit evidence, that was not challenged on the cross-examination on his affidavits, that he determined the individuals tampering with his property were Ms Zeliony and Mr. Tulchinski. This evidence is corroborated by Mr. Keough's evidence that on July 29, 2016, when Mr. Tulchinski called him to complain that Mr. Dunn had installed the doorbell camera, Mr. Tulchinski advised that he was the one who had been unscrewing Mr. Dunn's outside porch light bulb because it was attracting insects which annoyed him while he smoked a cigarette in the entryway at approximately 11:00 p.m. each night. Mr. Dunn's evidence is also corroborated by a note he found at his door on August 3, 2016, from "Alex" (Mr. Tulchinski's first name), "unit 3", which states, "We need to talk about the camera and lights". This is evidence that Mr. Tulchinski was certainly concerned

about the light. Mr. Dunn's evidence is also consistent with a note taped on his door around July 23, 2018, which reads as follows:

> To unit 5…
> Do not use permanent outdoor entrance light after 10 pm during the mosquito season in the summer time.
> Mosquitos and flying insects attracted to this light.
> I have a fear of mosquitos.
> I will be covering this light with carton box.
> Tatiana Zeliony
> unit 3…

[18] On about July 28, 2018, a box was placed over the light.

[19] While Ms Zeliony deposed that she never touched or tampered with the exterior porch light outside of unit 5 and is advised by Mr. Tulchinski that he never touched or tampered with this exterior porch light, given the foregoing evidence and the absence of direct evidence from Mr. Tulchinski (who did not provide an affidavit), for the reasons discussed, I find otherwise.

[20] Second, given Ms Zeliony's requests that the cameras be removed, the evidence that Ms Zeliony was recorded tampering with the original camera and taping over the doorbell camera, and the absence of any clear evidence from Ms Zeliony disputing the evidence in this regard, I find that Ms Zeliony was party to the obscuring of the cameras.

[21] Third, based on Mr. Dunn's evidence, I find that he installed the doorbell camera in order to deter or determine who was tampering with his property. On cross-examination on his affidavits, Mr. Dunn testified that he installed the doorbell camera in the summer of 2016 after repeated tampering with his light fixture since he moved in, in December 2015, and the installation of this doorbell camera was

a direct result of this tampering and his neighbours telling him they had not seen anybody do anything. This evidence is uncontradicted and his explanation about why he installed the doorbell camera is sensible in the circumstances.

[22] Fourth, I accept Mr. Dunn's evidence in his affidavit and the cross-examination on his affidavits that after a period where Mr. Dunn's property was left untouched, in about November 2017, at Mr. Keough's request, Mr. Dunn turned off the motion detection on the doorbell camera and it has not been turned on since. In response to this evidence from Mr. Dunn, Ms Zeliony deposed that after November 2017, the light on the doorbell camera remained lit and the doorbell camera made clicking noises when in operation and continued to do so. However, Ms Zeliony's observations are sensibly explained by Mr. Dunn's evidence that after November 2017 (following deactivation of the motion detection), the doorbell camera continued to be operational as a video doorbell which was only activated upon an individual ringing the doorbell, at which time the camera would activate and that the doorbell camera has a power indicator light that illuminates at all times. An attempt was made to challenge Mr. Dunn on cross-examination on his affidavits, but his description of the doorbell camera strikes me as credible, and I accept his evidence.

[23] For the reasons discussed, on the record before me, I am satisfied the summary judgment process allows me to make these and the other necessary findings of fact (discussed below). That is, to the extent that on the face of the evidence submitted by the parties, there is some conflict or lack of clarity, for the

reasons discussed (above and below), I have determined the need for a trial is avoided by weighing the evidence, evaluating credibility, and drawing inferences (Rule 20.03(2)). Where I have made these fact-findings, I am satisfied that the written record is so overbalanced in the direction of these findings that *viva voce* testimony before me is not required. (See ***Business Development Bank of Canada v. Cohen***, paras. 48, 50 and 54.)

Invasion of Privacy

[24] Ms Zeliony's invasion of privacy claim is grounded in ***The Privacy Act***, C.C.S.M. c. P125. Ms Zeliony also claims a violation of her privacy based on the tort of "intrusion upon seclusion". In ***Jones v. Tsige***, 2012 ONCA 32, the Ontario Court of Appeal described this tort as follows (para. 71):

> The key features of this cause of action are, first, that the defendant's conduct must be intentional, within which I would include reckless; second, that the defendant must have invaded, without lawful justification, the plaintiff's private affairs or concerns; and third, that a reasonable person would regard the invasion as highly offensive causing distress, humiliation or anguish. However, proof of harm to a recognized economic interest is not an element of the cause of action. I return below to the question of damages, but state here that I believe it important to emphasize that given the intangible nature of the interest protected, damages for intrusion upon seclusion will ordinarily be measured by a modest conventional sum.

[25] It is not apparent whether a "plaintiff's private affairs or concerns" extends to an "intrusion" in a public place. In any event, in oral argument, Ms Zeliony's counsel submitted that for the purpose of the present case, there is no reason to differentiate between ***The Privacy Act*** and the tort of intrusion upon seclusion, and for the present purpose, ***The Privacy Act*** subsumes this tort.

[26] The salient provisions of ***The Privacy Act*** provide as follows:

Violation of privacy

2(1) A person who substantially, unreasonably, and without claim of right, violates the privacy of another person, commits a tort against that other person.

Action without proof of damage

2(2) An action for violation of privacy may be brought without proof of damage.

Examples of violation of privacy

3 Without limiting the generality of section 2, privacy of a person may be violated

(a) by surveillance, auditory or visual, whether or not accomplished by trespass, of that person, his home or other place of residence, or of any vehicle, by any means including eavesdropping, watching, spying, besetting or following;

(b) by the listening to or recording of a conversation in which that person participates, or messages to or from that person, passing along, over or through any telephone lines, otherwise than as a lawful party thereto or under lawful authority conferred to that end;

…

Defences

5 In an action for violation of privacy of a person, it is a defence for the defendant to show

…

(b) that the defendant, having acted reasonably in that regard, neither knew or should reasonably have known that the act, conduct or publication constituting the violation would have violated the privacy of any person; or

(c) that the act, conduct or publication in issue was reasonable, necessary for, and incidental to, the exercise or protection of a lawful right of defence of person, property, or other interest of the defendant or any other person by whom the defendant was instructed or for whose benefit the defendant committed the act, conduct or publication constituting the violation; or…

[27] All counsel indicated there is no Manitoba case law that has considered privacy disputes between neighbours under ***The Privacy Act***. Counsel referred to case law from British Columbia and Ontario, although the British Columbia ***Privacy Act*** describes a violation of privacy differently than the Manitoba ***Privacy Act*** and in Ontario, the case law deals with the common law. All parties agree, as do I, that a contextual approach is applicable in assessing an alleged violation of privacy (***Heckert v. 5470 Investments Ltd.***, 2008 BCSC 1298, paras. 83-84). I also agree with Ms Zeliony's counsel that the right to privacy and protection of property are to be balanced in this contextual analysis.

[28] I find there is no genuine issue requiring a trial with respect to Ms Zeliony's invasion of privacy claim. Ms Zeliony has not shown that the defences advanced by Mr. Dunn must fail. However, Mr. Dunn has shown that Ms Zeliony's claim must fail, while Ms Zeliony has not shown that there is a genuine issue requiring a trial. (See ***Dakota Ojibway Child and Family Services et al.***, paras. 73-74.) I am not satisfied that Mr. Dunn substantially, unreasonably, and without claim of right, violated Ms Zeliony's privacy. In any event, I am satisfied that Mr. Dunn has shown that his acts and conduct were reasonable, necessary for, and incidental to, the exercise or protection of a lawful right of defence of his property. I make these findings for the following reasons.

[29] Relevant to the contextual analysis is whether Ms Zeliony had a reasonable expectation of privacy (***Heckert***, paras. 75-84). Mr. Dunn's counsel argued there was no reasonable expectation of privacy in the entryway as it was part of the

common element property in a condominium complex into which anybody could enter and exit and be seen by others when doing so. While the nature of the place where the surveillance occurs will always be an important factor to consider in determining whether a person has a reasonable expectation of privacy in the circumstances, it is not determinative. A person who is situated in what would normally be characterized as a public place may well have a reasonable expectation of privacy (***Heckert***, para. 81, quoting from ***R. v. Wong***, [1990] 3 S.C.R. 36 at 62). In the context of the case at hand, the concept of the entryway, which was part of the common element in a 128-unit condominium complex, that was required to be used by both Ms Zeliony and Mr. Dunn to access their respective units and was open for use by other unit owners and visitors, was accepted by Ms Zeliony as part of living in such a condominium complex. While by no means determinative, this points to a lowered nature and degree of reasonable expectation of privacy by Ms Zeliony when using the entryway.

[30] There is no doubt that Ms Zeliony enjoyed the right to be left alone upon entering and exiting her unit and her storage unit. However, in my view, the images of Ms Zeliony were not recorded so as to substantially violate her privacy.

[31] There is no reliable evidence to contradict Mr. Dunn's evidence that no video recordings or photographs were captured of the interior of Ms Zeliony's unit. While Ms Zeliony deposed the cameras were positioned to capture the interior of her storage unit, there was no evidence as to how often she entered her storage unit and there is no persuasive evidence to contradict Mr. Dunn's evidence that no

recordings or photographs captured the interior of her storage unit. Mr. Dunn deposed the recording of Ms Zeliony was not indiscriminate nor daily. Indeed, there is no compelling evidence to contradict Mr. Dunn's evidence that while the motion detection was active the doorbell camera only recorded videos when the motion detection sensor was triggered and the motion detection was always set at the lowest range, which was 5 feet. That is, the doorbell camera only recorded videos when Ms Zeliony (or someone else) triggered the motion detection sensor. While the dimensions and set up of the entryway could have reasonably and routinely resulted in Ms Zeliony stepping within the range of the doorbell camera motion detection (whether she knew she was within the range or not) and she was well within her rights to do so, the dimensions and set up of the entryway did not inevitably necessitate it in order to enter and exit her unit. There is also no evidence to contradict Mr. Dunn's evidence that the camera originally mounted inside his home was prevented from recording anything when someone put tape over his window. Similarly, there is no persuasive evidence to contradict Mr. Dunn's evidence that when he reinstalled this camera directly above his storage locker around February 2017, it was often tampered with, such that it was rendered inoperative since around March 2017, and for a period he left this camera up as a deterrent. As such, I find that this was not a situation of intentional constant surveillance by Mr. Dunn of Ms Zeliony every time she entered or exited her unit or storage locker.

[32] Regardless of the frequency that Mr. Dunn's cameras recorded Ms Zeliony, there is no compelling evidence to contradict Mr. Dunn's evidence that his only interest was someone tampering with his light and he had no interest in the comings and goings of his neighbours. There is also no reliable evidence to contradict Mr. Dunn's evidence that the doorbell camera allowed for cloud storage of videos for 60 days and the videos that depict Ms Zeliony and Mr. Tulchinski were retained for Mr. Dunn to give to police and his legal counsel.

[33] In my view, relevant to the contextual analysis is Ms Zeliony's participation in tampering with Mr. Dunn's light and obscuring his cameras. Also relevant is Ms Zeliony's incredible denial of tampering with Mr. Dunn's light. It is my view that Ms Zeliony's acts and conduct are relevant as they provide context to assessing Mr. Dunn's acts and conduct for the purposes of ss. 2(1) and 5 of ***The Privacy Act***. While Ms Zeliony's participation in tampering with Mr. Dunn's property is relevant, regardless of who was tampering, it is my view that with repeated tampering (by whomever), by placing the cameras in the manner that he did in this shared entryway, which included limited function of the original camera that was then reinstalled in February 2017 above Mr. Dunn's storage locker, limiting the doorbell recording to motion only within the minimum setting of five feet (with no credible evidence of continuous recording), keeping recordings for police and to give to his counsel, and deactivating the motion detection when asked by Mr. Keough, to the extent that Mr. Dunn violated Ms Zeliony's privacy, albeit not substantially, (whether by recording or deterrence), he acted reasonably

and with claim of right. In ***Heckert***, the court characterized claim of right as "an honest belief in a state of facts which, if it existed, would be a legal justification or excuse..." (para. 92). Based on the evidence and findings that I have described above and below, I find that this evidence and these findings would have led to Mr. Dunn having an honest belief in the state of facts that he has provided in his evidence and I have largely accepted which would be a legal justification or excuse for his acts and conduct.

[34] I also find that Mr. Dunn has shown that his acts and conduct, which led to the presence of the cameras and some recording of Ms Zeliony, were reasonable, necessary for, and incidental to, the exercise or protection of his lawful right of defence of his property. I make this finding for the same reasons I concluded that to the extent that Mr. Dunn violated Ms Zeliony's privacy, this violation was not substantial, and Mr. Dunn acted reasonably and with claim of right. I also base this finding on my finding (above) that Mr. Dunn installed the doorbell camera in order to deter or determine who was tampering with his property. Significantly, as I said above, this was not a situation of intentional constant surveillance by Mr. Dunn of Ms Zeliony every time she entered or exited her unit or storage locker. These circumstances distinguish the case at hand from, for example ***Heckert***, where the court found a violation under the differently worded British Columbia ***Privacy Act***. In ***Heckert***, the defendant landlord's building manager placed a camera in the hallway right outside of the plaintiff tenant's rental suite door which

recorded at all times people entering and exiting her suite as an attempt to facilitate the landlord's efforts to evict the plaintiff.

[35] Ms Zeliony's counsel strenuously argued that once Mr. Dunn concluded that it was Ms Zeliony and Mr. Tulchinski who were responsible for tampering with his property, his acts and conduct became actionable as the presence of the cameras was unnecessary. However, as discussed above, regardless of who was tampering, given the ongoing tampering with Mr. Dunn's exterior light (and the ongoing denials of responsibility by Ms Zeliony and Mr. Tulchinski right up to the time of Ms Zeliony's affidavit affirmed January 7, 2021), even if solely for the purpose of deterring further tampering with his property, Mr. Dunn's employment of the cameras was reasonable, necessary for, and incidental to, the exercise or protection of his lawful right of defence of his property. In my view, the presence of the cameras was overall a reasonable and proportional response by Mr. Dunn in the totality of the circumstances.

[36] Ms Zeliony's counsel argued the alleged tampering by Mr. Tulchinski should not be visited upon Ms Zeliony. However, in my view, this misses the point. It is the context and circumstances as a whole that are relevant in assessing whether there is an actionable invasion of privacy. Subsection 2(1) and the defence provided in s. 5(c) of ***The Privacy Act*** do not require that a defendant show he or she was acting in defence of his property from the plaintiff's conduct.

[37] For completeness, for these same reasons, I find there is no genuine issue requiring a trial with respect to Ms Zeliony's claim for intrusion upon seclusion

because I find that, to the extent such invasion of Ms Zeliony's private affairs or concerns occurred, Mr. Dunn acted with lawful justification in the protection of his property.

Nuisance and Wilful Infliction of Nervous Shock

[38] The parties disagree about the extent to which the law of nuisance extends to the present case. Ms Zeliony relies on comments in case law like ***Saelman v. Hill*** (2004), 20 R.P.R. (4th) 118 (Ont. S.C.J.) (paras. 35, 36 and 39) to argue nuisance may include harassment and invasion of privacy where neighbours are engaged in a dispute such that there is interference with the plaintiff's enjoyment of his or her residence. Ms Zeliony's counsel points to the following quotation in ***Saelman*** (para. 40), by reference to case law from New Brunswick and Alberta:

> …the principles governing the tort of nuisance are sufficiently flexible to cover harassing behaviour notwithstanding that all aspects of the recognized torts of intentional infliction of mental suffering, the right to privacy and the tort of private nuisance, may not be fully established…

[39] Ms Zeliony's counsel also points to the following comments in ***Johnson v. Cline***, 2017 ONSC 3916 (at para. 122), by reference to ***Smith v. Inco Ltd.***, 2011 ONCA 628:

> People do not live in splendid isolation from one another. One person's lawful and reasonable use of his or her property may indirectly harm the property of another or interfere with that person's ability to fully use and enjoy his or her property. The common law of nuisance developed as a means by which these competing interests could be addressed, and one given legal priority over the other. Under the common law of nuisance, sometimes the person whose property suffered the adverse effects is expected to tolerate those effects as the price of membership in the larger community. Sometimes, however, the party causing the adverse effect can be compelled, even if his or her conduct is lawful and reasonable, to desist from engaging in that conduct and to compensate the other party for any harm caused to that person's property. In essence, the common law of nuisance decided which party's interests must give way. That

> determination is made by asking whether in all the circumstances the harm caused or the interference done to one person's property by the other person's use of his or her property is unreasonable…

[40] As also pointed out by Ms Zeliony's counsel, in ***Johnson***, the court referred (at para. 136) to ***Lipiec v. Borsa***, [1996] O.J. No. 3819, where the plaintiffs by counterclaim were awarded $3,000 for nuisance based on several wrongs, one of which was that the defendants by counterclaim mounted a surveillance camera directly at the plaintiff by counterclaim's neighbouring backyard.

[41] Ms Zeliony's counsel also noted the court's reference in ***Johnson*** (at para. 137) to ***Suzuki v. Munroe***, [2009] B.C.J. No. 2019 (B.C.S.C.), where the plaintiffs were awarded $6,000 in nuisance for several different actions of their defendant neighbours including the installation of a surveillance camera which viewed the plaintiffs' front yard, entrance and driveway.

[42] In turn, Mr. Dunn's counsel argues that because Ms Zeliony's allegation of interference is with the use of the shared entryway in which she has no greater right than Mr. Dunn and Mr. Dunn's alleged interference originates in this entryway and not elsewhere, the law of nuisance does not apply. Moreover, Mr. Dunn's counsel argues the alleged interference was not unreasonable and was not substantial.

[43] The common law test for wilful infliction of nervous shock has three elements:

(1) flagrant or outrageous conduct;
(2) calculated to produce harm; and
(3) resulting in a visible and provable illness.

(***Piresferreira v. Ayotte***, 2010 ONCA 384, para. 27.)

[44] In light of my finding that Mr. Dunn's use of the cameras and any related violation of Ms Zeliony's privacy was not substantial, reasonable, with claim of right, necessary for, and incidental to, the exercise or protection of Mr. Dunn's lawful right of defence of his property, I find that any other interference with Ms Zeliony's use of her property relating to the presence or use of the cameras is also reasonable in the circumstances. For these same reasons, I find that in employing the cameras, Mr. Dunn did not engage in flagrant or outrageous conduct calculated to produce harm.

[45] In support of her claims in nuisance and wilful infliction of nervous shock, Ms Zeliony also argues that Mr. Dunn behaved unreasonably and in a manner that he knew was bothering her by not telling her the camera located over the storage locker was a decoy and the motion activation on the doorbell camera was deactivated in November 2017. I have already found that Mr. Dunn acted reasonably in keeping the cameras in place even as a deterrent. Given this finding, there was no reason to advise Ms Zeliony of this information. Nevertheless, Mr. Dunn was unopposed in his evidence that it was on Mr. Tulchinski's behalf that in November 2017, Mr. Keough asked Mr. Dunn to turn off the motion detection on the doorbell camera and Mr. Dunn agreed. As discussed above, I find that Mr. Dunn did in fact deactivate the motion detection on the doorbell camera at that time. Moreover, on March 1, 2018, Ms Zeliony's counsel was advised by counsel for WCC 87 that Mr. Dunn confirmed that he turned the record function of this doorbell camera off and it had remained off for several months as the

tampering with his patio light had ended. Overall, viewed on an objective basis, given the evidence that Mr. Dunn deactivated the motion detection on the doorbell camera when requested by WCC 87 in November 2017, given the ongoing denial of tampering by Ms Zeliony and Mr. Tulchinski, and given my finding that any violation of Ms Zeliony's privacy was not substantial, Mr. Dunn acted reasonably in keeping in place the cameras in the manner that he did.

[46] In support of her action, Ms Zeliony deposed that starting in March 2017, Mr. Dunn would wait for her outside of unit 5 and repeatedly verbally harassed and intimidated her and threatened to post photos and videos of her on the internet. Mr. Dunn denies this evidence and deposed that he did his best to avoid interactions with Ms Zeliony. On the weight of the evidence, Ms Zeliony is incapable of establishing that Mr. Dunn harassed, intimidated or threatened Ms Zeliony as she deposed. Ms Zeliony's evidence in this regard consists of a few sentences in her affidavit. No further details are provided of this harassment and intimidation or the occasions on which it occurred. Assertions about the specifics of this harassment, intimidation and threat were not put to Mr. Dunn in the cross-examination on his affidavits. While not required, there is no corroborating evidence of such repeated harassment, intimidation or threats. As well, I agree with Mr. Dunn's counsel that it is not sensible in the circumstances that a threat would be made to post what are relatively innocuous images of Ms Zeliony on the internet. On a summary judgment motion, each side must "put its best foot forward" with respect to the existence or non-existence of material issues to be

tried (***Dakota Ojibway Child and Family Services et al.*** (para. 75), by reference to ***Canada (Attorney General) v. Lameman***, 2008 SCC 14 (para. 11)). In the circumstances, I do not accept that *viva voce* testimony on this issue will better permit a finding of fact.

[47] As well, for the reasons discussed below, in the provisional assessment of damages with respect to Ms Zeliony's claim for wilful infliction of nervous shock, I find that she has not demonstrated that Mr. Dunn's conduct resulted in a visible and provable illness.

[48] Accordingly, I find there is no genuine issue requiring a trial with respect to Ms Zeliony's claims for nuisance or wilful infliction of nervous shock. Ms Zeliony has not shown that the defences advanced by Mr. Dunn must fail. However, Mr. Dunn has shown that Ms Zeliony's claims must fail, while Ms Zeliony has not shown that there is a genuine issue requiring a trial.

Negligence Claim against WCC 87

[49] In her amended statement of claim, Ms Zeliony claims that in breach of its duty of care the board of WCC 87 failed to take any measure to prevent or remedy the violation of Ms Zeliony's privacy rights despite repeated requests from her. Ms Zeliony and WCC 87 advanced extensive arguments as to whether the board of WCC 87 owed a duty to enact rules regarding the use of video surveillance by unit owners and/or to ensure the privacy of unit owners like Ms Zeliony was not breached. As well, Ms Zeliony and WCC 87 differed in their positions as to whether

WCC 87's response to Ms Zeliony's privacy violation allegations against Mr. Dunn breached its duty.

[50] Given my findings that there is no genuine issue requiring a trial with respect to Ms Zeliony's claim of invasion of privacy, regardless of whether a duty of care was owed by WCC 87 in the circumstances and the nature of this duty, I find there is also no genuine issue requiring a trial with respect to Ms Zeliony's negligence claim against WCC 87. Ms Zeliony has not shown that the defences advanced by WCC 87 must fail. However, WCC 87 has shown that Ms Zeliony's claim must fail, while Ms Zeliony has not shown that there is a genuine issue requiring a trial.

Provisional Assessment of Damages

[51] In the event it is later concluded that Mr. Dunn and/or WCC 87 are liable to Ms Zeliony, I have provisionally assessed Ms Zeliony's damages. I find that only nominal damages would be awarded for the following reasons.

The Privacy Act provides as follows in s. 4(2):

> **Considerations in awarding damages**
>
> 4(2) In awarding damages in an action for a violation of privacy of a person, the court shall have regard to all the circumstances of the case including
>
> (a) the nature, incidence and occasion of the act, conduct or publication constituting the violation of privacy of that person;
>
> (b) the effect of the violation of privacy on the health, welfare, social, business or financial position of that person or his family;
>
> (c) any relationship, whether domestic or otherwise, between the parties to the action;

> (d) any distress, annoyance or embarrassment suffered by that person or his family arising from the violation of privacy; and
>
> (e) the conduct of that person and the defendant, both before and after the commission of the violation of privacy, including any apology or offer of amends made by the defendant.

[52] Ms Zeliony's counsel conceded aggravated damages are not merited, but argued that in light of the considerations in s. 4(2) of ***The Privacy Act***, non-pecuniary damages should be awarded at the upper end described in the case law which he asserts is at least $20,000. He points out these were neighbours who were geographically close, the cameras remained long after their need particularly in light of the defendants' knowledge that Ms Zeliony objected to their presence, and there was significant mental distress experienced by Ms Zeliony as a result of the presence of the cameras. Ms Zeliony's counsel also suggests the court may want to award punitive damages to condemn and deter neighbours using video cameras to conduct surveillance on each other.

[53] Ms Zeliony deposed that Mr. Dunn's recording her daily caused her severe anxiety, insomnia, and she is unable to function as a result. However, the medical records that she attached to her affidavit from her psychiatrist wherein she notes the circumstances in the case at hand, first begin on November 20, 2018. It was July 2016, that Mr. Dunn first installed the camera inside his unit viewing outwards towards his light. As such, more than two years passed before Ms Zeliony sought treatment. This undermines her evidence that she was suffering severe anxiety or was unable to function as a result of Mr. Dunn's conduct. Moreover, as discussed above, on March 1, 2018, Ms Zeliony's counsel was advised by counsel

for WCC 87 that Mr. Dunn confirmed that he turned the record function of his doorbell camera off and it had remained off for several months. As also discussed above, in fact, it was in about November 2017, at Mr. Keough's request, on Mr. Tulchinski's behalf, that Mr. Dunn turned off the motion detection on the doorbell camera. As such, months before Ms Zeliony first attended her psychiatrist on November 20, 2018 allegedly as a result of Mr. Dunn's conduct, I infer she would have known that she was not being recorded by the doorbell camera.

[54] As part of her damage claim, Ms Zeliony relies on a report dated January 30, 2019 from her psychiatrist, in which an opinion is provided supportive of Ms Zeliony's position. However, I agree with Mr. Dunn's counsel that this report is inadmissible. In motions for summary judgment, expert opinion evidence is not properly before the court unless in the form of a sworn affidavit of the expert (***Towers Ltd. v. Quinton's Cleaners Ltd.***, 2009 MBCA 81, para. 33).

[55] While not required, no other form of corroborative evidence was provided in support of Ms Zeliony's position. For example, Ms Zeliony's husband, Mr. Tulchinski did not file an affidavit with any observations of Ms Zeliony's anxiety or functioning.

[56] In summary, Ms Zeliony has not demonstrated that she has sustained injury as a result of Mr. Dunn's conduct beyond the distress and annoyance that I infer would come from all of the circumstances. An action for violation of privacy may be brought without proof of damage (***The Privacy Act***, s. 2(1)). However, it is my view that the evidence does not support a non-pecuniary damage award

beyond a nominal amount whether for invasion of privacy, intrusion upon seclusion, nuisance, wilful infliction of nervous shock, or negligence.

[57] In the recent case of ***Bierman v. Haidash***, 2021 SKQB 44, the Saskatchewan Court of Queen's Bench, also at the urging of the parties, adjudicated competing summary judgment motions on the issue of whether, under ***The Privacy Act***, RSS 1978, c. P-24, the defendant invaded the plaintiff's privacy and, if so, what if any monetary damages should be awarded in her favour. In ***Bierman***, Justice Layh referred to the "helpful discussion of damages awarded by Canadian courts…found in *Getting to Damages in the Health Information Privacy Context: Is the Cost Worth the Damage*? by Liam O'Reilly (April 11, 2016)" (para. 78) and wrote as follows (paras. 80-81):

> The author then recognizes that the bulk of privacy breach jurisprudence has arisen in British Columbia. At the time he wrote, no damages for privacy violation had been awarded in other provinces with a statutorily created tort (Newfoundland, Saskatchewan or Manitoba). The author then provides a detailed and helpful summary of several decisions from British Columbia with damages ranging from a low of $50.00 (*Fillion v Fillion*, 2011 BCSC 1593 [*Fillion*]) to a high of $60,000.00 (*L.A.M. v J.E.L.I.*, 2008 BCSC 1147). The cases at the higher end attracted punitive damages and involved plaintiffs being spied upon in a private washroom (*Malcolm v Fleming*, [2000] BCJ No 2400 (QL) - $50,000.00 damages); watched in a bedroom through a hole cut in the wall above the bed, concealed on the inside by a two-way mirror (*Lee v Jacobson* (1992), 87 DLR (4th) 401 (BC SC) - $36,000.00 damages); intercepting and recording phone calls and providing them to person's employer resulting in dismissal (*Watts v Klaemt*, 2007 BCSC 662, [2007] 11 WWR 146 - $36,000.00 damages). The lower end of awards involved reading and copying personal documents (*Fillion* - $50.00 damages); sending bank statements to an ex-spouse's address allowing him to use the information to harass her (*Albayate v Bank of Montreal*, 2015 BCSC 695 - $2,000.00 damages); communicating between financial institutions and revealing confidential information (*B.M.P. Global Distribution Inc. v Bank of Nova Scotia*, 2005 BCSC 1091, 8 BLR (4th) 247 - $2,500.00 damages); photographing persons in their back yard and aiming video surveillance cameras at the windows of their home (*Wasserman v Hall*, 2009 BCSC 1318, 87 RPR (4th) 184 - $3,500.00

> damages); installing close-imaging cameras in a hallway outside of apartments (*Heckert v 5470 Investments Ltd.*, 2008 BCSC 1298, 299 DLR (4th) 689 - $3,500.00 damages).
>
> In Ontario, which does not have a statutorily created tort, the Court of Appeal found that using a workplace computer to access bank accounts of her partner's spouse at least 174 times was actionable under the developing tort of intrusion upon seclusion (*Jones v Tsige*, 2012 ONCA 32, 346 DLR (4th) 34) and awarded $10,000.00 in damages.

[58] The case at hand is distinguishable from those cases where non-pecuniary damages were awarded beyond a nominal amount. For example, the facts of the present case are distinguishable from ***Johnson***, where damages of $15,000, were awarded to each plaintiff for nuisance. In ***Johnson***, over the course of six years, the defendant monitored and made journals of the plaintiffs' daily activities, frequently swore and yelled at the plaintiffs, made over 30 unfounded or trivial police complaints, hired a private investigator to trespass on the plaintiffs' property to take photos, repeatedly made complaints to by-law enforcement about minor and trivial matters, and chopped the roots of the plaintiffs' tree that grew under the fence to the defendant's property.

[59] In my view, the case at hand is closer to the facts in ***Heckert*** ($3,500), ***Lipiec*** ($3,000) and ***Suzuki*** ($6,000) (all of which are discussed above) although less aggravating than in each of these other cases. In ***Heckert***, the camera was part of an attempt to pressure the plaintiff to move out. In ***Lipiec***, the defendants by counterclaim removed a fence thereby opening up to full view the plaintiffs by counterclaim's yard and erected a commercial style surveillance camera aimed directly at the plaintiffs by counterclaim's yard for no purpose other than to keep them under constant surveillance. In ***Suzuki***, the court found there was no useful

purpose served by having a camera directed at any part of the plaintiffs' property and that the defendants installed the camera and refused to remove or redirect it at least in part in order to provoke and annoy the plaintiffs. The case at hand is distinguishable from ***Heckert***, ***Lipiec***, and ***Suzuki*** given that Mr. Dunn installed the cameras to deter or determine who was tampering with his property in the context of tampering actually taking place by Ms Zeliony and Mr. Tulchinski.

[60] In considering the foregoing case law, s. 4(2) of ***The Privacy Act***, and the circumstances as a whole, including my finding that Mr. Dunn's objective was to deter or determine who was tampering with his property and, in my view, what would be a relatively minimal breach of privacy and nuisance and no compelling evidence of injury beyond the distress from and annoyance with the circumstances, with Ms Zeliony being periodically recorded in the common element shared entryway that was also accessible to others, I would provisionally assess non-pecuniary damages against the defendants of $2,000.

[61] Ms Zeliony also claims that but for Mr. Dunn's actions and the negligence of WCC 87, she would not have been forced to sell unit 3 at the time and price she did. Specifically, Ms Zeliony deposed that due to her mental suffering caused by the continued invasion of her privacy, it was too difficult to continue living at her unit and she was forced to hastily sell it on January 25, 2019. She also deposed that she is advised by her real estate agent that she was obliged to disclose to every prospective buyer the presence of Mr. Dunn's cameras. Ms Zeliony deposed that her poor health forced her to move quickly and coupled with the disclosure of

her unit being recorded, she had to sell at a lower price than she otherwise would have. Ms Zeliony claims loss of property value and equity of $15,000, as the difference between the price of $179,900 that she listed the unit for sale and its sale price of $165,000.

[62] I find that Ms Zeliony has not proven this aspect of her damage claim.

[63] First, again, I agree with Mr. Dunn's counsel that this expert opinion evidence from Ms Zeliony's real estate agent (relayed as hearsay in Ms Zeliony's affidavit) that she was obliged to disclose to every prospective buyer the presence of Mr. Dunn's cameras is inadmissible.

[64] Second, the evidence does not support Ms Zeliony's claim that due to her mental suffering caused by the continued invasion of her privacy, it was too difficult to continue living at her unit and she was forced to hastily sell it. More than two years passed between Mr. Dunn first installing a camera in July 2016 and Ms Zeliony listing her unit for sale on September 5, 2018. As well, this listing was over a year after the original camera was inoperative, about nine months after the motion detection feature on the doorbell camera was deactivated, and several months after I infer Ms Zeliony would have known that the doorbell camera was not recording her.

[65] Third, the evidence does not support Ms Zeliony's claim that she sold unit 3 for a lower price than she otherwise would have. Ms Zeliony previously listed unit 3 for sale three years earlier, on September 12, 2015, for $164,900. It remained on the market for 79 days and did not sell. In support of Ms Zeliony's

claim that when unit 3 sold for $165,000, on January 25, 2019, this was lower than she would have otherwise received, she relies on an extract from the City of Winnipeg Condominium Sales Book for January 1, 2016 to April 1, 2018 and City of Winnipeg assessment and property taxation information for what she deposed are the sales of three comparable units to her unit. However, these documents only provide the sale prices, assessed values, and other basic information about the building style, the year built, the floor, the living area, and the number of bedrooms. There is no other evidence that might more reasonably permit a comparison, such as the finishing of these units. Indeed, in his affidavit, Mr. Dunn also provided taxation assessments for other units that sold for prices similar to Ms Zeliony's sale price despite being the same square footage or larger and tax assessed at a higher value. Again, Ms Zeliony filed no admissible expert opinion evidence. As noted, there is no affidavit evidence from Ms Zeliony's real estate agent that might provide other potentially relevant information such as whether in fact the presence of the camera was a detriment to the sale, the state of the condominium market in the area at the time, or an opinion on whether Ms Zeliony sold at less than the fair market value.

[66] In my view, Ms Zeliony has not demonstrated she sold her unit for a lesser amount by reason of Mr. Dunn's conduct. Therefore, I would not award any special damages.

[67] Finally, in light of my other findings, I would not award any amount for aggravated or punitive damages.

CONCLUSION

[68] In conclusion, I am dismissing Ms Zeliony's motion for summary judgment and I am granting summary judgment dismissing Ms Zeliony's action against both Mr. Dunn and WCC 87. In the event that it is later concluded that Mr. Dunn and/or WCC 87 are liable to Ms Zeliony, I provisionally assess total damages in favour of Ms Zeliony against the defendants in the all-inclusive amount of $2,000.

[69] If the parties cannot agree on costs, I will receive written submissions.

_____ A.C.J.