

COURT OF APPEAL FOR ONTARIO

CITATION: D'Addario v. Smith, 2018 ONCA 163

DATE: 20180220

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Feldman, MacPherson and Huscroft JJ.A.

BETWEEN

Frank D'Addario

Plaintiff (Appellant)

and

Betty Smith and Chris Napior

Defendants (Respondents)

AND BETWEEN

Betty Smith and Chris Napior

Respondents (Plaintiffs by Counterclaim)

and

Frank D'Addario and Ferne D'Addario

Appellants (Defendants by Counterclaim)

Joseph W. L. Griffiths, for the appellants

Jeff G. Saikaley and Ronald F. Caza for the respondents

Heard: November 6, 2017

On appeal from the order of Justice Robert N. Beaudoin of the Superior Court of Justice, dated October 27, 2015, with reasons reported at 2015 ONSC 6652, and judgment dated April 18, 2017.

**Huscroft J.A.:**

## OVERVIEW

[1] Frank D'Addario brought an action against the respondents, Betty Smith and her nephew Chris Napior, for malicious prosecution, arising out of criminal sexual assault charges that were brought against him, but eventually stayed. Betty Smith counterclaimed for sexual assault, and Chris Napior counterclaimed for defamation arising out of comments that were made by Frank D'Addario and his wife Ferne to Napior's priest.

[2] The trial judge dismissed Frank D'Addario's malicious prosecution claim following a non-suit motion brought by the respondents.

[3] The jury found that Betty Smith had not been sexually assaulted by Frank D'Addario, and her counterclaim for sexual assault was dismissed.

[4] The trial judge withdrew Frank and Ferne D'Addario's defence of qualified privilege from the jury. The jury then found them jointly liable for defamatory statements made to Chris Napior's priest and awarded Napior damages of \$25,000.

[5] Frank D'Addario appeals from the trial judge's decision dismissing his action for malicious prosecution. Frank and Ferne D'Addario appeal from the trial judge's decision to withdraw their qualified privilege defence from the jury. Ferne D'Addario appeals from the decision permitting the jury to consider the allegation of joint liability for the allegedly defamatory statements made by Frank.

[6] In my view, the judge properly granted the motion for a non-suit, properly withdrew the defence of qualified privilege from the jury, and properly instructed the jury on the question of joint liability for defamation.

[7] I would dismiss the appeal for the reasons that follow.

## **BACKGROUND**

[8] Frank and Ferne D'Addario founded Environmental Management Solutions (EMS) in 1995. In 2005, Frank D'Addario lost control of the company and his employment with EMS was terminated. His business relationship with Betty Smith and Chris Napior began shortly afterwards, when he enlisted their support in an attempt to regain control of the company.

[9] Although Frank D'Addario reached a settlement with EMS subsequently, his relationship with Smith and Napior became acrimonious. The details need not be recounted here.

[10] In 2006, Betty Smith complained to the Huntsville O.P.P. that she had been sexually assaulted by Frank D'Addario. Her complaint was investigated by Constable Brooke McRoberts, who interviewed Smith and Napior. D'Addario was charged with sexually assaulting Betty Smith at Casino Rama in September 2005 and at an Ottawa restaurant in July 2005.

[11] Following the laying of the charges, Frank and Ferne D'Addario met with Napior's priest, Father Kerslake, at their request. Father Kerslake reported

statements made at the meeting to Napior and Smith. Those statements alleged that Napior: (i) is the town drunk; (ii) is an alcoholic; (iii) is abusing his position with the Church; (iv) is dishonest and cannot be trusted; and (iv) falsely alleged to police that Frank D'Addario sexually assaulted Betty Smith.

[12] The sexual assault charges against Frank D'Addario were stayed before they went to trial. D'Addario brought a claim against Smith and Napior for a number of causes of action including malicious prosecution. All of his claims, except for malicious prosecution, were abandoned before trial. Betty Smith counterclaimed for sexual assault in relation to the two alleged incidents that formed the subject matter of the criminal charges. Chris Napior counterclaimed against both Frank and Ferne D'Addario for defamation arising out of statements made to Father Kerslake.

## **THE DECISION UNDER APPEAL**

### **(1) The trial judge's decision on the motion for non-suit**

[13] The trial judge set out the test for a non-suit as follows: "The defendant must satisfy the trial judge that the evidence is such that no jury, acting judicially, could find in favour of the plaintiff".

[14] The trial judge noted that the bar for establishing malicious prosecution is set very high, in order not to discourage citizens from giving statements to police. Citing *Kefeli v. Centennial College of Applied Arts and Technology* (2002), 23

C.P.C. (5th) 35 (Ont. C.A., in Chambers), the trial judge observed that the police officer who lays a charge will generally be the person who initiated the prosecution. However, in exceptional circumstances a private citizen or complainant can be found to have initiated a prosecution, provided that there is evidence that, if true, could lead the jury to reasonably conclude that the police were unable to exercise independent discretion as a result of the defendants' actions.

[15] The trial judge concluded there was no evidence from which it could be inferred that Constable McRoberts was unable to exercise discretion or judgment, and that the only evidence was to the contrary. He explained, at paras. 49-51:

Even if it were accepted that the defendant[s'] statements to Constable McRoberts were false, that fact alone is not enough for a jury to conclude that they initiated the prosecution. Much more was required to meet the high bar of malicious prosecution. There has to be evidence that the defendants withheld exculpatory evidence; that they pressured the police in laying the charges or somehow compromised the independence of the prosecution. Other witnesses were identified by them and Constable McRoberts was aware of them but determined that these were not necessary for her investigation and she exercised her discretion independently. In light of the foregoing, there is no evidence that, if true, would lead the jury to conclude that Ms. Smith initiated the proceedings against Mr. D'Addario. As such, the claim of malicious prosecution as against Ms. Smith must fail and therefore, ought not to be put to the jury.

There is no evidence that Mr. Napior contacted the police much less that he initiated the proceedings. Mr. Napior did not alert the police and was responding to inquiries from the police. Constable McRoberts testified that Mr. Napior was

acting solely in his capacity as a witness and that any communications that she had with Mr. Napior were as a result of Ms. Smith having identified him as a witness to both incidents of sexual assaults.

Again, there is no evidence that could lead the jury to conclude that Mr. Napior initiated the proceedings against Mr. D'Addario. As such, the claim of malicious prosecution as against Mr. Napior must fail and therefore, ought not to be put to the jury.

[16] The trial judge concluded that the allegedly defamatory statements made to Father Kerslake were not made on a recognized occasion of qualified privilege and that the D'Addarios did not satisfy the onus of creating a new occasion of qualified privilege. Although Father Kerslake may have had an interest or duty to receive information regarding a member of his parish, the D'Addarios did not have a corresponding duty or interest to make the statements to him. A reasonable person would not feel compelled to seek out a parish priest from a church to which he or she does not belong to make the type of statements that were made. The communications were not of a spiritual nature and the D'Addarios admitted that they were not meeting Father Kerslake for a religious or spiritual purpose. Accordingly, the trial judge withdrew the D'Addarios' qualified privilege defence from the jury.

**(2) The jury charge**

[17] After dismissing the motion for non-suit, the trial judge went on to charge the jury on joint liability for defamation. Following discussions with counsel, the jury was asked whether Ferne D'Addario was jointly liable with Frank D'Addario for damages.

**(3) The jury verdict**

[18] The jury found that:

- Frank D'Addario did not sexually assault Betty Smith.
- Frank D'Addario said to Father Kerslake: "Chris Napior is an alcoholic", which was defamatory. Ferne did not herself make that statement, but was jointly liable with Frank D'Addario for general damages of \$10,000.
- Frank D'Addario said to Father Kerslake: "Chris Napior is abusing his position with the Church", which was defamatory. No damages were assessed for this statement.
- Frank D'Addario said to Father Kerslake: "Chris Napior is dishonest and cannot be trusted", which was defamatory. Ferne did not herself make that statement, but was jointly liable with Frank for general damages of \$10,000.
- Both Frank and Ferne D'Addario said to Father Kerslake: "Chris Napior falsely alleged to the police that Frank D'Addario committed sexual assault

against an elderly lady”, which was defamatory. They awarded \$5,000 in general damages against both Frank and Ferne.

## **ISSUES**

[19] The issues on appeal are:

1. Did the trial judge err in granting the respondents’ motion for non-suit?
2. Did the trial judge err in concluding that Frank and Ferne D’Addario’s communications with Father Kerslake were not protected by the defence of qualified privilege?
3. Did the trial judge err in permitting the allegation of joint liability for the defamation to go to the jury?

## **DISCUSSION**

### **(1) Did the trial judge err in granting the motion for non-suit?**

[20] The appellants submit that the trial judge made numerous errors in granting the respondents’ non-suit motion. In particular, they argue that the trial judge did not appropriately apply the test for a non-suit motion and, instead, effectively made factual findings against Frank D’Addario. In essence, they submit that Betty Smith and Chris Napior conspired to have Frank D’Addario falsely charged. In light of the jury’s conclusion that Smith was not sexually assaulted by D’Addario, the only reasonable inference is that Smith and Napior lied to the police. But for these lies, the appellants contend, Frank D’Addario would not have been charged. This is



evidence from which a trier of fact could have found liability. Whether Smith and Napior lied, thereby initiating the prosecution, was a question that was for the jury, not the trial judge on the non-suit motions. Further, on a fair reading of the plaintiff's evidence, the other witnesses to the alleged sexual assault were "compromised" by Smith, such that even if Constable McRoberts had interviewed them, she could not have done anything but continue with the investigation.

[21] This submission must be rejected.

[22] There is no dispute as to the proper legal test on a motion for a non-suit. As this court explained in *FL Receivables Trust 2002-A v. Cobrand Foods Ltd.*, 2007 ONCA 425, 85 O.R. (3d) 561, at paras. 35-36:

On a non-suit motion, the trial judge undertakes a limited inquiry. Two relevant principles that guide this inquiry are these. First, if a plaintiff puts forward some evidence on all elements of its claim, the judge must dismiss the motion. Second, in assessing whether a plaintiff has made out a *prima facie* case, the judge must assume the evidence to be true and must assign "the most favourable meaning" to evidence capable of giving rise to competing inferences.

...

In other words, on a non-suit motion the trial judge should not determine whether the competing inferences available to the defendant on the evidence rebut the plaintiff's *prima facie* case. The trial judge should make that determination at the end of the trial, not on the non-suit motion.

[23] The question for the trial judge was whether the jury could find that Smith and Napior were liable for malicious prosecution. As the Supreme Court set out in *Nelles v. Ontario*, [1989] 2 S.C.R. 170, at pp. 192-193, there are four elements of the tort of malicious prosecution, each of which must be established on a balance of probabilities:

- The proceedings must have been initiated by the defendant;
- The proceedings must have terminated in favour of the plaintiff;
- There is an absence of reasonable and probable cause; and
- There is malice, or a primary purpose other than the carrying of the law into effect.

[24] Malicious prosecution is difficult to establish. It is even more difficult to establish if a plaintiff seeks to establish that a private party is liable, as opposed to the police. Absent exceptional circumstances, the court will view the police officer who laid the charge as being the person who initiated the prosecution: *Kefeli*, at para. 24.

[25] The first element of the test from *Nelles* requires that the proceedings must have been initiated by the defendants – in this case, Smith and Napior. This court has discussed the circumstances in which a private party can be found to have initiated a prosecution in a series of cases. See *Kefeli*, at paras. 24-25; *McNeil v. Brewers Retail Inc.*, 2008 ONCA 405, 66 C.C.E.L. (3d) 238, at paras. 44-56; and,

most recently, *Pate Estate v. Galway-Cavendish and Harvey (Township)*, 2013 ONCA 669, 117 O.R. (3d) 481, at paras. 21-89. In *Pate Estate*, the court made clear that the test is a high bar, but it is not necessary to demonstrate that it was “virtually impossible” for the police to exercise any independent discretion or judgment.

[26] In this case, there was no evidence that Smith or Napior interfered with or undermined the independence of the investigation. The trial judge considered and rejected the argument that the mere provision of a false statement was sufficient to meet the test of initiating a prosecution. A false statement may cause the police to investigate, but there was no evidence from which it could reasonably be inferred that Constable McRoberts did not exercise her discretion independently.

[27] This conclusion is clearly supported on the record that was before the trial judge. Constable McRoberts testified that she formed the view that there were reasonable grounds to charge Frank D’Addario after conducting her own investigation, which included interviewing Smith and Napior. Constable McRoberts acknowledged that she was aware of two additional eyewitnesses who were present at the assault alleged to have taken place in July 2005 and asked Ottawa police to follow-up, but they did not do so and she did not consider the matter important to her investigation.

[28] Constable McRoberts acknowledged her receipt of correspondence from Smith but said that it had no effect on her investigation. The decision to charge was hers alone, and she decided to exercise her discretion to lay the charge after consulting with a supervising officer. She noted that she effectively has no choice but to lay charges where an allegation of sexual assault occurs in the context of parties that are dating or cohabiting, but she was satisfied that Smith and Frank D'Addario were not involved in a romantic relationship.

[29] In summary, taking the evidence at its highest for Frank D'Addario, the only reasonable conclusion was that Constable McRoberts exercised her own independent discretion to lay the charge. It followed that Smith and Napior could not be found to have initiated the prosecution. The trial judge did not err in granting the non-suit motion.

**(2) Did the trial judge err in concluding that the communications were not protected by qualified privilege?**

[30] The appellants proffered no authority establishing that communications to priests are a recognized occasion protected by the defence of qualified privilege. The onus was on the appellants to establish a new occasion of qualified privilege – that they had an interest or duty to make the statements and that Father Kerslake had a corresponding interest or duty to receive them. They failed to do so.

[31] The appellants submit that the trial judge overlooked their personal interest in having Chris Napior's priest know about and speak to him about his behaviour.

They say that Father Kerlake was Napior's spiritual leader and that he, like the appellants, had an interest in addressing Napior's "sudden shift in behaviour and alarming increase in his drinking" and was in a position to do so.

[32] There is no merit to this submission.

[33] The D'Addarios did not attend Napior's church and they admitted that they were not meeting with Father Kerslake for a religious or spiritual purpose. Even if Father Kerslake had an interest or duty to receive information concerning a member of his parish, it could not be said that the D'Addarios – strangers to the parish – had a corresponding duty to make the statements to him. Indeed, so surprised was the priest to receive the D'Addarios' allegations that he consulted his vicar general, who is involved in legal matters and important problems.

[34] The trial judge's conclusion that the statements were not made on an occasion of qualified privilege is fully supported by the record and is reasonable. There is no basis for this court to interfere with it on appeal.

**(3) Did the trial judge err in permitting the allegation of joint liability for the defamation to go to the jury?**

[35] Ferne D'Addario submits that the trial judge acted unfairly in permitting the respondents to add an allegation of joint liability for defamation after they had closed their case. Further, she contends that the trial judge erred in putting the issue of joint liability to the jury because there was no evidence that she had acted in concert with Frank D'Addario to defame Napior.

[36] I would reject these submissions.

[37] It is clear from the pleadings that the respondents claimed damages against Frank and Ferne D'Addario jointly and severally. This was not an allegation made late at the "11<sup>th</sup> hour", as Ferne asserts. Moreover, when the trial judge was reviewing the jury questions with the parties, counsel for the D'Addarios – who conducted a joint defence – requested that the questions distinguish between the speakers. In particular, he requested that the jury be asked what Frank D'Addario said and what Ferne D'Addario said, rather than what the D'Addarios said. This request was accommodated, and no objection was taken to the charge. There is no merit to the submission that the joint liability issue was unfairly raised.

[38] The trial judge instructed the jury that it was open to them to find Frank and Ferne D'Addario jointly liable for the statements if they planned to meet Father Kerslake to say the words complained of, even if only one of them said the words. It was enough that there was a common plan.

[39] He did not err in doing so. In *Botiuk v. Toronto Free Press Publications Ltd.*, [1995] 3 S.C.R. 3, at pp. 27-28, the Supreme Court of Canada adopted the law as set out by John Fleming:

The critical element of [concerted action liability] is that those participating in the commission of the tort must have acted in furtherance of a common design.... Broadly speaking, this means a conspiracy with all participants acting in furtherance of the wrong, though it

is probably not necessary that they should realise they are committing a tort.

[40] It is noteworthy that the jury found Ferne D'Addario did not make three of the four statements complained of. The jury found that she made the statement that Napior had falsely alleged to the police that Frank D'Addario had sexually assaulted an elderly lady.

[41] As this court noted in *Rutman v. Rabinowitz*, 2018 ONCA 80, at para. 34, concerted action liability arises when a tort is committed in furtherance of a common design or plan, by one party on behalf of or in concert with another party. It is a fact specific concept. It was open to the jury to conclude that Ferne D'Addario was no mere passive observer at the meeting with Father Kerslake. Ferne, along with Frank, had requested the meeting. Her evidence was that she thought the priest should know what Napior had done. She acknowledged that "we" talked about Napior.

[42] In all of these circumstances, it was open to the jury to conclude that the D'Addarios were acting in furtherance of a common plan to cause harm to Napior, and to find Ferne D'Addario jointly liable for the statements made by Frank D'Addario.

## **CONCLUSION**

[43] I would dismiss the appeal.

[44] The respondents are entitled to costs, fixed at \$15,000, inclusive of disbursements and HST.

Released:

"KF"

"FEB 20 2018"

"Grant Huscroft J.A."

"I agree K. Feldman J.A."

"I agree J.C. MacPherson J.A."