COURT OF APPEAL FOR ONTARIO

CITATION: Armstrong v. Corus Entertainment Inc., 2018 ONCA 689
DATE: 20180830
DOCKET: C62752 & C62764

Doherty, Brown and Huscroft JJ.A.

BETWEEN

William John Armstrong

Plaintiff (Respondent)

and

Corus Entertainment Inc., ~~Craig Needles, Shawn Lewis,~~ Nancy McSloy, Joseph Wilson, Robert Spencer, ~~Cheryl Miller, Christopher George and Stewart Blair~~ and Jack McSloy

Defendants (Appellants)

Andrew F. Camman and Susan A. Toth, for the appellants, Nancy McSloy, Joseph Wilson, Robert Spencer and Jack McSloy

Peter M. Jacobsen and Julia L. Lefebvre, for the appellant, Corus Entertainment Inc.

Sean C. Flaherty, for the respondent

Heard: June 29, 2017

On appeal from the order of Justice Joseph M. W. Donohue of the Superior Court of Justice, dated September 2, 2016.

Doherty J.A.:

A. OVERVIEW

[1] In 2014, William Armstrong, a candidate for city councillor in London, Ontario, sued his opponent, Nancy McSloy, for defamation. He also sued members of her campaign team and the local radio station. The claims arose out of certain remarks made during the municipal campaign.

[2] All of the defendants brought a motion to dismiss the claim under s. 137.1 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 ("*CJA*"). The motion judge dismissed the motion. The defendants appeal.

[3] For the reasons that follow, I would allow the appeal and dismiss the action against all of the appellants.

B. BACKGROUND FACTS

[4] In 2014, William Armstrong, an incumbent city councillor in London, Ontario, successfully ran for re-election against the appellant, Nancy McSloy. The appellants Joseph Wilson, Robert Spencer, and Jack McSloy were involved directly or indirectly in Ms. McSloy's campaign. Mr. McSloy is Ms. McSloy's husband. The appellant, Corus Entertainment Inc. ("Corus"), is a broadcasting corporation that operates a radio station ("AM 980") in London. Corus also maintains a publicly accessible online database that includes podcasts of broadcasts and a page on which commentaries are posted.

[5] Mr. Armstrong initially sued several other people as well, but he abandoned those claims.

[6] The allegation against Mr. McSloy is based on a single Facebook post he made on August 30, 2014. The claim against Mr. Wilson is based upon a single Facebook post he made on September 2, 2014, in response to Mr. McSloy's post. The claim against Mr. Spencer arises out of two Twitter posts he made on September 4 and 5, 2014.

[7] The claim against Ms. McSloy is based on several statements. In early September 2014, she issued a press release through Facebook in which she stated that Mr. Armstrong had been convicted of sexual assault "many years ago". She stated that her release of the information was not "about political campaigning or mudslinging", but was rather because she was "concerned for [her] own safety, [her] family's safety, as well as the safety of the residents of [her] community". She went on to indicate that Mr. Armstrong's conviction was part of a disturbing pattern of bullying and intimidation by him.

[8] Mr. Armstrong had in fact been convicted of sexual assault in 1987. Neither Ms. McSloy's assertion that Mr. Armstrong had been convicted of sexual assault, nor the details surrounding that conviction, are the subject of the defamation claim. The claim focuses on Ms. McSloy's assertion that Mr. Armstrong has shown a

pattern of unethical and illegal conduct, including the sexual assault, used to bully and intimidate others.

[9] On September 5, 2014, following her press release, Ms. McSloy appeared on the Craig Needles Show, a talk radio program broadcast by Corus on AM 980. Municipal politics was a common topic on the broadcast.

[10] Mr. Needles began the broadcast by summarizing Ms. McSloy's press release. He then questioned her about the press release, specifically asking her why she chose to make a 25-year-old criminal conviction public in the middle of an election campaign. Ms. McSloy responded, as she had in her press release, by insisting that she was not seeking political gain, but was concerned about her safety, her family's safety, and public safety. She said "that people have the right to know this concern". She indicated that Mr. Armstrong's prior conviction was consistent with a disturbing pattern of bullying and intimidating conduct by Mr. Armstrong over the years. Ms. McSloy identified prior instances that she said demonstrated that pattern. One of those incidents involved a dispute between Ms. McSloy and Mr. Armstrong earlier in the year over her continued involvement with a volunteer community organization after she announced she was running for city council.

[11] In his claim, Mr. Armstrong alleged that the "plain and ordinary meaning and/or innuendo" of the various statements made by all of the personal appellants

was that Mr. Armstrong was unethical, a threat to the safety of individuals in the community, would engage in criminal conduct, and would bully and intimidate others, both generally and in the context of the election campaign. Mr. Armstrong asserted that the statements were defamatory, clearly referred to him, and were published to others. He alleged malice against the individual appellants, but not against Corus.

[12] The allegations against Corus arose out of the September 5 interview with Ms. McSloy on Mr. Needles's show, a podcast of that interview posted on the AM 980 website the same day, and an article posted on the website the same day, entitled "Bombshell in Ward 2 Council Race", that referenced Ms. McSloy's interview at length. Attached to the article was a newspaper article from 1987 detailing the sexual assault allegation and the related court proceedings against Mr. Armstrong.

[13] The claim against Corus arises out of its publication of Ms. McSloy's allegedly defamatory statements. I do not understand Mr. Armstrong to allege that Corus made any defamatory statements apart from its repetition of those made by Ms. McSloy, either in her press release or in her interview with Mr. Needles.

[14] The motion judge struck the claim based on the broadcast itself for failure to comply with the notice requirements in s. 5(1) of the *Libel and Slander Act*, R.S.O.

1990, c. L.12. However, that provision did not apply to the posting of the broadcast on Corus's website. There is no appeal from that part of the order.

C. THE SECTION 137.1 MOTIONS

[15] After the appellants had filed their Statements of Defence, they moved for a dismissal of the action under s. 137.1 of the *CJA*. The motion judge held that the appellants had satisfied him that the expressions that were the subject matter of Mr. Armstrong's claims related to "a matter of public interest" as required by s. 137.1(3). That finding is not in dispute on the appeal. Nor should it be. Statements about a candidate's fitness for office made in the course of an ongoing election campaign undoubtedly qualify as expression relating to a matter of public interest.

[16] Having concluded that the appellants met their onus under s. 137.1(3), the motion judge turned to s. 137.1(4). That provision put the onus on Mr. Armstrong to satisfy the motion judge that:

- there were grounds to believe that his claims had substantial merit (s. 137.1(4)(a)(i));
- there were grounds to believe that the appellants had no valid defence to the allegations (s. 137.1(4)(a)(ii)); and
- the harm suffered or likely to be suffered by Mr. Armstrong as a result of the appellants' statements was sufficiently serious that the public interest in

permitting him to proceed with the litigation outweighed the public interest in protecting the appellants' freedom of expression (s. 137.1(4)(b)).

[17] The motion judge treated the personal appellants as a group and did not distinguish one from the other. He attributed statements made by one to all. For example, at para. 38, he observed:

> The statements of all of the personal Defendants advance four allegations of fact:
>
> (a) Armstrong bullied Nancy McSloy and others over her volunteer work….

[18] Some of the statements attributed to Ms. McSloy did refer to the bullying she was allegedly subjected to in relation to her volunteer work. However, none of the statements attributed to the other personal appellants made any reference to that "fact".

[19] The motion judge also treated the personal appellants as a single entity when considering harm for the purpose of s. 137.1(4)(b). For example, in assessing the potential harm to Mr. Armstrong from the impugned statements, the motion judge did not distinguish between the single post made by Mr. McSloy to a small audience of his Facebook followers and the much more detailed statements made by Ms. McSloy to a much broader audience.

[20] The motion judge made brief reference to the onus on Mr. Armstrong under s. 137.1(4). He observed that Mr. Armstrong was not required to establish either

substantial merit or the absence of a valid defence on the balance of probabilities. He made no further reference to the legal test to be applied under ss. 137.1(4)(a) or (b).

[21] The motion judge concluded that there was substantial merit to Mr. Armstrong's assertions that the impugned statements, when read as a whole, referred to Mr. Armstrong, were published to others, and bore various defamatory meanings. The motion judge addressed the specific defences that were raised by the personal defendants and by Corus. He concluded there were grounds to believe that none were valid.

[22] In holding that Mr. Armstrong had met his onus under ss. 137.1(4)(a)(i) and (ii), the motion judge was critical of the hearsay nature of much of the evidence contained in the affidavit of the personal defendants' counsel, filed on their behalf. He said nothing about the affidavit of Nathan Smith, the Program and News Director at AM 980 at the relevant time, filed on behalf of Corus. The motion judge also made no reference to the affidavit and cross-examination of Mr. Armstrong.

[23] In his public interest analysis under s. 137.1(4)(b), the motion judge acknowledged that there was a public interest in protecting expression about a candidate's suitability for office. He then proceeded to assess the potential harm to Mr. Armstrong. The motion judge set out the various defamatory meanings that a reader could take from the impugned statements. He also described in general

terms, without any reference to the specifics of this case, the potential for the continual and wide dissemination of statements posted on the internet. He concluded, at para. 69:

> I am brought to the conclusion that the harm likely to have been suffered by Mr. Armstrong as a result of the Defendants' expressions is sufficiently serious that the public interest in permitting the lawsuit to continue outweighs the public interest in protecting those expressions.

[24] The motion judge dismissed the motions. He awarded costs in the cause to Mr. Armstrong in the amount of $15,862.15.

D. THE APPEAL BY CORUS

[25] Corus advanced various defences in its Statement of Defence and the affidavit of Mr. Smith. Mr. Smith was not cross-examined.

[26] Corus argued that, having regard to the Statement of Defence and the material filed on the motion, Mr. Armstrong had failed to show that there were grounds to believe that Corus had no valid defence to the defamation allegations. The motion judge rejected this submission. I will focus on the motion judge's finding as it relates to the defence of responsible communication.

[27] The approach to be taken on a s. 137.1 motion, and specifically the meaning and operation of ss. 137.1(4)(a) and (b), are set out in *1704604 Ontario Ltd. v. Pointes Protection Association*, 2018 ONCA 685 (released concurrently with these reasons). I will not repeat that analysis here.

[28] The motion judge correctly identified the elements of the defence of responsible communication. That defence, as articulated in *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640, at para. 98, has two components. First, the subject matter of the publication must be a matter of public interest. Second, the publication must be "responsible". In this context, "responsible" refers to both the steps taken to validate the accuracy of factual assertions in the publication and the overall fairness of the publication.

[29] In considering the defence, the motion judge set out a lengthy quotation from a leading authority and listed ten factors identified in the authorities as relevant to the defence. His application of those principles to the facts of this case is found at paras. 58 and 60:

> As noted earlier the evidence is lacking that Corus attempted to verify the truth of Nancy McSloy's statements. In all the circumstances a statement that attempts were made to contact the Plaintiff carries little or no weight. Given the use of the sensational term "Bombshell" more evidence was required from Corus. I am satisfied that there are grounds to believe that Corus has no valid defence based on public interest responsible journalism (or Responsible Communication as I have termed it above).
>
> …
>
> [The concept of reportage] does not exist as a standalone defence but is a factor to be weighed in considering whether a publication was responsible. As a factor in these circumstances it has negligible weight considering that the publication was not a report of both sides of a dispute between competing candidates and there was no

> indication in the publication of an effort to verify the truth of Nancy McSloy's statements.

[30] The motion judge was not required to determine whether Corus had made out the defence of responsible communication. Corus had met its evidentiary burden of putting the defence "in play", both by its Statement of Defence and by Mr. Smith's affidavit. The onus then fell to Mr. Armstrong to satisfy the motion judge that a trier examining the record could reasonably conclude that Corus did not have a valid – meaning successful – defence to the allegation. If a trier could not reasonably come to that assessment on the motion record, Mr. Armstrong had failed to meet his onus under s. 137.1(4)(a)(ii): *Pointes*, at paras. 83-84.

[31] The first component of the responsible communication defence was not an issue. As counsel acknowledged, the suitability of a candidate to hold office on the city council was a matter of public interest. The availability of the defence depended on whether Corus acted responsibly in reporting Ms. McSloy's statements.

[32] Corus's reporting of Ms. McSloy's comments had two themes. Both concerned the suitability of candidates for public office. First, Corus reported on Mr. Armstrong's suitability for public office in light of the revelations of his prior conviction for sexual assault and Ms. McSloy's assertions that Mr. Armstrong used bullying and intimidation tactics to get his way. Second, Corus questioned Ms. McSloy's motive for making Mr. Armstrong's prior conviction public in the middle

of the campaign. Corus's reporting posed the question: was Ms. McSloy acting in the public interest or to advance her personal political career? That question went directly to Ms. McSloy's suitability as a candidate for public office.

[33] It is important to emphasize that the reporting of Mr. Armstrong's prior conviction for sexual assault is not the basis for the defamation allegation. The defamation claim focuses on Ms. McSloy's statements made in the course of explaining and defending her decision to reveal Mr. Armstrong's prior conviction in the middle of the campaign. The responsible communication defence must be assessed in that context.

[34] Ms. McSloy's comments characterizing Mr. Armstrong as a bully and posing a threat to the safety of others were not put forward by Corus as statements of fact, and no reasonable listener or reader would take them as such. Her comments were reported as her opinion. She justified making Mr. Armstrong's prior criminal record public because, in her view, it supported her characterization of him as a bully and a threat to the safety of others. She also offered the explanation to justify her position that she was not simply trying to advance her own political career by raising Mr. Armstrong's prior conviction. Her explanations for disclosing Mr. Armstrong's prior criminal conviction were integral to both public interest themes advanced in the Corus publications: see *Grant v. Torstar Corp.*, at paras. 119-20.

[35] The motion judge rejected Corus's responsible communication defence in part because "the evidence is lacking that Corus attempted to verify the truth of Nancy McSloy's statements". The motion judge did not identify any specific statements he had in mind when he made this observation. Nor did he identify any specific factual errors in the publications.

[36] If the motion judge was referring to Ms. McSloy's characterization of Mr. Armstrong as a "bully", or his conduct as "intimidating", or Ms. McSloy's concerns about her own safety and the safety of others, none of these assertions were factual statements capable of verification. Her comments were her opinions and her characterizations of Mr. Armstrong's conduct. No reasonable person reading or listening to the Corus publications would take those statements as anything other than Ms. McSloy's opinion about Mr. Armstrong's conduct and her justification for making his prior conviction public.

[37] If, when the motion judge spoke of Corus's failure to verify Ms. McSloy's statements, he was referring to her statements about prior events that she said justified her characterization of Mr. Armstrong as a bully, the motion judge's observation is contrary to the evidence. There was ample evidence that most, if not all, of the events referred to by Ms. McSloy had occurred and had been reported in the media. That material was all before the motion judge.

[38] For example, in speaking to Mr. Needles, Ms. McSloy said:

> Looking back at the bullying issue that I had with the incumbent in regard to my volunteer work within the community this year….

[39] Ms. McSloy was referring to an incident that had occurred earlier in 2014 that had been widely reported, including on Mr. Needles's radio program. The incident involved Mr. Armstrong's attempt to have Ms. McSloy removed from her position with a volunteer organization because she had chosen to run for city council. The reporting on this incident had included suggestions by persons other than Ms. McSloy that Mr. Armstrong's conduct amounted to "bullying". Mr. Armstrong had publicly responded to that characterization on Mr. Needles's program and presented his side of the debate.

[40] There was no question that the dispute between Mr. Armstrong and Ms. McSloy over her involvement in the volunteer organization had occurred. Her characterization of that event as indicative of Mr. Armstrong's bullying was her opinion and not something that Corus could verify.

[41] In holding that Corus's failure to verify the truth of Ms. McSloy's comments undermined the responsible communication defence, the motion judge erred in law in failing to distinguish between the accuracy of Ms. McSloy's reference to earlier events and her characterization of what those events said about Mr. Armstrong's character and disposition. Corus's obligation to make best efforts to verify the information provided by Ms. McSloy related to the events she referred to, not to her opinion of what those events said about Mr. Armstrong's character.

[42] I turn next to the overall fairness of the Corus publications. In making this assessment, I draw on the factors identified in *Grant v. Torstar Corp.*, at paras. 110-122. The publications clearly identify Ms. McSloy as the source of the information and opinion contained therein. The publications repeatedly emphasize the context – these were comments made by Mr. Armstrong's political opponent in the middle of a heated election campaign. Identifying the source of the comments and the context in which they were made gives the reader valuable information when assessing the comments' merits and goes a long way toward ensuring the fairness of Corus's reporting.

[43] The publications are even-handed in the sense that Ms. McSloy's explanation for going public with Mr. Armstrong's conviction, while clearly set out, is not simply accepted at face value. Mr. Needles pressed Ms. McSloy on her motive. In the end, he left the issue of what motivated Ms. McSloy an open question and invited comments and further discussion from the listeners.

[44] Corus also sought out Mr. Armstrong and his lawyer for comment on Ms. McSloy's assertions. Both declined that invitation. The motion judge dismissed Corus's attempt to get Mr. Armstrong's side of the story as worthy of "little or no weight" in assessing the responsible communication defence. I disagree.

[45] Ms. McSloy's characterization of Mr. Armstrong as a bully and a threat to the safety of others could best have been answered by Mr. Armstrong himself. This

is particularly true in the context of an ongoing election campaign. The public reasonably expects candidates to publicly respond to and refute assertions made by other candidates. Corus gave Mr. Armstrong that opportunity. In my view, that opportunity was entitled to considerable weight in assessing the responsible communication defence.

[46] There is no reason to think that Mr. Armstrong would not have been treated fairly had he chosen to respond as invited. Quite the contrary, Mr. Armstrong had appeared on Mr. Needles's show earlier that year to respond to allegations made by other persons that he bullied Ms. McSloy. Mr. Armstrong responded to those allegations in conversation with Mr. Needles. There is no suggestion that he was not given a full opportunity to respond or was otherwise treated unfairly by Mr. Needles.

[47] The motion judge seems to have discounted Corus's attempt to get Mr. Armstrong's side of the story because, in the motion judge's assessment, the Corus publications did not purport to be "a report of both sides of a dispute between competing candidates". There was no "report of both sides of a dispute" because Mr. Armstrong declined Corus's invitation to respond to Ms. McSloy's characterization of his conduct. There is no reason to doubt that, had Mr. Armstrong responded and offered a rebuttal to her characterization, that Corus would have reported that rebuttal, thereby making "both sides of the dispute" public.

[48] The motion judge fell into legal error in dismissing Corus's attempts to obtain Mr. Armstrong's side of the story in response to Ms. McSloy's statements. As indicated in *Grant v. Torstar Corp.*, at para. 116, a legitimate attempt to report both sides of a story "speaks to the essential sense of fairness the defence is intended to promote, as well as thoroughness".

[49] The motion judge was also critical of Corus's use of the word "Bombshell" in the title of the article on the AM 980 website. I understand the motion judge to have inferred from the use of that word that Corus was sensationalizing the controversy rather than attempting to present a balanced and fair report.

[50] The word "Bombshell" clearly refers to the revelation of Mr. Armstrong's prior conviction for sexual assault and not Ms. McSloy's explanation for going public with that prior conviction. The truth of the so-called "Bombshell" was never questioned and is not the subject matter of the defamation claim. In my view, the use of the word "Bombshell" had no impact on the tone of the Corus publications as they relate to Ms. McSloy's alleged defamatory comments.

[51] On a proper application of the responsible communication defence to the facts of this case, I am satisfied that the material filed by Corus put the defence of responsible communication squarely in issue. Mr. Armstrong's material does not provide reasonable grounds to believe that Corus did not have a valid defence of responsible communication.

[52] The Corus publications did not contain any material factual errors. They presented Ms. McSloy's explanation for disclosing Mr. Armstrong's very dated criminal conviction in her own words. The presentation was balanced and fair. Corus neither supported nor dismissed Ms. McSloy's explanation for the disclosure. Mr. Armstrong's voice went unheard because he chose to decline Corus's request for a comment. A reasonable trier on this record could not be satisfied that Corus did not have a valid defence of responsible communication.

[53] Mr. Armstrong failed to meet his onus under s. 137.1(4)(a)(ii). Corus's motion should have been allowed and the claim against it dismissed.

E. THE APPEAL BY THE PERSONAL APPELLANTS

[54] The personal appellants are responsible for their own comments, although comments made by others can in some circumstances provide context and meaning. For example, the comment made by Mr. Spencer after Ms. McSloy's press release clearly gains context and meaning from the contents of that press release. Similarly, Mr. Wilson's comment on Mr. McSloy's post must be read in light of Mr. McSloy's post.

(i) Mr. McSloy and Mr. Wilson

[55] Mr. McSloy made a single statement. On August 30, 2014, he posted the following on his Facebook page:

> It is sad to see people putting election signs on their lawn outs [*sic*] of fear and being bullied and yelled at. Sad too if that is what it takes to try to get re-elected.

[56] Mr. Wilson also made a single statement. On September 2, 2014, in response to Mr. McSloy's post, Mr. Wilson posted the following on Mr. McSloy's Facebook page:

> Some politicians make a career out of bullying people. Turf them!

[57] Mr. McSloy's post was not available to the general public, but could be read by his 338 Facebook friends. Mr. Wilson had 211 Facebook friends, and as his post appeared on Mr. McSloy's page, it was not available to the general public. Both statements were made days before Ms. McSloy's press release and her subsequent interview on Mr. Needles's show.

[58] The motion judge recognized that Mr. Armstrong had to show that Mr. McSloy's and Mr. Wilson's posts referred to Mr. Armstrong. Neither expressly identified Mr. Armstrong. In concluding that there was substantial merit to Mr. Armstrong's argument that Mr. McSloy's and Mr. Wilson's posts referred to him, the motion judge said, at para. 12:

> Not all the statements refer to the Plaintiff by name. However, the inescapable inference is that the references are to the Plaintiff. This inference arises from the placement, sequence, or thread of the comments and the use of the concept of re-election. Only the Plaintiff was running for re-election. *The statements of the various personal Defendants can be considered to have*

> *a cumulative effect. Arguably, by implication they are adopting each other's views.* [Emphasis added.]

[59] The motion judge treated the alleged defamatory statements as if they had all been made by all of the personal defendants. He erred in law in doing so. Liability is personal, absent evidence that the tortious conduct is the product of a conspiracy or common design. If a common design is established, then all parties to the common design become joint tortfeasors: see *Rutman v. Rabinowitz*, 2018 ONCA 80, 420 D.L.R. (4th) 310, at paras. 33-35, leave to appeal refused [2018] S.C.C.A. No. 130. In my view, Mr. McSloy's and Mr. Wilson's involvement in Ms. McSloy's election campaign does not make them legally responsible for any defamatory statement that may have been made by anyone in the course of the campaign.

[60] There is no allegation in the Statement of Claim that the personal defendants were joint tortfeasors, or that there was a common design among them to defame Mr. Armstrong.[1] Nor is there any evidence in the material filed on the motion to support a finding of common design. Nothing either Mr. McSloy or Mr. Wilson did or said could support the inference that they "adopted by implication" the subsequent comments of Mr. Spencer and Ms. McSloy.

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[1] There is a single reference, in para. 105 of the Amended Statement of Claim, to "organized dissemination of defamatory statements". The reference is made, however, in the context of a claim for punitive damages.

[61] An assessment of liability for the allegedly defamatory statements on an individual basis is particularly important to Mr. McSloy and Mr. Wilson. Each made a single comment days before Ms. McSloy's press release concerning Mr. Armstrong's criminal record and her subsequent comments tying that criminal conduct to other conduct by Mr. Armstrong. Ms. McSloy's statements cannot be used to put a meaning on Mr. McSloy's and Mr. Wilson's earlier statements. There is nothing in this record to suggest that Mr. McSloy or Mr. Wilson had any role in Ms. McSloy's subsequent comments, were aware that she intended to make those comments when they made theirs, or in any way subsequently associated themselves with Ms. McSloy's comments.

[62] Both Mr. McSloy and Mr. Wilson argued on appeal that Mr. Armstrong had failed to show grounds upon which a reasonable trier could find substantial merit to the claim that their posts referred to Mr. Armstrong. To establish defamation, the plaintiff must show that the impugned comments referred to the plaintiff: *Grant v. Torstar Corp.*, at para. 28.

[63] Mr. McSloy's post on August 30, 2014 is the first of the alleged defamatory comments. The record contains no other comments or actions of Mr. McSloy that could give context or meaning to the August 30 post.

[64] The August 30 post makes no reference to Mr. Armstrong by name and no reference to the particular ward or wards in which the described inappropriate electioneering activity occurred.

[65] Counsel for Mr. Armstrong, in arguing that the post refers to Mr. Armstrong, stresses that it speaks of “getting re-elected”. Mr. Armstrong was the incumbent in Ward 2. Counsel’s point is a valid one. I also accept that because Mr. McSloy was working on Ms. McSloy’s campaign and she was running for election in Ward 2, Mr. McSloy’s reference could reasonably be taken as a reference to activity in Ward 2. However, I see nothing in the language of Mr. McSloy’s post that could reasonably permit the inference that Mr. McSloy was speaking about Mr. Armstrong personally, as opposed to others who may have been involved in his campaign for re-election.

[66] When Mr. McSloy’s liability is considered by reference exclusively to what he said and not to what others subsequently said, it cannot reasonably be inferred that the August 30 post referred to Mr. Armstrong personally. Consequently, Mr. Armstrong failed to show that there were reasonable grounds to believe that there was substantial merit to the allegation that Mr. McSloy’s post defamed Mr. Armstrong. The action against Mr. McSloy should have been dismissed on this basis.

[67] Mr. Wilson's Facebook post on September 2 in response to Mr. McSloy's post must of course be read in the context of Mr. McSloy's post. However, it cannot be interpreted in light of the subsequent statements of others involved in Ms. McSloy's election campaign.

[68] Mr. Wilson's comment cannot reasonably be read as agreeing or adopting Mr. McSloy's allegation that people were being bullied and intimidated into putting signs on their lawns during the ongoing campaign. Mr. Wilson's Facebook post goes no further than to make the observation that some politicians "make a career" out of bullying others. It cannot reasonably be read as an allegation of improper conduct against any identifiable person, much less against Mr. Armstrong.

[69] Just as in his assessment of Mr. McSloy's liability, the motion judge wrongly treated Mr. Wilson as potentially liable for all of the allegedly defamatory statements in Mr. Armstrong's pleadings. When Mr. Wilson's liability is considered by reference to his single Facebook post in the context of Mr. McSloy's originating post, Mr. Armstrong failed to show that there were reasonable grounds to believe that there was substantial merit to his claim against Mr. Wilson. The claim against Mr. Wilson should have been dismissed.

(ii) Mr. Spencer and Ms. McSloy

[70] The claim against Mr. Spencer is based on two Twitter posts. The first tweet on September 4 said:

> Getting more and more complaints from #ward2 residents of being intimidated and threatened at the door by the current clcr. #ldnont #ldnvotes

[71] The second tweet on September 5 said:

> It's a serious charge. It was long ago, but the pattern didn't end in 87. He's still dominating and intimidating. Now it's for work not sex.

[72] Mr. Spencer's September 5 post came after Ms. McSloy's press release concerning Mr. Armstrong's prior sexual assault conviction and her claims that Mr. Armstrong had shown a pattern of bullying and intimidation. Mr. Spencer's reference to "a serious charge" could readily be understood as a reference to the prior sexual assault conviction. His comments could also be seen as supporting Ms. McSloy's allegations that Mr. Armstrong had demonstrated a pattern of bullying and intimidation, which posed a risk to the safety of others.

[73] I see no error in the holding that Mr. Armstrong had demonstrated grounds to believe that there was substantial merit to his defamation claim against Mr. Spencer. Mr. Spencer's words clearly referred to Mr. Armstrong and they were published to others. The words are also capable of a defamatory meaning. A reasonable reader could take from Mr. Spencer's statements that Mr. Armstrong was a person who used force, threats, and intimidation to get what he wanted from others, be it sex or something related to his work as a councillor.

[74] Ms. McSloy made various statements concerning Mr. Armstrong. Her statements lie at the heart of this lawsuit. I have described her comments earlier in these reasons and need not repeat them here.

[75] The motion judge properly concluded that Mr. Armstrong had demonstrated grounds to believe that the claim against Ms. McSloy had substantial merit. Her statements referred to Mr. Armstrong and were widely published. They were also reasonably capable of bearing at least some of the defamatory meanings that the motion judge identified. A reader could take from Ms. McSloy's comments that Mr. Armstrong used threats, intimidation, illegal acts, and bullying to get what he wanted from others.

[76] I am also satisfied that, insofar as Ms. McSloy and Mr. Spencer are concerned, Mr. Armstrong met his onus under s. 137.1(4)(a)(ii) to show reasonable grounds to believe that Ms. McSloy and Mr. Spencer had no valid defence to the claims. In this context, the motion judge's criticism of the hearsay nature of the material filed by the personal appellants in support of their defences is justified.[2] While Mr. Armstrong bore the ultimate onus under s. 137.1(4), the appellants had a clear evidentiary obligation, especially as it related to defences like justification, which concerns the truth of the statements: see *Pointes*, at para. 83.

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[2] In contrast, Mr. Smith's affidavit, relied upon in support of Corus's potential defences, did not contain hearsay evidence.

[77] The claims against Ms. McSloy and Mr. Spencer survive the merits analysis in s. 137.1(4)(a). Do they also survive the "public interest" analysis in s. 137.1(4)(b)?

[78] As with the merits analysis, the public interest considerations must focus on the claims as advanced against each defendant separately. In assessing the harm done or potentially done to Mr. Armstrong, one must distinguish between comments made through various media outlets to a wide public audience and comments made to a handful of Twitter followers. The motion judge did not draw that distinction, but instead looked at potential harm to Mr. Armstrong globally. He erred in law in doing so.

[79] On the evidence adduced at the motion, Mr. Armstrong demonstrated little, if any, personal or financial harm, real or potential, as a consequence of any of the alleged defamatory statements. He was re-elected, defeating Ms. McSloy and another candidate with "some separation" between himself and the second place candidate. The motion judge, while describing several variations of the derogatory meanings that he said could be taken from the statements, did not identify any specific harm suffered or likely to be suffered by Mr. Armstrong.

[80] Insofar as Mr. Spencer's tweets are concerned, I see no basis to infer that those tweets caused or could reasonably be expected to cause more than minimal harm to Mr. Armstrong. Although the motion judge went on at some length about

the potential for widespread and continuous dissemination of information on the internet, he made no reference to the actual evidence concerning Mr. Spencer's tweets. On that evidence, less than 200 people in total viewed them.

[81] Not only was Mr. Spencer's audience modest to say the least, it is hard to imagine how his comments added anything to the comments being made at the same time by the candidate, Ms. McSloy. Unlike Mr. Spencer's comments, those observations had a wide audience and were much more detailed.

[82] Had Mr. Spencer's tweets been the only statements in issue in this lawsuit, there would be no basis to find that Mr. Armstrong suffered or was likely to suffer any special damages. While general damages are presumed in defamation, they would surely be nominal against Mr. Spencer: see *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at para. 164; Raymond E. Brown, *Brown on Defamation: Canada, United Kingdom, Australia, New Zealand, United States*, loose-leaf, 2d ed., vol. 8 (Toronto: Carswell, 1999), at pp. 25-46 to 25-48.

[83] On any realistic assessment of this lawsuit, the thrust of Mr. Armstrong's claims was directed at Ms. McSloy's statements. The comments of Mr. Spencer, like those of Mr. McSloy and Mr. Wilson, were peripheral and their possible impact on Mr. Armstrong minimal. Indeed, including Mr. McSloy, Mr. Wilson, and Mr. Spencer in the lawsuit raises serious questions about Mr. Armstrong's motive in

bringing the lawsuit. Did he actually seek to vindicate his reputation, or did he seek to punish and intimidate his political foe and those associated with her?

[84] In the course of an election campaign, there is a high premium placed on the ability of candidates and members of the public to openly and freely express points of view about the opposing candidate, often in strong terms and sometimes with language that becomes personal. Mr. Spencer's tweets did that. As I read this record, Mr. Armstrong demonstrated virtually no harm, actual or potential, flowing to him from Mr. Spencer's tweets. Absent any harm or risk of harm, the public interest in allowing Mr. Armstrong to pursue his defamation claim against Mr. Spencer cannot outweigh Mr. Spencer's right to express his opinion on Mr. Armstrong's suitability as a candidate for municipal council, a matter of significant public interest. The claim against Mr. Spencer should have been dismissed under s. 137.1(4)(b).

[85] Although, as indicated above, I would dismiss the claims against Mr. McSloy and Mr. Wilson under the merits analysis in s. 137.1(4)(a), had I reached the public interest analysis in respect of their claims, I would have dismissed those claims for the same reasons that I would dismiss the claim against Mr. Spencer.

[86] The application of the public interest analysis in s. 137.1(4)(b) to Ms. McSloy raises a more difficult problem. She initiated the alleged attack on Mr. Armstrong's character. She repeated her allegations in various media outlets. Some of her

statements could reasonably be read as casting serious aspersions on Mr. Armstrong's character. As Mr. Armstrong's opponent, and a person with a history and supporters in the local political community, Ms. McSloy's opinions may well have been given significant weight. Her comments had the potential to do harm to Mr. Armstrong's reputation.

[87] In his affidavit, Mr. Armstrong focused on Ms. McSloy's comments. He referred to several specific incidents, which he alleged demonstrated the damage that Ms. McSloy's comments caused to him.

[88] The motion judge did not refer to any of Mr. Armstrong's evidence, or make any findings based on that evidence. On my reading of Mr. Armstrong's cross-examination, many, if not all, of the events he referred to as demonstrating the damages that Ms. McSloy's comments caused him could not be causally related to anything said by Ms. McSloy about Mr. Armstrong's character. It is clear that some of the events Mr. Armstrong described flowed directly from the disclosure of Mr. Armstrong's prior conviction for sexual assault. That disclosure forms no part of the defamation claim, and damages flowing from it can form no part of the harm suffered as a result of the defamation.

[89] There is almost no evidence of any special damage that Mr. Armstrong suffered as a result of Ms. McSloy's comments. Mr. Armstrong's continued electoral success strongly suggests that any harm to his reputation was minimal.

Any award for general damages would be modest to reflect the minimal impact on his reputation.

[90] Against what I would characterize as modest evidence of harm or potential harm to Mr. Armstrong stands the very strong public interest in promoting freedom of expression by candidates during the electoral process. The public expects and benefits from vigorous debate among candidates. The rhetoric can become personal and overly zealous. No doubt, candidates have in the past, and will in the future, step over the line between strongly stated opinions and defamatory comments. However, the message to be taken from the enactment of s. 137.1 is that not every foot over the defamatory foul line warrants dragging the offender through the litigation process. By enacting s. 137.1, the Legislature acknowledged that, in some circumstances, permitting the wronged party to seek vindication through litigation comes at too high a cost to freedom of expression.

[91] On this record, Mr. Armstrong did not suffer and is not likely to suffer any financial harm as a result of Ms. McSloy's comments about his character. His success at the polls belies the suggestion that his reputation has been damaged.

[92] In my view, Mr. Armstrong has not shown that the public interest in allowing him to continue with his claim against Ms. McSloy outweighs the public interest in protecting Ms. McSloy's right to express her opinions about another candidate in the course of an election campaign. I would dismiss the claim against Ms. McSloy.

F. CONCLUSION

[93] I would allow the appeals and set aside the order of the motion judge. I would dismiss the claims against all of the appellants.

[94] Unless the parties can agree on costs, they should exchange and file their submissions within 30 days of the release of these reasons. The submissions should not exceed ten pages. The submissions should address:

- the scale and quantum of costs on the appeal;
- the scale of costs in the Superior Court;
- whether this court or the Superior Court should fix the quantum of costs in the Superior Court;
- the quantum of costs in the Superior Court.

Released: “DD” “AUG 30 2018”

“Doherty J.A.”
“I agree D.M. Brown J.A.”
“I agree Grant Huscroft J.A.”