

COURT OF APPEAL FOR ONTARIO

CITATION: Safavi-Naini v. Rubin Thomlinson LLP, 2023 ONCA 86

DATE: 20230208

DOCKET: C70903

MacPherson, Hoy and Coroza JJ.A.

BETWEEN

Anahita Safavi-Naini

Plaintiff/Responding Party
(Appellant)

and

Rubin Thomlinson LLP and Katharine Montpetit

Defendants/Moving Parties
(Respondents)

Tamara Kronis, Yavar Hameed, and Nicholas Pope, for the appellant

Margaret L. Waddell and Tina Q. Yang, for the respondents

Heard: January 27, 2023

On appeal from the order of Justice Hugh R. McLean of the Superior Court of Justice, dated May 17, 2022.

REASONS FOR DECISION

[1] This appeal concerns an application under s. 137.1 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 (“CJA”) dealing with the *Prevention of Proceedings that Limit Freedom of Expression on Matters of Public Interest (Gag Proceedings)*.

[2] Dr. Anahita Safavi-Naini, the appellant, was a medical resident in the internal medicine training program at the Northern Ontario School of Medicine (“NOSM”) at the time of the events in issue.

[3] Katherine Montpetit, a respondent, is a senior investigator with expertise in sexual violence and sexual harassment investigations with the law firm Rubin Thomlinson LLP, the other respondent.

[4] The respondents were retained by NOSM in 2018 to investigate the appellant’s complaints of workplace harassment and sexual harassment. The complaints primarily concerned Dr. Stephane Gauthier, the North Bay site director of NOSM’s internal medicine program at the time of the complaints, but also raised concerns about Dr. Scott Shulman, a NOSM faculty member.

[5] The inquiry was required under the *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1 (“OHSA”). Ms. Montpetit acted as the inquiry officer for the investigation and was responsible for preparing a report for NOSM.

[6] On March 14, 2019, Ms. Montpetit submitted her report, as well as two Executive Summaries, concerning the conduct of Dr. Gauthier and Dr. Shulman to NOSM.

[7] The Executive Summaries form the basis for the appellant’s underlying defamation action. The essence of these summaries is:

Summary Concerning the Conduct of Dr. Gauthier (the “Gauthier Summary”): The appellant did not provide a detailed interview or evidence in support of her allegations. Ms. Montpetit “preferred Dr. Gauthier's version of events to that of [Dr. Safavi-Naini]” and she found that Dr. Safavi-Naini was not a credible or reliable witness. As a result, Ms. Montpetit concluded that she did “not find that Dr. Gauthier behaved in the manner alleged by [Dr. Safavi-Naini]” or that he “engaged in sexual harassment towards [Dr. Safavi-Naini] or otherwise breached NOSM policy”.

Summary Concerning the Conduct of Dr. Shulman (the “Shulman Summary”): The appellant did not provide a detailed interview or evidence in support of her allegations. Each allegation was addressed separately. First, the appellant alleged that Dr. Shulman entered into a bet with Dr. Gauthier to “loosen up” Dr. Safavi-Naini. Ms. Montpetit found that there was no bet. She based this conclusion on Dr. Safavi-Naini's undermined credibility, the absence of detailed documentary evidence, and Dr. Safavi-Naini's acknowledgment in communications that her knowledge of the bet was hearsay. Second, Dr. Safavi-Naini alleged that she entered into a sexual relationship with Dr. Shulman. Based on the evidence, Ms. Montpetit concluded that Dr. Safavi-Naini was flirting with Dr. Shulman and that they did not have a romantic relationship. Third, Dr. Safavi-Naini alleged that Dr. Shulman shared sexually explicit conversations with Dr. Gauthier. Ms. Montpetit concluded that this may have been discussed in the context of the resident's performance and, thus, would not have been inappropriate or outside of their supervisory duties.

[8] The Executive Summaries were provided to two staff members at NOSM and NOSM's lawyer. Dr. Gauthier and the appellant received the Gauthier summary, but only Dr. Shulman received the Shulman summary. The summaries were not publicly disseminated. However, they were ultimately filed with the

Human Rights Tribunal of Ontario as part of Dr. Gauthier's defence to the appellant's application to that tribunal.

[9] Before the inquiry was commenced, the appellant hired a publicist and issued a press release, which ultimately resulted in her allegations being seen by the public, in the press and other media.

[10] In March 2021, the appellant commenced an action against the respondents. In her Statement of Claim, she alleged that the two Executive Summaries were defamatory.

[11] In response, the respondents brought a motion to dismiss the action pursuant to s. 137.1 of the *CJA*.

[12] Sections 137.1(3) and (4) of the *CJA* provide:

(3) On motion by a person against whom a proceeding is brought, a judge shall, subject to subsection (4), dismiss the proceeding against the person if the person satisfies the judge that the proceeding arises from an expression made by the person that relates to a matter of public interest.

(4) A judge shall not dismiss a proceeding under subsection (3) if the responding party satisfies the judge that,

(a) there are grounds to believe that,

(i) the proceeding has substantial merit, and

(ii) the moving party has no valid defence in the proceeding; and

(b) the harm likely to be or have been suffered by the responding party as a result of the moving party's expression is sufficiently serious that the public interest in permitting the

proceeding to continue outweighs the public interest in protecting that expression.

[13] The motion judge granted the motion and dismissed the appellant's action. He held: (1) the summaries related to a matter of public interest; (2) this was a situation of qualified privilege because of the social utility of NOSM receiving frank communication about an important topic; (3) there was no evidence to support a finding of malice against Ms. Montpetit; and (4) a balancing exercise favoured protection of the expression.

[14] The appellant challenges all of these conclusions.

[15] In *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22, the Supreme Court of Canada set out the framework for applying the s. 137.1 *CJA* test. Justice Côté, writing for the Court, said, at para. 18:

In brief, s. 137.1 places an initial burden on the moving party — the defendant in a lawsuit — to satisfy the judge that the proceeding arises from an expression relating to a matter of public interest. Once that showing is made, the burden shifts to the responding party — the plaintiff — to satisfy the motion judge that there are grounds to believe the proceeding has substantial merit and the moving party has no valid defence, and that the public interest in permitting the proceeding to continue outweighs the public interest in protecting the expression. If the responding party cannot satisfy the motion judge that it has met its burden, then the s. 137.1 motion will be granted and the underlying proceeding will be consequently dismissed. It is important to recognize that the final weighing exercise under s. 137.1(4)(b) is the fundamental crux of the analysis: as noted repeatedly above, the [*Anti-Slaap Advisory Panel: Report to the Attorney General*] and the legislative debates

emphasized balancing and proportionality between the public interest in allowing meritorious lawsuits to proceed and the public interest in protecting expression on matters of public interest. Section 137.1(4)(b) is intended to optimize that balance.

[16] The first ground of appeal is that the motion judge erred in finding that the expressions in the Executive Summaries relate to a matter of public interest.

[17] In *Pointes Protection*, Côté J. held, at para. 28, that the public interest criterion is to be given “broad interpretation”. The expression at issue should be assessed “as a whole”, and it must be asked whether “some segment of the community would have a genuine interest in receiving information on the subject”: *Grant v. Torstar Corp.*, 2009 SCC 61, at paras. 101-2.

[18] In our view, it is obvious that the Executive Summaries prepared by Ms. Montpetit, and subsequently submitted to NOSM, relate to a matter of public interest.

[19] The subject matter of the Executive Summaries concerns general matters over which the public has substantial interest. The public has significant concern over sexual harassment and workplace harassment and, generally, has an interest in investigations into these issues.

[20] However, the mere fact that an expression relates to sexual and workplace harassment, on its own, will often be insufficient to bring it within the scope of public

interest. If this were not the case, the anti-SLAPP framework would apply - in most cases - to defamation proceedings stemming from #MeToo workplace allegations.

[21] Instead, a contextual approach is required to determine what the expression at issue is really about: *Sokoloff v. Tru-Path Occupational Therapy Services Ltd.*, 2020 ONCA 730, at para. 20. On the facts of this case, the Executive Summaries engaged the public interest, in part because of the nature of NOSM as an educational institution, the media attention garnered, and the public safety concerns arising from the allegations, which are addressed below.

[22] In her reply factum, the appellant argues that the fact that she hired a publicist to “try to shame NOSM into conducting a workplace investigation into her allegations does not convert this private matter into a matter of public interest”.

[23] We disagree. The act of retaining a publicist to assist in an attempt to “shame” a public education institution in a relatively small community is the antithesis of trying to keep the matter private. Moreover, the news release circulated by the publicist was successful; it provoked news coverage from national, provincial, and local media, including CBC, CTV, Post Media, the Toronto Star, and the North Bay Nugget.

[24] Further in these media reports, Dr. Safavi-Naini raised the issue of public safety. In the North Bay Nugget article, she acknowledged the patient safety concerns surrounding her allegations, stating that these matters “affect patient

care every day”. The concern for patient safety in a public institution is not a private matter. It directly engages the interest of the community and is indicative of why the Executive Summaries are within the scope of the public interest.

[25] The appellant’s second ground of appeal is that the motion judge erred by concluding that the respondents’ Executive Summaries were protected by the defence of qualified privilege.

[26] We are not persuaded by this submission. The respondents were retained to investigate allegations of workplace harassment and to prepare investigation reports for NOSM, as required under s. 32.0.7 of *OHSA*. Moreover, pursuant to s. 32.0.7(1)(b) of *OHSA*, NOSM had a legal duty to provide, in writing, the results of the investigation, and any corrective action taken, to the complainant and her alleged harassers.

[27] In *Bent v. Platnick*, 2020 SCC 23, the Supreme Court of Canada said, at para. 121, that qualified privilege exists “if a person making a communication has an interest or duty, legal, social, moral or personal, to publish the information in issue to the person to whom it is published” and the recipient has “a corresponding interest or duty to receive it”. The respondents had a duty to NOSM to complete the investigation and to provide their report to NOSM, and NOSM had a corresponding interest or duty to receive it. The respondents’ provision of the Executive Summaries to NOSM falls squarely within this privilege.

[28] The appellant's third ground of appeal, anchored in malice, is groundless. The motion judge found that there was no evidence of malice. There is no basis to interfere with that finding.

[29] Finally, and in light of our conclusion on the first three issues, it is obvious that the appellant's submissions regarding the balancing exercise cannot succeed.

[30] The appeal is dismissed. The parties request that the question of costs be reserved until after the court's decision is released. We accede to that joint request. The parties can contact the court office if they require a decision on this issue.

"J.C. MacPherson J.A."

"Alexandra Hoy J.A."

"S. Coroza J.A."