COURT OF APPEAL FOR ONTARIO

CITATION: Sokoloff v. Tru-Path Occupational Therapy Services Ltd., 2020 ONCA 730
DATE: 20201117
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Huscroft, Zarnett and Coroza JJ.A.

BETWEEN

Wendy Sokoloff and Wendy Sokoloff Professional Corporation c.o.b. Sokoloff Lawyers

Plaintiffs (Respondents)

and

Tru-Path Occupational Therapy Services Ltd. and Troy Campbell

Defendants (Appellants)

Shantona Chaudhury and Cristina Senese, for the appellants

Jonathan C. Lisus, Andrew Winton and Vlad A. Calina, for the respondents

Heard: July 20, 2020 by video conference; additional written submissions filed

On appeal from the order of Justice Edward M. Morgan of the Superior Court of Justice, dated July 25, 2019, with reasons reported at 2019 ONSC 4756.

Huscroft J.A.:

OVERVIEW

[1] The appellants appeal from the order of the motion judge dismissing their motion to dismiss the respondents' defamation action under s. 137.1 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 (*"CJA"*), Ontario's so-called anti-SLAPP (Strategic Litigation Against Public Participation) provision. The motion judge held that the impugned expression – messages on signs displayed on the sidewalk outside the respondents' office – concerned the appellants' private and commercial interests and did not relate to a matter of public interest within the meaning of s. 137.1(3) of the *CJA*. The motion judge went on to conclude that, in any event, the harm caused by the appellants' alleged defamatory comments was sufficiently great as to favour of letting the respondents' defamation action proceed pursuant s. 137.1(4)(b) of the *CJA*.

[2] As I will explain, the motion judge erred by taking into account irrelevant considerations in determining whether the expression at issue related to a matter of public interest. Nevertheless, his conclusion is amply supported by the relevant considerations he relied upon, and by the record, and should be upheld. Accordingly, the s. 137.1 pretrial dismissal remedy was not available to the appellants.

[3] I would dismiss the appeal and would deny leave to appeal costs for the reasons that follow.

BACKGROUND

[4] The alleged defamatory statements were made by the appellant Troy Campbell, president of Tru-Path Occupational Therapy Services Ltd., on two occasions when he stood in the street outside the respondent Wendy Sokoloff's law office, Wendy Sokoloff Professional Corporation ("Sokoloff Lawyers"), holding signs that stated:

> SOKOLOFF LAWYERS USED OUR COMPANY'S REHAB SERVICES TO HELP MANY OF THEIR CLIENTS' AB CLAIMS BUT WON'T PAY.
>
> OVER $1.3 MILLION OF OUR REHAB COMPANY'S PAYMENT IS BEING SEIZED BY SOKOLOFF LAWYERS.
>
> DEAR SOKOLOFF LAWYERS: YOU HAVE OUR REHAB COMPANY'S NEARLY $1.4 MILLLION DOLLARS. PAY YOUR UNDERTAKINGS NOW!
>
> SOKOLOFF LAWYERS IS TAKING MONEY FROM OUR REHAB COMPANY'S ACCOUNT TO PAY THEIR CLIENT'S TORT DISBURSEMENT. HOW IS THIS LEGAL?

[5] The first two statements were alleged to be defamatory. They were made in the context of a dispute over payment of the appellants' fees for services provided

to the respondents' clients. The respondents have held back payment the appellants say they are owed by the respondents' clients, pending authorization by their clients to pay the appellants.

The motion judge's decision

[6] The motion judge approached the first prong of the test under s. 137.1 by asking what the impugned expression was about, or what it pertained to, as directed by this court in *1704604 Ontario Ltd. v. Pointes Protection Association*, 2018 ONCA, 685, 142 O.R. (3d) 161 ("*Pointes (ONCA)*"), aff'd 2020 SCC 22 ("*Pointes (SCC)*"). It was not enough that the expression might address the field of law, legal ethics, health care, rehab services, or accident benefits. The real question was whether the expression concerned the respondents' publicly scrutinized conduct as members of the legal profession or, instead, the respondents' private conduct in carrying on their business.

[7] The motion judge found that the interest of the public did not rise above mere curiosity or prurient interest and so did not meet the s. 137.1 test. The sole issue between the parties was a contractual dispute – whether the respondents had to protect fees owing to the appellants by their clients when they received settlement funds for those clients. The motion judge found that Mr. Campbell acknowledged as much when he stated in cross-examination: "…the signs I was carrying in front

of Sokoloff Lawyers offices are concerned with settled matters in which Wendy and Sokoloff Lawyers are holding onto – have seized – money belonging to Tru-Path."

[8] The motion judge noted that Mr. Campbell did not say he was holding the signs because he was concerned about accident victims or the provision of services to the public. Nor did he profess to being concerned about the regulation of lawyers or their professional duties in handling trust funds. On the contrary, he stated specifically that these things did not concern him. The motion judge adopted the respondents' submission in stating: "you cannot be making statements about a matter of public interest if you profess to be indifferent to the public interest."

[9] The motion judge acknowledged that a fee dispute between a solicitor and client could be a matter of public interest, as it touches on legal fees and access to justice. But this was not a dispute between a solicitor and client; it was a contractual dispute between two sets of regulated professionals and had a strictly private character. He added that if there was a public interest in anything in these circumstances, it was in having professionals resolve their differences in court rather than on the street. The motion judge described the expression as "an unseemly attempt to embarrass" the respondents.

[10] This was sufficient to dispose of the appellants' motion, but the motion judge went on to briefly consider the test under s. 137.1(4)(b). He stated that in light of

his conclusion that there is no real public interest in the expression, the harm to the respondents would not have to be great in order to tip the balance in their favour. The motion judge found that the allegations against the respondents were serious and impacted their professional reputation, and that the harm to the respondents outweighed any imperative that the appellants air their financial dispute on the street corner.

THE POSITIONS OF THE PARTIES

The appellants

[11] The appellants argue that the motion judge erred at the first step of the inquiry by finding that the appellants' expression did not relate to a matter of public interest. Specifically, the motion judge erred (1) by taking into account the appellants' presumed motives in finding that their expression did not relate to a matter of public interest; (2) by taking into account the manner of the appellants' expression; (3) by making a qualitative assessment of the impact of the expression; and (4) by failing to consider that expression may relate to more than one matter. The appellants cite this court's decisions in *Levant v. Day*, 2019 ONCA 244, 145 O.R. (3d) 442, leave to appeal refused, [2019] S.C.C.A. No. 194 and *Nanda v. McEwan*, 2020 ONCA 431, both cases in which a motion judge was found

to have erred in considering the motivation for expression in determining the public interest question under s. 137.1(3).

[12] In supplementary submissions made following the release of the Supreme Court's decision in *Pointes*, the appellants reiterate these arguments and emphasize that the phrase "relates to a matter of public interest" in s. 137.1(3) should be given a broad and liberal interpretation. The appellants submit that the motion judge's approach was "misguided from beginning to end". The only question for the motion judge was: "what is this expression about, and is this something that any segment of the public would have a genuine interest in knowing about?" The appellants argue that the bar should be low in order that most cases be resolved at the balancing stage of the inquiry, thus promoting participation in public life.

[13] The appellants summarize their position as follows: "The manner in which a regulated profession such as a law firm renders service to its clients, including the arrangements it makes with heath care providers whose services are incorporated into its clients' claims, is undoubtedly a subject that some members of the public have an interest in knowing about." The fact that the expression stemmed from a "private dispute was irrelevant." The appellants submit that expression related to an organization's business dealings is a matter of public interest even if the

business involved is not a regulated profession, citing *Bradford Travel and Cruises Ltd. v. Viveiros,* 2019 ONSC 4587, at paras. 31-32.

The respondents

[14] The respondents argue that the motion judge did not make any of the mistakes alleged by the appellants. Instead, the respondents say that Mr. Campbell's statements in his affidavit and in cross-examination informed the context in which the nature of the expression at issue was to be determined. His evidence demonstrated his indifference to the public interest and he bluntly admitted that he was not interested in the ethical duties of lawyers holding clients' funds on trust, testifying: "I really don't give, you know, any nasal snots about that."

[15] The respondents submit that Mr. Campbell's statements made no reference to any of the public interest issues the appellants assert that the statements engage. Viewed objectively and in context, the statements concerned a private dispute over alleged unpaid accounts. The motion judge made no legal errors in dismissing the motion and his decision is entitled to deference.

[16] In their supplementary submissions, the respondents say that the Supreme Court held that whether the expression relates to a matter of public interest is a contextual inquiry that asks what the expression in question is really about. In answering this question, the motion judge considered the circumstances that

prompted Mr. Campbell to hold signs outside the respondents' offices and gave full faith and credit to his professed indifference to the public interest. The motion judge's decision that the expression concerned a private dispute was solidly rooted in the record, which demonstrated a lengthy financial dispute.

DISCUSSION

[17] In its decision in *Pointes*, the Supreme Court affirmed this court's approach to identifying the public interest, following *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640. Expression is to be assessed as a whole and the question is whether "some segment of the community would have a genuine interest in receiving information on the subject": *Pointes (SCC)*, at para. 102.

[18] There is necessarily a normative aspect to what is "genuinely" a matter of public interest. As the Supreme Court put it, there is "no single 'test'" for identifying the public interest; "'[t]he public has a genuine stake in knowing about many matters' ranging across a variety of topics": *Pointes (SCC)*, at para. 27; *Grant,* at paras. 103, 106. The court described the proper interpretation of whether expression relates to a matter of public interest as both "broad and liberal" and "generous and expansive": *Pointes (SCC)*, at paras. 24, 30.

[19] But not everything *relates* to a matter of public interest. For example, it is not enough if expression simply makes reference to something that is of public

interest, or to something that arouses the public's curiosity. Moreover, the court's instruction of interpretive generosity cannot be read in isolation. The scope for legitimate interpretation of vaguely worded concepts such as "public interest" must be informed by the purpose of the legislation: to safeguard the fundamental value that is public participation in democracy. The burden is on the moving party to establish that its expression relates to a matter of public interest, albeit that this burden is not an onerous one.

[20] The appropriate inquiry is contextual in nature. However, the Supreme Court makes clear in *Pointes* that no qualitative assessment of the expression in question is to be made. It is enough that the expression relates to a matter of public interest. As Côté J. put it, "it is not legally relevant whether the expression is desirable or deleterious, valuable or vexatious, or whether it helps or hampers the public interest": *Pointes (SCC)*, at para. 28. The question at the heart of s. 137.1(3) is this: Understood in its context, what is the expression really about?

[21] This is essentially the approach set out by Doherty J.A. in this court's decision in *Pointes*, an approach that the motion judge followed. He asked: "what is the expression about, or what does it pertain to?": *Pointes (ONCA)*, at para. 54. But while the motion judge cited this court's instruction that the determination of public interest "does not take into account the merits or manner of the expression",

he went on to consider these things, along with the motive of Mr. Campbell, in finding that the expression was really about a private contractual dispute.

[22] For example, the motion judge considered – and criticized – the way in which Mr. Campbell chose to express himself. He described Mr. Campbell's street protest as lacking in decorum, characterizing it as "an unseemly attempt to embarrass" the respondents that "serve[ed] no public interest." These considerations were not relevant to the question the motion judge had to decide under s. 137.1(3). Again, as Côté J. stated, "it is not legally relevant whether the expression is desirable or deleterious, valuable or vexatious, or whether it helps or hampers the public interest": *Pointes (SCC)*, at para. 28.

[23] Moreover, the motion judge considered Mr. Campbell's motive in expressing himself, finding that he was indifferent to the public interest when he expressed himself:

> To perhaps state the obvious, Mr. Campbell does not say that he was holding signs on the sidewalk because he was concerned about accident victims, or the provision of services to the public. Likewise, he was not concerned with the regulation of lawyers and their professional obligations in handling trust funds. When asked in cross-examination about a lawyer's duty of loyalty to their client, and whether he was aware that lawyers cannot pay out trust funds without the client's authorization, he responded curtly and frankly: "No, and it doesn't concern me."

> As counsel for the Plaintiffs points out, you cannot be making statements about a matter of public interest if you profess to be indifferent to the public interest.

[24] This, too, was inappropriate. The motion judge could properly consider the entire communication and the context in which it was made. But the motivation behind the communication – *why* the impugned expression occurred – is a subjective consideration that is not relevant to determining the objective nature of that expression. The quality or merits of the expression and the manner in which the expression is conveyed are similarly irrelevant.

[25] Mistakes have sometimes been made in this regard – see *Levant*, at para. 11; *Ontario College of Teachers v. Bouragba*, 2019 ONCA 1028, 51 C.P.C. (8th) 280, at paras. 31-33; and *Nanda*, at para. 37 – so the point bears repeating: Motive, merit, and manner are irrelevant in determining whether expression relates to a matter of public interest under s.137.1(3).

[26] Although the motion judge erred in taking into account irrelevant considerations, he also identified the relevant considerations and, in my view, he reached the correct result. His conclusion that the appellants' expression did not relate to a matter of public interest is amply supported by the relevant considerations in the record.

[27] The parties had a professional relationship that involved referrals. The respondents would refer clients who required occupational therapy to the appellants, who would provide services approved by the client's insurance company. The appellants would be paid by the client's insurance company, but if the insurer denied coverage the appellants might agree to treat the client and the client would be responsible for paying. In the event of a dispute between the insurer and the client, the respondents agreed to protect the appellants' accounts. The respondents would hold funds received from the insurance company in trust and would pay the appellants if the clients did not object or the appellants proved their expenses at a hearing.

[28] The respondents began to question charges made by the appellants and this led to a breakdown in the parties' relationship. The appellants terminated the referral arrangement with the respondents in 2016 and, in 2018, brought an application against the respondents seeking payment of their accounts. The application was converted to an action and is ongoing.

[29] This is the context in which Mr. Campbell's expression occurred. The appellants were pressuring the respondents to pay monies they claim they are owed by their mutual clients. The fact that the parties are members of regulated professions does not make their dispute a matter of public interest, nor does the

fact of unrelated proceedings by the Law Society of Ontario concerning the respondents make it so.

[30] The appellants submit that the public, or an aspect of it, has an interest in the expression because if lawyers are not held to their undertakings to protect the fees of service providers, many involved in motor vehicle accidents would be deprived of rehabilitation services while their disputes are adjudicated. Referring to this Court's decision in *Platnick v. Bent*, 2018 ONCA 687, 426 D.L.R. (4th) 60 ("*Platnick (ONCA)*"), aff'd 2020 SCC 23 ("*Platnick (SCC)*") the appellants argue that because Mr. Campbell's expression relates to a lawyer's undertaking it therefore relates to the public interest in holding lawyers to their undertakings.

[31] Plainly, the public has an interest in the ethical conduct of lawyers. But it does not follow that every lawyer's transactions are a matter of public interest, nor does it follow that expression touching on the ethical conduct of an individual lawyer necessarily relates to the public's interest in the ethical conduct of lawyers.

[32] The task of the motion judge under s. 137.1(3) is to determine "what the expression is really about", bearing in mind the purpose of s. 137.1: protecting expression relating to matters of public interest and safeguarding the fundamental value of public participation in democracy: *Pointes (SCC)*, at para. 30. Again, only expression *relating* to a matter of public interest attracts the statute's protection;

"expression that simply makes reference to something of public interest" does not: *Pointes (SCC)*, at para. 29.

[33] Understood in context, the expression at issue in this case is really about a private commercial dispute between the appellants and the respondents. The respondents happen to be lawyers. Mr. Campbell's expression does not relate to a matter of public interest on that account.

[34] Comparison to the Supreme Court's decision in *Platnick* is helpful in illustrating the nature of the public interest under s. 137.1(3). In that case the impugned expression was an email, sent by a lawyer who was the president-elect of the Ontario Trial Lawyers' Association. The email, sent to several hundred members of the Association by a listserv, alleged that a doctor frequently engaged as a medical expert in insurance litigation had engaged in dishonest conduct. The Supreme Court agreed with this court that the expression related to a matter of public interest. In *Platnick (SCC)*, Côté J., for the majority stated that the defendant's email:

> raises concerns regarding the truthfulness, reliability, and integrity of medical reports filed on behalf of insurers in the arbitration process. In turn, her email raises concerns regarding the integrity of the arbitration process itself and the proper administration of justice writ large. Further, the email is directed at a not insignificant number of individuals, who, more importantly, have a special interest in exactly that... (at para. 83).

[35] The expression in this case and the context in which it occurred are in no way similar. Mr. Campbell's expression raised no general concerns about the importance of lawyers respecting their undertakings, nor was it directed to anyone with an interest in the respondents' conduct. The expression did not relate to a matter of public interest. It was really about the appellants' commercial dispute with the respondents.

[36] In summary, the motion judge did not err in concluding that the impugned expression did not relate to a matter of public interest. Accordingly, the motion failed at the public interest threshold and it is not necessary to proceed to the merits-based hurdle under s. 137.1(4)(a) or the public interest weighing exercise under s. 137.4(b).

LEAVE TO APPEAL COSTS

[37] The motion judge initially awarded the respondents $75,000 in partial indemnity costs on the basis that they were the successful party. He did not consider s. 137.1(8) of the *CJA* in making this costs award. That section provides:

> If a judge does not dismiss a proceeding under this section, the responding party is not entitled to costs on the motion, unless the judge determines that such an award is appropriate in the circumstances.

[38] As this provision makes clear, the default position is the opposite of the position that normally obtains: a responding party who succeeds on the motion is *not* entitled to costs. However, the motion judge has the discretion to award costs if “appropriate in the circumstances”. No guidance is provided as to what it is that renders a costs award “appropriate”.

[39] Following the release of his decision, the motion judge was alerted to his error in overlooking s. 137.1(8). He advised the parties that he was open to revisiting his costs decision and invited further submissions from the parties.

[40] In his amended reasons, the motion judge determined that his award of costs would be unchanged and awarded the respondents $75,000 on a partial indemnity basis. The motion judge acknowledged the policy of making motions under s. 137.1 accessible and that the no-costs presumption was not to be put aside lightly. However, he considered that the facts of this case were compelling: this was a financial dispute between members of two publicly regulated professions. The appellants were simply trying to get the respondents to pay a disputed bill and resorted to allegedly defamatory street corner placards rather than legal proceedings. In these circumstances, the appellants did not deserve costs immunity. Nevertheless, the motion judge exercised his discretion to reduce

the costs award somewhat (from the requested $102,000 on a partial indemnity scale), bringing it more closely in line with the costs incurred by the appellants.

[41] The decision to award costs is a discretionary one that is entitled to deference. Leave to appeal a costs order is granted only where there are strong grounds upon which the court could find that the motion judge made an error in principle or the costs award is plainly wrong: *Hamilton v. Open Window Bakery Ltd*., 2004 SCC 9, [2004] 1 S.C.R. 303, at para. 27.

[42] In this case, the legislation reverses the ordinary presumption that the successful party is entitled to costs but empowers the motion judge to award costs to the successful party if the motion judge finds that costs are appropriate in the circumstances. Thus, the decision to award costs is discretionary and the same deferential standard applies on appeal.

[43] I see no error here that would allow this court to disturb the motion judge's costs award. Although the motion judge misstated when the appellants resorted to street protest – they commenced their application against the respondents in September 2018, after Mr. Campbell's initial demonstration but before his second one – that error is not significant. As the motion judge noted, in *Veneruzzo v. Storey*, 2018 ONCA 688, 23 C.P.C. (8th) 352, Doherty J.A. stated, at para. 39, "[t]he purpose underlying the costs provisions in s. 137.1 disappears when the

lawsuit has none of the characteristics of a SLAPP, and the impugned expression is unrelated to a matter of public interest." The motion judge found that the appellants were simply trying to get the respondents to pay a disputed bill for their services. It was open to him to conclude that they did not deserve costs immunity in all of the circumstances of this case.

[44] It was not necessary to say more than this, and I should not be taken as endorsing the suggestion that the exercise of the right to protest to resolve a dispute necessarily exposes a party to cost consequences under s. 137.1(8).

[45] I would add these comments. First, although the dismissal of a motion at the 137.1(3) threshold stage is a relevant consideration in determining whether to award costs to a plaintiff, it is not determinative of the appropriateness of a costs order. There will be cases in which the assertion of the public interest is wholly lacking in merit, but there will also be cases in which the moving party may have an arguable basis to assert that their expression relates to a matter of public interest. The award of costs in the former may be easier to justify in the former than the latter cases, but every case is different and the law will no doubt continue to develop in this regard.

[46] Second, although in *Pointes* the Supreme Court deprecated reliance on the traditional SLAPP indicia identified by this court – (1) "a history of the plaintiff using

litigation or the threat of litigation to silence critics"; (2) "a financial or power imbalance that strongly favours the plaintiff"; (3) "a punitive or retributory purpose animating the plaintiff's bringing of the claim"; and (4) "minimal or nominal damages suffered by the plaintiff" – it did so in the context of the inquiry at the weighing stage, s. 137.1(4)(b), in order to ensure the primacy of the text of the statute and the considerations it sets out: see *Pointes (SCC*), at paras. 78-80. The court did *not* hold the traditional SLAPP indicia are irrelevant – they may bear on the analysis under s. 137.1(4)(b), provided the analysis remains tethered to the statutory criteria – and, in any event, the court said nothing about their relevance to the question of costs.

[47] Finally, as Doherty J.A. explained in *Pointes (ONCA)*, at para. 73, a motion under s. 137.1 is meant to be a "screening or triage device designed to eliminate certain claims at an early stage of the litigation process". It is not an alternative means of trying a claim nor is it a form of summary judgment, and it is important to maintain a sense of proportionality where costs are concerned. The motion judge's decision to reduce the respondents' partial indemnity costs was appropriate.

CONCLUSION

[48] I would dismiss the appeal.

[49] I would refuse to grant leave to appeal costs.

[50] The parties are encouraged to reach an agreement on the costs of this appeal. If they cannot do so, they may make three-page submissions within 30 days of these reasons.

Released: November 17, 2020

G.H.

Gary Trotter J.A.

I agree B. Zarnett J.A.

I agree. S. Coroza J.A.