CITATION: 2015 ONSC 5041
COURT FILE NO.: CV-13-477848
REASONS RELEASED: 20150811

SUPERIOR COURT OF JUSTICE – ONTARIO

RE:

GOLNAZ SIMAEI

Plaintiff

- and-

JULIE K. HANNAFORD and JK HANNAFORD
BARRISTERS (PROFESSIONAL CORPORATION)

Defendants

BEFORE: MASTER D. E. SHORT

COUNSEL:

Howard Levitt for plaintiff	Fax: 416 363.3100
Melvyn L. Solmon, Nancy Tourgis for defendants (moving parties)	Fax: 416-947-0079

Supplementary Reasons for Decision

> *"Apology" means an expression of sympathy or regret, a statement that a person is sorry or any other words or actions indicating contrition or commiseration…*

I. Motion to Settle Order

[1] Pursuant to rule 25.11 of Ontario's Rules of Civil Procedure, the court may strike out all or part of a pleading or any other document with or without leave to amend on the ground that the pleading or document is scandalous or vexatious or an abuse of the process of the court. Rule 25.11 considers the substantive adequacy of the pleading and whether it conforms to the formalities of a proper pleading.

[2] In this case, the defendants moved for a number of headings of relief, but primarily to strike large portions of the plaintiff's statement of claim.

[3] After an inordinate delay. I delivered my reasons following the original hearing of this motion. The parties have encountered difficulties in the settlement of the terms of the formal order based upon those reasons.

II. Previous Disposition

[4] I concluded my earlier reasons, which can be found at 2014 ONSC 7075 2014, with the following 3 paragraphs:

> [98] The previous section of these reasons outlines my directions with respect to the amendments to the statement of claim. I have outlined in the course of my description of the other relief sought in Section IX of these reasons the disposition I have determined is appropriate with respect to those elements.
>
> [99] To the extent that these reasons are lacking in specificity in any regard, I may be contacted to by counsel.
>
> [100] In particular, if there are any concerns with respect to any of the present pleadings or motion material remaining in the public court file. I am prepared to hear the proposals of counsel in that regard.

III. Current Issues

[5] Despite their efforts, counsel for the parties have been unable to craft a form of order that is acceptable to both sides.

[6] I convened a subsequent hearing to consider the proposed drafts of both sides with a view to endeavouring to settle the form of order.

[7] At the time I delivered the original reasons I believed I had considered and addressed all of the arguments made by counsel throughout the lengthy argument of this motion. It now turns out that the parties have been unable to resolve the form of order, largely because my reasons failed to properly address the impact of the *Apology Act, 2009*, S.O. 2009, C. 3, on the challenged pleading.

[8] In hindsight, that clearly was an oversight on my part. Having not ruled on the of the subject act and the consequence consequences (if any) and no Order having, as yet, been formally issued and entered, I remain seized of this overall pleadings motion

[9] I therefore asked both counsel to submit draft orders and heard further argument with respect to the specific paragraphs challenged in this regard by the defendants' counsel.

[10] As well, counsel for the defendants used this opportunity to address their concerns with respect to the matters identified in paragraph 100 of my reasons, which is reproduced above.

[11] Put simply, the issue was what was to be done with regard to the retention of materials filed and relied upon in the argument of the original motion.

[12] In my earlier reasons at para [51] I observed:

> The Defendants' Notice of Motion sought a number of heads of relief. A supplementary notice of motion was also served seeking to strike portions of an affidavit sworn November 19, 2013 on the basis that parts of its content involved "statements, communications and documents that are in furtherance of settlement, part of the mediation process, protected by settlement privilege, and/or communications with the mediator". I had more

> than enough material to allow me to come to my conclusions on the main motion without relying on the elements challenged and rather than provide any more specific reasons, I simply note that I have treated the challenged information as expunged from what was referred to as the "Russell Affidavit."

[13] In the course of endeavouring to settle this order Mr Solmon wrote in part :

> "With regard to the issue of expunging, the defendants are not asking for the file to be expunged, just those parts of the pleading that were struck or expunged (both phrases were used in the reasons - see for example paras 1, 2, 54, 60, 72, 76, 80, 89, 90). As it turns out the case law, if you require it, is clear that strike and expunge can be the same thing – i.e. removal from the court file – if you wish this jurisprudence I will provide it to you.
>
> It is submitted that it is clear from your reasons that you intended the offending portions be removed from the court file. (see paras 26, 27, 63)."

[14] I understand that there is additional related litigation relating to the issues canvassed in this motion. In my view leaving the challenged material in the public file may well have results such that it would be unreasonably prejudicial to have such materials available in the public file.

[15] In my view it is a more simple solution to seal the contested documents in their entirety and thus remove them from the public file for the time being. If a portion is required in the future, either party can bring a specific request.

[16] I determined that inasmuch as the original form of the statement of claim was struck, I see no necessity for that version to continue as part of the public record. Similarly, I fail to see the need for the supporting affidavits to be available for general public inspection at this point in time.

[17] This matter clearly still has a lot of heat. Little is to be gained by exposing the preamble to either curiosity. The pleadings that are about to be before the court will be public, as with any other civil case.

[18] Perhaps in a weak moment, I agreed with the request of both counsel to Case Manage this action. If either side sees a need to ensure that the public have access to a particular document, I will hear submissions and would expect to apply proportionality on a case-by-case basis in evaluating the treatment of a specific document. However, for the time being I am directing that all affidavits and facta filed on the motion, together with the present form of the statement of claim be sealed and kept separate from the public file.

[19] Obviously this order is subject to future orders of the Court that may be made in light of the then current circumstances.

IV. Pleading of Alleged Statements of Regret or Apology

[20] Following the release of my reasons, counsel endeavoured to resolve the best approach to addressing at asserted "apology" related portions of the pleading.

[21] Counsel for the plaintiff asserted this position in endeavouring to reach a compromise with counsel for the defendants:

> "We have consented to removing it from the pleadings. As such, it is no longer an issue to be decided.
>
> If we choose to ask the question again in the future and, if it is refused, bring a motion on it, based upon the jurisprudence under the Apology Act at that time, then it will be a live issue to be determined then.
>
> It is no longer a live issue now."

[22] In response counsel for the defendants submitted to me that:

> "Reasons are required and necessary to put to rest the matter of the apology. If not permitted to be pled, then it is not part of the action and is not relevant on discovery. Without reasons, and with the Plaintiff simply agreeing to amend, it does not address the issue and the parties will likely be back in court.
>
> Further, if the defendants were simply attempting to delay, then they would not put Mr. Levitt on notice that "acknowledgement" will also be problematic and may lead to another motion to strike. The motion, as constituted, should be adjudicated and then the next steps taken."

[23] As a consequence, an analysis of the impact of the relatively new statute on cases such as this is required.

V. Relief Sought

[24] Many practicing lawyers may be unaware of the provisions of the statute which was first introduced by an individual Member of the Provincial Parliament.

[25] The full text of a 2009 article by Yvonne Diedrick, a claims counsel with LawPro, can be found at *www.LawPro.ca/magazinearchives*.

[26] In part, the article observes:

> As lawyers, we tend not to think of apologizing as a method of dispute resolution. Thanks to new legislation recently passed by the Ontario government, and to borrow from Elton John, saying sorry no longer has to be the hardest word.
>
> The *Apology Act* came into force on April 23, 2009. The legislation was introduced by David Orazietti, an MPP from Sault Ste. Marie, as a private members bill. The Act allows the communication of expressions of sorrow or regret without worrying that the comments can later be used adversely in a civil court.

[27] I understand that the original proponents of the legislation came from the health care field. Historically health care professionals have avoided apologizing to patients for mistakes out of fear the apology would be considered an admission of guilt in civil proceedings. Over time, thinking has changed. Many doctors, nurses and other health care providers felt that apologizing

would initiate the healing process by acknowledging to a patient that harm had been done and by promoting open communication and accountability between patient and health care provider.

[28] Ultimately in Ontario. The act received support from various groups including the Ontario Bar Association, the Ontario Medical Association and the Registered Nurses Association of Ontario.

[29] Proponents of the Apology Act suggest the legislation will

- enhance the dispute resolution process:
- promote accountability; and
- enhance the affordability and speed of justice by shortening or avoiding litigation.

[30] My personal involvement in mediation, arbitration has provided me with examples of the value of an apology in reaching a mutually acceptable out-of-court resolution.

[31] However, enacting such provisions requires a balancing of the desire to express regret while at the same time not unconditionally accepting legal liability for an occurrence.

[32] As a result, the Act provides that an apology, made by or on behalf of a person:

- does not constitute an admission of fault or liability by the person:
- does not affect any insurance coverage or indemnity available despite any wording to the contrary in the contract of insurance or an act or law:
- shall not be taken into account in determining fault or liability in the matter: and
- is not admissible in any civil proceeding, administrative proceeding or arbitration as evidence of fault or liability in the matter.

[33] In her article. Ms. Diedrick observes:

> "No doubt the legislation was intended to encourage the early resolution of disputes by providing the protection of the Act if the apology is given before reaching costly out-of-court examinations such as discovery, or matters escalate to an arbitration or trial."

VI. *Apology Act, 2009*

[34] At the outset of these reasons, I set out a portion of the definition section of the statute. With my emphasis added. The full definition reads

> "apology" means an expression of sympathy or regret, a statement that a person is sorry **or any other words** or actions indicating contrition or commiseration, whether or not the words or actions admit fault or liability or imply an admission of fault or liability in connection with the matter to which the words or actions relate.

[35] The key to this motion is found in section 2 0f the Act which reads

Effect of apology on liability

> An apology made by or on behalf of a person in connection with any matter, (a) does not, in law, constitute an express or implied admission of fault or liability by the person in connection with that matter;
>
> (b) does not, despite any wording to the contrary in any contract of insurance or indemnity and despite any other Act or law, void, impair or otherwise affect any insurance or indemnity coverage for any person in connection with that matter; and
>
> (c) **shall not be taken into account in any determination of fault or liability in connection with that matter**

[36] Section 2 (3), with my emphasis added, is the to the issue before me at this time

Evidence of apology not admissible

> Despite any other Act or law, **evidence of an apology made by or on behalf of a person in connection with any matter is not admissible in any civil proceeding**, administrative proceeding or arbitration as evidence of the fault or liability of any person in connection with that matter.

[37] The one exception that may ultimately have some impact on this action and the discoveries is found in Section 2 (4) and reads:

Exception

> However, if a person makes an apology while testifying at a civil proceeding, including while testifying at an out of court examination in the context of the civil proceeding, at an administrative proceeding or at an arbitration, this section does not apply to the apology for the purposes of that proceeding or arbitration.

[38] Clearly there was not there is no obligation on any litigant to apologize, particularly if they are convinced they have done nothing wrong. In my view, the statute is intended to allow a litigant, to express sympathy or care for the circumstances of an individual without having to worry whether or not a spontaneous utterance will be drawn back in their face at a later date.

[39] I see nothing that prevents a litigant from arguing a possible consequence for a failure to apologize, but that litigant cannot, in my view, rely on any expression of regret made by the party opposite.

[40] However, as I indicated in my earlier reasons, a party "cannot plead facts that go nowhere". Unless there is a remedy sought that is dependent on the pleading, it ought to be struck.

[41] In my view, having regard to the applicable legislation, references in a statement of claim to an expression of sympathy or regret or a statement that a person is sorry or any other

words or actions indicating contrition or commiseration now "go nowhere". That is why those portions of the pleading have been stuck.

[42] Rule 1.04 now provides:

> 1.04 (1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.
>
> (1.1) In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding.

[43] At this point I am satisfied the form or Order drafted is proportionally fair.

[44] The defendants of clearly been alerted as to elements of the alleged egregious behaviour. I have little doubt that inquiries will be made on discovery, which will prevent any suggestion that the defendants have been misled as to the case they have to meet at trial.

VII. Costs

[45] As noted previously, both parties have very competent counsel, and this was an expensive process. While it could be argued that lawyers who hire lawyers should anticipate that they potentially are going to be responsible for the payment of significant cost awards on a motion, I continue to think it is fairer to postpone the payment obligation.

[46] Counsel have agreed on $20,000 as an appropriate amount with respect to this motion. I therefore fix the costs payable in the case at that amount.

VIII. Disposition

[47] In the hope of moving this matter forward, I have now provided counsel these reasons, together with and draft Order in a form which I am prepared to sign.

[48] Given the history of this matter it may be that I have left out an essential term. Unless my ATC receives an Email of objection prior to 5 p.m. Wednesday, I will issue the Order is this form.

[3] I again express my appreciation to counsel for their courtesy and assistance in this complex case.

[49] As I indicated previously, this was a difficult case for me. I wish to again acknowledge the skilled advocacy before me, and the most helpful submissions provided by those advocates appearing for both parties.

Released: August 11, 2015

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Master D. E. Short

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