COURT OF APPEAL FOR ONTARIO

CITATION: Veneruzzo v. Storey, 2018 ONCA 688
DATE: 20180830
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Doherty, Brown and Huscroft JJ.A.

BETWEEN

Louis Veneruzzo, Brenda Veneruzzo, Jason Veneruzzo and Jennifer Veneruzzo

Plaintiffs
(Respondents)

and

Darryl Storey

Defendant
(Appellant)

Brendan F. Morrison and Jordan R. D. Lester, for the appellant

Daniel Lester and Jeffrey Moorley, for the respondents

Heard: June 28, 2017

On appeal from the order of Justice Douglas C. Shaw of the Superior Court of Justice, dated January 27, 2017, with reasons reported at 2017 ONSC 683, 7 C.P.C. (8th) 430, and from the costs order dated April 24, 2017, with reasons reported at 2017 ONSC 2532, 9 C.P.C. (8th) 136.

Doherty J.A.:

A. OVERVIEW

[1] The respondents (plaintiffs in the action) are all close relatives of Jasmine Veneruzzo ("Ms. Veneruzzo"). Ms. Veneruzzo died in a car accident in December 2008. The appellant (defendant in the action) was driving the vehicle that struck Ms. Veneruzzo's car. The appellant was charged with criminal negligence causing death, and eventually pleaded guilty to dangerous driving causing death in September 2012. In January 2013, he received a penitentiary sentence of two years. A related civil action was settled in 2015.

[2] In June and July 2015, the appellant posted several comments on his Facebook page. Those comments referred to various things, including the accident that resulted in Ms. Veneruzzo's death, her driving habits, the veracity of representations made about Ms. Veneruzzo in the proceedings, and the conduct of the respondents and other relatives of Ms. Veneruzzo in the aftermath of the accident.

[3] The content of some of the posts led the respondents to commence an action for libel and related claims. The appellant filed a Statement of Defence in which he advanced the defences of truth, fair comment, and qualified privilege. At para. 18 of the Statement of Defence, he alleged that "the comments that form the basis of the Plaintiffs' claim relate to matter [*sic*] of significant public interest."

[4] In June 2016, the appellant moved under s. 137.1 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 ("*CJA*") for an order dismissing the respondents' action. He alleged that the claims made against him arose from expressions that he made on matters of public interest. He further argued that the respondents could not meet the criteria in s. 137.1(4).

[5] The motion judge dismissed the motion, holding that the appellant had failed to demonstrate that his Facebook posts related to matters of public interest as required by s. 137.1(3). Having found that the appellant failed to meet that threshold requirement, the motion judge did not go on to consider the other requirements in s. 137.1(4).

[6] The motion judge also awarded costs to the respondents (plaintiffs in the action), despite the language of s. 137.1(8), which creates a "presumption" that a responding party should not have its costs when a s. 137.1 motion is dismissed.

[7] The appellant appeals from the order dismissing the s. 137.1 motion and, should the main appeal fail, seeks leave to appeal from the costs order. For the reasons that follow, I would dismiss the appeal, grant leave to appeal costs, and dismiss that appeal.

B. THE MAIN APPEAL

(i) The Facts

[8] On December 3, 2008, the appellant, who was a police officer, was driving his police cruiser over 200 km/hr in a 90 km/hr zone on a highway. He had not engaged the siren or any emergency lighting on the vehicle.

[9] The appellant's vehicle collided with the vehicle driven by 18-year-old Ms. Veneruzzo as she pulled out onto the highway. Ms. Veneruzzo died at the scene.

[10] The appellant was charged with criminal negligence causing death. At the end of the Crown's case at trial, he entered a plea to the included offence of dangerous driving causing death. In January 2013, the appellant was sentenced to two years' imprisonment on the basis of a joint submission put forward by counsel. At the sentencing hearing, the appellant publicly apologized for his conduct.

[11] Between June 20 and July 8, 2015, after the appellant had completed his sentence, he made a series of posts on his personal Facebook page, which was accessible to the public. The posts referred to a variety of topics. One alluded to the death of a police officer, who was a friend of the appellant, in a roadside accident. Others referred to the accident in which Ms. Veneruzzo was killed and the appellant was injured. Still other posts referred to the cruiser the appellant was driving at the time of the accident, the deceased's driving conduct at the time

of the accident and on other occasions, the conduct of the deceased's relatives, and what the appellant alleged were falsehoods put forward by the respondents about Ms. Veneruzzo's status as a high school student and her future plans at the time of her death.

(ii) Reasons of the Motion Judge

[12] In holding that the appellant had failed to show that the statements on his Facebook page related to a matter of public interest, the motion judge, at paras. 30-31, correctly relied on the analysis of "public interest" in *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640: see *1704604 Ontario Ltd. v. Pointes Protection Association*, 2018 ONCA 685, at para. 58 (released concurrently with these reasons).

[13] The motion judge, after specifically referring to the need to consider the subject matter of the comments "as a whole", offered his characterization of the subject matter, at para. 34:

> Mr. Storey's Facebook posts are concerned with two matters. First, he implies that Ms. Veneruzzo caused or contributed to the collision. He states that on a prior occasion she ran a stop sign at Highway 130 and Twin City Crossroads, that she had previously texted while driving and, on the day in question, that she was late for work. Second, his posts are critical of the Veneruzzo family for misrepresenting Ms. Veneruzzo's education and career path at the time of the collision and for being intoxicated and belligerent towards police on the evening of Ms. Veneruzzo's funeral. These two matters do not go beyond Mr. Storey's own personal interests.

[14] The motion judge, at para. 37, drew a distinction between matters of public interest and a matter that, because of its notoriety, might be of some interest to the public:

> Although notoriety may well have attached to the collision and to the death of Ms. Veneruzzo and to the ensuing criminal and civil proceedings, these were events which interested the public, not events which were in the public interest. These events did not affect the welfare of the public. Mr. Storey's posts did not assist the public to better understand and make decisions on issues in which they had a stake. The posts did not extend beyond Mr. Storey's own interests, to the interests of the community as a whole, or at least to a meaningful segment of the community.

(iii) Arguments on Appeal

[15] The appellant accepts that the motion judge properly identified *Grant v. Torstar Corp.* as the guiding authority when interpreting the phrase "public interest" in s. 137.1(3) of the *CJA*. Indeed, counsel for the appellant relies on the same passages cited by the motion judge in his reasons.

[16] Counsel alleges two errors. He contends that the motion judge:

- Failed to consider the relevant Facebook posts "as a whole"; and
- Characterized the phrase "public interest" too narrowly.

(iv) Did the Motion Judge Fail to Consider the Posts as a Whole?

[17] A failure to consider the expressions that are the subject matter of the lawsuit as a whole and in the context in which they are made constitutes a failure

to apply a controlling legal principle and is an error in law. Correctness is the appropriate standard of review in respect of this ground of appeal: *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at para. 35; *CNH Canada Ltd. v. Chesterman Farm Equipment Ltd.,* 2018 ONCA 637, at para. 34.

[18] The appellant faces a difficult task in advancing this argument. The motion judge expressly and repeatedly acknowledged that in determining whether the expression related to a matter of public interest, he must consider the publication "as a whole": see paras. 30 and 33. The appellant must convince this court that, despite those clear statements, the motion judge did not consider the publications as a whole.

[19] The appellant's submission that the motion judge failed to consider the posts as a whole comes down to the argument that there are comments in some of the posts that do not relate to Ms. Veneruzzo, the respondents, or the accident. He submits that at least some of those unrelated comments refer to matters of public interest (e.g. the post about police safety at roadside stops). On the appellant's argument, these comments are sufficient to place the entirety of the expressions contained in the posts under the public interest protection of s. 137.1(3).

[20] I cannot accept this submission. The appellant would have the court look at isolated portions of the communications without regard to the nature of the expressions that actually give rise to the proceeding. Section 137.1(3) makes clear that the expression at issue is the expression that gives rise to the proceeding. That expression must relate to a matter of public interest. The expressions giving rise to this proceeding are those relating to Ms. Veneruzzo and the respondents. A defendant who makes statements about a purely private matter cannot gain the protection of s. 137.1(3) by interspersing references to some other topic that may relate to a matter of public interest.

[21] I agree with the respondents that the motion judge was not obliged to summarize every comment that the appellant made in the posts to demonstrate that he considered all of the comments in determining the subject matter of the expression that gave rise to the claim. The passages excerpted by the motion judge at para. 13 of his reasons refer to the parts of the posts that were most germane to his assessment of whether the lawsuit arose out of expressions that relate to a matter of public interest.

[22] Nothing in the motion judge's reasons leads me to conclude that he did not, as he said he did, consider the relevant communications as a whole in deciding whether they related to a matter of public interest.

(v) Did the Motion Judge Characterize the Phrase "Public Interest" too Narrowly?

[23] The definition of the phrase "public interest" in s. 137.1(3) raises a question of law reviewable on a correctness standard. The application of the proper definition to the facts of a particular case raises a question of mixed fact and law. Absent the identification of an extricable error of law or a palpable and overriding factual error, an appellate court will defer to the motion judge's assessment: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 33-35; *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 S.C.R. 23, per Wagner J., as he then was, at paras. 35-36, and per Cromwell J. (concurring), at paras. 100-101; *Benhaim v. St-Germain*, 2016 SCC 48, [2016] 2 S.C.R. 352, at paras. 36-39.

[24] The phrase "public interest" takes its meaning from the circumstances of the specific case. An exhaustive definition is impossible. One must ask: what is the communication impugned in the lawsuit about?

[25] I agree with the motion judge's characterization of the relevant posts: see above at para. 13. Put a little differently, I would characterize the comments insofar as they related to Ms. Veneruzzo, the accident, and the respondents, as an attempt to create a new narrative about the accident. In that narrative, the appellant plays the role of victim (e.g. the references to his injuries) and shifts the

focus of the cause of the accident from his dangerous driving to the deceased's driving habits (e.g. her alleged constant texting while driving) and her family's character (e.g. their alleged drinking and drunk driving on the evening of the funeral).

[26] Like the motion judge, I see nothing in the posts that could reasonably be said to engage broader issues of road safety, the operation of the justice system, or the public perception of the conduct of the police.

[27] The appellant submits that the motion judge wrongly concluded that public notoriety or controversy could not be equated with public interest for the purposes of s. 137.1(3). There is no doubt that public notoriety is a kind of public interest. However, to the extent that the public interest does not rise above "mere curiosity or prurient interest", it cannot satisfy the public interest requirement in s. 137.1(3): *Grant v. Torstar Corp.*, at para. 105. The motion judge appreciated this distinction.

[28] The motion judge properly instructed himself on the law as it relates to the meaning of "public interest" in s. 137.1(3). I see no error in his finding that the appellant's attempt to shift the blame for the accident to the deceased and her family did not constitute expression on a matter relating to the public interest. As the appellant had failed to meet his onus under s. 137.1(3), the motion judge properly dismissed the motion.

C. THE COSTS APPEAL

[29] The motion judge awarded costs on a partial indemnity basis in the amount of $8,924.05 to the respondents, the successful parties on the motion. In the normal course, the motion judge's order would be unremarkable. However, s. 137.1 motions have their own costs regime. Section 137.1(7) provides that if the defendant (moving party) is successful in having the plaintiff's claim dismissed on a s. 137.1 motion, the defendant is entitled to its costs of the motion and in the proceeding on a full indemnity basis, unless the judge determines that such an award would be inappropriate in the circumstances. If the defendant is unsuccessful on the s. 137.1 motion, s. 137.1(8) provides:

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

[30] The motion judge ultimately exercised his discretion under s. 137.1(8) in favour of the respondents and ordered costs to them, on a partial indemnity basis.

(i) Should Leave be Granted?

[31] The appellant needs leave to appeal the costs order. The respondents argue that leave to appeal should be refused. They contend that this court rarely grants leave to appeal costs, and that the motion judge's order simply reflects the application of the discretion clearly given to him in s. 137.1(8) to the facts of this

case. The respondents further contend that even if the leave application raises a legal question of general importance, leave must be refused unless the court is satisfied that there is strong reason to believe that the motion judge's order is wrong.

[32] I agree with the respondents that leave to appeal costs should be granted sparingly. I also agree that this court will seldom interfere with a judge's exercise of discretion as it relates to costs.

[33] However, I would grant leave to appeal from the costs order in this case. The costs provisions in s. 137.1 are quite different from the generally applicable costs provisions and have not been considered by this court. I think this court should take this opportunity to address those provisions.

(ii) The Merits of the Costs Appeal

[34] The motion judge recognized that s. 137.1(8) applied and that there was a presumption that the respondents, even though they had been successful on the motion, should not receive their costs: at paras. 11-19. He gave two reasons for exercising his discretion in favour of granting costs to the respondents.

[35] First, he held that the respondents could not be criticized for initiating the lawsuit. Their lawsuit had none of the features common to the typical SLAPP.[1] There was nothing "strategic" about the lawsuit and the plaintiffs did not set out to

[1] SLAPP refers to Strategic Lawsuits Against Public Participation.

intimidate the appellant or extract costs from him. The motion judge said, at para. 17:

> The plaintiffs are not attempting to suppress public participation…. In the instant case, the plaintiffs are individuals who allege damage to their individual reputations. I find no ulterior motive for this lawsuit that would take it outside the usual considerations of a defamation action for damages.

[36] Second, the motion judge found that the appellant's argument that the relevant statements in the posts related to matters of public interest had "no merit": at para. 18.

[37] The motion judge concluded, at para. 19:

> In my view, an award of partial indemnity costs is appropriate in the circumstances of this case where the defendant's claim of public interest was found to be without merit and there are no facts that would suggest that a costs award would be inequitable.

[38] The motion judge's reasons for ordering costs in favour of the respondents are consistent with the rationale for the costs provisions in s. 137.1. Those sections are designed to encourage defendants, who have been sued over expressions on matters of public interest, to bring s. 137.1 motions for an early dismissal of those claims. The costs provisions ease the financial burden and risk placed on the defendant who seeks an early termination of what it claims is a SLAPP: *Accruent LLC v. Mishimagi*, 2016 ONSC 6924, 9 C.P.C. (8th) 136, at para. 4.

[39] The 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. In those circumstances, it is not the initial lawsuit challenging the expression that represents a potential misuse of the litigation process, but rather the s. 137.1 motion. A costs order denying a successful respondent its costs on a s. 137.1 motion, even though the lawsuit was not brought for an improper motive and the claim did not relate to a matter of public interest, could be seen as encouraging defendants to bring meritless s. 137.1 motions.

[40] The trial judge's findings that the respondents did not bring the lawsuit for any improper purpose and that there was no merit to the appellant's s. 137.1 argument were both available on the evidence. Both factors are properly considered in exercising the discretion provided in s. 137.1(8). Taken together, those factors provided a reasonable basis for the motion judge's conclusion that a costs award in favour of the respondents was "appropriate in the circumstances". I would defer to that conclusion.

D. CONCLUSION

[41] I would dismiss the appeal on the merits, grant leave to appeal costs, and dismiss that appeal.

[42] Counsel for the parties agreed on the costs of the appeal. The respondents should have their costs on the main appeal fixed in the amount of $6,500. I would make no order as to costs on the costs appeal. It is unclear whether the amounts agreed upon by counsel include HST and reasonable disbursements. If they do not, those amounts should be added to the amounts awarded above.

Released: “DD” “AUG 30 2018”

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