

CITATION: Joshi v. Allstate Insurance Company of Canada, 2019 ONSC 4382
COURT FILE NO.: CV-18-00609960-0000
DATE: 20190722

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
MEDHA JOSHI)
)
Plaintiff/Defendant by Counterclaim) *Andrew Monkhouse, Alexandra Monkhouse,*
(Moving Party)) *Kevin Wisnicki, for the Plaintiff/Defendant*
) *by Counterclaim (Moving Party)*
)
- and -)
)
ALLSTATE INSURANCE COMPANY OF) *Seann McAleese and Sasha Segal, for the*
CANADA) *Defendant/Plaintiff by Counterclaim*
) *(Responding Party)*
)
Defendant/Plaintiff by Counterclaim)
(Responding Party))
)
)
)
) HEARD: May 16, 2019

KIMMEL J.

REASONS FOR DECISION

[1] Invoking the summary procedure available under s. 137.1 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 (CJA), sometimes referred to as Ontario’s Anti-SLAPP legislation, Medha Joshi brought this motion for the dismissal of Allstate’s \$700,000.00 counterclaim against her. For the reasons that follow, I find that Allstate’s counterclaim is a Strategic Lawsuit Against Public Participation and I order that it be dismissed.

Overview

[2] Ms. Joshi worked for almost six years as an Agency Manager for Allstate, first in Brampton and later in Milton. She was 38 years old and was earning a combined annual base salary and bonus of approximately \$165,000.00 when she was terminated on or about October 9, 2018. On November 30, 2018 Ms. Joshi issued this claim seeking damages for wrongful dismissal and breach of her employment contract. She seeks 12 months’ pay in lieu of notice and all corresponding benefits for that period, unpaid bonus and overtime accruing prior to her termination of approximately \$367,627.00 in the aggregate, plus damages for *Human Rights Code*, R.S.O. 1990, c. H.19 violations and punitive damages totalling \$150,000.00.

[3] Ms. Joshi's lawyer issued a news release about her claim on December 13, 2018, referencing the allegation in her statement of claim that the Allstate office where she worked had a policy that she was concerned discriminated against selling insurance to residents of Brampton, who are mainly visible minorities. Ms. Joshi was interviewed by CBC News and they published an article on December 15, 2018, which was picked up by other news media.¹ The media reports linked her comments about the Allstate policy to the industry-wide "all-comers" rule and what the authors described as the perennial political issue in Brampton, Ontario about the relatively high auto insurance premiums in that area – also referred to as postal code discrimination. The "all-comers" rule and postal code discrimination are matters that are within the purview of the Financial Services Commission of Ontario (FSCO).

[4] On January 23, 2019 Allstate issued a Notice under the *Libel and Slander Act*, R.S.O. 1990, c. L.12 objecting to what it described as false, malicious and defamatory statements made by Ms. Joshi and/or her counsel reflected in various publications, and demanded that she publish a retraction and apology. The Libel Notice asserted that the statements were defamatory because they conveyed the meaning that:

- a. Allstate engaged in discriminatory insurance practices based on race and ethnicity, contrary to the *Human Rights Code*;
- b. Allstate engaged in discriminatory insurance practices contrary to the guidelines established by FSCO;
- c. Allstate treats the residents of Brampton, Ontario in a discriminatory and/or unlawful manner; and
- d. Allstate engaged in an unlawful reprisal against Ms. Joshi to conceal the foregoing conduct alleged.

[5] Shortly after this, Ms. Joshi found herself facing a counterclaim by Allstate, seeking repayment of all compensation she had received under the *Employment Standards Act, 2000*, S.O. 2000, c. 41 plus \$700,000.00 in damages. The counterclaim alleges Ms. Joshi has made false claims, widely communicated through the media, that Allstate engages in discriminatory practices contrary to the *Human Rights Code* with respect to its insurance business in Brampton. Allstate claims that it has suffered damage to its reputation and goodwill as a result of Ms. Joshi's breaches of duties and malicious falsehoods and that it has incurred costs and expenses in responding to client and regulatory concerns due to her allegedly false allegations about Allstate's sales practices.

[6] Ms. Joshi fears that Allstate's counterclaim seeks to unduly limit her free expression and ability to participate in the public dialogue on a matter of public interest, namely: the insurance industry's all-comers rule, the relevance and use of postal codes to determine insurance premiums

¹ Ms. Joshi was only interviewed by the CBC. These reasons only address the CBC article that was based on that interview, although they can be applied, as appropriate, to other derivative media reports.

and whether more than just postal code discrimination underlies certain of Allstate's insurance sales policies and practices applied to Brampton residents.

[7] Postal code discrimination in Brampton is already a matter of ongoing public debate and consideration at both the regulatory and legislative levels. Ms. Joshi's expressions broaden the debate to include other types of discrimination, beyond geography. The issue to be determined on this motion is whether Ms. Joshi can talk freely and publicly, without facing further reprisal from Allstate, about her concerns and beliefs relating to the potentially discriminatory sales practices that she has described in this action – the same sales practices that she says she resisted implementing and that resulted in her being fired. This is a matter of public interest.

[8] Allstate has not satisfied me that its counterclaim has substantial merit or that Ms. Joshi has no valid defence to any aspect that does have merit. While Allstate tries to distinguish what Ms. Joshi says about these potentially discriminatory sales practices in her statement of claim from what she said about them in her CBC interview, they amount in substance and effect to the same thing. In the absence of any demonstrated malice, Ms. Joshi's expressions to the media of her views and beliefs in relation to a matter of public interest that she says she challenged and believes was one of the reasons why she was fired should not be permitted to create an opening for Allstate to "gag" her by the threat of completely wiping out her claims in this action through the commencement of a strategic counterclaim of approximately equal value.

[9] Also of concern is the potential chilling effect that the permitted continuation of the counterclaim will have on Ms. Joshi's ability to freely speak and express her views relating to the potentially discriminatory sales practices being applied to residents of Brampton. Allstate has the ability to freely express itself on the topic of postal code, or any other type of, discrimination that may, or may not, form part of its sales practices and policies. The public interest in the expression of all parties with knowledge, information or belief on this subject outweighs any harm or potential harm to Allstate. Notably, Allstate has not, thus far, established any harm beyond the time and expense of responding to an ongoing FSCO investigation into these sales practices; aside from that, there are only conflicting and vague suggestions about what future harm may be suffered by Allstate, if any.

[10] The validity of Ms. Joshi's claim for wrongful dismissal and reprisal, and all of the defences that Allstate has to those claims (including its primary assertion that the allegations she makes are false), can be adjudicated on their merits in the ordinary course of this litigation. The dismissal of the counterclaim does not foreclose any of Allstate's defences to her claims.

Issues to be Decided

- [11] The issues to be decided are all prescribed by s. 137.1 of the CJA. They are:
- a. Is a counterclaim a proceeding within the meaning of s. 137.1?
 - b. Has Ms. Joshi satisfied me that the counterclaim arises from an expression made by her that relates to a matter of public interest? [s. 137.1(3)]

- c. Has Allstate satisfied me [under s. 137.1(4)(a)] that there are grounds to believe that:
 - i. The counterclaim has substantial merit?
 - ii. Ms. Joshi has no valid defence to the counterclaim?
- d. Has Allstate satisfied me [under s. 137.1(4)(b)] that the harm likely to be or have been suffered by it as a result of Ms. Joshi's expression is sufficiently serious that the public interest in permitting the counterclaim to continue outweighs the public interest in protecting that expression?

Is Allstate's Counterclaim a Proceeding Within the Meaning of s. 137.1 of the CJA?

[12] Rule 1.03 defines a "proceeding" to be either an action or an application. An "action" is defined to include a proceeding commenced by counterclaim.

[13] There is no doubt that a counterclaim is a proceeding and is subject to dismissal under s. 137.1 of the CJA based on the plain language of these definitions in the Rules. Allstate did not argue otherwise.

[14] The fact that the proceeding is a counterclaim is relied upon by Allstate in the public interest balancing that comes at the end of the s. 137.1 analysis.

Does Allstate's Counterclaim Arise from Expressions that Relate to a Matter of Public Interest?

[15] The word "expression" is broadly defined in s. 137.1(2) of the CJA. It is conceded by Allstate that the impugned statements attributed to Ms. Joshi are "expressions" by her within the meaning of s. 137.1(2). Those expressions can be found both in her statement of claim and in the report of her interview with the CBC. Allstate contends that the impugned expressions do not relate to a matter public interest.

[16] Ms. Joshi pleads (at paras. 39 to 46 of the statement of claim) that her termination was a reprisal for her resistance to a discriminatory policy or practice adopted in her Region "L" at Allstate, that:

- a. Prevented Allstate's employees who worked in Milton (Region "L") from selling insurance to residents of Brampton, Ontario; [claim, at para. 39]
- b. Regardless of whether an individual resident of Brampton qualified for insurance coverage, instructed Allstate employees of Region "L" not to provide them with insurance even though Region "L" included Brampton; [claim, at para. 40]
- c. Considered the residents of Brampton to be high risk, and that the Brampton Region had a large amount of 'fraudulent activity'; [claim, at para. 40]

- d. Was said, or implied, to be justified by Allstate, including her direct manager Mr. Derrick Bishop, because the visible minority groups within Brampton were more likely to commit fraud; [claim, at para. 41]
- e. Discriminated against individuals by in effect excluding them from Allstate's products and services due to their race or ethnicity; [claim, at para. 42]
- f. Was implemented in breach of s. 140 of the *Insurance Act*, R.S.O. 1990, c. I.8. [claim, at para. 46]

[17] Ms. Joshi pleads (at paras. 42 and 43 of the statement of claim) that shortly after she informed Allstate that she did not want to partake in this practice that effectively discriminated against individuals due to their race or ethnicity and noted that it contravened the FSCO guidelines and policies, Allstate terminated her employment. Ms. Joshi pleads that this was the real reason for her termination and not the stated reason about an unsubstantiated allegation of wilful misconduct involving misrepresentations by and about another employee.

[18] Ms. Joshi's pleaded allegations about this discriminatory policy and practice at Allstate correspond with the alleged defamatory remarks particularized in Allstate's Libel Notice relating to her CBC interview and the CBC article.² A few additional quotes attributed to Ms. Joshi from the CBC article to the same substance and effect are:

- a. "It's just wrong. There is no other word for it." "I said it was wrong and I was reprimanded for it."
- b. "It was very clearly said, in so many words, that there is a lot of fraud that happens in Brampton. That there is a very high number of claims and a very high number of fraudulent claims."
- c. "People are people. There was nothing that walked in through the door in Brampton that was different from any place else."
- d. "We know the community that resides in Brampton, and they are visible minorities."
- e. "I think it is wrong to be so brazenly biased toward an entire community." "I don't know how, in good faith, to go deliver this direction to my team, to deliver this message that I couldn't stand behind."

² Allstate also seeks to hold Ms. Joshi responsible for statements that were made by her counsel. His comments are of a similar nature and effect to hers, and the analysis and outcome of this motion would not change if Ms. Joshi was to be held responsible for them, but I have not been provided with sufficient authority or argument to be persuaded that Ms. Joshi could be held responsible for the statements made by her counsel so I have not separately addressed the statements of her counsel.

- f. "I could not seem to get meetings with my manager, I could not seem to have weekly discussions with my manager. He wasn't available. He wouldn't respond to emails."
- g. "While I was having conversations, I also needed my benefits. I also needed my company, my organization, to support me in my time of need. And not for a second did I think I would be penalized in such a manner."

Do the Expressions by Ms. Joshi Relate to a Matter of Public Interest under s. 137.1(3) of the CJA?

[19] The phrase "a matter of public interest" is not defined in the CJA. The onus is on Ms. Joshi to satisfy me that her expressions relate to a matter of public interest: see *1704604 Ontario Ltd. v. Pointes Protection Association*, 2018 ONCA 685, 142 O.R. (3d) 161, at paras. 40, 51 and 53, leave to appeal to S.C.C. allowed, 2019 CarswellOnt 6378.

[20] The Court of Appeal in *Pointes* has provided the following guidance about how to apply the legal principles from *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640 to the relevant circumstances of a case in order to decide whether an expression relates to a matter of "of public interest" for purposes of s. 137.1(3) (at paras. 45- 66):

- a. There is a distinction between statements or other expressions that make a reference to something of public interest and expressions that relate to a matter of public interest – this distinction depends on the context and must be evaluated by asking the question: what is the expression, when placed in its context and taken as a whole, about?
- b. Not everything that touches upon a matter of public interest necessarily relates to a matter of public interest, for example:
 - i. a brief incidental reference to a topic capable of relating to a matter of public interest in the course of communications devoted purely to a private dispute may not be regarded as an expression relating to a matter of public interest;
 - ii. private matters are not converted into matters relating to public interest merely because those expressions concern individuals in whom the public have an interest or involve topics that may titillate or entertain;
 - iii. a matter of public interest may be distinguished from a matter about which the public is merely curious or has a prurient interest;
- c. It does not require that the expression actually furthers a public interest. A qualitative assessment of the expression's impact on the issue to which it is directed is not part of the inquiry;
- d. A statement relating to a matter of public interest that is demonstrably false is nonetheless an expression relating to a matter of public interest;

- e. A broad reading of the phrase is consistent with the purposes identified in s. 137.1(1);
- f. There is no exhaustive list of topics that fall under the rubric of “public interest”. Some topics are inevitably matters of public interest. Some examples include the conduct of governmental affairs and the operation of the courts;
- g. Public interest does not turn on the size of the community or audience who is interested;
- h. The characterization of an expression as a matter of public interest will usually be made with reference to the circumstances as they existed when the expression was made.

[21] In order to decide whether the impugned expressions of Ms. Joshi relate to a matter of public interest, I must answer the question: what is the expression by Ms. Joshi that is the subject of the counterclaim about, when placed in its context taken as a whole? In answering that question, I have considered the guidance from *Grant v. Torstar* adopted by the Court of Appeal in *Pointes* and I have concluded that her expressions do relate to a matter of public interest.

[22] Ms. Joshi points to various media reports as well as Hansard debates and the 2019 budget speech of the Ontario government to demonstrate that postal code discrimination is in the public mind and interest, and in need of regulation. Allstate concedes that postal code discrimination in the insurance industry generally is a matter of public interest. However, Allstate argues that the existing public debate on this matter of public interest, prior to Ms. Joshi entering the arena, did not involve discrimination of the nature that the *Human Rights Code* is concerned with, or involve any racial undertones. Allstate contends that the issue of postal code discrimination as it exists in the public domain has not been tied by anyone else to racial identity and Ms. Joshi’s attempt to expand postal code discrimination is not legitimate or *bona fide*.

[23] Allstate seeks to characterize the issue in this case to be about it allegedly having a policy of refusing or prohibiting its employees from selling insurance in Brampton. Allstate then attacks this “straw man” by pointing to the fact that the evidence is to the contrary, that Allstate has a well-established office in Brampton that continues to issue many policies annually to Brampton residents. Allstate argues that this completely undermines the suggestion that any such policy exists and that it undermines the credibility of any suggestion that this could be a matter of public interest.

[24] There are two fundamental problems with Allstate’s position. First, as the Court of Appeal has said in *Pointes*, even a statement relating to a matter of public interest that is demonstrably false is nonetheless an expression relating to a matter of public interest.

[25] Related to this first point, Allstate has too narrowly described what the issue is. Ms. Joshi contends that the type of postal code discrimination employed by Allstate in its Milton office had the intent and/or effect of targeting visible minorities (who make up the vast majority of Brampton residents) with more barriers to access insurance because they were considered to be fraudsters. Ms. Joshi says the Milton office had historically serviced Brampton residents, and they were being

told not to for reasons that she believed to be discriminatory. The policy was not presented as a prohibition against selling insurance in Brampton across the board. When the evidence is assessed in this proper context, it is not as overwhelmingly in favour of Allstate's position as it suggests. Rather, it will depend on who is believed at trial, Ms. Joshi or her supervisor.

[26] Second, Allstate's suggestion that postal code discrimination can only be a matter of public interest if it remains defined by how it has been historically recognized and talked about (that is, not tied to any racial or ethnic considerations) takes too narrow an approach to the broad reading of the phrase "public interest" that the Court of Appeal in *Pointes* says is required, having regard to the stated purposes of s. 137.1(1), including (a) to encourage individuals to express themselves on matters of public interests and; (b) to promote broad participation in debates on matters of public interest.

[27] Matters of public interest, and the public debate that they engender, necessarily will evolve over time. If there is a new aspect to a recognized matter of public interest such as postal code discrimination that introduces racial or ethnic undertones to the criteria being employed, the introduction into the public debate of an additional layer of potential or embedded discrimination that has not been talked about before is not a reason to confine this to a private matter between Allstate and Ms. Joshi.

[28] Considered in context, the impugned expressions of Ms. Joshi that are subject of the counterclaim are about a type of postal code discrimination that Ms. Joshi believes is being employed by at least one office of Allstate in relation to residents of Brampton that may have either the intention and/or the effect of discriminating on grounds of race and ethnicity. These concerns may give rise to *Human Rights Code* considerations and may also violate the all-comers rule under the *Insurance Act*. That remains to be determined. That determination may not necessarily occur within the confines of this action. While these concerns have been raised by Ms. Joshi in her claim as part of the context for why she says she was wrongfully terminated from her employment, they are not devoted purely to a private dispute or attack on Allstate. They are matters of broader public interest.

[29] There were references in the record and the written submissions of the parties to a settlement offer that was made by Ms. Joshi before her action was commenced, which Allstate sought to rely upon to suggest that Ms. Joshi's expressions were strictly about her private dispute with Allstate since she was willing to settle her case. That suggestion was based on an assumption that a settlement would have ended the prospect of any public expression by Ms. Joshi in her statement of claim (then in draft) or to the media about the type of racially-charged postal code discrimination allegedly being employed by Allstate.

[30] I am not persuaded by the logic of this position or the foundation for the assumption upon which it is based. However, these arguments are not relevant because I heard submissions and ruled at the hearing that Ms. Joshi's offer to settle her wrongful dismissal claim before commencing the action (which made no reference to whether she would speak to the press) was privileged and should not be considered by me having been advised that privilege had not been waived by her. There was no "justice of the case" that required making an exception here to the

recognized class settlement privilege and the *prima facie* presumption of inadmissibility: see *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37, [2013] 2 S.C.R. 623, at para. 12.

Has Allstate Satisfied The Merits Hurdle of s. 137.1(4)(a) of the CJA?

[31] Since I am satisfied that Ms. Joshi's expressions relate to a matter of public interest and that the threshold inquiry under s. 137.1(3) has been cleared, the onus shifts to Allstate under s. 137.1(4) to persuade me on a balance of probabilities that there are: (i) grounds to believe its counterclaim has substantial merit; and (ii) Ms. Joshi has no valid defence to the counterclaim. This sub-section is concerned with the merits of Allstate's counterclaim (*Pointes*, at para. 70).

[32] I must decide whether a trier could reasonably conclude that the Allstate's counterclaim has "substantial merit", and that Ms. Joshi has "no valid defence" (*Pointes*, at para. 75). This is not a summary judgment "best foot forward" test (*Pointes*, at paras. 76-78).

(i) *Does the counterclaim have substantial merit?*

[33] This part of the test under s. 137.1(4)(a)(i) requires Allstate to do more than simply show that its claim has some chance of success. The Court of Appeal explains in *Pointes* (at para. 80): "A claim has "substantial merit" for purposes of s. 137.1 if, upon examination, the claim is shown to be legally tenable and supported by evidence, which could lead a reasonable trier to conclude that the claim has a real chance of success" taking into account what can reasonably be expected of a plaintiff (by counterclaim) at this early stage of the litigation (*Pointes*, at para. 81).

[34] This may involve a limited weighing of the evidence and even credibility evaluations. Bald allegations or unsubstantiated damage claims are not enough (*Pointes*, at para. 82).

[35] Allstate argued that it is advancing two causes of action arising out of the impugned expressions, defamation and malicious and/or injurious falsehood.

Allstate's Defamation Claim

[36] The Libel Notice it issued in advance of the counterclaim clearly refers to the prospect of a claim for defamation and provides the particulars of the words published that refer to Allstate and that are said to be defamatory in their natural and ordinary sense. These are the basic particulars that must be provided in a libel case: see *Platnick v. Bent*, 2018 ONCA 687, 426 D.L.R. (4th) 60, at para. 51, leave to appeal to S.C.C. allowed, 2019 CarswellOnt 6381.

[37] Ms. Joshi's challenge to the merits of Allstate's defamation claim is simple but technical: it has not been pleaded.

[38] I agree that the defamation claim is curiously absent from the counterclaim as an alleged cause of action. It was argued by counsel for Ms. Joshi that this was an intentional and strategic decision by Allstate to try to plead around s. 137.1, which Allstate regretted when it realized that it did not have evidence to substantiate any damages to support its other pleaded causes of action. Allstate does not address the reason why the claim for defamation was omitted from the

counterclaim but argues that because all of the particulars have been disclosed in the Libel Notice, even if not in the counterclaim pleading itself, Allstate should be granted leave to amend the counterclaim under s. 137.1(6) of the CJA, if necessary, and this cause of action should be considered.

[39] I am troubled by the cavalier attitude that Allstate has adopted in relation to this cause of action. The counterclaim pleading is clearly deficient and Allstate asks for the court's indulgence for leave without even having brought a motion or provided a proposed amended pleading. However, I agree that leave likely would have been granted if Allstate had formally made that motion because the particulars have been disclosed. I am not going to decide this aspect of the s. 137.1(4) analysis on the basis of a technical deficiency in the pleading. Having considered the defamation claim as if pleaded, I am satisfied that it is legally tenable and could lead a reasonable trier of fact to conclude that the claim has a real chance of success, subject however to the validity of the defences that would be available to Ms. Joshi, which are discussed below. If I was not dismissing the counterclaim I would have directed Allstate to amend it to properly incorporate this claim for defamation.

Allstate's Claim for Malicious and/or Injurious Falsehood

[40] Allstate's claim for malicious and/or injurious falsehood is pleaded in the counterclaim. The elements of this claim are similar to those for defamation (the particulars of which have already been addressed), but Allstate concedes (at para. 55 of its factum) that this claim has the additional requirement to demonstrate malice: see *Avalon Rare Metals Inc. v. Hykway*, 2011 ONSC 5569, at paras. 41 and 42.

[41] Allstate relies upon the privileged settlement letter that I ruled to be inadmissible in support of the contention that Ms. Joshi's expressions were actuated by malice because she was trying to leverage a settlement. Since the settlement letter was ruled inadmissible this contention cannot succeed, but I also do not accept the logic of it. Just because someone tries to settle does not mean that their claim, or any given fact relied upon in support of it, is malicious or actuated by malice. Nor does it follow that Ms. Joshi's expressions are actuated by malice simply because she was fired and is suing for wrongful dismissal. Something more is required here in order to establish the validity of this cause of action in the counterclaim. I am not persuaded that Allstate's claim for malicious and/or injurious falsehood is legally tenable and could lead a reasonable trier of fact to conclude that the claim has a real chance of success because of this missing component of malice.³

³ Allstate did not focus its submissions on any other pleaded claims. I am not persuaded that a reasonable trier would conclude that any other pleaded causes of action have a real chance of success. The claim for tortious abuse of process suffers from the same evidentiary problem as malicious and/or injurious falsehood in that it depends for proof of the necessary "collateral or improper purpose" in reliance on the settlement letter that I ruled to be inadmissible and similar inferences that I do not accept regarding Ms. Joshi's intentions or purpose. Ms. Joshi also contends that the purpose of inducing settlement is not an improper purpose: *Rowe v. Unum Life Insurance Co. of America* (2006), 37 C.C.L.I. (4th) 32 (Ont. S.C.), at para 257. The claim for breach of employment duties is legally untenable on the record in that it depends on the validity of implied terms or duties of her employment, which are disputed and for

[42] Ms. Joshi also challenged the merits of the claim for malicious and/or injurious falsehood (and the various other pleaded causes of action) on the grounds that it requires some proof of actual harm or losses (in contrast with the defamation claim for which damages may be presumed): see *Carbone v. DeGroot*, 2014 ONSC 6146, at paras. 56-57.

[43] Allstate contends that harm can be both monetary and non-monetary (*Pointes*, at para. 88). Ms. Joshi does not quibble with this, but contends that bald allegations and unsubstantiated damage claims or opinions are not enough (*Pointes*, at para. 82; see also *Fortress Real Developments Inc. v. Rabidoux*, 2018 ONCA 686, 426 D.L.R. (4th) 1, at para. 44). The Court of Appeal in *Pointes* provides guidance (at para. 91) that: “The motion judge must be able to make an informed assessment, at least at a general or ‘ballpark’ level, about the nature and quantum of the damages suffered or likely to be suffered by the plaintiff.”

[44] I will address these arguments about whether the necessary component of harm has been sufficiently substantiated, even though I do not need to in light of my conclusion that this claim for malicious and/or injurious falsehood fails because of the missing malice component.

[45] Ms. Joshi relies heavily on the refusal and/or choice made by Allstate not to tender any evidence about its sales of insurance in Brampton in 2019 (with or without comparable information for prior years). One of Allstate’s witnesses (Mr. Regan) says it is premature for it to assess its losses until it goes through the policy renewals cycle; however, that witness also admitted during cross-examination that the renewals happen daily and are not on a common annual renewal cycle, so some would have come up by now. Another of its witnesses (Mr. Bishop) says that Allstate continues to write business and do well in Brampton and that he is not aware of any reputational damage or losses.

[46] Evidence of damage to Allstate’s reputation and losses flowing from any loss of reputation and goodwill is also lacking. Further, I do not accept Allstate’s argument that because Ms. Joshi’s expressions accuse it of racial discrimination, either explicitly or by necessary implication, that is the same thing as accusing it of criminal conduct or conduct so reprehensible that damages should be presumed. The case of *Montour et al v. Beacon Publishing Inc. et al*, 2017 ONSC 4735, at para. 40, affirmed, 2019 ONCA 246 that Allstate urges should lead the court to presume harm in this case was not just about alleged regulatory breaches concerning contraband tobacco but also involved allegations of activity linked to organized crime and terrorism. I do not consider Ms. Joshi to be making allegations of criminal conduct or conduct so reprehensible that damages should be presumed.

[47] However, the claim for malicious and/or injurious falsehood could be saved by Allstate’s claim for recovery of the costs of responding to the FSCO investigation (if ultimately vindicated), of which there is evidence in the record. Considering what can be reasonably expected of Allstate at this point in the litigation, the claim for malicious and/or injurious falsehood would not have

which a factual foundation has not been made out on the record; some may also not exist in law: see *Globex Foreign Exchange Corp. v. Kelcher*, 2011 ABCA 240, 513 A.R. 101, at paras. 48-58.

failed the merits threshold on the basis of the lack of substantiation of damages or losses, if it had otherwise not failed the merits threshold for lack of malice.

(ii) *Does Ms. Joshi have no valid defence?*

[48] For any defence that Ms. Joshi has put in play, this part of the test under s. 137.1(4)(a)(ii) requires Allstate to prove on a balance of probabilities that the defence is not valid. The onus is on Allstate to persuade me that a trier could conclude that none of these defences would succeed. That assessment must be among those reasonably available on the record (*Pointes*, at paras. 83-84).

[49] Since the claim for malicious and/or injurious falsehood failed under (i), I do not have to address the validity of the available defences, however, the substance of Ms. Joshi's defences to this claim would be similar to those in response to the defamation claim, in addition to the defence that she would have because of the absence of demonstrated malice.

[50] The defences that Ms. Joshi has put in play in response to the defamation claim that Allstate contend with for purposes of this motion are: absolute privilege, qualified privilege and fair comment.

Absolute Privilege

[51] The authorities that I was referred to by counsel for Ms. Joshi establish that absolute privilege operates against a claim for words spoken, documents prepared and actions taken in the ordinary course of a proceeding and applies to claims for both defamation and injurious falsehood: see *Clancy v. Farid*, 2018 ONSC 7482, at para. 56 and *Dooley v. CN Weber* (1994), 19 O.R. (3d) 779 (C.J. (Gen. Div.)), at para. 12.

[52] The issue that Allstate raises in relation to this defence is that Ms. Joshi's expressions were not confined to her pleading or made in the ordinary course of the proceeding. There are two aspects to this: first, that she made statements in a CBC interview (not just in a pleading); and second, that the statements made to the CBC are not identical to those in the pleading.

[53] I have difficulty with Allstate's position, which does not reflect the acknowledgment made by its counsel during oral argument that the mere repetition of allegations from the pleading in a media interview would be a harder case for it to make out. When initially published, the statements were uttered by Ms. Joshi for the purpose of a judicial proceeding, this action, by a plaintiff who has a duty to particularize her claims and, as such, they would be protected by absolute privilege: see *Amato v. Welsh*, 2013 ONCA 258, 362 D.L.R. (4th) 38, at para. 1.

[54] On the second point of whether Ms. Joshi said anything different in her CBC interview than what is in her statement of claim, I have already found (at paragraphs 8 and 18) that Ms. Joshi's expressions during the CBC interview were in substance and effect the same as what she said in her statement of claim. As she describes it, she was just repeating the allegations in the statement of claim in her own words. Malice might have vitiated the availability of this defence, but that has also not been established by Allstate for reasons previously indicated.

[55] While I have difficulty with Allstate's position, the law in this area was not thoroughly canvassed on the question of the flow-through of absolute privilege to statements repeated out of court. While this defence of absolute privilege might be available, I am not able to determine based on the submissions made whether or not a trier could conclude that Ms. Joshi's defence of absolute privilege would or would not succeed. However, I do not need to decide this in order to decide this motion because Ms. Joshi has other defences reasonably available to her in response to the proposed claim for defamation.

Qualified Privilege

[56] The authorities that I was referred to by counsel for Ms. Joshi establish that qualified privilege is also available as a defence in relation to the statements she made to the CBC, if Ms. Joshi had a legal, social or moral duty to make the communication and there is a corresponding interest or duty in it being received: see *Platnick*, at paras. 86 and 87. Ms. Joshi deposed that she felt compelled to speak about what I have concluded is a matter of public interest and that she had never condoned it. She would be one among a relatively small group of people who has knowledge, information and belief about the particular Allstate policy or practice in question. That could be enough for a trier to find that she had a social or possibly a moral duty to speak about it. The analysis that I have already undergone in reaching my conclusion that the expressions of Ms. Joshi were in relation to a matter of public interest also satisfies me that the public would have a corresponding interest in receiving information about this matter.

[57] Allstate tried to draw parallels between Ms. Joshi's expressions in this case and the statements made in the publication that was the subject of the *Montour* case in which the court found, at para. 37, that: "Clearly in law, there could be no duty to report uncorroborated allegations of smuggling contraband tobacco ... nor could there be any reciprocal interest in the general public receiving such allegations." I do not see the direct parallel between that case (of a third party's uncorroborated speculation and hypotheses) and this one involving someone who was directly involved in the activity that is the subject of the statements.

[58] Allstate also argued that the defence of qualified privilege was invalidated because Ms. Joshi's expressions were made maliciously, dishonestly, or with reckless disregard for the truth in that she did not responsibly investigate the existence and pervasiveness of the policy that she understood was being directed by her immediate supervisor. Allstate's argument is mostly answered by my earlier finding that there is no evidence of malice or any intentional dishonesty or ulterior/improper motivation on the part of Ms. Joshi. The allegation of recklessness has similarly not been made out on the evidentiary record. Ms. Joshi deposed to having challenged or questioned the policy or practice with her supervisor at the time and to his lack of responsiveness to her efforts to discuss it and to her concerns. This is not consistent with recklessness. Since Mr. Bishop denies that Ms. Joshi raised any concerns with him, this is a matter that will have to be resolved by the trier of fact. There is no basis on which I can resolve the conflict in the evidence between Ms. Joshi and Mr. Bishop. For purposes of this aspect of the motion where Allstate has the burden, I am not persuaded a trier would find Ms. Joshi to have been reckless.

[59] I am not persuaded that a trier would conclude that this defence of qualified privilege would not succeed. It is reasonably available to Ms. Joshi.

Fair Comment

[60] I am similarly not persuaded by Allstate that a trier would conclude that the defence of fair comment would not succeed.

[61] The record establishes that this defence is available to Ms. Joshi. Based on the authorities that I have been referred to by counsel for Ms. Joshi, I am satisfied that the impugned expressions were fair comments by her on a matter of public interest. For them not to be fair comment, Allstate must persuade me that a trier would conclude that: (i) they are not on a matter of public interest; (ii) they are not based on facts; (iii) they are not recognizable as comment (although it may include inferences of fact); (iv) they do not satisfy the objective test: could any woman honestly express that opinion on the proved facts? and (v) they were actuated by malice: see *Simpson v. Mair*, 2008 SCC 40, [2008] 2 S.C.R. 420, at para 1.

[62] Allstate has not persuaded me that Ms. Joshi's statements were not fair comment. My analysis in relation to other aspects of this decision address all but criterion (iii), which asks: are her expressions recognizable as comment? Allstate argues that some of Ms. Joshi's expressions repeated in the CBC article appear to be statements of fact rather than of her comment or belief or opinion. I do not agree. Allstate attempts to look at each expression or comment in isolation. Read in context, it is clear that, beyond the foundational facts, the crux of what she is saying, and what Allstate complains about, is her own belief about the meaning and discriminatory effect of the policy about which she speaks.

Conclusion Regarding the Validity of the Defences Put "in play" by Ms. Joshi

[63] In conclusion, even though there are grounds to believe that Allstate's counterclaim for defamation has substantial merit, I am not satisfied that there are grounds to believe that Ms. Joshi does not have a valid defence to that claim (or any of the other claims). Allstate has not persuaded me on a balance of probabilities that a trier could reasonably conclude that none of the defences advanced on behalf of Ms. Joshi to the counterclaim would succeed (*Pointes*, at para. 84).

Has Allstate Satisfied the Public Interest Hurdle of s. 137.1(4)(b) of the CJA?

[64] Section 137.1(4)(b) of the CJA provides that when the merits threshold is met, there may be some claims that target expression on matters of public interest that are properly terminated under a s. 137.1 motion even though they could succeed at trial.

[65] I am not obliged to address this aspect because Allstate's claims failed the merits test under s. 137.1(4)(a)(i) and/or (ii) (*Pointes*, at para. 99).

[66] However, I will address one aspect of this component of the test under s. 137.1(4)(b) that ties into an earlier point: The absence of any evidence from Allstate about any material monetary or reputational damages that it has suffered, or is likely to suffer, as a consequence of the impugned expressions.

[67] The Court of Appeal in *Pointes* explains (at para. 87) that "the plaintiff (by counterclaim) must satisfy the motion judge that the harm caused to it by the defendant's (by counterclaim)

expression is ‘sufficiently serious’ that the public interest engaged in allowing the plaintiff to proceed with the claim outweighs the public interest in protecting the defendant’s freedom of expression.”

[68] As I concluded earlier, Allstate might have been narrowly able to meet the requirement of showing harm in order to satisfy me of the merits of its claim for malicious and/or injurious falsehood (if it had not failed on the malice component) by its proof of costs incurred in responding to regulatory action that it says resulted from Ms. Joshi’s expressions (the outcome of which remains to be determined). However, for reasons outlined earlier, Allstate failed to meet its onus with respect to proof of any other monetary or reputational losses arising from the impugned expressions. Its evidence, at best, is that it would be premature to make this determination, and it did not make any effort to show what, if any, monetary or reputational damages it is likely to suffer as a consequence of the impugned expressions.

[69] If I had been required to undertake the s.137.1(4)(b) analysis, the costs of responding to the regulatory and client inquiries would not have been enough to tip the balance in favour of Allstate for me to allow its counterclaim to proceed. Whatever expenditures Allstate may have incurred in this regard could not outweigh the public interest in protecting Ms. Joshi’s freedom of expression to talk about the concerns she had about the additional layer of discrimination that was reflected in Allstate’s policy in the Milton office concerning the availability of insurance to Brampton residents.

[70] Counsel for Ms. Joshi also emphasized that she was careful in her choice of words and the quality of her expression, never calling Allstate racist and that she has refrained from delivering her message with vitriol or obscenities. The quality of the expression and the motivation for it would be factored into the weight to be given to the public interest in protecting the expression. (*Pointes*, at para. 94).

[71] Ms. Joshi deposed that the counterclaim has had the effect of a “libel chill” on her and her ability to speak out about her experiences, concerns and beliefs. She also talked about the additional stress that it has placed on her and her family. These might also have been relevant considerations in the balancing exercise in favour of dismissing the counterclaim and upholding the public interest in protecting her expression, if I had been required to undertake it: see *Pointes*, at paras. 95-96.

[72] Conversely, Allstate argued that the s. 137.1 balance should favour the plaintiff by counterclaim because Ms. Joshi has already chosen to be in court (and is not being dragged into court by Allstate). Allstate contends that otherwise Ms. Joshi would have free licence to say anything she wants and embellish without impunity. It is difficult for me to accept the characterization that Ms. Joshi has “chosen” to be in court when she is suing for wrongful dismissal. If she is right, she was forced into court by Allstate’s actions, not by her choice. Counsel for Ms. Joshi amplified this by referring me to the case of *Wood v. Fred Deeley Imports Ltd.*, 2017 ONCA 158, 134 O.R. (3d) 481, which (at para. 27) characterizes terminated employees as vulnerable and in need of protection.

[73] The hallmarks of SLAPP lawsuits do not all have to be present in order to grant a motion

to dismiss under s. 137.1(3), although defamation actions (which Allstate now admits the counterclaim is) do fit squarely within the traditional notion of a SLAPP suit: see *Pointes*, at para. 103; *Air Georgian Limited v. Eugeni*, 2019 ONSC 3250, at paras. 55 and 56. Other indicia of a SLAPP suit that might be present here include the financial and power imbalance that strongly favours Allstate over its former terminated employee (*Wood*, at para. 27), the prospect of a retributory purpose animating the counterclaim and the minimal or nominal damages thus far demonstrated by Allstate.

[74] I also do not accept that the result of my decision is to give Ms. Joshi free licence to say whatever she wants; if she does not guide herself by the requirements of the defences that she has raised in this case then future expressions by her could well be challenged.

[75] Furthermore, Allstate is not defenceless, as it suggests, in its ability to respond to what Ms. Joshi has said. It has delivered a defence and it is not constrained in its ability to speak publicly about its policies in relation to Brampton or otherwise.

[76] I fully appreciate the significant consequences of allowing this motion, but Allstate has not met its persuasive burden under s. 137.1(4) of the CJA.

Disposition

[77] The plaintiff's motion is granted and the counterclaim is dismissed. The parties asked to defer their submissions on costs until after they received my decision. I directed that they exchange costs outlines after the hearing (and in advance of receiving my decision) and assume they have done so. I now encourage the parties to try to reach an agreement on costs.

[78] The plaintiff also sought damages on this motion, in addition to her costs, as s. 137.1(9) of the CJA allows for. To succeed in such a claim, Ms. Joshi would have to satisfy me that Allstate brought its counterclaim "in bad faith or for an improper purpose." The mere fact that I have decided to dismiss it under s. 137.1 as a Strategic Lawsuit Against Public Participation is not enough to satisfy me of this.

[79] If the parties are able to reach an agreement on the issues of costs and/or s. 137.1(9) damages, if any, they should advise me of such in writing by August 15, 2019. Arrangements can be made at that time for an order to be signed reflecting my decision and what has been agreed. If no agreement is reached on costs and/or s. 137.1(9) damages, then Ms. Joshi may make written submissions (to be accompanied by a costs outline) within 20 days thereafter. Allstate may make written responding submissions (to be accompanied by a costs outline) within 20 days thereafter. Ms. Joshi may make brief written reply submissions, if so advised, within 10 days thereafter. All submissions should be served on the opposing parties and delivered to my attention at Judges' Reception, Superior Court of Justice at 361 University Avenue (Room 106), Toronto, Ontario M5G 1T3.



KIMMEL J.

CITATION: Joshi v. Allstate Insurance Company of Canada, 2019 ONSC 4382
COURT FILE NO.: CV-18-00609960-0000
DATE: 20190722

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

MEDHA JOSHI

Plaintiff/Defendant by Counterclaim
(Moving Party)

– and –

ALLSTATE INSURANCE COMPANY OF CANADA

Defendant/Plaintiff by Counterclaim
(Responding Party)

REASONS FOR DECISION

KIMMEL J.

Released: July 22, 2019