COURT OF APPEAL FOR ONTARIO

CITATION: Hamer v. Jane Doe, 2024 ONCA 721
DATE: 20241003
DOCKET: COA-23-CV-1047

Roberts, Zarnett and Favreau JJ.A.

BETWEEN

Dee-Anne Hamer and Roo Roo Cat Rescue

Plaintiffs/Responding Parties (Appellants)

and

Jane Doe also known as Tina Melo, J.C. Price, Susan Namedoff* and Nicole Accord*

Defendants/Moving Parties* (Respondents*)

Sara J. Erskine and Adrienne Zaya, for the appellants

Charlotté Calon and Braxton Murphy, for the respondents

Heard: July 4, 2024

On appeal from the order of Justice Loretta P. Merritt of the Superior Court of Justice, dated September 22, 2023, with reasons reported at 2023 ONSC 4837.

Roberts J.A.:

I. OVERVIEW

[1] The appellants challenge the motion judge's dismissal of their defamation action under s. 137.1 of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43 ("CJA").

[2] The appellants operate a cat rescue, rehabilitation and adoption service in Hamilton, Ontario. They initiated a defamation action against the respondents and others for negative posts and associated comments about them ("the impugned statements") on the Facebook group "Helping Pets in Need" ("the HPIN Group" or "the Group"). These impugned statements alleged or suggested that the appellants were mistreating the cats under their care and that the appellant, Ms. Hamer, was a cat hoarder with mental health issues.

[3] The respondents, Susan Namedof and Nicole Algar (who were respectively incorrectly named as "Namedoff" and "Accord" in the statement of claim), were volunteer administrators of the HPIN Group who were responsible for monitoring and vetting postings and comments ("the respondents") and were two of the defendants to the action. They brought a motion under s. 137.1 of the CJA to dismiss the appellants' action against them. Although the motion was brought by only the respondents, the motion judge dismissed the action against all the defendants and ordered full indemnity costs payable by the appellants to the respondents in the all-inclusive amount of $40,000.[1]

[4] The appellants assert that the motion judge committed legal error by misapplying the criteria under s. 137.1(4)(a) and (b) of the CJA and effectively treating the respondents' motion as a motion for summary judgment. In any event,

[1] At the end of their oral submissions, the appellants abandoned their costs appeal.

the appellants maintain that the motion judge erred by dismissing the action against two of the defendants, Tina Melo and J.C. Price, when they had not sought to dismiss the appellants' action.

[5] I agree that the motion judge failed to apply the requisite approach in determining a s. 137.1 motion. Specifically, her analysis lost sight of the fact that a s. 137.1 motion is intended as only a preliminary screening mechanism and that it requires the court to consider, as the Supreme Court instructs, "the delicate equilibrium between two fundamental values in a democratic society, freedom of expression and the protection of reputation": *Bent v. Platnick*, 2020 SCC 23, [2020] 2 S.C.R. 645, at para. 2. In my view, the motion judge's analysis effectively focussed only on the respondents' freedom of expression and lost sight of the equally important value of the protection of the appellants' reputation.

[6] When the provisions of s. 137.1(4) are correctly applied, I am persuaded that the appellants' action is not the kind of proceeding that "comes within the legislature's contemplation of one deserving to be summarily dismissed at an early stage": *Bent*, at para. 172. I would therefore allow the appeal.

II. BACKGROUND

[7] The background set out in this section is taken largely from the pleadings and the motion judge's reasons and is not in dispute.

(i) The parties

[8] The appellant, Dee-Dee Hamer (also known as “Sissy”), is the sole director of the appellant, Roo Roo Cat Rescue. She has operated Roo Roo Cat Rescue for over six years in the Hamilton area. The appellants are “well known fixtures” in the Hamilton cat rescue community for their work in rescuing, housing, treating, and facilitating adoptions of homeless cats. Their stated objective is “to provide the necessities of life, care, veterinary treatment and find suitable homes for feral, stray and abandoned cats and kittens”.

[9] The respondents were two of the four volunteer administrators of the HPIN Group that at the relevant time had approximately 2,000 members, including the defendants, Ms. Melo and Mr. Price. The HPIN Group was created and maintained as a closed forum for postings and comments on its discussion page by its members concerning animal welfare issues and, according to its “About” page, “to help pets and animals in need in the Hamilton area”.

(ii) The HPIN Group forum and the impugned statements

[10] The postings and comments on the HPIN Group forum were not visible to the public, although the Group’s “About” page could be viewed by anyone, and, up to a certain point in time, the posts and comments could be shared by members of the Group with recipients outside the Group. Members of the HPIN Group had to

be approved by one of the administrators and comply with the “Group Rules” that were as follows:

> 1. Be Kind and Courteous
>
> We’re all in this together to create a welcoming environment. Let’s treat everyone with respect. Healthy debates are natural, but kindness is required.
>
> 2. No Hate Speech or Bullying
>
> Make sure everyone feels safe. Bullying of any kind isn’t allowed, and degrading comments will not be tolerated.
>
> 3. Respect Everyone’s Privacy
>
> Being part of this group requires mutual trust. Authentic, expressive discussions make groups great, but may also be sensitive and private. What’s shared in the group should stay in the group.

[11] The Group’s “About” page also states: “Everyone is welcome but drama and negative comments are not. We have several admin’s who will be monitoring for this. Our purpose is to put the animal first!” As part of their volunteer duties, the respondents were tasked to ensure that the postings and discussions adhered to the HPIN Group’s “Group Rules” and had the ability to remove posts and comments that did not comply with them, turn off the comments function on posts, and remove members from the Group.

[12] On or around March 13, 2020, and prior to the publication of the impugned statements, Ms. Namedof on behalf of the administrators published a post updating the Group Rules and stated that: “Any comments deemed to be

‘unhelpful’ will be deleted and if it becomes a continuing issue we will have no choice but to remove you from the group.” Her post also advised that postings and comments could no longer be shared outside the HPIN Group.

[13] The impugned statements that form the pleaded basis for the appellants’ action against the defendants were posted on the HPIN Group forum on March 19, 25, 27, and July 3, 2020. They are reproduced in their entirety in Schedules to the statement of claim and/or are referenced in the statement of claim.

[14] The first impugned statement by Ms. Melo dated March 19, 2020, instigating an exchange among members that included the other impugned statements, did not identify the appellants by name but included the location of one of the premises where they carried out their operations. It read as follows:

> Unfortunately the hotline won’t do anything. A friend of mine lives in the area of Barton and Glendale. She says that there is a lady coming with cats in traps and with food and litter. The windows of the property are covered with newspapers. She says she always sees her bringing in cats and never sees her leaving with any. We think it’s a hoarding situation and possibly worse. What can we do?

[15] Ms. Melo’s post generated numerous comments. The respondents monitored the comments, reminded commenters to follow the Group’s Rules, and removed comment threads that contained offensive language or were otherwise unrelated to Ms. Melo’s March 19, 2020 post. In response to Ms. Melo’s post and related comments that it sounded liked “a hoarding/drug abuse situation”,

Ms. Namedof posted the following comments: “or she needs help. Either way police should be called”; “it could be mental health issues”; “it’s okay. We all worry about the cats.”; and indicated that the address of the property should not be given out. She also commented: “At the end of the day something concerning seems to be going on here. Police should be called and if it is a rescue and not a hoarder and they have nothing to hide, it shouldn’t be an issue.”

[16] The discussion under Ms. Melo’s March 19, 2020 post ended a few hours later when Ms. Algar turned off the commenting function “for the time being”. She reminded members that the concerns were allegations that still “need to be investigated and proven like any other post with suspected animal abuse or neglect”. Ms. Namedof also responded to a post about comments being hidden with: “no comments have been hidden. Inappropriate comments have been removed.”

[17] The next impugned statement dated March 25, 2020 was made by J.C. Price. In relation to Ms. Melo’s posts and related comments, Mr. Price posted: “Anyone have any updates on the location at Barton and Glendale that seemed to be housing a lot of cats?” Ms. Melo commented on his post and repeated her belief that the woman in charge of the property was likely a hoarder, unstable and “needs to be shut down”. She stated that she and a friend watched the woman “feverishly cleaning” the property and inserted a photo of multiple garbage bags on the sidewalk.

[18] Ms. Melo's comments became more agitated once they were challenged by others. For example, a member denied the allegations on the basis of her personal knowledge of the person referenced in Ms. Melo's post and the good work she carried out. In response, Ms. Melo said the person was wrong and "Sissy" did not come to the property to water or feed the cats and she could not afford veterinary care for all the cats she was "hoarding". Ms. Melo insisted the cats "will die in [the appellants'] care". Ms. Namedof removed Ms. Melo's invective from the Group and only left comments that described her observations of the situation at the Barton property.

[19] According to the statement of claim, on April 25, 2020, when challenged about his question, Mr. Price posted: "I apologize for being concerned about the welfare of animals" and "its frustrating though when you post under concern and get such a response."

[20] On April 28, 2020, the appellants' lawyers sent letters to the respondents demanding the removal of the March 19 and March 25 posts and associated comments. On May 4, 2020, separate notices of libel were sent to the defendants.

[21] By May 4, 2020, Ms. Melo had deleted or deactivated her Facebook account which resulted in her posts and comments being removed from the HPIN Group page.

[22] Finally, on July 3, 2020, Ms. Namedof posted the warning letter sent by the appellants' lawyers and stated that the group administrators were being threatened

with legal action for simply posting statements by a citizen who was concerned about animal welfare.

(iii) Defamation Proceedings

[23] On October 2, 2020, the appellants issued their statement of claim against the defendants, claiming: $100,000 in general damages for libel and slander; unparticularized special damages; aggravated, exemplary and punitive damages in the amount of $60,000; and interim and permanent injunctive relief. They were able to serve all the defendants except for Ms. Melo with their statement of claim. The appellants were unable to identify or find Ms. Melo because “Tina Melo” is not a real name, but the alias used by the person who made the impugned statements attributed to her. As a result, Ms. Melo did not deliver a statement of defence or otherwise participate in these proceedings. J.C. Price delivered his statement of defence dated January 4, 2021.

[24] The respondents delivered their statement of defence dated January 25, 2021. They denied the allegations, including that the impugned statements were defamatory of the appellants, but pleaded in the alternative that if they were defamatory of the appellants, the impugned statements related to matters of public interest concerning animal welfare, were true or substantially true, fair comment, made in good faith without malice, and responsibly communicated.

[25] The respondents brought a motion under s. 137.1 of the CJA to dismiss the appellants’ action against only themselves. Ms. Melo was not served with, nor did

she participate in, the respondents' motion. Although served with the respondents' motion, Mr. Price did not participate. Neither Ms. Melo nor Mr. Price was served with the appellants' notice of appeal and they did not participate in the appeal.

[26] The motion judge stated that the appellants' claim arose from three posts and the comments made under those posts: the March 19, 2020 post by Ms. Melo; the March 25, 2020 post by Mr. Price; and the July 3, 2020 post by Ms. Namedof. She declined to consider other posts made on a separate forum because they were not pleaded and there was no motion before her to amend the statement of claim.

[27] The motion judge concluded that the impugned posts were "public interest expression" because they concerned animal welfare and the quality of animal protection services. Although the appellants were not expressly named in the impugned posts, the motion judge found that the posts contained sufficient identifying details that referred to the appellants, and that at least some but not all of them were *prima facie* defamatory.

[28] However, the motion judge concluded that the appellants had failed to show that there were grounds to believe that justification and fair comment were not valid defences and had no prospect of success. She also found that the appellants had failed to demonstrate that they had suffered actual harm and that any potential harm was outweighed by the importance of the public expression of the impugned statements.

[29] As a result, the motion judge dismissed the action against all the defendants with full indemnity costs of $40,000 payable by the appellants to the respondents.

III. ISSUES AND STANDARD OF REVIEW

[30] The appellants raise the following issues on appeal:

1. Did the motion judge err in her application of s. 137.1(4)(a) and (b) of the CJA?
2. Did the motion judge err in dismissing the action against all the defendants when only the respondents brought a motion to dismiss under s. 137.1 of the CJA?

[31] In analyzing these grounds of appeal, I am mindful of the applicable deferential standard of appellate review owed to the motion judge's determination on a s. 137.1 motion. Absent an error in law or a palpable and overriding error of fact or mixed fact and law, there is no basis for appellate intervention: *Marcellin v. London (Police Services Board)*, 2024 ONCA 468, at para. 57; *Park Lawn Corporation v. Kahu Capital Partners Ltd.*, 2023 ONCA 129, 165 O.R. (3d) 753, at para. 42, leave to appeal refused, [2023] S.C.C.A. No. 172; *Bent*, at para. 77.

[32] However, if such an error is established, the court may consider the matter afresh: *Marcellin*, at para. 57. As I shall explain, that is the case here.

IV. ANALYSIS

(1) First Issue: Did the motion judge err in her application of s. 137.1(4)?

(a) Section 137.1 of the CJA and its general legislative purposes

[33] In my view, the motion judge's analysis did not adequately consider both legislative purposes underlying s. 137.1 of the CJA, which inform the "delicate equilibrium" referenced by the Supreme Court in *Bent*, namely: protection of free speech; *and* the protection of one's reputation through a legitimate action. As I shall explain, the motion judge effectively focussed on the protection of free speech to the exclusion of the protection of one's reputation through a legitimate action.

[34] Both legislative purposes informed the enactment of s. 137.1 of the CJA. This section stems from the Anti-SLAPP Advisory Panel that was convened in 2010 by the Attorney General of Ontario to advise the government on how to respond to the proliferation of strategic lawsuits in matters of public interest. In its final report, the panel recommended Ontario enact legislation that offers a broad scope of protection to legitimate participation in public matters, while simultaneously ensuring that persons may seek legal protection from harm to their reputations: Ontario, Ministry of the Attorney General, Anti-SLAPP Advisory Panel: Report to the Attorney General, (Toronto: 2010), at para. 22. The panel's report emphasized the need for a balanced and proportional legislative approach: while "an adverse effect on the ability of persons to participate in discussion on matters

of public interest should not be sufficient to prevent the plaintiff's action from proceeding…the fact that a plaintiff's claim may have only technical validity should not be sufficient to allow the action to proceed": *Final Report*, at paras. 36, 37; *1704604 Ontario Ltd. v. Pointes Protection Association,* 2020 SCC 22, [2020] 2 S.C.R. 587, at para. 9.

[35] The debates in the Legislative Assembly of Ontario indicate an intention for the proposed legislation to represent this balanced approach. At the second reading of the bill, the Attorney General of Ontario at the time, Madeleine Meilleur, stated: "Our proposed legislation strikes a balance that will help ensure abusive litigation is stopped, but legitimate action can continue… Anyone who has a legitimate claim of libel or slander should not be discouraged by the legislation": Legislative Assembly of Ontario, *Official Report of Debates (Hansard)*, No. 41A, 1st Sess., 41st Parl., December 10, 2014, at p. 1975. The test adopted by the legislature in s. 137.1 of the CJA is substantively similar to the one proposed in the panel's Final Report: *Pointes*, at para. 9.

[36] Accordingly, s. 137.1 provides a preliminary screening mechanism under ss. 137.1(3) and (4) to prevent strategic lawsuits in matters of public interest: *Hansman v. Neufeld*, 2023 SCC 14, 481 D.L.R. (4th) 218, at paras. 49, 50; *Pointes*, at para. 16. The objective is to quickly identify and deal with strategic lawsuits, and ensure abusive litigation is stopped but legitimate action can continue: *Pointes*, at paras. 61, 62.

[37] Because the assessment under s. 137.1 is meant to be a preliminary screening mechanism, courts must carefully guard against conflating the summary vetting procedure under s. 137.1 with a motion for summary judgment under r. 20 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, and ensure that they engage in only a limited weighing of the evidence for the specific aim of assessing the legislated criteria under s. 137.1: *Pointes*, at para. 52; *Thorman v. McGraw*, 2022 ONCA 851, 476 D.L.R. (4th) 577, at para. 4; *Subway Franchise Systems of Canada, Inc. v. Canadian Broadcasting Corporation*, 2021 ONCA 26, 455 D.L.R. (4th) 525, at para. 55, leave to appeal refused, [2021] S.C.C.A. No. 87. Contested issues of fact and credibility and competing inferences drawn from contested primary facts are not to be resolved on a s. 137.1 motion: *Pointes*, at para. 52; *Bent*, at para. 65; *Subway Franchise Systems of Canada, Inc.*, at para. 55. As the Supreme Court instructed in *Pointes*, at para. 52, a motion judge deciding a s. 137.1 motion "should defer ultimate assessments of credibility and other questions requiring a deep dive into the evidence to a later stage, where judicial powers of inquiry are broader and pleadings are more developed."

[38] Subsection 137.1(3) of the CJA provides that "[o]n motion by a person against whom a proceeding is brought, a judge shall, subject to subsection (4), dismiss the proceeding against the person if the person satisfies the judge that the proceeding arises from an expression made by the person that relates to a matter of public interest" (emphasis added). As my emphasis makes clear, the relief under

this subsection is available only to the moving party who made or published the expression in issue. I shall return to this point later in these reasons.

[39] The initial onus is on the moving party to show on a balance of probabilities that the proceeding arises from an expression made by the moving party that is related to a matter of public interest: *Pointes*, at para. 31; *Bent*, at para. 87. If the moving party satisfies that onus, the onus then shifts to the responding party to satisfy the criteria under s. 137.1(4): *Pointes*, at para. 33; *Levant v. DeMelle*, 2022 ONCA 79, 79 C.P.C. (8th) 437, at para. 19, leave to appeal refused, [2022] S.C.C.A. No. 88.

[40] There is no issue taken on this appeal with the motion judge's finding that at least some of the impugned statements amount to an expression made or published by the respondents that is related to a matter of public interest, namely, animal welfare. While the appellants challenge the quality of and the protection that should be accorded to the impugned statements, which I address later in these reasons, that is not an issue that affects the motion judge's finding that the respondents met their onus under s. 137.1(3) of the CJA.

[41] Accordingly, the focus of this appeal centres on the motion judge's application of the criteria under s. 137.1(4),[2] to which I now turn.

[2] The appellants abandoned their costs appeal at the hearing of the appeal.

(b) Requisite Analysis under s. 137.1(4)

[42] Subsection 137.1(4) reads as follows:

> (4) A judge shall not dismiss a proceeding under subsection (3) if the responding party satisfies the judge that:
>
> (a) there are grounds to believe that,
>
> (i) the proceeding has substantial merit, and
>
> (ii) the moving party has no valid defence in the proceeding; and
>
> (b) the harm likely to be or have been suffered by the responding party as a result of the moving party's expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression. [Emphasis added.]

[43] I have emphasized the provisions of s. 137.1(4) that set out the standard to be applied in the court's determination in keeping with the function of s. 137.1(4) as an initial screening mechanism.

(i) Subsection 137.1(4)(a): the merits-based hurdle

[44] The merits-based hurdle under s. 137.1(4)(a) that "there are grounds to believe" that "the proceeding has substantial merit" is not "a high bar" and one lower than the "balance of probabilities" standard applied to the analysis under s. 137.1(3): *Pointes*, at para. 35; *Bent*, at para. 87; *Marcellin*, at para. 10. This is because the merits-based hurdle "is a preliminary assessment of the claims advanced and the defences to them" and "intended to provide an overall

assessment of the prospects of success of the action": *40 Days for Life v. Dietrich*, 2024 ONCA 599, at para. 43. As the Supreme Court instructed in *Pointes*, at para. 37, *per* Côté J.: "To be sure, s. 137.1(4)(a) is not a determinative adjudication of the merits of the underlying claim or a conclusive determination of the existence of a defence" (emphasis added). See also: *Pointes*, at para. 59.

[45] This lower hurdle is reflected in the requirement that the responding party must only satisfy the motion judge that "there are grounds to believe" the criteria under ss. 137.1(4)(a)(i) and (ii). Therefore, the merits-based burden on the responding party is not a high one and should not be overstated: *Mondal v. Kirkconnell*, 2023 ONCA 523, 485 D.L.R. (4th) 90, at paras. 51, 58.

[46] Fulfillment of the "grounds to believe" standard only "requires a basis in the record and the law - taking into account the stage of the litigation": *Bent*, at para. 87; *Pointes*, at para. 39. Importantly in this regard, the Supreme Court in *Bent* elaborated that "a basis in the record" means that "*any* basis in the record and the law will be sufficient" and that "[b]y definition, '*a* basis' will exist if there is a single basis in the record and the law to support a finding of substantial merit and the absence of a valid defence", so long as that basis is "legally tenable and reasonably capable of belief": at para. 88 (emphasis in the original). See also: *Pointes*, at paras. 39-40; *40 Days for Life*, at para. 43; *Mondal,* at paras. 51; *Subway Franchise Systems of Canada, Inc.*, at paras. 66-68.

[47] What does the “grounds to believe” standard entail when applied to the criterion under s. 137.1(4)(a)(i) that “the proceeding has substantial merit”? I start with the Supreme Court’s definition that “substantial merit” means “a real prospect of success – in other words, a prospect of success that, while not amounting to a demonstrated likelihood of success, tends to weigh more in favour of the plaintiff”: *Pointes*, at para. 49; *Bent*, at para. 90. What s. 137.1(4)(a) asks, in effect, is whether the motion judge concludes from his or her assessment of the record that “there is a basis in fact and in law – taking into account the context of the proceeding – to support a finding that the plaintiff’s claim has substantial merit” in that its prospect of success weighs more in favour of the plaintiff: *Pointes*, at para. 42.

[48] I turn next to the requirements of s. 137.1(4)(a)(ii). Section 137.1(4)(a)(ii) “operates as a *de facto* burden-shifting provision” whereby the moving party defendant “must first put in play the defences it intends to present, and then the burden effectively shifts to the plaintiff, who bears the statutory burden” of showing there are grounds to believe that the defences have no real prospect of success: *Pointes*, at paras. 56, 60; *Bent*, at paras. 101, 103.

[49] The responding party plaintiff is not required to show that the defences will inevitably fail, as “[t]o approach s. 137.1(4)(a)(ii) in that fashion risks turning a motion under s. 137.1 into a summary judgment motion”: *Lascaris v. B’nai Brith Canada*, 2019 ONCA 163, 144 O.R. (3d) 211, at para. 33, leave to appeal refused,

[2019] S.C.C.A. No. 147. Similar to the burden under s. 137.1(4)(a)(i), the limited burden on the responding party under s. 137.1(4)(a)(ii) is to show that there exists *any* basis in the record or law, having regard to the stage of the proceeding, to support a finding that the defences do not tend to weigh more in favour of the moving party defendant: *Bent*, at para. 103. A determination that the asserted defences could go either way in the sense that they could be accepted or rejected is a finding that the defences may not succeed: *Subway Franchise Systems of Canada*, *Inc.*, at paras. 56, 57; *Bondfield Construction Company Ltd. v. The Globe and Mail Inc.*, 2019 ONCA 166, 144 O.R. (3d) 291, at para. 15.

[50] Finally, while the responding party must meet all the criteria under ss. 137.1(4)(a)(i) and (ii), these criteria should not be considered in isolation; they inform each other. The inquiry under (ii) mirrors the one under (i) because "[i]n effect, 'substantial merit' and 'no valid defence' are 'constituent parts of an overall assessment of the prospect of success of the underlying claim'": *Bent*, at para. 101, citing to *Pointes*, at paras. 59, 60. Accordingly, the motion judge must assess the criteria together.

(ii) The motion judge's reasons under s. 137.1(4)(a)(i) and the required approach

[51] I agree with the appellants' submission that the motion judge did not follow the correct analytical framework under s. 137.1(4)(i).

[52] The respondents argue that the appellants are precluded from revisiting the motion judge's analysis under s. 137.1(4)(a)(i) because she found that it had been satisfied. I disagree.

[53] The motion judge's treatment of s. 137.1(4)(a)(i) contains analytical error that permeates her analysis under ss. 137.1(4)(a) and (b). Specifically, the motion judge did not carry out the requisite robust analysis of the issue of whether there were grounds to believe that the appellants' action had substantial merit. Rather, she considered the impugned statements and comments in isolation of each other and effectively required the appellants to prove each was defamatory on an individual basis. This led her to misapprehend the overall sting or main thrust of the defamation in issue and to undervalue the merit of the appellants' action. While that analytical error may not have affected her conclusion that the appellants met their onus under s. 137.1(4)(a)(i), it skewed her overall assessment of s. 137.1(4)(a), as well as her final weighing of the factors under s. 137.1(4)(b).

[54] I am not persuaded by the respondents' argument that when read as a whole, the reasons show that the motion judge applied the correct standard. In her consideration of s. 137.1(4)(a)(i), the motion judge did not refer to the "grounds to believe" standard but stated that the appellants "must show their claim has substantial merit" and that they "must show that they have a real chance of proving that the words were published, that they referred to the [appellants] and that they

are defamatory in the sense that they would lower the [appellants'] reputation in the eyes of a reasonable person" (emphasis added).

[55] In failing to apply the correct "grounds to believe" standard in her assessment of the criteria under s. 137.1(4)(a)(i), the motion judge erred in law by applying a standard that was higher than the legislated standard and inconsistent with the nature of the required preliminary assessment.

[56] Applying the correct approach, in assessing whether the appellants' defamation proceeding has substantial merit for the purposes of s. 137(4)(a)(i), the following three criteria must be met, as noted in *Bent*, at para. 92:

> 1. The words complained of were published, meaning that they were communicated to at least one person other than the plaintiff;
>
> 2. The words complained of referred to the plaintiff; and
>
> 3. The impugned words were defamatory, in the sense that they would tend to lower the plaintiff's reputation in the eyes of a reasonable person.

[57] The motion judge correctly alluded to these criteria and concluded that the appellants' burden under s. 137.1(4)(a)(i) with respect to the first two criteria were met, noting the respondents' concession that "at least some of the statements" made by Ms. Melo that suggest that Ms. Hamer might be "a hoarder or unstable" in the first and second posts are "*prima facie* defamatory".

[58] However, the motion judge erred by then taking a piecemeal approach to the impugned statements and requiring the appellants to prove each one in

isolation of the other. The motion judge concluded that "the other statements contained in the impugned posts are not *prima facie* defamatory" and that the July 3, 2020 post did not identify the appellants and could not lower the appellants' reputation because Ms. Melo's post and comments had been removed by the time it was posted.

[59] It was necessary to consider the cumulative effect of all the posts and comments. Ms. Melo's March 19, 2020 post served as the catalyst for all the related posts and comments that culminated in Ms. Namedof's July 3, 2020 post. All these posts and comments were interconnected and formed part of a series of statements relating only to the appellants and about the same subject, namely, the welfare of the cats in the appellants' care. They were inseparable from each other and had to be considered as a whole so that the sting or the main thrust of the defamation could be properly ascertained: *Bent*, at paras. 107, 108. While each defendant is responsible for his/her own statement in the absence of republication, each defendant's post made in response to another's post must be read in the context of the prior posts: *Armstrong v. Corus Entertainment Inc.*, 2018 ONCA 689, 143 O.R. (3d) 54, at para. 67.

[60] When correctly characterized, it is clear that the sting or main thrust of the impugned statements alleges that under the deliberately misleading auspices of the appellant cat rescue operation, Ms. Hamer is a mentally unstable cat hoarder who mistreats or even kills cats in her care and "scams" money in order to do so.

[61] The correct characterization of the sting of the defamation changes the analysis of whether there are grounds to believe that the appellants' action has substantial merit. Clearly, the sting of calling someone a mentally unstable cat hoarder who kills cats in her care is very damaging to the professional reputation of the appellants in the relatively circumscribed cat rescue community of Hamilton where the appellants are apparently well known. Calling the appellants "cat killers" is obviously much more damaging than the allegation of simply keeping too many cats in one place: it goes to the core of the appellants' professional reputation as cat rescuers. The motion judge's mischaracterization of the sting of the defamation caused her to understate, in her overall assessment, the legitimacy of the appellants' action and their right to protect their reputation by way of their action.

(iii) Are there grounds to believe the respondents have no valid defences?

[62] In response to the appellants' action, the respondents pled the defences of fair comment, justification, and responsible communication.

[63] The correct analysis under s. 137.1(4)(a)(ii) required the motion judge to assess whether there were grounds to believe that the respondents had no valid defences to the appellants' action. Accordingly, the motion judge was required to assess whether the appellants had shown there was a basis in the record and the law to support a finding that the defences put in play by the respondents do not tend to weigh more in their favour: *Bent*, at para. 103.

[64] For the reasons that follow, I conclude that the motion judge erred in her analytical approach. While I am prepared to assume that she applied the correct "grounds to believe" standard – she refers to that standard intermittently albeit inconsistently in her analysis of the defences - her analysis is nevertheless flawed because of her mischaracterization of the sting of the defamation. Moreover, she relied on inadmissible hearsay to support the factual foundation of the respondents' defences.

(a) Fair comment defence

[65] The defence of fair comment has the following elements: the comment must be on a matter of public interest; the comment must be based on fact; the comment must be recognizable as comment; the comment must satisfy an objective test: *Hansen*, at para. 96. There must be a factual foundation for the impugned statement: *Hansen*, at para. 99.

[66] Even if the comment satisfies the above objective elements, the defence can be defeated if the plaintiff proves that the defendant was actuated by malice. Malice can be established by reckless disregard for, or indifference to, the truth, by spite or ill-will, or by any indirect or ulterior motive: *Hansen*, at para. 115; *2110120 Ontario Inc. v. Buttar*, 2023 ONCA 539, 485 D.L.R. (4th) 551, at para. 72, leave to appeal refused, [2023] S.C.C.A. No. 432; *Awan v. Levant*, 2016 ONCA 970, 133 O.R. (3d) 401, at paras. 55, 94, 96, leave to appeal refused, [2017] S.C.C.A. No. 71.

[67] Little or no effort to check the facts may support a finding of malice: *Awan*, at paras. 55, 94, 96. The argument for recklessness must be understood having regard to the context in which the comments were made: *WIC Radio Ltd. v. Simpson, 2008 SCC 40, [2008] 2 S.C.R. 420*, at para. 56. It may be that in some contexts, a failure to inquire into the truth of a matter will give rise to a finding of recklessness, and hence malice: *Mondal*, at para. 63.

[68] A fair comment defence can also be defeated by malice if a defendant acts "out of revenge in order to obtain satisfaction for some personal resentment or grudge": *Zoutman v. Graham*, 2019 ONSC 2834, [2019] O.J. No. 2398, at para. 101, aff'd 2020 ONCA 767, [2020] O.J. No. 5287; *Mondal*, at para. 57.

[69] Accordingly, the appellants could satisfy their burden to establish that there were grounds to believe that the respondents' defence of fair comment would not succeed, either by establishing grounds to believe that the respondents could not establish fair comment, or grounds to believe that a fair comment defence otherwise available to them would be defeated by malice: see e.g., *Canadian Union of Postal Workers*, at paras. 31-34; *Mondal*, at para. 51.

[70] The motion judge's mischaracterization of the sting of the defamation meant she did not assess whether there were grounds to believe that the impugned statements that Ms. Hamer was a mentally unstable cat hoarder who harmed cats in the appellants' care amounted to fair comment.

[71] The motion judge also erred by considering hearsay evidence to find a factual foundation for the defence of fair comment. In her assessment of the defence of fair comment, the motion judge wrote:

> The posts appear to have a factual foundation; they were based on [Ms. Melo's] observations that [the appellants] were keeping cats at a commercial property, some cats were under the care of a veterinarian and in critical condition, some cats were kept at the property for multiple weeks at a time, there was newspaper on the windows, and [Ms. Melo] only ever saw cats going inside in cages and none coming out. Based on these facts, a person could honestly express the opinion that the [appellants'] rescue practices were concerning and [the appellants] were keeping too many cats at the premises and this could lead to poor outcomes for the cats … Read in context, [Ms. Melo's] expressions are recognizable as opinion. [Emphasis added.]

[72] Hearsay evidence on a motion is only admissible where the source of it is known and it is on uncontentious matters: rr. 39.01(4) and (5) of the *Rules of Civil Procedure*. Only the appellants and the respondents filed affidavit evidence on the motion. Specifically, none of the evidence of the individuals to which the respondents refer in their respective affidavits nor, importantly, Ms. Melo's evidence, was before the court other than by way of hearsay. Moreover, the hearsay evidence was highly contentious. And, given that Ms. Melo's identity was unknown, the source for the information contained in her posts was also untraceable and unknowable. As a result, the motion judge erred in relying on the respondents' evidence that depended on hearsay.

[73] The respondents argue that the appellants' admissions, as noted by the motion judge, support the motion judge's conclusions. I disagree. By themselves, the appellants' admissions are insufficient to support the validity of the respondents' defence of fair comment. They do not go to the crux of Ms. Melo's observations that constitute the sting of the alleged defamation: namely, that Ms. Hamer is a cat hoarder, mentally unstable, and a "scammer" who abuses the cats in the appellants' care. At most, they support a finding that the defence of fair comment could go either way – and, in that case, there would be grounds to believe that the defences could be rejected and would fail.

[74] Finally, although the respondents pleaded that the impugned posts were made without malice, the motion judge's assessment of the issue of malice was flawed in two ways.

[75] First, it was impacted by her mischaracterization of the sting. The motion judge did not consider whether there were grounds to believe that the respondents have no valid defence of fair comment because Ms. Melo was actuated by malice based on the correctly characterized sting of her impugned statements that Ms. Hamer was a mentally unstable cat hoarder who hurts cats in the appellants' care.

[76] Second, the motion judge did not address whether there were grounds to believe that the respondents had no valid defence of fair comment because they, as distinct from Ms. Melo, were actuated by malice or recklessness that could be

found to amount to malice, either by allowing Ms. Melo's anonymous posts to continue, by failing to check the accuracy of the posts and to remove them, or by making the statements attributed to the respondents, including the July 3, 2020 post that purported to justify Ms. Melo's posts.

[77] In other words, there are grounds to believe that the respondents have no valid defence of fair comment. Ms. Melo's increasingly vehement assertions against the appellants could support an argument that her actions were motivated by spite or ill-will. The respondents' apparent failure to take any steps to verify the postings of the anonymous Ms. Melo could be construed as recklessness amounting to malice.

[78] Moreover, Ms. Namedof's July 3, 2020 post that purports to justify Ms. Melo's posts, which had long since been removed, by characterizing them as the legitimate manifestation of a citizen's concern about animal welfare, could support the argument that Ms. Namedof's actions were motivated by malice in the sense of retaliation for the receipt of the letter from the appellants' lawyer.

[79] To be clear, the appellants may not ultimately succeed at trial in establishing malice; however, on a motion under s. 137.1(4)(a) and (b), the appellants only need to establish that there are grounds to believe that the respondents' fair comment defence will not succeed in order to clear the merits-based hurdle: *Mondal*, at para. 57; *Canadian Union of Postal Workers*, at para. 32. In my view, they have done so.

(b) Defence of Justification

[80] The motion judge's consideration of the respondents' defence of justification contains the same analytical flaws as her assessment of the defence of fair comment.

[81] To succeed on the defence of justification at trial, the burden is on the defendant to prove the substantial truth of the sting or main thrust of the defamation: *Bent*, at para. 107. In other words, "the defence of justification will fail if the publication in issue is shown to have contained only accurate facts but the sting of the libel is not shown to be true": *Bent*, at para. 107, citing Peter A. Downard, *The Law of Libel in Canada*, 4th ed. (Toronto: LexisNexis, 2018), at §6.4. Partial truth is not a defence: *Bent*, at para. 108. In other words, justification is not available as a defence if part of the posts and comments are untrue.

[82] The motion judge's conclusion with respect to the defence of justification largely depends on inadmissible hearsay evidence from individuals, like Ms. Melo and others to whom the respondents made reference in their respective affidavits:

> There is evidence that a number of people involved in the Hamilton rescue community had concerns about [the appellants'] rescue practices at the time of the impugned posts, including a concern that [the appellants] tended to keep too many cats at one time. People known to [the appellants] have admitted she had difficulty with the practice of trapping, neutering and returning feral cats to their environment. [The appellants] have admitted many of the statements made by [Ms. Melo] are true (i.e. the

> windows were covered, cats were held at the property including cats that were undergoing treatment or in critical conditions, and some cats were kept there for weeks at a time). [Emphasis added.]

[83] Again, absent the requisite factual foundation, there are grounds to believe that the respondents have no valid defence of justification. While the appellants' admissions may provide a basis for the truth of some of the statements, i.e., the appellants are keeping cats and perhaps too many cats, there are grounds to believe that the admissions could not support the respondents' defence of justification with respect to the true sting of the defamation, i.e., Ms. Hamer is a mentally unstable cat hoarder who abuses and kills cats in the appellants' care. The sting of the defamatory statements goes well beyond the admitted facts. At best, the defence could go either way, which means that there are grounds to believe that the respondents have no valid defence of justification.

[84] Accordingly, applying the proper test, there are grounds to believe the respondents have no valid fair comment and justification defences. While there may be a basis in the record to suggest that Ms. Hamer houses too many cats, there are grounds to believe that there is no defence to the real sting of the defamation that Ms. Hamer is a mentally unstable cat hoarder who abuses and kills cats in the appellants' care.

(c) Defence of Responsible Communication

[85] The motion judge did not squarely address the respondents' defence of responsible communication, but I shall do so to complete the analysis.

[86] To succeed on this defence at trial, the respondents must demonstrate that the subject matter of the impugned statements was of public interest and that the publication of the statements was responsible in the sense that reasonable steps were taken to ensure the overall fairness of the publication and the accuracy of any factual assertions: *Grant v. Torstar Corp*., 2009 SCC 61, [2009] 3 S.C.R 640, at para. 98; *Bondfield*, at para. 18; *Corus*, at para. 28; *Canadian Union of Postal Workers*, at para. 27. The defence of responsible communication can be defeated by a finding of malice because: "[a] defendant who has acted with malice in publishing defamatory allegations has by definition not acted responsibly": *Torstar*, at para. 125.

[87] A trier of fact could accept that the respondents' reason to publish the postings was on a matter of public interest, namely, animal welfare. However, the true sting of the defamation puts the overall fairness of the publication into question. Moreover, there are grounds to believe that this defence could fail because on this record, other than hearsay evidence, the respondents do not appear to have taken any steps to ensure the accuracy of the factual assertions in the publication.

[88] This was especially important in the context of an anonymous poster like Ms. Melo whom the respondents permitted to join the Group and make postings without first verifying Ms. Melo's identity and vetting her postings. The anonymous nature of postings on the Internet can create a greater risk that defamatory comments are believed, and the potential audience of such posts is far-reaching: *Barrick Gold Corp. v. Lopehandia* (2004), 71 O.R. (3d) 416 (C.A.), at para. 31.

[89] Finally, here, there is good reason to believe that the defence of responsible communication would be unavailable because a finding of malice could be made based on the analysis of malice above.

[90] As a result, both the overall fairness of the publication and the reasonableness of the steps taken by the respondents to validate the accuracy of any factual assertions in the impugned statements are open to legitimate dispute. A trier could reasonably find for or against the respondents on these issues. This establishes grounds to believe that the responsible communication defence could fail: *Bondfield*, at para. 18.

[91] As a result, I conclude that the appellants have met the merits-based hurdle under s. 137.1(4)(a). In coming to this conclusion, I am not making any findings that the appellants' action will ultimately succeed or that the defences will fail. Rather, I am applying the preliminary screening mechanism of s. 137.1.

[92] That, however, is not the end of the analysis. As the criteria under ss. 137.1(4)(a) and (b) are conjunctive, I turn to consider the motion judge's reasons under s. 137.1(4)(b).

(c) Subsection 137.1(4)(b): the weighing exercise

(i) Correct Analysis

[93] Section 137.1(4)(b) is the public interest weighing stage, which is the "crux of the analysis", where the focus is on "what is really going on" in this case: *Pointes*, at paras. 18, 30 and 81. The final weighing exercise requires the "structured evaluation" of the competing values of the public interest in allowing a legitimate action to continue to redress harm caused by the moving party's actions against the public interest in the moving party's expression.: *40 Days for Life*, at para. 93. As this court noted in *Mondal*, at para. 72:

> It seems uncontroversial to say that an interest that has little or no weight - a "technically valid" cause of action that causes "insignificant harm" - is outweighed by an interest in freedom of expression that is presumed to be very important. That is so because the price to be paid for protecting expression in these circumstances is minimal. In most cases, however, the weighing judgments that must be made under s. 137.1(4)(b) are more difficult and contentious, involving arguable claims of defamation with potentially significant, if undetermined, damages and contestable claims about the importance of the impugned expression.

[94] The burden on the responding party with respect to the alleged harm was recently described by this court in *Marcellin*, at para. 11: "The responding party

need not *prove* harm or causation but must simply provide evidence for the motion judge to draw an inference of likelihood in respect of the existence of harm and the relevant causal link" (emphasis in original). In *Thorman*, at paras. 11, 12, this court further explained that "[h]arm need not be 'monetized'" and that a "'definitive determination of harm or causation' is not required." Instead, in order to succeed on the weighing exercise, the [responding party] "must provide evidence that enables the judge 'to draw an inference of likelihood' of harm of a magnitude sufficient to outweigh the public interest in protecting the [moving party's] expression": *Hansman*, at para. 67. Neither reputational harm nor monetary harm is more important than the other. Nor is harm synonymous with the damages alleged: *Subway Franchise Systems of Canada, Inc.*, at para. 85.

[95] While no definitive determination of harm or causation is required, it is insufficient to rely on "[p]resumed general damages" or "bare assertions of harm": *Hansman*, at para. 67. That said, "there is no threshold requirement for the harm to be sufficiently worthy of consideration…the magnitude of the harm simply adds weight to one side of the weighing exercise": *Pointes*, at para. 70.

[96] Unlike the threshold analysis, where the question was simply whether the expression was related to a matter of public interest, at this stage, it is necessary to evaluate the expression's quality and the motivation behind it: *Pointes*, at para. 74. As this court explained in *Thorman*, at para. 14:

> The weighing analysis looks to the fundamental values underlying freedom of expression under s. 2(b) of the *Canadian Charter of Rights and Freedoms*, such as "the search for truth, participation in political decision making, and diversity informs of self-fulfillment and human flourishing, because '[t]he closer the expression is to any of these core values, the greater the public interest in protecting it'".

[97] To the extent the expression moves away from any of these core values, the public interest in protecting it diminishes. Defamatory statements and personal attacks are only "tenuously related to the core values which underlie s. 2(b) of the *Charter*" and therefore "there will be less of a public interest in protecting a statement that contains 'gratuitous personal attacks' and the 'motivation behind' the expression will be relevant to the inquiry": *Buttar*, at para. 87, *Bent*, at para. 163, *Pointes*, at paras. 74, 75; *Thorman*, at para. 15.

[98] In *40 Days for Life*, at para. 82, this court reiterated the correct approach in evaluating the quality of the expression:

> The Supreme Court cautioned in *Pointes* that "judges should be wary of the inquiry descending into a moralistic taste test", and instead instructed that the evaluation of the expression under s. 137.1(4)(b) should be guided by principles at the core of freedom of expression and other principles that underlie a free and democratic society: at paras. 76-77. This instruction should not be read as presupposing that moral evaluation is either unreasoned or lacking objectivity. Rather, it should be taken as an admonition to judges not to be quick to enter the fray on matters of moral controversy, and instead, for the purposes of this analysis, judges should disvalue only those expressions that would undermine or corrupt the core principles underlying the freedom of expression.

[99] In weighing the public interest in allowing a proceeding to continue, certain factors may be relevant, including a history of attempts to silence critics, financial power imbalance, punitive purpose, and minimal damages suffered. The potential chilling effect on future expression and the defendant's history of advocacy in the public interest may also be relevant: *Pointes*, at paras. 79, 80.

[100] In discussing factors that may bear on the public interest weighing exercise under s. 137.1(4)(b), at para. 79 of *Pointes*, Côté J. instructed that:

> [T]he only factors that might be relevant in guiding that weighing exercise are those tethered to the text of s. 137.1(4)(b), which calls for a consideration of: the harm suffered or potentially suffered by the plaintiff, the corresponding public interest in allowing the underlying proceeding to continue, and the public interest in protecting the underlying expression.

[101] While providing guidance on some of the relevant factors that may inform the analysis, Côté J. reminded that the "open-ended nature of s. 137.1(4)(b) provides courts with the ability to scrutinize what is really going on" and that s. 137.1(4)(b) "effectively allows motion judges to assess how allowing individuals or organizations to vindicate their rights through a lawsuit - a fundamental value in its own right in a democracy - affects, in turn, freedom of expression and its corresponding influence on public discourse and participation in a pluralistic democracy": *Pointes*, at para. 81.

(ii) Motion judge's reasons under s. 137.1(4)(b)

[102] I disagree with the motion judge's analytical approach. Rather than a balanced weighing of the relevant principles to which she referred, the motion judge proceeded on the understanding that "[the appellants] must establish harm caused by the expression" and that the issue "is whether the real purpose of the claim is to silence the [respondents] and whether the harm to [the appellants] is sufficient to outweigh the public interest in protecting [the respondents'] expression."

[103] The motion judge erred in her assessment of harm. She focused unduly on the public interest in protecting the expression and failed to consider the public interest in allowing the action to continue.

[104] As already noted, the appellants' burden under s. 137.1(4)(b) is not "to establish harm caused by the expression"; rather, it is to "provide evidence for the motion judge to draw an inference of likelihood in respect of the existence of harm and the relevant causal link": *Marcellin*, at para. 11. The question is whether the appellants have met their onus to establish that the harm likely to be or that has been suffered by them as a result of the respondents' expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression: *Levant*, at para. 71.

[105] The motion judge's imposition of a more onerous burden on the appellants with respect to the issue of harm is reflected in her treatment of the appellants'

proffered evidence on this issue and in her failure to engage in a robust consideration of the reputational harm caused by the sting of the defamation to the appellants.

[106] As the motion judge correctly noted, presumed harm, by itself, may not be sufficient in the weighing exercise to outweigh the public interest in protecting the respondents' expression. However, here, the appellants did not simply rely on presumed harm or bald statements of harm. Rather, they led affidavit evidence attesting to the loss of donations, loss of volunteers, loss of public engagement, and, with respect to Ms. Hamer, psychological and concomitant physical harm because of the impugned statements.

[107] The respondents challenged Ms. Hamer's evidence concerning the loss of donations, volunteers and public engagement: in Ms. Namedof's reply affidavit, she refers to ongoing "sizeable" food and financial donations to and the involvement of volunteers in the appellants' rescue operations. The respondents did not cross-examine Ms. Hamer on or otherwise challenge her evidence of psychological and physical injury.

[108] The motion judge did not properly assess the appellants' evidence of harm. She appears to have rejected or at least given no weight to the appellants' evidence of specific harms because they were not "established by documentation", including "medical evidence". In paragraphs 96 to 102 of her affidavit, Ms. Hamer sets out the details of the harm that she says she has suffered: she cannot sleep;

she has suicidal ideation; she is taking medication for her anxiety; and donations to her cat rescue have diminished.

[109] The motion judge's treatment of this evidence was inconsistent with a preliminary assessment of the evidence for the purposes of a s. 137.1(4) motion and reflected an approach consistent with a motion for summary judgment. As already noted, on this summary screening motion, it was not open to the motion judge to resolve real conflicts in the evidence, such as, for example, whether donations had diminished or not. It was open to the motion judge to reject the evidence as bald or insufficient. However, she had to explain why she did so, including why she required Ms. Hamer to produce medical documentation in support of her symptoms and medication.

[110] There was no basis on which the motion judge could have properly found Ms. Hamer's evidence to be, on its face, bald, vague, incredible or unreliable, especially given the limited assessment of the evidence that is appropriate at this stage. It was unnecessary for Ms. Hamer at this preliminary assessment stage to corroborate her evidence with medical documentation. At this preliminary stage, the burden on the appellants is to provide some evidence from which an inference of the likelihood of harm and causation could be drawn: *Marcellin*, at para. 92; *Thorman*, at para. 29.

[111] Specifically, with respect to the question of the psychological and concomitant physical harm described by Ms. Hamer in her affidavit, we note that

the Supreme Court in *Bent* did not require as part of the analytical framework that medical or other corroborating evidence be produced at the preliminary assessment stage for this kind of alleged harm but instructed, at para. 149, that these “intangible and subjective elements” should “factor into the assessment of the harm suffered by a plaintiff” and confirmed that “’injured feelings or the psychological impact’ of defamation are relevant to the assessment of damages”, with the reminder that “for the purposes of s. 137.1(4)(b), harm need not be monetized, as both ‘monetary harm or non-monetary harm can be relevant to demonstrating’ the existence of harm”, citing to *Pointes*, at paras. 68-71.

[112] Further, because of her mischaracterization of the sting of the defamation and her imposition of a more onerous burden to prove harm, the motion judge did not properly assess the reputational harm to the appellants, in particular, the harm to Ms. Hamer’s reputation. A consideration of the state of the appellants’ reputation was a necessary step in order to conduct a proper weighing under s. 137.1(4)(b): *Levant*, at para. 52; *Subway Franchise Systems of Canada, Inc.*, at para. 96.

[113] In *Bent*, at para. 146, Côté J. emphasized that "reputational harm is eminently relevant to the harm inquiry under s. 137.1(4)(b)" and that the Supreme Court's jurisprudence "has repeatedly emphasized the weighty importance that reputation ought to be given", because "reputation is one of the most valuable assets a person or a business can possess": see also *Pointes*, at para. 69. Moreover, she noted in *Bent*, at para. 147, that the "import of reputation is only

amplified when one considers *professional* reputation” (emphasis in original). As a result, she concluded, the harm analysis requires the consideration of not only the pleaded monetary harm, but also the harm to a plaintiff's reputation, "even if it is not quantifiable at this stage", noting that "the damaging effects that a defamatory remark may have on a plaintiff's ‘position and standing’ in the professional community exacerbate the harm suffered as a result": *Bent*, at para. 148; *Pointes*, at para. 71; *Thorman*, at para. 24.

[114] The harm analysis did not require the appellants to definitively quantify or prove their actual damages on this threshold motion, particularly because this case involves alleged reputational damages caused by very serious allegations of animal cruelty and disreputable dealings. The motion judge failed to acknowledge that general damages for defamation do not have to be proven. Importantly, as a result of her mischaracterization of the sting of the defamation, the motion judge failed to consider that the respondents’ very serious allegations against the appellants were potentially very harmful to the appellants' professional reputations. See: *Thorman*, at para. 23.

[115] The weighing exercise also requires an examination of the quality of the impugned statements. Rather than analyzing, as the motion judge was required to do, how close the impugned statements were to core *Charter* values, she focussed instead on the engagement of the respondents in animal welfare volunteer work and their participation in online activities related to animal welfare and rescue. Her

observations concerning the validity of the respondents' activities may have been relevant for her consideration of the defence of responsible communication, but they do not reflect on the quality of the impugned statements. Without this assessment, she could not determine whether the public interest in the protection of the impugned statements outweighed the harm to the appellants.

[116] Again, this relates to my earlier discussion of the motion judge's errors in assessing the sting of the defamation. When looked at as a whole, while Ms. Melo's initial post of March 19, 2020 seems to be motivated by animal welfare concerns and appears moderate, the same cannot be said of her subsequent posts that deteriorate into purely personal attacks against Ms. Hamer. Importantly, Ms. Melo's responses when challenged by more moderate voices became increasingly vitriolic. It was not simply the March 19 post that was in issue. The weighing exercise requires consideration of all the posts and related comments in issue and an examination of the quality of the expression and the motivation behind it. The vitriolic nature of the impugned statements should have been considered at this stage of the analysis.

[117] When taken as a whole, the quality of the impugned statements makes them less worthy of protection because they collapsed into personal and virulent attacks, unsupported by evidence, against Ms. Hamer.

[118] I am not persuaded by the respondents' submission that when the few inflammatory portions of Ms. Melo's posts are considered in the broader context of

animal welfare concerns, the public interest in the expression outweighs the harm to the appellants.

[119] The broader context is undoubtedly important for understanding the meaning of an expression; however, whatever good one ultimately hopes to achieve cannot be used to justify an expression that is untrue, not fair comment and could support a finding of malice, nor can it elevate the value of the expression: *40 Days for Life*, at para. 76.

[120] Further, the sting of the impugned expression was unnecessary to convey the animal welfare message. Ms. Melo and the respondents could have expressed their concerns about the appellants' activities without resort to the extreme and defamatory language that was used in the impugned statements. There is a significant difference between, on the one hand, providing others with a descriptive account of the animal welfare concerns with the appellants' activities, and on the other hand, calling Ms. Hamer a mentally unstable cat hoarder who harms or kills cats in the appellants' care: See: *Thorman*, at para. 30. Ms. Melo's posts subsequent to the March 19 post were unnecessary and gratuitous: she indicated that the police had been contacted to investigate her allegations. At that point, the utility of and public interest in allowing the further posts is questionable.

[121] Accordingly, I conclude that when considered as a whole, the impugned statements are worthy of little protection as an expression of animal welfare concerns.

(d) Conclusion on s. 137.1(4)

[122] When the criteria of s. 137.1(4) are correctly analyzed, I conclude: 1) there are grounds to believe that the appellants' action has substantial merit and that the respondents have no valid defence to the appellants' action; 2) the appellants have met their burden to provide evidence of harm beyond bare assertions; 3) the potential damage to their professional reputations in the cat rescue community of Hamilton appears considerable; and 4) the quality of the expression, when looked at in its entirety, is low.

[123] While I appreciate that there is one potential indicium of a SLAAP lawsuit, it consists only of one lawyer's letter that has been written in the past about which we have no other information. It certainly does not stand in support of a finding of a history of the appellants bringing strategic lawsuits or otherwise engaging in tactics to quell public debate about matters of public interest.

[124] What is really going on here? Unfortunately, the discussion, which appears to have started as an expression of concern about animal welfare, became an unnecessary personal attack against the appellants. As a result, I am of the view that the appellants have met their burden to establish that the public interest in allowing their action to proceed outweighs the public interest in the respondents' expression.

[125] I would therefore allow the appeal.

(2) Second Issue: Did the motion judge err in dismissing the entire action against all defendants?

[126] In my view, the motion judge erred in dismissing the action against the respondents. She compounded that error by dismissing the entirety of the action against all defendants, including Ms. Melo and Mr. Price. It is clear from the provisions of s. 137.1 of the CJA that the action may be dismissed against only the moving party, not other defendants who did not participate in the motion.

[127] As earlier noted, s. 137.1(3) provides for the dismissal of an action "against the person if the person satisfies the judge that the proceeding arises from an expression made by the person that relates to a matter of public interest". Similarly, s. 137.1(4) refers to the moving party, not to all defendants: the responding party must demonstrate, among other things, that there are grounds to believe that "the moving party" has no valid defence and that the sufficiency of the harm caused by "the moving party's expression" outweighs the public interest in that expression.

[128] Here, only the respondents brought a s. 137.1 motion to dismiss. As expressly stated in their notice of motion, they sought a dismissal of the appellants' action against only themselves. As earlier discussed, the proper determination of the motion required the motion judge to look at the respondents and their defences, not those of the other defendants, Ms. Melo and Mr. Price. Ms. Melo and Mr. Price were not represented by the respondents' counsel, nor did they participate in the

respondents' motion. There was no basis to grant relief that was not requested nor required as a result of the dismissal of the action against the respondents.

[129] The respondents resist this ground of appeal, arguing that it is inconsistent with a purposive reading of the statue and the clear direction of this court in *Schwartz v. Collette*, 2023 ONCA 574. I disagree.

[130] *Schwartz* has no application to this case. *Schwartz* confirmed the broad jurisdiction that motion judges have under s. 137.1(3) to dismiss the entirety of a plaintiff's action, even where some of the claims brought are "separate and distinct" from those at issue on the motion: at paras. 5, 6. This has nothing to do with the question here of whether the wording of s. 137.1(3) allows a court to dismiss a proceeding against a party who has not brought a motion to dismiss.

[131] The "purposive" approach suggested by the respondents ignores the plain language of s. 137.1(3) that only permits the court to dismiss the action against a party who brings the motion to dismiss. The court has no jurisdiction to dismiss the action against a party who does not bring or otherwise participate in the motion to dismiss.

[132] The respondents submit in the alternative that if s. 137.1(3) does not permit motion judges to dismiss against non-moving parties, this court should amend the respondents' notice of motion to add the non-moving parties. I would not accede to this request, which is inconsistent with their position that they neither speak for

nor represent those parties. This court has no jurisdiction in these circumstances to amend the notice of motion to include them.

[133] The notice of appeal was not served on Ms. Melo or Mr. Price. Ms. Melo has not participated in the action or the motion. As noted, that name is a pseudonym for a person who has not been located. In these circumstances, setting aside the improperly granted dismissal of the action against her does not require any further notice to her. I am mindful that Mr. Price was served with the respondents' motion to dismiss and, while he did not participate in it, achieved the benefit of the dismissal of the appellants' action against him. However, relief was granted that he did not request and that was beyond the power of the motion judge to grant. Moreover, the relief granted in his favour was not based on a separate analysis of his position but was completely derivative of the relief she granted to the respondents - relief I have found should not have been granted to them at all. Accordingly, even in the absence of notice to Mr. Price of this appeal, the dismissal order against him must be set aside. I do so without prejudice to any s. 137.1 motion Mr. Price may chose to bring and without prejudice to any objection by the appellants to his bringing such a motion given Mr. Price's failure to participate in the respondents' motion.

V. DISPOSITION

[134] Accordingly, I would allow the appeal and set aside the dismissal of the action, including the motion judge's costs award in favour of the respondents.

[135] In my view, the appellants were entirely successful on this appeal and would therefore be entitled to their costs of the appeal from the appellants in the all-inclusive agreed upon amount of $14,644.46.

[136] With respect to the motion costs, if the parties cannot agree on their disposition, I would permit them to deliver brief written submissions of no more than two pages, plus a costs outline, within ten days of the release of these reasons.

Released: October 3, 2024 “L.B.R.”

“L.B. Roberts J.A.”
“I agree. B. Zarnett J.A.”
“I agree. L. Favreau J.A.”