CITATION: Gorham et al. v. Behm et al., 2020 ONSC 6469
COURT FILE NO.: SC200001558550000
DATE: 2020/10/23

SUPERIOR COURT OF JUSTICE – ONTARIO

ONTARIO SMALL CLAIMS COURT

RE: BARRY GORHAM, COLLEEN HAGAN, CARRIE LINDSAY, SIDNEY CATLIN and WILLIAM HUBBS, Plaintiffs

AND

DARYL BEHM and VESNA KONDRIC, Defendants

BEFORE: Justice K. Phillips

COUNSEL: Jonathan P.M. Collings, for the Plaintiffs

Christopher A. Moore, for the Defendants

HEARD: October 20, 2020

DECISION ON MOTION

[1] The Defendants have a daughter who played competitive ringette. The Plaintiffs were her coaches.

[2] Things soured between the Defendants and the ringette team and league. Ultimately, the Defendants wrote an email complaint, which they sent throughout the ringette community. Alleging it to be defamatory and libelous, the Plaintiffs commenced an action.

[3] This is a motion brought by the Defendants pursuant to section 137.1 of the *Courts of Justice Act*, R.S.O. 1990, C. C.43 ("*CJA*"), to have the action brought to an end.

Background Facts

[4] The email in question was written December 4, 2019. In it, the Defendants outlined from their family's perspective why their 15-year-old daughter left her ringette team. It was written to the West Ottawa Ringette Association (WORA) and copied to essentially every ringette organization around. Although they did not directly identify the Plaintiff coaches, it would have been clear amongst the relevant community who they were referring to as they recounted their family's experience.

[5] The email contends that conflict arose early in the 2019-20 season from the fact that the Defendants' daughter wished to continue to juggle both competitive dance and competitive ringette. It alleges that the fact that she would miss some practices in doing so did not sit well with the coaches. At some point, four adult coaches took the girl into a private room to discuss the issue, apparently questioning her commitment to the team. It is said that she felt intimidated by this four on one dynamic and the general approach from the coaches and left the meeting upset.

[6] As the Defendants tell it, that early-season meeting got things off on a wrong foot. Other events unfolded which compounded the tension, at least from their perspective. Once, the girl questioned a coaching decision about a line change. Afterward, she was taken aside and disciplined. As well, the Defendants claim that her ice time appeared to become arbitrarily restricted. She was benched in the final minutes of some games in a way that did not seem fair.

[7] Eventually, the Defendants looked into moving their daughter off the team and into another league. Another team was found that followed a schedule which would allow for both ringette and dance. The coaches were informed and removed the girl from the roster. However, the league refused to grant the necessary release for the change. It would appear that the league did not want to compromise the competitiveness of its team by having the Defendants' daughter playing against them. In the result, after leaving the WORA team, she never played ringette again.

[8] The email is essentially a very detailed recounting of the situation outlined above. It is a long read, spanning over 7 single-spaced pages. Apparently written by the girl's mother, the tone is one of disappointment and frustration that her daughter was, in her view, effectively drummed out of ringette, a sport she loved. It is clear that the author is very biased and basing her assertions on a one-sided history about key conversations and events and that she is relaying highly subjective emotional reactions felt by the 15-year-old player.

[9] Where things are alleged to have become actionable is in the expression of some opinions. The email asserts that the girl was "intimidated" and "bullied" by the coaches when they met with her four on one, for instance. The allegedly arbitrary benching was described similarly: "It seemed more like a bullying tactic". In explaining the decision to leave the team, the Defendants write: "No one likes to feel intimidated, treated unfairly, disliked, and feel like they can't do anything right. You can't fault us for letting her step down from a team with these types of coaches because as parents we are all looking after the well-being of our children and don't want our children treated this way".

[10] The Plaintiffs take great exception to the way their conduct is characterized in the email. In submissions it was said that they feel "vilified". Pointing out that they are volunteer coaches with personal and professional reputations to preserve, they seek damages of $35,000.

Legal Principles

[11] It is agreed that this is an appropriate circumstance for application of s.137.1 of the *CJA*, a piece of legislation tailored toward "Prevention of Proceedings that Limit Freedom of Expression on Matters of Public Interest". It is further agreed that the recent Supreme Court of Canada decisions of *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22 and *Bent v.* Platnick, 2020 SCC 23, ought to govern my decision-making.

[12] In the circumstances, I have determined that the motion can be fairly disposed of by answering two questions:

> *Question one*: Have the Defendants established on a balance of probabilities that the proceeding arises from an expression made by them that relates to a matter of public interest?

> Only if the answer to that question is an affirmative one will the matter proceed to Question two;
>
> *Question two*: Have the Plaintiffs shown that the harm that has been or is likely to be suffered by them as a result of the Defendants' expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression?
>
> If this question is answered negatively the action must end.

Analysis

[13] I find in favour of the Defendants on question one.

[14] The evidence clearly establishes that the group of people involved are very much a community. They have something in common which they all care about a great deal – ringette in particular, and girls' sport in general. The social context at play involves a power structure, along with policies, rules, decision-making and enforcement, all meant to advance the community's shared interest.

[15] I reflect upon the purpose of freedom of expression, a concept understood in our law to be a fundamental right and value. Freedom of expression is the ability to express oneself and engage in the interchange of ideas. This activity fosters healthy communities by generating fruitful public participation in matters of shared interest. The exchange of perspectives and thoughts has value to any community interested in advancing any collective good.

[16] The best evidence of the public interest aspect of the email is the email itself. The first paragraph reads as follows:

> We are sending out the story of our daughter and how she has been treated by WORA, in order to help stop this or something like this from happening to other children. Along the way, somewhere, the WORA executives and the U16AA coaches have lost the perspective that ringette is for the children, whether they play competitive or regional. It's about the children not what the adults want. We have attached [our daughter's] story for you to read.

[17] This sharing of the story so that improvements can be effected is a theme repeated throughout. The email ends: "We hope by telling everyone [our daughter's] story, we can help stop this from happening to any other young players and we hope WORA and its competitive coaches learn from this…".

[18] I find on a balance of probabilities that the Defendants were motivated to express themselves with a view to communicating with a community they were part of in hopes of bringing about positive change to that community. Their motivation strikes me as reasonable and their communication was consistent with it. One could expect that a sports organization would welcome feedback from an athlete who chose to leave the sport because of dissatisfaction with the organization. The Defendants, in my judgment, were reasonably engaged in expression on a matter of public interest in all the circumstances.

Question two: Have the Plaintiffs shown on a balance of probabilities that the harm that has been or is likely to be suffered by them as a result of the Defendants' expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression?

[19] Those who volunteer their personal time to coach kids' sports are valuable assets in any community. The likes of the Plaintiffs are certainly deserving of appreciation and respect. That said, in my judgment, the harm to the Plaintiffs that could be said to have been caused by the email in question sits at the low end.

[20] To begin with, I note that not only does the email not directly identify the Plaintiff coaches, it touches on them in only a collateral way. The Defendants' central complaint is about the decisions made by the league. When the email is read as a whole, the Plaintiffs are hardly mentioned, relatively speaking. I also note that the Plaintiffs are referred to in the collective. No one is singled out. To a meaningful extent, there is safety in numbers here. The coaches, even if arguably maligned, are dealt with as a group. In my view, this would attenuate the effect on any of them in terms of reputational damage. To have been part of a group complained of is different from being said to have done something wrong as an individual.

[21] The email in question is very comprehensive and detailed. While it is obviously biased and full of reports of subjective feelings, it clearly sets out the factual basis for each of those feelings

and accompanying opinions and conclusions. It is not as if there are unexplained assertions made in a vague or indirect way that invite the reader to fill in the blanks. The detailed nature of the email allows the reader to assess the opinions and conclusions against actual facts.

[22] This is important because I must say that the alleged offenses committed by the coaches strike me as pretty small potatoes. The worst one, meeting with a player in a four on one way is hardly a high crime. Even accepting that it was ill-advised and maybe contrary to league policy, the adults in question were of mixed ages and genders and were familiar faces. The player was 15, not five. While it stands to reason that she would have found the meeting unpleasant, I do not think any reasonable person hearing of that event would find the coaches' conduct unduly concerning. Similarly, I find the coaching decision to discipline the girl after she talked back about a line change decision to be entirely in line with what anyone would expect a coach to do. Everyone knows that line changes are made in a hurried way, involving tactical decisions about which there can be disagreement. It is self-evident that a properly run bench must involve top-down one-way communication in respect of who takes the ice and those who think otherwise should be corrected. Finally, the unequal allocation of ice time is part of competitive sport. There would not be a competitive coach anywhere who has not received complaints from parents or players on that subject.

[23] The point I am trying to make is that the negative assertions about the coaches advanced in the email, when viewed in light of the accompanying facts, are not cogently connected to any actual evidence. To be sure, in a subjective sense events combined to form a context that upset the Defendants, but, objectively speaking, the conduct of the coaches does not amount to anything a reasonable outsider would deem offensive. At its highest, the perspective described by the Defendants is a series of clearly unintended consequences.

[24] I understand that the real concern from the Plaintiffs is in respect of the opinions expressed. I speak here to the assertions of "bullying" and "intimidation". I agree that no coach would want to be attached to those labels. At the same time, the actual facts underlying those opinions are clearly set out for all to see. In my view, any recipient of the email would perceive the bullying and intimidation claims as devoid of merit, offset by the obvious fact that the email author is a

biased raconteur of subjectively experienced events and that the opinions are far more emotionally driven than based in fact.

[25] I agree that reputation is important and that once it is damaged or lost it is hard to recover. However, in the totality of the circumstances, I see little likelihood that any reader of the impugned email would think anything less of the coaches involved as a result.

[26] On the other hand, I see considerable public interest in protecting the expression in question.

[27] There is significant power imbalance here. While I do not wish to be understood to be casting aspersions on anyone involved, it would appear that there is hierarchy in the way the WORA is structured and that the players and their families end up on the receiving end of authority. In my view, the ringette community should have an interest in the subject matter outlined in this email in order to ensure that its governing actions and policies do not have any unintended negative effects on any individual involved in the sport.

[28] An example of what I refer to here would be the decision by WORA to refuse to release the Defendants' daughter so she could play in another league. It is not my function to second-guess that decision. I do, however, think that it is a subject worthy of discussion. The powers that be who chose to refuse to allow this girl to continue playing competitive ringette could benefit from input from the family directly affected by their decision. The policy behind the decision may nonetheless survive intact but there is still considerable utility in exchanging ideas about it from the perspective of both sides. That is the value of freedom of expression on matters of public interest and it is high in this social context.

[29] In the final analysis, I find that the Plaintiffs have failed to show that the harm that has been or is likely to be suffered by them as a result of the Defendants' expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression.

Conclusion

[30] In accordance with the operation of section 137.1 of the *Courts of Justice Act*, this action is dismissed.

[31] I will receive submissions as to costs in writing, to be submitted within 30 days.

Justice Kevin B. Phillips

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ENDORSEMENT

PHILLIPS J.

Released: October 23, 2020