CITATION: [redacted] 2014 ONSC 5227
COURT FILE NO.: CV-13-493846
DATE: 20141003

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: [redacted] Plaintiff

AND:

[redacted] Defendant

BEFORE: Carole J. Brown J.

COUNSEL: Susan M. Vella, for the Plaintiff

Kevin Toyne, for the Defendant

HEARD: September 10, 2014

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ENDORSEMENT

[1] The defendant seeks an Order pursuant to Rule 21.01(1)(b) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, to strike a portion of the plaintiff's claim on the ground that it discloses no reasonable cause of action. The plaintiff brings a cross-motion pursuant to Rule 25.11 to strike portions of the defendant's statement of defence on the ground that they are scandalous, frivolous and vexatious. I will deal with each of the motion and cross-motion, consecutively, below.

[2] As background to the motion and cross-motion, I will provide a brief overview of the pleadings as set forth in the statement of claim and the statement of defence.

[3] The plaintiff, Ms. [redacted] alleges in her statement of claim that the parties began a romantic relationship in July of 2002 and engaged in protected sexual intercourse. She alleges that she had not previously engaged in sexual relations. In September 2002, the plaintiff asked the defendant if he had any STDs and he stated that he did not. She alleges that she placed a premium on ensuring that she was protected from STDs and that the defendant was aware of this. Thereafter, they made their relationship sexually exclusive. Subsequently, they began to have unprotected sex on the basis of the defendant's representations that he did not have any STDs and that he had recently tested negative for HIV. The plaintiff alleges that she relied on these representations, as well as the fact that they were in an exclusive relationship. The parties were married in August of 2003. In November 2005, the plaintiff discovered that the defendant had been prescribed the drug Valtrex, which she learned can be prescribed to treat the herpes virus. She asked the defendant whether he was infected with herpes and he denied that he was. In the

spring of 2012, the relationship broke down. In November of 2012, the plaintiff tested positive for the Herpes Simplex Virus-Type 2 (HSV-2).

[4] In his statement of defence, the defendant, Mr. [redacted], alleges that prior to his relationship with the plaintiff he had never exhibited any symptoms of a STD. He consented to having sexual intercourse with the plaintiff as she advised him that she was a virgin, did not have any STDs and did not need to be tested for STDs. In reliance on her representations, he engaged in sexual relations with her. When the plaintiff inquired as to whether he had STDs, he advised her that he went to his medical practitioner to be tested and the tests were negative. He also alleges that the parties agreed that the relationship was to be exclusive and they would not engage in romantic or sexual activity with anyone else. He denies being prescribed Valtrex for STDs, but rather maintains that it was prescribed for a rash. He alleges that the plaintiff showed signs of HSV-2 as early as 2009. He denies that he ever suffered from a STD and, in the alternative, argues that if he was infected with HSV-2, he was infected by the plaintiff herself. He has brought a counterclaim in this regard. His allegations, in many respects, mirror those of the plaintiff. Finally, he alleges that the plaintiff's motive for bringing this action relates to ongoing family law proceedings.

The Defendant's Motion Pursuant to Rule 21.01(1)(b)

[5] The plaintiff claims damages for sexual assault and battery, intentional or negligent transmission of HSV-2, intentional or negligent misrepresentation and breach of fiduciary duty. The defendant seeks to strike the portions of the plaintiff's statement of claim related to allegations of breach of fiduciary duty, as failing to disclose a reasonable cause of action.

[6] As regards the allegations of fiduciary duty, the statement of claim alleges that "by virtue of their marriage, Mr. [redacted] owed a fiduciary duty to Ms. [redacted] to place her health and welfare interest ahead of his own personal interests, and to act in a manner that would not jeopardize her welfare and health. Mr. [redacted] flagrantly breached his duty by failing to disclose that he had HSV-2 and engaging in unprotected sexual intercourse with her when he knew or ought to have known that this posed a serious risk, which subsequently materialized, of transmission of HSV-2 to Ms. [redacted]."

[7] It is the position of the moving party defendant that the plaintiff's claim that the marriage gives rise to a fiduciary duty is not tenable at law, as the spousal relationship is not one of the recognized presumptive or *per se* fiduciary relationships. The defendant further submits that the statement of claim does not properly plead an *ad hoc* or case-by-case fiduciary relationship, as the plaintiff has failed to plead an express or implied undertaking, and that even if such had been pled, an *ad hoc* fiduciary duty as regards the spousal relationship does not exist at law, should not be recognized and is contrary to public policy.

[8] It is the position of the plaintiff that the spousal relationship has been found to be fiduciary in nature and, at the preliminary pleadings stage, can be considered a *per se* fiduciary relationship; or in the alternative, that the facts, as pled, are sufficient to support an *ad hoc* fiduciary relationship.

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[9] Ms. Vella, counsel for the plaintiff, maintains that the scope of the claim for breach of fiduciary duty is limited to the spousal relationship imposing a duty to disclose a sexually transmitted disease that may expose the other to harm, illness or disease. She maintains that the plaintiff's claim for breach of fiduciary duty is not based on a duty of "sexual loyalty", but rather is limited to the spousal relationship imposing a duty upon a spouse to disclose the fact that he or she has information about a known or suspected sexually transmitted disease that may expose the other to harm or illness. She maintains that this information is important so that the healthy spouse can make an informed decision as to whether or not to engage in potentially unsafe or indeed any sexual relations with the infected spouse.

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The Legal Framework

Rule 21.01(1)(b)

[10] The test for striking a pleading is not in dispute. Pursuant to Rule 21.01(1)(b), a party may move to strike a pleading on the ground that it discloses no reasonable cause of action or defence. The test for determining whether a pleading should be struck is whether, assuming that the facts as set forth in the statement of claim can be proven, it is plain and obvious that no reasonable cause of action is disclosed.

[11] The pleadings should not be struck if there is a chance that the plaintiff may succeed. None of the length and the complexity of the issues, the novelty of the cause of action, or the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case.

[12] The test for striking the statement of claim at the pleadings stage is stringent, with a difficult burden for the defendant to meet. A germ or scintilla of a cause of action will suffice to maintain the claim. The claim should be struck only where the court is satisfied that the case is beyond doubt. Only in the clearest of cases should a party be deprived of the opportunity of persuading a trial judge that the evidence and the law entitle it to a remedy or defence. The test was recently summarized by the Court of Appeal in *Amato v. Welsh*, 2013 ONCA 258, 362 D.L.R. (4th) 38 at paras. 31 and 33 and in *McCreight v. Canada (Attorney General)*, 2013 ONCA 483, 116 O.R. (3d) 429 at para 39.

[13] The fact that allegations in an action might be novel is not justification for striking the statement of claim. In this regard, in *McLean v. Toronto (City) Police Service*, [2001] O. J. No. 2882 (Sup. Ct.) at para. 2, Molloy J. observed as follows:

> For purposes of the motion, the allegations of fact in the statement of claim must be taken as proven (unless patently ridiculous or incapable of proof). The pleading must be read generously, with allowances for inadequacies due to drafting deficiencies. The novelty or complexity of a cause of action does not require that the claim be struck on a summary basis. On the contrary, it is preferable that difficult and important points of law be examined within a full factual context, which can only take place at trial.

[14] A claim may also be struck under Rule 21.01(1)(b) when a plaintiff fails to plead every necessary element of an alleged offence. It is, however, rare that a case will be decided at the pleading stage without allowing the plaintiff leave to amend. The statement of claim is to be read generously with allowance for inadequacies due to drafting deficiencies. Unless the pleading contains a "radical defect," leave to amend will be granted: *AGF Canadian Equity Fund v. Transamerica Commercial Finance Corp. Canada*, [1993] O.J. No. 1340 (Gen. Div.)

[15] In this case, the issue to be determined is: assuming the facts pled are true, it is plain and obvious that Ms. [redacted]'s claim that Mr. [redacted] breached a fiduciary duty will fail?

[16] For the reasons set forth below, I find that it is not plain and obvious that Ms. [redacted]'s claim discloses no reasonable cause of action and will not succeed.

The Issue of Fiduciary Duty

The Per Se *or Presumptive Fiduciary Relationship*

[17] The Supreme Court of Canada summarized the two categories of fiduciary relationship in *PIPSC v. Canada (Attorney General)*, 2012 SCC 71, [2012] 3 S.C.R. 660 at paras. 113 and 115:

> 113 Fiduciary relationships may be either *per se* or *ad hoc*. The former refers to those relationships that the law presumes to be — and characterizes as — fiduciary. (*Perez v. Galambos*, 2009 SCC 48, [2009] 3 S.C.R. 247 (S.C.C.), at paras. 36-37). The recognized categories give rise to fiduciary duties "because of their inherent purpose or their presumed factual or legal incidents" (para. 36). The existence of an *ad hoc* fiduciary relationship, on the other hand, is determined on a case-by-case basis. Whereas the *per se* categories describe relationships in which the fiduciary character is "innate", *ad hoc* fiduciary relationships arise from the specific circumstances of a particular relationship. (*Galambos*, at para. 48).
>
> ...
>
> 115 Chief Justice McLachlin recently listed the *per se* fiduciary relationships in *Elder Advocates* of *Alberta Society v. Alberta*, 2011 SCC 24, [2011] 2 S.C.R. 261 (S.C.C.), identifying the following: trustee-cestui que trust, executor-beneficiary, solicitor-client, agent-principal, director-corporation, guardian-ward, and parent-child.

[18] Mr. Toyne, counsel for Mr. [redacted], submits that the spousal relationship cannot be a *per se* fiduciary relationship because it was not one of the seven relationships listed by the Chief Justice, above. In my view, this submission misconstrues the Supreme Court's treatment of fiduciary relationships by over-emphasizing the importance of "being on the list."

[19] As is the case with categories of negligence, in which a duty of care is owed, the categories of fiduciary, in which a duty of fiduciary care is owed, are not closed. As regards the presumptive or *per se* fiduciary duty in question, I am of the view that the list enunciated by the

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Supreme Court of Canada is not closed. In his treatise, *Fiduciary Duties: Obligations of Loyalty and Faithfulness*, loose-leaf, (2014) (Toronto: Canada Law Book, 2003) at p. 5-1, Michael Ng writes: "Such a list could never be closed, since different types of social relationships with trust and confidence at their core could always arise anew."

[20] In *Guerin v. The Queen*, [1984] 2 SCR 335, Dickson J. (as he then was) stated:

> It is sometimes said that the nature of fiduciary relationships is both established and exhausted by the standard categories of agent, trustee, partner, director, and the like. I do not agree. It is the nature of the relationship, not the specific category of actor involved that gives rise to the fiduciary duty. The categories of fiduciary, like those of negligence, should not be considered closed. See, e.g. *Laskin v. Bache & Co. Inc.* (1971), 23 D.L.R. (3d) 385 (Ont. C.A.), at p. 392.

[21] In *Galambos v. Perez*, 2009 SCC 48, [2009] 3 S.C.R. 247 at para. 77, Rothstein J. anticipated future attempts to establish new *per se* duties and provided guidance regarding the need to prove undertakings. He made it clear that an undertaking is not only necessary to prove *ad hoc* fiduciary relationships, but *per se* relationships as well: "In cases of *per se* fiduciary relationships, this undertaking will be found in the nature of the category in issue. The critical point is that in both *per se* and *ad hoc* fiduciary relationships, there will be some undertaking on the part of the fiduciary to act with loyalty." This passage was cited with approval by McLachlin C.J.C. in *Elder Advocates*, 2011 SCC 24, [2011] 2 S.C.R. 261 at para. 32.

[22] Likewise, the Supreme Court in *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 at para. 31, treats Wilson J.'s three-step analysis in *Frame v. Smith*, [1987] 2 S.C.R. 99 as a guide for finding new *per se* relationships:

> 31 In *LAC Minerals* I elaborated further on the approach proposed by Wilson J. in *Frame v. Smith.* I there identified three uses of the term fiduciary, only two of which I thought were truly fiduciary. The first is in describing certain relationships that have as their essence discretion, influence over interests, and an inherent vulnerability. In these types of relationships, there is a rebuttable presumption, arising out of the inherent purpose of the relationship, that one party has a duty to act in the best interests of the other party. Two obvious examples of this type of fiduciary relationship are trustee-beneficiary and agent-principal. In seeking to determine whether new classes of relationships are *per se* fiduciary, Wilson J.'s three-step analysis is a useful guide.
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> 32 As I noted in *LAC Minerals*, however, the three-step analysis proposed by Wilson J. encounters difficulties in identifying relationships described by a slightly different use of the term "fiduciary", viz., situations in which fiduciary obligations, though not innate to a given relationship, arise as a matter of fact out of the specific circumstances of that particular relationship; see *supra*, at p. 648. In these cases, the question to ask is whether, given all the surrounding circumstances, one party could reasonably have expected that the other party

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> would act in the former's best interests with respect to the subject matter at issue. Discretion, influence, vulnerability and trust were mentioned as non-exhaustive examples of evidential factors to be considered in making this determination.

[23] Thus, in a number of cases, the Supreme Court has directly or indirectly held that the *per se* list of fiduciary duties remains open.

[24] Further, the list is not exhaustive. Mr. [redacted] places too much emphasis on the fact that the Supreme Court only listed seven *per se* fiduciary relationships. Indeed, there are others.

[25] For example, in *Guerin*, the Supreme Court held that a *per se* fiduciary relationship exists between the federal Crown and aboriginal Canadians: see *R v. Sparrow*, [1990] S.C.R. 1075 at para. 59. The fact that this relationship was not included on the list in *Elder Advocates* does not vacate the Crown's fiduciary duty toward aboriginal Canadians.

[26] Similarly, in *Authorson v. Canada*, [2002] O.J. No. 962 (Ont. C.A.) at para. 73 (rev'd on other grounds), the Court of Appeal found that a *per se* fiduciary relationship exists between the federal Crown and disabled war veteran pensioners.

[27] Moreover, there is some precedent to support Ms. [redacted]'s claim that the spousal relationship is a *per se* fiduciary relationship. This has been recognized in *Fiduciary Duties*, *supra*, where Michael Ng writes: "marriages may be characterized as essentially or dominantly fiduciary in nature with respect to such matters as physical safety."

[28] In *Bell-Ginsburg v. Ginsburg* (1993), 14 O.R. (3d) 217, Rosenberg J. denied a defendant husband's motion to strike out the plaintiff wife's claim for breach of fiduciary duty. The plaintiff had alleged that the defendant breached his fiduciary duty by failing to disclose sexual activities that exposed the plaintiff to the risk of contracting sexually transmitted disease. At paragraph 2 of the decision, Justice Rosenberg determined that the three-step test in *Frame v. Smith* had been met insofar as:

> (1) Ginsburg had sole control over his undisclosed hazardous sexual behaviour,
>
> (2) He could unilaterally control his behaviour and thereby affect his wife's interests,
>
> (3) Sophia, as Ginsburg's wife, was particularly vulnerable to Ginsburg's extramarital behaviour.

[29] For these reasons, Rosenberg J. held that the defendant had failed to establish that the plaintiff's claim could not possibly succeed.

[30] In *Gregoric v. Gregoric* (1990), 4 O.R. (3d) 588 (Gen Div.), Granger J. found that a husband had a fiduciary duty toward his wife to the extent that she placed her trust in her husband during the marriage to make business decisions and deal with the financial management of the family unit.

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[31] Likewise, in *Verdina v. Verdina*, [1992] O.J. No. 2479 (Gen. Div.), MacDonald J. found that the defendant husband breached his fiduciary relationship to his wife by failing to disclose vital financial information.

[32] In *Fleming v. Fleming* (2001), 6 C.C.L.T. (3d) 271 (Ont. SCJ) at para. 13, MacKinnon J. also found that the respondent owed a fiduciary duty to his wife: "I accept that the spousal relationship is such that the law may impose a duty upon a spouse to warn the other of hazardous sexual activity that might expose the other to harm or illness."

[33] Finally, in *McInerney v. MacDonald*, [1992] 2 S.C.R. 138 at para. 19, citing *Henderson v. Johnston*, [1956] O.R. 789 at para. 31, the Supreme Court appeared to include spouses on a list of *per se* fiduciary relationships:

> In *Kenny v. Lockwood* (1931), [1932] O.R. 141, [1932] 1 D.L.R. 507 (C.A.), Hodgins J.A. stated, at p. 155 [O.R.], that the relationship between physician and patient is one in which "trust and confidence" must be placed in the physician. This statement was referred to with approval by LeBel J. in *Henderson v. Johnston*, [1956] O.R. 789, 5 D.L.R. (2d) 524 (H.C.), who himself characterized the physician-patient relationship as "fiduciary and confidential," and went on to say: "It is the same relationship as that which exists in equity between a parent and his child, a man and his wife, an attorney and his client, a confessor and his penitent, and a guardian and his ward" (p.799 [O.R.]).

[34] In my view, although these cases preceded the Supreme Court's restatement in *Galambos* and *Elder Advocates*, they are still good law.

[35] While *Galambos* and *Elder Advocates* state that an undertaking by the fiduciary is an essential component of *per se* and *ad hoc* fiduciary relationships, the earlier cases of *Gregoric*, *Verdina*, and *Fleming* did not consider the existence of an undertaking. However, because the issue in *Gregoric*, *Verdina*, and *Fleming* was whether the spousal relationship is *per se* a fiduciary relationship, such an undertaking would ultimately have to be found "in the nature of the category of relationship in issue." There was no need for those courts to find that the husband made an implied or express undertaking in order to find that a *per se* fiduciary relationship exists. It was open to those courts to find that that the undertaking to disclose certain information to a spouse is inherent to the spousal relationship.

[36] For the above reasons, I am of the view that it is not plain and obvious that the *per se* fiduciary relationship alleged to arise between Mr. [redacted] and Ms. [redacted] from the marriage will fail.

The Ad Hoc Fiduciary Relationship

[37] Ms. [redacted] pleads in the alternative that there was an *ad hoc* fiduciary relationship between the parties. As I have found that it is not plain and obvious that a *per se* fiduciary duty does not exist, it is not necessary to analyze this alternative argument. Nevertheless, I have considered and determined the issue below.

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[38] As regards an *ad hoc* fiduciary duty, such obligations may have arisen as a matter of fact in the specific circumstances of the relationship between Ms. [redacted] and Mr. [redacted].

[39] The necessary elements for an *ad hoc* fiduciary duty were identified by Rothstein J. in *Galambos*:

> [75] It is sufficient to say here that what is required in all cases is an undertaking by the fiduciary, express or implied, to act in accordance with the duty of loyalty reposed on him or her.
>
> ....
>
> [79] This does not mean, however, that an express undertaking is required. Rather, the fiduciary's undertaking may be implied in the particular circumstances of the parties' relationship. Relevant to the enquiry of whether there is such an implied undertaking are considerations such as professional norms, industry or other common practices and whether the alleged fiduciary induced the other party into relying on the fiduciary's loyalty.

[40] As stated by the Supreme Court in *Elder Advocates* at para. 36, to determine whether an *ad hoc* fiduciary duty exists, the court must ask, in addition to the three guiding indicia set out by Wilson J. in *Frame v. Smith*:

> (1) Whether there was an undertaking by the fiduciary, express or implied, to act in accordance with the duty of loyalty reposed on him or her;
>
> (2) Whether there is a defined vulnerable person or class of vulnerable persons to which the duty is owed; and
>
> (3) Whether the alleged fiduciary had the power to affect the legal or practical interests of the beneficiary.

[41] While the plaintiff's statement of claim does not allege, in those express words, an undertaking by the defendant to act with loyalty in the best interest of the plaintiff, vulnerability on the part of the plaintiff to the defendant's control, and a legal or substantial practical interest of the plaintiff that would be adversely affected by the defendant's exercise of discretion or control, in my view, reading the statement of claim as a whole, the relevant requisite elements to sustain an allegation of fiduciary duty are pled.

[42] On the facts as pled, it is not plain and obvious that Ms. [redacted] cannot establish that she was vulnerable to Mr. [redacted]'s decision not to disclose that he was infected with HSV-2. Moreover, it is not plain and obvious that Ms. [redacted] cannot establish that Mr. [redacted] had the power to affect her practical interests. On the facts as pled, due to his non-disclosure, Mr. [redacted] infected Ms. [redacted] with a sexually transmitted disease for which there is no known cure.

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[43] As stated above, it is the position of the moving party defendant that, as regards an *ad hoc* fiduciary duty, the statement of claim must be struck as it fails to plead an express or implied undertaking and is, therefore, deficient. In response, the plaintiff submits that the pleadings satisfy the three-step test set out in *Frame v. Smith*, and that she has pled facts giving rise to the requisite implied undertaking, which meets the test in *Galambos v. Perez*. The plaintiff submits that the implied undertaking is supported by the factual allegations set forth in the statement of claim at paragraphs 2 through 6, 8, 9, 10, 17, 26 through 29 and 31.

[44] The statement of claim, when read as a whole, pleads the necessary elements for a fiduciary duty. Where the jurisprudence is unsettled, as it appears to be as regards the spousal relationship, a claim should not be struck at this early interlocutory stage of pleadings.

[45] In the event that the plaintiff wishes to expressly state the above elements in those words, for greater certainty, she is free to amend the statement of claim. If she chooses not to do so, in my view, this is not fatal to her proceeding with her allegations.

Public Policy Arguments

[46] As regards the defendant's argument that a finding of fiduciary duty in a spousal relationship would contravene public policy concerns, it is the position of the plaintiff that finding an implied undertaking by spouses to disclose known or suspected sexually transmitted diseases is consistent with the reasonable expectations of Canadian society and satisfies the public policy purpose underlying fiduciary doctrine, namely the need to preserve the integrity of socially valuable and necessary relationships.

[47] The plaintiff argues that there is a presumption of mutual interdependence and mutual support that exists between spouses during the relationship and that recognizing the fiduciary duty in these circumstances serves the public policy interest by protecting the integrity of intimate spousal relationships where one spouse's health interests are at stake. The relationship between spouses is such that trust and confidence must be present with respect to disclosing and protecting each other from hazardous sexual activity. She relies, in this regard, on *Faridani v. Stubbert*, 2013 ONSC 1233, 47 C.P.C. (7th) 164. She argues that such a duty is also consistent with the development of the criminal law in HIV and HSV nondisclosure cases.

[48] I do not find the public policy considerations raised by Mr. Toyne convincing or persuasive.

[49] Recognizing a spousal fiduciary duty need not "exacerbate the vulnerability of one spouse", as argued by Mr. Toyne, because fiduciary duties can be mutual. Business partners, for example, are considered mutual fiduciaries – they owe fiduciary duties to each other: see *Cameron v. Julien* (1957), 9 D.L.R. (2d) 460 (Ont. C.A.)

[50] Further, recognizing a spousal fiduciary duty will not compromise the ability of one spouse to refuse to consent to sexual intercourse. This suggestion is inconsistent with a significant amount of caselaw on the nature of fiduciaries and their duties.

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[51] Finally, recognizing that a spouse has a fiduciary duty to disclose information that could affect their spouses' health and safety will not make spouses liable for infidelity or divorce. The existence of a fiduciary relationship does not determine the scope of a fiduciary's duties. Moreover, in my view, it is highly improbable given cases such as *Fleming*, that courts would include a "duty of fidelity" within the scope of a spouse's fiduciary duties.

[52] I find that it is not plain and obvious that the allegations of an *ad hoc* fiduciary duty will not succeed. I further find that there are no public policy concerns that would militate against this finding.

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The Plaintiff's Motion Pursuant to Rule 25.11

[53] The plaintiff moves to strike portions of paragraphs 24 and 25, as well as the entirety of paragraph 29 of the statement of defence on the grounds that they are scandalous, frivolous and vexatious.

The Legal Framework

[54] Pursuant to Rule 25.06(1), a pleading shall contain a concise statement of the material facts on which a party relies for the claim or defence, but not the evidence by which those facts are to be proven.

[55] Pleadings define the issues in the action. Where a party is required to respond to irrelevant facts, inquire into those facts on discovery and respond to evidence of those facts at trial, the litigation and trial will be diverted by inquiries into facts that have no connection to the real issues before the court.

[56] Specifically, pursuant to Rule 25.11, the court may strike out or expunge all or part of a pleading or other document with or without leave to amend, on the ground that the pleading may prejudice or delay a fair trial of the action, is scandalous, frivolous or vexatious, or is an abuse of the process of the court.

[57] A pleading is scandalous if it alleges misconduct that is inadmissible and irrelevant. Portions of the pleading that are irrelevant, argumentative or inserted for prejudicial colour, or constitute bare allegations, should be struck as scandalous. An allegation that includes unfounded and inflammatory attacks on the integrity of the party will be struck as being scandalous and vexatious. Allegations regarding a plaintiff's motives for bringing the action are irrelevant and will also be struck: *Welch, Anderson & Co. v. Roberts*, [1946] O.W.N. 5. Motive, however, may be relevant and necessary for claims such as malice, fraud, and conspiracy: *Welch, Anderson & Co. v. Roberts*, [1945] O.J. No. 358, [1946] O.W.N. 5 at paras. 2-7. In such cases, pleading motive will not be scandalous.

[58] If a pleading is a material or relevant fact, it cannot be scandalous: *Dalex Co v. Schwartz Levitsky Feldman*, [1994] O.J. No. 1388; *Canadian National Railway Company v. Brant*, (2009), 96 O.R. 3(d) 734 at para. 27. However, a court may strike out portions of a pleading even where the allegations are relevant, if the applicant can show that they are of marginal probative value

which is outweighed by a prejudicial effect: *Quizno's Canada Restaurant Corp. v. Kileel Developments Ltd.*, 92 O.R. (3d) 347 at para 15.

[59] A frivolous or vexatious pleading is a pleading that is hopeless factually and which obviously cannot succeed: *876502 Ontario Inc. v. I.F. Propco Holdings (Ontario) 10 Ltd.*, [1997] O.J. No. 4722 at para. 18. Similarly, a pleading of fact will be struck if it is designed solely for the purpose of atmosphere or colour: *Wilson v. Wilson*, [1948] O.J. No. 62 (H.C.J.) If the only purpose of the pleadings is to cast the opposing party in a bad light, it will be struck.

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Paragraph 24

[60] The plaintiff seeks to have struck from the statement of defence the third sentence of paragraph 24 on the ground that it is inflammatory and irrelevant to any claim pled. Paragraph 24 states as follows:

> In early January, 2012, John was finally ready to tell Donna about his daughter and he proceeded to do so. Rather than being supportive and understanding, Donna was very upset and angry with John. **Further, and much to John's surprise, Donna was also very upset that the mother of John's daughter was not white.** Donna's reaction to the news that John had a daughter led to the eventual breakdown of their marriage.

[61] I find that this paragraph is inflammatory and added for prejudicial colour. It is not relevant to any claim or to any of the issues involved in this action.

[62] The passage is neither relevant nor material to the defences and counterclaims raised by Mr. [redacted]. Alternatively, if the passage is relevant, its marginal probative value is outweighed by its prejudicial effect.

[63] The passage is directed at the moral character of Ms. [redacted] and appears to prejudice her by implying that she is racist. Furthermore, this pleading of fact would not affect the outcome but appears to have been inserted only for atmosphere. Accordingly, it should be struck from paragraph 24.

Paragraph 25

[64] The plaintiff further seeks to have the last part of the first sentence in paragraph 25 of the Statement of Defence struck on the ground that it again is irrelevant and inserted for colour.

[65] Paragraph 25 states as follows:

> On April 22, 2012, John moved out of their matrimonial home for approximately a week **to escape Donna's aggressive and abusive reaction to learning that he had a daughter**. There was no further sexual activity between John and Donna after John left.

[66] Again, I find this phrase is irrelevant to any of the claims or issues pled, is inflammatory and seeks to portray the plaintiff in a negative light. I am of the view that it is added only for colour. Any peripheral probative value that it may have, and I find that there is none, is outweighed by the prejudice of the statement. It is unnecessary, inflammatory and should be struck.

Paragraph 29

[67] Finally, the plaintiff seeks to have paragraph 29 struck on the ground that it relates entirely to the plaintiff's motives for bringing the action, which are irrelevant. Paragraph 29 reads as follows:

> Donna brought a motion in the family law proceedings seeking, among other things, production of John's medical records going back to the time that John's daughter was conceived (although Donna claimed that the basis for her request for the medical records was the allegation that John had infected her with HSV-2). Donna also told John that she was going to sue him for giving her HSV-2 whether or not she got the medical records through the family law proceeding and that she was doing so because he refused to waive his claim to the matrimonial home in the family law proceeding.

[68] Ms. [redacted] has moved to strike this passage on the grounds that the allegations it sets out relate entirely to motive. The rule against pleading motive is not absolute. Ms. [redacted]'s motive for commencing the proceedings may be material to a defence or counterclaim raised by Mr. [redacted], as indicated at paragraph 59 above, for claims of malice, fraud and conspiracy and, if so, will not be scandalous.

[69] In this case, it does not appear that the exception is applicable. In his factum, Mr. [redacted] points to paragraph 49(p) of his statement of defence and argues that the pleading there may be jeopardized if paragraph 29 is struck by the court.

[70] The defendant's submission, however, relates to an alleged malicious act which is not relevant to the pleadings. The malicious act referred to in 49(p) is the failure by Ms. [redacted] to disclose to Mr. [redacted] that she had HSV-2, not the decision to commence proceedings against Mr. [redacted]. Accordingly, I am of the view that Mr. [redacted] cannot avail himself of the exception to the rule against pleading motive. Paragraph 29 must be struck from the statement of defence.

Conclusions

[71] In conclusion, and based on all the material before me, and the submissions of the parties, I order as follows:

1. The defendant's motion to strike portions of the statement of claim pursuant to Rule 21.01(1)(b) as regards fiduciary duty is dismissed;

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2. The plaintiff's motion to strike portions of the Statement of Defence pursuant to Rule 25.11 is granted as follows:

    (a) the third sentence of paragraph 24 is struck;

    (b) the last part of the first sentence of paragraph 25 is struck; and

    (c) paragraph 29 is struck in its entirety;

all as set forth above.

Costs

[72] I would urge the parties to agree upon costs, failing which I would invite the parties to provide any costs submissions in writing, to be limited to three pages, including the costs outline. The submissions may be forwarded to my attention, through Judges' Administration at 361 University Avenue, within thirty days of the release of this Endorsement.

Carole J. Brown J.

Date: October 3, 2014

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