Court File No. SC-14-00130613-0000

SUPERIOR COURT OF JUSTICE
OTTAWA SMALL CLAIMS COURT

BETWEEN:

MARC ANTHONY FOSCHIA

PLAINTIFF

-and-

CARLETON CONDOMINIUM CORPORATION NO 25,
CYNTHIA PERRY, WILLIAM SAUNDERS, MICHELINE BOWIE,
ANDRE GIVOGUE, GARY SCHOFIELD, JAMES HALL,
AND BOARD OF DIRECTORS OF
CARLETON CONDOMINIUM CORPORATION NO 25

DEFENDANTS

JUDGMENT AND COSTS DECISION

DELIVERED BY DEPUTY JUDGE ROSALIND CONWAY
ON THURSDAY, NOVEMBER 10, 2016

Heard at Ottawa: On March 11, October 19 and 28, 2016.

Appearances:

For the Plaintiff: Self-represented

For the Defendants: Megan Molloy

BACKGROUND AND THE PARTIES

1. One snowy night the plaintiff was unable to stop in time as he entered the underground parking garage of his condominium.

2. He was levied the cost of repairing the garage door, which was part of the common areas of the condominium. His car was also damaged.

3. The plaintiff is suing the condominium, the board and board members for the cost of repairing his car, reimbursement of the levy he paid under protest to fix the garage door, for some related expenses. He sues for breach of duty of care, oppression and defamation.

4. The defendants' position is that the accident was the fault of the plaintiff, for driving too quickly. They did not fail in their duty and acted reasonably, that oppression and defamation were not proven, and that this is the wrong forum for a claim of oppression. Finally, the defendants argue that the way this litigation was conducted is relevant to any award of costs.

EVIDENCE AT TRIAL

5. The plaintiff is an IT consultant, he studied engineering at college and university, and used to work at Nortel. He has been a resident of the condominium since 1989, and has always parked in the same place. He is self-represented.

6. The defendant Carleton Condominium Corporation is a non-profit condominium corporation. Its only method of raising funds to support itself is through condominium fees and levies against the tenants.

7. The individual defendants are members of the Board of Directors. They were elected to hold unpaid positions. There was an additional defendant / member of the Board named Richard Latour. He is deceased. On consent, the case was discontinued against him and I have amended the style of cause. The Board itself is also named as a defendant. All of the defendants were represented by the same lawyer.

8. In order to enter the garage, cars must make a U-turn to get to the ramp. There is normally only one ramp open into the garage. The ramp in question is about 73 feet long, and the actual slope was not in evidence. It is unheated, and 67 feet are covered. The posted speed is five miles per hour.

9. The plaintiff claims that the ramp is sometimes slippery, and that there has been an icy spot that pulls cars to the left. He testified that he had made verbal complaints to the management office previously. There was rather general evidence in the trial from Peter Descelles, a former disgruntled superintendent, that other accidents have occurred with the door in wet wintertime conditions.

10. The night in question was snowy. The temperature report indicates that it was just under – 20 degrees Celsius. The product being used to melt the snow is called "Ice Melter", but would be referred to as "salt". The logs showed ice melter was applied at 7 a.m. and at 3 p.m. The logs show that 10 bags were used on the ramp that day, with four of them being placed in the afternoon. The snow began at 1 p.m. The log shows that five centimetres of snow were removed from the ramp at 3 p.m. by Mr. Laflamme.

11. Two men worked as superintendents at the time of the incident. Gilles Laflamme and Peter Decelles would put ice melter on the entrance ramps, using a "chicken feed" method to spread the green substance. Peter Decelles testified that because of the price, they were only allowed two skids a winter, and they would hear from management if they oversalted the ramps. Usage would be logged into a book. A skid has 50 bags, and during a heavy snowstorm they would use six bags for each of the buildings.

12. However, the logs show that during the previous winter 600 bags were purchased, during the winter of 2013-14, 490 bags were purchased, and during the following winter 600 bags were bought again. There was no evidence to compare weather conditions of one of these winters to another.

13. The superintendents did not shovel the ramps, according to Mr. Decelles. They were only told to salt them. Mr. Descelles also said that they used a compactor and that snow would be pushed by the superintendents to the right-hand side of the ramp, "because nobody is using the right side of the ramp". This removal would occur at the top of the ramp. The fob entry mechanism is on the far left, at the very bottom of the ramp.

14. A contractor named Yanic Dufresne, Excavation Inc. was hired for general snow removal. He never attended on the 17th of December. He is not a party to these proceedings, but his attendance was dictated by the amount of snowfall.

15. Mr. Decelles said that Gilles Laflamme was looking after putting the ice melter on the ramps at the time of these events. In heavy snow it would be placed on the ramp at 7 a.m. and 3 or 3:30 p.m., at the end of the shift. Whoever was on call at night should be checking it, he said. However, during the 19 months when he had worked there, when Mr. Decelles had been on call, he never removed snow from the ramp.

16. On December 17, 2013, Peter Decelles testified that he told Gilles Laflamme that there were complaints from tenants, and that he should probably go and check the ramp. Mr. Decelles said that the type of complaint was as follows: "I almost slid into the door. You should, you know, shovel the ramp off." Some people were actually very upset. This was at the end of the day.

17. Peter Decelles does not know if Mr. Laflamme checked the ramp. He did notice that Mr. Laflamme had been drinking. Although Laflamme was a diligent worker, his drinking would get worse at night. Descelles had covered for his friend many times before. He admitted that they drank together, and that Mr. Laflamme would even drink in Mr. Decelles apartment. Gilles Laflamme did not testify in this trial: he is deceased.

18. Mr. Decelles called this "enter at your own risk" conditions – but this was the only ramp open to the garage. Had he been on duty, he would have put up cones, closed the entrance and diverted traffic into the 2000 entrance.

19. Mr. Decelles had resigned as a resident superintendent, effective December 15; nevertheless, he continued working and living at the condominium. He was paid eight hours to work on December 16, 2013. His employment agreement required him to vacate his unit in seven days.

20. At 9 p.m. that evening Mr. Decelles was asked by Board members James Hall and Andre Givogue to return his keys, and to move out before January 1, 2014, even though he had offered to continue superintendent duties over the holidays. A letter from Board President Cynthia Perry, that would have been delivered at that time, gave him until midnight on Boxing Day to vacate the unit. An altercation ensued. According to Mr. Hall, Peter Decelles slammed his keys into director Andre Givogue's chest. Subsequently, Decelles wrote a letter of apology. At some point afterwards, the police were called about this, but they were not present during the accident with the garage door.

21. The condominium had a new superintendent coming as early as December 18, 2013. There was no other building superintendent at the time, except for Mr. Laflamme who was working long hours on the complex, covering for other people.

22. At about 9:30 p.m. that evening, the plaintiff was driving his 2008 Buick Enclave SUV. He testified that he used his brakes before the turn, applied them more as he felt his car

begin to go down the incline, but all four wheels locked: the car accelerated and slid down the entire length of the ramp through the garage door.

23. In cross-examination, he was asked about a letter that he had sent to the Board, in which he wrote, "I simply released my brakes after having made my turn towards the ramp." He agreed that he had lightly released his brakes before he advanced into the ramp, when he engaged his brakes again.

24. After the accident, he backed his car up, which took two attempts, before he said he had to change his route, and called Peter Decelles. Peter Decelles was friendly with the plaintiff, who had helped him with his computer. Decelles, who had just been fired a half hour earlier, referred the plaintiff to James Hall, who was also a friend of the plaintiff, and who is one of the directors.

25. According to Mr. Hall, the plaintiff had knocked on his door, looking perplexed. He said, "I slid into the garage door." He was asked how bad it was, and he responded, "Well, it is bad enough. I hit it." Mr. Hall called the emergency number to have the on-duty superintendent Gilles Laflamme meet him at the ramp. When Hall and Foschia walked down to the ramp, Mr. Hall realized that the security of the building was breached. Cars were just starting to come in, but were able to reverse back up the ramp. He walked up the ramp to tell them not to. After 10 or 12 minutes the superintendent Mr. Laflamme had not shown up, so Mr. Hall went to try to find the superintendent. Then he looked for security, so that they would make a report.

26. Mr. Hall asked the plaintiff if he would make a police report, or call his insurance company, and he said he was not sure. Mr. Hall was cold, he had no jacket, so he left and called Mr. Saunders, another board member.

27. The ramp was then blocked off. The alternate entrance was utilized.

28. According to Mr. Decelles, a superintendent would usually respond in five to ten minutes. That did not happen on the evening of the 17th: Mr. Laflamme had been drinking.

29. There is video footage of the incident, recorded by a surveillance camera. It shows the two previous cars navigating the entry without any difficulty in the previous 15 minutes. In his witness statement Azizi Zabiullah wrote "when I came in at 9:03 p.m., I had no trouble stopping using the fob on December 17, 2013." However, the plaintiff distinguishes their route from his, and says they entered the turn further to the left, and travelled on clear pavement.

30. It is worth mentioning that in 2006 Mr. Foschia was the successful litigant in a slip-and-fall case against his condominium.

31. No invoice was provided for the repairs to the vehicle, which he claims cost $2,289.13. The plaintiff testified that he had his car repaired some time after the accident by Orleans Collision. The photographs in evidence, which were not taken by the plaintiff, do not illustrate the damages, which included scratches to the paint and chips on the grill.

32. Two days after the accident Valerie Williams, the property manager, wrote to the plaintiff advising him to contact his insurance company to cover his damage and report the accident to the police. He still did neither. She estimated that the damage to both his vehicle and the garage door exceeded $1,000.

33. The plaintiff did not file an insurance claim, as he did not want to be found guilty of an "at-fault" accident.

34. He did not contact the police until at least January 27, 2014, some six weeks after the accident.

35. Although the plaintiff said he took pictures of the damage to his car, and filed a police report, and obtained a copy, these were not tendered as evidence during the trial.

36. The plaintiff received a letter from the defendants, dated March 17, 2014, giving him 10 days in which to pay for the damage to the garage door, otherwise a lien of $1,439.71 would be registered. He decided to pay the invoice, and then to sue to be reimbursed for it.

37. Other residents commented about the conditions of the ramp. Andre Villeneuve had been a resident of the condominium for 12 or more years when he testified. He testified that for one or two years the ramp was slippery sometimes. He is in the habit of having his window down before he gets to the ramp. On one particular occasion he was driving slowly down the ramp with his fob out, he engaged his brakes but began to slide, and managed to swipe the opener. Although he was unable to stop, luckily the garage door opened just in time. He never made a complaint about the ramp.

38. Joyce Dagenais wrote a letter that was filed with the court. On July 13, 2014, she wrote that the garage entrance had been slippery on several occasions, but mainly in December of 2013. She did not have an accident, nor did she file a complaint.

39. Lisa Spurvey wrote a statement on September 28, 2014, indicating that on one occasion in December 2013 she was unable to stop and slid down the ramp. She said she came "very close" to hitting the door.

40. James Hall, who is one of the directors, is retired from being the vice-president of a high-tech company. He has lived at the condominium for 18 years, and has served three terms on the board, for a total of six years. As noted above, he is friends with the plaintiff.

41. Mr. Hall said he had never personally had any problems with getting into the parking garage, or with an icy patch.

42. After the incident on December 17, 2013, as part of his responsibilities as a director, he made an incident report.

43. William Edward Saunders is the treasurer of the board. He is a resident owner who has lived at the condominium for 42 years. He had a career as a property manager, with experience with Minto and Urbandale.

44. Mr. Saunders is the one who posted the five mile an hour speed limit. He explained the key fob system: there is one-way access to the garage, the key fob must be within three inches of the garage door opener and it takes two seconds to activate the system. According to Mr. Saunders, the superintendents are expected to keep the ramps clear and to use shovels, ice melter and snow blowers, when necessary. Ice melter is preferable to salt, because it works a 5-6 degrees colder than salt. Its melting point is -22 degrees Celsius. Some of the ice melter is kept at the bottom of the ramps.

45. Mr. Saunders was not present for the incident, although he had driven into the garage at 6:39 p.m. that night. He said that the ramp is checked regularly during the evening, and on the night in question there were two superintendents on call. The following day there were three again.

46. Saunders received calls at about 9:30 p.m. from the on-duty superintendent, presumably referring to Mr. Decelles, who was just fired, and from board member Mr. Hall. He testified that the snow had begun at noon, and that when this happened it would have been -17 or -16.3 Celsius. The other times that the door was hit, he said, involved a drunk driver in 2012, and a driver trying to follow a previous driver through, in 2009.

47. Saunders provided a copy of the video footage to the plaintiff. In Mr. Saunders' opinion, the first two cars that proceeded down the ramp had their brake lights on, but Mr. Foschia did not, and that he was driving too fast. In cross-examination, he said the lights came on half-way down the ramp. He also pointed out that the plaintiff had all-season tires, not snow tires. The video was entered into evidence.

48. Mr. Saunders testified that, while the ramp accumulates slush, which is something everyone knows, it is not icy. The standard of care is more than adequate for the conditions and there have been no problems since. The board feels that the ramp clearance is good enough: ramps are not going to be completely bare. No letters of complaint were received in December of 2013.

49. The garage door was bent, Mr. Saunders testified, was not functioning and was off the track so that it could no longer elevate. The corporation paid $1,082.57 for the repair. They created a charge back invoice, with an administration fee of $25, and sent a letter on January 24, 2014.

50. On February 3, 2014, the plaintiff wrote to the board, accusing them of misconduct, breach of trust, and lack of standard of care.

51. On March 28, 2014, the plaintiff paid the full levy for the garage door repair.

THE DEFAMATION CLAIM

52. The defamation claim is made only against one defendant, Cynthia Perry, the President of the Board. The plaintiff is seeking $1,000 for defamation.

53. During the week following the accident the plaintiff had access to his friend James Hall's computer. Mr. Hall, as noted above, was a Board member.

54. The plaintiff had the email addresses of the members of the Board, and he wrote to them all about the accident. He testified that Ms. Perry had, in fact, given him her email address a year earlier.

55. Ms. Perry had written in an email, "As I suspected, no good could come from Marc Foschia having access to Jim's computer." Only members of the Board and the plaintiff received her email. He felt insulted, and requested an apology in his claim. He did not receive one. This was the entire email, and although he was asked if this reflected on his character, capacity or judgment, he did not say this was the case.

56. The email itself was never entered into evidence.

57. The plaintiff tried to find out what she meant. He was sent a warning letter, telling him that if he contacted the Board again he would be sued for harassment.

OPPRESSION CLAIM

58. The claim for oppression appears to be based initially on the Board not asking him for copies of his photographs of the ramp and the police report, before sending their demand letter.

59. Secondly, it is based on the difficulty the plaintiff encountered after these events when he had to justify continuing to have his own washer and dryer. Newer owners could not have these, and he was ultimately grandfathered when he proved that his machines were on site before the by-laws changed.

60. The *Condominium Act* requires that an application for oppression be made to the Superior Court of Justice. This is the wrong forum and, accordingly, I am not ruling on this claim.

POSITIONS OF THE PARTIES

61. The plaintiff did not press his claims for defamation or oppression, the latter of which is not within this court's jurisdiction. He seeks $2,289.13 in damages for his car repairs, $1,447.21 for reimbursement for the garage door levy ($1,437.91 plus $7.50 for a bank draft) he paid, $98.30 for gas to drive to Toronto to deliver his bank draft (to meet the payment deadline), and $181 for the cost of obtaining a police report.

62. The plaintiff is claiming a breach of duty of care. He conceded that the footage in the video is not clear. However, he says that the tire tread marks confirm that his car slid, otherwise, there would be horizontal tread patterns.

63. The plaintiff essentially argued that he corroborated his evidence about the iciness of the ramp by calling evidence by filing signed statements. He did not provide any photographs of the ramp on the night in question to the board or to the court. He did not report the accident that night to the police, nor did he contact his insurance company.

64. The plaintiff said that his objective is to make the board more accountable. He had sued the board successfully previously, after his slip-and-fall, and that is why they instituted procedures to track the salt (ice melter) use better.

65. The defendants' position is that the condominium and its directors took reasonable care and that the property is reasonably safe. Ms. Molloy cites section 3(1) of the *Occupiers Liability Act*, R.S.O. 1990, c.O.2., which states "An occupier of premises owes a duty to take such care as in all the circumstances of the case is responsible to see that persons entering on the premises, and the property brought on the premises by those persons are reasonably safe while on the premises." There are three superintendents with snow blowers, scrapers, shovels and ice melter. It is more effective than salt. It was used twice that day. The other people who had accidents with the door were at fault: one was drunk, and the other had followed a car in.

66. Her position is that the plaintiff had a duty to take reasonable care for his own safety, and failed to control his vehicle. Mr. Hall had no difficulty walking on the ramp that night in running shoes. No other complaints were received by the board at that time.

67. Ms. Molloy stated further, with respect to repair of damage to the condominium common elements, that the by-law indemnification provision and sections 85 and 92 the *Condominium Act*, 1998, S.O., Chapter 19, require full reimbursement. The board must register a lien within three months. Their purpose in acting is to prevent costs from being passed on to the owners. The condominium's source of revenue is the owners. The condominium cannot jeopardize its own interests.

68. She said that the court is to presume that the board acted in good faith, unless it is proven otherwise. Specific facts must be pleaded to prove personal liability by board members.

69. With respect to the claim for oppression, she pointed out that this is the wrong forum. With respect to the claim for defamation, she pointed out that there was a lack of evidence.

70. The burden of proof in this case lies with the plaintiff.

71. Dealing firstly with his claim of oppression, as stated above, that matter is not within the jurisdiction of this court, and should not have been brought by the plaintiff. He did not press it at trial.

72. Dealing with the claim of defamation, I note that even Ms. Perry's email was not entered as evidence by the plaintiff. He was cross-examined on its content. He called no evidence as to the impact it had on him in his community. It is distressing for a defendant to have such an allegation made against her. I note that Cynthia Perry was not called by either side as a witness.

73. The court was almost entirely without evidence to consider a claim of defamation, and it would have been preferable that the claim had not been brought at all. It must have been more distressing for Ms. Perry to be sued for defamation, than it was for Mr. Foschia to have been the subject of her email, in which she had stated, matter of factly, her opinion. I find as a fact on all of the evidence that she did not defame the plaintiff.

74. The real issue in this case is whether the defendants breached their duty of care to keep the ramp clear.

ANALYSIS

75. This accident happened in Ottawa, where weather conditions are often difficult. No other drivers had accidents that night. There were procedures in place to keep the ramp reasonably clear.

76. I have difficulty accepting Mr. Decelles evidence that the superintendents were not to remove snow from the ramps, which does not have the ring of truth, especially given the evidence of Mr. Saunders. I find that the superintendents were to push snow to the right on the ramp, to use ice melter, to check the ramp frequently and to utilize their shovels and snow blowers, as necessary, and extra ice melter. Indeed some ice melter is kept in a box at the bottom of the ramp.

77. Mr. Decelles credibility is questionable for a number of reasons: he had resigned, he had been asked for his keys, had his tenancy terminated, and had been assaultive with a director that same night. He admitted he had been covering up Mr. Laflamme's drinking, and would even drink with him.

78. I have viewed the video footage several times. It is not clear to me whether or not the plaintiff engaged his brakes. He testified that he did. Mr. Saunders opinion evidence is just that – a layman's opinion on viewing the footage. He was not present. I found the

plaintiff to be credible in his description of the accident, and accept, on a balance of probabilities, that he applied his brakes throughout. I do not find, however, that this is determinative of the case.

79. I have considered the fact that Mr. Decelles was fired, 30 minutes before these events. The other superintendent had been drinking and was not responsive. There is, however, no evidence that anyone other than Mr. Decelles was aware of Mr. Laflamme's drinking problem.

80. Given the totality of the evidence, I cannot find that the defendants breached their duty of care to the plaintiff. Two cars entered the ramp towards the left-hand side shortly before him. They had no difficulty. Only two other garage-door accidents had taken place in other years according to Mr. Saunders, and those were in discrete factual situations involving a drunk driver and a driver who was following another through without using a fob.

81. The plaintiff also had to proceed carefully, given that it was winter. It is Ottawa. The posted speed is five miles an hour. The path of least resistance and snow debris was to the left, and not to the right. He was driving an SUV, yet he chose not to put snow tires on it.

82. The plaintiff chose not to call the police for over a month, even though this was suggested to him immediately. They could have investigated the accident. He chose not to call his insurance company at all, as he was afraid he would be found to be "at fault". This does not favour his position, and his photographic evidence of the ramp on the night in question could have been provided to the board and to the court.

83. In *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, Chief Justice McLachlin held that a successful claim in negligence requires proof that a defendant owes a duty of care, that the defendant's behaviour breached the standard of care, that there was damage, and that

the damage was legally and factually caused by the breach. The defendants would have to create an unreasonable risk of harm.

84. The condominium's duty is to ensure that in all circumstances of the case, they took care to see that a person would be reasonably safe. "The standard of care is reasonableness and not perfection." See *Nabholtz v. Kimberley (City)*, 2002 BCSC 174, at para 11. This was a case dealing with ice and snow. Budgetary considerations can be considered, the Court held at para. 19, as long as this is not "so irrational as to constitute an improper exercise of discretion". Another consideration is whether the defendant discharged its own policy regarding snow and ice removal.

85. When a court reviews a board's decision, the question is not whether the reviewing court would have reached the same decisions as the board. The question is whether the board reached a decision "that was within a range of reasonable choices". See *3716724 Canada Inc. v. Carleton Condominium Corp. No. 375*, 2016 ONCA 650.

86. I find that there was no breach of duty of care by the defendant condominium corporation. There were reasonable procedures in place to deal with snow and ice removal. As the condominium and the Board did not breach their duty of care, there is no basis to find the board members liable. Moreover, the Board did not act unreasonably in seeking compensation for the door and in not paying to repair the plaintiff's car. In any event, facts giving rise to claims of personal liability against the directors must be specifically pleaded in the claim (see *Grossman Holdings Ltd. v. York Condominium Corp. No 75*, 1998 CarswellOnt 5061 (Ont. Gen. Div.) at para.15)).

JUDGMENT

87. This court makes no ruling with respect to the claim for oppression, as it lacks jurisdiction to deal with that application, which is within the exclusive jurisdiction of the Superior Court of Justice.

88. The claim for defamation is dismissed.

89. The claim based on a breach of duty of care is dismissed. I turn to the issue of costs.

COSTS

90. The plaintiff's claim is for $12,065.64. He was not successful. Section 29 of the *Courts of Justice Act* provides, in part, "An award of costs in the Small Claims Court, other than disbursements, shall not exceed 15 per cent of the amount claimed ... unless the court considers it necessary in the interests of justice to penalize a party ... for unreasonable behaviour in the proceeding." Accordingly, costs are normally assessed at 15% of the legal representative's fees plus disbursements. 15% of the amount claimed is $1,809.85. The disbursements total $651.08, including HST.

91. There were three parts to the claim: oppression, defamation and breach of duty of care. The oppression claim should not have been brought in this court. The defamation claim also should not have been brought and was unproven. Ms. Perry did not testify and was not in attendance, and one lawyer represented all parties. There was no evidence she was actually harmed by this allegation (see *Carleton Condominium Corporation No. 396 v. Burdet*, 2015 ONSC 1361 (Ont. Sup. Crt.), at para. 93.)).

92. Prior to the conclusion of the three-day trial I was given a bill of costs to consider, in the event that the defendants were successful. Originally, the defendant's bill of costs for days one and two was for $4,807.92 in fees for partial indemnity, $13,412.65 for substantial indemnity, and $16,795.81, if I were to allow all of her fees. She also had asked for a counsel fee of $565 for the third day of trial.

93. On November 8, 2016, Ms. Molloy wrote to the court seeking additional costs for the three-day trial. She wanted the court to take into consideration the work done by other members of her firm, Elia Associates. One of the lawyers is Antoni Casalinuovo.

94. The new bill of costs, inclusive of disbursements, seeks $18,107.54, if partial indemnity is granted; $30,501.61 if substantial indemnity is granted; and, finally, $36,698.64, if full indemnity is granted. I note that she has two years of experience as a lawyer.

95. The monetary jurisdiction of this court is $25,000. For that reason, alone, I am concerned about this request for costs. Ms. Molloy did provide me with case law in support of her argument for increased costs.

96. The following cases were cited for the proposition that all legal fees should be allowed in the small claims court cases involving litigation between a condominium owner and the condominium: *Oxford Condominium Corp. No. 16 v. Collins*, [2000] O.J. No. 4260 (S.C.J., Small Claims Court), *Kidney v. Carleton Condominium No. 571 et al.* (S.C.J., Small Claims Court), January 25, 2005, unreported, and *Norma Wexler v. Carleton Condominium Corporation No. 28* (S.C.J., Small Claims Court), February 18, 2016. I brought to her attention that the latter is under appeal.

97. The costs awarded the condominium in the *Oxford* case were $1,099, on a successful claim for $267 against the condominium owners. In the *Kidney* case Deputy Judge Doyle, as she then was, pointed out that the contractual arrangements between the parties meant that the parties were not bound by the *Courts of Justice Act* or the *Small Claims Court Rules*. She awarded costs on a solicitor and client basis.

98. Article X of the Condominium's declaration covers indemnification, and it states that each owner shall indemnify the corporation against any "costs". This is not elaborated upon. It does not specifically address the issue of legal costs. It refers to acts or omissions that affect the common areas.

99. Ms. Molloy did not provide the court with a copy of Justice Roger's decision in *Wexler v. Carleton Condominium Corporation # 28,* 2016 ONSC 4162, in which leave to appeal the costs order of Deputy Judge Gouin was granted. I note that Antoni Casalinuovo, a member of her firm, was counsel at trial and on the motion for leave to appeal.

100. Justice Roger held that there was good reason to doubt the correctness of Deputy Judge Gouin's decision in *Wexler.* Section 29 of the *Courts of Justice Act* provides for exceptions. In granting a costs award against the plaintiff of $20,000, he held that Deputy Judge Gouin appeared to have exceeded his jurisdiction.

101. I am strongly persuaded by Justice Roger's reasoning, on the leave motion, whether or not this is binding on me. Taking into consideration the amount of the claim, the fact that the plaintiff quite properly resiled from parts of it, and that there were factual issues to be resolved, I allow a 15 % legal representation fee. The disbursements are allowed.

102. Costs are fixed in the amount of $2,460.93.

103. Post-judgment interest is granted at the rate of 2 % per year, pursuant to the *Courts of Justice Act.*

Dated at Ottawa on November 10, 2016.

Released: Nov. 10/16

Rosalind Conway
Deputy Judge