CITATION: Liddle v. Corp. Municipality of Wawa, 2016 ONSC 4525
COURT FILE NO.: 27226/16
DATE: 2016-07-12

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
TAMARA LIDDLE, GERRY LIDDLE Applicants	)	Self-Represented
– and –	)	
CORPORATION OF THE MUNICIPALITY OF WAWA Respondent	)	P.Cassan/T. Harmar, Counsel for the Respondent
	)	**HEARD:** July 7, 2016

JUSTICE E. GAREAU

ENDORSEMENT

[1] This matter came before the court on July 7, 2016. The applicants brought a notice of application returnable July 7, 2016 and the respondent brought a motion to strike the application in its entirety.

[2] Both the application and the motion to strike were rendered moot by a notice of discontinuance dated July 6, 2016 in which the applicants wholly discontinued the application against the respondent.

[3] The applicants are self-represented. Technically they should have delivered a notice of abandonment pursuant to Rule 38.08(1). The applicants delivered a notice of discontinuance. Rule 23.01(1) of the *Rules of Civil Procedure* reads as follows:

> 23.01(1) A plaintiff may discontinue all or part of an action against any defendant;
>
> (a) before the close of pleadings, by serving on all parties who have been served with the statement of claim a notice of discontinuance (Form 23A) and filing the notice with proof of service;
>
> (b) after the close of pleadings with leave of the court; or
>
> (c) at any time, by filing the consent of all parties.

[4] The respondent does not oppose the discontinuance or abandonment of the application by the applicants. I am prepared to treat the notice of discontinuance filed by the applicants as a notice of abandonment pursuant to Rule 38.08(1); therefore leave of the court is not required for the applicants to abandon their application.

[5] The notice of application dated June 20, 2016 contains a nine page letter dated May 17, 2016 from Tamara Liddle to members of Wawa Municipal Council, a two page document titled "Issues for Chris Wray Complaint", and a three page letter dated December 4, 2015 to the Corporation of the Municipality of Wawa from Paliare Roland Rosenberg Rothstein LLP. These documents are not properly part of a notice of application pursuant to Rule 38 and 39 of the *Rules of Civil Procedure*. The aforesaid documents are not part of an affidavit or exhibits to an affidavit as required by the Rules and are not properly part of the notice of application. Accordingly, the three documents referred to in this paragraph shall be struck from the notice of application and removed from the court file.

[6] The respondent prepared an affidavit of Ron Rody sworn on June 27, 2016 together with exhibits. Mr. Rody is the Mayor of the Municipality of Wawa. A large portion of the affidavit of Ron Rody sworn on June 27, 2016 replies to the letter referred to in the notice of application. Given the fact that the letters in the notice of application are to be removed from the notice of application and the court file, in my view, it is appropriate that Mr. Rody's reply affidavit also be removed from the court file. It is not required to reply to the letters that have been removed from the notice of application. Accordingly, there shall be an order that the responding affidavit of Ron Rody sworn on July 27, 2016 and the exhibits attached thereto be removed from court file 27226/16.

[7] That leaves the issue of costs. The respondent is seeking costs on a full indemnity basis. By email dated July 6, 2016 at 4:00 p.m. the applicants were provided notice by Paul Cassan, counsel for the respondent, that the respondent is seeking costs and that email attached the draft bill of costs. That email reads as follows:

> Mr. Liddle, Mrs. Liddle – attached please find our bill of costs for responding to your application and preparing our client's motion. We will be putting this before the court tomorrow and asking that full indemnity costs be awarded to the Municipality against you as co-applicants.
>
> I also provide a copy of the case law we will be relying on tomorrow for your review.

> I also will put a copy of this email before the court tomorrow.

The applicants' names were paged in court on July 7, 2016 but they did not respond to the page.

[8] Rule 38.08(3) of the *Rules of Civil Procedure* provides that "where an application is abandoned or is deemed to have been abandoned, a respondent on whom the notice of application was served is entitled to the costs of the application, unless the court orders otherwise".

[9] The respondent is clearly entitled to costs. The question is on what scale and in what amount. Counsel for the respondent submitted a bill of costs in which total costs, including disbursements and HST, is claimed in the following amounts:

Partial Indemnity	$16,935.14
Substantial Indemnity	$22,836.57
Full Indemnity (actual rate)	$26,516.13

The respondent seeks costs in the full indemnity amount of $26,516.13.

[10] As set out in section 131(1) of the *Courts of Justice Act,* RSO 1990 c. 43, costs are in the discretion of the court subject to any provision in the Rules that may assist the court in the exercise of its discretion.

[11] In the exercise of its discretion to award costs, the court is guided by the factors set out in section 57.01(1) of the *Rules of Civil Procedure*.

[12] A reading of the notice of application reveals that the applicants request an order requiring the respondent to remove the Wishart Law Firm as lawyers for the Municipality of the Corporation of Wawa. In the letters improperly attached to the notice of application it is clear that the applicants alleged acts of impropriety against members of the Wishart Law Firm and against the CAO/Clerk-Treasurer for the defendant corporation, Chris Wray.

[13] As a result of the applicants' abandonment of their notice of application, it can be inferred that the allegations of impropriety are unfounded. Unproven, unfounded allegations of impropriety properly attract costs on a scale more significant than partial indemnity costs. As is stated in paragraph 88 and 89 in the case of *1623242 Ontario Inc. v. Great Lakes Copper Inc.* (2016) 264 ACWS (3d) 602, Price J. stated the following:

> [88] Unfounded allegations of fraud typically attract an award of costs on a substantial indemnity scale. In *Young v. Young,* in 1993. McLachlin J. (as she then was) for a majority of the Supreme Court of Canada, held that solicitor-and-client costs (the predecessor of substantial indemnity costs) "are generally awarded only where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties".

> [89] In 2004, the Supreme Court of Canada set out the principles governing awards of substantial indemnity costs in *Hamilton v. Open Window Bakery Ltd.*:
>
> > An unsuccessful attempt to prove fraud or dishonesty on a balance of probabilities does not lead inexorably to the conclusion that the unsuccessful party should be held liable for solicitor-and-client costs, since not all such attempts will be correctly considered to amount to "reprehensible, scandalous or outrageous conduct". However, **allegations of fraud and dishonesty are serious and potentially very damaging to those accused of deception. When, as here, a party makes such allegations unsuccessfully at trial and with access to information sufficient to conclude that the other party was merely negligent and neither dishonest nor fraudulent (as Wilkins J. found), costs on a solicitor-and-client scale are appropriate.** ...

[14] The court goes on to state at paragraphs 91 and 92 of the above noted decision:

> [91] Justice Dambrot, in *Mele v. Riddell,* in 2010 stated:
>
> > **Where unfounded allegations of fraud or improper conduct seriously prejudicial to the character or reputation of a party are made in an action, a court may depart from the usual scale of costs and award costs on a solicitor-and-client scale**. The authorities establishing this principle are conveniently collected and analyzed by Adams J. in *Murano v. Bank of Montreal* (1995), 41 C.P.C. (3d) 143 (Ont. Gen. Div.). **A plaintiff who proceeds in this manner must be prepared for these cost consequences if the allegations turn out to be unfounded**. [Emphasis in original]
>
> [92] A dilemma arises when the plaintiff commences an action in which it alleges fraud, and later withdraws the allegations or discontinues the action before a judgment is rendered. It can be inferred from the withdrawal of the allegations or discontinuance of the action that the allegations of fraud were unfounded. Because of this, the action rightly attracts an award of costs on a substantial indemnity scale until the allegations are withdrawn or the plaintiff discontinues the action...

[15] Given the principles set out in the jurisprudence, the respondent is entitled to costs on at least a substantial indemnity basis. I have reviewed the respondent's cost outline to consider its request for costs in the substantial indemnity ($22,836.57) to full indemnity ($26,516.13) range.

[16] The work required by counsel for the respondent to defend the application of the applicants up to the date of the withdrawal included obtaining detailed instructions, preparation of a lengthy affidavit of Ron Rody sworn on June 27, 2016 and preparation of a motion to strike the claim, a book of authorities and a factum, an attendance in court by counsel on July 7, 2016 to argue the matter of procedure now that the application had been withdrawn and the issue of costs were required.

[17] In reviewing the cost outline of the respondent I am prepared to allow the hours submitted and rates submitted on a full indemnity basis for Mr. Cassan, Mr. Acton, Mr.

Shoemaker and Ms. Carella. Those rates total $14,208.75 for fees and represent 52.5 hours of billable time. In my view, that amount of time is reasonable for the preparation of the documents referred to in the preceding paragraph and the steps required to be taken by the respondent to defend this application up until the time of the notice of withdraw. Any additional fees, which include the times submitted for Mr. Harmar, are, in my view, excessive and amount to over-kill given the fact we are dealing with an application which was never argued, even at the interlocutory stage. I am also prepared to allow the additional sum of $500.00 for Mr. Cassan to attend in motions court on July 7, 2016 to have this matter disposed of.

[18] The total fees allowable are therefore $14,708.75. HST on that amount is $1,912.13. The disbursements claimed of $1,075.59 are reasonable and allowed. This brings the total to $17,696.47. Therefore, there will be an order that the applicants pay costs in this matter to the respondent fixed in the amount of $17,696.47, inclusive of HST and disbursements. These costs are payable by the applicants to the respondent forthwith.

[19] The respondent is entitled to take out this order without the approval of the applicants. The respondent shall provide a copy of this endorsement and the signed and entered order to the applicants.

Justice E. Gareau

Released: July 12, 2016

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ENDORSEMENT

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Released: July 12, 2016