CITATION: Affleck v. Sunrise Senior Living, Inc., et al., 2023 ONSC 1405
COURT FILE NO.: CV-08-355757-0000
DATE: 20230301

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
Marnie Affleck	)	In Person
	)	
Plaintiff	)	
	)	
– and –	)	
	)	
Sunrise Senior Living, Inc., Sunrise of Erin Mills, Jennifer Seehra, Elisabette Garcia, Linda Barbara Fraser, and Linda Barbara Fraser as Estate Trustee of the Estate of Redvers Dalton Stubley	)	Teresa-Anne Martin and Maya M. Kanani, for the Defendants Sunrise Senior Living, Inc., Sunrise of Erin Mills, Jennifer Seehra, and Elisabette Garcia
	)	
Defendants	)	
	)	
	)	
	)	
	)	**HEARD:** February 13, 14, 15, 16 and 17, 2023

J.T. AKBARALI J.:

Overview

[1] In this action the plaintiff claims $10 million in compensatory damages, $800,000 in aggravated damages, and $4 million in punitive damages against the defendants Sunrise Senior Living, Inc., Sunrise of Erin Mills, Jennifer Seehra (the Executive Director of Sunrise of Erin Mills at the relevant time) and Elisabette Garcia (an Assisted Living Coordinator at Sunrise of Erin Mills at the relevant time). Collectively, I refer to these defendants as the "Sunrise defendants". The claim has been dismissed against the plaintiff's sister, Linda Barbara Fraser, and the estate of the plaintiff's father, Redvers Dalton Stubley.

[2] The plaintiff's mother, Barbara Stubley, was a resident at Sunrise of Erin Mills beginning in 2006. Ms. Fraser held the powers of attorney for property and for personal care for Mrs.

Stubley.[1] She and Mr. Stubley were the listed responsible parties for Mrs. Stubley at Sunrise of Erin Mills.

[3] For reasons I describe more fully below, Ms. Fraser and Mr. Stubley became concerned that the plaintiff was abusing or attempting to abuse Mrs. Stubley, at least financially. They asked the Sunrise defendants to supervise the plaintiff's visits with her mother. There were altercations between the plaintiff and Sunrise employees resulting in a Notice of Trespass that was given to the plaintiff. Police were called on multiple occasions.

[4] The plaintiff alleges that the Sunrise defendants took unreasonable steps to impede her ability to see her mother, and in so doing, caused her significant trauma and mental and physical injuries. She claims relief based principally on "malicious negligent infliction of nervous shock."

Procedural Background

[5] Before I turn to the issues and evidence in this case, it is necessary to spend some time explaining the procedural background to this litigation.

[6] The litigation was commenced in 2008. At that time, the plaintiff was represented by counsel. In April 2011 the plaintiff delivered a Notice of Intent to Act in Person. The plaintiff proceeded as a self-represented litigant thereafter.

[7] This litigation consumed significant court resources. For example, the compendium of court orders and endorsements filed at trial contains 50 separate endorsements.

[8] The litigation was first scheduled to go to trial in October 2019. It was adjourned six times before the trial finally proceeded before me, on its seventh scheduled trial date, and after the plaintiff's request to adjourn the trial yet again was refused by Chalmers J. on January 23, 2023.

[9] For some period of time, the litigation was case managed by J. Wilson J. On May 20, 2021, J. Wilson J. vacated the trial date, then set for 20 days, because the plaintiff was unable to manage the challenges of a virtual trial. In the same endorsement, J. Wilson J. ordered that the matter proceed using a modified summary trial procedure to be heard for 4 to 5 days. She noted that the litigation was not, at that time, ready for trial: "There is no agreed joint book of documents, no agreed upon chronology of undisputed facts and no indication of the facts that are in dispute and the position of the parties".

[1] Mr. Stubley had originally been named as Mrs. Stubley's attorney, but he subsequently resigned, and as a result, Ms. Fraser, the alternate, held the powers of attorney at the relevant time.

[10] Justice J. Wilson made a series of procedural orders designed to get the litigation ready for trial, which she scheduled for November 29, 2021. The intention was for the parties to adduce the examination in chief of their witnesses by affidavit.

[11] In a subsequent endorsement on January 20, 2022, J. Wilson J. vacated the then-current trial date of January 31, 2022 and set a new trial date for April 25, 2022. She noted that previous trial management orders she had made were not complied with. She recorded that the parties were unable to agree on a joint book of documents, so each party would prepare their own documents. Defence counsel agreed to assist the plaintiff with posting and hyperlinking her documents on CaseLines. Justice J. Wilson also noted that certain witnesses would testify remotely, such that the trial would proceed as a hybrid trial. It was important to the plaintiff that she attend the trial in person as she is not technologically adept.

[12] On J. Wilson J.'s retirement, a new case management judge, Sugunasiri J., was appointed. When Sugunasiri J. was reassigned to another team in January 2023, no new case management judge was appointed. However, Vermette J. spent hours with the parties at a trial management conference the week before the trial and, among other things, set out a timetable for the progression of the trial. She also provided the plaintiff with a copy of the court's guidelines for self-represented litigants who are representing themselves at trial.

[13] Despite the tremendous investment of court resources into the management of this litigation, the trial did not go smoothly. The week before trial, I wrote to the parties to advise that the plaintiff's affidavit was not uploaded to CaseLines. It eventually was uploaded, the weekend before trial, by defendants' counsel. That same week, I was advised that the parties intended to bring a series of motions at the outset of trial, including a motion by the Sunrise defendants striking portions of the plaintiff's affidavit for including evidence and documents subject to settlement privilege, and evidence that was scandalous because it attacked defendants' counsel personally. For her part, the plaintiff intended to move, among other things, for an order requiring the defendants to pay the damages claimed into court at the outset of trial due to their failure to negotiate a settlement with her in good faith, and for an order converting the trial into a summary judgment process.

[14] Given the fact that the court had only five days of trial time, I concluded that it was not an appropriate use of court time to hear the motions that the parties sought to bring. I proposed that, rather than deal with the motion striking portions of the plaintiff's affidavit, the plaintiff give her evidence in chief orally, and we proceeded in that manner. The plaintiff advised me that she had sworn an affidavit indicating that the allegations in the latest version of her statement of claim were true. I suggested she testify to that in her examination in chief, such that the factual allegations in her claim would function as a written record of her factual claims, and she did so.

[15] The plaintiff was ill-prepared for trial. I set out some of the many problems that plagued this trial, along with the efforts of the court, court staff, and defence counsel to assist and accommodate the plaintiff:

a. As I have noted, the plaintiff's affidavit contained inappropriate and inadmissible evidence, so she was allowed to give her evidence in chief orally;

b. The plaintiff was unable to figure out how to operate zoom for the hybrid portion of the trial. The court registrar first updated the plaintiff's computer so it could run the zoom program, and logged her into zoom, so she could participate in the hybrid portion of the trial.

c. While the plaintiff was examining witnesses over zoom, defence counsel shared their screen to put up the documents the plaintiff sought to put to the witnesses because she was unable to do so herself;

d. When the plaintiff's computer stopped working, one of the defence counsel loaned the plaintiff her personal cell phone so she could participate on zoom;

e. Court staff assisted the plaintiff in moving her books and paper around the courtroom as needed;

f. Although I advised the plaintiff by email in the week before trial that she had to bring five copies of any paper document she wished to introduce as an exhibit, the plaintiff did not do so. When she sought to introduce a document, defence counsel kindly arranged for a copy of it to be uploaded to CaseLines;

g. When examining a witness with a document already in CaseLines and of which the plaintiff had brought only one hard copy, defence counsel loaned the witness her laptop so the witness could see the document about which she was being asked questions;

h. Defence counsel provided paper copies of the documents they put to the witnesses so that the plaintiff did not have to navigate CaseLines to view those documents;

i. To attempt to save time, defence counsel offered to ready the documents the plaintiff would need for her examinations if she told them in advance what they documents would be. The plaintiff did not take them up on this offer, so significant time was lost searching for documents;

j. Rather than collect her documents in a book of documents, or even in a pile, the plaintiff used her copies of the affidavits of documents to identify documents for the witnesses. The affidavits of documents had been uploaded onto CaseLines by defence counsel, but it still took significant time to locate the documents the plaintiff was referring to within the multiple volumes of affidavits of documents. It often took the plaintiff significant time to identify the document she was looking for in her briefs before defence counsel could even begin looking for it in CaseLines;

k. The plaintiff regularly mislaid her documents, necessitating that everyone, including defence counsel and court staff, search for the documents in the courtroom;

l. The plaintiff disrupted the trial process by wandering around the courtroom while others were speaking (usually looking for her missing documents), knocking over briefs and other items. She benefitted from the patience of all other trial participants as she did so;

m. I explained the trial process at length and multiple times to the plaintiff, who advised that she had brain damage and could not recall everything I said earlier. She had difficulty implementing my instructions. For example, I told her during her examination in chief that she had to stop talking when defence counsel rose to object. Rather than follow the direction, she would speak louder and faster when she saw defence counsel rise.

n. I regularly interrupted the plaintiff (something I do not usually do) to redirect her evidence and questioning when it strayed from relevant issues, or when it became inappropriate. For example, I redirected her from arguing with witnesses she was cross-examining, or from trying to give her own evidence about the matters the witness was testifying to. When she sought to elaborate on questions during her cross-examinations, I limited her ability to do so, to ensure the witness could give the answer and court time would be used efficiently. When she strayed into irrelevant evidence during her own examinations, I refocused her on the issues in the litigation. I reminded her regularly of the timetable that had been set, and regularly suggested that she not spend her time on matters that were irrelevant. Often, when I interrupted to redirect her, the plaintiff would speak louder and faster over me, but as I pointed out to her, when she did so, I could not hear her because I was also speaking;

o. At the plaintiff's request, I allowed her to borrow time from her later-scheduled cross-examinations to complete the cross-examinations she concluded were more important to her case while still ensuring the trial was completed on schedule;

p. The court regularly sat late, and took abbreviated breaks to extend the trial day beyond its usual length to, in effect, provide the plaintiff with more than five days of trial time. Because the plaintiff took a great deal of time to gather her things at the end of the day, court staff routinely stayed well past their working day to accommodate her. At the same time, the plaintiff regularly arrived late in the morning and after breaks;

q. When the plaintiff had an outburst on the last day of trial and attempted to argue with me about a ruling I had made, I took a break to allow her to calm down, but indicated that the lost time would come from her closing argument;

r. The plaintiff was afforded significantly more time than that to which she was entitled according to the timetable set by Vermette J. At the same time, much of the plaintiff's evidence and questioning was unfocused and meandering. Despite all of the efforts to accommodate her, the plaintiff did not use her time well.

[16] In the end, although the court, court staff, and counsel all made significant efforts to ensure the smooth running of the trial, and the effective participation of the plaintiff in the process, the plaintiff rushed through the examinations of the last witness or witnesses. This was the result of her choice about how to spend the time allocated to her (and augmented during the trial), and her lack of preparation for the examinations.

[17] Finally, I note that I did not exercise my discretion to extend the time allotted for the trial (apart from lengthening the allotted trial days[2]). The court is currently facing a significant backlog and its resources have to be managed to ensure all parties before the court, not just parties to one particular case, are served. This case has already consumed significant court resources, and I was not prepared to allocate time over and above that which had been scheduled and which was adequate for the case, if properly prepared, especially in view of the guidance given to the plaintiff during the case management process.

Procedural Issues at Trial

[18] During the course of the trial, I made two rulings that affected the plaintiff's evidence and intended claims. I explain those rulings here.

[19] First, the plaintiff sought to adduce the evidence of two witnesses: Dorothy-Anna Orser, by way of affidavit, and Roy Abraham, by way of unsworn statement. Despite the fact that this litigation has been in the trial preparation phase for several years, these documents were delivered to the defendants the week prior to the trial. The plaintiff advised me that neither Ms. Orser nor Mr. Abraham were available for cross-examination, either in person or via zoom.

[20] Ms. Orser is a proposed witness about whom the defendants have no knowledge. Her name has never come up in the litigation before her affidavit was delivered. Mr. Abraham's name has arisen in the course of the litigation, but has I have noted, his statement is unsworn.

[21] I declined to admit the evidence of these witnesses. The ability of the opposing party to test another party's witness's evidence in cross-examination is a key component of our adversarial system. Moreover, the fact that Mr. Abraham's statement is unsworn renders it unreliable on its face. In any event, the affidavit and statement are short, and do not add much to the evidence about the events at issue in this litigation. I note that portions of Ms. Orser's affidavit are also inadmissible because they amount to oath-helping. As to Mr. Abraham's statement, the plaintiff

[2] On one day of trial, we began late due to a conflict in my schedule. However, by adjusting the court's schedule on other days, we made up the lost time and more.

was present for the events it relates and has given her own evidence of what occurred. Even if the statement and affidavit had been inadmissible, they would not have affected the outcome of the trial.

[22] The second procedural issue arose on the last day of trial, when the plaintiff sought to amend her pleading. She did not provide a draft pleading for the purpose.

[23] One of the proposed amendments related to her prayer for relief, and appeared to be geared at addressing the fact that her proposed settlement position in the statement of claim be removed, and replaced with a statement that $10 million in compensatory damages would suffice such that, were she awarded that amount she would not seek punitive damages. She advised me she did not wish to argue punitive damages. I found that the amendment was not necessary; as a self-represented litigant, the plaintiff is entitled to a generous reading of her pleading in any event, and her position on damages would, in effect, be as she argued it in closing argument (as she appeared to intend to seek less in damages than set out in her prayer for relief). As it happened, the plaintiff did make argument on punitive damages in closing despite her stated intention not to.

[24] The plaintiff also sought to amend para. 169 of her claim to add a claim for "malicious negligent infliction of nervous shock" and defamation. The motion to amend the claim was originally brought before Associate Justice Brott on February 20, 2020 and was refused. Among other things, Brott A.J. held "this action has proceeded for the past 12 years [15 years now]. There have been six amendments to the Statement of Claim [seven now]. There is no evidence to suggest new information has come to light. The requested amendments are being brought 12 [now 15] years after the incidents giving rise to the claim. The delay triggers presumptive prejudice and is therefore denied."

[25] Associate Justice Brott's decision was not appealed. The plaintiff sought the same amendments before Sugunasiri J. which request was denied on November 7, 2022 on the basis that Brott A.J. had decided the issue. As I explained at trial, it would be improper for me to sit in appeal of Brott A.J.'s decision three years later at trial, or to permit a collateral attack on her decision. Accordingly, I declined to permit the amendments.

[26] I also note that "malicious negligent infliction of nervous shock" is not a claim known at law. The plaintiff explained that by "malicious" she meant that the defendants' actions were intentional, even if the result of those actions (her trauma) were not. In my view, the claim is properly understood as negligent infliction of nervous shock. In addition, although the claim does not use the word "defamation" there are some pleadings relating to spreading falsehoods which I address in my analysis.

Issues

[27] This trial requires me to determine the following issues:

a. Are the Sunrise defendants liable to the plaintiff for negligent infliction of nervous shock? Answering this question will require me to consider:

i. Whether the Sunrise defendants owed the plaintiff a duty of care;

ii. Whether the Sunrise defendants breached the standard of care;

iii. Whether the breach of the standard of care caused damage to the plaintiff.

b. Are the Sunrise defendants liable for defamation?

c. If liability is established:

i. What are the plaintiff's foreseeable damages that are both proven on the record, and not too remote?

ii. Is the plaintiff entitled to aggravated damages?

iii. Does the conduct of the Sunrise defendants warrant the imposition of punitive damages?

Analysis

Negligent Infliction of Nervous Shock

[28] In *Louie v. Lastman*, [2001] CanLII 28066 (ON SC) at para. 33, the court set out the elements of the tort of negligent infliction of nervous shock:

a. A duty of care owed to the plaintiff;

b. A breach of the standard of care;

c. Damage resulting from the breach;

d. Damage which is foreseeable and not too remote.

[29] I turn to consider the facts of this case to determine whether the cause of action is made out.

Credibility Assessment

[30] In the course of making my findings of fact, I have assessed the credibility of the witnesses. I found the Sunrise defendants and Ms. Fraser to be clear and consistent in giving their evidence. In contrast, the plaintiff was argumentative, refused to concede reasonable points, and crafted a narrative that was often lacking in common sense, and inconsistent with the documentary record. Where there is a conflict in the parties' evidence, I prefer the evidence led by the defendants to that of the plaintiff. I am not satisfied that the plaintiff's evidence is credible or reliable.

The Facts Underlying the Claim

[31] Below I set out the key facts I find that are relevant to the disposition of this litigation. I do not review all the evidence, and in particular, I do not review many of the plaintiff's explanations for her behaviour in these reasons. Nor do I review many of the plaintiff's theories of aspects of this case because many are misdirected and, to me, obviously wrong.[3] I have considered all of the evidence led in this trial and below refer only to the evidence that I find is necessary to resolve the claims.

[32] This unfortunate situation began with family disagreements involving the plaintiff and her sister, and the plaintiff and her father, that occurred between 2005 and 2008. The details are unimportant, although I note that some of the disagreements related to material goods and a cottage property.

[33] Things came to a head on January 15, 2008, when the plaintiff, together with her cousin Mark Griffiths who was in town from London, England, went to Mr. Stubley's home. Mr. Stubley grew angry with the plaintiff, who wanted to take some things from the home, and he refused to allow her to do so. Mr. Griffiths and the plaintiff left the home. Mr. Griffiths shared with the plaintiff his view that Mr. Stubley had written the plaintiff out of his will.

[34] By this time, Mrs. Stubley had been a resident at Sunrise of Erin Mills for nearly two years. The plaintiff understood that Mrs. Stubley's will provided that, should she predecease Mr. Stubley, her assets would pass to him. The plaintiff believed that her parents had intended that on the death of the second of them, their assets would be shared equally between their two children: the plaintiff and Ms. Fraser. The plaintiff was concerned that if Mrs. Stubley predeceased Mr. Stubley, the plaintiff would be disinherited entirely.

[35] Over the next couple of weeks, the plaintiff took the following steps:

a. She told Mrs. Stubley that she believed her father had disinherited her;

b. She telephoned Mrs. Stubley's lawyer asking how she could obtain a copy of Mrs. Stubley's will. According to the plaintiff, the lawyer, despite never having dealt with the plaintiff before, gave the plaintiff advice over the phone about revoking the Powers of Attorney Mrs. Stubley had signed;

[3] By way of example only, the Continuing Power of Attorney for Property of Barbara Isobel Stubley in the record is a notarized copy. The Notary Public has signed and sealed a document which attest that the paper-writing annexed to the document "…purporting to be a Continuing Power of Attorney for Barbara Isobel Stubley…" is a true copy. The plaintiff spent a great deal of time emphasizing the word "purporting" in the Notary Public's statement. It is perhaps an example of how legalese can confuse lay people, but it is standard language and does not give rise to the conspiracy that the plaintiff was suggesting, that somehow the power of attorney was not legitimate.

c. After Mrs. Stubley handwrote a document purporting to be a new will, the plaintiff typed up an "Agreed Statement of Facts regarding the Will of Barbara Isobel Stubley", indicating that Mrs. Stubley wished her estate to be divided equally between the plaintiff and Ms. Fraser, for signature of Mrs. Stubley, the plaintiff, Ms. Fraser, and Mr. Stubley;

d. She prepared documents for Mrs. Stubley's signature purporting to revoke the Powers of Attorney that Mrs. Stubley had previously signed.

[36] The plaintiff does not deny taking these steps, but insists they were done on her mother's instructions. Ms. Fraser testified that Mrs. Stubley was upset by the plaintiff's insistence that she sign documents.

[37] Moreover, the evidence indicates that at the time of these events, there were serious concerns about Mrs. Stubley's capacity. She was assessed by a geriatric medicine specialist, Dr. Devarj, multiple times between 2006 and 2008. Ms. Fraser deposed that Mrs. Stubley was experiencing progressive memory failure during this time. Ms. Garcia also observed Mrs. Stubley's short term memory loss and cognitive impairment. Dr. Devarj's reports reveal his impressions of Mrs. Stubley's clinical situation, including dementia of mixed etiology (cerebrovascular and early Alzheimer's). Mrs. Stubley was prescribed increasing dosages of medication to slow the progression of dementia.

[38] The plaintiff insists that Mrs. Stubley was capable of managing her financial affairs in 2008. However, it is apparent from the documents in the record that Mr. Stubley was the responsible person for dealing with Mrs. Stubley's expenses at Sunrise of Erin Mills. The evidence indicates that Ms. Fraser accompanied Mrs. Stubley to her medical appointments. By 2006, Ms. Fraser took responsibility for Mrs. Stubley's shopping and banking. A capacity assessment of Mrs. Stubley on April 21, 2008 concluded that Mrs. Stubley was incapable of managing her property and incapable of managing her personal care.

[39] Mrs. Stubley was likely not capable of changing her will or revoking her powers of attorney in January 2008. More to the point, I find that the plaintiff was aware of the capacity concerns regarding Mrs. Stubley. At trial, she testified that she had discovered that her mother's identification continued to list the family home as her address, so she wrote up a card with the Sunrise of Erin Mills address on it and put it in her mother's purse so that if her mother got lost, someone assisting her would know where she lived. If Mrs. Stubley was fully capable, the plaintiff would not have worried about her getting lost and not knowing where her home was.

[40] Ms. Fraser and Mr. Stubley learned of the plaintiff's attempts to get Mrs. Stubley to sign a new will and revoke the powers of attorney. They became concerned about elder abuse, particularly financial elder abuse, although there is evidence, which I accept, that the plaintiff's efforts to pressure Mrs. Stubley to sign documents was also emotionally upsetting for Mrs. Stubley. As a result, Ms. Fraser and Mr. Stubley asked Sunrise of Erin Mills to supervise the plaintiff's visits with Mrs. Stubley.

[41] On January 28, 2008, the plaintiff went to Sunrise of Erin Mills to visit Mrs. Stubley. In the elevator on her way to her mother's floor, the plaintiff had a discussion with a staff member who was also in the elevator, and whom she did not know. The plaintiff described the conversation as an exchange of "niceties" but her own evidence indicates that the conversation was not benign. After a brief exchange of pleasantries, the plaintiff indicated that she asked the staff member if she could ask her a personal question, and proceeded to ask her why she wore a hijab. The plaintiff observed that the staff member's demeanour changed quickly on being asked the question, and she seemed to take offence to what the plaintiff insisted was an innocent question. As a result, the plaintiff suggested to the staff member that she "educate herself" on the struggle of women for equal rights "in this country". She explained that she was simply trying to broaden the staff member's perspective so she would not take such easy and unnecessary offence to an innocent question.

[42] The plaintiff's evidence about this exchange reveals her complete lack of self-awareness. Even now, years later, after being told that the staff member was upset and offended by the exchange, she continues to insist she did nothing wrong, when in fact, her behaviour was inappropriate, aggressive, and racist.

[43] The staff member was so upset by the exchange that she was in tears, and another employee reported what happened to management. After speaking with the upset staff member, Ms. Seehra decided to speak to the plaintiff about the incident, and asked Ms. Garcia to ask the plaintiff to meet her at Dunn Terrace in the facility for a discussion about what had occurred.

[44] Ms. Garcia went to Mrs. Stubley's room. She asked the plaintiff to speak to the Sunrise staff outside of Mrs. Stubley's room, in Dunn Terrace. Ms. Garcia testified that they did not want to upset Mrs. Stubley by raising the incident in the elevator in front of her. However, the plaintiff refused to leave Mrs. Stubley's room. According to the plaintiff, she indicated she would speak to Sunrise staff after her visit with her mother was over.

[45] Ms. Seehra then also came to Mrs. Stubley's room. She and Ms. Garcia waited outside the room for a little while. They wanted to approach the plaintiff in a calm and professional manner. Ms. Garcia gave evidence that, while they were outside Mrs. Stubley's door, she heard the plaintiff telling Mrs. Stubley to sign some papers. As a result, Ms. Garcia knocked. She and Ms. Seehra entered the room, together with a third staff member. Ms. Seehra asked to speak to the plaintiff in private, but the plaintiff again refused.

[46] While in Mrs. Stubley's room, the parties began speaking about the incident in the elevator, and Mrs. Stubley grew upset. The plaintiff also grew upset. The plaintiff telephoned the police. The parties have differing recollections of what was said in the room, but it is clear that there was a great deal of tension. I accept that the plaintiff was yelling and escalating the conflict unnecessarily. As a result of the altercation in Mrs. Stubley's room, someone from Sunrise called Ms. Fraser who arrived very quickly.

[47] On Ms. Fraser's arrival, there was discussion about the request she and Mr. Stubley had made that the plaintiff's visits with her mother be supervised. Ms. Fraser asked the plaintiff to stop

asking Mrs. Stubley to sign papers about powers of attorney and changing her will. The plaintiff screamed at Ms. Fraser. Ms. Fraser recalls the plaintiff yelled, "[y]ou're not the boss of me!" The plaintiff was also behaving in a threatening manner towards Ms. Seehra, getting very close to and screaming at her.

[48] Ms. Seehra and Ms. Garcia asked the plaintiff to leave the building. Ms. Garcia and another staff member escorted her out through the service elevator. The plaintiff continued to yell in the hallway, and once they arrived on the main floor, she began to make a scene. The plaintiff again called the police, and they attended to diffuse the situation.

[49] Thereafter, Ms. Seehra obtained authorization from her regional director to issue a Notice of Trespass against the plaintiff. Ms. Fraser and Mr. Stubley supported the trespass notice being issued. Ms. Seehra wrote to the plaintiff to explain that she was restricted from attending the property and police would be called should she attend. Ms. Seehra intended the restriction to be temporary while the parties came to an agreement about supervised visits between the plaintiff and Mrs. Stubley.

[50] The plaintiff then began a campaign of telephoning Sunrise of Erin Mills, up to ten times a day. Staff logs describe her as rude and impossible. She telephoned Mrs. Stubley so often, upsetting Mrs. Stubley, that Ms. Fraser and Mr. Stubley eventually decided to remove Mrs. Stubley's telephone for a period of time to give Mrs. Stubley a break from the plaintiff's incessant phone calls. The plaintiff began trying to communicate with Mrs. Stubley in other ways, including by sending friends to deliver a cell phone to her, and later a walkie-talkie. She also had friends and courier deliver papers for Mrs. Stubley to sign, including papers purporting to rescind the trespass notice. The plaintiff even used her eleven-year-old daughter as a courier. Over 30 times, she faxed Sunrise a note stating she was allowed to visit the premises.

[51] On one occasion, the plaintiff directed Mrs. Stubley to write out a note indicating that the trespass notice was lifted, and get a concierge at Sunrise's reception to sign it. The concierge did so at Mrs. Stubley's request, in error, but in any event, there is no reason to think she would have had the authority to lift the trespass notice.

[52] Nonetheless, the plaintiff maintains that by procuring the signature of the concierge, the trespass notice was lifted. She thus attended the property on March 2, 2008 to visit Mrs. Stubley. During that visit, she obtained a cheque in the amount of $2,000 written on Mr. and Mrs. Stubley's joint account. According to the plaintiff, this cheque was a birthday gift for the plaintiff's daughter. Mrs. Stubley later called her to ask her to rip up the cheque, but the plaintiff had already cashed it. Cashing it put the Stubleys' account into overdraft. The plaintiff did not return the money. She says she was not entitled to return it, because it belonged to her eleven-year-old child.

[53] The plaintiff was advised again not to attend the Sunrise property. She continued to attend the area, remaining just off property, and perhaps sometimes on the property outside of the building. At times, she yelled while outside the property. Police were called several times. On one occasion, the plaintiff was charged with causing a disturbance, and given her arrest, had to leave

her daughter behind at the property, an incident which upset both her daughter and her mother greatly. Ms. Fraser cared for the child until the child's father could come to pick her up.

[54] The plaintiff was not prevented from seeing Mrs. Stubley off the property, and she did so, including by sending a taxi for Mrs. Stubley, which Ms. Fraser, as Mrs. Stubley's attorney, agreed to pay for. On one visit off property, the plaintiff took her mother to two different branches of her bank to attempt to obtain new cheques and a new bank card.

[55] When the plaintiff saw Mrs. Stubley off the property, the Sunrise defendants would check Mrs. Stubley's bags on her return, just as they would check any packages the plaintiff had delivered for Mrs. Stubley. The defendants were concerned about the plaintiff sending documents for Mrs. Stubley to sign, with reason, as she often did exactly that.

[56] On one occasion, the plaintiff showed up at Ms. Fraser's home uninvited when Mrs. Stubley and other family were there. The plaintiff refused to leave the premises, necessitating another call to police, and again upsetting Mrs. Stubley and other family members.

[57] On November 27, 2008, a temporary agreement was reached between the plaintiff and Sunrise that would allow the plaintiff to visit Mrs. Stubley at the Sunrise premises. The plaintiff agreed to keep the peace, and be escorted to and from Mrs. Stubley's room by a staff member.

[58] Very shortly thereafter, due to Mrs. Stubley's declining health, she moved into a long-term care home that could provide her with a higher level of care.

[59] The plaintiff alleges that the conduct of the defendants in impeding her ability to see her mother in her mother's own home led to trauma and stress that initiated various disease processes in her body. She claims to have suffered brain damage, a compromised respiratory system, compromised heart functioning, chronic nausea, abdominal pains, memory problems, pancreatic cysts, a lesion in her colon, hair loss, asthma, osteoporosis and kidney complications, among other problems.

[60] The plaintiff gave evidence as to her physical and mental injuries. However, there is no expert evidence, or any medical records, to either support her oral evidence or establish any causative link between her medical problems and the conduct of the Sunrise defendants.

The Expert Evidence

[61] The only expert evidence in the record was led by the defendants. Judith Ritson is a registered nurse with over 40 years' experience. She has twelve years of management experience as a Director of Care and Care Coordinator for two long-term care facilities. She is certified in gerontology. Among other things, she was appointed the first Assisted Living Registrar in British Columbia. She was a member of the Assisted Living Centre of Excellence, where she assisted in creating standards for assisted living homes.

[62] The plaintiff did not object to Ms. Ritson's qualifications. At trial, I qualified Ms. Ritson as an expert in the standard of care in retirement homes and assisted living facilities. I find her evidence to be reliable and credible, and I accept it.

[63] Ms. Ritson gave evidence that assisted living communities owe their residents the core principles of choice, privacy, independence, individuality, dignity and respect. Even when adults need support or assistance or care in their daily life, they must retain the ability and right to manage their own lives.

[64] However, Ms. Ritson also explained that assisted living operators have a duty to keep a "watchful eye" over residents, without unnecessarily intruding into residents' private lives and personal decision-making. When an operator notices a problem in relation to a resident's health and safety, the operator has the responsibility to follow up on the matter with the resident and/or their designated contact person.

[65] In circumstances where a resident's decision-making ability is declining, there is a greater onus on the operators to ensure that the resident is making informed decisions, mitigating harm to themselves, and not placing others in the residence at risk.

[66] Ms. Ritson deposed that there are no documented standards of care for family members or guests of residents, but operators respect those guests and family members who form part of the residents' social well-being. At the same time, guests are expected to abide by the policies of the assisted living facility, including respectful communication and behaviour.

[67] Ms. Ritson confirmed that an operator has the right to restrict entry to a family member, on consultation with the resident (if appropriate), family members, powers of attorney and lawyers where necessary to maintain the safety and well-being of their residents and staff.

[68] Ms. Ritson expressed the opinion that the documents she reviewed, including the defendants' witnesses' affidavits, supported the conclusion that the Sunrise defendants had met the standards of care they owed, and were justified in restricting the plaintiff from the premises to ensure the safety of Mrs. Stubley and Sunrise staff, as well as other residents.

Do the facts support the plaintiff's claim of negligent infliction of mental shock?

[69] For the purpose of my analysis, I assume without deciding that the Sunrise defendants owed the plaintiff a duty of care, although I note this was strongly contested by the Sunrise defendants.

[70] I dismiss the plaintiff's claim for negligent infliction of nervous shock because I find that the Sunrise defendants did not breach the standard of care. To the contrary, the actions they took in this situation were reasonable and designed to respect and protect Barbara Stubley, and consistent with the directions of her chosen substitute decision makers.

[71] In my view, the Sunrise defendants and Ms. Fraser and Mr. Stubley were right to be concerned about elder abuse in this case. I do not accept the plaintiff's evidence that the documents

she was preparing for Mrs. Stubley's signature were prepared in accordance with Mrs. Stubley's wishes, nor that her efforts to obtain a copy of Mrs. Stubley's will, or new cheques or a new bank card, were at Mrs. Stubley's behest. There is ample evidence that when Mrs. Stubley needed assistance, she turned to Mr. Stubley and Ms. Fraser. They were named in her powers of attorney. Ms. Fraser assisted her with her shopping, previously with her banking, and with her medical appointments. Ms. Fraser assisted her with finding an appropriate living facility when the time came to move out of the family home. Ms. Fraser and Mr. Stubley attended the meetings at Sunrise to develop Mrs. Stubley's care plan. They were the identified responsible people for Mrs. Stubley in Sunrise's records. In contrast, the plaintiff was one of Mrs. Stubley's visitors. If Mrs. Stubley indeed wanted to make changes in her affairs, and if she were competent to do so, she would have turned to Mr. Stubley and Ms. Fraser for assistance, not the plaintiff.

[72] The plaintiff may have convinced herself that she was carrying out her mother's wishes, but in fact, she was looking out for her own financial interest. She was attempting to engage in financial abuse of Mrs. Stubley, and succeeded at least once by obtaining the $2,000 cheque.

[73] Thus, the Sunrise defendants were faced with a situation where Mrs. Stubley was at risk of financial abuse. Moreover, Mrs. Stubley was regularly emotionally upset by the plaintiff's conduct.

[74] And apart from the obligations the Sunrise defendants had towards Mrs. Stubley, I accept that they had to consider their other residents, who were disturbed by the plaintiff's conduct. They had to consider the right of Sunrise staff to work in a safe environment, free from harassment. The plaintiff regularly harassed Sunrise staff, from her racist and aggressive remarks in the elevator, to the harassing telephone calls to the concierge.

[75] In these circumstances, the Sunrise defendants acted in accordance with their obligations by prohibiting the plaintiff's attendance at the premises until an agreement could be worked out. I have no hesitation in concluding that the plaintiff's own actions delayed that agreement unnecessarily. In the meantime, she was not precluded from seeing Mrs. Stubley off the property. The limitations placed on the plaintiff were reasonable and consistent with their obligations as described by Ms. Ritson, including "keeping a watchful eye" over Mrs. Stubley, especially in view of her cognitive decline, and maintaining a safe environment for other residents and staff.

[76] I thus conclude that the Sunrise defendants met their obligations and did not breach the standard of care.

[77] Finally, for the sake of completeness, I note that there is no evidence on the record which would allow me to find that the plaintiff's illnesses and ailments were caused by the conduct of any Sunrise defendant, nor any basis on which to assess the quantum of damages were I to find causation.

[78] The plaintiff has thus failed to make out the elements of negligent infliction of nervous shock.

[79] Although it is my view that the plaintiff has structured her claim in negligence, I briefly note that she has failed to make out the elements of intentional infliction of nervous shock as well. One of the elements of the tort of intentional infliction of nervous shock is that the conduct at issue must be flagrant and outrageous: *Prinzo v. Baycrest Centre for Geriatric Care*, 2002 CanLII 45005 (ON CA), at para. 43. It is obvious from my findings above that the Sunrise defendants did not engage in any flagrant and outrageous conduct.

Defamation

[80] Although the plaintiff's claim does not use the word "defamation", it does plead that the Sunrise defendants spread falsehoods about her which caused her damage. Accordingly, I consider whether she has made out the tort of defamation.

[81] As best as I understand it, the plaintiff alleges that the Sunrise defendants spread falsehoods as follows:

a. by telling Sunrise staff that she was the subject of a restraining order, when in fact she was the subject of a trespass notice;

b. by spreading the falsehood to staff, Ms. Fraser and Mr. Stubley, and perhaps others, that the plaintiff was extorting or stealing money from Mrs. Stubley.

[82] A defamatory statement has been defined by the Court of Appeal as "one which has a tendency to injure the reputation of a person to whom it refers; which tends…to lower him in the estimation of right thinking members of society generally and in particular to cause him to be regarded with feelings of hatred, contempt, ridicule, fear, dislike or disesteem. The statement is judged by the standard of an ordinary, right thinking member of society. Hence, the test is an objective one": *Colour Your World Corp. v. CBC*, (1998) 38 O.R. (3d) 197, 1998 CanLII 1983 (ON CA) at p. 7.

[83] A pleading of defamation requires the plaintiff to set out precisely what each allegation of defamation is, when the incident occurred, what was alleged to have been said, by whom and to whom: *Khan v. Canada (Attorney General)*, 2009 CanLII 70990 (ON SC) at para. 25.

[84] To prove defamation, a plaintiff must show that: (i) the defendant made a defamatory statement, in the sense that the impugned words would tend to lower the plaintiff's reputation in the eyes of a reasonable person; (ii) the words in fact referred to the plaintiff; and (iii) the words were communicated to at least one person other than the plaintiff: *Guergis v. Novak*, 2013 ONCA 449, at para. 39.

[85] There are a number of issues with the plaintiff's claim of defamation. First, the statement of claim does not plead the alleged defamation with the required particularity, nor does she plead any damages relating to her reputation.

[86] Second, I do not accept the plaintiff's argument that she was defamed in the eyes of Sunrise staff who understood she was subject to a restraining order, not a notice of trespass. Sunrise staff

may well have thought poorly of the plaintiff. Given the plaintiff's disruptive behaviour, and her aggressive and rude behaviour, both in person and over the telephone to staff, it is little wonder that staff might have had a negative opinion about her. Any negative impact on her reputation is the result of her conduct. The difference between a restraining order and a trespass notice is minimal; in either event the plaintiff was not allowed on the premises because of her behaviour. It was her behaviour that caused any lowering of the plaintiff's reputation in the eyes of a reasonable person, not the mechanism by which she was excluded from the property.

[87] Third, to the extent that the plaintiff argues that she was defamed by the defendants expressing the view that she was attempting to extort or steal money from Mrs. Stubley, I have found that the plaintiff was attempting to financially abuse her mother and succeeded at least once. Proof that a statement made is substantially true constitutes a defence to defamation: *Vigna v. Levant*, 2010 ONSC 6308 at para. 35. In my view, this defence applies in this case.

[88] Accordingly, I dismiss the plaintiff's claim for defamation, if indeed she pleaded one.

Damages

[89] In the circumstances, it is unnecessary to address the plaintiff's claim for compensatory damages, aggravated damages, or punitive damages. However, I note again that the plaintiff's evidence on damages was seriously deficient, being wholly unsupported by any medical records or expert evidence to prove her injuries, the quantum of damages, or causation.

Costs

[90] The final issue to resolve is costs. At the conclusion of trial, I asked the parties to deliver costs submissions and bills of costs. The defendants' counsel again kindly agreed to upload the plaintiffs' submissions to CaseLines for her. The parties agreed that, after I wrote my reasons on the merits, I would review the costs submissions and determine costs. I have followed this process.

[91] The three main purposes of modern costs rules are to indemnify successful litigants for the costs of litigation, to encourage settlement, and to discourage and sanction inappropriate behaviour by litigants: see *Fong v. Chan* (1999), 46 O.R. (3d) 330, at para. 22.

[92] Subject to the provisions of an act or the rules of this court, costs are in the discretion of the court, pursuant to s. 131 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. The court exercises its discretion considering the factors enumerated in r. 57.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. including the principle of indemnity, the reasonable expectations of the unsuccessful party, and the complexity and importance of the issues. Overall, costs must be fair and reasonable: see *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 291 (Ont. C.A.), at para. 38. A costs award should reflect what the court views as a fair and reasonable contribution by the unsuccessful party to the successful party rather than any exact measure of the actual costs to the successful litigant: see *Zesta Engineering Ltd. v. Cloutier* (2002), 21 C.C.E.L. (3d) 161 (Ont. C.A.), at para. 4.

[93] The Sunrise defendants have been wholly successful and are presumptively entitled to their costs.

[94] The Sunrise defendants made a r. 49 offer to dismiss this claim on a without costs basis, first on August 22, 2019, and reiterated twice on May 10, 2021 and January 30, 2023. I accept that they have beaten their offer to settle. They are entitled to partial indemnity costs up to the date of the first offer, and substantial indemnity costs thereafter.

[95] The Sunrise defendants' bill of costs supports costs of $120,680.05 on a partial indemnity scale, and $181,569.42 on a substantial indemnity scale, inclusive of HST, plus disbursements of $253,243.37. The disbursements include the cost of the defendants' prior counsel, Thompson, Tooze, McLean & Elkin of $226,145.75.

[96] The following factors are relevant to the determination of the quantum of costs:

a. The plaintiff's unreasonable conduct has lengthened and delayed these proceedings;

b. The plaintiff's unreasonable conduct has caused the defendants to incur significantly increased costs in these proceedings;

c. The plaintiff's lack of preparation for trial led to defence counsel taking on a significant role in preparing documents and assisting her to try to maximize the use of trial time and keep the trial on schedule. I am grateful for their efforts. But it is not the Sunrise defendants' obligation to pay for the work the plaintiff should have done for herself;

d. The plaintiff received a copy of the Sunrise defendants' bill of costs before the trial and chose to proceed with the trial rather than accept their offer. She was aware of the costs that had been incurred;

e. The defendants advise that the plaintiff was told by several judges that her proceeding lacked merit, but she chose to continue to pursue it;

f. The costs of previous counsel is included as a disbursement but it ought to be recoverable on a partial indemnity basis only, as it reflects costs incurred prior to the offer to settle was made.

[97] This was not a normal case, because the plaintiff did not litigate it in a normal manner. The result is a significant increase in the costs incurred by the defendants. The principle of indemnity is important in this case, as is the principle of sanctioning inappropriate behaviour. In view of these factors, I conclude that costs in the amount of $330,000, all inclusive, are fair and reasonable. The plaintiff shall pay these costs to the Sunrise defendants within thirty days.

Conclusion

[98] In summary, I dismiss the plaintiff's claim in its entirety. The plaintiff shall pay costs of $330,000, all inclusive, to the Sunrise defendants within 30 days.

[99] The defendants may take out the order arising from these proceedings without the approval as to form and content of the plaintiff.

J.T. Akbarali J.

Released: March 01, 2023

CITATION: Affleck v. Sunrise Senior Living, Inc., et al., 2023 ONSC 1405
COURT FILE NO.: CV-08-355757-0000
DATE: 20230301

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Marnie Affleck

Plaintiff

– and –

Sunrise Senior Living, Inc., Sunrise of Erin Mills, Jennifer Seehra, Elisabette Garcia, Linda Barbara Fraser, and Linda Barbara Fraser as Estate Trustee of the Estate of Redvers Dalton Stubley

Defendants

REASONS FOR JUDGMENT

Akbarali J.

Released: March 1, 2023