CA No. C66718

**COURT OF APPEAL FOR ONTARIO**

B E T W E E N :

KELLY LYNN DONOVAN

Plaintiff
(Appellant)

- and -

WATERLOO REGIONAL POLICE SERVICES BOARD
and BRYAN LARKIN

Defendants
(Respondents)

# FACTUM OF THE RESPONDENTS

**Filion Wakely Thorup Angeletti LLP**
333 Bay Street, Suite 2500
Toronto, Ontario M5H 2R2

Donald B. Jarvis LSO#: 28483C
Cassandra Ma LSO#: 71985R

Tel: 416-408-3221
Fax: 416-408-4814
Email: djarvis@filion.on.ca
cma@filion.on.ca

Lawyers for the Defendants
(Respondents)

**TO:** Kelly Donovan
(c/o Larry Donovan)
14 Laurie Ann Lane
Paris, Ontario N3L 4H4

Tel: 519-209-5721
Email: kelly@fit4duty.ca

Plaintiff (Appellant)

**TABLE OF CONTENTS**

**PAGE**

PART I - OVERVIEW ..... 1

PART II - STATEMENT OF FACTS ..... 2

A. The Parties ..... 3

B. The Prior and Outstanding Litigation Between the Parties ..... 3

i. The Initial Human Rights Application and Settlement ..... 3

ii. The Class Action Against the WRPSB ..... 4

iii. The Determination of the Appellant's Entitlement to Workers' Compensation Benefits ..... 5

iv. The WRPSB's Enforcement Application ..... 6

v. The Appellant's Enforcement Application ..... 6

vi. The Appellant's Action Before this Court ..... 6

PART III - THE ISSUES AND LAW RAISED BY THE APPELLANT ..... 7

A. Standard of Review ..... 7

B. The Claim Discloses No Reasonable Cause of Action Against the Respondents ..... 7

i. Chief Larkin's Affidavit Cannot Form the Basis for a Cause of Action . 8

(a) Absolute Privilege Attaches to Chief Larkin's Affidavit ..... 8

(b) Chief Larkin's Affidavit Did Not Breach the Resignation Agreement ..... 12

ii. The Release Executed by the WRPSB Does Not Preclude Participation in WSIB Processes ..... 13

(a) Workplace Parties Cannot Contract out of the WSIB Regime ..... 13

(b) The Appellant's Action Amounts to an Improper Restraint of the WSIB and the WRPSB's Right to Participate in WSIB Processes 16

(c) The Filing of an Intent to Object Form Is Not an Appeal Before the WSIB ..... 17

(d) The Intent to Object Form Could Not Cause the Appellant to Suffer Any Loss or Face Any Liability to the Respondents ..... 19

C. The Personal Respondent Was Properly Removed as a Respondent .......... 20

D. Under Rule 21.01(1)(b), Justice Doi was Restricted to the Alleged Facts Set Out in the Amended Statement of Claim.............................................. 21

E. Justice Doi Did Not Find that the Amended Statement of Claim Was a Claim for WSIB Benefits or that the Respondents' Motion Was for Leave to Amend a Pleading, as Alleged by the Appellant .................................... 22

PART IV - ORDER REQUESTED......................................................................... 23

CA No. C66718

**COURT OF APPEAL FOR ONTARIO**

B E T W E E N :

KELLY LYNN DONOVAN

Plaintiff
(Appellant)

- and -

WATERLOO REGIONAL POLICE SERVICES BOARD
and BRYAN LARKIN

Defendants
(Respondents)

**FACTUM OF THE RESPONDENTS**

## PART I - OVERVIEW

1. By decision dated February 21, 2019, the Honourable Mr. Justice Doi of the Superior Court of Justice struck the Appellant's Amended Statement of Claim without leave to amend for disclosing no reasonable cause of action, pursuant to Rule 21.01(1)(b) of the *Rules of Civil Procedure* (the "*Rules*").

   *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 21.01(1)(b) [*Rules*].

2. The Appellant's Appeal of that decision should be dismissed as Justice Doi correctly found that:

   (a) The Amended Statement of Claim discloses no reasonable cause of action against one or both of the Respondents. First, Chief Larkin's affidavit was prepared in the course of a judicial proceeding and, as such, is covered by absolute privilege and cannot ground a cause of action. It did not breach the Resignation Agreement in any event. Second, the Release in favour of the Appellant cannot preclude the review of the Appellant's workers'

compensation claim as: (i) workplace parties cannot contract out of the no-fault statutory benefit review processes prescribed in the *Workplace Safety and Insurance Act, 1997* ("*WSIA*"); (ii) the Appellant's action amounts to an improper restraint on the Organizational Respondent's rights, contrary to section 118(4) of the *WSIA*; (iii) the filing of the Intent to Object Form constitutes a "review" rather than an "appeal" of the Initial Entitlement Decision; and (iv) the review could not result in any loss to the Appellant or finding of liability owed by the Appellant to the Respondents.

(b) The Amended Statement of Claim did not set out any facts that would indicate an independent actionable wrong and/or separate identity or interest for which the Personal Respondent could be personally liable.

(c) Justice Doi was not permitted to review "post-resignation evidence" nor make findings in respect of the Appellant's allegations of bad faith. Such evidence and allegations of bad faith were immaterial to the preliminary issues raised on the Respondent's Rule 21 motion; the *Rules* specifically prohibit the admission of evidence on a Rule 21 motion. In any event, the Appellant ought to be foreclosed from raising these new issues on appeal.

*Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Sched. A [*WSIA*].
Decision of Justice Doi, Appeal Book and Compendium, Tab 3.

**PART II - STATEMENT OF FACTS**

3. Except where otherwise noted herein, the Respondents do not agree with the Appellant's summary of facts (the majority of which pertains to matters beyond the scope of the instant Appeal). The Respondents specifically disagree with the

various new "facts" raised by the Appellant that are unsupported in the record and/or that constitute conclusions of law.

## A. The Parties

4. The Organizational Respondent, the Waterloo Regional Police Services Board ("WRPSB"), is an agency created under the *Police Services Act* that is responsible for the provision of police services to the Regional Municipality of Waterloo. It oversees the Waterloo Regional Police Service ("WRPS").

> *Police Services Act*, R.S.O. 1990, c. P.15 [*PSA*].
> Affidavit of Laura Freitag, Compendium of the Respondents, Tab 1 at para. 2.

5. The Personal Respondent, Bryan Larkin, is the Chief of Police of the WRPS.

> Affidavit of Laura Freitag, Compendium of the Respondents, Tab 1 at para. 3.

6. The Appellant commenced employment with the WRPS in or around 2010. She held the rank of Constable until her employment resignation and was, at all times, represented in her employment by the Waterloo Regional Police Association (the "WRPA").

> Affidavit of Laura Freitag, Compendium of the Respondents, Tab 1 at paras. 4-5.

## B. The Prior and Outstanding Litigation Between the Parties

### i. The Initial Human Rights Application and Settlement

7. On or about June 6, 2016, the Appellant filed an application with the Human Rights Tribunal of Ontario (the "Tribunal") against the WRPSB (the "2016 Application"), alleging discrimination in employment on the grounds of sex and marital status contrary to the *Human Rights Code* (the "*Code*").

> *Human Rights Code,* R.S.O. 1990, c. H.19 [*Code*].
> Affidavit of Laura Freitag, Compendium of the Respondents, Tab 1 at para. 18.
> Human Rights Application, Compendium of the Respondents, Tab 2 at pp. 16-22.

8. The 2016 Application and all other matters among the Appellant, the WRPA, and the WRPSB were fully and finally resolved through a Resignation Agreement executed on or about June 8, 2017. In addition to being a member of the applicable WRPA bargaining unit, the Appellant was represented by independent legal counsel throughout the negotiation of the Resignation Agreement. The WRPSB and the Appellant executed mutual Releases and agreed, *inter alia*, to keep the terms and existence of the Resignation Agreement in absolute and strict confidence "[e]xcept where disclosure is required by law…".

> Affidavit of Laura Freitag, Compendium of the Respondents, Tab 1 at paras. 19-22.
> Resignation Agreement, Compendium of the Respondents, Tab 3, pp. 38-44.

### ii. The Class Action Against the WRPSB

9. On or about May 30, 2017, the WRPSB was named as a defendant, along with the WRPA, in a class action lawsuit (dismissed by Madam Justice Baltman on July 13, 2018; dismissal affirmed on April 5, 2019 by this Honourable Court) commenced by current and former employees of the WRPS and their family members. The Appellant was not a putative class member of the class action.

> *Rivers v. Waterloo (Regional Municipality) Police Services Board*, 2018 ONSC 4307, aff'd 2019 ONCA 267 (Book of Authorities of the Respondents, Tabs 1 and 2).
> Affidavit of Laura Freitag, Compendium of the Respondents, Tab 1 at para. 23.

10. Chief Larkin swore an affidavit in support of a dismissal motion in the class action lawsuit on or about December 21, 2017. Attached as Exhibit "F" to Chief Larkin's affidavit was an anonymized chart with non-identifying particulars of human rights applications that were commenced by female WRPS employees in the period of 2012 to 2017. The chart includes, *inter alia*, the following:

| NAME | GROUNDS FOR DISCRIMINATION | RESOLUTION |
|---|---|---|
| Female Constable | • Sex, including sexual harassment and pregnancy<br>• Marital status | SETTLED<br>• monetary settlement<br>• withdrawal of OHRT application<br>• voluntary resignation |

Affidavit of Laura Freitag, Compendium of the Respondents, Tab 1 at paras. 24-25.
Affidavit of Chief Larkin, Compendium of the Respondents, Tab 4, pp. 50, 66.

**iii. The Determination of the Appellant's Entitlement to Workers' Compensation Benefits**

11. The Appellant commenced a medical leave of absence on or about February 27, 2017, and claimed that she suffered from post-traumatic stress disorder ("PTSD") as a result of an accident she had witnessed at the Ontario Police College in February 2011. On April 10, 2017, the Appellant submitted a claim for workers' compensation benefits to the Workplace Safety and Insurance Board ("WSIB").

Affidavit of Laura Freitag, Compendium of the Respondents, Tab 1 at paras. 6-9.

12. In a decision dated July 12, 2017, WSIB Case Manager Jane Drake granted Initial Entitlement (Eligibility for Benefits) and allowed the Appellant's claim for healthcare benefits and full loss of earnings (LOE) benefits from February 27, 2017 to June 24, 2017 (the "Initial Entitlement Decision").

Affidavit of Laura Freitag, Compendium of the Respondents, Tab 1 at para. 10.
WSIB Decision dated July 12, 2017, Compendium of the Respondents, Tab 5.

13. On or about January 11, 2018, the WRPSB filed an Intent to Object form (along with accompanying submissions) with the WSIB. Following its review of the claims file, the WSIB re-affirmed the Initial Entitlement Decision on August 3,

2018. Since then, the WRPSB has taken no steps to initiate any further WSIB reviews of the Initial Entitlement Decision.

> Affidavit of Laura Freitag, Compendium of the Respondents, Tab 1 at paras. 11-13.
> Intent to Object Form, Compendium of the Respondents, Tab 6.
> WSIB Decision dated August 3, 2018, Compendium of the Respondents, Tab 7.

### iv. The WRPSB's Enforcement Application

14. On or about June 28, 2018, the WRPSB filed an Application for Contravention of Settlement with the Tribunal alleging breaches of the Resignation Agreement by the Appellant.

> Affidavit of Laura Freitag, Compendium of the Respondents, Tab 1 at para. 26.
> WRPSB Application for Contravention of Settlement, Compendium of the Respondents, Tab 8.

### v. The Appellant's Enforcement Application

15. On or about July 27, 2018, the Appellant filed her own Application for Contravention of Settlement with the Tribunal alleging a breach of the Resignation Agreement as a result of Chief Larkin's affidavit in the class action lawsuit and seeking similar remedies as those in the instant action, including an order of reinstatement.

> Affidavit of Laura Freitag, Compendium of the Respondents, Tab 1 at para. 28.
> Kelly Donovan Application for Contravention of Settlement, Compendium of the Respondents, Tab 9.

### vi. The Appellant's Action Before this Court

16. In May 2018, the Appellant commenced the instant action (the "Claim"), which was amended on January 16, 2019.

> Affidavit of Laura Freitag, Compendium of the Respondents, Tab 1 at para. 44.
> Statement of Claim and Amended Statement of Claim, Appeal Book and Compendium, Tabs 10 and 5.

## PART III - THE ISSUES AND LAW RAISED BY THE APPELLANT

17. Justice Doi correctly found that the claim discloses no reasonable cause of action and that there is no basis for the Appellant to pursue her action as against Chief Larkin personally.

### A. Standard of Review

18. The standard of review that applies to the appeal of a decision granting a motion to strike is correctness. Such a decision, made under Rule 21.01(1)(b), poses a question of law, namely whether "assuming that the facts as stated in the statement of claim can be proved, [it is] "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action".

> *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (Book of Authorities of the Respondents, Tab 3) at para. 8 [*Housen*].
> *Hunt v. Carey Canada Inc.,* [1990] 2 S.C.R. 959 (Book of Authorities of the Respondents, Tab 4) at p. 46 [*Hunt*].

19. A decision regarding the removal of a personal defendant to an action must also be reviewed on a standard of correctness. The applicable question of law is whether a pleading alleges an actionable wrong and/or separate identity or interest for which the named defendant could be personally liable.

> *Housen*, *supra*, (Book of Authorities of the Respondents, Tab 3) at para. 8.
> *Lussier v. Windsor-Essex Catholic District School Board* (1999), 47 C.C.E.L. (2d) 256 (Ont. Div. Ct.) (Book of Authorities of the Respondents, Tab 5) at paras. 17-18 [*Lussier*].

### B. The Claim Discloses No Reasonable Cause of Action Against the Respondents

20. To support a claim of breach of contract, a plaintiff must prove the existence of: (1) a contract with the defendant; and (2) an act that contravenes the contract.

> *Mars Canada Inc. v. Bemco Cash & Carry Inc.*, 2018 ONCA 239 (Book of Authorities of the Respondents, Tab 6) at para. 32.

21. For the reasons that follow, Justice Doi correctly concluded that it is plain and obvious that the Appellant has no reasonable cause of action against the Respondents on the basis of the statements made in Chief Larkin's affidavit.

### i. Chief Larkin's Affidavit Cannot Form the Basis for a Cause of Action

#### (a) Absolute Privilege Attaches to Chief Larkin's Affidavit

22. It is trite law that no cause of action can arise from "words spoken in the ordinary course of any proceeding before any court or judicial tribunal".

> *Salasel v. Cuthbertson*, 2015 ONCA 115, 124 O.R. (3d) 401 (Book of Authorities of the Respondents, Tab 7) at para. 35.

23. All statements which take place during, incidental to, and in the processing and furtherance of a judicial or quasi-judicial proceeding, including statements in "all pleadings and other documents brought into existence for the purpose of the proceedings", are covered by absolute privilege and immune from action. It matters not whether the statements "may be totally and knowingly false and spoken *mala fide* and with actual malice, without justification or excuse, or that they may be irrelevant to all the issues in the judicial proceeding".

> *Cook v. Milborne*, 2018 ONSC 419 (Book of Authorities of the Respondents, Tab 8) at paras. 17-20.
> *Fabian v. Margulies* (1985), 53 O.R. (2d) 380 (C.A.) (Book of Authorities of the Respondents, Tab 9) at p. 111, citing *Lincoln v. Daniels*, [1962] 1 Q.B. 237 (Eng. C.A.).

24. Such absolute privilege extends to statements in a sworn affidavit created for the purposes of a judicial proceeding.

> *Gray Investigations Inc. v. Mitchell*, 2007 CanLII 17194 (Ont. Sup. Ct.) (Book of Authorities of the Respondents, Tab 10) at paras. 17-20.
> See also *Web Offset Publications Ltd. v. Vickery* (1999), 43 O.R. (3d) 802 (C.A.) (Book of Authorities of the Respondents, Tab 11) at p. 128.

25. As stated in *Dooley v. C.N. Weber Ltd et. al.*, a claim shall fail to disclose a reasonable cause of action if it is based upon statements subject to absolute privilege. To allow such a claim to proceed amounts to an abuse of process:

> However, I conclude, after considering submissions of counsel and the relevant jurisprudence, that **an absolute privilege attaches to the pleadings and they may not form the basis for a cause of action, even for abuse of process**. The development of this privilege has been consistent and without exception, applying in England, Canada and other common law jurisdictions to judges, witnesses, counsel and litigants. **The privilege extends to statements made in court, the evidence of witnesses, to submissions, to addresses, to statements in court by counsel, to pleadings (as in this case) and perhaps even to statements made to investigators in the preparation of a prosecution**.
>
> […]
>
> …It matters not whether the action is framed in libel or slander, in defamation, intentional infliction of mental suffering, intentional interference with economic interest, or abuse of process. **To the extent that any action is based upon statements in a pleading, the claim will disclose no reasonable cause of action. Otherwise expressed, the action has no reasonable chance of success in law, and to permit it to continue would constitute an abuse of the process of the court.**
>
> [Emphasis added]

*Dooley v. C.N. Weber Ltd. et. al.* (1994), 19 O.R. (3d) 779 (Ct. (Gen. Div.)) (Book of Authorities of the Respondents, Tab 12) at pp. 137, 143.

26. Precisely because Chief Larkin's affidavit is a document that was brought into existence solely for the purpose of supporting a dismissal motion in the class action lawsuit, it is subject to absolute privilege. To permit the Amended Statement of Claim to proceed on the basis of the impugned content of this affidavit would amount to an abuse of process.

Decision of Justice Doi, Appeal Book and Compendium, Tab 3 at paras. 26-36.

27. In this Appeal, the Appellant alleges that Justice Doi "failed to recognize competing privileges, such as settlement privilege".

Appellant's Factum at para. 90.

28. The issue of competing privileges was neither plead nor argued by the Appellant in the Motion hearing. For this reason alone, the Appellant ought not to be allowed to pursue her Appeal on the basis of an alleged failure of Justice Doi to recognize competing privileges. As stated by this Honourable Court:

> **The general rule is that appellate courts will not entertain entirely new issues on appeal. The rationale for the rule is that it is unfair to spring a new argument upon a party at the hearing of an appeal in circumstances in which evidence might have been led at trial if it had been known that the matter would be an issue on appeal**. The burden is on the appellant to persuade the appellate court that "all the facts necessary to address the point are before the court as fully as if the issue had been raised at trial. This burden may be more easily discharged where the issue sought to be raised involves a question of pure law. In the end, however, the decision of whether to grant leave to allow a new argument is a discretionary decision to be guided by the balancing of the interests of justice as they affect all parties.
>
> [Emphasis added; citations omitted]

*Kaiman v. Graham*, 2009 ONCA 77 (Book of Authorities of the Respondents, Tab 13) at para. 18.
See also *Ontario Energy Savings L.P. v. 767269 Ontario Ltd.*, 2008 ONCA 350 (Book of Authorities of the Respondents, Tab 14) at para. 3.

29. In any event, neither competing privileges nor settlement privilege is engaged in the instant matter. With respect, the Appellant has confused an alleged breach of a contractual confidentiality clause with the legal doctrine of settlement privilege. The Supreme Court of Canada noted the difference between these two concepts:

> The common law settlement privilege and confidentiality in the mediation context are often conflated. They do have

> a common purpose: facilitating out-of-court settlements. But as we saw above, confidentiality clauses in mediation agreements can also have different purposes. In most cases involving such clauses, the status of the common law settlement privilege will not arise, because the two protections generally serve the same purpose, namely to foster negotiations by encouraging parties to be honest and forthright in reaching a settlement without fear that the information they disclose will be used against them at a later date. However, as I mentioned above, **settlement privilege and a confidentiality clause are not the same, and they may in some circumstances conflict. One is a rule of evidence, while the other is a binding agreement; they do not afford the same protection, nor are the consequences for breaching them necessarily the same.**
>
> [Emphasis added]

*Union Carbide Canada Inc. v. Bombardier Inc.*, 2004 SCC 35, [2014] 1 S.C.R. 800 (Book of Authorities of the Respondents, Tab 15) at para. 45 [*Union Carbide*].

30. Unlike an alleged breach of a contractual confidentiality clause, settlement privilege is limited to the issue of whether communications in furtherance of settlement are admissible as evidence in a judicial or quasi-judicial proceeding as against one of the parties to the settlement negotiations:

> **Settlement privilege is a common law rule of evidence that protects communications exchanged by parties as they try to settle a dispute.** Sometimes called the "without prejudice" rule, it enables parties to participate in settlement negotiations **without fear that information they disclose will be used against them in litigation**. This promotes honest and frank discussions between the parties, which can make it easier to reach a settlement: "In the absence of such protection, few parties would initiate settlement negotiations for fear that any concession they would be prepared to offer could be used to their detriment if no settlement agreement was forthcoming".
>
> [Emphasis added; citations omitted]

*Union Carbide*, *supra*, (Book of Authorities of the Respondents, Tab 15) at para. 31.
See also *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37, [2013] 2 S.C.R. 623 (Appellant's Book of Authorities, Tab 12) at paras. 12-13.

31. The sole legal basis for the Appellant's claim against the Respondents, as it relates to the affidavit of Chief Larkin, is that the Respondents breached the confidentiality provisions of the Resignation Agreement. No allegation is made regarding breach of settlement privilege in the Claim, the Amended Statement of Claim, or before Justice Doi. Indeed, Chief Larkin's affidavit did not seek to proffer the Resignation Agreement, or any communications relating to its creation or execution. In short, settlement privilege is not engaged in this matter.

Statement of Claim and Amended Statement of Claim, Appeal Book and Compendium, Tabs 10 and 5; see, in particular, Statement of Claim at para. 16.
Factum of the Responding Party, Compendium of the Respondents, Tab 10.

(b) **Chief Larkin's Affidavit Did Not Breach the Resignation Agreement**

32. In any event, no reasonable cause of action arises on the face of Chief Larkin's affidavit. Put simply, it is plain and obvious that the WRPSB did not breach the confidentiality provisions of the Resignation Agreement:

(a) Chief Larkin's affidavit did not contain any identifying information relating to the Appellant. Any reference to the Appellant or the 2016 Application was completely anonymized, and there was no indication as to the time when the settlement took place; and

(b) The Appellant's bald assertion that Chief Larkin's affidavit contained information "that is sufficient to identify [the Appellant]" is wholly speculative and remote at law.

Appellant's Factum at para. 49.
See Affidavit of Chief Larkin, Compendium of the Respondents, Tab 4, pp. 50, 66.

33. In the alternative, Chief Larkin's affidavit was "required by law" and, therefore, excluded from the scope of the confidentiality provisions set out in the

Resignation Agreement. The content of Chief Larkin's affidavit was directly responsive to the issues raised in the class action lawsuit, which specifically alleged systemic and institutional gender-based discrimination and harassment. The WRPSB had a legal obligation to provide the Court with a full factual record to allow the Court to render a decision in the class action lawsuit.

> See Resignation Agreement, Compendium of the Respondents, Tab 3, pp. 38-39.
> See also Affidavit of Chief Larkin, Compendium of the Respondents, Tab 4, pp. 50, 66.

### ii. The Release Executed by the WRPSB Does Not Preclude Participation in WSIB Processes

#### (a) Workplace Parties Cannot Contract out of the WSIB Regime

34. The Appellant alleges that Justice Doi "erred in finding that the Organizational [Respondent] (the "employer") is a "workplace party" for the purposes of *WSIA* section 16". No such finding is made by Justice Doi nor did the Appellant raise this issue in the Claim, Amended Statement of Claim, or her submissions in the Motion before Justice Doi. In any event, section 16 of the *WSIA* does not contain the term "workplace party". Moreover, it is well-established that an employer is a "workplace party" for the purposes of the WSIB regime and any allegation to the contrary is patently absurd.

> Notice of Appeal, Appeal Book and Compendium, Tab 1 at para. (f).
> Statement of Claim and Amended Statement of Claim, Appeal Book and Compendium, Tabs 10 and 5.
> Factum of the Responding Party, Compendium of the Respondents, Tab 10.
> WSIB, *Policy 11-01-12: Legislative Authority* (Book of Authorities of the Respondents, Tab 16) at p. 205.
> See also WSIB, *Appeals Services Division Practice & Procedures* (1 January 2018) (Book of Authorities of the Respondents, Tab 17) at p. 211 [WSIB ASD P&P].

35. The Appellant also alleges that Justice Doi "erred in finding that section 16, and references made by Justice Juriansz to it, were meant to preserve the right of the Respondent Board to appeal the Appellant's WSIB claim…." More specifically,

the Appellant asserts that section 16 protects only the rights of workers, not employers. With respect, the Appellant has misconstrued both the decision of Justice Doi and the authority of this Honourable Court relied on by Justice Doi.

Appellant's Factum at para. 80.

36. Section 16 of the *WSIA* provides that any agreement between a worker and an employer to waive or forego benefits to which the worker may be entitled under the insurance plan (which applies to every Schedule 1 and 2 employer) is void. From section 16, the Appellant mistakenly concludes that employers, unlike workers, can contractually waive or forego the rights and obligations to which they are subject under the *WSIA*. It is precisely this conclusion that was rejected by this Honourable Court in *Fleming v. Massey* and relied upon by Justice Doi:

> I recognize that the courts should exercise extreme caution in interfering with the freedom to contract on the grounds of public policy. Considering the sweeping overriding of the common law made by workers' compensation legislation and the broad protection it is designed to provide to workers in the public interest, **it would be contrary to public policy to allow employers and workers to contract out of its regime, absent some contrary legislative indication**.
>
> [Emphasis added]

*Fleming v. Massey*, 2016 ONCA 70, 128 O.R. (3d) 401 (Appellant's Book of Authorities, Vol. I, Tab 8) at para. 34 [*Fleming*].

37. Notably, this Honourable Court held that section 16 neither attracted the implied exclusion principle nor amounted to any "contrary legislative indication", albeit in the context of uninsured employment under Part X of the statute:

> [45] Reading the WSIA as a whole, it is apparent its objective is to ensure injured workers have access to compensation. It employs two different means to accomplish that objective. The first means provides workers with an insurance plan and completely eliminates

> workers' civil actions. In the part of the Act dealing with the first means, it was necessary to prohibit only the waiver of benefits under the insurance plan. The second means, Part X, makes numerous changes to the common law to achieve the same statutory objective by providing workers with rights of action for damages. It seems to me that applying the implied exclusion principle to s. 16 to infer a worker can waive the rights provided by Part X would fundamentally undermine what the Legislature is trying to achieve in Part X.
>
> [46] Hence, I would conclude that a reading of the Act as a whole does not support interpreting s. 16 as impliedly indicating that the Legislature intended to permit the waiver of the statutory actions created by Part X. The two different means by which the object of the Act is secured must each be interpreted on its own terms.
>
> *Fleming*, *supra*, (Appellant's Book of Authorities, Vol. I, Tab 8) at paras. 45-46.

38. Put simply, the section 16 prohibition against workers agreeing to give up their right to benefits does not mean that all other contracting out under the statute is permissible. From a policy perspective, the prescribed statutory and administrative review processes — available to both employers and workers — are as integral to the legislative scheme governing workers' compensation in Ontario as the substantive right of workers to obtain benefits under this "no-fault" legislative scheme.

39. In any event, as the Release executed by the WRPSB shares the same language as the Release executed by the Appellant, they must be interpreted in a consistent manner. Just as the Appellant's Release cannot result in a waiver of the Appellant's right to pursue WSIB benefits (due to section 16 of the *WSIA*), the WRPSB's Release cannot result in a waiver of the WRPSB's reciprocal statutory right to challenge entitlement decisions.

> Resignation Agreement, Compendium of the Respondents, Tab 3 at pp. 40-44.

40. In summary, Justice Doi correctly concluded that the Release executed by the WRPSB in favour of the Appellant cannot constitute a release of the WRPSB's right to participate in WSIB processes.

### (b) The Appellant's Action Amounts to an Improper Restraint of the WSIB and the WRPSB's Right to Participate in WSIB Processes

41. The Legislature enshrined the exclusive jurisdiction of the WSIB and the Workplace Safety and Insurance Appeals Tribunal ("WSIAT") over matters relating to workers' compensation insurance in sections 118(1) and 123(1) of the *WSIA*. Beyond this, the Legislature included what this Honourable Court characterized as "the toughest privative clause known to Ontario law":

> 118 (3) An action or decision of the Board under this Act is final and is not open to question or review in a court.
>
> (4) No proceeding by or before the Board shall be restrained by injunction, prohibition or **other process or procedure in a court** or be removed by application for judicial review or **otherwise into a court**.
>
> […]
>
> 123 (4) An action or decision of the Appeals Tribunal under this Act is final and is not open to question or review in a court.
>
> (5) No proceeding by or before the Appeals Tribunal shall be restrained by injunction, prohibition or **other process or procedure in a court** or be removed by application for judicial review or **otherwise into a court**.
>
> [Emphasis added]

*WSIA*, *supra*, ss. 118(1), 118(3), 118(4), 123(1), 123(4), 123(5).
*Rodrigues v. Workplace Safety and Insurance Appeals Tribunal*, 2008 ONCA 719, 92 O.R. (3d) 757 (Appellant's Book of Authorities, Vol. II, Tab 10) at para. 22.

42. By alleging that the WRPSB's filing of an Intent to Object form is a breach of the Resignation Agreement, the Appellant is seeking to use a court procedure to restrain a WSIB proceeding contrary to section 118(4) of the *WSIA*. By definition, a court determination that the WRPSB breached the Release when it filed its Intent to Object Form would necessarily amount to a restraint of the WSIB's review of the Appellant's entitlement to workers' compensation benefits and a restraint of the WRPSB's right to participate in that process. Justice Doi put it succinctly and correctly when he concluded at paragraph 25 of his Judgment: "…I find that s.118(4) precludes the [Appellant] from pursuing her breach of contract claim to restrain the [WRPSB] from taking part in proceedings before the WSIB involving her workers' compensation claim under the *WSIA*".

Decision of Justice Doi, Appeal Book and Compendium, Tab 3 at para. 25.

**(c) The Filing of an Intent to Object Form Is Not an Appeal Before the WSIB**

43. The Appellant alleges that Justice Doi "erred in finding that the Organizational [Respondent]'s 'review' of the [Appellant]'s Workplace Safety and Insurance Board ("WSIB") claim was not an 'appeal'".

Notice of Appeal, Appeal Book and Compendium, Tab 1 at para. (c).

44. In fact, however, Justice Doi was correct in characterizing the WRPSB's filing of the Intent to Object Form as a "review" of the Initial Entitlement Decision.

Decision of Justice Doi, Appeal Book and Compendium, Tab 3 at paras. 16, 18, and 19.

45. The Practices and Procedures of the WSIB's Appeals Services Division expressly state that the filing of an Intent to Object Form is an administrative step whereby a workplace party "bookmarks" its objection to a WSIB decision and/or

provides the WSIB with any new information that may alter that decision. Only when a workplace party has completed and filed an Appeal Readiness Form, with accompanying submissions, does the WSIB consider an "appeal" to have been initiated:

**<u>Definition of Terms</u>**

| | |
|---|---|
| **Intent to Object Form** | This is a form available on the wsib website that allows the WPP [workplace party] to provide new information that might alter a decision by the front-line decision maker as well as to bookmark their objection within the time required by the workplace safety and insurance act. To bookmark an objection is to indicate disagreement with a decision made by a front-line decision maker; if it is done within the time frame required by the workplace safety and insurance act the WPP can move forward with their objection whenever they are ready to do so. |

…

| | |
|---|---|
| **Appeal Readiness Form** | The form that the WPP can complete and send to the wsib. It allows the parties to make their argument about their appeal and indicate their opinion on how the appeal should be resolved. |

…

| | |
|---|---|
| **Appeal** | The process that occurs when a WPP has completed an intent to object form, an appeal readiness form and the file is registered in the appeals services division to resolve. |

WSIB ASD P&P, *supra*, (Book of Authorities of the Respondents, Tab 17) at pp. 211-212; see also WSIB ASD P&P at pp. 214-216.

46. As the WRPSB has not filed any Appeal Readiness Form with the WSIB, there has been no "appeal" of the Initial Entitlement Decision.

### (d) **The Intent to Object Form Could Not Cause the Appellant to Suffer Any Loss or Face Any Liability to the Respondents**

47. The Release executed by the WRPSB in favour of the Appellant only released proceedings (including appeal proceedings) as against the Appellant. Non-adversarial WSIB proceedings do not fall into this category.

48. The goal of a legal release is to "liberate a party once and for all from any liability or obligation **to another party** arising out of specific circumstances".

> *Gregory v. KPMG LLP*, 2012 BCSC 1387 (Book of Authorities of the Respondents, Tab 18) at para. 19.

49. Under Canadian workers' compensation legislation, including the *WSIA*, employees surrender their right to sue employers for workplace injuries in exchange for a no-fault insured compensation scheme. The principles underlying this historic trade-off were first articulated by the Honourable Sir William Ralph Meredith in 1913 (known as the "Meredith principles").

> Ontario, Legislative Assembly, *Final report on laws relating to the liability of employers to make compensation to their employees for injuries received in the course of their employment which are in force in other countries, and as to how far such laws are found to work satisfactorily* (1913) (Hon. Sir W. R. Meredith) (Book of Authorities of the Respondents, Tab 19) [*Meredith Report*].
> WSIB, *Policy 11-01-02: Decision-Making* (Book of Authorities of the Respondents, Tab 20) at p. 248.
> *Decision No. 2157/09*, 2014 ONWSIAT 938 (Book of Authorities of the Respondents, Tab 21) at para. 21.

50. As previously noted, pursuant to the Initial Entitlement Decision, the Appellant was awarded LOE benefits only until June 24, 2017. In the result, consistent with the no-fault nature of Ontario's workers' compensation scheme, the Appellant would not have suffered any losses even if the WSIB had set aside or altered the Initial Entitlement Decision as a result of the review triggered by the WRPSB's filing of the Intent to Object form. Absent acts of fraud or misrepresentation, the

WSIB will not pursue recovery of benefits from a worker if a previous entitlement decision is overturned upon reconsideration or appeal.

> WSIB, *Policy 18-01-04: Recovery of Benefit-Related Debts* (Book of Authorities of the Respondents, Tab 22) at pp. 333, 335.
> *Decision No. 1658/02*, 2002 ONWSIAT 2718 (Book of Authorities of the Respondents, Tab 23) at para. 20.

51. Because the WSIB's review of the Initial Entitlement Decision could not lead to any finding of liability or obligation owed <u>by the Appellant to the WRPSB</u> or any loss to the Appellant, the WRPSB did not contravene the terms of the WRPSB's Release granted in favour of the Appellant, nor did the WRPSB initiate any "proceeding against Donovan" contrary the Resignation Agreement.

> Resignation Agreement, Compendium of the Respondents, Tab 3 at p. 37.

52. The WRPSB is a Schedule 2 employer under the *WSIA* and, therefore, acts as a self-insurer for the full costs of all claims and benefits awarded by the WSIB in respect of its employees. In such circumstances, and given the non-adversarial nature of Ontario's workers' compensation scheme, it was wholly proper for the WRPSB to ensure that the benefits granted to the Appellant were appropriate. Inviting the WSIB to conduct an internal review of the Initial Entitlement Decision was consistent with the discharge of that responsibility.

> *WSIA*, *supra*, ss. 68, 85(1).
> O. Reg. 175/98, Schedule 2.

## C. The Personal Respondent Was Properly Removed as a Respondent

53. To properly found an action against officers and employees in their personal capacity, a plaintiff must set out facts that point to specific actionable wrongs or tortious acts of an officer or employee that are independent of any cause of action alleged against the employer. Further, the officers or employees must be alleged

to have acted outside the scope of their authority or against the employer's best interests.

*Lussier*, *supra*, (Book of Authorities of the Respondents, Tab 5) at paras. 17-18.

54. Justice Doi correctly held that Chief Larkin should not be named personally as a Defendant to the action. The Appellant has not alleged any facts against Chief Larkin in respect of an actionable wrong and/or separate identity or interest for which he could be personally liable. In preparing and swearing his affidavit in the class action, Chief Larkin was acting solely within the scope of his employment duties as Chief of Police of the WRPS and in the best interests of the WRPSB. Moreover, the WRPSB, and not Chief Larkin, was party to the Resignation Agreement and may be sued in its own name.

Decision of Justice Doi, Appeal Book and Compendium, Tab 3 at para. 37.
See also *PSA*, *supra*, s. 30(1).

**D. Under Rule 21.01(1)(b), Justice Doi was Restricted to the Alleged Facts Set Out in the Amended Statement of Claim**

55. The Appellant alleges that Justice Doi "erred in failing to find bad faith in the actions of the [Respondents] by entering into an agreement without the intention to fulfil it", "misdirected himself on the law of absolute privilege and malice", and "ignored post-resignation evidence that demonstrated malice and bad faith by the [Respondents]".

Notice of Appeal, Appeal Book and Compendium, Tab 1 at paras. (a), (h), and (i).

56. As stated previously, the Appellant cannot, on appeal, raise issues that were not raised before the Court below.

*Kaiman*, *supra*, (Book of Authorities of the Respondents, Tab 13) at para. 18.

57. Despite having the opportunity to do so, the Appellant did not plead allegations of bad faith or malice in the Claim, the Amended Statement of Claim, or her Factum in the Motion. As such, the record in this action was not developed with a view to establishing or responding to such allegations. In the circumstances, the Appellant ought to be foreclosed from raising these issues for the first time on appeal.

> Statement of Claim and Amended Statement of Claim, Appeal Book and Compendium, Tabs 10 and 5.
> Factum of the Responding Party, Compendium of the Respondents, Tab 10.
> See also Factum of the Moving Party, Compendium of the Respondents, Tab 11.

58. In any event, in ruling upon a Rule 21 motion, Justice Doi was required to assume that all facts pleaded in the Amended Statement of Claim could be proven and was expressly prohibited from admitting evidence on such a motion.

> *Hunt*, *supra*, (Book of Authorities of the Respondents, Tab 4) at p. 46.
> *Rules*, r. 21.01(2)(b).
> See also Decision of Justice Doi, Appeal Book and Compendium, Tab 3 at para. 9.

## E. Justice Doi Did Not Find that the Amended Statement of Claim Was a Claim for WSIB Benefits or that the Respondents' Motion Was for Leave to Amend a Pleading, as Alleged by the Appellant

59. At paragraph (g) of the Notice of Appeal, the Appellant alleges that Justice Doi "erred in finding that the amended statement of claim was a claim for compensation or benefits resulting from the Plaintiff's workplace injury". Similarly, paragraph (k) of the Notice of Appeal alleges that Justice Doi "erred in believing the motion was for leave to amend a pleading, as the amendment to the claim was done on consent".

> Notice of Appeal, Appeal Book and Compendium, Tab 1 at paras. (g) and (k).

60. Notwithstanding the fact that the Appellant is precluded from raising new issues on appeal, the basis for these grounds of appeal is unclear. Justice Doi did not

find that the Amended Statement of Claim was a “claim for compensation or benefits resulting from the [Appellant’s] workplace injury”, as alleged. Further, at no time did Justice Doi indicate any belief that a party had moved for leave to amend a pleading. In his decision, Justice Doi merely reviewed the principles for leave to amend a pleading in the context of Rule 21 motions. Given that it was plain and obvious that no tenable cause of action was possible, Justice Doi denied leave to amend the Amended Statement of Claim.

Decision of Justice Doi, Appeal Book and Compendium, Tab 3 at paras. 11, 16-25, 38.

61. In any event, the foregoing grounds set out in the Notice of Appeal were not advanced in the Appellant’s Factum for this Appeal. As such, they must be deemed to be abandoned.

*Society of Lloyd’s v. Meinzer* (2001), 55 O.R. (3d) 688 (C.A.) (Book of Authorities of the Respondents, Tab 24) at paras. 92-97.

**PART IV - ORDER REQUESTED**

62. Based on the foregoing, the Respondents respectfully request that the Appeal be dismissed with costs of this Appeal granted to the Respondents on a substantial indemnity basis and made payable within 30 days.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 20th day of June, 2019.

Donald B. Jarvis
Cassandra Ma
**Filion Wakely Thorup Angeletti LLP**
Lawyers for the Defendants (Respondents)

**CERTIFICATE**

I, Donald B. Jarvis, counsel for the Respondents, certify that:

1. An order under Rule 61.09(2) (original record and exhibits) is not required; and
2. Time assigned in accordance with the Court's Notice of Hearing dated May 21, 2019 or, if permitted by the Court, approximately ½ to ¾ of one hour will be required for the Respondents' oral argument, not including reply.

Dated at Toronto, Ontario this 20th day of June, 2019.

Donald B. Jarvis
**Filion Wakely Thorup Angeletti LLP**
Lawyers for the Defendants (Respondents)

## SCHEDULE "A"
## LIST OF AUTHORITIES

1. *Rivers v. Waterloo (Regional Municipality) Police Services Board*, 2018 ONSC 4307.
2. *Rivers v. Waterloo Regional Police Services Board*, 2019 ONCA 267.
3. *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R 235.
4. *Hunt v. Carey Canada Inc.,* [1990] 2 S.C.R. 959.
5. *Lussier v. Windsor-Essex Catholic District School Board* (1999), 47 C.C.E.L. (2d) 256 (Ont. Div. Ct.).
6. *Mars Canada Inc. v. Bemco Cash & Carry Inc.*, 2018 ONCA 239.
7. *Salasel v. Cuthbertson*, 2015 ONCA 115, 124 O.R. (3d) 401.
8. *Cook v. Milborne*, 2018 ONSC 419.
9. *Fabian v. Margulies* (1985), 53 O.R. (2d) 380 (C.A.).
10. *Gray Investigations Inc. v. Mitchell*, 2007 CanLII 17194 (Ont. Sup. Ct.).
11. *Web Offset Publications Ltd. v. Vickery* (1999), 43 O.R. (3d) 802 (C.A.).
12. *Dooley v. C.N. Weber Ltd. et. al.* (1994), 19 O.R. (3d) 779 (Ct. (Gen. Div.)).
13. *Kaiman v. Graham*, 2009 ONCA 77.
14. *Ontario Energy Savings L.P. v. 767269 Ontario Ltd.*, 2008 ONCA 350.
15. *Union Carbide Canada Inc. v. Bombardier Inc.*, 2004 SCC 35, [2014] 1 S.C.R. 800.
16. *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37, [2013] 2 S.C.R. 623.
17. WSIB, *Policy 11-01-12: Legislative Authority*.
18. WSIB, *Appeals Services Division Practice & Procedures* (1 January 2018).
19. *Fleming v. Massey*, 2016 ONCA 70, 128 O.R. (3d) 401.
20. *Rodrigues v. Workplace Safety and Insurance Appeals Tribunal*, 2008 ONCA 719, 92 O.R. (3d) 757.
21. *Gregory v. KPMG LLP*, 2012 BCSC 1387.
22. Ontario, Legislative Assembly, *Final report on laws relating to the liability of employers to make compensation to their employees for injuries received in the course of their employment which are in force in other countries, and as to how far such laws are found to work satisfactorily* (1913) (Hon. Sir W. R. Meredith).
23. WSIB, *Policy 11-01-02: Decision-Making.*
24. *Decision No. 2157/09*, 2014 ONWSIAT 938.
25. WSIB, *Policy 18-01-04: Recovery of Benefit-Related Debts*.

26. *Decision No. 1658/02*, 2002 ONWSIAT 2718.

27. *Society of Lloyd's v. Meinzer* (2001), 55 O.R. (3d) 688 (C.A.).

## SCHEDULE "B"
## RELEVANT STATUTES

***Rules of Civil Procedure*, R.R.O. 1990, Reg. 194**

**RULE 21 – DETERMINATION OF AN ISSUE BEFORE TRIAL**

**Where Available**

***To Any Part on a Question of Law***

**21.01** (1) A party may move before a judge,

…

(b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence,

and the judge may make an order or grant judgment accordingly.

(2) No evidence is admissible on a motion,

…

(b) under clause (1) (b).

**RULE 57 – COSTS OF PROCEEDINGS**

**Costs of a Motion**

***Contested Motion***

**57.03** (1) On the hearing of a contested motion, unless the court is satisfied that a different order would be more just, the court shall,

(a) fix the costs of the motion and order them to be paid within 30 days; or

(b) in an exceptional case, refer the costs of the motion for assessment under Rule 58 and order them to be paid within 30 days after assessment.

***Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Sched. A**

**No waiver of entitlement**

**16** An agreement between a worker and his or her employer to waive or to forego any benefit to which the worker or his or her survivors are or may become entitled under the insurance plan is void.

**"Trade" of municipal corporations, etc.**

**68** The exercise by the following entities of their powers and the performance of their duties shall be deemed to be their trade or business for the purposes of the insurance plan:

1. A municipal corporation.

2. A public utilities commission or any other commission or any board (other than a hospital board) that manages a work or service owned by or operated for a municipal corporation.
3. A public library board.
4. The board of trustees of a police village.
5. A school board.

**Payments by Schedule 2 employers**

**85** (1) The Board shall determine the total payments to be paid by all Schedule 2 employers with respect to each year to defray their fair share (as determined by the Board) of the expenses of the Board and the cost of administering this Act and such other costs as are directed under any Act to be paid by the Board.

**Jurisdiction**

**118** (1) The Board has exclusive jurisdiction to examine, hear and decide all matters and questions arising under this Act, except where this Act provides otherwise.

…

**Finality of decision**

(3) An action or decision of the Board under this Act is final and is not open to question or review in a court.

**Same**

(4) No proceeding by or before the Board shall be restrained by injunction, prohibition or other process or procedure in a court or be removed by application for judicial review or otherwise into a court.

**Jurisdiction**

**123** (1) The Appeals Tribunal has exclusive jurisdiction to hear and decide,

(a) all appeals from final decisions of the Board with respect to entitlement to health care, return to work, labour market re-entry and entitlement to other benefits under the insurance plan;

(b) all appeals from final decisions of the Board with respect to transfer of costs, an employer's classification under the insurance plan and the amount of the premiums and penalties payable by a Schedule 1 employer and the amounts and penalties payable by a Schedule 2 employer; and

(c) such other matters as are assigned to the Appeals Tribunal under this Act.

…

**Finality of decision**

(4) An action or decision of the Appeals Tribunal under this Act is final and is not open to question or review in a court.

**Same**

(5) No proceeding by or before the Appeals Tribunal shall be restrained by injunction, prohibition or other process or procedure in a court or be removed by application for judicial review or otherwise into a court.

**O. Reg. 175/98: General**

SCHEDULE 2
INDUSTRIES THE EMPLOYERS IN WHICH ARE INDIVIDUALLY LIABLE TO PAY BENEFITS UNDER THE INSURANCE PLAN

1. Any trade or business within the meaning of section 68 of the Act.

***Police Services Act*, R.S.O. 1990, c. P-15**

**Board may contract, sue and be sued**

**30** (1) A board may contract, sue and be sued in its own name.

KELLY LYNN DONOVAN
Plaintiff (Appellant)

and

WATERLOO REGIONAL POLICE SERVICES BOARD and BRYAN LARKIN
Defendants (Respondents)

CA No. C66718

**COURT OF APPEAL FOR ONTARIO**

Proceeding commenced at BRAMPTON

**FACTUM OF THE RESPONDENTS**


**Filion Wakely Thorup Angeletti LLP**
333 Bay Street, Suite 2500
Toronto, Ontario M5H 2R2

Donald B. Jarvis LSO#: 28483C
Cassandra Ma LSO#: 71985R

Tel: 416-408-3221
Fax: 416-408-4814
Email: djarvis@filion.on.ca
cma@filion.on.ca

Lawyers for the Defendants (Respondents)