SCC File No.: 38374

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N :

LERNERS LLP

APPELLANT
(Respondent)

- and -

HOWARD PLATNICK

RESPONDENT
(Appellant)

RESPONDING FACTUM OF THE RESPONDENT, HOWARD PLATNICK
(Pursuant to Rule 36(1) of the *Rules of the Supreme Court of Canada*, SOR.2002-156, as amended)

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PART I – OVERVIEW AND STATEMENT OF FACTS

A] Overview

1. Lerners LLP supports and adopts the submissions made by Ms. Bent in the parallel appeal and builds on those submissions. The respondent therefore relies upon his submissions in his factum responding to Ms. Bent and has endeavoured not to repeat, any more than necessary, the submissions, the corresponding references and acronyms that appear in that factum.

2. Lerners is incorrect when it asserts that the respondent's allegations against it are limited to vicarious liability. The respondent maintains that Lerners authorized the publication of the defamatory communication by Ms. Bent, one of Lerners' senior partners, published on Lerners' letterhead, written about Lerners' client and using Lerners' e-mail address. It was the prestige and prominence of the Lerners' law firm that contributed significantly to the sting and weight of the impugned libel. Lerners is a party to the libel and is therefore directly and vicariously liable to the respondent.

3. As discussed in paragraph 23 of Dr. Platnick's responding factum in the Bent appeal, Peter Downard, one of the architects and drafters of the *PPPA*, explained that the *PPPA* introduced a **"procedural mechanism"**[1] to "purge" from the Court system, abusive SLAPP actions. The "procedural mechanism" established a screening mechanism available at a very early stage of the proceedings, for a judge of the Superior Court of Justice, acting in the role of a gatekeeper, to undertake a preliminary review of the case for the purpose of screening out abusive SLAPP actions. Downard re-affirmed that the substantive law of defamation was not altered by the *PPPA*.[2] This is why the *PPPA* and its procedural mechanism, is achieved by way of an amendment to the *Courts of Justice Act* ("*CJA*"), rather than the *Libel and Slander Act*. When the *PPPA* is properly seen through this lens, the analysis of the Court of Appeal is unassailable.

4. In discussing the legislative history of the *PPPA* in paragraphs 28 and 30 of its factum, Lerners makes some significant concessions that should be determinative of this appeal in

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[1] The Balance Shifts, Peter Downard, Record of the Respondent, Vol. 1, tab 5, p. 42 [RR].
[2] The Balance Shifts, Peter Downard, RR, Vol. 1, tab 5, pp. 44-45, 48, 50.

providing Dr. Platnick with the opportunity to vindicate his name at trial. The first concession is that Lerners accepts that the new anti-SLAPP legislation is not intended to unduly stop legitimate libel actions "that deserve vindication through legal process". The second concession is Lerners' acceptance of the Attorney General's statements that the anti-SLAPP legislation is intended **"to strike a balance that will end abusive litigation while allowing legitimate actions … I strongly believe that the law must defend reputation …"** (emphasis added). When these concessions are measured against the uncontradicted and unchallenged facts of this case, keeping in mind that the adjudication took place at a very early stage of the proceedings in the context of a preliminary, procedural, screening motion, it is clear that there could not be a more "legitimate" case than that of Dr. Platnick's deserving of the opportunity to 'defend [his] reputation'.

5. The appellants' unprovoked assault on Dr. Platnick's reputation concerning Dr. Dua, was so personal and indefensible, that it ought to be seen (to use the words of the Attorney General quoted at paragraph 31, Lerners' factum), as a "personal allegation", rather than an expression on a matter of "public interest", deserving of protection under the *PPPA*. Lerners argues that the legislation is clear in stating (again in words of the Attorney General), that actions involving **"truly harmful defamatory attack[s]" are not to be dismissed.** Viewed in its proper context, this means that if the libel action is not frivolous, but legitimate, it must proceed to trial.

6. Whatever the ultimate characterization and test, an attack on the integrity and trustworthiness of a professional which causes egregious damage, as here, must, by any measure, satisfy any gatekeeping/screening test under s. 137.1(4) of the *CJA*, so as to allow such victims the opportunity to vindicate their names at trial. Outside of truly abusive SLAPP actions, those who cause such injury by unfairly attacking other people's integrity and trustworthiness, should not be given preferential treatment.

7. The appellants do not and cannot dispute the swift and devastating impact that their libel had on Dr. Platnick. The appellants do not and cannot claim that it was not reasonably foreseeable that Dr. Platnick would be blacklisted, with his reputation destroyed, having accused him of altering the conclusion (decision) of another doctor's report, without that doctor's knowledge and consent, from a catastrophic impairment to a non-catastrophic impairment, for

the sole purpose of denying a deserving claimant in a motor vehicle accident, entitlement to enhanced benefits. A more serious allegation of dishonesty and professional misconduct could not have been made against Dr. Platnick. The appellants effectively accused Dr. Platnick of a very serious fraud. The appellants however are claiming that what was not reasonably foreseeable was that one of the 670 OTLA members who received the incendiary and explosive defamatory e-mail, would leak it. As argued in his responding factum in the Bent appeal, the Court of Appeal was correct in dismissing the appellants' purported "leak" theory in that it lacked credibility. It was "inevitable" that the e-mail would get out. Not only did it get out, it quickly went viral through the industry. As argued elsewhere, at best, Ms. Bent, is guilty of willful blindness. Dr. Platnick however submits that Ms. Bent was motivated by malice, which is notoriously difficult to prove.[3] Determining malice cannot be adjudicated on an expedited, preliminary, procedural, screening motion.

8. Lerners got it right in paragraph 96 of its factum where it argued that the *PPPA* intended to provide an efficient, cost-effective mean to dismiss "SLAPP" suits. This action however is the antithesis of a SLAPP action. Likewise, Lerners got it right in paragraph 97 of its factum where it stated that the *PPPA* was intended to **"fix a specific problem – the harm … caused by SLAPP suits"** (emphasis added). Notwithstanding these significant admissions, the appellants are attempting to highjack the anti-SLAPP legislation in order to strategically prevent a legitimate libel action from proceeding to trial. Ironically, this is not the case of a powerful and rich plaintiff who is attempting to bully his opponents into silence. Rather, it is the rich and powerful defendants who are using the anti-SLAPP legislation as a strategic weapon to silence an innocent libel victim.

9. Both the Quebec Court of Appeal in *Klepper v. Lulham* (commenting on Quebec's anti-SLAPP legislation),[4] and The Advocates' Society in its presentation to the Attorney General and the Advisory Panel concerning Ontario's then proposed anti-SLAPP legislation,[5] warned that anti-SLAPP legislation heightens the risk that it will be "misused for collateral purposes by certain litigants, which is the very type of mischief that the law itself seeks to address". The

[3] *Cusson v. Quan* 87 O.R. (3d) 241 (C.A.), para. 136 [*Cusson*]; *Reynolds v. Times Newspapers Ltd. and Others* [1999] 4 ALL ER 609, p. 15 [*Reynolds*].
[4] *Klepper v. Lulham*, 2017 QCCA 2069, para. 29 [*Klepper*].
[5] Submissions of The Advocates' Society, RR, Vol. 1, tab 6, p. 53.

Advocates' Society, like the Quebec Court of Appeal, warned against any legislation that restricted or compromised access to justice for those with real claims of harm to reputations and/or economic interests. The legislature agreed. The test articulated by the Court of Appeal, like the approach taken by the Quebec Court of Appeal in *Klepper*, assures that these important principles and values are respected.

B] Dr. Platnick Tried To Avoid Litigation

10. In the context of responding to an anti-SLAPP motion, it is important that Dr. Platnick did not ask for this fight. There is nothing "strategic" about his libel action. He was living a happy and rewarding life. As stated in paragraph 4 of his responding factum in the Bent appeal, Dr. Platnick did not know Ms. Bent; they had never communicated with each other. He had never criticized, challenged, complained, argued or protested against anything to do with Ms. Bent, Lerners or OTLA. Dr. Platnick was totally blindsided by the appellants' unprovoked defamatory attack, particularly with respect to the devastating Dua allegation which concerned an entirely unrelated case addressed over two years prior. Dr. Platnick attempted to mitigate his damages through his December 9, 2014 libel notice. He put the defendants on notice that their allegations were false and that the damage to him was extreme. He requested a measured apology and retraction for distribution <u>limited</u> to the OTLA membership who had received the e-mail and to the insurers and vendor companies who had blacklisted him. The appellants consciously and deliberately ignored his request. On December 22, 2014, Dr. Platnick caused another letter to be written to the appellants respectfully inquiring into whether they intended to respond to his libel notice. The appellants, all experienced lawyers, again made the conscious and deliberate decision to ignore this request. With the limitation period fast approaching, Dr. Platnick provided the appellants with his Statement of Claim. In his counsel's covering letter serving the Claim, without a request being made, the appellants were granted a reasonable indulgence for the filing of their Statement of Defence. Dr. Platnick had hoped that this would trigger a positive response, resulting in mitigation of his losses. It did not. In paragraph 11 of her Statement of Defence, Ms. Bent doubled down and asserted that "she was under no

obligation to respond to the plaintiff's communication of either December 9 or December 22, 2014".[6]

11. Dr. Platnick had viewed his letters as an opportunity for a quick resolution, aimed to control the growing damages he was suffering. He was desperate to get his side of the story out. Dr. Platnick did not want to litigate. Rather, his "genuine, sincere and honest response to this nightmare was to resolve it as quickly as possible". Having refused his request for a dialogue and with no other way to stop the bleeding, Dr. Platnick stated "with tremendous regret and a broken heart" that he saw no choice but to proceed with his libel action.[7]

PART II – QUESTIONS IN ISSUE

12. The Court of Appeal correctly stated the appropriate test for applying the "grounds to believe" merits test and in finding that it was in the public interest that this case proceed to trial.

PART III – STATEMENT OF ARGUMENT

C] Motion Judge's Palpable and Overriding Errors of Fact and Errors of Law

13. The appellants criticize the Court of Appeal for its purported failure to give significant deference to the motion judge's findings of fact and for inappropriately re-weighing the evidence, substituting the motion judge's findings of fact with its own. The appellants argue that the Court of Appeal treated the appeal as a hearing *de novo*. The appellants further argue that the Court of Appeal did not consider whether the motion judge had made palpable and overriding errors of fact. These submissions are wholly without merit. Entirely apart from the serious errors of law identified, corrected by the Court of Appeal and addressed in the respondent's responding factum in the Bent appeal and below, the Court of Appeal did find that the motion judge had made very serious errors of fact. The use of words "palpable and overriding" is unnecessary when it is clear that that is precisely what the Court has found. As confirmed and referenced in the respondent's factum in the Bent appeal, on the most critical facts in this case,

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[6] Platnick Affidavit, AR, Vol. VI, tab 19, pp. 6-10, paras. 13-20; tab 19-B, pp. 97-98, December 9, 2014 libel notice; tab 19-C, p. 99, December 22, 2014 letter; tab 19-D, p. 100, January 29, 2015 letter; AR, Vol. II, tab 14, p. 16, para. 11, Bent Statement of Defence.
[7] Platnick Affidavit, AR, Vol. VI, tab 19, pp. 9-11, paras. 20-22.

the Court of Appeal found that Justice Dunphy's findings were **"unreasonable and based on a misunderstanding of [the] evidence"**;[8] **"nonsensical"**,[9] **"misreads"**.[10] With respect to the libel dealing with Dr. Dua (which caused the most damage to Dr. Platnick), the appellants are asking this Court to reverse the Court of Appeal's decision, despite it ruling that Justice Dunphy's findings were **"not accurate in <u>any</u> sense"** [11](emphasis added). With respect to other findings of the motion judge, the Court concluded that they were **"highly debateable, if not unreasonable"**.[12] As discussed in paragraphs 52-53 below, Justice Dunphy's finding under the s. 137.1(b) harms test, that the evidence only established that the harm suffered by Dr. Platnick was "fairly low", was perverse and properly rejected by the Court of Appeal. It would be difficult to find a stronger case for palpable and overriding errors of fact than the case-at-bar.

14. According to the appellants, Dr. Platnick's entire cause of action must be dismissed. He should not be given the <u>opportunity</u> to vindicate his name, even though there is not a shred of truth to their destructive allegations. To use the words of Justice Binnie in *WIC Radio*, as far as the appellants are concerned, Dr. Platnick is to be treated as "road kill", with no ability to repair his shattered life because there should be deference to a motion judge who got the law wrong and got his facts wrong. This is a vacuous argument which is offensive to the community's sense of fair play and decency. There should be no deference to Justice Dunphy. His errors of law were significant and his errors of fact were not just palpable and overriding – they were out-and-out wrong. His erroneous findings of fact also went far beyond what is permissible on a preliminary, procedural, screening motion. Justice Dunphy was neither a trial judge nor a summary judgment judge. His job was to undertake a gatekeeping role in order to screen out abusive SLAPP actions, not to determine the case on its merits before Dr. Platnick was even capable of properly and fairly presenting his case.

D] Appellants' Factual Assertions Unreliable

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[8] Appeal Decision, para. 71.
[9] Appeal Decision, para. 72.
[10] Appeal Decision, para. 79.
[11] Appeal Decision, para. 79.
[12] Appeal Decision, para. 107.

15. As confirmed below, significant statements of fact asserted by the appellants are not supported by the references cited. In some cases, the appellants' factual assertions are simply wrong. In other cases, they are seriously misleading, distorted or taken out of context, leading the Court to draw adverse conclusions and inferences that are inappropriate and unfair. This pattern of distortion cannot be excused as "spin" or "creative advocacy". It is strategically misleading. The appellants have cherry-picked words, still framed certain events in time, and removed them entirely from the context in which they had arisen.

16. In paragraph 54 of the Bent factum (adopted by Lerners), for the very first time in these proceedings, the appellants refer to Dr. Dua's final report which Dr. Platnick based his report on, as "purportedly authored by Dr. Dua". The appellants then state that Dr. Platnick "claimed" that this report provided the basis for his non-catastrophic impairment decision. There is not a shred of evidence in the record which questions the authenticity of Dr. Dua's report. To the contrary, the only evidence in the record, as found by the Court of Appeal, is that Dr. Dua's final report was in fact her report. Ms. Bent's position has always been that the insurer/vendor company had never provided her with a copy of Dr. Dua's final report, not that the final report was unauthentic. Further, Ms. Bent's counsel did not ask a single question of Dr. Platnick about the authenticity of Dr. Dua's report. As if the allegation regarding Dr. Dua in the November 10, 2014 e-mail was not bad enough, the appellants now assert in their factum, now part of public record, without any evidence whatsoever, what may be an even more egregious allegation, namely, that the Dua report is not authentic, meaning it must be a fraud. Ms. Bent's counsel did not ask a single question of Dr. Platnick about the circumstances leading up to his original telephone conversation with Dr. Dua, the substance of the conversation itself or the telephone conversation he had had with Dr. Dua just before his filing deadline on the anti-SLAPP motion. This is notwithstanding that this was fully addressed in his affidavit, evidence which entirely repudiated the appellants' position. When on cross-examination, Dr. Platnick asked Ms. Bent to ask her client in the Dua case if he would sign a consent permitting him access to his insurer's file so he could independently verify the facts, Ms. Bent took it under advisement and later refused on the basis of relevance in relation to the s. 137.1 motion.[13] As illustrated in paragraphs 17 and 18 below, when Ms. Bent was asked about the Dua report, her counsel instructed her not

[13] Bent Transcript, AR, Vol. XIII, tab 28, pp. 31-32, q. 900-901.

to answer the questions. While the respondent understands that there has been no ruling on his fresh evidence motion, the appellants must be betting on this Court to not even look at the fresh evidence before it from Dr. Dua.

17. During the course of Ms. Bent's cross-examination regarding Dr. Dua the following exchange took place:

Q (920) **:** Based on the report that Dr. Dua has given Dr. Platnick, you would agree that he did nothing wrong?

A **:** [Mr. Winkler] **Don't answer the question** … [q. 922] … **I am not going to have the witness answer that question.**

Q (924) **:** Show me on the basis of Dr. Dua's final report that Dr. Platnick has produced in his materials where in his report he, to use your words, changed the doctor's decision from a marked to moderate impairment?

A **:** [Mr. Winkler] **No.**

Q (925) **:** Show me.

A **:** [Mr. Winkler] **No.**

Q (932) **:** I am going to stand up before Justice Dunphy and I am going to say "Your Honour, please look at the final report of Dr. Dua … and when you compare what Dr. Dua said there to his [Dr. Platnick] report, you will see that Dr. Platnick was a 100% accurate". Are you going to stand up and say 'no, no, no, it is not accurate'?

A **:** [Mr. Winkler] **I am going to stand up and say it is irrelevant to the defence of the words that were in the confidential communication.**

Q (935) **:** So it doesn't bother you at all that you made an allegation against Dr. Platnick which is untrue?

A **:** [Mr. Winkler] She hasn't said that.

Q (936) **:** No, I am …

A **:** [Mr. Winkler] You are making …

Q (937) **:** No, no, I am asking her. We now know that the allegation that is

made against Dr. Platnick is untrue.

A : [Mr. Winkler] We don't know that.

Q (938) : You do know that because you have the final report.

A : [Mr. Winkler] We don't know that … **I am not having her answer that question**.[14]

18. While these questions were directed at the most egregious and damaging aspect of Ms. Bent's libel, Ms. Bent refused to answer these questions whilst asking for Dr. Platnick's libel action to be dismissed without a trial. The questions could not have been more relevant. Mr. Winkler knew this. He knew that the only truthful answer Ms. Bent could give was to agree that her allegation against Dr. Platnick concerning Dr. Dua (to use the words of the Court of Appeal) **"was <u>not</u> accurate in <u>any</u> sense"** (emphasis added). Mr. Winkler therefore prevented Ms. Bent from answering such an important question and incredulously took the position that it was "irrelevant". Equally remarkable was that notwithstanding that the <u>only</u> evidence before the Court was that the final Dua report was the one that she had provided to Dr. Platnick, Mr. Winkler maintained, "we don't know that". But, that too was untrue. They did know. The report was an Exhibit to Dr. Platnick's affidavit, confirming that it was the final report which had been provided to him by Dr. Dua. This evidence was neither challenged nor contradicted. It remains to be the <u>only</u> evidence before the Court. This said, as stated and referenced in paragraph 35 of Dr. Platnick's responding factum in the Bent appeal, Ms. Bent agreed that Dr. Dua's final report spoke for itself and concluded that she had **"no reason to think those are not Dr. Dua's conclusions"**. This amounts to an admission that the report was in fact authentic. Even Justice Dunphy held that Dr. Dua **"… may well have had good and honourable reasons for doing so [changing her report]"**. The authenticity of her report was never in issue. Further, by stating "we don't know that", Ms. Bent is at minimum conceding that when she published her incendiary and explosive e-mail wherein she had accused Dr. Platnick of changing the conclusion in Dr. Dua's report, she had no idea whether this allegation in fact was true or not, notwithstanding that by any objective criteria, it would result in a "death" sentence for Dr. Platnick. Ms. Bent admitted that notwithstanding that the Dua case had settled over two years earlier, she remembered being so "appalled" by Dr. Platnick's conduct in that case, that she did

[14] Bent Transcript, AR, Vol. XIII, tab 28, pp. 36-40.

not consult her file and therefore went entirely by memory, a memory we now know to have been completely false.[15]

19. In paragraph 56 (d) of the Bent factum (adopted by Lerners), the appellants effectively accused Dr. Platnick of lying. The appellants assert that notwithstanding that Dr. Platnick had repeatedly emphasized under oath, in his affidavit, that he had not spoken to any of the defence medical assessors or influenced their opinions, he had later admitted that he had spoken to Dr. Dua and therefore had been untruthful. What the record confirms however is that in response to Ms. Bent's allegations that in *Carpenter*, Dr. Platnick had spoken with the defence medical assessment team and pressured them into changing their reports, Dr. Platnick had emphasized that he had never spoken to those doctors and that all communications were solely between the vendor company and the doctors.[16] This fact is beyond dispute. Once the reports were in their final form, the vendor company had provided them to Dr. Platnick, who, based on the respective medical findings contained therein, completed his Catastrophic Impairment Determination Report ("CIDR"). The appellants took Dr. Platnick's testimony which was focused exclusively to responding to their allegations in the *Carpenter* case out of its true context and inappropriately applied it to an entirely different case (Dr. Dua), a case which Dr. Platnick was not asked a single question about. This is grossly misleading, false and profoundly unfair to Dr. Platnick. There is no evidence in the record to support the aforesaid assertion by the appellants. The only evidence in the record is to the contrary.

20. In paragraph 19 of the Bent factum (adopted by Lerners), the appellants cite page 148, question 459 of the Platnick transcript for the proposition that Dr. Platnick did not feel bound to follow the findings of the defence medical assessment team. This too is extremely misleading. Ms. Bent's counsel had asked Dr. Platnick what he had meant when he had noted in his October 8, 2009 CIDR "**My** calculations detailed below incorporate and **consider** the findings of all assessors on this CAT assessment"[17] (emphasis added). Prior to this question being asked, Dr. Platnick had reminded counsel that he was retained to do an impairment report in compliance with Ontario law, and as the record confirms, on 11 separate occasions in a short 5-page report

[15] Bent Transcript, AR, Vol. XIII, tab 28, p. 6, q. 820-821.
[16] Platnick Affidavit, AR, Vol. VI, tab 19, pp. 27-29, 31, 38-39, paras. 59, 62-63, 69, 77 (b)-(c); Platnick Transcript, AR, Vol. XIII, tab 29, p. 117, q. 308-310.
[17] Platnick Transcript, AR, Vol. XIII, tab 29, p. 148.

he only talked about **"my calculations"; "I am able to conclude"; "I would conclude"; "I would assign a rating"; "I was not able to identify"** (emphasis added). The word "we" appeared nowhere in his report. Dr. Platnick explained that he could not have been more transparent in communicating in his report that **"These are my own findings in this report. These are my own determinations. This is my report"**. Dr. Platnick further explained that he repeated this format in his Addendum Report of August 16, 2011, when on 12 separate occasions in a 4 ½-page report he had stated "**I** performed the final Catastrophic Impairment Determination"; "This value is in agreement with the number that **I** used on **my** Catastrophic Determination"; "**my** calculation"; "**I** assigned a value"; "**I** am able to conclude"; "Dr. Kaplan's values do not cause **me** to alter **my original** [October 8, 2009] reports/conclusions". The word "consensus" appeared nowhere in his Addendum Report. The two reports must and were read together by Ms. Bent. She was not misled in the slightest. Her own experts without the benefit of Dr. Platnick's Addendum Report had concluded that due to the Nova Scotia doctors' unfamiliarity with the Ontario law, a genuine consensus (meaning a report where the doctors signed off on by affixing their signatures), had not been attainable.[18] Dr. Platnick objected to Ms. Bent cherry-picking of one word – "consensus" – and ignoring the full context of the process.[19] This was the context for Dr. Platnick stating in his October 8, 2009 report that he had "considered the findings" of the other doctors. Ms. Bent had been in possession of both of Dr. Platnick's reports at the time that she sent her November 10, 2014 e-mail. It was impossible for anyone to conclude that Dr. Platnick had been expressing anything other than his own opinion, including his opinion, that when he applied the Ontario law to the relevant physical impairment findings of the insurer's assessors, there was a consensus that Dr. Carpenter was not catastrophically impaired.

21. Also in paragraph 19 of the Bent factum (adopted by Lerners), the appellants cite paragraph 99 (a)-(c) and (f) of Dr. Platnick's affidavit for the proposition that he "admitted to counselling … [Dr. Dua] to remove material findings from her final report on behalf of an insurance assessment firm" (emphasis added). As stated in paragraphs 7-8, 27-35 and 78 of Dr.

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[18] Bent's Expert's Report, Kaplan and Kaplan, January 24, 2011, AR, Vol. XI, tab 24, p. 15.

[19] Platnick Transcript, AR, Vol. XIII, tab 29, pp. 145-147, q. 448-457; Dr. Platnick's CIDR, October 8, 2009 AR, Vol. IV, tab 18-O, pp. 180-185; Dr. Platnick's Addendum Report, August 16, 2011, AR, Vol. VI, tab 19-J, pp. 112-117.

Platnick's responding factum in the Bent appeal, this is a gross distortion of the truth and not at all supported by the stated references.

22. Further, as discussed and referenced in his responding factum in the Bent appeal, in the context of the case-at-large, CAT ratings must be done in strict compliance with the Ontario legislative/regulatory regime, which the Nova Scotia doctors were not familiar with. CIDRs do not take into account disability, but rather the actual measured impairment based on data collected during a physical examination. Dr. Platnick explained that he had a professional and ethical responsibility to complete his CIDR in accordance with Ontario law. Therefore, for the appellants to cite page 148 of Dr. Platnick's transcript for the proposition that he did not feel bound to follow the Nova Scotia doctors' findings is grossly misleading, unfair and untrue.

23. In paragraph 53 of the Bent factum (adopted by Lerners), the appellants cite pages 100-101, questions 228-229 of Dr. Platnick's transcript, with bold emphasis, for the proposition that he knew that the insurer would rely on his report to deny Dr. Carpenter's claim and prevent her from receiving enhanced benefits. What the actual evidence confirms is that Dr. Platnick was involved in a "process" that would ultimately determine whether Dr. Carpenter was CAT or not. This "process" involved all assessors for both sides, the plaintiff's and the insurer's. Further, while a catastrophic finding gave Dr. Carpenter access to enhanced benefits, she still had to go through a process to prove her entitlement to the enhanced benefits.[20]

24. In paragraph 53 of the Bent factum (adopted by Lerners), the appellants cite pages 104-105, questions 248-249 and pages 141-143, questions 428-433 of the Platnick transcript for the proposition that Dr. Platnick had known that his October 8, 2009 report may eventually be used at an arbitration and that he had understood that it would carry greater weight if there was a "consensus" on whether Dr. Carpenter was CAT or not. What Dr. Platnick had stated was that he knew that at the FSCO arbitration, the arbitrator "might use some of the information" in his report,[21] and in the context of testifying, he would have had an opportunity to answer Ms. Bent's questions and to fully defend his report, as would the other doctors. Further, while the appellants focus exclusively on his October 8, 2009 report, they conveniently ignore Dr. Platnick's

[20] Platnick Transcript, AR, Vol. XIII, tab 29, pp. 100-101, q. 228-231.
[21] Platnick Transcript, AR, Vol. XIII, tab 29, p. 105, q. 250.

Addendum Report of August 16, 2011. As stated previously, at the arbitration, these reports would have been presented and considered together along with all the other evidence presented by both sides. Everything would be transparent. This said, while Dr. Platnick had agreed that a genuine consensus report would carry more weight, he had added that to be a "consensus" report, **all** doctors had to have signed the report as the plaintiff's doctors had.[22] The appellants were fully aware that the defence doctors had not signed the consensus page. The appellants had had all the underlying reports and knew exactly what each doctor had concluded. This was all the more obvious in this case because on 23 separate and distinct occasions in his two short reports, Dr. Platnick was clear and unequivocal in stating that all the "calculations", "ratings", "determinations", "values" and "conclusions" were his and his alone. Further, as stated in his responding factum in the Bent appeal, the appellants knew that the "consensus" concept was a carryover from the previous DAC system and that without the doctors signing the report and adopting it, there was no genuine consensus. Everyone who practices or is involved in this area of the law knows that the only way a doctor can adopt another doctor's opinion for the purposes of a consensus report, is by physically affixing his or her signature to the report.[23] The appellants know this. In the absence of this, as here, there is no genuine consensus. Therefore, focusing on only one word to the exclusion of everything else, including the industry practice, misrepresents the truth. Additionally, prior to publishing the November 10, 2014 e-mail, the appellants had had in their possession the consensus signature page, unsigned.

25. In paragraph 52 of the Bent factum (adopted by Lerners), the appellants stated that Dr. Platnick had "omitted relevant impairment findings from the defence assessor reports and then cited page 148, question 459 of his transcript to support the assertion that Dr. Platnick had known that the defence "assessors were not in agreement on the non-catastrophic impairment conclusion" adding that he had "admitted that his report was only a selective digest of what he saw fit to include regardless of the findings of the assessors". This reference does not at all support the appellants' assertion. In his affidavit, Dr. Platnick explained what went into a CIDR and what did not, as dictated by the *SABS*, OCF-19 Form and the AMA Guides. Impairment is based on the objective physical impairment identified by a physical examination or a measurable

[22] Platnick Transcript, AR, Vol. XIII, tab 29, pp. 142-143, q. 432-434.
[23] Platnick Affidavit, AR, Vol. VI, tab 19, pp. 32-33, para. 70, p. 90, para. 121; Platnick Transcript, AR, Vol. XIII, tab 29, p. 160, q. 517; also see para. 28, *infra*.

psychological impairment. A CIDR is circumscribed to these findings. Once the Ontario law was applied to the impairment findings of the assessor doctors, not their findings at large, factually, there was in fact a consensus. Dr. King (neurologist), had given Dr. Carpenter a WPI rating of 14%, the identical rating given by Dr. Platnick, far below the 55% WPI threshold for a CAT determination.[24] Dr. Rubens (psychiatrist), had concluded that Dr. Carpenter had a serious psychiatric condition that **pre-dated** the accident, which would otherwise have met the criteria for a catastrophic impairment, if caused by the motor vehicle accident, which it was not. Therefore, Dr. Rubens had confirmed that Dr. Carpenter was not CAT due to the accident.[25] Dr. Hanada (physiatrist), had been incapable of conducting a CAT impairment assessment in accordance with the Ontario legislative regulatory regime and ultimately deferred to Dr. Platnick to do the CIDR.[26] Dr. Genest (psychologist), had stated **"In none of the four areas specified would I judge Dr. Carpenter to be suffering from a Class 4 (marked) or Class 5 (extreme) impairment as a result of mental or behavioural disorders"**[27] **and "As a result in terms of specifically psychological structures and functions, the answer is no, Dr. Carpenter has not sustained a catastrophic impairment"**[28] (emphasis added). Notwithstanding the fact that as a psychologist, Dr. Genest had never done a physical examination of Dr. Carpenter, nor was he permitted to do so, he nonetheless had made some inexplicable findings which fell outside his area of expertise, not just contrary to Ontario law, but in complete defiance of the Ontario law, by insisting on applying the 6th Edition of the AMA Guides, rather than the 4th Edition (as mandated in Ontario).[29] On this basis, there was not just a "consensus" that Dr. Carpenter was not CAT, there was in fact unanimity on the point.

26. Dr. Platnick was clear in stating in his October 8, 2009 report that it was the consensus conclusion of his assessment after considering the findings of the CAT assessment team, that Dr. Carpenter (Raaymakers) had not achieved the catastrophic impairment rating **"as outlined in the *SABS* and utilizing the OCF-19 Form [which incorporates the 4th Edition of the AMA**

[24] Bent Affidavit, AR, Vol. V, King Report, August 19, 2009, tab 18-S, pp. 112-113; Vol. IV, tab 18-O, Platnick Report, October 8, 2009, p. 185.
[25] Bent Affidavit, AR, Vol. V, Rubens Report, September 23, 2009, tab 18-EE, pp. 201-202.
[26] Bent Affidavit, AR, Vol. V, Hanada Report, October 8, 2009, tab 18-W, p. 143.
[27] Bent Affidavit, AR, Vol. V, Genest Report, September 25, 2009, tab 18-BB, p. 178.
[28] Bent Affidavit, AR, Vol. V, Genest Report, September 25, 2009, tab 18-BB, p. 179; also see Vol. V, tab 18-X, undated Genest Report. p. 164.
[29] Bent Affidavit, AR, Vol. V, Genest Report, September 25, 2009, tab 18-BB, p. 179.

Guides] due to impairments/injuries as a result of the April 12, 2007 motor vehicle accident".[30] As demonstrated in the above, this was factually true. Dr. Platnick was expressing his view that in his opinion there was a consensus that the appellants' client was not CAT. In accordance with the industry practice, the other assessors could adopt Dr. Platnick's opinion or not, but to do so and generate a genuine consensus report, they have to sign the consensus signature page, which they did not do. Had Dr. Platnick applied the 6th Edition of the AMA Guides resulting in a non-CAT impairment rating, in circumstances where applying the 4th Edition of the AMA Guides would have resulted in a CAT impairment rating, one could rest assured that the appellants would have accused him of breaching his professional and ethical responsibilities for failing to do a CIDR in compliance with Ontario law.

27. In paragraph 16 of the Bent factum (adopted by Lerners), Ms. Bent referenced paragraphs 5, 8 and 26 of Dr. Platnick's affidavit and pages 95-98 of his transcript to support the statement that his reports are used by insurers to deny motor vehicle accident victims access to enhanced benefits. Structured this way, Ms. Bent invites this Court to conclude that Dr. Platnick's evidence supports this statement. It does not. Throughout his affidavit, Dr. Platnick discussed exactly what his responsibilities were in preparing a CIDR and his professional and ethical duty to do so in compliance with Ontario's law. His reports were completely transparent. In the cited affidavit references, Dr. Platnick stated that over the past 20 years, he has undertaken over 10,000 direct examinations, approximately 500 catastrophic impairment ratings and thousands of paper reviews. He stated that over the past two decades, he had earned a reputation for his professionalism and his integrity, regardless of the fact that plaintiff's lawyers may take a different view. Dr. Platnick further stated that this was the first case in 20 years that a lawyer had brought his professional integrity into question. Had Ms. Bent been more careful with her references, she would have realized that in paragraph 8 of Dr. Platnick's affidavit, he had discussed the fact that based on his reputation for integrity and professionalism, Lerners itself had retained him on four separate occasions. Dr. Platnick further testified that his reports were known "for accuracy and fairness"; that he had "always approached [his] CAT assessments objectively and unbiased and presented the CAT ratings in a way that [he] believed [were] fair, accurate and in compliance with the OCF-19 Form, … the Ontario … *SABS* [and the] … 4th

[30] Bent Affidavit, AR, Vol. IV, tab 18-O, Platnick Report, October 8, 2009, p. 185.

Edition of the AMA Guides". Dr. Platnick also testified that he cared that people who have been catastrophically impaired obtain the benefits that they are entitled to.[31] The aforesaid transcript references cited by the appellants covered Ms. Bent's counsel questioning of Dr. Platnick about his income, having nothing to do with the point being made by the appellants. The appellants' spin on the factual evidence and the references cited are unreliable.

28. Dr. Platnick gave an extensive explanation with respect to the "consensus" issue addressed in paragraphs 36-38 of his responding factum in the Bent appeal and paragraphs 20, 24 and 25 above which confirms, in the words of this Court in *Gilles* (see paragraph 57, respondent's factum in Bent appeal), that Ms. Bent's communication on this issue was out of context, misleading, unfair, tendentious, selective and the product of wrongful pruning. Consequently, the readers of the e-mail were seriously misled. This said, in paragraph 51 of the Bent factum (adopted by Lerners), Ms. Bent references pages 149, 150, 167, 168 of Dr. Platnick's transcript for the proposition that he had agreed that the use of the word "consensus" was "misleading". In the context of his explanation at large, at those specific references cited by the appellants, and also considering the questions and answers before and following those references, Dr. Platnick had been explaining that in the industry, the word "consensus" meant different things to different people and therefore the word "consensus" could be misleading, not that his use of the word was misleading. At no point during the course of his cross-examination was Dr. Platnick questioned or challenged on his evidence that regardless of whether the consensus page had been signed by the Nova Scotia doctors or not, based on their objective findings, there was in fact a consensus. Nor was Dr. Platnick challenged on his evidence that anyone practicing in this field knew the "consensus" concept was a carryover from the previous DAC system, where absent all the assessors physically signing off on the report, there was no genuine consensus. Ms. Bent consciously made the decision to leave these critical details out of her e-mail.

29. In paragraph 22 of the Bent factum (adopted by Lerners), Ms. Bent quotes an arbitrator in a completely unrelated case, who had criticized a defence expert witness for being biased and partisan (just as plaintiff expert witnesses can be), and asserted that the criticized conduct

[31] Platnick Affidavit, AR, Vol. VI, tab 19, pp. 3, 22, paras. 6, 46; Platnick Transcript, AR, Vol. XIII, tab 29, p. 172.

touched upon by this arbitrator was the same conduct "admitted to by Dr. Platnick" (emphasis added). Dr. Platnick has made no such admission. This alleged statement of fact by the appellants is completely false. His evidence was to the contrary.

30. In paragraph 40 (b) of the Bent factum (adopted by Lerners), Ms. Bent states that Dr. Genest refused to sign the consensus page because he had disagreed with Dr. Platnick's conclusion that Dr. Carpenter was not catastrophically impaired. She then referenced Dr. Genest's October 27, 2009 e-mail. However, a review of that e-mail reveals that what Dr. Genest was in fact stating was that while Dr. Carpenter may not have been CAT using the 4th Edition of the AMA Guides as required by Ontario law (which Dr. Platnick and Dr. Genest were required to use), he nonetheless was not prepared to apply the 4th Edition because he deemed the 4th Edition to be an "outdated criteria for catastrophic impairment". Therefore, contrary to Ontario law, he insisted on using the 6th Edition of the AMA Guides. However, as stated in paragraph 25 above, Dr. Genest nevertheless found that Dr. Carpenter was not catastrophic.

E] Specific Responses to Lerners' Submissions

31. In paragraph 10 of its factum, Lerners emphasizes that Dr. Platnick "almost exclusively" works for insurance companies, but does not inform the Court that it too, having acknowledged Dr. Platnick's expertise and reliability in this field, has retained Dr. Platnick on four separate occasions to undertake catastrophic impairment designation reports for its plaintiff clients. The appellants had retained their own team of expert witnesses who in this case had somehow turned a $1,300.00 minor fender bender with no reported injuries at the time of the accident, into a catastrophic impairment case. For Lerners, to adopt paragraphs 4 and 5 of the Bent factum asserting that Dr. Platnick is a "cog" in the billion-dollar automotive machine (which by the way provides plaintiff personal injury lawyers with very lucrative incomes), and is a "hired gun", is rather disingenuous and a bit like the kettle calling the pot black. Here, the fresh evidence is highly relevant.

32. In paragraph 13 of its factum, Lerners notes that Dr. Platnick had not personally examined Dr. Carpenter notwithstanding that Lerners is fully aware that under the AMA Guides, this is not required as many doctors who undertake the CAT ratings analysis are relying on the

impairment findings of other assessors in the team. By this submission, Lerners invites this Court to draw an adverse inference when none is to be drawn.

33. In paragraph 22 of the Lerners factum, it is asserted that Dr. Platnick does not dispute the confidential nature of the OTLA Listserv. Dr. Platnick strongly disputes this assertion, particularly when used for the prohibited purpose of disseminating defamatory or potentially defamatory material. His life has been shattered precisely because the Listserv was not confidential. OTLA itself has acknowledged this very real danger by requiring the Listserv users to sign an undertaking to comply with the expressly prohibited use of the Listserv for this very reason as the dissemination of incendiary and explosive defamatory material cannot be controlled. OTLA understands the danger and the risk of using such a forum to spread defamatory messages. If one breaches this condition as the appellants did, they do so at their own peril and are subject to the same laws as every other citizen. The fact that the appellants chose the Listserv to defame Dr. Platnick does not provide them any kind of special legal protection. It is not a privileged occasion. Further, where does one draw the line? OTLA has 1,600 members, entitling all 1,600 to have access to the Listserv. What is the principle here? The organization may have 5,000, 10,000, 25,000, 100,000 members. On the appellants' theory, regardless of the number of recipients, communications are confidential simply because they say so, even though everyone knows that there is no air of reality to such an assertion. Libel laws cannot be so easily defeated by simply calling the forum "confidential", when the risk and consequences of it not being "confidential", as proven by this case, are, so severe and as found by the Court of Appeal, "inevitable". At a minimum, such an issue must be tested with evidence, at trial, for the jury to decide.

34. While Lerners adopts Ms. Bent's factual assertions, it is important to point out that a "fact" is not a fact simply because Ms. Bent says it is. Dr. Platnick has everything on the line. He does not and will not accept her assertions at face value. He has a right to challenge them. That is what our adversarial system of justice is all about. This is the only way to discover the truth. Of course Ms. Bent is going to claim that it had never crossed her mind that her incendiary and explosive e-mail would go beyond the 670 OTLA personal injury lawyers. Notwithstanding that her e-mail went immediately viral, it is to be expected that Ms. Bent would claim that she was "shocked". Likewise, unquestionably, Ms. Bent is bound to claim that she acted in good-

faith and was not motivated by malice, ill-will, spite, or an ulterior motive. Dr. Platnick does not accept these bald assertions and seeks an opportunity to challenge Ms. Bent's evidence in material respects.

35. On cross-examination whenever Dr. Platnick, through counsel, attempted to challenge Ms. Bent on her answers to critical questions relating to the Dua report or her "leak" theory, he was met with a refusal. He was either told that the questions or document requests were not relevant to a s. 137.1 motion or that the examination of Ms. Bent was not a discovery. When asked for the name of the alleged leaker who Ms. Bent claimed had "confessed" shortly after the purported "leak", Mr. Winkler instructed Ms. Bent: **"Don't answer the question"**, stating that the examination of Ms. Bent was not an opportunity to go "fishing" or a "witch hunt". When asked to speak to the head of FAIR, a plaintiff's personal injury advocates organization, and ask how FAIR had received information relating to this matter, Mr. Winkler said **"No"**. Every attempt to challenge Ms. Bent's principal defence was met with a refusal.[32]

36. When asked to produce the list of the 670 people who received the defamatory e-mail on the OTLA Listserv, Ms. Bent refused on the grounds that it was not relevant to a s. 137.1 anti-SLAPP motion. Her counsel stated, *inter alia*, "… you are conducting this as if it were a discovery". When asked about having access to the Listserv to see, for example, the type of communications that appeared on the Listserv and more importantly, the communications that followed the defamatory e-mail, her counsel stated "… you would have to bring a third party discovery order". When Ms. Bent was asked to use her best efforts to obtain this information, she refused again, with her counsel stating "… I don't consider that to be relevant to the issues on this motion".[33]

37. Lerners supports Bent in her assertion that it was appropriate and necessary for her to single Dr. Platnick out by name for special attention, a proposition rejected by the Court of Appeal.[34] Lerners takes this position notwithstanding the explicitly expressed prohibition against using the OTLA Listserv to disseminate defamatory or potentially defamatory materials.

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[32] Bent Transcript, AR, Vol. XII, tab 28, pp. 158-159, q. 600-604, pp. 171-172, q. 649-650, pp. 206-207, q. 769-773.
[33] Bent Transcript, AR, Vol. XII, tab 28, pp. 40-42, q. 156-160.
[34] Appeal Decision, para. 109.

Lerners therefore supports Ms. Bent's testimony that in accusing Dr. Platnick of altering reports, she was not accusing him of wrongdoing and hence not violating the rules of the OTLA Listserv. Ms. Bent testified that all she was stating was a fact which she did not consider to be critical.[35] Yet in paragraphs 49, 56, 57, 58, 66, 73, 106, 108, 110 and 111 of her factum (adopted by Lerners), she forcefully accuses Dr. Platnick of having engaged in professional misconduct. The appellants cannot have it both ways.

38. Ms. Bent testified that she did not believe that accusing a doctor (who had made his living doing CIDRs), of altering other doctors' reports, was a serious allegation. In fact, Ms. Bent did not even view her accusations as an "allegation". Instead, she viewed her accusation as "dissemination of some information that my colleagues would benefit from and learn from".[36] Later in her examination however, the following exchange with Ms. Bent took place:

> **Q** : … you would agree that altering the report goes to the quintessential core of a person's ability to discharge their responsibilities in a proper manner?
>
> **A** : I think that is absolutely correct, and if I understand your client's affidavit, he is essentially confirming that Sibley did just that. And I do think that that is **deplorable** and **should not be tolerated**.[37]

39. This was a pivot. Ms. Bent knew that she had not only accused Dr. Platnick of altering reports, but more significantly in the case of Dr. Dua, had changed her decision from a catastrophic impairment to a non-catastrophic impairment. At the time of her cross-examination, Ms. Bent knew that her allegations had had a "crushing" effect on Dr. Platnick and that he had been blacklisted. She also knew that she had named Dr. Platnick twice in her e-mail. As an experienced and skilled trial lawyer, Ms. Bent knew that the aforesaid question was directed at Dr. Platnick, not Sibley. Nevertheless, she pivoted to Sibley. This said, her characterization of Dr. Platnick's affidavit evidence was simply wrong. More importantly, this was not what she had stated at all in her e-mail. Ms. Bent had specifically accused Dr. Platnick of altering reports, which she considered to be "deplorable" and "should not be tolerated" and as stated in paragraph 37 above, accused Dr. Platnick of professional misconduct.

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[35] Bent Transcript, AR, Vol. XII, tab 28, pp. 146-148.
[36] Bent Transcript, AR, Vol. XII, tab 28, pp. 155-156, q. 588.
[37] Bent Transcript, AR, Vol. XII, tab 28, p. 169, q. 641.

40. Ms. Bent then began to "fudge" and obfuscate on what she considered to be an alteration of reports. She testified, wrongly, that in his October 8, 2009 report, Dr. Platnick had not fairly summarized the defence assessors and then she said this:

> "… I don't know if you would consider that [unfairly summarizing insurer's assessor's reports] to be an alteration or not … So, there are many ways in which I think you could say that the report had been altered".[38]

41. For reasons stated elsewhere, Ms. Bent's supposition is entirely without merit. Firstly, Dr. Platnick's October 8, 2009 report was a CIDR, which is very specific and circumscribed to the rating calculation based on a specific criteria dictated by the *SABS*, the OCF-19 Form and the AMA Guides, 4th Edition. Further, it was only 5 pages. The underlying assessment reports were 199 pages, which were completely transparent and in counsel's possession. Secondly, nowhere in her e-mail had Ms. Bent articulated the point that her complaint against Dr. Platnick was that he had not fairly summarized the findings of the insurer's assessors, which at worse would be a matter of opinion. Rather, Ms. Bent had accused Dr. Platnick of <u>altering</u> other doctors' reports. That is the core of the libel she had published. To even suggest that criticizing a doctor for not properly summarizing another doctors' report fairly, amounts to altering those reports, speaks volumes about Ms. Bent's thinking process and how unreliable her evidence is. Ironically, while based on the DAC system, there is significant uncontradicted evidence in the record establishing that the word "consensus" has different meanings, there is <u>no</u> evidence in the record that "altering" has different meanings. Ms. Bent was grasping at straws and is not credible.

42. As stated in paragraph 86 of Dr. Platnick's responding factum in the Bent appeal, Ms. Bent stated that she was **"shocked"** and **"appalled"** by the fact that Dr. Platnick had changed Dr. Dua's report, which act (altering) she characterized as **"deplorable"** and "**intolerable"**, yet contemporaneously with the event, she did nothing. Over two years later, having harboured such intense and burning animus and resentment toward Dr. Platnick over something he had <u>never</u> done, she could not control her outrage and anger and completely disconnected from the rest of her e-mail, chose to deliver a "death" sentence to Dr. Platnick. Not only has Dr. Platnick established that this allegation against him was false, he has further established that there are

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[38] Bent Transcript, AR, Vol. XII, tab 28, p. 177, q. 677-678.

grounds to believe that the jury hearing this case will find that Ms. Bent was motivated by malice.

43. This aside and by way of contrast, Ms. Bent conceded that even in the absence of Dr. Platnick's lawsuit, she would never have publically singled him out by name to make the point she wanted to make to the legislative Standing Committee on Finance and Economic Affairs or any other public forum. Specifically, in response to the question "Is there any circumstances in front of this standing committee to say that, "Hey, by the way, and then launch on Dr. Platnick as engaging in professional misconduct? You would never have done that", Ms. Bent replied "… **No, of course not**". Later, Ms. Bent stated that she would not publically malign any individual. It is clear that Ms. Bent knew it was wrong to publically single out Dr. Platnick and accuse him of dishonesty and professional misconduct, let alone do so without ever giving him an opportunity to defend himself. Therefore, according to the appellants, what is wrong to do publically, was perfectly fine to do on the OTLA Listserv, notwithstanding the clear prohibition to do so. It is submitted that this too is deeply offensive to the community's sense of fair play and decency.[39] Ms. Bent asserts (adopted by Lerners), that she found Dr. Platnick's lawsuit intimidating such that she could not freely speak out. This is a self-serving statement. An experienced trial lawyer like Ms. Bent is not one to be intimidated. A review of her presentation before the Standing Committee illustrates this fact.[40] Further, Dr. Platnick's lawsuit is focused exclusively on the appellants accusing him of dishonesty and professional misconduct. The only limitation on Ms. Bent's free speech was to not falsely and publically accuse him of what effectively amounted to fraud, something Ms. Bent admitted she would never do even if this lawsuit did not exist.[41] Therefore, by her own admission, Ms. Bent's free speech rights are not the least bit affected by this libel action. She could have done this differently. She could have made her point without singling out Dr. Platnick. Having decided to identify him by name, Ms. Bent could have first spoken to Dr. Platnick and sought his side of the story. Instead she made a deliberate decision not to do so.

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[39] Bent Transcript, AR, Vol. XII, tab 28, pp. 197-200, more specifically p. 198, q. 742-744.
[40] Grnak Affidavit, AR, Vol. XI, tab 20-F, CD of Bent Standing Committee Presentation, p. 99.
[41] Bent Transcript, AR, Vol. XII, tab 28, pp. 199-201, q. 748-753.

44. In a clear attempt to obfuscate, colour the issues and divert this Court's attention from the real issues before it, in paragraph 3 of the Bent factum (adopted by Lerners), the appellants emphasize in bold, that they are being sued by Dr. Platnick "for the intimidating amount of **"$16,300,000.00"** (emphasis original). This is then repeated in bold, in paragraph 30 of the Bent factum, emphasizing that KMI and the Globe and Mail are being sued for the same amount. The appellants also state in paragraph 4 of the Bent factum, in bold, that Dr. Platnick was making about "**$1,000,000.00** a year for 10 years" (emphasis original). The appellants cannot claim that Dr. Platnick was perhaps making only $100,000.00 a year and therefore a $16,300,000.00 claim was grossly inflated designed to intimidate. The appellants properly acknowledge that Dr. Platnick was earning $1,000,000.00 a year, an income which was wiped-out effectively overnight. Therefore, the amounts sought by Dr. Platnick ($15,000,000.00 for general and special damages, $300,000.00 for aggravated damages and $1,000,000.00 in punitive damages – similar to the award in *Hill*), are both measured and appropriate. Dr. Platnick's loss of income will be based on, *inter alia*, producing his tax returns for the five years prior to the libel and his tax returns post-libel. Dr. Platnick's expertise was routinely sought out by defendants and plaintiffs, including Lerners. He was paid well for his services, as were other similarly situated experts. If Dr. Platnick had published a libel that had wiped-out Ms. Bent's law practice and income or caused serious injury to Lerners, surely Ms. Bent and Lerners would have brought a libel action for considerably more than what Dr. Platnick is suing for. Further, the appellants argue that Dr. Platnick does not meet the "harms" test under s. 137.1(4)(b), but highlight that the economic harm they caused to him was enormous. The appellants cannot have it both ways.

45. At or about the same time Dr. Platnick served his libel notice on the appellants and watched his life fall apart, he issued a statement to the insurance industry that had blacklisted him entitled "Setting The Record Straight"[42] This short, targeted and measured statement was aimed to make it clear that he had "never altered the reports of other assessors", the very allegation that had caused Dr. Platnick to be blacklisted. The statement did not identify the appellants. In paragraph 11 of her affidavit, in the context of refusing to communicate with Dr. Platnick, Ms. Bent characterized his sensible and measured response this way: "Dr. Platnick has launched a public campaign against me … The Platnick PR Campaign goes beyond addressing

[42] Bent Affidavit, AR, Vol. III, tab 18, pp. 5-6, para. 11; Vol. IV, tab 18-I, p. 31, Setting The Record Straight.

the statements I made … and falsely attacks my personal and professional credibility and integrity. In light of this defamation proceeding, I feel restrained from responding to the Platnick PR Campaign". Ms. Bent had effectively accused Dr. Platnick of fraudulent activity. She had accused him of dishonesty and professional misconduct, wiped-out his livelihood, decimated his reputation and robbed him of everything of value and meaning in his life. She had achieved this result by making a crushing allegation which the Court of Appeal has concluded was **"not accurate in any sense"**. Ms. Bent had accomplished all of this in circumstances where she had not had the professional decency to speak to Dr. Platnick to seek his side of the story. Having admitted that she had not given any consideration as to how this would impact him, shockingly, she has characterized Dr. Platnick's modest attempt to save what was left of his business and reputation, as the "Platnick PR Campaign". This is consistent with the respondent's overarching response to the appellants, namely, that their characterization of the facts are neither reliable, nor credible, including Bent's claim in paragraph 42 of her affidavit where she self-proclaimed therefore **"I am a champion of the rights of MVA victims …"**. There are critical issues of credibility in this case that must be decided by the jury, not a motion judge serving in the role of gatekeeper on an expedited preliminary, procedural, anti SLAPP, screening motion.

46. All this said, when the questions turned to her false allegation accusing Dr. Platnick of altering Dr. Dua's report, an allegation tantamount to fraud, Ms. Bent claimed that she was "appalled" and "shocked", having already stated her views with respect to the act of altering reports as "deplorable" and "should not be tolerated". Ms. Bent then testified "I never used those words [professional misconduct]". When pressed on the point, Ms. Bent stated "I was reporting a fact".[43] Ms. Bent held to this position notwithstanding that the only evidence in the record was that it was not a fact – it was a lie. Ms. Bent, when convenient, keeps moving the goal posts. Here, she has claimed that she had never used the words "professional misconduct" in her e-mail, yet as referenced in paragraph 37 above, this is precisely what she has alleged throughout her factum.

F] Appellants' Professional Misconduct Theory Misconceived

[43] Bent Transcript, AR, Vol. XIII, tab 28, p. 17, q. 854, p. 18, q. 860.

47. The submissions appearing in paragraphs 49, 56, 57, 66, 73, 106, 108, 110 and 111 of the Bent factum (adopted by Lerners), regarding the professional misconduct innuendo, and the substantial truth defence, are entirely misconceived and misguided and make a mockery out of the law of defamation. The appellants' criticism of the Court of Appeal in this regard is wholly without merit. What the appellants are attempting to do is to separate the actual allegation and words used in the defamatory publication from the innuendo emanating therefrom. In other words, the appellants ignore context, thereby distorting what has truly occurred.

48. Everything about libel law is on a continuum. The particular expression or reputational interest will require a higher or lower level of protection depending on the circumstances of the case. This in turn will impact the careful balance that is required on the basis of a fulsome evidentiary record, including findings of credibility. By way of example, a person may be accused of breaking the law, but no one would compare a parking ticket or a charge of mischief to a charge of rape or murder. Yet what the appellants are attempting to do (to follow the analogy), is to claim that the innuendo that is the target of the libel is that the person broke the law. Therefore, the appellants argue that, if they can establish that a person was guilty of a parking ticket or mischief, even though the allegation was that of rape or murder, having established that there was a 'breaking of the law' – the innuendo, they have a justification defence. The appellants take the erroneous view that if they can fit their allegation anywhere on the continuum, irrespective of the actual words used in the defamatory communication, they have a defence, because the "innuendo" was "professional misconduct".

49. In paragraph 57 of the Bent factum (adopted by Lerners), the appellants argue that Dr. Platnick's CIDR (not an ESR) in the second case (Dr. Dua) was false and/or misleading and therefore constituted "professional misconduct". This submission is preposterous. Not only is there no shred of evidence in the record to support this very spurious allegation, as found by the Court of Appeal, there is significant evidence repudiating it. With this submission, the appellants reinforce the importance of the Court considering the fresh evidence from Dr. Dua.

50. For all intent and purposes, the appellants could not have attacked Dr. Platnick's integrity and professionalism in a more severe way than by accusing him of changing Dr. Dua's decision, without her knowledge or consent, from a catastrophic impairment to a non-catastrophic

impairment. To use the aforesaid analogy, the appellants did not accuse Dr. Platnick of committing a parking violation. Rather, they accused him of having committed murder. This is the allegation that resulted in the severe damage and the blacklisting. The Court of Appeal's finding that the sting of the libel was an allegation of "dishonesty and serious professional misconduct"[44] was directly tied to the actual words used by Ms. Bent. It was not some abstract concept.

51. To use the words of this Court in *Gilles*, the entire "tilt, tone and texture" of the defamatory e-mail was misleading, incomplete, unfair, tendentious, selective and the product of "wrongful pruning". Consequently, with respect to the "consensus" issue, while Dr. Platnick did not alter anything, that is exactly what he was accused of, which was the context and segue into the stunning Dua allegation. As a very experienced and skilled litigator, Ms. Bent knew exactly what she was doing. All this said, in response to the appellants' specific allegation of professional misconduct regarding Dr. Platnick's October 8, 2009 CIDR, factually, Dr. Platnick neither signed that report nor authorized Sibley to apply his electronic signature. It was the devastating allegations regarding Dr. Dua that explains why the e-mail went immediately viral and destroyed Dr. Platnick's business effectively overnight.

G] Section 137.1(4)(b) (The "Harms" Test)

52. The Court of Appeal correctly took into account all the relevant factors under s. 137.1(4)(b) in concluding that the harm likely to be or has been suffered by Dr. Platnick as a result of the appellants' libel was sufficiently serious that it was in the public interest to permit his action to proceed to trial. Firstly, the Court properly found that this is <u>not</u> a SLAPP action, but to the contrary, a legitimate and *bona fide* libel action where the particular type of reputational interest in issue is one that must attract the highest level of protection. Conversely, the egregious nature of the defamatory expression and the callous disregard for Dr. Platnick's rights are so indefensible that they should only attract the lowest level of protection, if any. Secondly, the appellants' devastating attack on Dr. Platnick's integrity, honesty, professionalism and trustworthiness, is precisely the type of injury that this Court in *Botiuk* held would

[44] Appeal Decision, para. 60.

"undoubtedly cause a crushing injury",[45] which it did. This alone satisfies the harms test under s. 137.1(4)(b) on a preliminary screening motion. It is hard to imagine a more compelling public interest in allowing such a case to proceed to trial on its merits. Thirdly, Dr. Platnick had also filed a report from his accountant confirming a financial loss of $578,949.00 as of April 30, 2016. This evidence was not challenged by the appellants. The losses are considerably higher today. Fourthly, also part of the "crushing" injury, was Dr. Platnick's powerful evidence describing the depth of the humiliation, shame, disgrace, embarrassment and degradation that he had and continues to experience as a result of the unprovoked and needless defamatory attack the appellants had inflicted on him. Dr. Platnick explained how "emotionally crushed", "busted up", "defeated", "despondent" and "belittled" he felt. He was and remains anxious, nervous and sleep deprived. He knew that he was going up against one of the most powerful law firms in the country and explained that he was so withdrawn with shame and embarrassment that he became a prisoner in his own house. All of this has had a very devastating impact on his marriage and his relationship with his four children.[46] Notwithstanding the overwhelming evidence of harm, in paragraph 80 of the Lerners factum, the appellants urge this Court to accept the motion court's erroneous view that the harm suffered by Dr. Platnick was "fairly low", a completely untenable conclusion which was properly rejected by the Court of Appeal. It is hard to imagine a better example of "harm" for the purposes of the s. 137.1(4)(b) analysis. Giving deference to the motion judge who characterized the harm in this case as "fairly low" in the face of overwhelming evidence to the contrary, would, with respect, be perverse and result in a serious miscarriage of justice. This was an error of law and an error of fact.

53. The evidence also confirms that there is a direct link between the inevitable "harm" that results when a person's reputation is wrongly destroyed (as articulated by this Court in cases such as *Hill*, *Lucas*, *Grant*, *Simpson* and *Botiuk* and the House of Lords in *Reynolds*), discussed in paragraphs 10, 15, 49-53 of Dr. Platnick's responding factum in the Bent appeal, and the "harm" suffered by Dr. Platnick. There is a reason why the common law of defamation presumes "harm" or "damages" once a libel victim has established that the published words referring to him or her, in their natural and ordinary meaning, were defamatory. It would be

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[45] *Botiuk v. Toronto Free Press Publications Ltd.* [1995] S.C.J. No. 69, para. 92 [*Botiuk*].
[46] Platnick Affidavit, AR, Vol. VI, tab 19, pp. 1-3, 5, 7, 17-19, 21-22; see paras. 2, 5, 10, 14-15, 35, 37-38, 40-41, 45-47; Appeal Decision, paras. 103-104, 106, 108-110.

completely incongruous and contradictory to recognize that protecting a person's reputation is a constitutional and social value of superordinate importance (for the reasons stated by this Court) and yet when the injury occurs, conclude that it was of little consequence or "fairly low". There will always be a severity continuum where a particular "reputational interest" and a particular "expression" will lie. This is precisely why this Court and the common law requires, on a case-by-case basis, a "careful", "sensitive" and "delicate" balance between the particular reputational interest and the expression in issue. There cannot possibly be a more compelling public interest case than Dr. Platnick's, to move past the procedural, screening stage of an anti-SLAPP motion and on to trial so he can have his day in Court and have an opportunity to vindicate his name. This jury case must be decided by the jury on the basis of a fully developed trial record, not on a preliminary anti-SLAPP screening motion, by a judge whose role is that of a gatekeeper.

54. While the Court of Appeal correctly held that the question of whether the action is a SLAPP action or a legitimate and *bona fide* libel action is of vital importance to the analysis under s. 137.1(4)(b) and should be determinative of the issue, it is submitted that whether the action is a SLAPP or non-SLAPP action is relevant to the entire s. 137.1(4) analysis and not just s. 137.1(4)(b). In *Pointes*,[47] the Court described s. 137.1(4)(b) as **"the heart of Ontario's anti-SLAPP legislation"**, where determining whether the action was a SLAPP or non-SLAPP action was paramount.[48] Respectfully, what is at the heart of Ontario's anti-SLAPP legislation is the fact that it <u>is</u> anti-SLAPP legislation. The application of the "heart" of the legislation – its pith and substance, should not be delayed until the third step of the s. 137.1(4) analysis, as this stage may never be reached. On the appellants' theory of the case, meritorious actions will be dismissed at stage two of the analysis ("no valid defence"). The fact that in the context of anti-SLAPP legislation, the Court is dealing with a legitimate and *bona fide* libel action, where serious injury has been suffered by an innocent libel victim, is a vitally important fact under s. 137.1(4)(a)(i) (first step) in concluding that there are grounds to believe that the proceeding has substantial merit. There must be a proportionality between a libel case that has substantial merit because, *inter alia*, it is <u>not</u> a SLAPP action and whether (applying the test articulated by the Court of Appeal), there are grounds to believe that the defendant has no valid defence under s. 137.1(4)(a)(ii) (second step). The key anti-SLAPP purpose of the legislation must be fully

[47] *1704604 Ontario Ltd. v. Pointes Protection Assn*. [2018] ONCA 685, para. 86 [*Pointes*].
[48] Appeal Decision, paras. 96-100.

incorporated into steps one and two and not delayed until step three of the s. 137.1(4) analysis. A contextual, purposive and principled analysis must be incorporated into the entire s. 137.1(4)(a)(i) and (ii) analysis, with the result that whether the action is a SLAPP or non- SLAPP action, is essential for the entire analysis. There is a strong bias in the legislation against SLAPP actions proceeding to trial, but an even stronger bias in favour of legitimate and *bona fide* libel actions proceeding to trial.

H] American Jurisprudence

55. Although various American jurisdictions have differing anti-SLAPP regimes, the principle underlying each is that the Court's focus must be on whether the impugned action is in fact a SLAPP and not a valid, non-frivolous claim. In Illinois, anti-SLAPP relief is only available for "traditional" SLAPPs.[49] In both Washington state[50] and the District of Columbia,[51] despite seemingly strict and onerous statutory language similar to s. 137.1(4), Courts have held that a defamation suit must proceed to trial unless it is a "sham" or "frivolous", adding that anti-SLAPP legislation cannot be interpreted to create "a truncated adjudication of the merits of a plaintiff's claim" for fear of running afoul of a plaintiff's right to redress from the Courts for a non-frivolous claim.[52] The test of "likely to succeed" can therefore be no higher than whether the trier of fact could reasonably find that the claim is supported in light of the evidence produced.[53] The test in California is similar: the legislated onus to demonstrate "a probability that the plaintiff will prevail on the claim"[54] was interpreted by that State's Court of Appeal as simply requiring the plaintiff to make "a *prima facie* showing of facts which would, if proved at trial, support a judgment in plaintiff's favor".[55] In essence, these various Courts applied the same "reasonable range of outcomes" test as the Court of Appeal in the case-at-bar. Finally, the Massachusetts Supreme Court cautioned that the apparently strict statutory language employed

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[49] *Sandholm v. Kuecker* 962 N.E.2d 418 (2012)(Ill. S.C.), paras. 42-45, 49.
[50] *Davis v. Cox* 351 P.3d 862 (2015), paras. 30-36.
[51] *Libre by Nexus v. Buzzfeed, Inc.*, 311 F. Supp. 3d 149 (D.D.C. 2018) (U.S. Dist. Ct.), pp. 153, 158-160.
[52] *Davis v. Cox* 351 P.3d 862 (2015), para. 36 (also see paras. 30-35).
[53] *Libre by Nexus v. Buzzfeed, Inc.*, 311 F. Supp. 3d 149 (D.D.C. 2018) (U.S. Dist. Ct.), pp. 153, 158-160.
[54] *California Code Civ. Proc.*, s. 425.16, paras. (a) and (b).
[55] *Wilcox v. Superior Court (Peters)*, 27 Cal.App.4th 809 (1994) (US Law Justicia printed pages), pp. 3-7, 9-11, 14.

in anti-SLAPP legislation must be read with its purpose in mind, and with a view to the kinds of situations the legislature intended for its use; otherwise, Courts risk *de facto* creating a new absolute privilege category over all matters of public interest.[56]

I] Inconsistent Judicial Rulings

56. In addition to the herein proceeding, there are three parallel proceedings. One, is the appellants' client, Dr. Carpenter's, $7.5 million action against Dr. Platnick and the other defence assessors and vendor company, based on the identical facts that are the subject matter of the appellants' defamatory communication, namely, the *Carpenter* arbitration. The second action is Dr. Platnick's libel against KMI which owns Insurance Business Canada Magazine which republished the appellants' libel.[57] The third action, not in the record, but identified in the Bent factum at paragraph 34, is Dr. Platnick's action against the Globe and Mail for republishing the appellants' libel. Subject to qualifications that must be left to Dr. Platnick's fresh evidence motion, the *Carpenter, KMI* and *Globe and Mail* actions are/were proceeding to trial, on their merits, in the ordinary course, which includes the exchange of Affidavits of Documents, production of Schedule "A" documents, Rule 31.10 and 30.10 motions to examine non-parties and obtain documents from non-parties, examinations for discovery, interlocutory motions, pre-trial and lastly the trial. Dr. Carpenter's initial Affidavit of Documents is reproduced in the respondent's record.[58] This 71-page document identifies the thousands of documents relevant to the *Carpenter* arbitration and litigation which could not possibly have been utilized in response to an expedited, preliminary, procedural, anti-SLAPP screening motion. Further, as illustrated by Dr. Platnick's Demand for Particulars[59] and his Request to Inspect Documents,[60] he was seeking critical evidence relevant to the herein proceedings and the *Carpenter* action, including production of Dr. Carpenter's insurer's (TD) file addressed in the respondent's fresh evidence motion. In paragraph 5 (d) of her affidavit, Ms. Bent made the appellants' client, Dr. Carpenter's Statement of Claim an Exhibit, as evidence of "… biased and unfair reports by insurer assessors,

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[56] *Duracraft Corporation v. Holmes Products Corporation*, 427 Mass. 156, 168 *(Mass. 1998)* (Supreme Judicial Court), pp. 161-163, 166-167.
[57] RR, Vol. 2, tabs 7-29, *KMI* and *Carpenter* pleadings.
[58] RR, Vol. 2, tab 24, Dr. Carpenter's Affidavit of Documents, pp. 157-227.
[59] RR, Vol. 2, tab 22, Dr. Carpenter's Demand for Particulars, pp. 145-151.
[60] RR, Vol. 2, tab 23, Dr. Carpenter's Request to Inspect Documents, pp. 152-156.

which includes the manipulation and alteration of insurer assessor reports in favour of insurers …". It would bring the administration of justice into disrepute to effectively try the threshold issues on their merits in the *Carpenter*, *KMI* and the *Globe and Mail* litigation, but not in the herein action. Far more damaging to the administration of justice would be to have three juries or three judges making findings of credibility and fact in favour of Dr. Platnick in *Carpenter*, *KMI* and the *Globe and Mail* on the basis of a fulsome and tested evidentiary trial record, that are the opposite of the findings made prematurely by Dunphy J. based on a completely undeveloped evidentiary record on a preliminary, procedural, screening motion at the conclusion of which Dr. Platnick was saddled with an "eye-popping" $312,943.42 cost award for a three day motion. This would highlight the egregious miscarriage of justice caused by the motion judge's arbitrary dismissal of the herein action. The fresh evidence motion will highlight the significance of this submission.

J] Jury Has the Responsibility to Determine Certain Facts, Not a Motion Judge in a Screening Motion

57. The appellants criticize the Court of Appeal for substituting its discretion for that of Justice Dunphy notwithstanding his errors of fact were palpable and overriding. When a motion judge calls white-black and black-white, the appellate Court is not exercising a "discretion", but rather correcting serious factual errors amounting to an error of law – white is white and black is black. Even putting aside the gatekeeper role of a motion judge on a procedural anti-SLAPP screening motion, in *Grant v. Torstar Corp.*,[61] this Court held that if the public interest criteria was met, it was for the jury, not the judge, to decide whether the inclusion of the impugned statement was justifiable because this involves a **"highly fact-based assessment of the context and details surrounding the publication itself"**. This determination is **"intimately bound up in the overall determination of responsibility and should be left to the jury"** (emphasis added). It is for the jury to consider the need to include particular defamatory statements. The Court of Appeal was correct in stating that this cannot possibly be done on a preliminary screening motion in a non-SLAPP libel action. Nor was this the intention of the legislature. The principle of leaving factual determinations to the jury is equally applicable to determining the defences advanced by the appellants, including, in the context of qualified privilege, whether the

[61] *Grant v. Torstar Corp.* [2009] S.C.J. No. 61, paras. 109, 128; also see *Reynolds*, p. 45.

occasion was exceeded or whether Ms. Bent was motivated by malice. Serious findings of credibility and issues of malice must be left to the jury.

K] Communication Between Dr. Platnick and Dr. Dua Judicially Mandated

58. While Dr. Platnick has provided a full explanation for his communication with Dr. Dua concerning her report, that explanation is academic for the purposes of this lawsuit. As stated by the Court of Appeal,[62] Ms. Bent falsely accused Dr. Platnick of changing the conclusion of Dr. Dua's report. Dr. Platnick was never consulted by the appellants prior to their libel being published. Therefore, what they learned subsequently, through Dr. Platnick's explanation responding to their anti-SLAPP motion, long after the publication, is irrelevant. The appellants cannot now bootstrap their argument this way. Regardless, Dr. Platnick's explanation entirely repudiated the appellants' allegations and revealed it for the lie that it was. There is no other evidence in the record. This said, Dr. Platnick's communication with Dr. Dua was completely appropriate and necessary.

59. In *Moore v. Getahun* (leave denied by this Court),[63] the Ontario Court of Appeal ruled that consultations with experts are necessary for the proper functioning of the justice system and that under normal circumstances, there is no obligation of disclosure related to consultations with experts, changes made to earlier expert drafts, nor of the drafts themselves. Although *Moore* dealt with the specific case of counsel's assistance in the preparation of expert reports, the principles underlying the Court's judgment apply with equal force to the facts-at-bar and in particular, Dr. Platnick's discussion with Dr. Dua, for the sole purpose of ensuring her report's compliance with Ontario law. Expert witnesses "require a high level of instruction … which may necessitate 'a high degree of consultation' involving an iterative process through a number of drafts", particularly in a case like the one-at-bar where doctors, who are experts in the field of their practice, do not understand the complex process of undertaking a catastrophic impairment rating in compliance with the Ontario *SABS*, the OCF-19 Form and the AMA Guides. The Court of Appeal held that draft reviews and consultations ensure that the report ultimately complies

[62] *Platnick v. Bent*, 2018 ONCA 687, paras. 92-93 [Appeal Decision].
[63] *Moore v. Getahun* [2015] O.J. No. 398 (C.A.), paras. 7, 27-28, 32, 41-48, 54-55, 60-66, 75-78, 120; Leave to Appeal to S.C.C. dismissed: [2015] S.C.C.A. No. 119.

with the relevant statutory requirements, is restricted to the relevant issues, and is written in a manner and style that is proper, accessible and comprehensible. It would have been unthinkable to identify the very serious errors in Dr. Dua's report such as the Class 3/Class 4/moderate/marked impairment designation and do nothing about it. This omission would have subverted the ends of justice, not enhanced them. Any imposed restriction on communication with expert witnesses is contrary to the interests of justice, and would do a disservice to the Court in terms of hearing fulsome, well-organized, effective and appropriate evidence. Allowing an open-ended inquiry into the differences between a final report and an earlier draft would unduly interfere with the orderly preparation of a party's case and would run the risk of needlessly prolonging proceedings. The Court of Appeal has held that if there is a concern that an expert witness was improperly influenced, it is to be addressed in cross-examination, where the doctor in question can defend him or herself, not, as here, in an e-mail and in circumstances such as the case-at-bar. The appellants made sure that Dr. Platnick was never given the opportunity to defend himself against their very serious allegations.

L] Statutory Interpretation

60. Legislation and the common law are presumed to comply with the limits on jurisdiction imposed by constitutional law, thereby giving constitutional values a central role in statutory interpretation. It is submitted that the overarching anti-SLAPP purpose of the legislation must be taken into account at every stage of the s. 137.1(4) analysis. Any interpretation that defeats the purpose of the legislation, as advocated by the appellants, are considered untenable and must be rejected. Further, if the language of the provisions permits two interpretations, one which is consistent with the *Charter* and avoids disproportionate hardship or interference with the efficient administration of justice and avoids irrational distinctions, and one which does not, the former must prevail.[64]

[64] *R. v. Sharpe* 2001 SCC 2, para. 33; Sullivan on the Construction of Statutes, 6th Edition by Sullivan, R., LexisNexis, 2014, pp. 260-262, 264-265, 267-268, 277-280, 292-294, 299-300, 308, 311-312, 319-321, 328-330, 523-533, 690-693 [Sullivan], *Hills v. Canada (Attorney General)* 1988 CarswellNat 654, paras. 92-93; *Rizzo & Rizzo Shoes Ltd. (Re)* [1998] 1 S.C.R. 27, paras. 34-35.

61. Citing this Court's decision in *R. v. Rodgers*,[65] the Court held that there must be a genuine ambiguity in the legislation before *Charter* values can be used as an interpretable tool. It is open to this Court to find that there is the necessary ambiguity in s. 137.1(4) to invoke *Charter* values as an interpretative tool. Having said this, in the unique circumstances of this case, such a view is implicit and therefore, from a practical point of view, academic. As stated previously, it is clear that in enacting the *PPPA*, the legislature was affirming that the substantive law of defamation was not altered. In a series of libel cases, this Court made certain that the common law of defamation was consistent with *Charter* values and principles. *Ipso facto*, *Charter* values and principles are integral to any purposive interpretation of s. 137.1(4), which is to determine which libel actions are to proceed to trial to be determined on their merits based on the existing substantive law of defamation and which actions are not. The determination of whether there are grounds to believe that the proceeding has substantial merit and the moving party has no valid defence must, of necessity, apply the *Charter* compliant law of defamation.

M] Cases Cited by Appellants Do Not Support Submission

62. A number of Ms. Bent's case references (adopted by Lerners), do not stand for the submissions referred to in her factum. For example, *Daggitt*[66] in paragraphs 5 and 22 actually refers to the Court's reflection, in *obiter*, about experts who have been found to breach their Rule 4.1.01 duties pursuant to Rule 53.03 undertakings.[67] The paragraph 59 reference to *Black v. Breeden*[68] simply confirms that a defendant is not liable for republication unless it is authorized or a natural and probable result of the original libel, which is the case here. The appellants' reliance on *Will-Kare*[69] in paragraph 81 does not support its "grounds to believe" argument. In fact, the case does not even contain that expression at all. The appellant's immigration[70], and standard civil burden of proof[71] cases following a full evidentiary hearing have no application to a s. 137.1 preliminary screening motion. Paragraph 92's reliance on *Rizzo & Rizzo Shoes Ltd.*

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[65] *R. v. Rodgers* [2006] 1 S.C.R. 554, paras. 18-19; Appeal Decision, para. 39.
[66] *Daggitt v. Campbell* 2016 ONSC 2742.
[67] 2016 ONSC 2742, paras. 18, 22-27, 31.
[68] *Black v. Breeden* 2012 SCC 19, para. 20
[69] *Will-Kare Paving & Contracting Ltd. v. Canada* 2000 SCC 36.
[70] *Mugesera v. Canada (Minister of Citizenship and Immigration)* 2005 SCC 40 [*Mugesera*]; *George v. Rockett*, [1990] HCA 26, para. 8 (referred to in para. 82 of appellant's factum).
[71] *F.H. v. McDougall*, 2008 SCC 53, paras. 46, 49 (referred to in para. 90 of appellant's factum).

(Re)[72] arguing that the Court of Appeal created a "pointless merits test" is also misplaced as this bankruptcy/employment standards case simply held at the paragraph referenced by the appellant that "[i]t is a well-established principle of statutory interpretation that the legislature does not intend to produce absurd consequences." While in *Fournie v. Coachman,*[73] a single arbitrator ruled that a psychiatrist can consider pain as contributing to the four areas of social functioning, nowhere in the case is there a ruling that a psychiatrist may make his or her own WPI finding on pain, which was the issue in Dr. Dua's report. It therefore does not assist the appellant in any way. Finally, the appellants rely[74] on the UK case of *Lachaux v. Independent Print Ltd.*[75] for the proposition that a plaintiff in Ontario must prove serious harm to establish the merits of a defamation suit, ignoring the fact that the UK *Defamation Act, 2013* legislatively altered the common law in this regard, a significant legal revision that has not occurred in Ontario. That said, Dr. Platnick has established serious harm.

63. Lerners has made two case references in its factum that do not support its arguments. Firstly, at paragraph 51, the appellant submits that the Court of Appeal erred by reaching conclusions of fact for which there was no supporting evidence, and that these directly contradicted findings of the motions court judge. This submission is not supported by the referenced case, *R. v J.M.H.,*[76] which was a criminal appeal following a full trial. What this Court had actually stated in *J.M.H.* was that it is an error of law to make a finding of fact for which there is no evidence; however, a conclusion that the trier of fact has a reasonable doubt is not a finding of fact for the purposes of this rule. Secondly, like the appellant Bent, Lerners also errs in relying [77] on the legislated standard of proof in the immigration *Mugesera* case.[78] Lerners submits that "[i]t makes perfect sense to apply the same interpretation to the two statutes [the *Immigration and Refugee Protection Act*[79] and the *Courts of Justice Act*[80]]. The respondent rejects this for two reasons: (i) the former contains a legislated standard while the latter does

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[72] 1998 CanLII 837 (SCC), para. 27.
[73] *Fournie v. Coachman*, FSCO Appeal Order A07-000297.
[74] In para. 124, Bent factum.
[75] *Lachaux v. Independent Print Ltd.* 2019 UKSC 27.
[76] *R. v. J.M.H.* 2011 SCC 45, para. 25.
[77] At para. 57 of the appellant's factum.
[78] *Mugesera, supra,* footnote #65.
[79] *Immigration* and *Refugee Protection Act*, S.C. 2001, c. 27.
[80] *Courts of Justice Act*, R.S.O. 1990, c. C.43.

not; and (ii) the former contemplates a full evidentiary hearing, while the latter contemplates a cursory, time-limited, summary screening motion without a full evidentiary record.[81]

N] Conclusion

64. The *PPPA* was intended to recalibrate the legal balance between abusive SLAPP actions and *bona fide* libel actions. It did not alter the substantive law of defamation or in any way diminish the vitally important values and principles that are integral to the common law of defamation, consistent with the *Charter*.

65. What the appellants are effectively seeking to accomplish in this appeal, is to roll back decades of progress this Court has made in developing the common law of defamation in a manner which repudiates any notion of a hierarchy of rights between freedom of expression and protection of reputation, for a reconciliation of rights through a careful, sensitive and delicate balance. This Court has repeatedly stated that recognizing and cherishing the fundamental importance of protecting an individual's reputation is critical to our democracy. Society must be vigilant in protecting a value of such vital importance. Canada's legal system and our *Charter* compliant common law of defamation is the envy of the world and the appellants' attempt to take us back in time must be rejected.

66. The unprovoked attack on Dr. Platnick's integrity and trustworthiness by the appellants was as egregious a libel as one could imagine; yet they seek this Court to dismiss Dr. Platnick's action without a trial. They ask this Court to place them above the law by absolving them of all wrongdoings. The appellants are not asking for justice – they are seeking immunity for their wrongful acts. Again, to use the words of Justice Binnie in *WIC Radio*, Dr. Platnick's reputation "is not to be treated as regrettable but unavoidable road kill on the highway of public controversy …".[82]

PART IV – SUBMISSIONS ON COSTS

67. Dr. Platnick requests costs in this Court and the costs before the motion judge.

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[81] Also see Responding Factum of the Respondent, Howard Platnick responding to Ms. Bent, pp. 28-29, para. 60.

[82] *WIC Radio Ltd. v. Simpson* [2008] S.C.J. No. 41, para. 2.

PART V – ORDER SOUGHT

68. Dr. Platnick asks that the appeal be dismissed, with costs and his case be permitted to proceed to trial.

PART VI – SUBMISSIONS ON CASE SENSITIVITY

N/A

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 12th day of September, 2019.

Timothy S. B. Danson **Marjan Delavar**

PART VII – AUTHORITIES

NO.	AUTHORITY	PARAGRAPH(S)
1	*1704604 Ontario Ltd. v. Pointes Protection Assn.* [2018] ONCA 685	54
2	*Black v. Breeden* 2012 SCC 19	62
3	*Botiuk v. Toronto Free Press Publications Ltd.* [1995] S.C.J. No. 69	52, 53
4	*Cusson v. Quan* 87 O.R. (3d) 241 (C.A.)	7
5	*Daggitt v. Campbell* 2016 ONSC 2742	62
6	*Davis v. Cox* 351 P.3d 862 (2015)	55
7	*Duracraft Corporation v. Holmes Products Corporation,* 427 Mass. 156, 168 *(Mass. 1998)* (Supreme Judicial Court)	55
8	*F.H. v. McDougall*, 2008 SCC 53	62
9	*Fournie v. Coachman*, FSCO Appeal Order A07-000297	62
10	*George v. Rockett*, [1990] HCA 26	62
11	*Gilles E. Néron Communication Marketing Inc. v. Chambre de Notaires de Québec* [2004] S.C.J. No. 50	28, 51
12	*Grant v. Torstar Corp.* [2009] S.C.J. No. 61	53, 57
13	*Hill v. Church of Scientology of Toronto* [1995] S.C.J. No. 64	44, 53
14	*Hills v. Canada (Attorney General)* 1988 CarswellNat 654 (S.C.C.)	60
15	*Klepper c. Lulham*, 2017 QCCA 2069	9
16	*Lachaux v. Independent Print Ltd.* 2019 UKSC 27	62

NO.	AUTHORITY	PARAGRAPH(S)
17	*Libre by Nexus v. Buzzfeed, Inc.*, 311 F. Supp. 3d 149 (D.D.C. 2018) (U.S. Dist. Ct.)	55
18	*Moore v. Getahun* [2015] O.J. No. 398 (C.A.); Leave to Appeal to S.C.C. dismissed: [2015] S.C.C.A. No. 119	59
19	*Mugesera v. Canada (Minister of Citizenship and Immigration)* 2005 SCC 40	62, 63
20	*R. v. J.M.H.* 2011 SCC 45	63
21	*R. v. Lucas* [1998] S.C.J. No. 28	53
22	*R. v. Rodgers* [2006] 1 S.C.R. 554	61
23	*R. v. Sharpe* 2001 SCC 2	60
24	*Reynolds v. Times Newspapers Ltd. and Others* [1999] 4 ALL ER 609	7, 53, 57
25	*Rizzo & Rizzo Shoes Ltd. (Re)* [1998] 1 S.C.R. 27	60, 62
26	*Sandholm v. Kuecker* 962 N.E.2d 418 (2012) (Ill. S.C.)	55
27	*Simpson v. Mair*, 2008 SCC 40	53
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34	*Courts of Justice Act*, R.S.O. 1990, c. C. 43 tribunaux judiciaires (Loi sur les), L.R.O. 1990, chap. C.43	ss. 137.1 and 137.2 ss. 137.1 et 137.2
35	*Libel and Slander Act*, R.S.O. 1990, c. L.12 diffamation (Loi sur la), L.R.O. 1990, chap. L.12	
36	*Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 Règles de procédure civile, R.R.O. 1990, Règl. 194	Rules/Articles 4.1.01, 30.11, 31.10, 53.03
37	UK *Defamation Act, 2013*	
38	*Immigration and Refugee Protection* Act, S.C. 2001, c. 27	