

1 of 2 DOCUMENTS

*Case Name:*

**Fiwchuk v. York Region Condominium Corp. No. 865**

**RE: Steven Fiwchuk and Mary Fiwchuk, and  
York Region Condominium Corporation No. 865, L.W. &  
Associates, Larry Wronzberg and Richard Wronzberg**

[2009] O.J. No. 6329

Court File No. 74409/05

Ontario Superior Court of Justice

**E.B. Minden J.**

September 30, 2009.

(7 paras.)

**Counsel:**

Steven Fiwchuk and Mary Fiwchuk, self-represented.

Christopher J. Jaglowitz, for the Defendants.

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**ENDORSEMENT**

**1 E.B. MINDEN J.:**-- I have reviewed the parties' written submissions as to costs. Both sides declined the opportunity to make additional oral submissions.

**2** The defendants were almost entirely successful. The plaintiffs' main claims, for defamation, intentional infliction of mental suffering, aggravated damages and punitive damages, were dismissed. Litigating these claims occupied most of the approximately four day trial and required a comprehensive defence. The plaintiffs' claim for return of chattels was successful in part, but recovery was entirely set off as against the successful, undefended counterclaim.

**3** I see no reason in this instance to depart from the usual rule that costs follow the event. Given the outcome, the defendants are entitled to costs on a partial indemnity scale, as requested.

**4** I have considered all of the relevant factors listed in Rule 57.01(1), including the amount of costs that the unsuccessful plaintiffs could reasonably expect to pay relative to these proceedings. I have considered the governing principles in relation to costs as set out by the Ontario Court of Appeal in Boucher et al v. Public Accountants Council for the Province of Ontario et al (2004), 71 O.R. (3d) 291 and subsequent appellant authorities. In particular, I have endeavoured to determine the amount that is fair and reasonable for the unsuccessful parties to pay in these proceedings, rather than an amount determined solely by the actual costs incurred by the successful litigants.

**5** In my view, the counsel rate charged by defendants' counsel is reasonable, but preparation time is excessive. As defendants' counsel conceded, this was a relatively brief, uncomplicated trial in which only three witnesses testified.

6 I would fix costs at \$18,500.00, inclusive of disbursements and G.S.T., payable by the plaintiffs to the defendants within six months.

7 At the request of the defendants, leave is granted to amend title of the proceedings and the amendment is hereby made so that the plaintiff Steven Fiwchuk is referred to as "Steven Fiwchuk also known as Stephen Fiwchuk".

E.B. MINDEN J.

cp/s/qlrxg/qlvxw

2 of 2 DOCUMENTS

*Case Name:*

**Fiwchuk v. York Region Condominium Corp. No. 865**

**Between**

**Steven (a.k.a. Stephen) Fiwchuk and Mary Fiwchuk,**

**Applicants, and**

**York Region Condominium Corporation No. 865, L.W. &**

**Associates, Larry Wronzberg and Richard Wronzberg,**

**Defendants**

[2009] O.J. No. 6330

File No. 05-74409

Ontario Superior Court of Justice

Newmarket, Ontario

**E.B. Minden J.**

Heard: August 14, 2009.

Oral judgment: August 14, 2009.

(100 paras.)

**Counsel:**

S. Fiwchuk: Appearing in Person.

C.J. Jaglowitz: Counsel for the Defendants.

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**REASONS FOR JUDGMENT**

E.B. MINDEN J. (orally):--

Introduction

**1** Steven Fiwchuk and Mary Fiwchuk were hired as a superintendent couple by L.W. & Associates, the defendant property management association, on behalf of the defendant condominium corporation. The defendants Larry Wronzberg and Richard Wronzberg were the owners/operators of the defendant association.

**2** For about three years, the Fiwchuks assisted 224 unit owners in two condominium towers on Townsgate Drive, located near Bathurst Street and Steeles Avenue West in Vaughan. In mid-February 2004, Mr. Fiwchuk was accused by his employer of stealing cash from the property management office during the course of his employment. Eventually, Mr. Fiwchuk was charged by York Regional Police with theft not exceeding \$5,000.00. Mrs. Fiwchuk was charged with theft from mail, arising from an incident that also allegedly occurred on the premises of the condominium. Mr. Fiwchuk was terminated for cause, Mrs. Fiwchuk without cause. Within a month, they vacated the superintendent suite. In late summer or early fall 2004, after \* numerous court appearances in the Ontario Court of Justice, Newmarket, the Crown withdrew the charges.

[\* The Court had inserted a paragraph break at this point and numbered the text paragraph 3. LexisNexis has removed the break and the number but retained the Court's subsequent paragraph numbering.]

**4** Following termination and prior to the plaintiffs vacating, the defendants posted or caused to be posted numerous notices around the condo towers. They also delivered or caused to be delivered an open letter to all residents. The notices and letters referred to the allegations of illegal conduct against Mr. Fiwchuk, evidence in support of those allegations, the plaintiffs' termination and some of the surrounding circumstances.

#### Positions of the Parties

**5** The plaintiffs' position is that they were hard-working and well regarded employees. Many of the residents supported and respected them. They claim that in the aftermath of a battle for control over the condominium's Board of Directors, allegations of criminal conduct by Mr. Fiwchuk were trumped up by Larry Wronzberg and Rick Wronzberg in order to provide a basis for the plaintiffs' termination. The defendants ignored the presumption of innocence. They made public allegations of criminal conduct which had not and could not be proven and, more importantly, they did so, for an oblique motive, knowing that no supportive evidence existed. The Crown's ultimate withdrawal of the charges reflects that there never was a case against them.

**6** The plaintiffs further assert that their reputation was damaged in significant ways by reason of the defendants' acts and in particular, due to the dissemination of the "open letter". They say that prior to moving out, their access to the buildings was severely restricted. The defendants denied them access to most public areas. This, too, was made public. Residents continually asked what had happened. As a consequence, the plaintiffs suffered considerable embarrassment and anxiety.

**7** The plaintiffs seek damages for defamation and for intentional infliction of mental suffering, aggravated damages and punitive damages. They also seek compensation in lieu of the return of chattels they say were kept in their storage locker to which they were deliberately and consistently denied access.

**8** The defendants say their intention was to keep the theft a private matter. However, the conduct of the plaintiffs compelled them to inform residents of what had occurred. The plaintiffs disseminated false and misleading information, claiming the defendants had arbitrarily and falsely accused Mr. Fiwchuk of illegality, knowing there was no evidence in support. The defendants say that in the circumstances, they were entirely justified in providing the residents with the true facts surrounding the alleged theft and consequent termination. They acted in good faith, with cogent evidence, including video surveillance tapes, in support of their position. The Crown's eventual withdrawal of the charges has no impact on the propriety of the defendants' bona fide acts.

**9** The defendants also resist the claim regarding the property in storage. They say they made numerous efforts to arrange for retrieval of the chattels. These attempts were largely ignored.

**10** Finally, the defendants counterclaim for approximately \$8,000.00 in damages to the superintendent's suite. They discovered this damage when the plaintiffs vacated.

#### The Plaintiffs' Case

**11** Mary Fiwchuk was the plaintiffs' sole witness.

**12** The plaintiffs were hired in late 1999 and commenced working shortly thereafter. They were terminated February 17, 2004. Mrs. Fiwchuk testified that for the first couple of years, they worked diligently and were favourably

received by the residents. The relationship with management began to sour in August 2002 when the plaintiffs inadvertently learned that the defendants were paying a previous employee in a fashion that the plaintiffs believed was "under the table". The plaintiffs allege that they were threatened with termination if they disclosed what they had learned. Another incident occurred in early 2003. Mrs. Fiwchuk received \$1,500.00 cash payment for a guest suite and turned it over to the office manager, Rick Wronzberg's spouse and Larry Wronzberg's sister in law. When she could not locate the money, Larry Wronzberg implied that Mrs. Fiwchuk had failed to turn over the cash. The money was found. From that point on, the relationship was uneasy and the plaintiffs began thinking they should search for alternate employment. Other incidents occurred that left the plaintiffs feeling they were not trusted and that their closeness with some of the residents and Board members was not appreciated.

**13** Things seemed to come to a head after the plaintiffs signed another one year contract in late January 2004.

**14** The accusation of theft was made when Larry Wronzberg summoned the plaintiffs to the office. He asked when they had last been in the office. He told them that the defendants had set up video surveillance and that the camera had captured them in the office. It revealed that they were stealing money. Money had gone missing in the office and he demanded to know which one of them was responsible. Mrs. Fiwchuk responded that any missing monies had likely been misplaced by those responsible for securing them, not as a result of theft. Mrs. Fiwchuk was very upset. She said the accusation was "ridiculous" and not true. Larry Wronzberg told them to admit it. He told them of his contacts within the York Regional Police and that he would prevail. He said: "We'll see who gets the last laugh. You don't know who you are dealing with". Mrs. Fiwchuk testified he was screaming. Residents sitting in the lobby overheard. Mrs. Fiwchuk told him they would not be bullied and would not leave. She invited him to call police and let them investigate. She testified that Larry Wronzberg told them to "get the fuck out of the office".

**15** Later, Rick Wronzberg pounded on their unit door. He tried to push his way in, insisting that the plaintiffs permit him entry. He had a letter. He told them they were terminated and demanded their keys. He told them they would be out in seven days. He said: "I know the law. I can do that." He told them he would prevent their access to their mailbox and storage area. He threatened to make their lives miserable. Eventually, a letter (Exhibit 4), dated February 25, from the Board to Mr. Fiwchuk confirmed his "termination of employment -- with cause" and referenced the changing of the locks to the mailbox and storage area, as well as denial of access to public areas including the recreation room and library. The Fiwchuks were informed they could not use the laundry room in the absence of a security guard.

**16** The plaintiffs told Rick Wronzberg they wanted to inform the Board of Directors that the defendants had made a false accusation. Mrs. Fiwchuk testified that she drafted a handwritten letter to the President of the Board regarding the events in question. In it, she wrote that the plaintiffs wanted to address the Board and present their version of events. She attended at the President's unit and attempted to hand the letter to his spouse. Rick Wronzberg appeared at the door and grabbed the letter out of her hand. Mrs. Fiwchuk stated she never saw that letter again.

**17** Subsequently, Rick Wronzberg returned to the plaintiffs' unit and put a letter (Exhibit 1) under the door. The letter was her written notice of termination. Over the ensuing hours, several unit owners approached the plaintiffs and offered support.

**18** On February 19, a letter (Exhibit 2), signed by the Board President, on behalf of the Board of Directors, was delivered to the building residents. It stated that the defendants had terminated Mr. Fiwchuk for cause. They had taken legal advice and complied with all legal requirements. The letter indicated that the defendants had also terminated Mrs. Fiwchuk who was to receive pay in lieu of notice in accordance with the Employment Standards Act.

**19** The letter also included these extracts:

"The actions of Mr. Fiwchuk were both contrary to the law and his terms of employment. His conduct also compromised the security of the condominium and its residents.

While the Board of Directors would clearly have preferred to have kept this matter confidential, recent libelous, slanderous and defamatory statements made by Mr. and Mrs. Fiwchuk have forced the Board to provide a written response to all residents in order to dispute the unfounded allegations made by Mr. and Mrs. Fiwchuk and to clarify the true facts related to the dismissal of Mr. Fiwchuk. These facts include the following:

\* Physical evidence exists which clearly identifies Mr. Fiwchuk's involvement in illegal conduct, which conduct constitutes the cause for his dismissal;

- \* Eyewitness accounts place Mr. Fiwchuk at the scene of the crime; and
- \* Mr. Fiwchuk verbally admitted to having engaged in illegal conduct in the presence of Larry Wronzberg, Rick Wronzberg and Mary Fiwchuk, although Mr. Fiwchuk has refused to sign any formal admission of guilt with respect to same.

Contrary to the statements being made by Mr. and Mrs. Fiwchuk, it was not the decision of property management to arbitrarily or unilaterally terminate his employment, nor was property management acting beyond the scope of its authority in dismissing him. The decision to terminate Mr. Fiwchuk's employment was that of the Board alone. Property management merely carried out the duties it was instructed to do."

**20** The letter stated that despite the "reprehensible circumstances" surrounding Mr. Fiwchuk's dismissal, the Board had made a number of concessions to the Fiwchuks and had treated them with courtesy and consideration. The letter concluded:

"It is imperative to point out that the decision to terminate Mr. Fiwchuk would not have been made without corroborating evidence to support the reasons for dismissal. In the interest of providing Mr. Fiwchuk with a "dignified way-out", it was the original intention of the Board to forego police involvement in this case. However, in light of the statements and allegations made to residents about property management and the Board of Directors by both Mr. and Mrs. Fiwchuk, the decision has been revisited, and charges are to be filed. It is unfortunate that Mr. and Mrs. Fiwchuk have chosen to deal with this most regrettable situation in such a confrontational manner, especially since they have been provided with every opportunity to resolve this matter with dignity and without incident or ridicule.

Under the circumstances, the Board simply could not turn a blind eye to the acts being perpetrated against the Corporation and its residents. The Board of Directors therefore stand behind their decision to dismiss both Mr. and Mrs. Fiwchuk, who left the Board with no other alternative."

**21** Mrs. Fiwchuk testified that several residents brought the letter to the plaintiffs' attention. Mrs. Fiwchuk testified that she and her husband did not make the statements attributed to them. She said the letter signed by the Board President "totally slandered us". The content was "private information" between them and the employer. Informing the residents of the false accusation was "despicable".

**22** Mrs. Fiwchuk testified she was very upset. She felt her world was caving in on her. She suspected the Board of Directors had not been consulted and that the President and the Wronzbergs were in cahoots. She wanted to speak with other Board members. The defendants told her she could not do so. They ordered the plaintiffs to remain in their unit and not to discuss the matter with anyone.

**23** Mrs. Fiwchuk composed a computer generated letter (Exhibit 3) to the five Board members. After she placed copies of the letter in their mailboxes, a resident persuaded her not to deliver them. She retrieved these letters from the mailboxes and threw them in the garbage. Mrs. Fiwchuk testified that she later discovered the Wronzbergs had placed video surveillance in the area of the mailboxes. As a result of this incident, the defendants had her charged with theft from the mail.

**24** York Regional Police officers arrived at the office on February 19. Two officers spoke with the plaintiffs. No charges were laid. Mrs. Fiwchuk testified that the Wronzbergs were very upset about this and taunted them. She stated that they said they would pursue criminal charges if it meant they had to call ten different police officers.

**25** Either later that evening or the next evening, Mrs. Fiwchuk observed different police officers in the office. On February 20, police called her on her cell phone and asked the plaintiffs in for questioning. On February 22, the Fiwchuks attended at the police station and the aforementioned charges were laid.

**26** Mrs. Fiwchuk described her experience with the criminal justice system as "totally humiliating" and "disgusting". She testified that after one court appearance, Larry Wronzberg followed their vehicle. As I have indicated, charges were withdrawn in late August or early September 2004.

**27** The plaintiffs moved out on March 28, 2004. Larry and Rick Wronzberg refused to permit them to remove their personal belongings from their storage locker. Mrs. Fiwchuk testified that for years since, they have attempted to retrieve their belongings but the Wronzbergs have refused access. She said they have learned that some of the items have sustained water damage.

**28** Mrs. Fiwchuk testified that in addition to the letter hand delivered to all residents, a shorter version regarding the alleged theft was posted in every lobby and elevator landing. Every visitor to the building would have seen it. Many of the letters were posted in locked bulletin boards. Mrs. Fiwchuk testified that one of the Wronzbergs used a photo he had acquired of one of the plaintiffs' children to create a notice informing residents that the child was to be denied access to certain public areas. This notice was posted near the lobby for a day or two.

**29** Mrs. Fiwchuk testified that many people questioned them and looked at them differently. Their good name was tarnished. Their children were questioned by classmates about the matter. All of this caused enormous stress. They had difficulty obtaining alternate employment because the defendants reported the allegations to prospective employers. Mrs. Fiwchuk said she felt she has always been trying to prove her innocence. Her life and that of her family will not be the same.

#### The Defendants' Case

**30** Richard Wronzberg is a chartered accountant who, together with his brother Larry Wronzberg, serves as property manager of the condominium corporation. Richard Wronzberg testified that prior to the events in question, the defendants were satisfied with the plaintiffs' work. In negotiations respecting the plaintiffs' final one year contract, the Wronzbergs recommended to the Board significant pay raises for Mr. and Mrs. Fiwchuk. This took place only a matter of weeks before the events giving rise to these proceedings.

**31** Richard Wronzberg testified that commencing in early January 2004, cash monies had frequently gone missing from the petty cash envelope secured in a locked filing cabinet in the management office. The key was placed in the office desk and only the Wronzberg brothers and Debbie Wronzberg, Richard's spouse, had keys to the desk. Richard Wronzberg testified that he and the other defendants did not even consider that either of the plaintiffs might be responsible for the missing funds. The plaintiffs were considered hard-working and trustworthy.

**32** Prior to leaving for the week-end commencing Friday, February 13, Debbie Wronzberg recorded that there was \$175.00 cash in the petty cash envelope. On Monday morning, all but \$10.00 had been removed.

**33** Richard Wronzberg said the defendants were stunned when the videotape from Saturday, February 14 showed Mr. Fiwchuk in the management office. He accessed the desk drawer, apparently with his own key, and removed the key to the locked filing cabinet. Mr. Wronzberg said the video showed Mr. Fiwchuk using that key to access the filing cabinet and retrieve the petty cash envelope. He then removed the contents and replaced the envelope and key where he had found them. This occurred shortly after noon on Saturday, February 14.

**34** The video was played during the trial. Mr. Wronzberg provided a running commentary, as he broke it down, frame by frame. He acknowledged that at no time did the video show the full face of the man depicted. But he pointed out a number of details that convinced him that the man was Mr. Fiwchuk. For example, he noted the unique jacket worn by the man. It appeared to be made of a dark, suede material with leather or vinyl patches. This was the jacket routinely worn by Mr. Fiwchuk. The man wore a set of keys, with a unique key fob, on the waist, just as Mr. Fiwchuk always did. At one stage, another resident entered the office door. Mr. Fiwchuk then grabbed a garbage can and pretended to be involved in cleaning, as a superintendent might. The gait and movements were clearly his. At one point, the video briefly depicts part of the man's face. Mr. Wronzberg said he recognized the chin, nose and moustache of Mr. Fiwchuk. He was certain it was him.

**35** Richard Wronzberg testified that after he and his brother viewed the video, they played it for the President and other Board members. All agreed it depicted Mr. Fiwchuk in the office. The defendants became concerned that the plaintiffs had keys and access to all residents' units. On the advice of the Board, the Wronzbergs contacted their lawyer and letters of termination were prepared.

**36** In the afternoon of February 17, they called the plaintiffs to the office. When confronted, Mr. Fiwchuk denied being in the office over the week-end and denied removing monies. Larry Wronzberg told them they had evidence and proceeded to show the videotape. Both plaintiffs denied that the individual depicted was Mr. Fiwchuk. Larry Wronzberg asked Mrs. Fiwchuk to leave the office. He told Mr. Fiwchuk not to insult his intelligence. Mr. Fiwchuk continued to deny taking the money. Larry then asked his brother to leave the room.

**37** Richard Wronzberg testified that within a few minutes of his leaving his brother alone with Mr. Fiwchuk, he learned from his brother that Mr. Fiwchuk had acknowledged taking the money. He insisted Mrs. Fiwchuk had played no role. He wished to speak with the President to try to keep his job. The Wronzbergs attended at the President's unit and told him Mr. Fiwchuk had confessed. The President stated that any decision would be made by the Board. Richard Wronzberg testified that his brother suggested that Mr. Fiwchuk inform his wife what had occurred. Mr. Fiwchuk refused. According to Richard Wronzberg, Mr. Fiwchuk insisted he was solely responsible for the theft. She had nothing to do with it.

**38** Richard Wronzberg informed Mr. Fiwchuk of what the President had said. Then, after Mrs. Fiwchuk was summonsed, pursuant to legal advice, he provided the Fiwchuks with letters of termination, signed by the President. The letter to Mr. Fiwchuk (Exhibit 8) referred to his having "engaged in theft of the Corporation's petty cash". Mrs. Fiwchuk was upset at being given the minimum seven days before they were required to vacate. The Wronzbergs made various suggestions concerning other arrangements. According to Richard Wronzberg, everything seemed calm, amicable and professional. It was approximately 7:30 p.m. on Tuesday, February 17.

**39** Richard Wronzberg stated that immediately after the February 17 meeting with the Fiwchuks, he learned from various sources that the plaintiffs had launched a campaign around the building, disseminating information about the termination that was completely unfounded. The Fiwchuks were alleging they had been fired for no reason. They claimed they were being falsely accused based on "no evidence" and were otherwise being treated miserably by the property managers. The Fiwchuks wanted management replaced.

**40** Richard Wronzberg came into possession of a letter (Exhibit 3), dated February 18, addressed to the Board of Directors, authored by the plaintiffs. He retrieved a copy when he attended at the Board President's unit. Mrs. Fiwchuk was present. He observed her hand the letter to the nurse who was then caring for the President's spouse. He advised Mrs. Fiwchuk that the President had instructed him to retrieve the letter because he did not want his spouse to have to deal with it. The letter, signed by the plaintiffs, contained the following:

"The management ... wrongfully dismissed Steve and Mary Fiwchuk with no proof of cause. We have been tarnished by the Property Management. They have accused us with no proof or evidence; this is strictly hearsay and personal ... they have infringed our human rights and labour rights.

We are asking for reinstatement and the removal of management for their incompetence and attack of staff. We will go to the rest of the building to find out just how they feel about the management and how we've been treated, with this knee jerk reaction by management."

**41** After references to management's "incompetence", the letter continued:

"In closing, our family has been harassed by management by stalking outside our unit door, harassing our kids, and now we are prepared to fight them to the bitter end ... we will not stand by and let a management company tarnish our reputation. We do have backing within the building and the building will receive a copy of this letter ... we will not be bullied by the Management anymore."

**42** Richard Wronzberg testified that he showed the letter to the President and other Board members. The letter was discussed at that evening's Board meeting.

**43** As a result, on instructions from the Board and pursuant to legal advice, Richard Wronzberg drafted two letters. The first, dated February 19, was a letter (Exhibit 19) to the Fiwchuks, signed by the President. It was hand delivered to them around noon that day. That letter referred to "many inaccuracies and slanderous comments" contained in their letter of February 18 and set out the circumstances refuting all of the above noted claims. It made clear that the Fiwchuks' allegation of "wrongful dismissal with no proof of cause" was completely unfounded. It set out the allegation of theft against Mr. Fiwchuk and the evidence in support. It concluded:

"Your recent actions combined with both derogatory and libelous comments are a complete and utter surprise and disappointment to us all. In conclusion, we would point out that our decision to terminate your employment is based purely on the evidence. Unfortunately, your conduct has provided us with no other alternative."

**44** The defendants received no response to this letter from the plaintiffs. In the meantime, the defendants received numerous queries and complaints from unit owners. They were concerned about what had happened. They informed management that the plaintiffs were actively soliciting support and seeking residents to sign a petition regarding their reinstatement.

**45** The second letter (Exhibit 2), dated February 19, was the aforementioned open letter to all residents. Richard Wronzberg testified that he prepared this letter at the direction of the Board of Directors which vetted and approved the content, as did counsel. Copies were made for all unit owners. He swore its contents were truthful and accurate. It was prepared, at least in part, because the plaintiffs had ignored the President's letter and had rather defiantly persisted in providing unit owners with false and misleading information regarding their dismissal. The complaints and expressions of concern were increasing. The defendants decided to set things right.

**46** Prior to forwarding the letter, Mr. Wronzberg spoke to the unit owner who appeared briefly in the video. She confirmed that she entered the office the previous Saturday afternoon and that Mr. Fiwchuk was present. They spoke briefly and she left. Later, Mr. Fiwchuk asked her to deny that she had seen him in the office.

**47** On the evening of February 19, the Wronzbergs placed copies of Exhibit 2 in each mailbox and another on a bulletin board. Richard Wronzberg testified that this letter cleared the air and appeared to satisfy most residents that the Board and management had acted appropriately. He said the plaintiffs did not respond to it.

**48** Richard Wronzberg described placing a copy of the open letter into each of the unit owners' mailboxes located just outside of the management office. This was a typical way of distributing information to unit owners. This occurred on February 19 between 8:30 and 9:30 p.m. When this was completed, he pointed the office web cam in the direction of the mailboxes and left for the evening. On February 20, he discovered that in the early afternoon the web cam had captured video images of the plaintiffs removing from owners' mailboxes the copies of the open letter that the Wronzbergs had inserted the previous evening. Mrs. Fiwchuk was seen to gather up several letters and move off camera. It was discovered that the Fiwchuks had placed the letters in a garbage can adjacent to the mailboxes. Later that day, the Wronzbergs photographed the letters as discovered in the garbage can. The content is readily discernible as Exhibit 2.

**49** It is noteworthy that Mr. Fiwchuk is clearly depicted in this video as wearing a jacket identical to the one worn by the man in the management office on the day the money went missing.

**50** Shortly after the plaintiffs moved out, Richard Wronzberg received a copy of a letter, dated March 29, (Exhibit 20), from the Fiwchuks to all residents and owners. It read, in part:

"Management has slandered us and wrongfully accused our family and told us that we had to leave in 7 days or else. Knowing that we have done nothing wrong we did not leave after the 7 days and have chosen to fight them as they are just a couple of bullies."

**51** Richard Wronzberg testified that through counsel, numerous letters were forwarded to plaintiffs' former counsel and later to the plaintiffs personally concerning arrangements for retrieval from storage of the plaintiffs' personal effects. The letters, with fax confirmations, were filed. Mr. Wronzberg stated there was no response. In June 2007, over three years later, the plaintiffs forwarded a list of items. Mr. Wronzberg testified many of those items were not in storage.

**52** Finally, immediately after the plaintiffs vacated, Mr. Wronzberg took video footage showing damage done to the interior of the superintendent's suite. This included holes and cracks in doors, missing doors, dents and other damage to door frames, walls and trim as well as a cracked washroom vanity. The amount claimed for all repairs was \$8,000.00.

**53** Larry Wronzberg is a real estate agent who is his brother's partner in the association that runs the condominium. He confirmed his brother's testimony in all material respects. He stated that Mr. Fiwchuk initially denied being in the office on the Saturday. He denied having a key to the desk drawer and denied unlawfully removing any money.

**54** After the video was played, Mr. Fiwchuk stared and remained silent. Mrs. Fiwchuk became irate, claiming an infringement of their rights. Larry Wronzberg stated that he felt Mr. Fiwchuk was upset and would not speak in his wife's presence. Larry Wronzberg asked her to leave. Then Richard suggested that his brother should speak privately with Mr. Fiwchuk.

**55** Larry Wronzberg stated that when the two were alone, he confronted Mr. Fiwchuk. He testified he told Mr. Fiwchuk that he knew he had taken the money. He wanted to know why. He said Mr. Fiwchuk's eyes became glossy and he replied that he needed the money because of problems he was having with his older son. He admitted stealing approximately \$1,000.00. He said he wanted to pay the money back and did not want to lose his job. He asked if there was anything Mr. Wronzberg could do for him. He wanted to speak with the President of the Board. Larry Wronzberg also confirmed that subsequent to his speaking with the President, Mr. Fiwchuk confessed again to him as well as to his brother.

**56** Larry Wronzberg confirmed that he and his brother made various offers to provide alternate accommodations if the Fiwchuks did not wish to face the unit owners. He confirmed that the confrontation was short and relatively amicable.

**57** Larry Wronzberg also agreed with his brother's account of the ensuing days. He referred to an incident that occurred the following day. He observed Mr. Fiwchuk speaking with a few unit owners. Mr. Fiwchuk was very rude to him. He denied stealing anything, denied there was any evidence of theft and claimed that management was simply trying to get rid of him because they never liked him. In front of the other residents, Mr. Fiwchuk asked: "if there was a crime, why don't you call police?"

**58** Larry Wronzberg confirmed that he saw the Fiwchuks speaking with numerous unit owners who then came into the office to complain of management's treatment of the Fiwchuks. He testified owners were approaching him all day with false information regarding the termination. He estimated that day alone he spoke with fifteen or twenty residents.

**59** Finally, Larry Wronzberg testified that prior to these events, he and his brother had a very positive relationship with the Fiwchuks. He liked them. They were hard-working and reliable. Over the years, he had done personal favours for them. He denied there was any reason for wanting to terminate them. Each year he would tell Mr. Fiwchuk to state how much he wanted by way of salary and he would go to bat for him. Only a few weeks prior to the events in question, he and his brother had pushed hard for their new contract and a pay increase.

THE COURT: We're going to take 10 minutes.

RECESS

UPON RESUMING:

The Law

**60** The defendants rely on the defences of fair comment and qualified privilege. The plaintiffs submit, in essence, that these defences are not available in the circumstances of this case because there was malice on the part of the defendants. According to the plaintiffs, the defendants alleged Mr. Fiwchuk was guilty of criminal conduct knowing there was no evidence in support of that allegation. The defendants made and published this allegation in order to facilitate the plaintiffs' termination.

**61** In *McCullough v. Cohen*, [2000] O.J. No. 3431, Grainger, J. at paragraph 36, quoted with approval from a paper entitled "The Tort of Defamation -- Libel and Slander", delivered to the Canadian Bar Association on February 9, 1995, by Robert P. Armstrong, Q.C. (as he then was). The learned author said this about defamation and the defence of fair comment:

"The defence of fair comment protects expressions of opinion made in good faith on facts that are truthful and which concern a matter of public interest. The comment must be an honest expression of the publisher's opinion, and must be a statement of opinion, as opposed to an allegation of fact. The defence of fair comment can also be rebutted if the plaintiff can establish malice.

A good description of the defence of fair comment can be found in the Canadian text of Professor Raymond Brown:

"Everyone is entitled to comment fairly on matters of public interest. Such comments are protected by qualified privilege if they are found to be comments and not statements of fact, and are made honestly, and in good faith, about facts which are true on a matter of

public interest. A comment is the subjective expression of opinion in the form of conclusion, remark or a deduction, inference, criticism, judgment, observation which is generally incapable of proof. In order to be fair, it must be shown that the facts upon which the comment is based are truly stated, and that the comment is an honest expression of opinion relating to those facts. Where a comment imputes evil, base or corrupt motives to a person, it must be shown that such imputations are warranted by, and could reasonably be drawn from these facts. A comment must be made on a matter of public interest. The matter may be of interest because of the importance of the person about whom the comment is made, or because of the event, occasion or circumstances that give rise to the opinion. The protection may be lost if it is shown that the comment was made maliciously, in the sense that it originated from some improper or indirect motive, or if there was no reasonable relationship between the comment that was made and the public interest that it was designed to serve."

**62** In McCullough, Grainger J. also referred, at paragraph 41, to Mr. Armstrong's summary of the defence of qualified privilege:

"A statement is said to be made on an occasion of qualified privilege if it is made in the exercise of some duty, or for the purpose of pursuing or protecting some interest, provided that it is made to a person who has some corresponding interest in receiving it. The defence of qualified privilege, unlike absolute privilege, can be defeated if malice on the part of the defendant can be shown. However, absent malice, a statement which is defamatory and untrue will not attract liability on an occasion of qualified privilege."

**63** In Gatley, Libel and Slander (8th Edition), at p. 185, the author says the following about an occasion of qualified privilege:

... an occasion where the person who makes a communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential."

**64** In *Botiuk v. Toronto Free Press Publications Ltd.*, [1995] 3 S.C.R. 3, Cory, J., in describing the defence of qualified privilege, adopted this passage from Gatley's text and added the following (at paragraph 79):

"Where an occasion is shown to be privileged, the bona fides of the defendant is presumed and the defendant is free to publish remarks which may be defamatory and untrue about the plaintiff. However, the privilege is not absolute. It may be defeated in two ways. The first arises if the dominant motive for publishing is actual or express malice. Malice is commonly understood as ill will toward someone, but it also relates to any indirect motive which conflicts with the sense of duty created by the occasion. Malice may be established by showing that the defendant either knew that he was not telling the truth, or was reckless in that regard.

Second, qualified privilege may be defeated if the limits of the duty or interest have been exceeded. In other words, if the information communicated was not reasonably appropriate to the legitimate purposes of the occasion, the qualified privilege will be defeated. This was discussed at some length in *Hill*, supra, and there is no need to repeat it in these reasons."

**65** In *Myers v. Canadian Broadcasting Corp.*, [1999] O.J. No. 4380, Bellamy, J. considered the availability of the defence of fair comment and qualified privilege. She stated (at paragraphs 140-142):

"Proof of malice defeats the defence of fair comment. Malice is commonly understood as spite or ill-will towards someone. Express malice includes the desire to injure the person defamed, every unjustifiable intention to inflict injury and every wrong feeling in a person's mind: *Brown*, supra at 16-11. Actual malice is a state of mind to be inferred from the acts, conduct or expressions of the defendant: *Brown*, supra at 16-39.

Malice may be established by showing that the defendant spoke dishonestly, or in knowing or reckless disregard for the truth. In the malice context, recklessness includes speaking in utter disregard for the consequences, without caring about truth or falsity, or without having made reasonable inquiry where the means or sources were readily available. Malice may also be found when the defendants are reckless in the sense that they deliberately refrained from making an inquiry: *Brown*, supra at 16-35. In *Hodgson*, supra at 394, Justice Lane referred to the English case of *Horrocks v. Lowe* [1975] A.C. 135, [1974] 1 All E.R. 622 (H.L.). Lord Diplock articulated a simple test for malice: "Has it been proved that the defendant did not honestly believe that what he said was true, that is, was he either aware that it was not true or indifferent to its truth or falsity?"

In terms of finding evidence of malice, courts can look to intrinsic evidence which emanates from the words themselves, and extrinsic evidence, which includes concepts like the nature of the relationship between the parties, the conduct and motivation of the defendants, unnecessary or needless publication or repetition of the defamation and the circumstances surrounding the investigation into the accuracy of the charges: *Brown*, supra at 16-40."

**66** Finally, I have reviewed the Supreme Court of Canada's recent treatment of the defence of fair comment: *WIC Radio Ltd. v. Simpson*, [2008] S.C.J. No. 41.

#### Discussion

**67** Mrs. Fiwchuk was self-represented. Her presentation would have benefited from the usual witness preparation by counsel. At times she was disorganized, repetitive and unfocused. That said, when specifically directed to address various issues, she was, for the most part, responsive.

**68** Mrs. Fiwchuk appeared anxious and upset by the proceedings and the events giving rise to them. However, I found her to be relatively articulate and alive to the issues. She was well prepared. She was able to follow and did follow the court's instructions. She put appropriate questions in cross-examination. She stated and summarized the plaintiffs' position with a reasonable degree of skill.

**69** However, Mrs. Fiwchuk repeatedly fenced with counsel in the course of her cross-examination. She was shiftily and evasive, even when asked straightforward questions. Despite being cautioned, she frequently responded to questions by posing questions of her own. It was clear that she spent equal or more time endeavouring to anticipate "where counsel was going" than attempting to respond directly to his questions.

**70** On more than one occasion, Mrs. Fiwchuk's answers demonstrated that she was prepared to bend the truth. A few illustrations will suffice. Mrs. Fiwchuk claimed she played no role and had no interest in condominium politics or the composition of the Board of Directors and management group. She claimed she did not communicate with anyone concerning the improper conduct of the Wronzbergs. She claimed she could not recall whether she had ever seen copies of letters that were purportedly written by her or her husband. She repeatedly hedged as to whether or not those letters accurately reflected the plaintiffs' position as of the dates on the documents. I have no hesitation in finding that all of these assertions were not true.

**71** Mrs. Fiwchuk claimed her husband had entered the management office for an innocent purpose. She claimed he was there to retrieve parking stickers. The video evidence and the roll of parking stickers produced by the defendants at trial demonstrated this to be untrue.

**72** She denied retrieving numerous copies of the Board's open letter to residents from their mailboxes and throwing them in the garbage can. She claimed she was retrieving and discarding her own letter that she had decided not to distribute. The video evidence demonstrated, beyond any doubt, that this was not the case.

**73** Even in the face of multiple letters from defendants' counsel to the lawyer then representing the plaintiffs, she insisted that the defendants had resisted all of the plaintiffs' efforts to retrieve personal items held in storage. She claimed she did not recall receiving a letter, dated July 22, 2003, from the President of the Board of Directors, that was highly critical of some of her contacts, including the divulging of confidential information, with residents and a Board member. Nor could she recall anything of the content. This, too, strained credulity to the breaking point.

**74** Mrs. Fiwchuk's evidence made clear that she was very much involved in the day to day, "behind the scenes" politics of the condominium corporation. I am satisfied that she spent much of her time stirring the pot. In her efforts to

disassociate herself from these endeavours and to distance herself from the various accusations and cross-accusations, I found Mrs. Fiwchuk's evidence to be incredible and unreliable. Indeed, that is how I would characterize much of her evidence.

**75** I accept the evidence of Richard Wronzberg and Larry Wronzberg that they, the Board members and others who expressed an opinion on the content of the surveillance video honestly believed that it depicted Mr. Fiwchuk. I accept their evidence to the effect that amongst those who saw the video, that opinion was unanimous.

**76** I accept Richard Wronzberg's evidence that the clothing worn by the alleged perpetrator had common features with the clothing worn by Mr. Fiwchuk in the subsequent video of him standing near the mailboxes. At least one such feature, the vinyl or leather sleeves juxtaposed with the different material comprising the balance of the jacket, was quite unique. That was the jacket Mr. Fiwchuk commonly wore. I accept Mr. Wronzberg's evidence that he believed that the manner of dress, items carried, gait, and movements further supported his belief that the man was Mr. Fiwchuk. To the extent that a portion of the man's face was visible, it did appear to be that of Mr. Fiwchuk.

**77** This evidence was buttressed by Mr. Wronzberg's testimony concerning the brief appearance of the Fiwchuk's son, Cody, in the video, apparently while the actual theft occurred. I accept Mr. Wronzberg's evidence that Cody was wearing precisely the same dark track suit with a red stripe on the pants when he saw him a day or two later. This outfit was clearly visible in the video.

**78** I agree with Mr. Wronzberg's assessment of the video, to the effect that the alleged perpetrator appeared to be using a key obtained from the office desk to unlock the filing cabinet where the petty cash envelope was stored. He thereafter appeared to remove funds from the petty cash envelope. The large zip-lock type envelope shown in the video appeared identical to the one identified in these proceedings. The perpetrator could be seen to place the contents on the desk and place the envelope back in the desk. He then leaned back and in one quick, deliberate motion removed the contents from the desk, apparently placing them in his pocket before walking away from the desk towards the office door. At different times, the alleged perpetrator also appeared to be taking precautions to avoid detection. While not the only available inference, based on the movements of Mr. Fiwchuk and Cody, it is not unreasonable to posit that whether he knew it or not, the Fiwchuk's son was being used to keep watch.

**79** Having regard to all of the surrounding circumstances, including the video itself, I find that the Wronzbergs' opinion that the man depicted was Mr. Fiwchuk was a reasonable one. It was noteworthy that they came to that view prior to any discussions with Mr. Fiwchuk about the events in question.

**80** Further, I accept Richard Wronzberg's evidence that prior to seeing the video, the defendants did not suspect either plaintiff was involved in the theft. Mr. Wronzberg's evidence that the brothers generally liked and trusted the plaintiffs was not challenged. Nor was it challenged that they had recommended a significant raise for the plaintiffs relative to their final one year contract, executed only a few weeks prior to these events. I reject as illogical and fanciful the plaintiffs' theory that the Wronzbergs deliberately accused them of a crime knowing they did not commit it in order to facilitate a termination for cause.

**81** I accept the Wronzbergs' evidence that Mr. Fiwchuk, in his wife's absence, admitted stealing funds from the petty cash envelope in the management office. Richard Wronzberg's and Larry Wronzberg's accounts of their exchanges with Mr. Fiwchuk were credible and accurate. Their evidence in this regard was logically consistent with the subsequent steps they took. It had the ring of truth.

**82** Following a detailed explanation regarding his right to testify and call evidence and after taking time to reflect, Mr. Fiwchuk elected not to testify. Accordingly, in these proceedings he did not deny removing monies from the office. He offered no lawful explanation. His admissions, made at the time of the incident, concerning the theft stand uncontradicted.

**83** I find that very shortly after the confrontation with the Fiwchuks, Richard Wronzberg met with the female unit owner who appeared in the video and took a statement from her. I accept that he was told by her that she had in fact encountered Mr. Fiwchuk in the office as depicted in the video. This evidence, admissible for a limited purpose and not for its truth, only added to Mr. Wronzberg's feeling of certainty that Mr. Fiwchuk was responsible for the missing monies.

**84** In short, the defendants' decisions and acts were not based on mere suspicion. At the relevant time they had cogent evidence pointing to Mr. Fiwchuk's responsibility for the theft.

**85** Richard Wronzberg testified that the confrontation with the Fiwchuks went reasonably well. While upset, the plaintiffs did not make a scene. Over the next day or two, things took a dramatic turn. The Wronzbergs began receiving a storm of complaints and queries as to why they had acted in the way they had. They heard the plaintiffs were telling many unit owners that management was out to get them. The plaintiffs claimed they had been "set up" and falsely accused based on no evidence whatsoever. Management's purpose, based on some hidden agenda, was to fabricate a cause for summary dismissal and to put the plan into effect without Board approval. With that as a backdrop, Richard Wronzberg came into possession of the aforementioned letter (Exhibit 3), dated February 18, written by the plaintiffs and addressed to the Board.

**86** In short, I accept the position of the defendants that their open letter to residents was written and distributed as a reaction to what the plaintiffs had done. In other words, the plaintiffs had attempted to gain support around the condominium for the proposition that one or both of them had been falsely accused and that the defendants had deliberately and knowingly made these false accusations, based upon no evidence, for some ulterior purpose.

**87** I accept Richard Wronzberg's evidence that even after the confrontation, he felt badly for the Fiwchuks and regretted having to dismiss them. I also accept his evidence that initially the Wronzbergs did not want to involve the police. They decided to report the matter only after the Fiwchuks attempted to use the defendants' failure to involve the authorities as bolstering their claim that they had been falsely accused.

**88** I have no doubt that the defendants believed that the statements made in the open letter were true. In my view, they were reasonably justified in that belief. Moreover, they acted reasonably in believing first, that they owed a duty and responsibility to the residents to communicate with them in the way they did and second, that in the circumstances the residents had an interest in receiving the information. I find the defendants acted honestly and without malice. As I have said, they reasonably believed they were communicating the truth. In endeavouring to set the record straight regarding the circumstances surrounding the plaintiffs' termination, their motives were entirely appropriate. Their intention was not to harm or injure the plaintiffs.

**89** Assuming the comments were defamatory, the defendants were entitled to rely on the defences of fair comment and/or qualified privilege. These defences were not vitiated by malice.

#### Claim Based on Intentional Infliction of Mental Suffering

**90** Based on these findings, the plaintiffs have not established the elements of flagrant or outrageous conduct calculated to produce harm: *Prinzo v. Baycrest Centre for Geriatric Care* (2002), 60 O.R. (3d) 474 (Ont. C.A.), at page 490.

#### Damages

**91** If I am wrong and the defendants defamed Mr. Fiwchuk, I would assess damages in the amount of \$1.00. I do not accept that the plaintiff suffered any real damage to his reputation. It must be borne in mind that very shortly after the open letters were distributed, police charged Mr. Fiwchuk with theft. He was required to appear in court. Clearly, police investigators believed on reasonable grounds that he had committed the very offence referred to in the open letter. Accordingly, within days of the unit owners being apprised of the allegations, they were made public by the laying of criminal charges.

**92** As I have already indicated, Mr. Fiwchuk did not testify. He did not maintain his innocence of the theft. He did not assert that what occurred during the short period between the dissemination of the letters and being charged by the police led to any unfair tarnishing of his reputation.

**93** I would make one additional observation. No transcript was filed in these proceedings regarding any comments that may have been made when the theft charge against Mr. Fiwchuk was withdrawn. There was no other evidence of what occurred at that time. It was not suggested by the Fiwchuks that what transpired in the Ontario Court of Justice was anything beyond the common occurrence that from the Crown's perspective, the charge could not be proved to the very high criminal standard of proof beyond a reasonable doubt. In any event, based on the record before me, it cannot be claimed that there was "no evidence" in support of the charge or that the police acted precipitously, inappropriately or unfairly in laying it.

**94** Finally, this is clearly not a case for either aggravated or punitive damages.

#### Return of Chattels/Counter-Claim

**95** I propose to deal briefly with these matters.

**96** I reject Mrs. Fiwchuk's evidence that the plaintiffs' remained unaware of the many letters to their lawyer from the defendants' counsel regarding arrangements for the return of the goods in storage. I do not accept Mrs. Fiwchuk's evidence that all of the items listed by the plaintiffs were actually in the storage locker when they vacated. I am not satisfied that the value of the possessions left behind approximated the amount claimed. I am convinced the plaintiffs would have retrieved any and all items of significant value at a very early stage.

**97** Regarding the counter-claim, it was difficult to ascertain how much of the alleged damage to the superintendent's suite might have been caused by the deliberate actions of the plaintiffs as opposed to wear and tear over the years.

**98** Doing the best I can with a less than perfect record, I have determined that only rough justice can be achieved. To that end, I find that the value of any chattels to which the plaintiffs might be entitled is approximately equal to the damage they wilfully caused to the suite. I would estimate that amount to be approximately \$5,000.00. Accordingly, there will be no recovery in respect of either of these claims.

#### Conclusion

**99** The plaintiffs' claims for defamation and intentional infliction of mental suffering are dismissed. The plaintiffs' claim for the value of their chattels is established in part and is set off in its entirety as against the defendants' counterclaim, also allowed in part.

**100** Judgment to issue in accordance with these reasons.

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