Court of King's Bench of Alberta

Citation: Astolfi v Stone Creek Resorts Inc, 2023 ABKB 416

Date: 20230712
Docket: 1801 05350
Registry: Calgary

Between:

Jon Astolfi

Plaintiff

- and -

Stone Creek Resorts Inc.

Defendant

Reasons for Decision
of the
Honourable Justice M.A. Marion

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I. Introduction

[1] The Defendant, Stone Creek Resorts Inc. (**Stone Creek**) appeals the decision of Master Farrington (as he then was) granting the Plaintiff (**Astolfi**) permission to amend his Statement of Claim in this wrongful dismissal action. Stone Creek consents to some of Astolfi's amendments, but vigorously objects to many of the amendments on numerous grounds.

[2] Stone Creek's appeal turns on a number of issues, including whether the amendments: (1) fail to disclose a cause of action; (2) are not supported by sufficient evidence; (3) are outside the court's jurisdiction or an abuse of process; (4) are brought in bad faith; (5) are frivolous, irrelevant or improper; (6) would cause Stone Creek significant prejudice; (7) are barred by limitations; (8) are barred by the *Workers' Compensation Act*, RSA 2000, c W-15 (*WCA*); or (9) are against the public interest. The appeal also raises the proper interpretation of rule 3.66 of the *Alberta Rules of Court*, Alta Reg 124/2010 (*Rules*) and addressing costs in the context of amendments.

[3] For the reasons set out below, the appeal is dismissed, the decision of Applications Judge Farrington is confirmed and Astolfi's amendments are allowed, except for some amendments which are not permitted. The rule 3.66 decision and costs award are varied.

II. Background

A. Termination of Astolfi's Employment and Initial Steps in the Action

[4] Astolfi commenced his employment with Stone Creek in April 2012.

[5] On April 3, 2018, Stone Creek terminated Astolfi's employment. Stone Creek alleges termination for cause.

[6] On April 17, 2018, Astolfi filed the Statement of Claim in this action alleging, among other things, termination without notice in breach of Stone Creek's obligation to provide reasonable notice.

[7] The Statement of Claim describes that Astolfi was subjected to "angry, shouted abuse and physical pounding of a table" by Stone Creek's President, Guy Turcotte (**Turcotte**), on February 23, 2018 (**February Incident**). It pleads that Astolfi took a vacation following the February Incident, and that Astolfi attempted to get assurances from Stone Creek that he would not be subject to similar threats, bullying and intimidation. Having not received such assurances Astolfi avoided Stone Creek's office on April 2, 2018 and was advised on April 3, 2018 that his employment was terminated for cause. The Statement of Claim claims that the assertion of cause was Stone Creek's bad faith attempt to engage in "strong arm tactics" to compel Astolfi to compromise his claim for compensation.

[8] Astolfi sought damages in the amount of $235,000, including $195,000 for lost wages and RRSP contributions, $15,000 for lost health and dental benefits, and $25,000 for Stone Creek's "breach of its duty of good faith to provide a safe workplace free from harassment, bullying and intimidation and failure to protect Astolfi's personal information" which caused Astolfi anxiety and distress.

[9] On May 17, 2018, Stone Creek filed its Statement of Defence. Stone Creek asserts that Astolfi was terminated for cause for deliberately refusing to attend work, and that his termination for cause was further justified because Astolfi challenged Turcotte's credibility and therefore wrongfully eroded and destroyed the working relationship between the parties.

[10] In June and September 2018, the parties exchanged Affidavits of Records. Stone Creek's Chief Financial Officer was questioned in November 2018, and Turcotte (Stone Creek's corporate representative) was questioned in December 2018. Astolfi was questioned for discovery under Part 5 of the *Rules* in April 2019. As of September 2021, some undertakings from questioning remained unanswered and questioning on undertakings had not yet taken place.

B. Service Canada Proceedings

[11] Following his termination, Astolfi applied for employment insurance benefits. On May 1, 2018, Stone Creek filed a record of employment which Astolfi asserts indicated that Astolfi quit his job, not that he was terminated. Astolfi's claim to employment insurance benefits went through several procedures, including before the Service Canada-Employment Insurance Commission, the Service Canada-Social Security Tribunal (General Division)(**SSTGD**), and the Service Canada-Social Security Tribunal (Appeal Division)(**SSTAD**). His claim to employment insurance was initially denied.

[12] Astolfi applied to the Federal Court for judicial review of the SSTAD decision. On January 1, 2020, Astolfi was successful and the Federal Court directed the matter to be returned to the SSTAD for redetermination: ***Astolfi v Canada (Attorney General)***, 2020 FC 30.

[13] The SSTAD then returned the matter back to the SSTGD, which denied Astolfi's claim again. Then, on April 22, 2021, the SSTAD held that Astolfi was not disqualified from receiving EI benefits.

[14] Stone Creek, and Turcotte specifically, participated in some of the steps related to Astolfi's claim to employment insurance benefits. All or portions of paragraphs 11, 12, 16, 17, 21, 22, 27–29 and 30(a) and (b) of the Amended Statement of Claim relate to Stone Creek's alleged dealings with Service Canada in respect of Astolfi's employment insurance benefits claim (**Service Canada Amendments**).

C. Occupational Health and Safety Proceedings

[15] In January 2019, Astolfi made a formal complaint to Alberta Occupational Health & Safety (**OHS**) relating to Stone Creek, although the full nature of the complaint is not before the Court. Astolfi alleges that OHS determined that Stone Creek was in violation of OHS codes requiring a violence prevention policy, violence prevention procedures, and workplace and harassment prevention procedures. Astolfi alleges that Stone Creek reinstated its third-party OHS reporting and compliance system, which Astolfi attempted to take advantage of in July 2019. He asserts that Stone Creek closed his complaint without any response to Astolfi or the third-party system.

[16] Astolfi also made a complaint pursuant to section 36 of the *Occupational Health and Safety Act*, SA 2017, c O-2.1(*OHSA*)(**Section 36 OHSA Complaint**) on the basis that Astolfi was disciplined by Stone Creek for his compliance with OHS legislation. Stone Creek participated in

the Section 36 OHSA Complaint. On May 13, 2020, OHS dismissed that complaint. Astolfi appealed that decision to the Alberta Labour Relations Board, which was dismissed on March 16, 2023. It is unknown whether Astolfi has taken or will take further steps to challenge the Alberta Labour Relations Board decision.

[17] All or portions of paragraphs 16, 18, 19, 21, 22, 27–29 and 30(a) and (b) of the Amended Statement of Claim relate to these allegations involving OHS related matters (**OHS Amendments**).

D. Workers' Compensation Board Proceedings

[18] In September 2019, Astolfi submitted an injury claim to the Workers' Compensation Board (**WCB**) for "workplace mental health injuries" Astolfi sustained while working at Stone Creek. In November 2019, Astolfi received emergency funds from WCB. Astolfi alleges that Stone Creek, including through Turcotte, participated in Astolfi's WCB claim. On December 30, 2019, the WCB accepted Astolfi's claim, in part relying on the February Incident and a November 2019 Comprehensive Psychological Assessment which diagnosed Astolfi with adjustment disorder and anxiety. Astolfi received $96,913 in WCB compensation.

[19] All or portions of paragraphs 20–22, 24, 27–29 and 30(a) and (b) of the Amended Statement of Claim relate to allegations involving the WCB proceedings (**WCB Amendments**).

E. Astolfi's Proposed Amendments to the Statement of Claim

[20] In May 2020, Astolfi's counsel withdrew from the record, which Astolfi states was because he could not continue to afford legal counsel.

[21] In June 2020, Astolfi reached out to Stone Creek's counsel to find a time to discuss the status of the action and the next steps. Stone Creek's counsel advised that it was his view that Astolfi's claim was "now spent", and that Astolfi would have to "address what you have done with your EI claim and what you have done with your occupational health and safety claim in any proceedings". It was Stone Creek's counsel's view that Astolfi had "mitigated entirely" by virtue of Astolfi's receipt of benefits during the period of reasonable notice.

[22] On June 30, 2020, Astolfi provided undertakings from his questioning, and requested dates for the parties to conduct questioning of each other on their undertakings. Stone Creek took the position that Astolfi should amend his pleading before questioning dates were scheduled, if that was Astolfi's plan.

[23] On January 28, 2021, Astolfi proposed postponing amending the Statement of Claim until a scheduled settlement conference with the Alberta Labour Relations Board was completed. Stone Creek disagreed.

[24] By at least March 2021, Astolfi had proposed an amended Statement of Claim and, while Stone Creek agreed to some amendments, the parties were unable to reach agreement.

F. The Amendment Application

[25] On June 21, 2021, Astolfi filed an application seeking to amend the Statement of Claim. It is helpful to categorize the proposed amendments into different groupings for analysis. The proposed amendments were:

(a) minor clarifications and amendments related to the events leading up to his termination (paragraphs 1, 3, 4, 6, 7, 8 and 9), and amendments clarifying certain damage claims (paragraphs 23–26) which are not objected to by Stone Creek (**Consented-To Amendments**);

(b) Stone Creek terminated Astolfi's employment when it knew Astolfi had suffered a physical injury and would not be able to obtain necessary medical treatment (paragraph 14) (**Physical Injury Amendment**);

(c) the Service Canada Amendments;

(d) the OHS Amendments;

(e) the WCB Amendments;

(f) Stone Creek's alleged failure to return Astolfi's personal contact records (paragraphs 13, 27(b) and 30(b)), including seeking an order for return of those records (**Personal Contacts Amendments)**;

(g) communications between the parties in July 2018 respecting a possible return to employment with Stone Creek (paragraph 15)(**July 2018 Amendments**);

(h) allegations of additional post-termination conduct not otherwise covered in the other amendments, including conveying to other employees at Stone Creek that Astolfi was to blame for Turcotte's mistreatment of him (paragraph 27(b)); exploiting Astolfi's vulnerability as a negotiating tactic (paragraph 27(d)); threatening Astolfi with a long, combative, and expensive legal process in an attempt to dissuade Astolfi from pursuing his rights (paragraph 27(e)); and blatant non-compliance of laws and regulations by Stone Creek (paragraph 27(f)) (collectively the **Other Post-Termination Amendments**).

[26] In support of his amendment application, Astolfi filed a 34-page affidavit, with 24 exhibits, dated June 21, 2021, and a supplemental affidavit sworn August 19, 2021.

[27] Astolfi's amendment application came before Applications Judge Farrington in morning chambers on August 24, 2021, and he made an order (**AJ Order**) that: granted Astolfi permission to file the proposed Amended Statement of Claim; ordered Astolfi to pay $2,500 in "costs for the purposes of additional proceedings stemming from the amended claim"; and ordered that costs of Astolfi's application would be in the cause.

[28] The Amended Statement of Claim was filed on September 9, 2021.

G. The Appeal

[29] On September 9, 2021, Stone Creek filed a Notice of Appeal of the AJ Order. In support of the appeal, it filed a September 9, 2021 affidavit sworn by a legal assistant based on a review her file, a detail of which was corrected by a September 28, 2021 affidavit (together, **Marshall Affidavit)**.

[30] On October 15, 2021, Astolfi filed a Notice of Appointment for questioning on the Marshall Affidavit, but Stone Creek refused to produce her for questioning. On October 18, 2021, Justice Armstrong ordered that Astolfi could question on the Marshall Affidavit.

[31] On November 17, 2021, Astolfi questioned Marshall, and Stone Creek questioned Astolfi on his June 20, 2021 and August 19, 2021 affidavits. The transcripts from those questionings are on the court file.

[32] The appeal was originally scheduled to be heard on February 3, 2022, however, the appeal was dismissed for noncompliance with the *Rules*. On March 28, 2022, Justice Armstrong granted Stone Creek leave to continue the appeal and to re-schedule the special application. The matter then came before me on January 18, 2023.

III. Standard of Review

[33] An appeal from an applications judge is a hearing *de novo*: ***Kadco Construction Inc v Sterling Bridge Mortgage Corp***, 2021 ABCA 52 at para 11. The standard of review is correctness: ***Bahcheli v Yorkton Securities Inc***, 2012 ABCA 166 at para 30. New evidence presented on appeal necessarily requires a fresh assessment of the facts: ***Bahcheli*** at paras 17, 30; ***Gudzinski Estate v Allianz Global Risks US Insurance Company Limited***, 2012 ABCA 5 at paras 21, 24.

IV. The Record and Additional Evidence

[34] Rule 6.14(4) provides that the record of proceedings is the application before the applications judge, evidence filed by the parties before the applications judge, any transcript of proceedings before the applications judge, and the applications judge's judgment or order and written reasons.

[35] Rule 6.14(3) provides that the appeal may also be based on additional evidence that is, in the opinion of the judge hearing the appeal, relevant and material. The test for additional evidence has been described as a "very lax test" and that "lack of due diligence is not one of the tests": ***Boyd v Cook***, 2013 ABCA 266 at para 5. Thus, the common law rule under ***R v Palmer*** (1979), [1980] 1 SCR 759, 1979 CanLII 8 (SCC) does not apply: ***Gudzinski Estate*** at para 21.

[36] The test for whether the additional evidence is relevant and material under rule 6.14(3) is whether the new evidence might reasonably be expected to significantly help determine one or more of the issues in raised on the appeal: ***Spady v Spady Estate***, 2022 ABQB 591 at para 37.

[37] In this case, neither party objected to the supplemental affidavit evidence and transcripts of questioning on affidavit being considered by the court on the appeal. I reviewed that material

and, given the lack of objection, find that that information was properly before me as evidence relevant and material to the appeal.

V. Issues

[38] The issues in this application are:

(a) Is there a compelling reason not to allow the amendments?

(b) What is an appropriate cost award?

VI. Analysis

A. Is there a Compelling Reason Not to Allow the Amendments?

[39] Rule 3.65(1) provides that, subject to rule 3.65(5), the Court may give permission to amend a pleading before or after the close of pleadings. It is discretionary. Judicial interpretation of rule 3.65 over time provides some guidance on the exercise of the discretion.

[40] The most recent Alberta Court of Appeal framework provides that there is a strong presumption in favour of allowing amendments to pleadings after the close of pleadings: ***Kosteckyj v Paramount Resources Ltd***, 2022 ABCA 230 at paras 12, 41; ***Pace v Economical Mutual Insurance***, 2021 ABCA 1 at para 3; ***AARC Society v Canadian Broadcasting Corporation***, 2019 ABCA 125 at para 85. The applicant need not show any particular reason for needing the amendment: ***Attila Dogan Construction and Installation Co Inc v AMEC Americas Limited***, 2014 ABCA 74 at para 24. Courts should exercise their discretion to allow the amendment unless the non-moving party demonstrates an exception or compelling reason not to: ***Kosteckyj*** at paras 12, 41; ***Pace*** at para 3, 53; ***AARC Society*** at paras 6, 53.

[41] Courts must consider two distinct interests when assessing the merits of an amendment application: (1) the impact the proposed amendment will have on the non-moving party's litigation interests; and (2) the public interest in the resolution of litigation as quickly as reasonably possible without the expenditure of more public and private resources than is reasonably necessary: ***AARC Society*** at paras 57–62.

[42] What contemplates a compelling reason not to permit an amendment after the close of pleadings is not, and never has been, a closed list of exceptions. However, while described in different ways by different courts, certain compelling reasons or grounds not to permit amendments have been recognized over time, including:

(a) the proposed amendment will significantly harm a legitimate litigation interest of the non-moving party; for example the proposed amendment will cause significant prejudice to a legitimate litigation interest of the non-moving party that cannot adequately be abridged by an ameliorative costs order or any other order: ***Pace*** at paras 4–5; ***Kosteckyj*** at para 41; ***AARC Society*** at para 64; ***Attila Dogan*** at para 25; ***Remington Development Corporation v Enmax Power Corporation***, 2022 ABCA 71 at para 33;

(b) the proposed amendment advances a claim that cannot possibly succeed or is hopeless because it would have been struck if it were in the original pleading; the test is whether it is plain and obvious that there is no triable issue: ***Swaleh v Lloyd***, 2020 ABCA 18 at para 13; ***Remington*** at paras 35–37; ***Eon Energy Ltd v Ferrybank Resources Ltd***, 2018 ABCA 243 at para 18. This incorporates considerations like those under rule 3.68. For example, proposed amendments will be hopeless if they:

(i) disclose no cause of action or reasonable claim, or no reasonable defence to a claim: ***Pace*** at para 6; ***AARC Society*** at para 10; ***Attila Dogan*** at para 27; rule 3.68(2)(b);

(ii) raise matters over which the court has no jurisdiction: rule 3.68(2)(a);

(iii) are frivolous, irrelevant or improper: rule 3.68(2)(c);

(iv) constitute an abuse of process: rule 3.68(2)(d); and

(v) have an irregularity that is so prejudicial to the claim that it is sufficient to defeat the claim; rule 3.68(2)(e);

(c) the proposed amendment is not supported by a required threshold level of evidence, based on the nature of the proposed amendment: ***Balm v 3512061 Canada Ltd***, 2003 ABCA 98 at paras 25–29; ***Attila Dogan*** at para 24; ***Barker v Budget Rent-A-Car of Edmonton Ltd***, 2012 ABCA 76 at para 12; ***Brewin v Magyar***, 2022 ABKB 729 at paras 32–33; ***Club Industrial Trailers v Paramount Structures***, 2022 ABQB 34 at para 25;

(d) unless permitted by statute, the proposed amendment seeks to add a new party or a new cause of action after the expiry of a limitation period and is statute-barred or subject to a "rock-solid" limitations defence: ***Attila Dogan*** at para 25; ***Pace*** at para 6; ***AARC Society*** at para 65;

(e) if the failure to plead earlier, or the proposed amendment itself, involves bad faith: ***Pace*** at paras 7, 54; ***AARC Society*** at paras 11, 66; ***Attila Dogan*** at para 25; and

(f) the proposed amendment will contravene the public interest in promoting expeditious and economical dispute resolution: ***Pace*** at paras 4, 7, 51–52; ***Kosteckyj*** at para 41; ***AARC Society*** at paras 59–62.

[43] Stone Creek raises several of these grounds in opposition to Astolfi's proposed amendments. I address Stone Creek's arguments or potential arguments below.

1. Are Any of the Amendments Hopeless Because They Fail to Disclose a Cause of Action?

[44] Stone Creek argues that the several of the amendments fail to disclose a cause of action.

[45] A cause of action is a set of facts that provides the basis for an action: ***Sherwood Steel Ltd v Odyssey Construction Inc***, 2014 ABCA 320 at paras 23–24; ***Markevich v Canada***, 2003 SCC 9 at para 27; ***Bard v Canadian Natural Resources***, 2016 ABQB 267 at para 36.

[46] In some cases, where an amendment includes a new cause of action not included in the original pleading, an issue may arise as to whether the amendment adequately pleads a cause of action or claim. If it is plain and obvious that it does not, then the amendment is hopeless and will not be allowed: ***Remington*** at paras 35–37; ***Swaleh*** at para 13. However, courts must allow the amendment, even though it raises a doubtful plea, if it is arguable: ***Balm*** at para 12; ***Oregon Jack Creek Indian Band v Canadian National Railway Co***, [1990] 1 SCR 117 at 118. The test is similar to striking out existing pleadings — a claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action — one that has no reasonable prospect of success: ***Balm*** at para 12; ***R v Imperial Tobacco Canada Ltd***, 2011 SCC 42 at paras 17–22; rule 3.68(2)(b); ***Rudichuk v Genesis Land Development Corp***, 2020 ABCA 42 at para 5; ***RPC Limited Partnership v SNC-Lavalin ATP Inc***, 2018 ABCA 423 at para 15.

[47] However, where the amendment does not, in substance, raise a new cause of action or claim, but rather provides further factual particulars, seeks additional remedies, or pleads new legal conclusions, relating to or arising out of a cause of action or claim that is already in the original pleading, the amendment alone does not need to have all the elements of a separate or new cause of action or claim: ***Breen v Foremost Industries Ltd***, 2022 ABQB 478 at para 54; ***Korte v Deloitte, Haskins & Sells***, 1996 ABCA 15 at para 27; ***Bard*** at paras 36–37; ***Balm*** at para 11; ***Tiger Calcium Services Inc v Sazwan***, 2019 ABQB 885 at para 38. Where the original pleading already contained the substance of the allegation, courts may allow amendments that elaborate or provide further particulars on existing claims: ***Bard*** at para 37. Particulars are, by definition, further details about the claim originally pleaded: ***Geophysical Service Incorporated v Plains Midstream Canada ULC***, 2021 ABCA 55 at para 5. In these circumstances, the ground to challenge an amendment based on a failure to disclose a cause of action is not necessarily engaged.

[48] The court's task is not to look at the amendments *in isolation* to see if they alone, divorced from the pleading from which they are to be added, disclose a cause of action or reasonable claim. If that was the test, many amendments would fail. The amendments must be considered in the context of the pleading to which they are proposed to be added.

[49] Further, like pleadings generally, proposed amendments must be interpreted liberally and generously, not restrictively: ***Anderson v Airsprint Inc***, 2005 ABCA 332 at para 9; ***PricewaterhouseCoopers Inc v Perpetual Energy Inc***, 2021 ABCA 16 at para 74; ***Tottrup v Lund***, 2000 ABCA 121 at para 9; ***Armstrong v Gula***, 2023 ABKB 270 at para 20.

[50] The Personal Contacts Amendments plead a new cause of action. However, the amendments sufficiently plead a claim in detinue for return of Astolfi's property: ***Sprung Instant Structures Ltd v Royal Bank of Canada***, 2008 ABQB 30 at para 14.

[51] Stone Creek characterizes many of Astolfi's other amendments, including the Service Canada Amendments, the OHS Amendments, the WCB Amendments, the July 2018 Amendments, and the Other Post-Termination Amendments, as making new claims that do not

disclose causes of action. It is arguable that many of these amendments do not, reviewed in isolation, plead the elements of a cause of action. However, when the amendments are reviewed generously, in the context of the Statement of Claim as a whole, and recognizing that they were prepared with the input of knowledgeable and experienced legal counsel, they are cast in a different light.

[52] Damages resulting from the manner of employee dismissal are available where the employer engages in conduct during the course of dismissal that is "unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive": ***Honda Canada Inc v Keays***, 2008 SCC 39 at para 57 [***Keays***], citing ***Wallace v United Grain Growers Ltd***, [1997] 3 SCR 701 at para 98, 1997 CanLII 332 (SCC); ***Elgert v Home Hardware Stores Limited***, 2011 ABCA 112 at paras 72–75; ***Gerling v Camrose Regional Exhibition & Agricultural Society***, 2022 ABCA 210 at paras 45–46. If the employee can prove that the manner of dismissal caused mental distress that was in the contemplation of the parties, those damages will be awarded through an award that reflects the actual damages: ***Keays*** at para 59; ***Gerling*** at paras 45–47.

[53] These types of damages are often referred to as "*Wallace*", or "*Wallace/Keays*" or moral damages. In ***Keays***, at para 59, the Supreme Court of Canada noted that the distinction between these damages and "true aggravated damages" need not be maintained, which has been interpreted as doing away with the distinction between aggravated damages and moral damages: ***Keays*** at para 59; ***Doyle v Zochem Inc***, 2017 ONCA 130 at para 12. Since ***Keays***, in Alberta *Wallace/Keays* damages have sometimes been referenced as aggravated damages: see, for example: ***Elgert*** at paras 72–77; ***Gerling*** at paras 42–52, 55; ***Alberta Computers.com Inc v Thibert***, 2019 ABQB 964 at para 162; ***Molloy v EPCOR Utilities Inc***, 2015 ABQB 356 at para 298; ***Ayalew v The Council for the Advancement of African Canadians in Albert***a, 2023 ABKB 113 at para 132.

[54] Appellate courts have confirmed that the factors relevant to *Wallace/Keays* or aggravated damages awards in the context of wrongful dismissal are not limited to the moment of dismissal. Pre-termination and post-termination conduct may be considered if it is a component of the manner of dismissal: ***Doyle*** at para 13, citing ***Gismondi v Toronto (City)***, 2003 CanLII 52143 (ONCA) at para 23, leave to appeal to SCC refused, 29857 (19 February 2004); ***Porcupine Opportunities Program Inc v Cooper***, 2020 SKCA 33 at para 24; ***Silvester v Lloyd's Register North America, Inc***, 2004 NSCA 17 at para 23. The "manner of dismissal" is a question of fact, and has been held in some cases to span a period of years before, or years after, the moment of dismissal: ***Matthews v Ocean Nutrition Canada Ltd***, 2020 SCC 26 at para 81; ***Lalonde v Sena Solid Waste Holdings Inc***, 2017 ABQB 374 at para 80.

[55] Most of the amendments relate to Stone Creek's post-termination conduct. The allegations he makes are similar to post-termination conduct that has been considered relevant to the question of the manner of dismissal in other cases, including:

(a) falsely maintaining a position of just cause of termination, or misrepresenting the reason for dismissal, which casts the employee in a negative light, and informing others of this position: ***Wallace*** at para 148; ***Lalonde*** at para 80; ***Silvester*** at paras 22–24; ***Capital Pontiac Buick Cadillac GMC Ltd v Coppola***, 2013 SKCA 80 at para 28; ***OWL (Orphaned Wildlife) Rehabilitation Society v Day***, 2018 BCSC 1724 at paras 286–290; ***Antonacci v Great Atlantic & Pacific Co of Canada***, 2000

CanLII 5496 (ONCA) at paras 22–26, rev'g in part 1998 CanLII 14734 (ONSC); ***Geluch v Rosedale Golf Assn***, 2004 CanLII 14566 (ONSC) at paras 184–188; ***Porcupine*** at paras 26–31;

(b) making misrepresentations about the termination to government officials or administrative tribunals, or otherwise delaying an employee's attempt to mitigate lost income: ***Gismondi*** at para 28, citing ***Marshall v Watson Wyatt & Co***, 2002 CanLII 13354 (ONCA) at paras 40–41; ***Villa v Association of Professional Engineers on Ontario***, 2017 ONSC 3277 at para 7; ***Antonacci*** at paras 24–26; ***Lalonde*** at para 76;

(c) the employer's conduct either within, at the time of, or in the context of, the wrongful dismissal litigation: ***Galea v Wal-Mart Canada Corp,*** 2017 ONSC 245 at para 276; ***Antidormi v Blue Pumpkin Software Inc***, 2004 CanLII 30885 (ONSC) at para 155; ***Capital Pontiac Buick*** at para 28; ***OWL (Orphaned Wildlife)*** at paras 286–288; ***Elgert*** at paras 73–76, 86–87; ***Lalonde*** at paras 72–77;

(d) attempts to put pressure on the employee or playing "hard-ball", including threatening an employee not to make a claim: ***Wallace*** at paras 108–109; ***Silvester*** at paras 23–24; ***Ruston v Keddco MFG (2011) Ltd***, 2019 ONCA 125 at para 14; and

(e) callous and insensitive treatment: ***OWL (Orphaned Wildlife)*** at paras 285–289; ***Antidormi*** at para 155.

[56] It is also well established that punitive damages may be available in the context of a wrongful dismissal action: ***Elgert*** at paras 78–82; ***Ashraf v SNC Lavalin ATP Inc***, 2017 ABCA 95 at para 26; ***Deol v Dreyer Davison LLP***, 2020 BCSC 771 at paras 140–144; ***Ruston*** at paras 15–19; ***Huber v Way***, 2014 ONSC 4426 at para 51; ***Kelly v Norsemont Mining***, 2013 BCSC 147 at paras 114–115; ***Park v 101143482 Saskatchewan Ltd***, 2017 SKQB 156 at paras 89–95.

[57] On balance, I reject Stone Creek's argument that the amendments do not disclose a cause of action. Rather, in my view, when interpreted in the context of the rest of the Statement of Claim, they add further particulars to the plea of aggravated damages, and the new remedy of punitive damages, arising out of or related to Astolfi's existing wrongful dismissal claim. In this respect the amendments have some similarities with those at issue in ***Villa*** at paras 7–8, 19.

[58] Stone Creek has not established a compelling reason to refuse the amendments on the basis that they do not disclose a cause of action.

2. Are any of the Amendments Hopeless or Not Supported by Sufficient Evidence?

[59] Stone Creek argues that the amendments alleging bad faith are advanced "in the absence of any evidence".

[60] An amendment that is not supported by sufficient evidence to meet the evidentiary threshold can be considered hopeless: ***Attila Dogan*** at para 27; ***Kichton Contracting Ltd v***

Giselbrecht, 2022 ABQB 476 at para 15; ***Ingram v Alberta (Chief Medical Officer of Health)***, 2022 ABQB 164 at para 35; ***Brewin*** at para 32.

[61] The evidence threshold for amending pleadings after the close of pleadings depends on the nature or classification of the proposed amendment: ***Balm*** at para 25; ***Hartum (Estate of) v Loewen***, 2007 ABCA 15 at para 12; ***Tiger Calcium*** at para 38. For example:

(a) many amendments require no or minimal evidence. This incudes amendments that are trivial, inconsequential, ancillary or merely clarifying wording: ***Waquan v Canada***, 2002 ABCA 110 at para 26; ***Balm*** at para 10; ***Bard*** at para 12. It also includes amendments that add new causes of action based on the facts already pleaded: ***Balm*** at para 11; ***Tiger Calcium*** at para 39;

(b) most other significant amendments require only modest evidence and have a low evidentiary threshold: ***Balm*** at paras 25, 29; ***Attila Dogan*** at paras 24–26; ***Remington*** at para 33. The type of "evidence" can be any admissible evidence, but may also include hearsay (see ***Balm*** at para 25, citing ***Marathon Construction (Alberta) Ltd v Bank of Nova Scotia***, 1985 CanLII 2517 (SKCA); ***Green v Redlick***, 2023 ABKB 19 at para 10) and possibly even opposing party pleadings: ***Balm*** at para 31. But it must have some foundation in fact: ***Attila*** at paras 24–26; ***Bard*** at para 12;

(c) some amendments have a significantly elevated evidentiary threshold. Amendments that add new causes of action based on fraud, high-handedness, or malicious conduct require "significant evidence" establishing a "good ground" or "exceptional circumstances": ***Canadian Natural Resources Limited v Arcelormittal Tubular Products Roman SA***, 2013 ABCA 87 at para 11; ***Waquan*** at para 61; ***Balm*** at para 63; ***Tiger Calcium*** at para 41; ***Condominium Corporation No. 00311443 v Goertz***, 2022 ABQB 104 at para 29; ***Evanoff Enterprises Ltd v Pioneer Hi-Bred Limited***, 2009 ABQB 223 at para 49. A similar elevated evidentiary threshold applies to new allegations of bad faith: ***Bard*** at paras 33, 36. However, the elevated threshold does not apply where the amendments add particulars for an existing cause of action: ***Tiger Calcium*** at para 42; ***Bard*** at para 36.

[62] In this case, most of the amendments fall into the first two categories.

[63] I have considered whether any of the amendments fall into the third category requiring the elevated evidentiary threshold, in particular the amendments that allege "bad faith" (para 11), "inappropriate" conduct (para 16), failure in Stone Creek's "obligation of good faith" (para 21), use of "harassment, intimidation and bullying" (para 21), "intentional wrongful acts" (para 27), "malicious and outrageous" conduct that is a marked departure from the ordinary standard of decent behaviour (para 27) and "wrongful acts and abuse of power" (para 28). I characterize these amendments as adding particulars to the existing cause of action of wrongful dismissal, providing further particulars related to the existing aggravated damages remedy, and adding particulars to plead the remedy of punitive damages. In the circumstances, I find that the evidentiary threshold remains the modest one, and I find that it has been met.

[64] If I am wrong, and Astolfi is required to meet the elevated evidentiary threshold, Astolfi's evidence discloses:

(a) a detailed narrative of the negative impact that the February Incident, his termination, and Turcotte and Stone Creek's conduct both before and after his termination, have had on Astolfi's mental health and well-being, much of which he says was not yet known to him when the Statement of Claim was filed. He exhibited a 2019 letter from Astolfi's psychologist that indicates Astolfi was traumatized by the February Incident and his termination, and Astolfi presented consistent with "moral injury" which occurs when people witness or experience events that are an affront to basic values such as dignity and justice, and which can result in symptoms of Post Traumatic Stress Disorder. Astolfi also exhibited a December 2019 letter which disclosed a diagnosis obtained in the context of the WCB process (discussed further below). Astolfi was not questioned on these aspects of his affidavit evidence;

(b) in February 2018, Astolfi contacted OHS about the February Incident and was encouraged to work things out with Stone Creek;

(c) on February 26, 2018, Astolfi wrote to Turcotte claiming that Turcotte's conduct had constituted a violation of Stone Creek's Code of Conduct, that Turcotte's conduct rendered the situation "unhealthy for me to continue in your presence", and that Astolfi stated he would work from home;

(d) after the February Incident, Turcotte stated to Astolfi that he should take his accrued holidays for a cool down period, which Astolfi did;

(e) in March 2018, Turcotte and Astolfi had discussions, one of which (March 22, 2018) Turcotte secretly recorded. A member of the SSTAD summarized some of these dealings this way, some of which are also explained in Stone Creek's Statement of Defence:

> During the phone call of March 22, 2018, the CEO said that he was prepared to meet some of the Claimant's conditions for resolving his harassment complaint. He apologized for his behaviour, acknowledged that it was unacceptable, and promised not to treat the Claimant that way again. He also agreed to weekly progress meetings with the Claimant. However, he refused to admit that he had harassed the Claimant, to confirm that he would never raise his voice again, to hire more staff, or to put his apology in writing...
>
> At the end of the call on March 22, 2018, the Claimant said that the CEO lacked sincerity and that he did not feel safe returning to the office when the CEO was there. The CEO, on the other hand, said the Claimant would be abandoning his job if he did not return to work from the office.

> On March 27, 2018, the Claimant wrote to the CEO and restated the conditions for resolving his harassment complaint, including a written apology and written commitments to follow the Employee Handbook and to provide a safe workplace free from harassment, intimidation, and bullying. The CEO responded later the same day saying that he would not meet the Claimant's changing demands and warning the Claimant that he would be fired if he did not return to the office.

(f) in an email in response to Astolfi's March 27, 2018 letter, Turcotte stated "I am asking you to be back at work on the 28th and your performance will be closely monitored for deliverables. If you do not show up, we will assume you are abandoning your position and you will be terminated for cause". At that time, Stone Creek did not have an absenteeism policy. Further, despite Turcotte's email being produced in Stone Creek's affidavit of records in September 2018, in December 2018 Turcotte later testified in Service Canada proceedings that he did not respond to Astolfi's March 27, 2018 letter, which Astolfi asserts negatively affected his claim to employment insurance benefits;

(g) Astolfi returned to the office on March 28 and 29, 2018 because he was aware Turcotte was away, but then worked from home on April 2, 2018 when Turcotte was in the office;

(h) the very next day, on April 3, 2018, Stone Creek emailed Astolfi with a letter terminating him for cause. The letter stated that Astolfi had "deliberately not attended for work at the office". The subject line of the email said "Your Job Abandonment and Termination of your Employment";

(i) on April 5, 2018, Astolfi requested his business card binder be returned because it contained "a substantial amount of personal contact information", and Stone Creek refused indicating that it believed that the contact information Astolfi had been provided electronically was adequate. Astolfi's evidence is this information would have been helpful to his mitigation. A later formal request for this information through Astolfi's counsel was refused unless Astolfi provided other information in return;

(j) on April 17, 2018, Astolfi filed his Statement of Claim;

(k) on May 17, 2018, Stone Creek filed its Statement of Defence, seeking solicitor-client costs against Astolfi and alleging, among other things, that Astolfi:

  (i) was "generally negligent and deficient" in the performance of work on an important "Eagle Ranch" project and paid "little requisite attention to it";

  (ii) "deliberately refused to attend at work" and he was terminated for cause;

  (iii) Stone Creek had "further cause" on the basis that "Astolfi challenged the credibility of Turcotte, [Stone Creek's] senior officer, and in so doing

wrongfully eroded and destroyed the working relationship between the parties" such that his termination for cause was further and also justified; and

(iv) based on the amount Astolfi claimed in the Statement of Claim, "Astolfi was in fact attempting to set up an inflated damage claim" as against Stone Creek. Stone Creek states it offered, on a "with prejudice" basis, $20,000, to settle the claim.

(l) in late May 2018, Stone Creek issued Astolfi's record of employment that indicated that Astolfi "quit" his job, even though the evidence (and Stone Creek's Statement of Defence) indicates he had been terminated for cause;

(m) on May 31, 2018, Turcotte spoke to Service Canada on the main issue of the "reason for separation". Turcotte expressed his displeasure with Astolfi's performance and indicated that there was no evidence Astolfi was working from home the two days he refused to come into the office. Astolfi's evidence is that Turcotte misrepresented this and other matters in the Service Canada proceedings. Astolfi's employment insurance benefits were denied and he and Stone Creek participated in several related employment insurance proceedings. Ultimately, almost three years after his termination, in March 2021 the SSTAD concluded in an appeal decision, that Astolfi had "no reasonable alternative to refusing to work from the office when he did" and that Astolfi was not disqualified from receiving employment insurance benefits. The SSTAD decision stated:

> The Claimant could not have reasonably been expected to simply accept the CEO's apology and return to the office given:
>
> a) the seriousness of the February incident;
>
> b) the psychological harm that [Astolfi] experienced because of it;
>
> c) the significant breakdown of trust between the CEO and [Astolfi]; and
>
> d) the lack of an effective dispute resolution mechanism.

(n) in July 2018, Turcotte approached Astolfi about doing part-time work for Stone Creek on a gondola project in Canmore, which Turcotte advised Astolfi could do from home. In the course of that conversation, Astolfi's notes indicate that Turcotte advised Astolfi that he could continue with litigation but that "they don't always get the desired outcome" and "they can take several years". Astolfi understood Turcotte was "conveying that taking his offer to continue working for him would be a much better scenario for me as opposed to naively choosing a pursuit of justice". Astolfi indicated he was interested but that he expected they would achieve resolution to the issue at hand before engaging in a new relationship, but that if Turcotte considered the two issues to be separate to provide a proposal. Turcotte

simply responded with an offer of a 6 month term for $3,000 per month for work on the Canmore gondola project as well as the Eagle Ranch project that had been the subject of the February Incident;

(o) in December 2018, Turcotte testified in Service Canada proceedings. Astolfi's affidavit indicates that Turcotte "upheld his misleadings defiantly" in those proceedings;

(p) in August 2019, Astolfi filed the Section 36 OHSA Complaint. In November 2019, in the context of that complaint, Turcotte denied that Astolfi's termination was a result of Astolfi filing a harassment complaint, and that this appeared to be a new position by Astolfi. He represented to the OHS and the WCB that Astolfi did not report to work "because of his own conduct", that Stone Creek had "no choice but to terminate him for cause", that "we terminated him because of his own misconduct (his choosing not to return to work at his place of employment)" and that "this background has also been well documented in his claim for EI which has been disallowed because of Mr. Astolfi's own misconduct". Astolfi's affidavit asserts that Turcotte's representations included misrepresentations and "deliberate falsehoods". Ultimately, as noted earlier, the Section 36 OHSA Complaint was dismissed because there was a finding that there was no causal connection between Astolfi's reporting of the unsafe or harmful condition at his worksite and his termination;

(q) in December 2019, Astolfi was awarded WCB benefits after Astolfi underwent a Comprehensive Psychological Assessment. He was diagnosed with adjustment disorder and anxiety. The WCB benefits were awarded in relation to the February Incident and based on WCB's policy to presume the psychological or psychiatric condition was caused by the traumatic incident. Astolfi's affidavit indicates that Stone Creek was provided a copy of the WCB's letter confirming his WCB benefits and his diagnoses of adjustment disorder and anxiety, but Turcotte has "continued to defend his actions of harassment, bullying and intimidation with defiance, and continued attempts to prevent me from receiving much needed assistance";

(r) it appears that following Stone Creek's April 2019 questioning of Astolfi, not much occurred in the action. The parties appeared to be focussed on the other proceedings;

(s) in June 2020, Astolfi reached out to Stone Creek's counsel about moving the action forward. In response, Stone Creek's counsel told Astolfi "you will have to address what you have done with your EI claim and what you have done with your [OHS] claim in any proceedings", and that further questioning on undertakings and an examination of Astolfi on "mitigation" was required;

(t) on July 2, 2020, Stone Creek's counsel indicated that "before we book any new dates you will need to amend your pleadings if that is your plan"

(u) on March 22, 2021, in the context of discussions relating to the proposed amendments in which Astolfi advised he had retained counsel (Catherine Crang, QC) to assist him with the proposed amendments, Stone Creek's counsel advised Astolfi:

> Neither Stone Creek nor the writer accept the WCB payments to you as proper. We do not accept that you are medically precluded from working at alternate employment due to one meeting at Stone Creek. In fact it has been your evidence under oath that you were more than willing to work at [Stone Creek] if either you got an apology, reviews, etc. and you did work for a period of time. It is virtually inconceivable that the alleged "trauma" from that meeting has precluded you from gainful employment.
>
> It is my personal view that your claim is simply a cash grab.
>
> Independent of that personal opinion, however, I also do not believe your draft amendment was fully vetted by Ms. Crang, who is capable counsel. Your draft is not her style in my view. In my further opinion it is also not capable of being filed "as is".

[65] While Astolfi was questioned on his affidavits, he was not directly questioned about many of the specific facts he provided in those affidavits. The only evidence Stone Creek filed in response was from a legal assistant who did not have first-hand knowledge and based her limited evidence on her review of her file. If necessary, based on the record before me, I would nonetheless find that the "significant evidence" threshold has been met.

[66] Once I find that the required evidentiary threshold is met to support the amendments, it is not appropriate for me to go further and comment on the evidence or provide my opinion on its strengths or weaknesses: ***Farm Credit Canada v Chan***, 2021ABCA 168 at para 17. None of the allegations made in the amendments have been proven at this point, and the evidentiary record before me may be quite different than what will be before the court at trial.

3. Are Any of the Amendments Improper Because the Court Lacks Jurisdiction or Because they are an Abuse of Process?

[67] Stone Creek makes several arguments that could fall in this category. First, it argues that the court has no jurisdiction over claims associated with alleged improper conduct in respect of the Service Canada, OHS or WCB proceedings. Second, it argues that the within action "is not, and should not be permitted to become a claim about the actions" of the parties before other tribunals which have exclusive jurisdiction over the subject matter of those claims. Third, Stone Creek also argues that certain of the amendments are causes of action that "should have been the subject matter of separate actions before the relevant tribunals".

[68] Stone Creek misconstrues the nature of the amendments, which relate to the manner of dismissal relevant to Astolfi's aggravated damages claim. As outlined above, that type of claim is within the court's jurisdiction and is not an abuse of process. None of Service Canada, OHS, or the WCB has jurisdiction to award damages, aggravated damages or punitive damages for

wrongful dismissal. While those administrative tribunal processes arguably may have provided Astolfi options to try to mitigate his lost income, they did not provide him a forum to litigate his wrongful dismissal action: see, for example: ***Villa*** at para 8.

[69] Further, Stone Creek argued that issue estoppel does not necessarily apply to findings of the administrative tribunals, citing ***Minott v O'Shanter Development Company Ltd***, 1999 CanLII 3686 (ONCA). Whether issue estoppel applies to any of the factual findings of the tribunals can be address at trial, if necessary, when a full record is before the court and it can decide whether, even if the elements of issue estoppel are established, the court should exercise its discretion to apply issue estoppel: ***Danyluk v Ainsworth Technologies Inc***, 2001 SCC 44 at paras 33–34; ***Penner v Niagara (Regional Police Services Board)***, 2013 SCC 19 at paras 28–31; ***Arndt v Banerji***, 2018 ABCA 176 at paras 52–53.

[70] In all the circumstances, there is no compelling reason not to permit the amendments due to a lack of jurisdiction of the court, or an abuse of process.

4. Are the Amendments Brought in Bad Faith?

[71] The onus is on the party alleging bad faith to prove it on a balance of probabilities, not the opposite party to disprove it: ***Club Industrial*** at para 31; ***Hur v 726913 Alberta Ltd***, 2013 ABQB 208 at paras 72, 76. The bad faith exception applies to amendments that seek to inflict financial or emotional harm, conceal information relevant and material to the litigation issues, or deceive the adverse party or the court, but is not intended to punish negligent or careless delay that can be remedied through costs: ***Brewin*** at para 31; ***Club Industrial*** at paras 35–36. In my view, bad faith would also apply to amendments that are brought for tactical purposes intended to frustrate, delay or increase the costs of litigation rather than to seriously advance the existing or proposed claims or defences.

[72] While Stone Creek has vigorously objected to the amendments, it has not gone so far as to argue that Astolfi is not bringing the amendments in good faith. In my view, Astolfi is attempting to bring forward additional claims in good faith, at least in part because Stone Creek took the position Astolfi would have to address his own post-litigation conduct before the various administrative tribunals, and that Stone Creek would not schedule the next steps in the action unless Astolfi brought an amendment application (if that was his plan).

5. Are Any of the Amendments Frivolous, Irrelevant or Improper?

[73] Stone Creek raises additional concerns with some of the amendments that, in my view, are best addressed as potentially frivolous, irrelevant or improper pleading: (1) certain aspects of the OHS Amendments which relate to legislation or Stone Creek policies that were not in force while Astolfi was a Stone Creek employee; (2) amendments relating to wrongful conduct in the action, which Stone Creek asserts are a matter for costs only; (3) Astolfi's alleged failure to properly particularize certain amendments; (4) duplicative amendments; (5) Astolfi's pleading that he would donate certain damage awards received to charity; and (6) settlement privilege. I address these issues below.

a. The OHS Amendments

[74] Stone Creek argues that OHS Amendments, or at least some of them, are irrelevant because they relate to Stone Creek's policies after Astolfi was terminated and after the *Occupational Health and Safety Act*, RSA 2000, c O-2 was repealed and replaced by *OHSA* effective June 1, 2018.

[75] On the limited record before me, it does appear that Stone Creek was required by OHS to put into place a violence prevention policy as a result of the enactment of the new *OHSA*, and that part of the OHS Amendments (part of paragraph 18 of the Amended Statement of Claim) relate to these facts.

[76] Further, part of the OHS Amendments relate to Astolfi attempting to utilize Stone Creek's third-party reporting and compliance system which, based on the limited record, appears to have been put into place under Stone Creek's new Workplace Bullying & Harassment Policy which may have been instituted in January 2019.

[77] In my view, the portion of the OHS Amendments that relate to Stone Creek's dealings with OHS responding to Astolfi's January 2019 complaint and his Section 36 OHSA Complaint (both of which could arguably be part of the manner of dismissal as discussed above), or which reflect Stone Creek's policies in place while he was an employee, properly relate and are relevant are relevant to the wrongful dismissal claim.

[78] However, Stone Creek's implementation of new policies to respond to new legislative requirements is not relevant to Astolfi's wrongful dismissal claim. Further, Astolfi's attempt to take advantage of Stone Creek's workplace bullying and harassment reporting system well over a year after his termination is not relevant because he was no longer an employee and the system was not functioning while he was an employee. Further, Astolfi has not included sufficient evidence to support that, even if his attempt to use the reporting and compliance system had been successful, it would somehow be relevant to his wrongful dismissal claim. For example, there is no evidence that the system would have somehow contributed to loss mitigation.

[79] Accordingly, paragraph 18 of the Amended Statement of Claim is only permitted as follows:

> After the February 23, 2018 incident described above, Astolfi complained under SCR's policies and also advised SCR that its policies were dysfunctional. SCR denied the complaint and denied that there was anything wrong with its conduct. On January 9, 2019, Astolfi filed a complaint against SCR with OHS. OHS investigated SCR's practices related to violence and harassment procedures, and thereafter issued three unique orders against SCR. In particular, OHS determined that SCR was in violation of unestablished and unimplemented workplace harassment prevention procedure(s) for the employer to follow if/when workplace harassment is identified at the worksite, in accordance with Section 290.6 OHS Code 2009.

[80] Paragraph 19 of the Amended Statement of Claim is irrelevant to Astolfi's wrongful dismissal claim and shall be struck.

b. Astolfi's Amendments of Wrongful Conduct in the Action

[81] Stone Creek objects to the amendments on the basis that they plead wrongdoing in the conduct of Astolfi's wrongful dismissal action, which should be dealt with as a matter of costs only. In my view, the portion of the amendments that may arguably relate to Stone Creek's litigation conduct in this action are paragraphs 16 ("Throughout the within proceeding....SCR and Turcotte have been obstructive and have put Astolfi through arduous procedural tasks, in an inappropriate attempt to prevent Astolfi from obtaining appropriate relief and remedies") and paragraph 27 ("Throughout the within proceedings....[Stone Creek] and Turcotte have continually denied any wrongdoing whatsoever, notwithstanding evidence to the contrary...").

[82] Stone Creek relies on British Columbia cases that provide that misconduct during the course of the litigation is properly addressed through an order for costs, as opposed to an award for punitive damages, because punitive damages are a remedy for breach of contract that reflects the conduct of a party at the time of the breach, and costs reflect the results and conduct of parties leading to and in the course of litigation: ***TeBaerts v Penta Builders Group Inc***, 2015 BCSC 2008 at para 114; ***Marchen v Dams Ford Lincoln Sales Ltd***, 2010 BCCA 29. Alberta courts also distinguish between costs and punitive damages in a similar way: ***Bard*** at paras 52–54; ***College of Physicians and Surgeons of the Province of Alberta v JH***, 2009 ABQB 48 at paras 12–23.

[83] Courts have also denied proposed amendments which alleged that litigation conduct constituted a breach of fiduciary duty: ***Bard*** at para 44–45; ***Geographic Resources Integrated Data Solutions Ltd v Peterson***, 2015 ONSC 4658 at para 34, citing ***Canada v Stoney Band***, 2005 FCA 15, leave to appeal to SCC refused, 30826 (15 September 2005).

[84] I agree that litigation conduct, in most cases, is appropriately addressed as a matter of costs: ***Alberta Computers.com*** at paras 147–152. However, in my view the law is not settled in Alberta as to whether post-termination litigation conduct can potentially be considered part of the "manner of dismissal" in the context of aggravated damages/moral damages in a wrongful dismissal claim. As noted above, some courts have held or implied that positions taken during, or in the context of litigation, can be part of the manner of dismissal relevant to aggravated/moral damages: see ***Galea*** at para 276; ***Antidormi*** at para 155; ***Capital Pontiac Buick*** at para 28; ***OWL (Orphaned Wildlife)*** at paras 286–288; ***Elgert*** at paras 73–76, 86–87; ***Lalonde*** at paras 72–77.

[85] I conclude that the words "throughout the within proceedings" in paragraph 16 of the amendment only impugns Stone Creek's procedural handling of the action to delay Astolfi's damages claim. In my view, this is not sufficiently pleaded to connect to the manner of dismissal; Stone Creek's alleged conduct in the litigation related to the process of the litigation is more appropriately addressed as a matter of costs. Therefore, the beginning of paragraph 16 shall be struck so that paragraph 16 of the Amended Statement of Claim shall read: "In the proceedings leading up to and including the decision of the Federal Court of Canada....".

[86] In contrast, I am satisfied that the reference to "throughout the within proceedings" in paragraph 27 is narrow and limited to Stone Creek's denial of any wrongdoing despite evidence to the contrary, which in my view is related to the wrongful dismissal aggravated damages claim. How this is ultimately dealt with in the context of a wrongful dismissal action is a matter best

resolved by the trial judge within the context of the entire litigation: ***Middleton v Lev 2 Inc***, 2022 ONSC 1619 at paras 20–24.

[87] Accordingly, although I make no determination as to whether Stone Creek's litigation conduct in this case can or does form part of the manner of dismissal in Alberta, as that is an issue for trial, the words "Throughout the within proceedings" in paragraph 27 are permitted to remain in the Amended Statement of Claim.

c. Alleged Lack of Particularization

[88] Stone Creek argues that Astolfi failed to properly particularize allegations pursuant to rule 13.7. Rule 13.7 provides that a pleading must give particulars of breach of trust, fraud, misrepresentation, wilful default, undue influence or defamation. Bald allegations do not provide an adequate basis for a defendant to respond: ***GH v Alcock***, 2013 ABCA 24 at para 58.

[89] I am satisfied that Astolfi has provided sufficient evidence of particulars of the allegations that Stone Creek made misrepresentations to the various administrative tribunals. He was questioned on his affidavit and was specifically asked for further particulars, so Stone Creek is not taken by surprise. Any concern about particularization can be addressed in a Request for Particulars or order under rule 3.61. Lack of particularization is not a compelling reason to refuse the amendments in this case.

d. Alleged Duplicative Pleading

[90] Stone Creek argues that the Physical Injury Amendment in paragraph 14 of the Amended Statement of Claim is duplicative and unnecessary because the Statement of Claim already included a claim for lost benefits (which is now at paragraph 25 of the Amended Statement of Claim). I disagree. Paragraph 14 is different because it alleges that Stone Creek was aware of his injury at the time of termination, which is not included in paragraph 25. In any event, a pleadings amendment application should not devolve to a microscopic assessment to a standard of perfection. This ground of opposition is rejected.

e. Pleading Intended Use of Damages Judgment

[91] In paragraph 28 of the Amended Statement of Claim, Astolfi pleads that if he obtains a punitive damage award he will donate it to relevant causes aimed at assisting victims of mental abuse. I agree with Stone Creek that this pleading should not be permitted. A plaintiff's intended use of a damage award is irrelevant to the issues in the wrongful dismissal claim. It is obviously included for the purpose of reflecting good character or influencing the court to grant the remedy. While Astolfi may be well-meaning, a plaintiff pleading his philanthropic intentions for the fruits of litigation is just as objectionable as it would be if a defendant pleads that a plaintiff intends to waste the fruits of litigation or that a plaintiff is wealthy and does not need the money. It is simply irrelevant to the issues in the action and is prejudicial. Pleadings in private claims for damages are not platforms for a litigant's social causes: see ***Rare Charitable Research Reserve v Chaplin***, 2009 CanLII 49639 (ONSC); ***Little v Ottawa (City)***, 2004 CanLII 18893 (ONSC) at para 38.

[92] The second sentence in paragraph 28 of the Amended Statement of Claim is not permitted and is struck.

f. Alleged Breach of Settlement Privilege

[93] Stone Creek argues that the July 2018 Amendments reflect privileged settlement communications which should not be in the pleading without the consent of both parties.

[94] The existence of settlement privilege is determined by a three-part test: (a) the existence or contemplation of a litigious dispute; (b) communications that are made with the intention that they would remain confidential if the negotiations failed; and (c) the purpose of the communication was to achieve a settlement: ***Thomson v University of Alberta***, 2013 ABCA 391 at para 12; ***Bellatrix Exploration Ltd v Penn West Petroleum Ltd***, 2013 ABCA 10 at paras 21–28.

[95] Once privileged, subject to some exceptions, settlement communications can only be used if both parties waive the privilege — one party cannot unilaterally waive the privilege and put settlement communications before the court: ***Bellatrix*** at para 26; ***Williams v Williams***, 2020 ABCA 15 at para 22. Therefore, settlement communications should not be unilaterally disclosed in a pleading without consent.

[96] However, it is insufficient for a party objecting to an amendment on the ground of privilege to simply argue that a pleading contains privileged settlement communications, unless it is obvious on the face of the amendment that the communication is privileged. It is not obvious on the face of paragraphs 15 or 27(d) and (e) of the Amended Statement of Claim that the related communications were settlement communications. Stone Creek did not file any evidence on this issue. I have reviewed Astolfi's detailed evidence (including emails and his personal notes of his conversation with Turcotte), and Stone Creek's questioning of Astolfi on this issue. I am not satisfied based on the record before me that that the communications referenced in the July 2018 Amendments were for the purpose of achieving a settlement of a litigious dispute — they were for other purposes which are better explored at trial.

[97] Therefore, Stone Creek's objection alleging settlement privilege is not a compelling reason to deny the amendments.

6. Would Any of the Amendments Cause Stone Creek Significant Prejudice Not Compensable in Costs?

[98] A non-moving party may argue that a proposed amendment will cause significant prejudice that cannot adequately be abridged by an ameliorative costs order or any other order: ***Pace*** at paras 4–5; ***Kosteckyj*** at para 41; ***AARC Society*** at para 64; ***Attila Dogan*** at para 25; ***Remington*** at para 33.

[99] The non-moving party has the onus to establish serious prejudice: ***Bard*** at para 15. Delay or the passage of time may lead to prejudice: ***Eon Energy*** at paras 26–27, citing ***Matthison v Bradburn (Estate)***, 2007 ABCA 173; ***Hunter Financial Group Ltd v Maritime Life Assurance Company***, 2009 ABCA 199 at para 9. An inability to defend due to lost witnesses or evidence may lead to prejudice: ***Bard*** at para 18; ***Hunter Financial Group Ltd v Maritime Life Assurance Company***, 2007 ABQB 263 at para 12. However, most prejudice will be compensable in costs, including the fact that the amendments may lead to further pleadings and discovery, may lengthen the lawsuit, or are made late in the litigation process: ***Bard*** at para 18; ***Sauvageau v Alberta (Justice and Solicitor General)***, 2017 ABQB 448 at para 22; ***Dow Chemical Canada Inc v Nova***

Chemicals Corporation, 2010 ABQB 524 at para 28; ***AARC Society*** at para 93; ***Kosteckyj*** at paras 39–42.

[100] Stone Creek argues delay, that the action was virtually ready for trial, and that the amendments will require significantly more questioning. In my view, the amendments have not caused delay to the progress of the action that would warrant rejecting them. Stone Creek made it clear in 2020 that Astolfi would have to "address what you have done" with his claims before the administrative tribunals, that it was Stone Creek's position that Astolfi had fully mitigated his damages, and that Stone Creek needed to conduct questioning on mitigation. It is likely that Stone Creek was going to conduct detailed questioning on the administrative tribunal proceedings regardless of the amendments, and likely would not have completed its questioning until the administrative tribunal processes had run their course. The appeal decision of the Labour Relations Board was not delivered until 2023.

[101] Further, while I am satisfied that there may be some additional records production and Part 5 discovery questioning that will be required as a result of the amendments, it is not necessarily all caused by the amendments.

[102] Any delay and additional costs caused by the amendments is clearly compensable in costs. Stone Creek has not discharged its onus to establish that it would suffer serious prejudice if the amendments are allowed.

7. Are Any of the Amendments Hopeless Because they Are Barred by the *Limitations Act*?

[103] Stone Creek argues that the amendments should not be permitted because they add new claims that are statute barred by the *Limitations Act*, RSA 2000 c L-12.

[104] Where a fair and just determination on the expiry of the limitation period can be made on the application to amend, the court should do so: ***Domenic Construction Ltd v Primewest Capital Corp***, 2020 ABCA 265 at para 26.

[105] With respect, I disagree with Stone Creek's position and find that the amendments do not raise new claims that are barred by limitations.

[106] First, as I have found above, the vast majority of the amendments do not add a new cause of action, but rather provide further particulars of Astolfi's wrongful dismissal claim, so they speak from the original date of the Statement of Claim and do not add a new claim after the limitation period: ***Stoney Tribal Council v Encana Corporation***, 2019 ABCA 90 at para 29.

[107] The only arguably new claim is the Personal Contacts Amendments, to the extent it raises a claim in detinue for return of personal property. The question of whether detinue is a continuing tort that gives rise to a rolling limitation period has previously been held to be a matter to be determined at trial: ***Amack v Wishewan***, 2015 ABCA 147 at paras 24, 52.

[108] Second, even if the amendments raise new claims that are being added to the proceeding, section 6 of the *Limitations Act* would be engaged. Section 6(1) and (2) provide:

> 6(1) Notwithstanding the expiration of the relevant limitation period, when a claim is added to a proceeding previously commenced, either through a new pleading or an amendment to pleadings, the defendant is not entitled to immunity from liability in respect of the added claim if the requirements of subsection (2), (3) or (4) are satisfied.
>
> (2) When the added claim
>
> (a) is made by a defendant in the proceeding against a claimant in the proceeding, or
>
> (b) does not add or substitute a claimant or a defendant, or change the capacity in which a claimant sues or a defendant is sued,
>
> the added claim must be related to the conduct, transaction or events described in the original pleading in the proceeding.

[109] The amendments do not add a new defendant or change the capacity in which Stone Creek is sued. Therefore, if the amendments add new claims, section 6(2)(b) applies and if they are "related to the conduct, transaction or events described in the original pleading in the proceeding", then Stone Creek cannot rely on the passage of any limitation period for immunity for liability in respect of the added claim.

[110] Whether a new claim is related to the same conduct, transaction or events requires an assessment of the whole factual and legal context: ***Homersham v New Urban (Ramsay Exchange) GP Ltd***, 2023 ABCA 86 at para 13; ***DeSoto Resources Limited v Encana Corporation***, 2010 ABCA 110 at para 8.

[111] No firm line can be drawn between an unrelated new claim and what has previously been pleaded; too general a definition would give the plaintiff an unlimited ability to add statute-barred claims: ***DeSoto*** at para 8. However, the "relatedness" of the new claims to the conduct, transaction or events described in the original pleading has been described as being broadly defined and having a low threshold: ***Bow Valley Insurance Services (1992) Limited v Shah***, 2005 ABCA 304 at para 14; ***Domenic Construction Ltd v Primewest Capital Corp***, 2019 ABQB 840 at para 46, rev'd in part 2020 ABCA 265; ***Kang v MB***, 2019 ABQB 246 at para 56. But it is not unlimited; there must be more than only a cursory or superficial connection: ***513320 Alberta Inc v St Jean***, 2015 ABQB 826 at paras 34–35; ***Stirling v Encana Corporation***, 2019 ABQB 182 at para 40.

[112] One test is whether the new claim would require a new set of conduct, transactions and events to be proven at trial, or whether the documents or other evidence needed to prove the new allegations differ significantly from those required to prove the originally pleaded facts: ***Desoto*** at para 10.

[113] Even if amendments raise new claims (which I have found they do not), I find they are related to the same conduct, transaction or events as the Statement of Claim, namely Astolfi's alleged wrongful dismissal. While some of the conduct alleged in the amendments post-dates the filing of the Statement of Claim, this does not mean it is not related to original dismissal claim. As

I have noted, it may potentially be part of the "manner of dismissal" which can continue beyond the moment of termination or the filing of a Statement of Claim.

[114] Further, as is often the case in wrongful dismissal claims, the mitigation efforts and assessment of damages requires evidence that comes after the filing of a claim as terminated employees often do not wait until they have mitigated their losses before filing a claim. Stone Creek has made it clear to Astolfi that it intended to question him about the Service Canada, OHS and WCB proceedings regardless of the amendments, which supports the relatedness of the amendments to the original pleading, and means that at least some of the evidence related to those proceedings would have been involved in any event. I find that the amendments are all related to Astolfi's termination and its aftermath and, if required, engage section 6(2) of the *Limitations Act*.

[115] Third, even if the amendments were not related, it is not clear that all of the amendments would be statute-barred in any event, based on the timing of the events and the requirements of section 3(1) of the *Limitations Act*. Given my findings, I do not need to assess this in detail, but no limitation issue could arise with respect to Stone Creek's alleged conduct that occurred, or was discovered by Astolfi, within two years of Astolfi's application to amend the Statement of Claim.

[116] In conclusion, I find that there is no compelling reason not to permit the amendments based on the *Limitations Act*.

8. Are Any of the Amendments Hopeless Because They Are Barred by the *Workers' Compensation Act*?

[117] Stone Creek argues that the amendments are barred by section 23 of the *WCA*, which provides:

> 23(1) If an accident happens to a worker entitling the worker or the worker's dependants to compensation under this Act, neither the worker, the worker's legal personal representatives, the worker's dependants nor the worker's employer has any cause of action in respect of or arising out of the personal injury suffered by or the death of the worker as a result of the accident
>
> (a) against any employer, or
>
> (b) against any worker of an employer,
>
> in an industry to which this Act applies when the conduct of that employer or worker that caused or contributed to the injury arose out of and in the course of employment in an industry to which this Act applies.

[118] Stone Creek relies on ***Donnelly (Estate of) v Ay-Jay Operations Ltd***, 2007 ABCA 62. That case confirmed the "all-encompassing" language exhibiting a clear legislative intention that "any cause of action" be barred against any employer when the statutory pre-conditions of the section have been met: ***Donnelly*** at para 17. The Court of Appeal noted the historic trade-off inherent in the *WCA* at paras 18–19:

> [18] On the second argument, the "historic trade-off" contemplated by workers compensation statutes was thoroughly explained in ***Pasiechnyk v. Saskatchewan (Workers' Compensation Board)***, [1997] 2 S.C.R. 890, 216 N.R. 1. In return for losing a potential cause of action against their employers, workers were guaranteed "compensation that depends neither on the fault of the employer nor its ability to pay. Similarly, employers were forced to contribute to a mandatory insurance scheme, but gained freedom from potentially crippling liability.": ***Pasiechnyk*** at para. 25.
>
> [19] Central to this scheme is the legislative bar to actions against employers. Without such a bar, employers would have to contribute to an insurance scheme without receiving protection from law suits by injured employees. Permitting actions to proceed in circumstances where the statutory pre-conditions set out in section 23(1) have been met would undermine the historic trade-off on which workers' compensation legislation is based. This argument must fail.

[119] In ***Donnelly***, an employee of a tire retailer sold defective tires which failed and allegedly contributed to the death of another employee. The Court of Appeal upheld summary dismissal of a claim under the *Sale of Goods Act*, RSA 1980, c S-2, that the tire retailer breached the implied conditions of merchantable quality and fitness, because the WCB had made factual findings that engaged the statutory protection of section 23, namely that the conduct that caused or contributed to the injury arose out of and in the course of employment in an industry to which the *WCA* applied.

[120] Here, the WCB accepted Astolfi's WCB claim on the basis that the February Incident caused Astolfi an injury while in the course of his employment with Stone Creek. It does not appear that anyone has appealed or otherwise sought to challenge the WCB decision. Therefore, the issue is whether Astolfi's action, or the amendments, are barred by section 23 the *WCA*.

[121] In ***Ashraf***, (2015 ABCA 78), the plaintiff's claim sought damages for two causes of action: physical and psychological injuries sustained in the workplace and constructive dismissal. The Court of Appeal held, at paras 10–11, that the *WCA* barred a claim for the first cause of action, but not the second, because the *WCA* did not have jurisdiction over a constructive dismissal claim. A similar conclusion has been reached in Ontario and British Columbia under their statutory workers' compensation regimes: ***Morningstar v WSIAT***, 2021 ONSC 5576 at paras 110–124; ***Deol v Dreyer Davison LLP***, 2020 BCSC 771 at paras 89–106. In ***Bass v Boston Pizza International Inc***, 2021 ABPC 315, Judge Higa (as he then was) applied the ***Ashraf***, 2015 ABCA 78 reasoning to find that a claim for aggravated damages arising from the manner of termination in a wrongful dismissal action was not barred by the *WCA*. I agree with the reasoning in ***Bass*** — wrongful dismissal claims are not barred by section 23 of the *WCA*.

[122] Accordingly, if Astolfi seeks damages for personal injury suffered in the February Incident, it is barred by section 23 the *WCA*. Based on my interpretation of Astolfi's original claim and the amendments, he seeks damages for wrongful dismissal, including aggravated damages arising out of the manner of dismissal, and return of his personal property. Further, Astolfi's claim for recovery of his personal property is not barred by section 23 of the *WCA*.

[123] Even if I am wrong, and certain portions of the Amended Statement of Claim could be interpreted to also include a claim for personal injury suffered as a result of the February Incident, where there is possible overlap of barred and non-barred claims, the claim should proceed to trial so that the matter can be determined with a full evidentiary context: ***Dahlen v Avenue Living Communities Ltd***, 2021 ABQB 797 at paras 21–25.

[124] Accordingly, the *WCA* is not a compelling reason to not deny the amendments.

9. Would Allowing the Amendments be Against the Public Interest?

[125] As a steward of public resources, the court must consider the impact an action featuring the proposed amendment will have on the timely resolution of the dispute and its ultimate cost in terms of both public and private resources: ***AARC Society*** at para 62.

[126] Despite Stone Creek's assertions that the matter was largely ready for trial in 2019, the parties had not completed all the steps to schedule a trial. Further, I find that the amendments did not solely cause delay as noted above and further questioning was required in any event. Further, some of the amendments could not have been questioned on when the Part 5 questioning took place because the underlying events had not yet happened.

[127] With respect to costs, the Amended Statement of Claim will likely increase the total cost of the action to some extent, although the extent to which it will do so is not clear at this time. The reality is that the parties may very well have now expended more time and cost in respect of Astolfi's amendment application and this appeal than they would have had the amendments been consented to and the additional work had been done.

[128] In the circumstances, I find that allowing the amendments is not against the public interest.

10. Conclusion re Amendments

[129] I confirm Astolfi's permission to file the amendments, subject to the changes noted above.

B. What is an Appropriate Costs Award?

[130] Applications Judge Farrington allowed the amendments in their entirety on the condition that Astolfi pay $2,500 for costs associated with having to "redo and repeat some work in relation to this matter". Stone Creek argues that this amount is "woefully inadequate and patently unreasonable," and asserts that "at least $10,000 should be awarded".

[131] Rule 3.66 provides:

> 3.66(1) Subject to subrule (2), the costs, if any, as a result of an amendment to a pleading are to be borne by the party filing the amendment unless
>
> (a) the amendment is a response to an amended pleading, or
>
> (b) the Court otherwise orders.

> (2) The costs of a contested application to amend a pleading are in the discretion of the Court, in accordance with rule 10.29.

[132] In my view, rule 3.66 has dual competing purposes. The purpose of rule 3.66(1) is to encourage litigants to get their pleadings right the first time and to hold the amending party responsible for costs resulting from the amendment: ***Goska Nowak Professional Corporation v Robinson***, 2011 ABQB 385 at para 34; ***Rodd v Alberta Health Services***, 2015 ABQB 498 at para 9. On the other hand, the purpose of rule 3.66(2) is to ensure that respondents in amendment applications do not unreasonably object to amendments. The rule provides the court the discretion to balance these competing purposes based on the circumstances of specific cases.

[133] The wording and interpretation of rule 3.66 (and its predecessor under former rules) has changed over time, and there has been some uncertainty as how the rule was intended to work and what types of costs it covered. Many cases only deal with some, but not all, of the potential costs that are "as a result of the amendment". In my view, costs "as a result of the amendment" encompasses at least three cost-related matters, which each have different considerations: (1) thrown-away or wasted costs for steps already taken; (2) future costs for steps not yet taken but that will be undertaken as a result of the amendment; and (3) the costs of the amendment application. I address these matters below.

1. Thrown-Away or Wasted Costs

[134] In the context of a contested application permitting an amendment, thrown-away or wasted costs for steps already taken are costs that have been incurred but would not have been incurred had the pleading included the amendments in the first place. That is, thrown-away costs are those which are wasted for work rendered useless as a result of the amendment sought, either because an issue has been withdrawn, abandoned or otherwise rendered moot: ***Koppe v Garneau Lofts Inc***, 2005 ABQB 727 at para 13, citing ***Miliken & Co v Interface Flooring Systems (Canada) Inc***, 1998 CanLII 7706 (FC). They are costs that "should not have had to be incurred", regardless of who eventually wins or loses the lawsuit: ***Tiger Calcium*** at para 99, citing ***VAS v Grace***, 2014 ABQB 268 at para 12.

[135] Stone Creek has not argued any thrown away or wasted costs caused by the amendments. I do not order any thrown away costs.

2. Future Costs Resulting from the Amendment

[136] Future costs that are incidental to or consequent upon the amendment can be costs "resulting from" the amendment: ***Fluid Pro Oilfield Services Ltd v Diamond Cut Industrial Park Ltd***, 2017 ABQB 630 at para 29; ***Trimay Wear Plate Ltd v Way (Amend Statement of Claim)***, 2008 ABQB 705 at paras 38–40.

[137] The court maintains a residual discretion whether to award these costs: rule 3.66(1)(b). Where there is insufficient evidence to determine what future costs will be "resulting from" an amendment, it may be premature to order costs and the matter can be reserved to the trial judge: ***Trimay*** at paras 38–40. Further, where the costs that are resulting from the amendment are difficult to discern, for example because they are intertwined with costs that are not resulting from the

amendments, it will often make sense to defer determination of any amounts until the full record of the results of the amendment are known.

[138] In this case, there is some evidence that there will be additional records and questioning, however, the evidence is not clear. Further, as I have noted, it also appears that there was going to be questioning required in respect of the administrative tribunal processes even if the amendments were not allowed. It is not possible for me, on the record at this time, to determine what future costs will be "resulting from" the amendments.

[139] Accordingly, I find it is appropriate not to award any amount for future costs, but to reserve that matter to be determined by the trial judge. To this extent, I disagree with and overturn Applications Judge Farrington award of $2,500 in costs against Astolfi.

3. Costs of the Amendment Application and Appeal

[140] In ***Koppe***, Justice Slatter (as he then was), in the context of predecessor rules, stated in *obiter* that a successful applicant on an amendment application should be entitled to its costs of the event absent some positive misconduct. Under the rules at the time, the amending party was to "bear the costs of the amendment", which Justice Slatter concluded did not include the cost of the amendment application:

> Therefore, as a general rule where (for example) one party asserts a right to amend pleadings, and the other party denies that right, and the amending party must take the matter to court, costs should follow the event. If the applicant succeeds in its motion to amend, it should get costs. Rule 141 says simply that the amending party must bear the costs of the amendment (as I have previously mentioned, supra, para. 7(c), a reference to a now repealed part of Schedule "C"). Rule 141 does not say that the applicant must pay the costs of the fight over whether it has the right to amend, even if it wins that fight. That would be a most undesirable result, because it would mean that the respondents on motions like that could defend them with impunity, knowing that win or lose they would receive costs. Absent some positive misconduct, the successful moving party should get costs of the motion to permit the amendment.

[141] After the *Rules* came into force, some courts held that the wording of rule 3.66, as it was originally worded (without rule 3.66(2)) effectively created "one cost-free opportunity to resist the amendment" and that opposing party was entitled to costs even if the amendment application was successful or of mixed-success: ***Goska*** at paras 33–38; ***869120 Alberta Ltd v B & G Energy Ltd***, 2011 ABQB 209 at para 51. Other courts, where the amendment application was successful, held that the successful party was entitled to costs (***Kent v Martin***, 2011 ABQB 675 at paras 14–18) or costs in the cause (***Hunka v Degner***, 2012 ABQB 207 at para 36).

[142] In July 2012, rule 3.66 was amended to add rule 3.66(2). In my view, this version of the rule more clearly aligns with the sentiments of Justice Slatter in ***Koppe*** and directly engages the presumption in rule 10.29 that the successful party should have his or her costs but always subject to the overriding discretion of the court: see ***Champagne v Sidorsky***, 2017 ABQB 557 at para 89. Since the amendment to rule 3.66, amending parties having success or mixed success are much

less likely to have costs awarded against them. Courts have granted the applicant costs (***Champagne*** at paras 88–96), ordered the parties to bear their own costs (***Crystal Ridge Fuels Limited v McIntosh***, 2014 ABQB 257 at para 14), or ordered costs in the cause (***Kang*** at para 163).

[143] Applications Judge Farrington ordered the costs of the application to be in the cause. In my view, in all of the circumstances and based on the record before me, it is more appropriate that the parties bear their own costs of the amendment application and this appeal.

VII. Conclusion

[144] The decision below is confirmed in part.

[145] Astolfi is directed to file and serve an "Amended Amended Statement of Claim" that removes the portions of the Amended Statement of Claim noted above, within 15 days of this decision. If Stone Creek wishes to serve a request for particulars pursuant to rule 3.61(1) it shall do so within one month of this decision, and Astolfi shall respond to any rule 3.61 request for particulars within one month of receipt of the request. Should Stone Creek wish to file an Amended Statement of Defence, it shall do so by no later than September 29, 2023. The parties shall exchange supplemental Affidavits of Records addressing the amended pleadings by October 31, 2023.

[146] Stone Creek is not awarded thrown-away costs. Future costs resulting from the amendments is reserved and deferred to be dealt with by the trial judge in this matter and, accordingly, the costs order requiring Astolfi to pay $2,500 is overturned. If he has paid that amount, it shall be repaid forthwith pending trial and the determination of the future costs resulting from the amendments. The parties shall bear their own costs of the application below and this appeal.

[147] Counsel for Stone Creek shall prepare the order arising from today and shall provide it to Astolfi for his review and approval. If the parties cannot agree on the form of order they may seek my further direction.

Heard on the 18th day of January, 2023.
Dated at the City of Calgary, Alberta this 12th day of July, 2023.

M.A. Marion
J.C.K.B.A.

Appearances:

Jon Astolfi
for the Self-Represented Litigant

Grant Stapon, K.C.
for the Defendant