CITATION: Sinnathamby v. The Chesterfield Shop Limited, 2016 ONSC 6966
COURT FILE NO.: CV-11-103858
DATE: 20161122

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
SUCHETA SINNATHAMBY	)	Justin P. Baichoo, for the Plaintiff
Plaintiff	)	
– and –	)	
THE CHESTERFIELD SHOP LIMITED	)	Phil White, for the Defendant
Defendant	)	
	)	**HEARD:** October 14, 2016

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REASONS FOR DECISION

CHARNEY J.:

Introduction

[1] The plaintiff, Suchethea Sinnathamby (Sue), was a fourteen year employee at the defendant Chestfield Shop (Chesterfield). She worked as a Senior Customer Service Agent. On October 4, 2010, the plaintiff's employment at Chesterfield Shop was terminated. The plaintiff alleges that she was wrongfully dismissed without notice while she was ill and away from work. The defendant takes the position that she was dismissed for just cause because she failed to provide medical documentation to support her absence from work contrary to the defendant's sick leave policy.

[2] The plaintiff has brought a motion for summary judgment pursuant to Rule 20 of the *Rules of Civil Procedure*. She takes the position that most of the facts are undisputed, and that the court can resolve any relevant disputed facts on the basis of the record, which includes affidavits and cross-examination. She seeks general damages in lieu of reasonable notice and punitive and aggravated damages due to what she describes as the defendant's "high-handed, callous and malicious conduct."

[3] The defendant takes the position that the issues in this action involve conflicting evidence of all material facts regarding the events leading to the plaintiff's dismissal, and that there are genuine issues requiring a trial. Accordingly, they ask that the motion for summary

judgment be dismissed and a trial ordered. In the alternative, if this court determines that it can decide the case under Rule 20, it takes the position that the plaintiff's claim should be dismissed.

[4] For the reasons set out below I find that this is an appropriate case in which to apply Rule 20 and decide this case as a summary judgement motion.

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Facts

i) Facts not in dispute

[5] The plaintiff commenced full-time employment with the defendant in February 1997 in the area of customer service and sales support.

[6] At the time of her termination on October 4, 2010, the plaintiff was 45 years old. She held the position of Senior Customer Service Agent. The role is an administrative role and she did not have any supervisory or managerial responsibilities. She was responsible for answering incoming phone calls from customers regarding the status of their orders and keeping in touch with suppliers regarding individual orders and incoming inventory.

[7] Pursuant to the Employment Agreement, the defendant paid the plaintiff an annual salary of approximately $37,500, plus additional benefits valued at $234 per month, and an annual performance bonus of five per-cent of her base salary.

[8] On June 17, 2010, Tom Bochynek, the defendant's general manager, sent a warning letter to the plaintiff, warning her that she was not eligible for any further vacation time in 2010. The letter was issued because the employer believed that the plaintiff had taken more vacation time off than allowed by her vacation allotment. The letter stated:

> Your vacation time for the calendar year of 2010 has now been exceeded. We approved the additional time because of the long distance that you were traveling. Please note that you are not eligible for any further vacation time in this calendar year.
>
> Sue, we attempt to show flexibility with hours and vacation, however you constantly push the envelope. We ask that you honour your schedule as we honour our obligations to you. If your tardiness continues, the time will be deducted and we will be forced to return you to an hourly pay structure. You may not make up for late arrivals with a shorter lunch, or by staying longer hours. We also ask that you limit your personal calls. Too many incoming calls are being left unanswered while you attend to personal business.
>
> I trust that we will receive your full co-operation effective immediately.

[9] This was the only written warning that the plaintiff received from the defendant.

[10] On the evening of September 9, 2010, or the morning of September10, 2010, the plaintiff called in sick.

[11] On Monday September 13, 2010, Mr. Bochynek telephoned the plaintiff to discuss her absence. They do not agree about the content of this phone call or about the dates or content of any of their other telephone conversations. The parties agree that Mr. Bochynek asked the plaintiff when she would be returning to work, but the plaintiff characterizes this as a "demand" while the defendant states that it was a question.

[12] The plaintiff did not return to work after September 10, 2010.

[13] On October 4, 2010, Mr. Bochynek, on behalf of the defendant, terminated the plaintiff's employment over the telephone. The ostensible reason for terminating the plaintiff was her failure to provide doctors notes to support her continued absence from work as required by an employer policy. The defendant did not provide the plaintiff with any compensation in lieu of notice.

[14] Immediately following the employer's phone call on October 4, 2010, the plaintiff faxed to the defendant, to Mr. Bochynek's attention, three doctors notes dated September 10, 2010, September 17, 2010 and September 27, 2010. These documents were faxed from the plaintiff's home fax number.

[15] The doctor's note of September 10, 2010 was signed by Dr. Frederick Chen, and stated:

> This certifies Suchetha Sinnathamby is unable to work 10/9/2010 until Sep 19/2010 due to ill. She may return to work Sep 20/2010.

[16] The doctor's note of September 17, 2010 was signed by Dr. H. Cheng, and stated:

> Sinnathandy, Suchetha was treated in the Emergency Department of the Toronto Western Hospital today at 1300 hours. The condition is such that absence from work is likely to be Uncertain*-1 week to be reassed (sic) in 1 week by MD.

[17] The doctor's note of September 27, 2010 was signed by Dr. Frederick Chen, and stated:

> This certifies that Suchetha is unable to work due to her medical condition, investigations are being undertaken and she will be followed until she is ready to return to work.

[18] It is significant that the first note of September 10, 2010 does include a return to work date (September 20, 2010) while the next two notes do not. I will return to this fact later in the analysis.

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[19] The plaintiff subsequently took a course to become a real estate agent (commencing in December 2011) and has worked as a real estate agent since 2012.

ii) Facts in dispute

[20] The relevant facts in dispute in this case all relate to the events and telephone conversations between September 9, 2010 and October 4, 2010.

Plaintiff's Position

[21] The plaintiff states that she contacted Mr. Bochynek on the evening of Thursday, September 9, 2010 to advise him that she would not be attending work due to an illness. She states that she told him that she would be attending her doctor to seek treatment.

[22] The plaintiff visited her family physician, Dr. Chen, on Friday, September 10, 2010, and claims that she was "diagnosed by Dr. Chen as suffering from depression, hypertension and anxiety. My doctor again advised that I should temporarily refrain from any work or driving, and that I must re-attend his office for a re-assessment within one week."

[23] After visiting the doctor on September 10, 2015, she again called Mr. Bochynek, but he was not available to take her call. Accordingly, she provided him with "multiple detailed voice messages" advising him of her "medical circumstances", and that on the advice of her doctor she would not be able to attend work the following week.

[24] She gave Dr. Chen's September 10, 2010 note to her husband to mail to Mr. Bochynek the following week, "probably" on Monday, September 13, 2010 "or so". She did not fax the note because her fax machine was broken. Her husband made a photocopy of the note at his office before he mailed it.

[25] On Monday, September 13, 2010, Mr. Bochynek phoned the plaintiff and "became defensive and aggressive towards me when I told him that my doctor advised that my depression, hypertension and anxiety could be work-related."

[26] On Friday, September 17, 2010, the plaintiff attended the Toronto Western Hospital Emergency Department "for a further check-up regarding my condition. My treating physician in the Emergency Department of Toronto Western Hospital provided me with a letter stating that my condition was such that I could not return to work at that time…" The plaintiff acknowledges that she did not forward this doctor's note to her employer until after she was dismissed October 4, 2010.

[27] The plaintiff states that she called Mr. Bochynek again on Monday, September 20, 2010 to advise him of the results of her doctor's "appointment" on September 17, 2010. Mr. Bochynek was on vacation so she left a voice mail message advising him that she required additional time off as a result of her illness. She claims that since she was unable to contact Mr. Bochynek she called Ms. Norene Mahadeo, the head of accounting, who

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advised her that she would forward the "new information" regarding her illness to the management team.

[28] The plaintiff denies that the defendant contacted her on September 22, 2010. She states that on September 23, 2010 she contacted Mr. Bochynek and explained the "details" of her September 17, 2010 visit to Toronto Western Hospital and her doctor's advice that she remain off work. She also advised him of an additional appointment she had scheduled with Dr. Chen on Monday September 27, 2010. Mr. Bochynek requested that she ask her family physician for a return to work date.

[29] The plaintiff's next doctor's appointment was September 27, 2010. She was advised by Dr. Chen that he could not give her a specific return to work date. He provided her with a doctor's note. The plaintiff acknowledges that she did not forward this doctor's note to her employer until after she was dismissed on October 4, 2010.

[30] Following this appointment she contacted Mr. Bochynek. He demanded to know when she would be returning to work and told her that he would not accept any doctor's note that did not specify a return to work date. She alleges that he demanded that she provide him with a doctor's note with a specific return to work date by Wednesday, September 29, 2010.

[31] The defendant states that she was not aware that Chesterfield had an employment policy requiring a doctor's note if an employee falls ill and is absent from work for a period of more than two days. She states that at no time prior to her October 4, 2010 termination did Mr. Bochynek tell her that her position at Chesterfield would be in jeopardy if she did not provide such a letter.

[32] The plaintiff states that she contacted her doctor's office again on September 27, 2010 in order to ask for a note with a specific return to work date. She was advised by her "doctor's office" (she does not state whom at her doctor's office) that it was impossible to provide a specific return to work date "given the nature of my illness". On September 29, 2010 she advised Mr. Bochynek that her doctor was unable to provide a specific return to work date, but Mr. Bochynek continued to demand a return to work date.

[33] She contacted her "doctor's office" again on September 29 and attempted to obtain a specific return to work date. Her "doctor's office" advised her that the doctor required a written request from the employer before he could provide her with a "satisfactory reply". The plaintiff then called Mr. Bochynek to advise him of her doctor's request. At first Mr. Bochynek refused to provide a written request, but eventually relented and stated that the plaintiff could pick up the written request on Thursday, September 30, 2010.

[34] The plaintiff states that on Thursday, September 30, 2010 she contacted Chesterfield and spoke with Ms. Mahadeo and advised her that she could not drive and was unable to pick up Chesterfield's written request for her doctor. Ms. Mahadeo told her not to worry and that she could come by another time to pick up the letter. The plaintiff testified on cross-

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examination that she did not think of asking Ms. Mahadeo to fax the letter to her home fax machine.

[35] On October 4, 2010, Mr. Bochynek telephoned her and terminated her employment. In an effort to save her job she immediately faxed the three doctors notes from her home fax number.

[36] As a result of her termination of employment, the plaintiff states that she has "suffered from further depression, mental distress and emotional anguish" and has been under the care of her treating physician since her termination. The defendant's conduct at the time of the termination and her illness from work related stress prevented her from seeking and obtaining employment until late 2011.

[37] It was not until January 2012 that the plaintiff's treating physician, Dr. Chen, advised that she had recovered sufficiently to return to work.

Defendant's Position

[38] The defendant takes the position that the plaintiff called in sick on Friday, September 10, 2010. She made no mention of taking time off to attend a doctor's appointment. Mr. Bochynek called the plaintiff on Monday, September 13, 2010 to ask if she would be returning to work the next day and she did not know. She did not tell Mr. Bochynek that she had visited a doctor or that the doctor had indicated that she could return to work on September 20, 2010. Mr. Bochynek advised the plaintiff that the company's policy required that she provide a doctor's note to support any further absence.

[39] Mr. Bochynek states that he also advised the plaintiff that if her absences continued she would need to provide a second doctor's note confirming that she was able to return to work. He states that the plaintiff told him that part of the reason she was unable to return to work was that she was unable to drive. He asked the plaintiff to call him back by or on September 21, 2010 to keep him informed.

[40] Mr. Bochynek telephoned the plaintiff on September 22, 2010 because he had not heard back from her. He expressed concern that she had still not provided a doctor's note to support her absence. She asked Mr. Bochynek what he wanted the doctor's note to say. He replied that it was not up to him to tell a doctor what to say in a note.

[41] Mr. Bochynek called the plaintiff again Tuesday, September 28, 2010 because he still had not received any doctor's note. She asked for a letter specifying what type of medical information should be included in the doctor's note. Mr. Bochynek states that he told the plaintiff that given her failure to provide any documentation to support her sick leave he expected her to return to work the next day.

[42] On Wednesday, September 29, 2010, the plaintiff did not come to work or contact the employer to let him know that she would not be coming in or provide the employer with a doctor's note to support her continued absence.

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[43] On Monday, October 4, 2010, having not heard from the plaintiff, Mr. Bochynek called her and told her that because she had not provided any doctor's notes to support her continued absences despite his repeated request and breach of the employment policy, her employment was being terminated for cause.

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[44] Mr. Bochynek states that after calling the office on September 10, 2010 to call in sick, the plaintiff did not call him or leave any messages regarding her absences or medical condition. He did not receive any doctor's notes from the plaintiff until she sent him the three doctors' notes on October 4, 2010 after she was dismissed.

[45] Mr. Bochynek's affidavit is supported by the affidavit of Ms. Mahadeo, who is no longer an employee of Chesterfield. Ms. Mahadeo stated that the conversations the plaintiff alleges to have had with Ms. Mahadeo did not occur. She also agrees that she was present when Mr. Bochynek spoke to the plaintiff on Monday, September 13, 2010, Wednesday, September 22, 2010 and Tuesday, September 28, 2010, and that the calls were as he describes in his affidavit. She specifically remembers Mr. Bochynek telling the plaintiff that she needed to provide the company with doctor's notes and that if she did not provide the notes or return to work she would be dismissed.

[46] While Mr. Bochynek testified that the employer policy requiring a doctor's note to support absences was a verbal or spoken policy, another employee, Ms. Soloveichik testified that she was aware of the Chesterfield Shop's policy requiring a doctor's note to support absences of more than three days, and that this policy was a written policy hanging on the lunchroom wall.

Procedural Issues

[47] At the outset of the motion before me the plaintiff brought a motion to strike two affidavits from the defendant's motion record on the basis that they were not properly part of the motion record because they were filed in contravention of Rule 39.02(2), which provides:

> A party who has cross-examined on an affidavit delivered by an adverse party shall not subsequently deliver an affidavit for use at the hearing or conduct an examination under rule 39.03 without leave or consent, and the court shall grant leave, on such terms as are just, where it is satisfied that the party ought to be permitted to respond to any matter raised on the cross-examination with evidence in the form of an affidavit or a transcript of an examination conducted under rule 39.03.

[48] The defendant conducted the cross-examination of the plaintiff on September 26, 2016. Accordingly, it cannot deliver an affidavit for use on the motion without consent of the plaintiff (which was denied) or leave of the court. The defendant did not bring a motion for leave to file these affidavits, but attempted to slip them in as part of its motion record. In the interests of justice I will consider the admissibility of these affidavits

notwithstanding the defendant's failure to seek leave in accordance with the rules, but there will be costs consequences for the defendant's failure to bring a motion for leave.

[49] The first affidavit is the supplementary affidavit of Tom Bochynek, sworn October 4, 2016. In this affidavit Mr. Bochynek states that he misspoke when he stated during his cross-examination on September 30, 2016, that the employment policy was "verbal". He states that the policy is actually written, and attaches a copy of the policy, which was also included in the defendant's affidavit of documents filed on February 19, 2015.

[50] Mr. Bochynek obviously could have included a copy of that written policy in his affidavit sworn on June 15, 2016 in support of the defendant's position on this motion. Indeed, Mr. Bochynek refers to the policy several times in that affidavit.

[51] Mr. White, counsel for the defendant, advises that the failure to include the written policy in the June 15, 2016 affidavit was inadvertent.

[52] The difficulty with simply permitting the defendant to file a new affidavit including the written policy on the eve of the motion for summary judgment is that it is prejudicial to the plaintiff, whose counsel conducted the cross-examination on the basis of the affidavit sworn on June 15, 2016 and the answer given on cross-examination that the policy was verbal. The cross-examination would have been very different if the written policy had been attached to the affidavit.

[53] I advised Mr. White that I would permit him to file the supplementary affidavit including the written policy if he would agree to an adjournment of the motion to permit the plaintiff to re-examine Mr. Bochynek on his new evidence and file a new factum if he wanted. The defendant would be responsible for costs thrown away as a result of this error. Given that choice Mr. White advised that he would not seek to file the supplementary affidavit but would rely on the affidavit evidence and cross-examination of Mr. Bochynek and Ms. Soloveichik. The plaintiff agreed to proceed on that basis.

[54] The second affidavit the defendant sought to file was the affidavit of Kathleen Murphy, a law clerk in Mr. White's office, dated October 5, 2016. This affidavit sets out the correspondence between counsel for the defendant and the plaintiff regarding the scheduling of cross-examination of the parties, including two of the defendant's affiants: Ms. Mahadeo (sworn September 7, 2016) and Mr. Evan Batherson (sworn June 20, 2016).

[55] The October 13, 2016 date for this motion for summary judgment was scheduled by the court six months earlier on April 13, 2016.

[56] The Murphy affidavit indicates that the defendant made several efforts commencing in July of 2016 to schedule mutually agreeable dates for cross-examinations, but received no response from the plaintiff's counsel. On September 20, 2016, plaintiff's counsel served a Notice of Examination on the defendants to conduct cross-examinations on September 27

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and 28 without consulting with counsel for the defendant. Defendant's counsel objected to those unilaterally scheduled dates. On September 22, 2016 - just 3 weeks before the scheduled date for the motion for summary judgment – the plaintiff proposed that cross-examinations be conducted on September 30, 2016. The defendant was unable to produce Mr. Batherson and Ms. Mahadeo (who do not live in Toronto) on such short notice.

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[57] The Murphy affidavit was made in response to para. 34 of the plaintiff's factum which asks the court to draw an adverse inference from the defendant's failure or refusal to produce Batherson and Mahadeo for cross-examination.

[58] The Murphy affidavit does not include any evidence in relation to the substantive dispute but is limited to the correspondence between counsel. Its sole purpose is to respond to para. 34 of the plaintiff's factum (filed October 3, 2016) and explain why these two affiants were not available for cross-examination on short notice. The Murphy affidavit is appropriately introduced at this stage of the proceedings and leave is granted pursuant to Rule 39.02(2) to add the Murphy affidavit to the defendant's motion record. The plaintiff's counsel confirmed that he was not seeking an adjournment with respect to the Murphy affidavit.

[59] The defendant argues that the plaintiff failed to exercise reasonable diligence in relation to the cross-examinations, and therefore no adverse inference should be made against the affiants for failure to appear at the cross-examination.

[60] Rule 39.02(3) provides:

> The right to cross-examine shall be exercised with reasonable diligence, and the court may refuse an adjournment of a motion or application for the purpose of cross-examination where the party seeking the adjournment has failed to act with reasonable diligence.

[61] Having reviewed the correspondence in the Murphy affidavit I agree with the defendant that in the circumstances of this case the plaintiff did not exercise reasonable diligence in exercising the right to cross-examine, and it would not be appropriate for the court to draw an adverse inference with respect to the Batherson and Mahadeo affidavits.

Analysis

[62] Rule 20.01 of the *Rules of Civil Procedure* provides:

> The court shall grant summary judgement if the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence.

[63] Rule 20.04(2.1) sets out the powers of the court on a motion for summary judgment:

> In determining under clause (2) (a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:
>
> 1. Weighing the evidence.
> 2. Evaluating the credibility of a deponent.
> 3. Drawing any reasonable inference from the evidence.

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[64] These powers have been extensively reviewed by the Supreme Court of Canada in the case of *Hyrniak v. Mauldin*, 2014 SCC 7 (CanLII) [2014] 1 S.C.R. 87.

[65] Even with these extended powers, a motion for summary judgment is appropriate only if the material provided on the motion "gives the judge confidence that she can find the necessary facts and apply the relevant legal principles so as to resolve the dispute" *Hryniak* supra, at para. 50. In *Hryniak* the Supreme Court held (at para. 49) that there will be no genuine issue for trial when the summary judgment process "(1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result."

[66] In order to defeat a motion for summary judgment, the responding party must put forward some evidence to show that there is a genuine issue requiring a trial. A responding party may not rest on mere allegations or denials of the party's pleadings, but must set out, in affidavit material or other evidence, specific facts showing that there is a genuine issue requiring a trial.

[67] The motion judge is entitled to assume that the record contains all of the evidence that would be introduced by both parties at trial. A summary judgment motion cannot be defeated by vague references as to what may be adduced if the matter is allowed to proceed to trial.

[68] Pursuant to Rule 20.02(1) the court may, if appropriate, draw an adverse inference from the failure of a party to provide the evidence of any person having personal knowledge of contested facts.

[69] This adverse inference is particularly appropriate in cases like the present in which a party is relying on a doctor's clinical notes in a motion for summary judgment. A party should not be permitted to "shield its expert from cross-examination through the use of an 'information and belief' affidavit of someone completely unqualified to testify on the issue" *Suwary v. Women's College Hospital*, [2008] O.J. 883 (S.C. at para. 30) and *Dupont Heating & Air Conditioning Limited v. Bank of Montreal*, [2009] O.J. No. 386

(S.C. at para. 51 and cases cited therein). See also: *Ghaffari v. Asiyaban*, 2013 ONSC 387 at para. 18 (CanLII):

> The clinical notes and records and the consultation note of Dr. Azadian in no way comply with the requirement on a summary judgment motion to place before the court expert evidence in a form that conforms with the Rules and the *Evidence Act*. At the very least, these records should have been put into an affidavit from the psychiatrist that could then have been cross-examined upon.

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[70] Where summary judgment is refused or is granted only in part, Rule 20.05 provides “the court may make an order specifying what material facts are not in dispute and defining the issues to be tried and order that the action proceed to trial expeditiously” and to give directions or impose such terms as are just.

[71] It is now well settled that “both parties on a summary judgment motion have an obligation to put their best foot forward” *Mazza v. Ornge Corporate Services Inc.*, 2016 ONCA 753 at para. 9. Given the onus placed on the moving party to provide supporting affidavit or other evidence under Rule 20.01, “it is not just the responding party who has an obligation to ‘lead trump or risk losing’” *Ipex Inc. v Lubrizol Advanced Materials Canada*, 2015 ONSC 6580 (CanLII) at para. 28.

[72] A plaintiff bringing a motion for summary judgment does not thereby reverse the onus of proof or alleviate her onus to prove the elements of the tort or breach of contract alleged or damages claimed. See for example, *Sanzone v. Schechter*, 2016 ONCA 566, at paras. 30-32, which confirms the initial evidentiary obligation borne by the moving party (in that case the defendant) on a summary judgment motion.

Factual Findings

[73] Taking into account the powers given to the court under Rule 20.04(2.1) I am able to make the following factual findings in relation to the disputed facts.

Medical Evidence

[74] The plaintiff alleges that she was “diagnosed by Dr. Chen as suffering from depression, hypertension and anxiety”. She also claims that as a result of her wrongful dismissal she has “suffered further depression, mental distress and emotional anguish”. She alleges that her illness “stemmed from work related stress and prevented her from seeking and obtaining alternative employment”.

[75] These allegations are unsupported by any evidence whatsoever. Dr. Chen did not file an affidavit on this motion. Even the medical documents that the plaintiff did file belie this claim. None of the doctor’s notes filed by the plaintiff include any such diagnosis. The hospital records relating to her emergency visit to Toronto Western Hospital on

September 17, 2010 filed by the plaintiff state that the plaintiff's "presenting complaint" was "vertigo" and the clinical notes state that she "came to ER because it takes 2 weeks to see family MD". The notes indicate that she should take gravol as needed for nausea. The triage assessment states that her chief complaint was dizziness and that she "reported intermittent dizziness x 2 weeks". There is no reference to depression, hypertension, anxiety, mental distress or emotional anguish, let alone any evidence linking such diagnosis to her dismissal from Chesterfield.

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[76] The medical report from October 27, 2010 states that she is a 44 year old female who presents with dizziness and imbalance. It states:

> Mrs. Sinnathamby states that approximately two months ago she developed upper respiratory tract infection for which she was started on antibiotics. That eventually resolved but subsequent to that she developed episodes of vertigo. She describes them as true vertigo, and positional in nature, worse when in a lying down position. She has no associated fluctuating hearing loss, no aural fullness and no tinnitus. She otherwise has no focal neurological features. In particular she has no symptoms consistent with vertebrobasilar insufficiency. Since having started the BETAHISTINE she does feel that her symptoms are improving.

[77] None of these records contain~~s~~ any reference to depression, hypertension, anxiety, mental distress or emotional anguish. All of her medical records up to and including July 2011 relate to dizziness and vertigo.

[78] There are some barely legible clinical notes commencing September 2011 that state that the plaintiff is "depressed", but in the absence of an expert affidavit to explain the relevance or significance of these cryptic references they do not meet the "best foot forward" obligation imposed on a party moving for summary judgment.

[79] The plaintiff places particular reliance on a clinical note dated January 18, 2012 that, again, is barely legible. The parts that can be read state:

> Sleeping better…overall better. Was terminated at work. Depressed at home. Will look for job.

[80] In the absence of an expert affidavit explaining the relevance and significance of these comments they do not support her claim for mental distress or her claim that she was unable to return to work prior to January of 2012. Even on its face the clinical note does not indicate that Dr. Chen advised her that she could not return to work prior to January 18, 2012; it appears that she made the decision to look for a job herself. The note appears to reflect what the patient has reported to the doctor and not what the doctor has diagnosed.

[81] Indeed, the plaintiff was aware that she required an affidavit from her doctor to support the allegations made in this lawsuit. Dr. Chen's final clinical note dated January 5, 2016 states "Upset/depressed re: wrongful dismissal, wants affidavit re: medical condition at the time – off work ~ 1year since Sep. 2010. Now has moved on – different job. Still has unresolved ill feelings".

[82] No such affidavit was provided, but Dr. Chen did provide the plaintiff with an undated note stating: "This is to certify that Suchitha may return to work as of January 18, 2012".

[83] The note, by itself, is not particularly helpful. It does not indicate whether or why she was not able to return to work earlier. It does not provide a date range of when the plaintiff was unable to work or why. It appears to be carefully drafted to say as little as possible. Since it is not part of an expert affidavit that can be cross-examined it cannot be used to support the plaintiff's claim on a motion for summary judgment.

[84] There is some dispute as to when this undated note from Dr. Chen was written. All of Dr. Chen's other notes were dated. The undated note was not included in the plaintiff's original affidavit dated April 4, 2016. On cross-examination she gave conflicting evidence, initially stating that she could not recall when she received the note or how it came into her possession. I agree with counsel for the defendant that the note was likely written by Dr. Chen around the same time as the plaintiff's reply affidavit (September 13, 2016) because Dr. Chen was unable or unwilling to provide an affidavit. Pursuant to Rule 20.02(1) I have drawn an adverse inference from the plaintiff's failure to provide an affidavit from Dr. Chen or any other medical expert.

[85] I have dealt with the plaintiff's medical allegations in some detail because they are allegations that are subject to objective verification. Other allegations (such as the dispute regarding the telephone calls between the plaintiff and Mr. Bochynek) are more difficult to resolve on an objective basis. It is clear from the medical records provided by the plaintiff that she complained of dizziness and was diagnosed with vertigo in September/October 2010. Yet her affidavit makes no mention of vertigo or dizziness, and claims instead that she was diagnosed with depression, hypertension, anxiety, mental distress and emotional anguish.

[86] Based on this objective inconsistency between her affidavit and her medical records I find that the plaintiff is not a credible or reliable witness. There are other parts of her affidavit evidence that are also unreliable (I will address these later), and at the end of the day I am inclined to believe Mr. Bochynek's versions of events rather then the plaintiff's.

Compliance with Company Sick Leave Policy

[87] Both Mr. Bochynek and Ms. Soloveichik testified that Chesterfield had a policy requiring a doctor's note to support absences of more than three days. Such a policy is neither unreasonable nor unusual. It is contemplated by s. 50(7) of the *Employment Standards Act, 2000*, S.O. 2000, c.41, which authorizes employers to require an employee who takes leave for personal illness "to provide evidence reasonable in the circumstances that the

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employee is entitled to the leave". Mr. Bochynek thought that it was a verbal policy; Ms. Soloveichik testified that it was a written policy hanging in the lunch room. While it does not really matter for the purposes of my analysis whether the policy was written or verbal, I find that such a policy did exist and was available to be viewed by the employees in the lunchroom.

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[88] I also accept Mr. Bochynek's evidence that he advised the plaintiff of this policy when he spoke to her on Monday, September 13, 2010 and asked her to send a doctor's note to support her sick leave. This strikes me as the natural reaction of any employer faced with an extended sick leave claim. The plaintiff's testimony that she was never told of this policy in any of her discussions with Mr. Bochynek is simply incredible and inconsistent with her testimony that Mr. Bochynek "demanded" a doctor's note with a return to work date. Whether or not the plaintiff knew of this employer sick leave policy before September 10, 2010, I find that she was made aware of the policy on September 13, 2010.

[89] By her own admission the plaintiff did not fax the three doctor's notes to her employer until after she had been dismissed on October 4, 2010.

[90] Contrary to her testimony, I find that she (or her husband) did not mail the September 10, 2010 doctor's note to her employer on or after September 13, 2010 as she claimed in cross-examination. I reach this conclusion for several reasons. The first is that it makes no sense that the note would be put in the mail rather than faxed (by either her or her husband) to her employer so that she could have a record that it was sent. She did fax all three notes on October 4, 2010.

[91] The second is that the September 10, 2010 doctor's note had a return to work date of September 20, 2010. Had Mr. Bochynek actually received this note prior to October 4, 2010 his conversation with the plaintiff would have been very different. He certainly would have asked why she was not at work on September 20, 2010 as indicated by her doctor. Yet even in her own testimony the plaintiff never suggests that Mr. Bochynek made any reference to the September 20, 2010 return date stated in Dr. Chen's September 10, 2010 note. Given the nature of the dispute between the parties I find it difficult to believe that Mr. Bochynek would not have referenced this letter and the September 20, 2010 return date in at least one of their conversations if he actually had a copy of it.

[92] The plaintiff suggests that Mr. Bochynek's reference to "a second doctor's note confirming that she was able to return to work" in his affidavit suggests that he already had the first doctor's note of September 10, 2010 when he spoke to her on Monday, September 13, 2010. Mr. Bochynek explained on cross-examination that the reference to the "second note" does not suggest that he already had a first note, but indicates that at this point he was expecting two notes: the first confirming that the plaintiff was sick, and a second confirming that she could return to work. I accept this explanation as consistent with the ordinary and contextual use of the language in his affidavit.

[93] It should also be noted that Mr. Bochynek stated that this conversation took place on September 13, 2010, and, even if I were to accept the plaintiff's testimony that she gave the note to her husband to mail as early as September 13, 2010, Mr. Bochynek could not have been in possession of the note on September 13, 2010.

[94] Given the plaintiff's failure to refer to dizziness or vertigo in her affidavit, I have no difficulty believing Mr. Bochynek's evidence that the plaintiff did not explain to him the nature of her illness or tell him that the first note indicated that she could return to work on September 20, 2010.

Summary of Factual Findings

[95] In my view this is an appropriate case in which to use the expanded fact-finding powers provided by Rule 20.04(1). Given the evidentiary record, including the affidavits and the transcripts of cross-examination, and given the presumption that the record contains all of the evidence that would be introduced by both parties at trial, I am confident that I can make the necessary factual findings that will permit me to apply the legal principles to reach a just and fair determination.

[96] On this basis I make the following findings of fact in relation to the facts in dispute:

[97] I accept that the plaintiff was sick when she called in sick on September 9 or 10 (it does not matter which). The doctor's note confirms that as of September 10, 2010 she was not able to return to work until September 20, 2010. At that time she was complaining of dizziness and was diagnosed with vertigo. The subsequent doctor's notes (September 17, 2010 and September 27, 2010) confirm that she could not return to work on September 20, 2010, and that a return to work date was uncertain.

[98] On Monday, September 13 Mr. Bochynek telephoned the plaintiff to discuss her absence and to ask if she would be returning to work the next day. She did not tell Mr. Bochynek that she had visited a doctor or that she had a doctor's note that indicated that she could return to work on September 20, 2010. She did not tell Mr. Bochynek that she was complaining of dizziness. The plaintiff did tell Mr. Bochnek that she did not know when she could return to work.

[99] On September 13, 2010 Mr. Bochynek advised the plaintiff that the company's policy required that she provide a doctor's note to support any further absence. I find that this policy did exist and it is a reasonable employer policy. Whether or not the plaintiff knew of the policy prior to September 13, 2010, I find that she was advised of the policy by Mr. Bochynek on that date.

[100] I find that notwithstanding three requests by the defendant employer (on September 13, 22 and 29) for a doctor's note, the plaintiff did not provide the employer with the doctor's notes until after she was dismissed on October 4, 2010. I find that she was warned on September 29, 2010 that if she did not provide a doctor's note or return to work she would be fired.

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[101] Those facts, together with the undisputed facts above are, in my view, sufficient to determine the legal issues in this motion for summary judgment. On this basis I reject the defendant's position that the case is not appropriate for summary judgment.

Legal Issues

[102] The legal issues in this case are:

a. Was the plaintiff's employment terminated for just cause?
b. If not, what notice should have been given?
c. Did the plaintiff mitigate damages?
d. Is the plaintiff entitled to punitive and/or moral damages?

Was the plaintiff's employment terminated for just cause?

[103] The defendant takes the position that the plaintiff's employment was terminated for just cause based on her failure to provide medical documentation to support her absence from work contrary to Chesterfield's sick leave policy and repeated requests from her manager for such documentation. While I have found that this is indeed the basis of her dismissal, it does not end the legal inquiry. The legal question is whether the employee's impugned conduct was sufficiently serious to justify her dismissal without notice (*McKinley v. BC Tel*, 2001 SCC 38 at paras. 34 – 35, 48-49). Depending upon the circumstances, alternatives to summary dismissal without notice (such as demotion or docking pay) must be considered by the employer before terminating an employee for cause (*McKinley* at paras. 52 – 53):

> Underlying the approach I propose is the principle of proportionality. An effective balance must be struck between the severity of an employee's misconduct and the sanction imposed.

[104] In considering the principle of proportionality the court must examine the nature and circumstances of the misconduct and the employer's response. In *Dowling v. Ontario (Workplace Safety and Insurance Board)*, 246 DLR (4th) 65; 2004 CanLII 43692 (ON CA) the Ontario Court of Appeal stated the principle of proportionality as follows (at para. 49):

> Following *McKinley*, it can be seen that the core question for determination is whether an employee has engaged in misconduct that is incompatible with the fundamental terms of the employment relationship. The rationale for the standard is that the sanction imposed for misconduct is to be proportional -- dismissal is warranted when the misconduct is sufficiently serious that it strikes at the heart of the employment relationship. This is a factual inquiry to be determined by a contextual examination of the nature and circumstances of the misconduct.

[105] In *Dowling* the Ontario Court of Appeal set out a three step analysis at para. 50:

1. determining the nature and extent of the misconduct;
2. considering the surrounding circumstances; and,
3. deciding whether dismissal is warranted (i.e. whether dismissal is a proportional response).

[106] Certain conduct, such as theft or other illegal activities "where the employee breaches the trust and honesty that constitute the very fabric of the employer's business" (*Leitner v. Wyeth Canada*, 2010 ONSC 579 (CanLII) at para. 11) will fall clearly into the serious misconduct category.

[107] In the present case the employee did nothing illegal or dishonest. She was a fourteen-year employee who called in sick when she really was sick and, on her doctor's advice, unable to come to work. By September 17, 2010, her doctor had indicated that her return to work date was uncertain. The defendant acknowledges that the plaintiff's misconduct was her failure to provide her employer with a doctor's note in a timely fashion.

[108] I am not questioning the reasonableness of the employer's request for a doctor's note to verify the claim for sick leave and request some indication when the employee might be returning to work. Employers have the right to request a doctor's note to verify sick leave claims *(Honda Canada Inc. v. Keays*, [2008] 2 SCR 362, 2008 SCC 39 (CanLII) at paras. 67 and 71). It is also reasonable for employers to request a duration estimate in order to make alternative arrangements to cover for the employee who calls in sick. Depending on the nature of the job, such alternate arrangements can be very challenging, particularly for smaller employers with fewer employees to fill in or cover when one employee becomes ill.

[109] On the other hand, I have been provided with no evidence as to why the doctor's note was required before October 4, 2010, or the consequences to this employer of receiving the note after that date. Mr. Bochynek was clearly frustrated and irritated by the plaintiff's apparent insubordination. In the absence of a doctor's note, I suspect that he was, understandably, dubious whether she was really sick. There is, however, no evidence from the defendant to suggest that the failure to provide the doctor's note prior to October 4, 2010 had any impact on the employer other than this irritation.

[110] Some assistance in establishing the seriousness of the plaintiff's conduct can be determined by reference to Chesterfield's own employment policy. Mr. Bochynek's June 17, 2010 letter to the plaintiff warned her that: "If your tardiness continues, the time will be deducted and we will be forced to return you to an hourly pay structure." If continued tardiness was not considered a matter sufficiently serious to warrant summary dismissal, it is difficult to see how failure to provide a doctor's note in a timely way would rise to that level. There were clearly alternatives to summary dismissal in these circumstances. For example, the employer can simply refuse to provide paid sick leave or disability

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benefits (if available) until the employee delivers a proper doctor's note. The plaintiff's failure to provide the doctor's note was given disproportionate significance relative to the plaintiff's long time service record.

[111] Given the letter of June 17, 2010, it was reasonable for the plaintiff to believe that some lesser penalty than termination would be imposed in these circumstances, or that termination would only follow a written warning. She received no further warning letters after June 17, 2010 and was not returned to an hourly pay structure.

[112] While the plaintiff disobeyed a reasonable company policy and a direct request from her manager, the requirement to provide a doctor's note in a timely way cannot be described as an essential condition of employment; nor would I consider an employee's failure to immediately comply with this policy a breach of faith or trust inherent in the work relationship.

[113] In my view, while the plaintiff's behaviour was inappropriate, her immediate termination of employment was disproportionate to the misconduct in question. Her failure to provide the doctor's note in a timely fashion did not amount to misconduct sufficient to justify the summary dismissal of a 14-year employee.

What notice should have been given?

[114] The parties agree that the principles for determining the appropriate notice period are to be determined by taking into account factors such as the character of the employment, the length of service, the age of the employee, the availability of similar or comparable employment, and the experience, training and qualifications of the employee (*Bardal v. Globe & Mail Ltd. (1960)*, 24 D.L.R. (2d) 140 (Ont. H.C.J.) at p. 145; *Minott v. O'Shanter Development Co.* (1999), 1999 CanLII 3686 (ON CA), 168 D.L.R. (4th) 270 (Ont. C.A.), at p. 293; *Honda Canada Inc. v. Keays*, [2008] 2 SCR 362, 2008 SCC 39 (CanLII) at paras. 28 – 32).

[115] The plaintiff submits that she is entitled to a reasonable notice period between 14 and 18 months given her age (45 years) and 14 years tenure with the defendant. She was employed in the area of customer service and sales support, and claims that she was forced to seek employment in a whole new field as a real estate agent. She also claims that she was unable to find alternate employment for 17 months following her termination "as a result of her medical condition, despite her best efforts".

[116] The defendant argues that if it did not have just cause to terminate the plaintiff's employment her claim for 14 to 18 months' notice is excessive, and the appropriate notice period is 8 to 10 months. The defendant points to factors including the plaintiff's salary ($37,500) and the nature of her non-managerial administrative role. There is no evidence that the defendant's customer service job required any particular educational qualifications. There is no evidence that the plaintiff ever sought employment prior to her December 2011 enrolment in the real estate agent course. And, given the complete lack of admissible medical evidence for the period following October 2010, there is no evidence

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to support her claim that her medical condition prevented her from obtaining employment for 17 months.

[117] In my opinion the cases relied upon by the defendant, which provide for an 8 to 10 month notice requirement for a non-managerial employee of 10 to 15 years, are closer to the mark. Having regard to the character of employment, her length of service, age at the time of dismissal and the lack of evidence relating to her medical condition or effort to find similar employment after October 2010, I find that the appropriate notice period for a person in her circumstance is 10 months.

Did the plaintiff mitigate damages?

[118] It is well established that in wrongful dismissal cases employees are obliged by law to mitigate the damages that flow from the wrongful dismissal by seeking an alternative source of income in the absence of a pre-determined fixed notice period or other agreement to the contrary. (*Bowes v. Goss Power Products Ltd*., 2012 ONCA 425 (CanLII) at paras. 23-25, and 34).

[119] The plaintiff acknowledges that she did not begin to look for alternative employment until January 2012, fifteen months after her dismissal. She claims that her medical condition prevented her from looking for work before that period. As already indicated, the plaintiff has filed no admissible medical evidence to support her claim that she could not work prior to January 2012.

[120] Indeed, the plaintiff began her real estate course in December 2011, one month before seeking alternative work in the customer service field and one month before she claims she was able to return to work. Based on this evidence I reject her contention that she "was forced" to seek employment as a real estate agent because she was unable to find employment in the customer service field.

[121] The plaintiff did not take any steps to mitigate her damages by seeking an alternative source of income prior to January 2012.

[122] In the absence of any admissible medical evidence to support this delay I conclude that it is appropriate to reduce the notice period for which the plaintiff is entitled to damages to six months.

Is the plaintiff entitled to punitive and/or moral damages?

[123] In *Honda Canada Inc. v. Keays*, [2008] 2 SCR 362, 2008 SCC 39 the Supreme Court of Canada set out the legal principles relating to the calculation of damages in wrongful dismissal cases. The case makes clear that punitive damages are available only in exceptional cases where the employer engages in conduct that is "unfair or is in bad faith" and "harsh, vindictive, reprehensible and malicious". The Court stated (at paras. 50, 56, 57, 68):

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> An action for wrongful dismissal is based on an implied obligation in the employment contract to give reasonable notice of an intention to terminate the relationship in the absence of just cause. Thus, if an employer fails to provide reasonable notice of termination, the employee can bring an action for breach of the implied term … The general rule… is that damages allocated in such actions are confined to the loss suffered as a result of the employer's failure to give proper notice and that no damages are available to the employee for the actual loss of his or her job and/or pain and distress that may have been suffered as a consequence of being terminated.
>
> … The contract of employment is, by its very terms, subject to cancellation on notice or subject to payment of damages in lieu of notice without regard to the ordinary psychological impact of that decision. At the time the contract was formed, there would not ordinarily be contemplation of psychological damage resulting from the dismissal since the dismissal is a clear legal possibility. The normal distress and hurt feelings resulting from dismissal are not compensable.
>
> Damages resulting from the manner of dismissal must then be available only if they result from the circumstances described in *Wallace*, namely 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".
>
> …Courts should only resort to punitive damages in exceptional cases … The independent actionable wrong requirement is but one of many factors that merit careful consideration by the courts in allocating punitive damages. Another important thing to be considered is that conduct meriting punitive damages awards must be "harsh, vindictive, reprehensible and malicious", as well as "extreme in its nature and such that by any reasonable standard it is deserving of full condemnation and punishment" …

[124] In the present case the plaintiff claims that Chesterfield acted in an unfair and callous manner in terminating her employment over the phone when she was sick and despite her long tenure. She also alleges that after she commenced the lawsuit against Chesterfield she was telephoned by Mr. Bochyneck who attempted to intimidate her into withdrawing her claim.

[125] The plaintiff further claims that Chesterfield misrepresented the reasons for the decision to terminate her employment because the defendant stated in the plaintiff's record of employment that the plaintiff had "abandoned" her position with Chesterfield. The

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defendant acknowledges that this statement in the record of employment is incorrect and, as indicated above, takes the position that the plaintiff was dismissed for cause.

[126] I do not find the presence of any grounds to support the plaintiff's claim for punitive and/or moral damages for the manner in which she was terminated. Firstly, there is no medical evidence to suggest that she suffered any mental distress beyond the "normal distress and hurt feelings resulting from dismissal" as a result of the manner of her dismissal.

[127] Based on the facts that I have found, the plaintiff's dismissal was the result of her refusal to comply with the employer's policy and her manager's repeated (September 13, 22 and 29) requests to provide doctor's notes to verify her sick leave claim. I have found that the employer's reaction to this refusal or delay was disproportionate, and should result in damages in lieu of notice. While disproportionate, the employer's conduct was not one of the exceptional cases that can be described as "harsh, vindictive, reprehensible and malicious". The employer did not know that the plaintiff had visited a doctor with complaints about dizziness, and did not know that the plaintiff had been diagnosed with vertigo. The plaintiff, for whatever reason, did not provide the employer with this information until after she was dismissed on October 4, 2010, notwithstanding three requests by the defendant employer. As in *Honda v. Keays* (at para. 76), the employer was sceptical and was taking legitimate steps to verify the sick leave claim. The employer did not know about the seriousness or true nature of the employee's illness because the employee was not providing the relevant documentation or information.

[128] Whatever the defendant recorded in the plaintiff's employment record, the employer was honest about its reasons for dismissing the plaintiff. Mr. Bochynek on behalf of the defendant, told the plaintiff that if she did not provide the doctor's notes in accordance with the company's sick leave policy she would be dismissed, and I have found that she was dismissed for exactly that reason. This was not a pretext for some nefarious or improper reason.

[129] The defendant has, throughout this litigation, taken the position that the plaintiff was dismissed for cause for failure to provide the doctor's notes, and the reference to "abandoned" employment in her employment record was a legal error by a layperson. There is nothing in the record before me to support the contention that the statement in the employment record was written in bad faith or with an intention to mislead the plaintiff or any other person. On this basis I reject the plaintiff's claim that this error gives rise to a claim for punitive damages.

[130] Finally, while Mr. Bochynek acknowledges that he telephoned the plaintiff when he received the Statement of Claim, he denies that he attempted to intimidate her into withdrawing her claim. He takes the position that he called her to ask her what she was looking for in terms of settlement. It is obvious that he did not agree to whatever amount she requested, and as a result the parties are in court. There is nothing improper about that. Given my previous ruling that the plaintiff is not a credible or reliable witness, I am

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disinclined to accept her evidence with regard to the nature of this telephone conversation. There is nothing *per se* inappropriate about Mr. Bochynek calling the plaintiff; “parties are always entitled to deal with each other directly” (*Honda v. Keays* at para. 77).

[131] Accordingly, the plaintiff’s claim for punitive and/or moral damages must be dismissed. The defendant’s conduct was neither egregious nor outrageous in the circumstances, and there is no evidence that the defendant acted in bad faith when it dismissed the plaintiff.

Conclusion

[132] Based on the foregoing, I grant summary judgment in favour of the plaintiff and I find that the plaintiff is entitled to damages for wrongful dismissal calculated on the basis of six months’ notice. According to my calculations this would amount to $20,904 based on six months’ salary and benefits and one half her annual bonus.

[133] If the parties are unable to agree on costs, the plaintiff may provide written submissions of not more than 3 pages plus costs outline and any offers to settle within 20 days of the release of this decision, and the defendant may file reply submissions on the same terms within 10 days thereafter.

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Justice R.E. Charney

Released: November 22, 2016

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CITATION: Sinnathamby v. The Chesterfield Shop Limited, 2016 ONSC 6966

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

SUCHETA SINNATHAMBY

Plaintiff

– and –

THE CHESTERFIELD SHOP LIMITED

Defendant

REASONS FOR DECISION

Justice R.E. Charney

Released: November 22, 2016

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