

2016 ONSC 4259  
Ontario Superior Court of Justice

Beaumont v. Lewis

2016 CarswellOnt 21759, 2016 ONSC 4259, 281 A.C.W.S. (3d) 265

**Janette Beaumont (Plaintiff) and Joshua Lewis and the Estate of Charlotte Scott,  
Deceased, by her litigation administrator, Robert J. Nagel (Defendants)**

J.C. Corkery J.

Heard: July 25, 2016  
Judgment: December 13, 2016  
Docket: 0088/11

Proceedings: leave to appeal refused *Beaumont v. Lewis et al* (2017), 2017 ONSC 4258, 2017 CarswellOnt 10705, B.A. Glass J. (Ont. S.C.J.)

Counsel: Gordon Marsden, for Plaintiff  
M. Greg Abogado, Andrew E. Franklin, for Defendants

Subject: Civil Practice and Procedure

**Related Abridgment Classifications**

Civil practice and procedure

[XXIV](#) Costs

[XXIV.4](#) Offers to settle or payment into court

[XXIV.4.a](#) Offers to settle

[XXIV.4.a.v](#) Miscellaneous

**Headnote**

Civil practice and procedure --- Costs — Offers to settle or payment into court — Offers to settle — Miscellaneous  
Parties were involved in action arising out of automobile accident — Parties arrived at settlement agreement offered by defendant that called for costs to be paid by agreement or as assessed — Defendant brought motion for order that costs be payable to date of service of settlement — Motion dismissed — Plaintiff entitled to costs to date of acceptance of offer, rather than date settlement offered — Rule 49.07(5) of Rules of Court has no application to offers to settle that dispose of costs — Allowing plaintiff costs to date of acceptance did not give costs holiday and did not discourage settlement offers from being made — Expert reports were related to extent of injuries and were compensable disbursements.

**Table of Authorities**

**Cases considered by J.C. Corkery J.:**

*Rosero v. Huang* (1999), 1999 CarswellOnt 1613, 44 O.R. (3d) 669, 96 O.T.C. 302 (Ont. S.C.J.) — considered

363066 *Ontario Ltd. v. Gullo* (2007), 2007 ONCA 785, 2007 CarswellOnt 7374, 88 O.R. (3d) 170 (Ont. C.A.) — referred to

**Statutes considered:**

*Courts of Justice Act*, R.S.O. 1990, c. C.43  
s. 131 — considered

s. 131(1) — considered

*Insurance Act*, R.S.O. 1990, c. I.8  
s. 266 — considered

**Rules considered:**

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

R. 49.02(1) — referred to

R. 49.03 — referred to

R. 49.04(1) — considered

R. 49.04(3) — referred to

R. 49.07(5) — considered

R. 49.07(5)(a) — referred to

R. 49.07(5)(b) — referred to

R. 49.10(2) — referred to

R. 57 — referred to

**Regulations considered:**

*Insurance Act*, R.S.O. 1990, c. I.8

*Court Proceedings for Automobile Accidents that occur on or after November 1, 1996*, O. Reg. 461/96

s. 4 — considered

MOTION by defendant regarding costs following settlement of proceedings.

***J.C. Corkery J.:***

1 This action settled on the first day set for trial after a jury was selected. The plaintiff accepted the defendants' offer to settle. The accepted offer included a term that the defendants pay the plaintiff's costs and disbursements "to be agreed upon or assessed." However, the parties have not been able to agree on costs.

2 The defendants bring this motion seeking an order that the costs be fixed payable by the defendants to the plaintiff for her reasonable, fair and proportionate costs from the date the action was commenced until the defendants' offer was served, and payable by the plaintiff to the defendants from the date the defendants' offer was served until it was accepted by the plaintiff. In the alternative, the defendants seek to have this court conduct an assessment of costs or, in the further alternative, that the matter be referred to an assessment officer with specific direction as to which disbursements are payable by the defendant, Charlotte Scott.

3 The action arose out of a motor vehicle accident that occurred in the City of Kawartha Lakes on March 24, 2010. The plaintiff had stopped her vehicle at a red light when it was struck from behind by a vehicle operated by the defendant, Joshua Lewis, and owned by the defendant, Charlotte Scott. The plaintiff claimed she sustained soft tissue injuries to her neck and back that developed into debilitating chronic pain, which interfered with her ability to function as a foster parent.

4 As a result of her injuries, the plaintiff claims that she was unable to work. To fund her litigation, she obtained a litigation loan at a high rate of compounding interest. By March 2016, when the defendants served the offer to settle, the balance owed by the plaintiff on her loan had grown to more than three times the original principal amount. From the plaintiff's perspective, the amount owing became an impediment to settlement.

5 On March 21, 2016, the defendants served on the plaintiff an offer to settle that contained the following terms:

1. The Defendant shall pay to the Plaintiff the sum of \$150,000.00 for all claims for damages inclusive of interest.
2. *The Defendant shall pay to the Plaintiff costs and disbursements to be agreed upon or assessed.*
3. This Offer to Settle expires one minute after the commencement of the trial of this action.

6 On May 16, 2016, the first day of trial, the plaintiff accepted this offer.

7 The plaintiff's position is that she is entitled to her costs up to when the offer was accepted. She argues that the defendant's position is in complete contradiction of the express language of the accepted offer to settle and asks that costs be assessed by an assessment officer.

8 The defendant takes the position that the plaintiff is only entitled to her reasonable, fair and proportionate costs from the date the statement of claim was issued to the date the offer to settle was served and that the defendant is entitled to its costs from the date the offer was served until it was accepted. The defendant asks that costs be fixed by this court.

9 Subject to the *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 131(1), the costs of a proceeding are in the discretion of the court. It may determine who pays and to what extent.

10 I would summarise the applicable rules as follows:

1. When exercising discretion under s. 131 of the *Courts of Justice Act*, the court may consider an offer to settle made in writing: r. 57, *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

2. A party may serve an offer to settle any claim in a proceeding on specified terms: r. 49.02(1).

3. An offer to settle may be withdrawn at any time before it is accepted: r. 49.04(1).

4. An offer that specifies a period when it may be accepted is deemed to have been withdrawn at the end of that period: r. 49.04(3).

5. Where an offer to settle is accepted that "does not provide for the disposition of costs", the plaintiff is entitled to costs assessed to:

a. the date the plaintiff was served with the offer, if the offer was made by the defendant: r. 49.07(5)(a); or

b. the date the plaintiff the notice of acceptance was served, if the offer was made by the plaintiff: r. 49.07(5)(b).

6. Where an offer is made by a defendant,

a. at least seven days before a hearing commences (r. 49.03),

b. is not withdrawn or expired before the hearing,

c. is not accepted, and

d. the plaintiff obtains a judgment as favourable as or less favourable than the terms of the offer,

then the plaintiff is entitled to partial indemnity costs to the date the offer was served and the defendant is entitled to partial indemnity costs from that date, unless the court orders otherwise: r. 49.10(2).

7. In exercising its discretion with respect to costs, despite rr. 49.03 and 49.10, the court may take into account any written offer to settle and when it was made: r. 49.13.

11 The defendants rely on the decision of this court in *Rosero v. Huang* [1999 CarswellOnt 1613 (Ont. S.C.J.)], 1999

CanLII 14806, in which Nordheimer J. considered a motion to determine costs in circumstances very similar to what is before this court. The plaintiff served an offer to settle on the defendant that included the term, “costs to be assessed or agreed upon.” The offer was left outstanding to “after the first witness is called at trial.” The plaintiff accepted the defendants’ offer the day before the trial was set to commence. The issue was whether the plaintiff was entitled to costs up to the date of the offer or the date of the acceptance. The late acceptance was significant, in Nordheimer J.’s view, because of the increased costs associated with trial preparation which the defendant would be required to bear if the later date of acceptance was enforced.

12 The defendants in *Rosero* argued that given the parties’ dispute, there had not been a disposition of costs in the offer. Therefore, r. 49.07(5) applied and thus the plaintiff was only entitled to his costs to the date the plaintiff was served with the offer. Nordheimer J. rejected this argument. He did not accept that costs were not disposed of such that r. 49.07(5) was engaged. However, even though r. 49.07(5) did *not* apply, he determined that the plaintiff was entitled to costs only to the date the offer was served.

13 His reasons were threefold. First, this result resolved what he perceived as an ambiguity between the alternative dates contained in r. 49.07(5) in a manner consonant with the provision dealing with offers served by plaintiffs. Second, to allow the plaintiff to rely upon the later date, the date of acceptance, would be inconsistent with the underlying purpose of settlement offers to bring litigation to early resolution and minimize costs by giving the plaintiff a “costs holiday.” A plaintiff, having the benefit of an offer that includes costs up to acceptance, could mull it over and continue to accrue costs at the expense of the defendant. Third, Nordheimer J. reasoned that determining that costs were payable to the date of acceptance would discourage offers being made or being accepted at an early stage contrary to the objective of settling matters as early as possible and minimizing the expense to the parties.

14 In this case, unlike *Rosero*, the defendants agree that r. 49.07(5) has no direct application. However, the defendants still argue that since the offer was made in accordance with the rules, the award of costs should be determined in harmony with r. 49.07(5). Relying on *Rosero*, the plaintiff is only entitled to receive costs until the date the Offer to Settle was served.

15 In my view, such an interpretation is wholly inconsistent with the rules and the plain meaning of the terms drafted by the defendants in their offer. With respect, I disagree with the conclusion reached by Nordheimer J. in *Rosero*.

16 First, there is no ambiguity in r. 49.07(5). It simply has no application to offers to settle that dispose of costs. As recognized by the court in *Rosero* and the defendants in this case, the subrule does *not* apply where an offer contains a term that, “The Defendant shall pay to the Plaintiff costs and disbursements to be agreed upon or assessed.”

17 Second, allowing the plaintiff costs to the date of acceptance of a defendant’s offer does not give the plaintiff a “costs holiday.” Parties are free to determine the terms of their offers. Offers to settle are revocable, even where there is a term stating that the offer shall remain open for acceptance for a fixed period. Rule 49.04(1) expressly provides that an offer may be withdrawn at any time before it is accepted: *363066 Ontario Ltd. v. Gullo*, 2007 ONCA 785, 88 O.R. (3d) 170 (Ont. C.A.). It is not necessary or appropriate for the court to inquire into the reasons an offer was not accepted earlier than it was.

18 Allowing the plaintiff costs to the date of acceptance of a defendant’s offer does not discourage offers from being made or accepted at an early stage. As a defendant is free to withdraw an offer at any time and a plaintiff never knows when an offer may be withdrawn, there is always an incentive to accept an offer before it is withdrawn. Rule 49.02(1) states that a party may serve an offer to settle on specified terms. In exercising its discretion under s. 131(1) of the *Courts of Justice Act*, the court should not reinterpret those terms in a manner that deviates from their plain meaning. That creates uncertainty that would discourage offers being made.

19 The defendant also claims that it is entitled to its costs from the date the offer was served until it was accepted. Having determined that the plaintiff is entitled to its costs to the date the offer was accepted, this argument need not be addressed. However, I note that this position is inconsistent with the accepted offer. The offer provides that the defendant shall pay the plaintiff costs. There is no rule that would suggest otherwise. As the offer was accepted, r. 49.10(2) does *not* apply.

20 I am satisfied that the expert reports of Dr. Garner, Dr. Gharsaa, Dr. Devlin, and Dr. Schacter provide evidence on the severity of Ms. Beaumont’s injuries and are relevant to the determination of how these injuries exceed the statutory threshold imposed by s. 266 of the *Insurance Act*, R.S.O. 1990, c. I.8. I agree with the submission of the plaintiff that these experts provide opinions on the nature of Ms. Beaumont’s impairment, the permanence of the impairment, the specific function that is impaired, and the importance of the specific function to her. Furthermore, they conclude that the impairment is directly sustained as a result of the motor vehicle accident on March 24, 2010. These expert reports comply with the provisions of s. 4 of *Court Proceedings for Automobile Accidents that occur on or after November 1, 1996*: O. Reg. 461/96 and are proper disbursements that are recoverable.

21 The plaintiff is entitled to her costs and disbursements from March 24, 2010 to May 16, 2016, on a partial indemnity basis. As the parties have not agreed on costs, the terms of the accepted offer to settle provide that costs will be assessed. Costs and disbursements in this matter shall be referred to an assessment officer.

22 If the parties cannot agree on the costs of this motion, brief written submissions may be made within 10 days for the plaintiff and 15 days for the defendants.

*Motion dismissed.*

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