COURT OF APPEAL FOR ONTARIO

CITATION: Elbakhiet v. Palmer, 2014 ONCA 544
DATE: 20140711
DOCKET: C56143

Rosenberg, Cronk and Tulloch JJ.A.

BETWEEN

Amira Khalid Mo Elbakhiet, Abdelrhman Elkh Ahmed and Maha Ahmed, a minor, and Niem Ahmed, a minor, by their Litigation Guardian, Abdelrhman Alkh Ahmed

Plaintiffs (Respondents)

and

Derek A. Palmer, Rockie Palmer, Metcalfe Realty Company Limited and Kingsway General Insurance Company

Defendants (Appellants)

Chris G. Paliare and Andrew K. Lokan, for the appellants, Derek A. Palmer and Rockie Palmer

Allan Rouben, for the respondents

Heard: January 20, 2014

On appeal from the judgment of Justice Giovanna Toscano Roccamo of the Superior Court of Justice, dated June 21, 2012, with reasons reported at 2012 ONSC 3666.

Rosenberg J.A.:

[1] The appellants, defendants in a motor vehicle accident action, appeal from the trial judge's costs award. Prior to the commencement of trial, the appellants made two offers to settle. While the respondents obtained judgment in their

favour following a jury trial, the appellants submit that the trial judge erred in failing to correctly apply rules 49.10(2) and 49.13, and Rule 57 of the *Rules of Civil Procedure,* R.R.O. 1990, Reg. 194. This appeal raises the following issues:

> (1) Was the appellants' second offer to settle made at least seven days before the commencement of the hearing as required by rule 49.10(2)?
>
> (2) Did the appellants prove that the respondents obtained a judgment as favourable as or less favourable than the terms of the second offer to settle?
>
> (3) Even if the second offer to settle did not meet the requirements of rule 49.10, did the trial judge err in awarding the respondents their costs on a partial indemnity basis in the amount of $578,742.28 despite the respondents' modest success at trial and the offers to settle made by the appellants?

[2] For the following reasons, I would allow the appeal and set aside the costs order of the trial judge.

THE FACTS

The Jury's Damages Award

[3] This appeal arises out of a jury trial for a motor vehicle accident that occurred on July 7, 2007. There was no dispute that the appellant Derek Palmer's motor vehicle rear-ended a vehicle being driven by the respondent Abdelrhman Elkh Ahmed. The issue at trial was the scope of the injuries suffered by the respondent Amira Khalid Mo Elbakhiet, who was a back-seat passenger.

Despite the fact that the collision occurred at low speed, Ms. Elbakhiet claimed that she suffered serious post-traumatic headaches, whiplash-related symptoms, depression and a traumatic brain injury leading to post-concussive syndrome. The respondents claimed damages of almost $2 million, including substantial amounts for loss of future earnings and cost of future care. The jury awarded damages of only $144,013.07 ("Judgment") allocated as follows:

Non-pecuniary damages	$25,000.00
Loss of past earnings	$0.00
Loss of future earnings	$87,852.75
Cost of future care	$6,160.32
Family Law Act claims	$25,000.00
Total	$144,013.07

[4] The jury's answers to the questions on the verdict sheet show that it had difficulty with Ms. Elbakhiet's credibility.

The Offers to Settle

[5] The respondents made one offer to settle on February 9, 2012 for $600,000, plus costs as agreed or assessed on a partial indemnity basis to the date of the offer, and on a substantial indemnity basis thereafter.

[6] The appellants made two offers. The first, dated November 15, 2011, was for $120,000, plus costs as agreed or assessed to the date of the offer. The second offer was dated February 9, 2012 and served on February 10, 2012. This

offer was for $145,000, plus prejudgment interest in accordance with the *Courts of Justice Act*, R.S.O. 1990, c. C. 43, and costs as agreed or assessed to the date of the offer.

THE APPLICABLE RULES

[7] As this case involves offers to settle, portions of Rule 49 are involved as follows:

> 49.03 An offer to settle may be made at any time, but where the offer to settle is made less than seven days before the hearing commences, the costs consequences referred to in rule 49.10 do not apply.
>
> …
>
> 49.10 (2) Where an offer to settle,
>
> > (a) is made by a defendant at least seven days before the commencement of the hearing;
> >
> > (b) is not withdrawn and does not expire before the commencement of the hearing; and
> >
> > (c) is not accepted by the plaintiff,
>
> and the plaintiff obtains a judgment as favourable as or less favourable than the terms of the offer to settle, 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.
>
> (3) The burden of proving that the judgment is as favourable as the terms of the offer to settle, or more or less favourable, as the case may be, is on the party who claims the benefit of subrule (1) or (2).
>
> …

> 49.13 Despite rules 49.03, 49.10 and 49.11, the court, in exercising its discretion with respect to costs, may take into account any offer to settle made in writing, the date the offer was made and the terms of the offer.

[8] This case also concerns the general principles a court considers when exercising its discretion to award costs, set out in rule 57.01(1):

> 57.01 (1) In exercising its discretion under section 131 of the *Courts of Justice Act* to award costs, the court may consider, in addition to the result in the proceeding and *any offer to settle* or to contribute made in writing,
>
> (0.a) the principle of indemnity, including, where applicable, the experience of the lawyer for the party entitled to the costs as well as the rates charged and the hours spent by that lawyer;
>
> (0.b) the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed;
>
> (a) *the amount claimed and the amount recovered in the proceeding*;
>
> (b) the apportionment of liability;
>
> (c) the complexity of the proceeding;
>
> (d) the importance of the issues;
>
> (e) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;
>
> (f) whether any step in the proceeding was,
>
> (i) improper, vexatious or unnecessary, or
>
> (ii) taken through negligence, mistake or excessive caution;
>
> (g) a party's denial of or refusal to admit anything that should have been admitted;

> (h) whether it is appropriate to award any costs or more than one set of costs where a party,
>
> (i) commenced separate proceedings for claims that should have been made in one proceeding, or
>
> (ii) in defending a proceeding separated unnecessarily from another party in the same interest or defended by a different lawyer; and
>
> (i) any other matter relevant to the question of costs. [Emphasis added.]

THE REASONS OF THE TRIAL JUDGE

[9] The trial judge first dealt with whether the offer served by the respondents on February 10 was made "at least seven days before the commencement of the hearing", within the meaning of rule 49.10(2)(a). Because of rule 3.01(1)(b), holidays including weekends and statutory holidays are not to be counted in calculating the seven days. It was conceded by the parties that the seven day requirement was met only if the hearing commenced on February 22.

[10] The trial judge held that in a jury trial, the time should only begin to run with the calling of evidence. The trial judge referred to several cases that have held to this effect. Jury selection, opening statements and rulings on objections by the parties to each other's opening statements were dealt with on February 21, 2012. The calling of evidence did not begin until February 22. She also noted that the respondents had 14 calendar days to consider the offer. Accordingly, she found

that the February 10 offer was made within seven days before commencement of the hearing, within the meaning of rule 49.10(2)(a).

[11] The trial judge then turned to the question whether the respondents obtained a judgment as favourable as or less favourable than the terms of the second offer to settle. It was the position of the appellants that the phrase “plus prejudgment interest in accordance with the *Courts of Justice Act*” in the offer was intended to mean prejudgment interest of 5% on the entire $145,000. If that were the case, the offer would exceed the jury’s verdict. Under the *Courts of Justice Act,* s. 128, only non-pecuniary damages attract an interest rate of 5%. Other elements of an award, such as past income loss and damages at that time would have had a lower interest rate. The trial judge was not satisfied there was a uniform practice that 5% should be applied to the entire offer. The trial judge noted that the terms of a Rule 49 offer must be fixed, certain and capable of clear calculation in order to attract the cost consequences. The trial judge appeared to find that the offer was uncertain and therefore the respondents should not be deprived of partial indemnity costs, subject to considerations under Rule 57.

[12] The trial judge found, at para. 35, that there were “no circumstances pertinent to the factors in Rule 57 that would justify departure from application of the costs consequences of Rule 49”. She rejected the position that even if the Judgment was only slightly better than the offer, the normal costs consequences should not follow. She stated, at para. 36, that only where “the party meets its

burden under Rule 49.10(2) and (3), subject to the court's jurisdiction to order otherwise" should there be costs consequences from not accepting the offer. The trial judge said, at para. 37:

> [N]either the Plaintiffs nor the Defendants clearly point to any factor in Rule 57.01, other than the result in the proceedings and the Offers to Settle, to guide me in the exercise of my discretion to award costs in this case.

[13] The trial judge dealt with what she identified as the relevant matters under Rule 57 as follows:

- *The Amount Claimed and Received*: while the jury preferred the appellants' theory of the case, based on reputable and ample medical opinion, the case was potentially worth considerably more than the jury awarded. In light of the body of medical evidence, the trial judge would "not exercise [her] discretion to penalize the Plaintiffs in costs for pursuing the case with the degree of care and attention it clearly demanded."
- *Complexity of Proceeding, and Importance of the Issues*: the parties agreed that the case involved complex issues of causation and significantly important issues.
- *Conduct Tending to Impact on Duration of Proceedings*: while the respondents called seven witnesses not on their witness list and filed three expert reports after a deadline ordered by the trial management Master, there should be no costs consequences. There was no suggestion that the

witnesses were unnecessary or that the appellants were prejudiced by the expert reports.

- *Improper, Vexatious or Unnecessary Steps*: there were no improper, vexatious or unnecessary steps.
- *Failure or Refusal to Admit what should have been Admitted*: neither party could be faulted for denial of or refusal to admit anything that should have been admitted.
- *Other Relevant Matters*: the trial judge took into account that if the appellants were given costs this would deprive Amira Elbakhiet of funding for ongoing psychotherapy and would have some bearing on her ability to complete her schooling.

Accordingly, the trial judge ordered the appellants to pay the respondents' partial indemnity costs throughout in the amount of $578,742.28, inclusive of disbursements and taxes.

THE ISSUES

[14] The appellants submit that the trial judge erred in finding that their offer to settle did not exceed the Judgment. They submit that there is a "general understanding" that an offer in the terms made by the appellants would bear interest at the most favourable rate of 5% for the entire amount. If there was any doubt, the respondents should have made inquiries as to the terms of the offer.

Alternatively, the trial judge should have allocated most of the offer to general damages in which case the offer would have exceeded the Judgment. They rely upon the reasons of the majority in *Rooney (Litigation Guardian of) v. Graham* (2001), 53 O.R. (3d) 685 (C.A.) and note that while the trial judge referred to *Rooney*, she only referred to the concurring minority reasons of Carthy J.A. Alternatively, the trial judge erred in failing to take into account that the Judgment was very close to the appellants' offer. This "near miss" should have been considered as required by rules 49.13 and 57.01. Finally, the trial judge also failed to apply the proportionality principle, given the respondents' very limited success as compared to the amounts sought.

[15] The respondents support the trial judge's order, except that they argue that the second offer to settle was not made at least seven days before the commencement of the hearing. They argue that the hearing began on February 21, 2012. They further submit that the offer was not certain and the appellants were unable to discharge the onus of proving that the offer was more favourable than the Judgment. They deny that there is any industry practice in relation to pre-judgment interest as claimed by the appellants. There is also no "near-miss" principle that applies to attract the costs consequences of Rule 49. The trial judge had the authority to reduce the respondents' costs but it was a matter of discretion for the trial judge and she did not act unreasonably. The trial judge considered all of the relevant factors under Rule 57. This was not a case where

the parties litigated a matter of negligible value out of all proportion to the amounts at stake.

ANALYSIS

"At least seven days before commencement of the hearing"

[16] Determining when a trial has commenced is a complex matter that depends upon the purpose involved in the inquiry. In general, cases in the trial courts of this province have supported the view that a jury trial commences for the purpose of Rule 49 when evidence has been heard. Some of the relevant cases are summarized by Sutherland J. in *Capela v. Rush* (2002), 59 O.R. (3d) 299 (S.C.J.). One contrary decision in *Bontje v. Campbell, Roy & Brown Insurance Brokers Inc.* (1994), 21 O.R. (3d) 545 (Gen. Div.), is discussed at some length in *Capela*. Sutherland J. in *Capela* pointed out that the judge in *Bonje* did not refer to the many other cases that held the trial only commenced with the hearing of evidence.

[17] The respondents point out that Rule 49 uses the term "hearing" rather than "trial". I agree with the appellants that the use of "hearing" merely reflects the fact that Rule 49 can apply to other types of proceedings, not just trials.

[18] In different circumstances the terms "trial" or "hearing" can have a broader or narrower meaning depending upon the purpose for which the term is used. For example, in *Sauve v. Pokorny* (1997), 35 O.R. (3d) 752 (C.A.), the court had to

determine the meaning of the phrase “presiding at a trial” in s. 108(7) of the *Courts of Justice Act*. That section provides as follows: “[t]he judge presiding at a trial may discharge a juror on the ground of illness, hardship, partiality or other sufficient cause.” The question in *Sauve* was whether that section applied after the jury was sworn and the trial judge and counsel had given their opening addresses. A majority of this court held that the judge was presiding at the trial for the purpose of that section and could proceed with five jurors. The court relied upon a similar decision in the criminal context in *R. v. Varcoe* (1996), 104 C.C.C. (3d) 449 (Ont. C.A.).

[19] The wording of Rule 49 and s. 108(7) are different and engage different interests. In the case of discharge of jurors, as in *Sauve,* the purpose of the power is to avoid abortive trials. The purpose of Rule 49, in contrast, is to encourage settlement.

[20] The weight of judicial authority, reviewed in *Capela*, suggests that a trial commences on the first day of evidence. This is also the view expressed in the leading text on costs, M.M. Orkin *The Law of Costs*, looseleaf, 2d ed. (Aurora: Canada Law Books Inc., 2011), at para. 214.5. This consensus has provided certainty to parties making Rule 49 offers, and such certainty furthers the purposes of Rule 49. A civil trial therefore commences within the meaning of Rule 49 when evidence has been heard.

[21] The appellants' second offer to settle, served February 10, 2012, was therefore made at least seven days before the commencement of the hearing.

Did the Offer exceed the Judgment?

[22] There are two issues involved in the question whether the second offer exceeded the Judgment. First, whether the offer was sufficiently certain or clear. Second, whether the appellants established that the offer did in fact exceed the Judgment.

[23] The clarity issue arises because the offer does not specify to what part of the judgment the interest rate should apply. As noted by the trial judge, there are different rates of interest for different types of claims. In *Rooney (Litigation Guardian of) v. Graham* (2001), 53 O.R. (3d) 685 (C.A.), Carthy J.A. in his concurring minority reasons suggested that an offer of that type could suffer from lack of clarity and be invalid. As he said, at para. 30:

> The inclusion of a general claim for prejudgment interest in an offer presents no problems to the trial judge because it appears as the same amount in both the offer and the judgment. However, if presented as a general claim (in the present case it was fixed at 10 per cent of $225,000) it does provide problems to the offeree. Section 128 of the *Courts of Justice Act* provides for different rates for different types of claims and, thus, whenever the claim is a mixed one there would be no means whereby the offeree would know the current amount being offered.

[24] Speaking for the majority, Laskin J.A. seemed more inclined to accept that this type of offer could be sufficiently clear. As he said, at para. 49:

> What I have said about ongoing costs provisions in an offer applies to provisions for prejudgment interest. Carthy J.A. suggests that even some provisions for prejudgment interest may deprive a party of the cost consequences of rule 49.10. Rule 49 offers routinely contain provisions for prejudgment interest, either a specified amount or, as in this case, a specified rate. The calculation of prejudgment interest ordinarily is not difficult. I see no justification for interpreting Rule 49 to preclude provisions for ongoing prejudgment interest in offers to settle.

[25] The problem in this case is that the provision for prejudgment interest in the offer neither provides for a specified amount nor a specified rate, because the rate varies depending upon the element of the claim. *Rooney* has, however, in my view resolved the approach to this uncertainty. As Laskin J.A. said, albeit in the context of a provision for solicitor and client costs, at para. 44:

> This "uncertainty" should not invalidate Rule 49 offers. I recognize that some courts have taken the opposite view. It seems to me, however, that in evaluating a Rule 49 offer any "uncertainty" that arises from a provision for costs should only be relevant in deciding whether the party relying on the offer has met its burden of proof under rule 49.10(3). In other words, uncertainty or lack of clarity in an offer may prevent a party from showing that the judgment it obtained was "as favourable as the terms of the offer to settle, or more or less favourable, as the case may be". [Citations omitted.]

[26] The respondents could know with sufficient precision whether to accept the offer. The uncertainty about the amount that would accrue for prejudgment

interest in the circumstances of this case was narrow and did not prevent the respondents from fairly determining whether to accept the offer or proceed with the trial.

[27] The real issue faced by the appellants is whether, in accordance with *Rooney*, they established that the offer exceeded the Judgment. As indicated, the appellants meet this argument on the basis that there is a general understanding that interest at 5% should apply to the entire offer. The trial judge was unaware of any such general understanding. The appellants have not offered any evidence of such a general understanding. The appellants refer to *Igbokwe v. Clarke*, [2004] O.J. No. 4667 (S.C.J.) where an offer used wording similar to the wording in the offer in the present case. But, that case, if anything, suggests that there was a lack of any such general understanding. In *Igbokwe,* in response to the offer, plaintiff's counsel wrote to defendant's counsel and received a statement that prejudgment interest would be payable on the entire amount offered for net damages at the rate of 5% per year. There is nothing in the reasons of Jennings J. on costs suggesting that there was any general understanding to this effect; it was the terms of the correspondence that established the interest rate.

[28] In this case, the Judgment and the offer were sufficiently close that only by making some arbitrary distribution of interest could the appellants establish that their offer exceeded the Judgment. They have not met the burden of proof

imposed by rule 49.10(3): *Onisiforou v. Rose* (1998), 41 O.R. (3d) 737 (C.A.), at p. 740.

Relevant Considerations for Setting the Costs

[29] The appellants submit that even if their offer was not shown to have exceeded the Judgment, the trial judge erred in awarding the respondents costs on a partial indemnity basis without regard to the terms of the offer and the amount of the award.

[30] It is only where a plaintiff's judgment is as favourable as or less favourable than the terms of the offer to settle that the defendant is entitled to costs in accordance with rule 49.10(2) "unless the court orders otherwise." This court has narrowly construed this exception and the defendant will almost always be entitled to the benefit of rule 49.10 where the defendant's offer complies with rule 49.10. A narrow construction of the exception underlies the high interest in encouraging settlement of cases: see *Niagara Structural Steel (St. Catherines) Ltd v. W.D. Laflamme Ltd.* (1987), 58 O.R. (3d) 773 (C.A.), at p. 777 and *Starkman v. Starkman* (1990), 75 O.R. (2d) 19 (C.A.), at p. 27. As Morden J.A. said at p. 777 in *Niagara Structural Steel*:

> [R]esort should only be had to the exception where, after giving proper weight to the policy of the general rule, and the importance of reasonable predictability and the even application of the rule, the interests of justice require a departure.

[31] I agree with the respondents that there is no “near miss” policy. A party that comes close to meeting the judgment is not thereby entitled to an award of costs as if they did provide a successful offer. This point was made clear in *PreMD Inc. v. Ogilvy Renault LLP*, 2013 ONCA 412 where the court applied the reasoning of *Niagara Structural Steel* and held, at para. 106, that “a court should depart from rule 49.10 only in exceptional circumstances, where ‘the interests of justice require a departure’”.

[32] For the appellants to succeed they must show that the trial judge erred in principle in respect to other aspects of Rules 49 and 57. In my view, she did. First, the trial judge gave no consideration to rule 49.13 which provides that despite, among other things, rule 49.10, “the court, in exercising its discretion with respect to costs, may take into account any offer to settle made in writing, the date the offer was made and the terms of the offer.” The trial judge gave lengthy reasons in considering the factors set out in Rule 57. She dealt at length with rule 49.10. But she made no mention of rule 49.13. Given that the offer to settle was virtually the same as the Judgment, this was a case where the court had to consider the impact of rule 49.13.

[33] As this court pointed out in *Lawson v. Viersen*, 2012 ONCA 25, at para. 46, rule 49.13 is not concerned with technical compliance with the requirements of rule 49.10. Rather, it “calls on the judge to take a more holistic approach.” The appellants complied with the spirit of Rule 49 even if they failed for technical

reasons to provide an offer that exceeded the Judgment. As held in *Lawson*, at para. 49, this was the type of offer that ought to have been given "considerable weight in arriving at a costs award."

[34] Second, the trial judge erred in principle in her approach to rule 57.01(1)(a), which asks the trial court to consider "the amount claimed and the amount recovered in the proceeding". The trial judge recognized that the jury preferred the defence theory of the case but she gave that factor no weight. Rather, she relied upon her own view of what the case was worth. As she put it in para. 38 of her reasons:

> There is no doubt that the amount recovered by the Plaintiffs in the proceedings falls well short of the amount claimed. However, even in closing submissions before the jury, defence counsel acknowledged that if the jury did not accept that Amira Elbakhiet suffered minor injury in the accident, and believed that Amira Elbakhiet's complaints were caused by the accident, an appropriate range of general damages would fall between $70,000 and $90,000. In view of the verdict, it is apparent the jury preferred the Defendants' theory of the case. *From the Plaintiffs' perspective, however, based on reputable and ample medical opinion, this case was potentially worth considerably more than the jury ultimately awarded. In light of the body of medical opinion supporting the Plaintiffs' cause, I would not exercise my discretion to penalize the Plaintiffs in costs for pursuing the case with the degree of care and attention it clearly demanded.* [Emphasis added.]

[35] The respondents sought damages of approximately $1.9 million, most of it in relation to loss of future earnings and cost of future care totalling

approximately $1.6 million. The jury awards for those items were approximately $94,000. The amounts claimed and the amounts recovered were completely different. Rule 57.01 required those facts to be taken into consideration, not discounted because the trial judge believed the case was worth potentially more. It was not fair and reasonable to award the respondents costs of almost $580,000 for a claim the jury valued at just under $145,000.

[36] In my view, because of these errors, the trial court's decision on costs cannot stand. The trial judge made an error in principle in failing to give any consideration to the offers to settle and her award is wholly disproportionate to the amounts recovered. The trial judge's decision to simply award the costs sought by the respondents failed to give any consideration to what amount would be fair and reasonable.

Proper Costs Award

[37] The appellants submit that the costs award should be set aside and an order made awarding the appellants their costs in an amount offsetting the amount of the Judgment and the respondents' partial indemnity costs to the date of the second offer to settle. In my view, this submission gives undue weight to the offer to settle and fails to take into account any of the other matters to be considered under Rule 57, which were resolved against the appellants.

[38] I would allow the appeal and reduce the costs to be paid by the appellants to $100,000. In my view, this amount takes into consideration all the factors to be considered under Rules 49 and 57, including the complexity of the matter and the manner in which the litigation was conducted, and in particular that the offer to settle was virtually the same as the Judgment. This amount is more consistent with the objectives of fairness and reasonableness and especially gives some attention to the need for some proportionality.

DISPOSITION

[39] Accordingly, I would allow the appeal, set aside the costs order made by the trial judge and reduce the award for costs to $100,000, inclusive of disbursements and HST. There was divided success on the appeal and I would order no costs of the appeal.

Released: “KF” July 11, 2014

“M. Rosenberg J.A.”
“I agree. E.A. Cronk J.A.”
“I agree. M. Tulloch J.A.”