CITATION: Goldmann v. Constable, 2026 ONSC 1175
COURT FILE NO.: CV-23-00711658-0000
DATE: 2026-02-24

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: GOLDMANN et al v. CONSTABLE

BEFORE: Associate Justice Eckler

DATE: February 24th 2026

COUNSEL: *L. Gruppuso* appearing for the defendant/moving party

J. Wadden appearing for the plaintiffs/responding parties

COSTS ENDORSEMENT

[1] In a decision released on January 9th 2026, this court granted the defendant's motion seeking an order requiring the plaintiffs to post security for costs. However, the defendant was not successful in obtaining the amount requested for security for costs which was $150,000.00 representing his partial indemnity costs through to trial.

[2] The court ordered that the plaintiffs post $30,000 for security for costs in stages with $10,000 being payable within 30 days of the release of the decision and $20,000 payable within 10 days of the commencement of the first examination for discovery The order made was without prejudice to the defendant's right to move for a further order on new materials after examinations have been completed.

[3] The parties were encouraged to settle the issue of costs of the motion failing which the parties were invited to deliver written costs submissions.

[4] The parties were unable to agree on the issue of costs and therefore delivered written costs submissions which I have reviewed.

Offers to Settle

[5] On November 5, 2024, the plaintiffs served an Offer to Settle (the "Plaintiffs' Offer") to place $50,000 in trust and to post further security before trial if necessary.

[6] On September 30th 2025, the defendant served an Offer to Settle (the "Defendant's Offer") proposing $120,000 in security, without prejudice to the defendant's ability to seek further security before trial.

[7] The plaintiffs further proposed resolving the matter by placing $25,000 in trust up to the examinations for discovery. This position was reflected in the Responding Factum of the plaintiffs for the motion. The defendant's position was that $150,000 should be posted as security.

Position of the Parties

[8] The defendant argues that he was the successful party on his security for costs motion and is therefore presumptively entitled to his costs. The defendant requests his partial indemnity costs of this motion, being $11,443.01, in accordance with the Costs Outline filed.

[9] The defendant argues that while the plaintiffs made an informal offer to settle on November 5, 2024, the offer does not constitute a Rule 49 offer and even if it did, the terms of that offer are not as favourable as the terms of the Order made, such as to attract any costs consequences.

[10] The plaintiffs argue that their offer to settle triggers the Rule 49.10 costs consequences as their offer met all of the Rule 49 requirements. The plaintiffs argue that they obtained a judgment as favourable as, or better than their Rule 49 offer and they are therefore entitled to partial indemnity costs to the date of the offer and substantial indemnity costs thereafter.

[11] Alternatively, the plaintiffs argue that the defendant is not entitled to the costs he seeks, as he was not entirely successful. The plaintiffs highlight that the defendant's claim to have been the successful party is incorrect. The plaintiffs maintain that the order made by this court awarding only $30,000 across multiple tranches, where the Defendant sought $150,000 cannot reasonably be characterized as a "success".

[12] In the further alternative, the plaintiffs argue that defendant's claimed costs are disproportionate.

Analysis and Disposition

[13] Subject to the provisions of an Act or the rules of court, costs are in the discretion of the court, pursuant to s. 131 of the *Courts of Justice Act,* R.S.O. 1990, c. C.43. The court exercises its discretion taking into account the factors enumerated in r. 57.01 of the *Rules of Civil Procedure,* R.R.O. 1990, Reg. 194, including the principle of indemnity, the reasonable expectations of the unsuccessful party, and the complexity and importance of the issues. Overall, costs must be fair and reasonable: *Boucher v. Public Accountants' Council for the Province of Ontario,* 2004 CanLII 14579 (Ont. C.A.), 71 O.R. (3d) 291, at paras. 4 and 38.

[14] A costs award should reflect more what the court views as a fair and reasonable amount that should be paid by the unsuccessful party rather than any exact measure of the actual costs to the successful litigant.: *Zesta Engineering Ltd. v. Cloutier*, 2002 CanLII 25577 (ON CA), para. 4.

[15] Ultimately, when assessing costs, a court is to undertake a critical examination of the relevant factors, as applied to the costs claimed, and then "step back and consider the result produced and question whether, in all the circumstances, the result is fair and reasonable". (*100 Bloor Street West Corporation v. Barry's Bootcamp Canada Inc.*, 2025 ONCA 447 at para.71) The overarching objective is to fix an amount for costs that is objectively reasonable, fair, and proportionate for the unsuccessful party to pay in the circumstances of the case, rather than to fix an amount based on the actual costs incurred by the successful litigant.

[16] The plaintiffs urge this Court to find that they obtained a judgment as favourable as, or better than their Rule 49 offer. They argue that although certain non-monetary terms of the offer and the order differ, the order obtained "need not be identical to the terms of the offer in order to be within Rule 49". Instead, "the standard to be applied is one of equivalence with the judgment; it need not be identical". (*Waxman v. Waxman* 2003 CanLII 32907 (ONSC) at para. 75).

[17] When determining whether or not an offer to settle is "as favourable as" or "more favourable" than the terms of an offer to settle, the Court in *Waxman* at paras. 74-76, highlighted the following:

> In *Hunger Project v. Council on Mind Abuse (C.O.M.A.) Inc*. (1995), 1995 CanLII 7145 (ON SC), 22 O.R. (3d) 29 (Gen. Div.), Macdonald J. held that a judgment in a defamation action was "more favourable" than an offer requiring an apology the court could not have ordered. He said at pp. 40-41:
>
> > The *Shorter Oxford English Dictionary* defines "favourable" as including that which facilitates one's purposes or wishes, and that which concedes what is desired. As mentioned earlier, my view is that the concept of favourability requires only comparability between the offer and the judgment, not equivalence and not correspondence.
> > …
>
> Evidence may be necessary to determine favourability depending upon the degree of divergence between the offer to settle and the familiar currency of judicial remedies. For example, in *Ligate v. Abick* (1992), 1992 CanLII 7677 (ON SC), 8 O.R. (3d) 49 (Gen. Div.), Austin J. as he then was gave the plaintiff an opportunity to call evidence to demonstrate that the judgment was more favourable than a structured settlement which the defendant had offered in an injury action. [emphasis added]
>
> In *Rueter v. Fraser Estate*, (2000) 143 O.A.C. 388 (Div. Ct.), an offer to settle included a term requiring the imposition of a permanent injunction, which the court did not order, O'Driscoll J. said at para. 39-40:
>
> > We agree with counsel for the Rueters that the judgment obtained need not be identical to the terms of the offer in order to be within rule 49. The overall terms of the offer must be assessed against the judgment

> obtained to determine whether the judgment after trial is as favourable as the offer. The standard to be applied is one of equivalence with the judgment; it need not be identical…
>
> In our view, the trial judge was in error in refusing to apply rule 49. The Rueters met the onus under rule 49.10(3) and showed that the offer under rule 49.10(1) was equivalent or better than the judgment obtained. [emphasis added]

E.M. MacDonald J. has since observed in *Gianfrancesco v. Junior Academy Inc.*, [2001] O.J. No. 5107 (S.C.J.) at paragraph 6 that the "fact that the plaintiffs' offer contains non-monetary terms is not fatal to the position that they now advance with respect to their entitlement to costs by reason of Rule 49.10(1)."

[18] In *Elbakhiet v. Palmer*, the Ontario Court of Appeal confirmed that "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". (*Elbakhiet v. Palmer*, 2014 ONCA 544 at para. 25)

[19] Pursuant to Rule 49.10(3), the plaintiffs bear the burden to demonstrate that their offers to settle were as favourable or more favourable than the order made. *Onisiforou v. Rose* (1998), 1998 CanLII 5798 (ON CA).

[20] Having regard to the above, in my view, none of the offers made by the plaintiffs serve to attract the cost consequences outlined in Rule 49.10. Leaving aside the issue of the timing of the plaintiffs' first offer, the plaintiffs' offer to resolve the motion by placing $25,000 in trust up to the examinations for discovery cannot be said to be an equivalent or more favourable result than the court's order flowing from the security for costs motion which required the plaintiffs to post $30,000 up to the examinations for discovery.

[21] The plaintiffs' offer to post $50,000 contemplated that if the action proceeds through to trial the plaintiffs would be willing to post additional security. Given that the offer to post $50,000 was for the time period up to trial, it cannot be said, in my view that the plaintiffs' offer serves to attract the Rule 49.10 costs consequences. In this regard, it is not clear from the offer made what portion of the $50,000 offer would have been attributed to the time period up to the examinations for discovery. Therefore, in my view the plaintiffs have failed to meet their burden to demonstrate that their offer is "as favourable as" or "more favourable" than the order made by this court on January 9th 2026, which contemplated security of $30,000 being posted up to the examinations for discovery.

[22] In the circumstances of this case, the court is mindful that "there is no near-miss" policy and the court "should depart from rule 49.10 only in exceptional circumstances where

the interests of justice require a departure". (*Elbakhiet v. Palmer,* 2014 ONCA 544 at para. 31). I do not find that such exceptional circumstances exist in the immediate case.

[23] However, Rule 49.13 provides that "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".

[24] The offer made by the plaintiffs in my view, "complied with the spirit of Rule 49" even if it failed to meet the technical requirements to engage the Rule 49.10 cost consequences. (*Elbakhiet v. Palmer,* 2014 ONCA 544 at para.33) This is the type of offer that the Ontario Court of Appeal has confirmed ought to be given considerable weight in arriving at a costs award. (*Elbakhiet* at para. 33)

[25] In my view, there was some divided success on this motion. The defendant sought security of $150,000 up to trial. The court ordered that security of $30,000 be posted up to the examinations for discovery and declined to order security up to trial at this time, but without prejudice to a further motion being brought.

[26] However, the court did ultimately grant the defendant's motion. In this regard, despite the divided success outlined above, I find that the defendant is entitled to be awarded costs of the motion on a partial indemnity basis having successfully argued the motion. In my view, the defendant's partial indemnity costs ought to be reduced in light of the fact that the plaintiffs made two offers to settle, both of which were very close to what the court ultimately ordered. This is therefore a case where the court must consider the impact of Rule 49.13. (*Elbakhiet* at para.32)

[27] Moreover, in my view, there should be a reduction to the costs awarded given the defendant's lack of complete success. The defendant received an order for security for costs for only a portion of the amount requested. (*2579394 Ontario Inc. v. Mammone*, 2019 ONSC 871 at para.10)

[28] Having regard to the above, I find that it is fair, just and within the reasonable expectation of the parties that the plaintiffs pay the defendant's partial indemnity costs of this motion fixed in the amount of $3500.00 inclusive of HST and disbursements within 30 days of the release of this decision.

[29] Order to go to reflect the wording of this endorsement.

_____

Associate Justice Eckler

DATE: February 24, 2026