COURT OF APPEAL FOR ONTARIO

CITATION: Jordan v. Commonwell Mutual Insurance Group, 2026 ONCA 795
DATE: 20261105
DOCKET: COA-25-CV-0371

Miller, Trotter and Osborne JJ.A.

BETWEEN

John Jordan and William Nielson

Plaintiffs/Responding Parties
(Appellants/Respondents by way of cross-appeal)

and

Commonwell Mutual Insurance Group and Finnegan Insurance Brokers Ltd.

Defendants/Moving Parties
(Respondents/Appellants by way of cross-appeal)

Michael Switzer, for the appellants

Kadey B.J. Schultz and Colin MacDonald, for the respondent Commonwell Mutual Insurance Group

Pasquale Santini, for the respondent Finnegan Insurance Brokers Ltd.

Heard: May 13, 2026

On appeal from the order of Justice Thomas J. Carey of the Superior Court of Justice, dated September 4, 2025, with reasons for judgment reported at 2025 ONSC 1086, and reasons for costs reported at 2025 ONSC 4173.

Trotter J.A.:

A. INTRODUCTION

[1] This appeal arises from a fire that destroyed a hunting camp on November 3, 2018. The plaintiffs,[1] joint owners of the property, had a cash value fire insurance policy with Commonwell Mutual Insurance Group ("Commonwell") in the amount of $55,000. They filed a Proof of Loss with Commonwell, claiming $51,000.

[2] This seemingly simple scenario has resulted in years of contentious litigation.

[3] Initial delays in adjusting the claim resulted from an Ontario Provincial Police investigation into the cause of the fire. The investigation ended favourably for the plaintiffs, following which, Commonwell initiated the appraisal process under s. 148, Statutory Condition 11, of the *Insurance Act*, R.S.O. 1990, c. I.8. The umpire appraised the cash value of the property at $32,918.26 (less the deductible and indemnity payments).

[4] The plaintiffs took the position that the appraisal was not binding and pursued further relief. On a motion before Justice Mary A. Fraser of the Superior Court on October 6, 2022 (three years into the litigation), she observed the following:

[1] The plaintiffs are the appellants on the main appeal. The defendants are the appellants on the cross-appeal. For clarity, I will refer to the parties as the plaintiffs and the defendants.

> Also, the parties have agreed to an order that the Appraisal Agreement dated February 23, 2021 regarding the premises located at 155 Christie Lake Road, Perth, Ontario is binding on the parties, except for the items that were specifically excluded in the appraisal and without prejudice to the other claim for damages sought by the Plaintiffs.

[5] When the limitation period to appeal the order of Fraser J. expired, Commonwell paid the plaintiffs the appraisal amount. The plaintiffs later sold the property for $23,000 and continued their action against the defendants. They alleged that Commonwell had breached the insurance contract and breached the duty of good faith in adjusting the claim. They alleged that their broker, Finnegan Insurance Brokers Ltd. (“Finnegan”), was negligent in failing to, among other things, advise them that the policy would not cover the replacement cost of the camp.

[6] At the trial, John Jordan was cross-examined on his affidavit. In re-examination, he claimed to have reached an agreement with Commonwell for payment in the amount of $50,000, and that Commonwell breached the agreement. The trial judge dismissed a motion brought by the plaintiffs to amend the Statement of Claim to seek this relief – the new claim asserted a new cause of action long after the limitation period had expired.

[7] Along the way, other ill-advised steps were taken. For example, even though the plaintiffs’ claim had been brought as a Simplified Procedure under r. 76 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, on October 3, 2022, the plaintiffs

filed an Amended Statement of Claim, seeking $10 million in damages, but limiting that claim to $200,000.

[8] After several days of discoveries and motions, the case was tried over the course of three days. At the end of the plaintiff's case, the defendants brought a motion for non-suit. The trial judge reserved judgment. Roughly 15 months later, he released a 1½ page Decision dismissing the action against both defendants. Six months later, in slightly longer reasons, he awarded both the defendants costs, each in the amount of $10,000, inclusive.

[9] The plaintiffs appeal the order dismissing their action. The defendants appeal the trial judge's costs award. For the reasons that follow, I would dismiss the plaintiffs' appeal. I would also grant the defendants leave to appeal the costs order, and allow the cross-appeal.

B. THE APPEAL FROM THE NON-SUIT MOTION

[10] In his Decision, the trial judge wrote that he was granting "the summary judgment motions" and dismissed the claims against both defendants. He found that "there is no credible evidence that supports the plaintiffs' position that the policy limits were not explained by Finnegan or that Commonwell acted in bad faith." The trial judge further found that, even if liability had been established, there was no evidence to support the claim for damages. As noted above, the umpire

appraised the value of the property at $32,918.26. Commonwell subsequently sent the plaintiffs' counsel a cheque for $31,918.26.[2]

[11] The plaintiffs submit that the trial judge: (a) applied the wrong legal test for a non-suit; (b) provided insufficient reasons; and (c) erred in concluding that the plaintiffs had failed to establish a *prima facie* case.

[12] I do not accept these submissions.

1. The Proper Legal Test Was Applied

[13] The trial judge erred when he made reference to "the summary judgment motions". The plaintiffs submit that this suggests the trial judge applied the wrong test, especially considering his reasons which they say reflect the broader test for summary judgment. The defendants contend that this was merely a typographical error – a slip of the pen – and that, to the contrary, when read in the context of the record before him, the trial judge's reasons reflect the test for non-suit. I agree with the defendants.

[14] At trial, the defendants were clear in the relief they were seeking. Their motion was styled as a non-suit motion. All parties filed written submissions, citing and quoting from the applicable non-suit cases. The trial judge's Decision is entitled, "Decision on Motions for Non Suit".

[2] This reflects the amount after $1,000 in deductibles was removed.

[15] Beyond labels, there is no indication in the trial judge's reasons that he applied the test for summary judgment – i.e., whether there was a genuine issue for trial: *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, at para. 34. It would have been ill-advised for counsel to bring, and the trial judge to determine, a summary judgment motion at the end of the plaintiff's case. By then, it was clear that there were genuine issues for trial. The question was whether there was any evidence to sustain the plaintiffs' claims for relief. This is what the trial judge determined.

[16] It would have been preferrable had the trial judge articulated the test for non-suit. For example, in *FL Receivables Trust 2022-A v. Cobrand Foods*, 2007 ONCA 425, 85 O.R. (3d) 561 Laskin J.A. articulated the test as follows, at para. 35:

> On a non-suit motion, the trial judge undertakes a limited inquiry. Two relevant principles that guide this inquiry are these. First, if a plaintiff puts forward some evidence on all elements of its claim, the judge must dismiss the motion. Second, in assessing whether a plaintiff has made out a *prima facie* case, the judge must assume the evidence to be true and must assign "the most favourable meaning" to evidence capable of giving rise to competing inferences.

However, looking at the substance of the trial judge's reasons, there is no basis to conclude that he failed to apply this straightforward test.

[17] Moreover, I am not persuaded that the trial judge's reference to "credible evidence" (see para. 10 above) suggests that he applied the wrong test. It was

mere surplusage. It is clear from his brief reasons that he asked himself whether there was any evidence to ground the plaintiffs' claims against either of the defendants. He further found that even if negligence were proven, "there is no evidence to support the claim for damages as the only evidence of the hunt camp value was that established by the Appraisal Award, $32,918.26" (emphasis added).

2. The Trial Judge's Reasons Were Sufficient

[18] The plaintiffs submit that the trial judge's reasons were insufficient. Insufficiency is not determined by the length of a judge's reasons, nor by the time that it took to render those reasons. The test for insufficiency is whether the impugned reasons frustrate meaningful appellate review. In *Levac v. James*, 2023 ONCA 73, 89 C.C.L.T. (4th) 27, Sossin J.A. reviewed how this determination is to be approached, at para. 76:

> The adequacy of reasons must be determined functionally based on whether they permit meaningful appellate review. If they do, then an argument that the reasons are inadequate fails, despite any shortcomings. Adequacy is contextual, and includes the issues raised at trial, the evidence adduced, and the arguments made before the trial judge. In general, reasons are to be read as a whole with the presumption that the trial judge knows the record and the law and has considered the parties' arguments. [Emphasis added; Citation omitted.]

See also *Denman v. Radovanovic*, 2024 ONCA 276, 495 D.L.R. (4th) 444, at paras. 49-50.

[19] The trial judge's reasons fell short of the ideal in several respects but were adequate for appellate review. The issue in this case was straightforward – it required a simple binary decision on whether there was any evidence or not. Considered in the context of the record as a whole, including the written and oral submissions of the parties, the trial judge's reasons have not frustrated appellate review. And, as set out in the next section, I agree with the trial judge that there was no evidence to support any of the claims advanced by the plaintiffs.

3. The Test for Non-suit Was Met

[20] At trial the plaintiffs submitted that Commonwell breached the insurance contract and acted in bad faith in adjusting the claim. The breach of contract claim is not pursued on appeal. This is likely due to Mr. Jordan's admission in his evidence that he knew he did not have a replacement cost policy. In any event, there was no breach.

[21] The plaintiffs' bad faith submission alleges such things as Commonwell failing to return Mr. Jordan's phone calls fast enough, Commonwell failing to diligently investigate the cause of the fire (including allegations that Mr. Jordan may have caused it), and that Commonwell delayed processing the claim while an investigation into the cause of the fire was on-going. However, while brief, the trial judge explained why he rejected these submissions:

> [Mr. Jordan's] position in proceeding in this case seemed to be motivated by the belief that the defendants and the

> police thought that he was responsible for the apparent arson at the property. There was no evidence at all that this was the case and that would have been inconsistent with the issuance of the $54,000 cheque to the plaintiffs.[3]

[22] The plaintiffs also assert that Mr. Jordan reached an agreement to settle with Commonwell for $50,000 which was subsequently breached. As noted above, the trial judge did not allow the plaintiffs to further amend their Amended Statement of Claim to include this claim for damages. The trial judge was thus not obligated to consider it in his reasons, and in any event the issue is not properly before us.

[23] The claim against Finnegan was that it was negligent in not explaining the policy limits to the plaintiff, leaving him underinsured. The trial judge explained that "[a]t trial, [Mr. Jordan] admitted that before the claim was issued, he knew he had a cash value only policy." Furthermore, on Mr. Jordan's evidence, he acknowledged that he did not discuss these issues with his broker and that he renewed the exact same policy more than once.

[24] Further, although it is recognized that an insurance broker/agent owes a duty of care to a prospective insured person, the plaintiffs failed to adduce any expert evidence to establish the requisite standard of care, nor did it proffer an expert opinion on whether it was breached in this case: *Krawchuk v. Sherbak*,

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[3] I accept the plaintiffs' submission that the trial judge erred in identifying a cheque in the amount of $54,000. The only cheque issued by Commonwell was for $31,918.26. In my view, this mistake is inconsequential, the point being that, if Commonwell believed that Mr. Jordan had set the fire, they would not have paid him anything.

2011 ONCA 352, 106 O.R. (3d) 598, at paras. 129-30, leave to appeal refused, [2011] S.C.C.A. No. 319. This was fatal to their claim against Finnegan.

[25] Further, Finnegan submits that, even if the plaintiffs were able to establish negligence, no damages would flow from this finding. In his trial affidavit, Mr. Jordan appended as an exhibit an appraisal of Geoffrey Gonneau, who valued the replacement cost of the hunt camp and outbuildings at approximately $140,000. The plaintiffs attempt to rely on this appraisal on appeal. It is not properly before us. With the consent of plaintiffs' counsel, it was struck out at trial, leaving only the appraisal award, which as I have already discussed, has been paid.

[26] I would dismiss the appeal from the order dismissing the action.

C. THE COSTS APPEAL

1. Background

[27] In their costs submissions before the trial judge, both defendants sought costs on a substantial indemnity basis in the following amounts: Commonwell, $116,286.80 (including $11,607.37 in disbursements); Finnegan, $97,714.39 (including $2,556.24 in disbursements). The trial judge rejected the submission that costs on a substantial indemnity basis was warranted and awarded each defendant $10,000, inclusive.

[28] Both defendants relied on their respective, multiple offers to settle that were rejected by the plaintiffs. They also asserted reprehensible conduct on the part of

the plaintiffs, such that they should be awarded costs on a substantial indemnity basis. Finnegan relied on the weakness of the plaintiff's case in challenging the binding findings of the Appraisal Award.

[29] The plaintiffs disputed the defendant's characterization of their conduct, relying on their own offers to settle. Moreover, the plaintiffs assert that a number of the defendants' settlement offers were accompanied by very short deadlines that prevented meaningful consultation with counsel.

[30] The trial judge concluded that the conduct of the plaintiffs fell "far short" of justifying substantial indemnity costs. As he said in his Costs Endorsement:

> I reject completely that plaintiff Jordan's conduct or that of his counsel was such as to require costs on the substantial indemnity scale. The filing of a multimillion dollar claim when the settlement attempts were unsuccessful was imprudent and counterproductive but did not, in my view, impact the length of the trial or complicate the issues.

2. Discussion

[31] On appeal, Commonwell seeks all-inclusive costs of "not less than $100,000" (which would be above the higher end of its costs on a partial indemnity basis), while Finnegan seeks costs on a partial indemnity basis in the amount of $65,994.01, all-inclusive.

[32] An appellate court should set aside a costs award only if the order is the product of an error in principle or the award is plainly wrong: *Hamilton v. Open*

Window Bakery Ltd., 2004 SCC 9, [2004] 1 S.C.R. 303, at para. 27; *Fernandez v. Norseman Inc.*, 2026 ONCA 716, at para. 24. A party challenging a costs award faces "a high threshold because appellate courts recognize that fixing costs is highly discretionary and that trial judges are best positioned to understand the dynamics of a case and to render a costs decision that is just and reflective of what actually happened on the ground in a case": *Algra v. Comrie Estate*, 2023 ONCA 811, at para. 48.

[33] Rule 57 identifies myriad factors that a decision-maker may take into account in determining whether costs should be ordered, and in what amount:

> **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;
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> (a) the amount claimed and the amount recovered in the proceeding;
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> (b) the apportionment of liability;
>
> (c) the complexity of the proceeding;
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> (d) the importance of the issues;
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> (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;
>
> (h.1) whether a party unreasonably objected to proceeding by telephone conference or video conference under rule 1.08; and
>
> (i) any other matter relevant to the question of costs. [Emphasis added.]

[34] The defendants submit that the trial judge almost singularly focused on the principle of proportionality, neglecting other important factors in this case. As the trial judge said:

> The enormity of the total costs sought here in relation to the amount sought by the plaintiffs and the length of the trial is staggeringly disproportional to the claim at stake as well as the reasonable time requirements for preparation and trial. There was no demonstrable need for four counsel to appear with attendant trial expenses on this uncomplicated case.

[35] I agree that the trial judge focused heavily on proportionality. While he did consider other factors enumerated in r. 57, in my view he failed to seriously consider several factors relevant to this case.

[36] For instance, the trial judge was correct to identify the shortness of the trial (only 3 days) as a factor for consideration. However, he overlooked the significant costs involved in the lengthy path to trial, which put the defendants to considerable expense in participating in four days of discoveries.

[37] The trial judge expressed his concern about the need for each of the defendants to be represented by two lawyers. This was evident at the outset of trial, where the very first thing he said was: “I can’t remember the last time I had six lawyers. Must be a lot of money involved”, to which plaintiffs’ counsel answered, “Definitely not”. As the trial judge noted, this was an uncomplicated case. I would defer to the trial judge’s assessment of the need for multiple counsel, even though second counsel for both defendants were not senior members of the Bar. But I would also observe that the plaintiffs were represented by two senior counsel, a fact not mentioned by the trial judge. Moreover, given that counsel for the defendants filed detailed Bills of Costs, the trial judge could have simply reduced the amount awarded by deducting the fees attributable to the second counsel for each defendant.

[38] The trial judge made passing reference to both sides making "offers to settle this out of court consistent with there being triable issues." The plaintiffs made five offers to settle; Commonwell, ten; and Finnegan, two. Given that the plaintiffs did not recover judgment, r. 49.10(2) was inapplicable in the circumstances: see *Dermann v. Baker*, 2019 ONCA 584, 436 D.L.R. (4th) 321, at para. 24, citing *S & A Strasser Ltd. v. Richmond Hill (Town)* (1990), 1 O.R. (3d) 243 (C.A.), at p. 245. However, rr. 49.13 and 57.01(1) allow a court to consider any offer to settle, including offers falling outside the scope of r. 49.10(2): *James v. HSBC Bank of Canada*, 2026 ONCA 440, at para. 30; *Kondaj v. Crossbridge Condominium Services Ltd.*, 2026 ONCA 636, at para. 86. This deserved further consideration by the trial judge.

[39] The defendants submit that the trial judge failed to properly characterize the conduct of plaintiffs' counsel during the litigation. The trial judge dealt with this matter head-on in his reasons (see para. 30 above). I see no basis to disturb that finding, especially his conclusion that any imprudent conduct (like the filing of an Amended Statement of Claim for $10 million) did not lengthen the trial.

[40] I would also reject the defendants' submission that the trial judge's reasons as to costs were insufficient. Given their position on the sufficiency of the trial judge's reasons on the non-suit appeal, it is somewhat surprising that they attack the trial judge's costs order on the same basis. However, again, brevity alone is not the metric; it is functionality for the purposes of meaningful appellate review:

see *More v. 1362279 Ontario Ltd. (Seiko Homes)*, 2023 ONCA 527, at para. 33. In my view, although brief, and while I respectfully disagree with how the trial judge dealt with some of the factors, his reasons reveal the path of reasoning to the result he reached.

[41] That being said, when looked at in its totality, the trial judge's assessment of costs resulted in an award that was clearly wrong and requires intervention by this court. Proportionality was an important part of the analysis, but some of the other considerations discussed above deserved more serious treatment. The principle of indemnity was neglected in this case, to the point of even denying Commonwell's claim to be reimbursed for its disbursements (which were not contested by the plaintiffs at trial, or on appeal). Experienced counsel on behalf of both defendants charged modest hourly rates, yet the trial judge's costs award woefully deprived their clients of reasonable indemnification.

[42] I would set aside the trial judge's costs award and order trial costs to Commonwell in the amount of $40,000 inclusive of HST, in addition to $11,607.37 in disbursements, inclusive. I would award Finnegan $40,000 in costs, inclusive of HST, in addition to $2,556.24 in disbursements, inclusive. Both amounts are on a partial indemnity scale.

D. DISPOSITION

[43] I would dismiss the plaintiffs' appeal from the trial judge's order dismissing their claims. I would grant the defendants leave to appeal the costs order, allow the cross-appeal, and would substitute the amounts reflected in para. 42, above.

[44] Having been completely successful, the defendants are entitled to their costs of both appeals. I would award Commonwell and Finnegan each $10,000, all-inclusive for the non-suit appeal, and each another $10,000, all-inclusive for the costs appeal.

Released: November 5, 2026

J.A.

I agree J.A.

I Agree. J.A.