2008 CarswellOnt 9472
Ontario Superior Court of Justice

Scott v. Scott

2008 CarswellOnt 9472, [2010] W.D.F.L. 3535, [2010] W.D.F.L. 3537, 189 A.C.W.S. (3d) 127

Patricia Anne Scott (Applicant) and John Frederick Scott (Respondent)

Rogers J.

Judgment: August 12, 2008
Docket: Newmarket FC-05-022922-00

Proceedings: additional reasons to *Scott v. Scott* (2008), 2008 CarswellOnt 9474 (Ont. S.C.J.)

Counsel: **Andrea Di Battista** for Applicant
Valerie Brown for Respondent
Sean Dewart for G. Allan, former counsel for Respondent

Subject: Family; Civil Practice and Procedure

Related Abridgment Classifications

Civil practice and procedure
XXIV Costs
XXIV.6 Effect of success of proceedings
XXIV.6.c Divided success
XXIV.6.c.ii Apportionment of costs

Civil practice and procedure
XXIV Costs
XXIV.7 Particular orders as to costs
XXIV.7.d Costs against solicitor personally
XXIV.7.d.iii Miscellaneous

Family law
XX Costs
XX.1 In family law proceedings generally
XX.1.h Scale of costs

Family law
XX Costs
XX.1 In family law proceedings generally
XX.1.k Offer to settle

Headnote

Family law --- Costs — In family law proceedings generally — Scale of costs
Husband and wife were married for 18 years and had 14 year old son — Husband was part owner in two businesses (family business and technology business) but submitted no valuation of business at trial — Hearing was chaotic and husband failed

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

to disclose documents until week before trial and in some cases did so during trial — Hearing was held to determine equalization, access, child support and spousal support, and trial judge made various orders — Success was divided at trial and both husband and wife made submissions on costs — Hearing was held to determine costs — Costs awarded — Wife was 66 per cent successful and husband was 33 per cent successful — Confusion and poor disclosure during trial was unreasonable behaviour and partially displaced presumption of success for husband and was accounted for by way of deduction of cost for trial time — Hourly rates claimed by wife's counsel were reasonable, though fees claimed for other person present at trial, who was not explained, were not allowed — Wife's bill was calculated at $62,000 with apportioned 66 per cent being $40,920 — Husband's counsel's hourly rate was reasonable but time claimed for trial was not and there was deduction for disclosure difficulties, duplication during examination and presentation of income information — Husband's bill was calculated at $44,050 with apportioned 33 per cent being $14,536.50 — There were no offers to settle so wife had less than full recovery, but only marginally so, as husband's poor disclosure made offer to settle difficult — Set off amount in favour of wife was $25,500.

Family law --- Costs — In family law proceedings generally — Offer to settle
Husband and wife were married for 18 years and had 14 year old son — Husband was part owner in two businesses (family business and technology business) but submitted no valuation of business at trial — Hearing was chaotic and husband failed to disclose documents until week before trial and in some cases did so during trial — Hearing was held to determine equalization, access, child support and spousal support, and trial judge made various orders — Success was divided at trial and both husband and wife made submissions on costs — Hearing was held to determine costs — Costs awarded — Wife was 66 per cent successful and husband was 33 per cent successful — Confusion and poor disclosure during trial was unreasonable behaviour and partially displaced presumption of success for husband and was accounted for by way of deduction of cost for trial time — Hourly rates claimed by wife's counsel were reasonable, though fees claimed for other person present at trial, who was not explained, were not allowed — Wife's bill was calculated at $62,000 with apportioned 66 per cent being $40,920 — Husband's counsel's hourly rate was reasonable but time claimed for trial was not and there was deduction for disclosure difficulties, duplication during examination and presentation of income information — Husband's bill was calculated at $44,050 with apportioned 33 per cent being $14,536.50 — There were no offers to settle so wife had less than full recovery, but only marginally so, as husband's poor disclosure made offer to settle difficult — Set off amount in favour of wife was $25,500.

Civil practice and procedure --- Costs — Particular orders as to costs — Costs against solicitor personally — General principles
Husband and wife were married for 18 years and had 14 year old son — Husband was part owner in two businesses (family business and technology business) but submitted no valuation of business at trial — Hearing was chaotic and husband failed to disclose documents until week before trial and in some cases did so during trial — Hearing was held to determine equalization, access, child support and spousal support, and trial judge made various orders — Success was divided at trial and both husband and wife made submissions on costs, and wife also requested costs from husband's former counsel — Hearing was held to determine costs — Costs awarded — Delivery of huge volumes of potential exhibits along with insistence that trial proceed was responsibility of counsel, not husband, as was witness list and repetition in examination — While there was no bad faith in counsel's behaviour, his lack of skill caused costs to wife without reasonable cause — Court fixed responsibility of counsel at 25 per cent of costs owing to wife — Set off amount in favour of wife was $25,500 — Husband to pay wife $19,125 plus GST and counsel to pay wife $6,375 plus GST.

Civil practice and procedure --- Costs — Effect of success of proceedings — Divided success — Apportionment of costs
Husband and wife were married for 18 years and had 14 year old son — Husband was part owner in two businesses (family business and technology business) but submitted no valuation of business at trial — Hearing was chaotic and husband failed to disclose documents until week before trial and in some cases did so during trial — Hearing was held to determine equalization, access, child support and spousal support, and trial judge made various orders — Success was divided at trial and both husband and wife made submissions on costs, and wife also requested costs from husband's former counsel — Hearing was held to determine costs — Costs awarded — Wife was 66 per cent successful and husband was 33 per cent successful — Delivery of huge volumes of potential exhibits along with insistence that trial proceed was responsibility of counsel, not husband, as was witness list and repetition in examination — While there was no bad faith in counsel's behaviour, his lack of skill caused costs to wife without reasonable cause — Court fixed responsibility of counsel at 25 per cent of costs owing to wife — There were no offers to settle so wife had less than full recovery, but only marginally so, as poor disclosure made offer to settle difficult — Wife's bill was calculated at $62,000 with apportioned 66 per cent being $40,920 — Husband's bill was calculated at $44,050 with apportioned 33 per cent being $14,536.50 — Set off amount in

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

favour of wife was $25,500 — Husband to pay wife $19,125 plus GST and counsel to pay wife $6,375 plus GST.

Table of Authorities

Rules considered:

Family Law Rules, O. Reg. 114/99
Generally — referred to

R. 2 — referred to

R. 18 — considered

R. 24(1) — considered

R. 24(9) — considered

R. 24(10) — considered

ADDITIONAL REASONS to judgment reported at *Scott v. Scott* (2008), 2008 CarswellOnt 9474 (Ont. S.C.J.), concerning costs.

***Rogers J.*:**

1 Submissions on costs have been received from the applicant wife, the respondent husband and counsel acting for former counsel for the respondent husband. The latter submissions are due to a claim made by the applicant wife that the former counsel for her husband should pay her costs.

Steps in a Case

2 Rule 24(10) of the Family Law Rules states as follows:

> COSTS TO BE DECIDED AT EACH STEP - Promptly after each step in the case, the judge or other person who dealt with that step shall decide in a summary manner who, if anyone, is entitled to costs, and set the amount of costs.

3 As pointed out by Ms Brown who now acts for the respondent, this judicial officer was the trial judge and can only deal with costs directly related to the trial. This includes the costs from the drafting of pleadings, from any steps where another judicial officer reserved the costs to the trial judge, from trial preparation and from the trial proper. The Continuing Record shows no costs were reserved to the trial judge and therefore that is not a consideration for this court.

Success

4 Rule 24(1) provides a presumption that the successful party is entitled to costs. If success is divided, the court is to apportion costs. A successful party may be deprived of some or all of their costs if found to have behaved unreasonably. The court must therefore determine success is this trial. The chart at schedule “A” hereafter sets out the success of the many issues.

5 There was no evidence at the trial as to when concessions were made; be it prior to trial or at the court room door. The court is therefore unable to determine if trial preparation time was expended on conceded issues.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

6 Considering the success as outlined in Schedule “A” and the relative importance of the successful claims to the overall result, the court finds the applicant was 66% successful and the respondent 33% successful.

7 The only unreasonable behaviour of either party was the confusing and time-wasting presentation of respondent’s case and the poor disclosure process of the respondent as discussed below. This unreasonable behaviour has partially displaced the presumption of success for the respondent and has been accounted for by way of a deduction of cost for trial time claimed by the respondent in these cost arguments.

Applicant’s Counsel’s Bill

8 As already indicated, the court shall only deal with costs in the step before the court.

9 The hourly rates claimed for Ms. Di Battista and the senior lawyer with whom she consulted were reasonable. The presence of the other person attending during the trial was never explained. The fees claimed for this person are not allowed.

10 The preparation time spent was reasonable and the trial work by the counsel for the applicant was efficient and to the point. As well as these amounts, the court shall allow $1000 for the preparation of pleadings.

11 The applicant’s bill is calculated at $62,000 with the apportioned 66% being $40,920.

Respondent’s Counsel’s Bill

12 The hourly rate is reasonable.

13 Many of the items presented to the court as potential exhibits were not proper exhibits but merely suggestions by the respondent or his counsel as to what the evidence should amount to. In fact, considerable time was spent during the trial pruning these items out of the proffered exhibits. Such calculations may have been useful to the respondent’s counsel as a work in progress as the evidence came in during the trial, but they should not have been sought to be introduced as evidence themselves.

14 In the judgment in this trial the court has already commented on the case as put by the respondent. Counsel for Mr. Allan, the respondent’s trial counsel, makes certain assertions about disclosure. Cost submissions are not a proper forum for the urging of fact finding. The facts in this trial as found by this court are in the judgment. The court concluded during the trial that voluminous material was presented to the lawyer for the applicant within the week prior to trial and then during the trial. Even if this material had already been disclosed, such an avalanche of material, much of which was found to be inadmissisble, so close to and during the trial would be impossible for the applicant’s counsel to sort out. And most certainly no one but Mr. Paul Williams, the respondent’s business partner, had any idea what was in the three bankers’ boxes he brought to court the day of his testimony. Nor did it assist the court for the witness, Mr. Williams, and counsel, Mr. Allan, to tell the court that any proof sought to back up Mr. William’s testimony was in the bankers’ boxes. What a litigant seeks to rely upon at trial should be disclosed in a timely and organzied fashion. There shall be a deduction from trial time billed for these disclosure difficulties.

15 During the trial the examination of witnesses by Mr. Allan was repetitive and at times completely irrelevant. There shall be a deduction of time billed for trial for this consideration.

16 The opening statement of the respondent claimed a current income of $48,666 which did not even consider expenses paid by his company on his behalf or his profit from the company, Sundown. Mr. Scott’s tax return bore little resemblance to his income. The presentation of the income information was confusing.

17 It is regrettable that Mr. Scott chose not to have proper valuations for his companies and his income. This would definitely have shortened the trial time and might even have led to resolution.

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

18 The respondent's claim for support already paid contained amounts that were clearly not proper for child support. These claims should not have been made or sustained. Again the presentation of such evidence wasted the court's time.

19 The bill of Mr. Allan shows trial work commencing October 10, 2007. That amount was for $1500. The next bill was for $46,350. The combined total is $47,850. Again, the court shall allow $1000 for the preparation of pleadings. The daily counsel fee of Mr. Allan appears to be $2400. As indicated above, the presentation of the respondent's evidence prolonged the trial unnecessarily. The court calculates two days were wasted. The fees are therefore reduced by $4800. The respondent's bill is calculated at $44,050 with the apportioned 33% being $14,536.50.

Rule 18 Offers

20 The applicant makes no mention of a Rule 18 offer. She therefore shall have less than full recovery but only marginally so. It would have been very difficult to frame an offer that dealt with the business at the time of the marriage as there was no expert valuation, and two valuations that had been done proximate to the marriage were not produced by the respondent as he said he could not find them. As well there was no reliable valuation of the subscription to the Maple Leafs tickets. The state of the disclosure on income was poor. Any offer would have been based on guess work. The court ought not to encourage such. The applicant shall have somewhat less than full recovery at $40,000.

21 The respondent made offers that cover the whole of the time of the fees considered herein. The offers were largely better than the judgment. He shall therefore have almost full recovery of $14,500.

22 The set off amount in favour of the applicant is therefore $25,500.

Applicant's Claim for Payment of her Costs by Mr. Allan

23 The applicant claims that all or a portion of her costs should be payable by the trial lawyer for the respondent, Mr. Gordon Allan, pursuant to Rule 24(9). The rule states as follows:

> COSTS CAUSED BY FAULT OF LAWYER OR AGENT - If a party's lawyer or agent has run up costs without reasonable cause or has wasted costs, the court may, on motion or on its own initiative, after giving the lawyer or agent an opportunity to be heard,
>
> > (a) order that the lawyer or agent shall not charge the client fees or disbursements for work specified in the order, and order the lawyer or agent to repay money that the client has already paid toward costs;
> >
> > (b) order the lawyer or agent to repay the client any costs that the client has been ordered to pay another party;
> >
> > (c) order the lawyer or agent personally to pay the costs of any party; and
> >
> > (d) order that a copy of an order under this subrule be given to the client.

24 The standard set in Rule 24(9) must be carefully considered. Ordering costs against a lawyer is a drastic step. The court should only consider such actions that fall clearly at the feet of the lawyer, not what might be on instructions from a client. However, this court is not of the view that there must be "bad faith" in the behaviour of the lawyer. The heading of this Sub Rule refers to "fault". While a heading cannot define the intent of a Rule, it is noteworthy that the word "fault" is the most extreme word in the Sub Rule. "Fault" denotes reponisibility for mistakes, for accidents, for errors. Fault does not imply malfeasance. The actual Sub Rule itself sets a lesser tone. The concerns in that Sub Rule are about running up costs without reasonable cause or wasting costs. There is no suggestion in the text of the Sub Rule of bad behaviour as in the concept of "bad faith".

WestlawNext. CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

25 The costs in question arose out of a trial. Family Law trials are not common because most matters settle. However, when the process moves to litigation, the parties should be able to assume their resources will not be wasted by counsel. This Sub Rule applies to a party's own lawyer wasting their costs, not just those of the opposite side. Both sides are entitled to an efficient use of trial time that bears some relation to the amount of resources at issue. If a lawyer wastes costs or runs up costs without reasonable cause, that counsel can be held to account by both their own client and the other side.

26 Sub Rule 24(9) is a different test than has been used in the rules for civil law cases because the drafters of the Family Law Rules recognized the peril wasting of costs could do to the resources of Family Law litigants. The Family Law Rules have made every effort to design a process that deals with cases "justly" as outlined in the Primary Objective in Rule 2. Counsel are to join in the endeavour.

27 The court is unaware of what transpired between Mr. Allan and Mr. Scott as to the conduct of the trial and the direction the evidence for the respondent took. However, the court is aware of the Rule 24(9) issues as observed during the trial. The consideration of responsibility by counsel shall only be such events and procedures as were observed by the court in relation to the overall conduct of the trial.

28 The delivery of huge volumes of potential exhibits as noted above with the accompanying insistence that the trial proceed was the responsibility of Mr. Allan, not his client. If he had already disclosed the items, he should have been able to say so and he should have been able to identify the disclosed items. Moreover, the inclusion in the volumes of the curious calculations as proffered exhibits caused the other lawyer and the court much wasted time.

29 The lack of clarity as to the respondent's witness list and the repetitive and prolix examination of witnesses was the responsibility of Mr. Allan. The lack of understanding of the rules of the admissibility of evidence can only fall at the feet of counsel.

30 In the case at bar, the court does not find "bad faith" in Mr. Allan's behaviour. However, his lack of skill as so clearly demonstrated in the face of the court did cause costs of the applicant to be run up without reasonable cause and to be wasted. This is precisely the problem Sub Rule 24(9) targets.

31 The trial time wasted by Mr. Allan during examination of witnesses, the procedural difficulties concerning the respondent's witness list, the lack of knowledge of the rules of evidence and the unnecessarily confusing presentation of potential exhibits by trial counsel for the respondent causes the court to fix the responsibility of Mr. Allan at 25% of the costs owing to the applicant.

32 The respondent Mr. John Scott shall therefore pay the applicant $19,125 plus G.S.T. and Mr. Gordon Allan shall pay the applicant $6,375 plus G.S.T. Said amounts shall be paid by September 1, 2008.

Costs awarded.

End of Document Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.