

**CITATION:** Hales, et al. v. Vaughan Build Ltd., et al., 2026 ONSC 2161  
**COURT FILE NO.:** CV-22-00689681-0000  
**DATE:** 20260413

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** ROSEMARY HALES, MEGAN KAVANAGH, JOHN DAVIDSON and  
PATRICIA THAW, Plaintiffs

**AND:**

VAUGHAN BUILD LTD, DANCAP PRIVATE EQUITY INC., DANCAP  
REALTY INC. and JOE DOE CONSTRUCTION FENCE INC., Defendants

**BEFORE:** Akazaki J.

**COUNSEL:** David W. Levangie and Shane Gould, for the Plaintiffs

David M. Trafford and Adam S. Beyhum, for the Defendants

**HEARD:** April 10, 2026

**REASONS FOR DECISION**

**OVERVIEW**

- [1] The plaintiffs moved under rule 49.09 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, for enforcement of a \$600,000 settlement following mediation on August 7, 2024. That she approaches her 90<sup>th</sup> birthday and suffers from life-altering injuries requiring a monthly expenditure of \$5,500 for assisted living expenses are factors both in the expedition of this decision and the discretionary second part of the analysis under the rule.
- [2] Rosemary Hales sued the defendants for compensation after being struck and knocked to the ground by an unsecured construction fence around the defendants' project site on the Rosedale High Street stretch of Yonge St. Through their insurance broker, the defendants reported the claim to the issuer of the Wrap-Up construction insurance policy, TruStar Underwriting Inc. TruStar instructed a firm of established independent insurance adjusters, Charles Taylor Adjusting, to manage the claim and to appoint Dolden Wallace Folick LLP to defend the action. The firm accepted the retainer on the understanding that a Lloyd's of London syndicate was the insurer, with TruStar as the coverholder and the syndicate's Canadian Managing General Agent. The litigation progressed in the usual manner, through pleadings and discovery, before the case settled with the assistance of mediator Frank Gomberg.
- [3] Beyond their contractual obligation to participate as party defendants, the defendants had left the conduct of the case to their insurer-appointed counsel at Doldens, Kate O'Malley.

They had no complaints about her handling of the defence and were relieved that she shepherded the claim to settlement. They were indifferent to the quantum of the settlement within policy limits, and they introduced no evidence of any concern about the settlement's effect on their insurance rating or increased premiums for future projects. They believed they had made adequate arrangements to compensate members of the public for construction injuries.

- [4] After the mediation, Ms. O'Malley and the adjuster repeatedly followed up with TrueStar's president, Daniel Moses, after the requisition of funds went unanswered. For several months, they both assumed that the payment delay originated with the Lloyd's insurance market in London. The Wrap-Up construction site insurance issued by TruStar did not refer to Lloyd's by name, although the capitalized name "Underwriters" would lead one to believe that a Lloyd's syndicate was the insurer. There was no evidence of either the adjuster or the law firm's practice to verify TruStar's status as Managing General Agent for a Lloyd's syndicate. I gleaned from Ms. O'Malley's affidavit that TruStar purported to hold the underwriting pen when the defendants bought the insurance.
- [5] On December 30, 2024, Ms. O'Malley learned from the adjuster that Mr. Moses had been sued by TruStar for fraud. The reasons of Osborne J. (as he then was) for the *Mareva* injunction in that action was reported in *Trustar Underwriting Inc. v. Moses et al.*, 2024 ONSC 6932. Mr. Moses allegedly would issue fake insurance policies and pocket the premium, or he would sell genuine policies and issue false renewal notices, to misappropriate the renewal premiums. The defendants then learned that the TruStar policy was one of these fake insurance policies. It mattered not to the defendants whether the allegations are true. For Vaughan and Dancap, no Lloyd's syndicate has wired \$600,000 to Ms. O'Malley's firm.
- [6] The defendants contended that, in the circumstances, there was no liability insurance. I was not convinced of that categorical conclusion. The placement of insurance through the defendants' broker and TruStar also entail agency law issues that, I was advised, are already being interpleaded in a separate proceedings. *Cronnox Inc. v. Lloyd's Underwriters*, 2018 ONSC 6437, at paras. 69-70, illustrated how promissory estoppel and agency law could not bridge a true absence of an insurance policy after the insured's cancellation of it before the claim trigger. Unlike Cronnox, Vaughan and Dancap paid for and received what they believed to have been a valid policy. Although the issue is not for me to decide, the burden of litigating the issue should rest with the defendants as the parties with proximity and privity via intermediaries to the putative insurer via the broker and the insurer's agent, TruStar. The burden of securing insurance coverage was the defendants'. They delegated that task to the broker. The only documentation produced on the motion did not include an insurance policy – only declaration pages. There appeared to be fodder for insurance litigation in the evidence the defendants filed. In contrast, Ms. Hales is an utter stranger to that agency chain. She has no standing to sue the broker, TruStar, or even Lloyd's.
- [7] Whether or not the defendants have recourse to insurance or to others, they do not wish to fund the settlement. They submitted that the court should allow the action to continue, as if there had been no settlement. In that regard, they argue Ms. Hales and her family would

be no worse off than they were before the session with Mr. Gomberg. Like the plaintiffs, they rely on rule 49.09, which reads:

49.09 Where a party to an accepted offer to settle fails to comply with the terms of the offer, the other party may,

(a) make a motion to a judge for judgment in the terms of the accepted offer, and the judge may grant judgment accordingly; or

(b) continue the proceeding as if there had been no accepted offer to settle.

[8] Ontario courts have applied a two-part test for rule 49.09. The court must first determine whether a settlement agreement was reached, based on ordinary contract law principles. If it was reached, the court must enforce it, unless the circumstances would render such enforcement unjust: *Coreslab Structures v. Vitmont Holdings*, 2025 ONSC 4544, at para. 27. Because of the public policy favouring finality, the circumstances of injustice sufficient to warrant the exercise of discretion are rare and must be compelling: *Srebot v. Srebot Farms Ltd.*, 2013 ONCA 84, at para 6.

[9] Following this test, the defendants opposed the motion on two grounds:

1. There was no settlement agreement, because it was tainted by fraud and concluded by a lawyer they did not retain.
2. If there was an agreement, it would be unjust to enforce it against the defendants in their uninsured capacities.

[10] In concluding that the court must enforce the settlement, I have found that the fraud alleged to have been committed by Mr. Moses jeopardizing the availability of liability insurance is not to be visited upon the innocent accident victim. I have also found that Ms. Hales' retainer within the typical Canadian tripartite relationship entailed an agency relationship with her insured clients and adorned her with apparent authority to bind the defendants to a settlement of the case with the plaintiffs.

[11] The justice of the case does not favour requiring the plaintiffs to carry on with the litigation. Rather, the burden of litigating to indemnify the defendants for the burden of funding the settlement rests with the defendants, because the source of the problem lay several layers within their management of the risk of a construction accident. It also does not lie in the mouth of the defendants, however diligent they may have been in obtaining liability insurance for the project, including the "John Doe" fence subcontractor, to unravel the settlement for the purpose of arguing that they could have achieved a more provident settlement or – less likely – that they could have defended the case on liability.

[12] I will now turn to my analysis of the two parts of the rule 49.09 test.

## WAS THERE A SETTLEMENT AGREEMENT WITH THE DEFENDANTS?

- [13] There was no dispute that the parties *appeared* to have settled the action at mediation. The plaintiffs and their lawyer attended the mediation with Ms. O'Malley and her adjuster client. The adjuster, in turn, had obtained authority to settle from Mr. Moses. They executed a mediation agreement with Mr. Gomberg warranting that the *parties* had authority to settle the case. The only reference to insurance appeared in the terms for avoiding a cancellation fee for the mediation.
- [14] The defendants argued that the fraud by Mr. Moses vitiated the settlement agreement, because he instructed the adjuster and defence counsel to settle for a monetary insurance indemnity payment for which there was no underwriter in London. The defendants played no part in the mediation. The *bona fide* belief of all participants in a valid Lloyd's policy empowered Mr. Moses to settle the case by the force of their perceived roles in the defence and negotiation process. From the defendants' perspective, they declined to participate because they would have perceived no exposure beyond the payment of the policy deductible and the impact on their future insurance ratings. In other words, they became party to the settlement by being lulled into the false belief that their participation and consent were unnecessary. If they had any concerns about the effect of an insurance indemnity payment on their insurability or ratings, they could hardly argue that Ms. Hales was at fault in the incident.
- [15] It is trite law that fraud by one of the contracting parties vitiates an agreement. The fraud allegations against Mr. Moses have not been proven. An allegation that a contract is void *ab initio* does not make it so until the court has adjudged it to be void: *Haas v. Gunasekaram*, 2016 ONCA 744, at para. 36. Osborne J.'s interlocutory injunction freezing Mr. Moses' assets only stands for the existence of a strong *prima facie* or arguable case. The instant action will not be the forum for a judgment on the alleged fraud perpetrated by TruStar's employee. The deception of one of the parties by a stranger to the agreement does not affect the validity of the agreement. The *non est factum* or mistake of fact defence to a breach of contract claim based on a third party's deception will generally be rejected. The courts will protect the contracting party in Ms. Hales' position, not only on the grounds of her innocence and lack of control over the defendants' insurance arrangements, but also because of the need for certainty: *Marvco Colour Research Ltd. v. Harris*, 1982 CanLII 63 (SCC), [1982] 2 SCR 774, at pages 786-787.
- [16] Between innocent parties, the party who provided the means and authority to commit the fraud is responsible for the legal consequences to the counterparty: *McKay v. Guardian Insurance Co. of Canada*, 1995 CanLII 1798 (BC CA), at para. 30. Here, the defendants' non-participation in the mediation enabled Mr. Moses to instruct the adjuster and defence counsel. These circumstances allow the defendants to pursue the parties to the relationship chain at least between them and TruStar. The lack of insurance cannot render the settlement unenforceable. The parties to this court proceeding exchanged valid promises to pay compensation and to release the defendants.

- [17] The defendants' second argument on this issue, that they did not retain Ms. O'Malley to represent them in the litigation and at the mediation, is inconsistent with the fact that they allowed her to plead their case on their behalf. This is a court proceeding. A litigant must abide by the court's rules. Under subrule 15.01(2), she was their lawyer, including at the mediation. Although outsourced to private mediation services, under rule 24.1 the mediation was mandatory and a formal step in the action. Ms. O'Malley deposed in her affidavit that the defendants did have some involvement in the defence of the injury claim and did interact with her during the proceeding. Because of her role as lawyer of record in this settlement, Ms. Hales and her lawyers were entitled to rely on defence counsel's ability to bind the defendants to a settlement of a proceeding before this court.
- [18] Whatever the subjective beliefs of the insured clients' representatives may be, the lawyer regulates the agency relationship in relation to professional ethics and responsibilities. The insurance defence lawyer's status as an officer of the court does not differ from that of one acting in the typical dyadic retainer. That said, the tripartite relation among insured, insurer and insurer-appointed defence counsel is an unusual example of a joint retainer, because the standard general liability insurance wording makes the insurer *dominus litis* ("master of the suit") with the insured's role one of party participation in interlocutory and trial process. Keeping the insureds apprised of steps in the litigation and securing their concurrence with a negotiated resolution remains integral to defence counsel's duty to the insureds.
- [19] Indeed, in Canadian law, defence counsel's primary duty remains to the insured client: *Loblaw Companies Limited v. Royal & Sun Alliance Insurance Company of Canada*, 2024 ONCA 145, at paras. 265-266; *Hopkins v. Wellington*, 1999 CanLII 5583 (BC SC), at paras. 8-9. There was nothing in the record to doubt Ms. O'Malley's evidence that she perceived no reason, as defence counsel, to address any coverage issues. That said, defence and coverage issues are not water-tight compartments. The state of the litigation and the nature of the potential issue can engage the need to navigate the potential conflict, so as not to prejudice the client's interests: *McNeil v. Kansa General International Insurance Company Ltd.*, 2000 CanLII 22279 (ON CA), at para. 61. Without commenting on her duties to the defendants, any deontological issue arising from the authority to choose a lawyer for the insured floats in the relational space occupied by Doldens, Charles Taylor, TruStar, and Lloyd's. The fact that she acted as the defendants' agent in concluding the settlement is but one important element of the problems that befell the defendants and which the defendants must pursue – but not against Ms. Hales.
- [20] The defendants' characterization of Ms. O'Malley's role at mediation as that of the insurer's lawyer is therefore incorrect. Rather, she was their lawyer and their agent to settle the litigation against the defendants. When her lawyers launched the suit, Ms. Hales was not to know whether insurance applied or, as many businesses do, self-insure for the whole amount in the statement of claim. It was the adjuster who operated under the mistaken belief that he was acting for a valid insurance principal. Ms. O'Malley took her instructions from the adjuster, as to the availability of insurance funds. Otherwise, her defence duty was to defend the litigation against the defendants.

- [21] It mattered not that, in the circumstances, Ms. O'Malley's awareness of or ability to inquire into any coverage issue was defeated by Mr. Moses' fraudulent conduct in the original policy purchase. From the perspective of Ms. Hales and her family, they were entitled to rely on the regularity of the retainer of defence counsel as in any instance of an agent with apparent authority or a company employee's conduct without regard to problems of indoor management. After the settlement, the plaintiffs executed their side of the bargain by providing their release. They could make plans for the future, based on the promise of funds coming in. If the court set the settlement aside, such an order would effectively transfer the defendants' loss from the alleged fraud to the person hospitalized by the negligence of the defendants' personnel or fence subcontractor. Such a transfer of the loss burden would be an injustice.
- [22] I therefore conclude that the parties to this litigation concluded a valid settlement at the August 7, 2024, mediation.

**WOULD REQUIRING THE DEFENDANTS TO FUND THE SETTLEMENT BE AN INJUSTICE?**

- [23] No. The defendants, not the plaintiffs, possess the procedural rights to pursue others for the provisional prejudice arising from the funding of the settlement. The courts have laid out the playbook for liability insureds to complete settlements and pursue insurers and others liable for underwriting disputes: *Cansulex Ltd. v. Reed Stenhouse Ltd.*, 1986 CanLII 898 (BC SC), at para. 151; *Jon Picken Ltd. v. Guardian Insurance Co. of Canada*, (1993) 1993 CanLII 17702, 17 C.C.L.I. (2d) 167 (ON CA), at para. 16. Without deciding the point against any candidates, the lens of the inquiry trains logically on the insurance broker's due diligence but may not stop there.
- [24] In contrast, the 89-year-old injured plaintiff has spent a year and a half trying to collect the settlement she and her family thought they had concluded with Mr. Gomberg's help. The defendants' argument that she can be returned to the position she was in the morning of August 7, 2024, is not compelling, especially having regard to proportionality of the time remaining in her life expectancy to endure uncertainty and financial strain.
- [25] The basic facts of the underlying case do not give the court much cause to perceive injustice to the defendants beyond some sympathy for their desire not to pay. However, our legal system applies the English common law of torts, including the maxim that one must find the victim as one finds her. An elderly woman assisted by her PSW and carrying home her shopping could not be blamed for lacking the agility to guard against a fence propelled into the sidewalk. In hindsight, an empty pledge of \$600,000 may have been a promise Mr. Moses was prepared to tender to achieve a quick settlement. This could have allowed him to avoid having to fund adjusters and lawyers in the more immediate interim. As Ms. O'Malley's evidence implied, overseas funding delays by Lloyd's syndicates may have survived money transfer innovations since insurance payment cheques were mailed and

transported to the New World by clipper ship. Such delays could have provided him cover and delayed the discovery of the empty insurance pot for several months.

- [26] Or, perhaps, the case was worth \$600,000 or more. The defendants did not counter the evidence of the plaintiff's psychiatrist regarding her ongoing post-traumatic ailments. Contrary to the defendants' argument, it would be patently unjust to reopen the proceedings so the defendants can one day defend a damages trial prosecuted by Ms. Hales' estate. As between the defendants and Ms. Hales, the provisional absence of indemnity for the defendants is their problem to contend with – not hers.
- [27] This is indeed a rare case. However, the rarity does not describe a compelling reason to allow the case to be reopened.

### **CONCLUSION AND COSTS**

- [28] Judgment shall issue for the plaintiffs, in accordance with the settlement.
- [29] The parties have uploaded their costs outlines to Case Center. If the parties cannot agree on the costs of the motion, the plaintiffs may deliver their costs submissions within seven days hereof. The defendants may deliver their costs submissions within fifteen days hereof. The submissions shall be limited to two pages or less. A copy of the submission shall be sent to my judicial assistant.

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Akazaki J.

**Date:** April 13, 2026