

CITATION: Barkhouse v. Benlea Group of Companies, 2026 ONSC 5615
COURT FILE NO.: CV-26-00000651-0000
DATE: 2026/10/05

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: JESSY BARKHOUSE, Plaintiff

AND:

BENLEA GROUP OF COMPANIES, Defendant

AND:

TOP GEAR AUTOMOTIVE and MAJESTIC AUTOMOTIVE
LIMITED, Third Parties

BEFORE: Justice M.D. McArthur

COUNSEL: R. Konduros, Counsel for the Plaintiff

A. Andaya, Counsel for the Defendant

B. Saini, Counsel for the Third Party Top Gear Automotive (Not in Attendance)

M. Salariu, Counsel for the Third Party Majestic Automotive Limited (Not in Attendance)

HEARD: October 1, 2026

ENDORSEMENT

Costs as a term where leave sought to amend a pleading

1. The Plaintiff sought to add Majestic as a defendant in this action for damages in a slip and fall accident. A current defendant in this action, Benlea, submits that due to the plaintiff's conduct, it unnecessary incurred costs in conducting a third party process and other related actions. Benlea does not oppose nor contest that the amendment be granted, but asks, as a term of leave, the Plaintiff be ordered to pay Benlea's costs associated with preparing and delivering its third party claim, its costs of this motion, and the anticipated costs for amending their Statement and Defence, and issuing a crossclaim to reflect the amended Statement of Claim.

The issue

2. The issue is whether the Plaintiff should be required to pay Benlea's costs as a term of leave being granted for the Plaintiff's amendment to the Statement of Claim.

Positions of the parties

3. Benlea submits that leave should be granted only on terms that require the Plaintiff to compensate Benlea for the reasonable costs caused by the Plaintiff's chosen procedural course. It submits the plaintiff had both the information and opportunity to add Majestic before pleadings closed where the Plaintiff had initially sued Majestic as the sole defendant in a previous action arising from the same loss, then discontinued that proceeding then commenced this action against Benlea alone.

4. The Plaintiff does not seriously contest the facts. It may have been argued that the indications from Benlea's counsel were conclusory and that the documentary basis was not provided by Benlea as to Majestic until the affidavit of documents of Benlea was provided. Plaintiff's counsel also does not dispute the request from Benlea's counsel to communicate and does not offer any explanation for the lack of response.

Factual Background

5. The Plaintiff first issued a Statement of Claim on March 9, 2026 in another action naming Majestic as the sole defendant. The Plaintiff then issued the present action on April 13, 2026, naming Benlea as the sole defendant. Both actions arise from the same alleged loss and plead identical facts against different defendants. The Plaintiff then discontinued the first action against Majestic without an explanation to Benlea why the initial action was discontinued.

6. On May 8, 2026, before Benlea served its Statement of Defence and, before pleadings closed, Benlea advised Plaintiff's counsel that it intended to seek instructions to issue a third party claim against Majestic and Top Gear. Benlea advised that Majestic and Top Gear were both tenants/occupiers of the property and that Majestic was believed to be responsible for winter maintenance in the parking-lot area.

7. Benlea's counsel invited Plaintiff's counsel to discuss the matter by telephone and expressly advised that it would seek costs if the Plaintiff waited until after a third party claim had been issued and pleadings closed before moving to add those parties. Plaintiff's counsel responded that, "[f]rom what I understand quite clearly, your client is responsible, no one else. So you had better serve your defence fast to avoid default."

8. The Plaintiff declined to amend at that time and maintained that Benlea was solely responsible. Benlea then issued and served a third party claim against Majestic and Top Gear. Not surprisingly, both of the third parties have now delivered pleadings, including Statements of Defence to the main action.

9. Unfortunately, Plaintiff's counsel did not take up Benlea's sensible invitation to discuss the issue. Later that same day, Benlea's counsel explained that it had voluntarily provided the information concerning Majestic and Top Gear so that the Plaintiff could consider amending the Statement of Claim to add the correct defendants. Benlea's counsel advised it would seek costs if the Plaintiff later moved to amend after the issuance of the third party claim. Benlea's counsel advised Plaintiff's counsel again that it did not believe the correct defendants had been named and specifically advised that the Plaintiff could remedy the pleading before pleadings closed, but that a later amendment would require Benlea to incur costs to respond to the amended pleading. Benlea further advised that it would rely on this correspondence in support of a costs request if the Plaintiff later sought an amendment after a third party claim was issued and pleadings closed.

10. Benlea served and filed its Statement of Defence on May 14, 2026. On May 25, 2026, Benlea issued a third party claim against Majestic and Top Gear. In July of 2026, Benlea delivered its draft affidavit of documents and Schedule "A" productions, including snow-removal invoices from Majestic to Benlea for the 2024–2025 and 2025–2026 winter seasons. Benlea subsequently advised Plaintiff's counsel that the arrangement with Majestic was verbal, that Majestic was responsible for plowing the property and that Majestic invoiced Benlea at the end of the winter season.

11. Top Gear delivered its Defence and Crossclaim to the third party claim and its Statement of Defence to the main action on September 2, 2026. Majestic delivered its Defence and

Crossclaim to the third party claim and its Statement of Defence to the main action on September 14, 2026.

12. On September 18, 2026, the Plaintiff served a Notice of Motion and Motion Record seeking leave to amend the Statement of Claim to add Majestic as a defendant, returnable on October 1, 2026. Benlea advised that it would seek instructions to oppose the motion on costs alone, relying on the May 8, 2026 correspondence. Benlea also requested that dates be canvassed with all counsel because the motion had been booked unilaterally by Plaintiff's counsel and was returnable in 13 days.

13. On September 24, 2026, Benlea confirmed that it takes no position on the Plaintiff's substantive request for leave to amend but opposed on the issue of costs alone.

Legal Provisions

14. Common courtesy may sometimes not be so common. Costs in this context are likewise. Leave means something well-beyond expecting nothing more to occur. No one should ignore nor discount common courtesy nor costs in our actions before the court. The objectives of every party and counsel in a court action must be on sensible management and procedural fairness throughout all stages of the action.

15. Rule 26.01 provides that at any stage of an action the court shall grant leave to amend a pleading on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.

16. Rule 57.01(1) provides that the Court, in exercising its discretion as to costs, shall consider the result in the proceeding and may consider, among other relevant circumstances: (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 mistake, negligence 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, -8- (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.

17. Rule 57.01(2) provides that the fact that a party is successful in a proceeding or a step in a proceeding does not prevent the court from awarding costs against the party in a proper case.

18. Rule 57.03(1) provides that the costs of a motion are in the discretion of the Court, subject to rule 57.03(2). *Courts of Justice Act* Section 131(1) subject to the provisions of an Act or rules of court, the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid.

19. This court has recognized that often no costs will be awarded against the moving party in an amendment motion, and likewise, the terms of the amendment would usually compensate the opposite party for additional costs incurred as a result of the amendment: See *Tilden v. St. Catharines (City)*, 2019 ONSC 7522. A party seeking leave to correct an error in its own pleading is seeking an indulgence and successfully obtaining that indulgence does not ordinarily justify an award of costs to the moving party: See *MacPherson v. 2155530 Ontario Inc. et al.*, 2022 ONSC 6822. However, in *Ross Dixon Financial Services Limited v. Fair River Capital Corporation et al.*, the Court considered a motion to add a defendant and amend the Statement of Claim after the close of pleadings and confirmed that, where the addition of a party has been overlooked, it may be appropriate to require the moving party to bear the costs of adding that party and amending the proceeding.

Discussion

20. This is not a case where the Plaintiff first learned of Majestic's potential involvement after pleadings had closed. The Plaintiff first sued Majestic in the first action as the sole defendant, then discontinued that action and commenced this action against Benlea alone.

21. Before pleadings closed in this action, Benlea expressly advised the Plaintiff of Majestic's and Top Gear's roles as tenants/occupiers and of Majestic's potential responsibility for winter maintenance. Benlea did more than identify the proper parties. It also invited Plaintiff's counsel to discuss the issue, advised that the information had been provided so the Plaintiff could amend before pleadings closed, and gave express notice of its intention to seek costs if the Plaintiff waited until a third party claim been issued to add the proposed parties as defendants. The Plaintiff declined to act on that information and maintained that Benlea was solely responsible.

22. In face of this, it would be obvious to all parties that Benlea would and did reasonably protect its position by preparing, issuing, serving and litigating a third party claim against Majestic and Top Gear. Many of the costs to then be incurred would, to any informed observer, be expected unnecessary and reformulated if, but more likely when, the Plaintiff sought the amendment to add Majestic, a party it already had familiarity with.

23. This court finds the Plaintiff's conduct - perfunctory, dismissive or otherwise - would reasonably and objectively be viewed to lead to delay and lengthen the proceeding and result in unnecessary steps and costs being incurred, as occurred here.

24. Costs in this context are compensatory, not punitive. In addition to those actions incurred as mentioned, Benlea's responding materials on this motion also arise from the Plaintiff's timing and request to obtain relief without addressing the costs occasioned by that timing. That is also a feature to consider in this matter.

25. For these reasons after review of the Bill of Costs submitted and where this court finds this is not a case of any significant complexity, Benlea shall have its costs fixed and payable by the Plaintiff in the amount of \$ 2,500 and payable within 30 days.

26. Leave is granted to the Plaintiff to amend the Statement of Claim as requested subject otherwise to the terms referred to above.

M.D. McArthur J.

DATE: October 5, 2026