

**SUPERIOR COURT OF JUSTICE – ONTARIO**

7755 Hurontario Street, Brampton ON L6W 4T6

**RE:** OKAFOR, Anthony, **plaintiffs**

**AND:**

WILSON, Michael, **defendant**

**BEFORE:** Justice C. Petersen

**COUNSEL:** JAYATILAKE, Anne, for the **plaintiff**  
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HARPER, Meredith, for the **defendant**  
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**HEARD:** December 10, 2025, in person

**ENDORSEMENT**

**INTRODUCTION**

[1] The plaintiff brings this motion for an extension of time to serve two expert reports. The defendant opposes the motion.

[2] Under r.53.03(1) of the *Rules of Civil Procedure*, a party who intends to call an expert witness at trial must serve on every other party a report signed by the expert not less than 90 days before the pre-trial conference. In this case, the plaintiff served the two disputed expert reports on March 25, 2025, four months after the pre-trial conference, which was held on November 28, 2024.

[3] The underlying action arose out of a motor vehicle accident that occurred on April 3, 2018. The two disputed reports consist of a future care costs assessment and

orthopaedic surgeon's report. They contain evidence that is not only relevant but critical to the plaintiff's case.

[4] Under r.53.03(4), the time provided for service of an expert report may be extended either on consent of the parties, by the judge or associate judge at the pre-trial conference, or by the court on a motion.

[5] The plaintiff served the defendant with his notice of motion for an extension of time just prior to the pre-trial conference on November 28, 2024. At that stage, the experts had not yet been retained and the reports did not exist. The associate judge adjourned the pre-trial conference to September 9, 2025, to give the plaintiff time to obtain the expert reports and either secure the defendant's consent to late-filing of the reports or bring a motion for an extension of time. The associate judge set the matter down for trial during the civil trial sittings commencing on January 12, 2026.

[6] The defendant did not consent to the late filing of the expert reports. The plaintiff therefore scheduled a motion hearing for February 20, 2025. The plaintiff requested an adjournment of the hearing to February 28, 2025, to which the defendant consented. The plaintiff then requested another adjournment of the motion hearing, and the parties agreed to a new date of April 10, 2025. The plaintiff failed to secure the April 10, 2025 hearing date with the court, so the motion hearing did not proceed that day. It was rescheduled, once again, to May 30, 2025, but the plaintiff did not file a confirmation form on time, so the motion was struck from the list. The motion hearing was again rescheduled to July 18, 2025, then further rescheduled to August 12, 2025. It is unclear from the record why the motion did not proceed on July 18, 2025, but there is no evidence that the defendant was to blame. Defendant's counsel was available and ready to proceed with the motion hearing on every scheduled date.

[7] The motion hearing did not proceed on August 12, 2025 for three reasons. First, the plaintiff served its supplemental motion record late in the day on August 11, 2025. Second, due to an oversight in the office of the defendant's counsel, the defendant's motion materials were not uploaded to Case Centre until the morning of August 12, 2025.

Third, the judge hearing regular motions that day determined that more than one hour would be required to hear the motion, so she referred the parties to Long Motion Triage Court on August 19, 2025. At Triage Court, the motion was scheduled to be heard on December 10, 2025.

### **ANALYSIS**

[8] As the motion judge, I have the authority, under r.53.03(4), to extend the time for service of the expert reports. The Rules do not specify criteria for the exercise of my discretion. The defendant urges me to adopt the criteria set out in r.53.08, which are discussed below. The plaintiff urges me to interpret r.53.03(4) liberally, in accordance with r.1.04, which states: “These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.”

[9] A party who fails to serve an expert report in accordance with the prescribed time limit cannot call the expert witness to testify at trial without first obtaining leave of the trial judge. Under r. 53.08, leave may be granted if the party responsible for the failure satisfies the judge that,

[10] there is a reasonable explanation for the failure; and

[11] granting the leave would not,

(i) cause prejudice to the opposing party that could not be compensated for by costs or an adjournment, or

(ii) cause undue delay in the conduct of the trial.

[12] Rule 53.08 was amended in 2022 to address a substantial problem with the way that civil litigation was being conducted in the Province of Ontario. The pre-amendment provisions of the rule required trial judges to grant leave to admit late-served expert reports unless prejudice could be demonstrated. There was a tendency of many counsel, sometimes for both parties, to arrive at a judicial pre-trial without their expert reports completed. This tendency created delays in the adjudication of disputes and resulted in

wasted Court time because a pre-trial could not meaningfully address the substance of the case without the expert reports.

[13] The change in r.53.08 was designed to address this issue. It was also designed to address the larger culture of delay that exists in the adjudication of civil disputes in Ontario. The amendment to r.53.08 signalled to the bar that delays in the service of expert reports would no longer be countenanced.

[14] Notably, when the legislature amended r.53.08 and inserted the criteria that are applicable to the exercise of a trial judge's discretion to grant leave, it chose not to cross reference and include those criteria in r.53.03(4). Consequently, a motion judge's ability to extend the time for service of an expert report does not strictly require satisfaction of the factors set out in r.53.08(1): *Seo v. Francis*, 2024 ONSC 4341, at para. 21. Those factors may nevertheless inform a motion judge's decision whether to extend the time for service under r.53.03(4): *Seo v. Francis*, 2024 ONSC 4341, at para. 26. Indeed, motion judges in this Court have adopted and applied those factors in several cases. See, for example, *Rosato v. Singh* 2025 ONSC 1798, at paras. 24-25, and *Quinn et al. v. Rogers et al.*, 2024 ONSC 1967, at para. 16.

[15] Defendant's counsel concedes that the factors governing the exercise of a trial judge's discretion under r.53.08 do not strictly apply and, if adopted, may be relaxed in the context of a pre-trial motion for an extension of time to file expert reports. However, she argues that, in the circumstances of this case, where the plaintiff has failed to pursue the motion with diligence, and the motion is now being heard only one month prior to the commencement of trial, the court should adopt and strictly enforce the criteria applicable under r.53.08.

[16] I agree that, in the circumstances, the factors applicable under r.53.08 should guide the exercise of my discretion in this case.

### **Reasonable Explanation**

[17] The first factor is whether there is a reasonable explanation for the plaintiff's failure to deliver the expert reports 90 days before the pre-trial conference that was held on November 28, 2024. In her factum, and during oral argument, plaintiff's counsel made submissions about the voluminous medical records that had to be reviewed by the experts in preparation of the reports, and she asserted that there were delays in obtaining the requisite documents for the experts. She argued that those delays were outside of the plaintiff's control. She also submitted that the limited availability of the experts made it impossible for the plaintiff to obtain the reports earlier. She urged the court to find that this provides a reasonable explanation for the delay.

[18] The evidence in the motion record does not support these submissions. Two affidavits were filed by the plaintiff. Both were sworn by Gowry Mallawa-Arachchi, a senior legal assistant in the office of the plaintiff's counsel. The first was sworn on June 13, 2025 and does not contain any information regarding the reason for the delay in obtaining and serving the expert reports. A supplemental affidavit was sworn on August 11, 2025 and contains only one paragraph providing the following explanation for the delay:

I acknowledge that the service of the expert reports were not in compliance with the timeline set out under rule 53.03(3), which 90 days before pre-trial for the plaintiff originally held on November 26, 2024. The reason for this is simple oversight by our office. The other reason has to do with the expert's professional commitments and limited availability and the Plaintiff was unable to secure an earlier appointment for the assessment. The Plaintiff served the reports promptly upon its completion and receipt.

[19] No particulars are provided about the lawyer's "oversight", which is cited as the primary reason for the plaintiff's failure to serve the reports in compliance with the Rules. No evidence is adduced about the plaintiff's efforts to secure an earlier appointment with the experts. The affidavits contain no evidence whatsoever about the need for the experts to obtain and review voluminous medical records.

[20] Even if the experts' professional commitments contributed to the delay, there is no evidence of efforts made by plaintiff's counsel to retain the experts prior to the pre-trial conference. Plaintiff's counsel admitted as much during the motion hearing. She stated that they had hoped the action would settle at the pre-trial, so that the expense of expert reports could be avoided. That is not "simple oversight" but rather a strategic litigation decision that amounts to deliberate non-compliance with the Rules. The delay in this case was not caused by circumstances beyond the plaintiff's control. Nor was it caused by an inadvertent mistake made by counsel regarding a delivery deadline. Rather, the delay was caused by counsel's conscious decision to assume the risks associated with non-compliance with the Rules as a cost-saving measure.

[21] Plaintiff's counsel argues that the plaintiff ought not to be penalized for his lawyer's mistake particularly where there is no prejudice to the other side. She relies on the decisions of this court in *Quinn v. Rogers*, at paras. 25, 26 and 29; *Seo v. Francis*, at para. 27; and *Rosato v. Singh*, 2025 ONSC 1798, at paras. 31-33. Those cases articulate the principle that a lawyer's inadvertence in meeting a deadline required by the Rules can constitute a reasonable explanation for a failure to meet the deadline. However, inadvertence was not the cause of the delay in this case. Rather, plaintiff's counsel made a strategic decision not to comply, hoping that the action would be resolved through a settlement without incurring the expense of expert reports.

[22] I find that the plaintiff has not provided a reasonable explanation for the delay.

### **Prejudice to the Defendant**

[23] The plaintiff argues that there has been no prejudice caused to the defendant because the expert reports were served in March 2025, ten months prior to the scheduled trial date. The plaintiff submits that the defendant has had ample time to obtain responding expert reports and that the defendant's own failure to exercise diligence in doing so is the cause of any prejudice suffered.

[24] I disagree with this submission. The defendant opposed the motion for late filing of the reports. There was no guarantee that the plaintiff's motion would be successful and

therefore no reason for the defendant to incur the cost of obtaining responding expert reports until after the motion was argued and decided.

[25] The plaintiff had an obligation to pursue the motion with diligence and ensure that it was heard well in advance of the scheduled trial date. Indeed, the plaintiff ought to have ensured that the motion was heard well in advance of the September 9, 2025 continuation date for the pre-trial conference. Its failure to do so resulted in an unproductive pre-trial conference on September 9, 2025, and has now jeopardized the January 12, 2026 trial date.

[26] The plaintiff argues that the defendant consented to all the adjournments of the motion hearing and therefore shares responsibility for the delay in having the motion adjudicated. I disagree. It was the plaintiff's responsibility to pursue the motion. The defendant's counsel made herself available on six separate dates to argue the motion. The plaintiff requested adjournments of four of those dates, and on the sixth date in August 2025, did not serve or file its supplemental affidavit until the day before the hearing. Although an oversight by the defendant's counsel (with respect to uploading materials to Case Centre) contributed to the last adjournment, the motion hearing would not have been able to proceed in any event because the plaintiff's materials were not served or filed in a timely way. It was the plaintiff's actions that delayed the adjudication of the motion.

[27] If I granted the motion at this stage, and the plaintiff were permitted to rely on the expert reports, the defendant would be placed in the disadvantageous position of having to scramble to try to obtain responding expert reports within 30 days or proceed to trial without responding expert evidence. This amounts to prejudice that can only be remedied by adjourning the trial date, which takes me to the third factor for consideration.

### **Undue Delay of the Trial**

[28] The final factor is whether admitting the reports would unduly delay the trial. For the reasons set out below, I have concluded that it would.

[29] It would be unfair to the defendant, in the circumstances, to grant the motion and not adjourn the trial date. The trial would need to be put over to the next available civil trial sittings. That would mean an adjournment of at least five months to May 2026, or possibly longer, if the spring sittings list is already full. In an alternative submission, the plaintiff requests that I order the adjournment so that the action can be adjudicated on its merits.

[30] The motor vehicle accident that gave rise to this action occurred seven and half years ago, in April 2018. The Statement of Claim was issued on June 20, 2019. The Statement of Defence was served on October 24, 2019. The plaintiff delivered his Trial Record on April 17, 2023. The trial was set down for the January 2026 sittings at a pre-trial conference on November 28, 2024. Had the plaintiff served and filed his expert reports in accordance with the timelines set out in the Rules, the trial could have been scheduled during the January 2025 blitz sittings. The plaintiff's non-compliance with the Rules caused a delay of a year. Given these circumstances, a further trial delay of 5 months due to the plaintiff's failure to pursue his motion with diligence would be undue.

## **CONCLUSION**

[31] Taking all the above factors into consideration, I have concluded that it is not in the interests of justice to grant the motion. There is no reasonable explanation for the plaintiff's failure to meet the timeline set out in the Rules, and allowing the late-filing of the reports would either result in severe prejudice to the defendant, or would cause undue delay in the trial.

[32] I recognize that this ruling has grave consequences for the plaintiff. I am mindful that both this Court and the Court of Appeal have expressed the view that parties should not be penalized for the mistakes of their lawyers and that a client should not irrevocably be placed in jeopardy because of their lawyer's mistakes: *Seo v Francis*, at para. 27; *Rosato v. Singh*, at para. 33; *Graham v. Vandersloot*, 2012 ONCA 60, at para. 10. The facts in those cases are, however, distinguishable from the facts in the case before me.

[33] In *Rosato v. Singh*, plaintiff's counsel failed to file a standard of care report in a negligence action prior to the pre-trial. She explained that she had been focussed on her client's misrepresentation claim and did not realize, until she began to prepare the pre-trial brief, that a standard of care report would be necessary to support the secondary negligence claim. In other words, it was a case of true "oversight" or "inadvertence" by counsel.

[34] In *Seo v. Francis*, the plaintiff served expert reports prior to the pre-trial conference, but not in compliance with the 90-day requirement. One report was served 6 days late and the other was served 75 days late (i.e., only 15 days prior to the conference). The reason for the delay was turnover within the law office retained to represent the plaintiff. Consequently, different counsel had carriage of the file over time. While the pre-trial judge found that this was "at the low end of being a reasonable excuse" (para. 27), she held that it nevertheless constituted genuine oversight by the lawyer. Moreover, the pre-trial judge noted that extending the time limits for serving the reports would cause no prejudice to the defendant and would not necessitate an adjournment of the trial date.

[35] Finally, in *Graham v. Vandesloot*, the defendant had admitted liability and the only issue in dispute was the quantum of damages. The Court of Appeal held that, in those circumstances, the motion judge erred by concluding that a further delay in the trial would not be in the interests of justice.

[36] In contrast, in this case, the plaintiff's non-compliance with the time limits set out in the Rules was deliberate and not due to his lawyer's inadvertence; the plaintiff has not pursued his motion for an extension of time with diligence; a substantial adjournment of the trial would be necessary if the time for service of the reports were extended at this late date; and liability has not been conceded by the defendant.

[37] While the consequences of this ruling are grave for the plaintiff, he will not be placed in irrevocable jeopardy even if his claim is ultimately dismissed at trial for lack of expert evidence of damages, because he may have a potential claim against his solicitor.

[38] For the above reasons, the motion is dismissed.

**COSTS**

[39] The parties are encouraged to try to negotiate costs. If the issue cannot be resolved, they may make written submissions on costs and I will decide the issue.

[40] If costs submissions are necessary, the defendant shall serve and file his written submissions by December 24, 2025, and the plaintiff shall serve and file his responding costs submissions by January 9, 2026. There will be no reply submissions unless requested by me. Submissions shall not exceed 2 pages, excluding any authorities, Bills of Costs, and Offers to Settle. After serving and filing the submissions, the parties shall upload them to Case Centre and send a copy via email to my judicial assistant at [SCJ.JudicialAssistant.Guelph@ontario.ca](mailto:SCJ.JudicialAssistant.Guelph@ontario.ca)

Dated this 12<sup>th</sup> day of December 2025,

Petersen, J.