

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** CHADWICK THOMPSON, Plaintiff

**AND:**

REBECCA LEE BURSEY, THOMAS E. HEGENAUER, WILSAND HOLDINGS LTD. (CORPORATE NUMBER 129264), 402981 ONTARIO LIMITED (CORPORATE NUMBER 402981), and SUBURBAN LANDSCAPING, Defendants

**BEFORE:** The Honourable Justice R.E. Charney

**COUNSEL:** D. Romaine, Counsel for the Plaintiff

J. Lin, Counsel for the Defendant, Rebecca Lee Bursey

R. Hajdëri, Counsel for the Defendants, Thomas E. Hegenauer, Wilsand Holdings Ltd. (Corporate Number 129264), 402981 Ontario Limited (Corporate Number 402981) and Suburban Landscaping

**HEARD:** February 4, 2026

**TELEPHONE CONFERENCE ENDORSEMENT**

- [1] On February 4, 2026, I held a telephone case conference to deal with the timetable for the Defendant's motion for summary judgment. This is the sixth such case conference in relation to this matter.
- [2] The underlying action relates to a motor vehicle accident that occurred on June 7, 2019.
- [3] The Defendants Thomas E. Hegenauer, Wilsand Holdings Ltd. (Corporate Number 129264), 402981 Ontario Limited (Corporate Number 402981) and Suburban Landscaping ("the Hegenauer Defendants") have brought a motion for summary judgment to have the claim against them dismissed. The Hegenauer Defendants served their Notice of Motion and motion record on March 13, 2024.
- [4] The Defendant Thomas E. Hegenauer was the driver of one of the motor vehicles involved in the accident. His car was rear-ended by the motor vehicle being driven by the Defendant Rebecca Lee Bursey.

- [5] The purpose of this latest case conference was to deal with the Plaintiff and the Defendant Bursey's request to amend the timetable to permit them to file additional expert affidavit evidence.

### **Previous Case Conferences**

- [6] The first case conference was held on May 29, 2024. Counsel for the Hegenauer Defendants requested the case conference to establish a timetable for the delivery of the Plaintiff's and the Defendant Bursey's responding material.
- [7] At that case conference, counsel for the Plaintiff advised that he had brought a motion under Rule 30.10 to inspect Mr. Hegenauer's motor vehicle, which had since been sold to a non-party. The motion was returnable on October 30, 2024. The Plaintiff took the position that the motion for summary judgment could not proceed until his Rule 30.10 motion was decided, since the evidence available from the inspection of the car's Event Data Recorder might be relevant to the motion for summary judgment. In particular, he argued that the inspection of the car's Event Data Recorder might reveal whether Mr. Hegenauer applied the brakes of his vehicle immediately before his vehicle was rear-ended by the Bursey vehicle.
- [8] At that case conference, counsel for the Plaintiff provided no expert evidence that an inspection of Mr. Hegenauer's car some 5 years after the accident would provide any relevant information.
- [9] Accordingly, the case conference was adjourned to August 13, 2024 to permit counsel for the Plaintiff to provide an expert report to support his request.
- [10] The case conference reconvened on August 13, 2024. Counsel for the Hegenauer Defendants advised that her clients consented to the motion, which still had to proceed to court on October 30, 2024 because the car was in the possession of a non-party. Another case conference was scheduled for December 3, 2024.
- [11] The third case conference was held on December 3, 2024. By that time the motion to inspect had been granted and Mr. Hegenauer's former vehicle had been inspected. The parties advised that the inspection of the Event Data Recorder in the subject motor vehicle contained no details pertaining to the incident that was the subject matter of this litigation.
- [12] The Hegenauer Defendants advised of their intention to proceed with their motion for summary judgment. At that case conference counsel for the Defendant Bursey advised that his client would take no position on the motion for summary judgment.
- [13] At the December 3, 2024 case conference, the parties agreed to the following timetable:
- Moving Party's Motion Record: Already served on March 13, 2024
  - Moving Party's Amended Motion Record: February 14, 2025
  - Responding Party's Motion Record: March 14, 2025

- Reply materials (if any): April 18, 2025
- Cross-examinations: to be completed by May 15, 2025
- Moving Party's Factum: June 30, 2025
- Responding Party's Factum: July 23, 2025
- Materials to be Served & Filed 14 Days before Triage Court Date: August 5, 2025
- Triage Court: August 19, 2025

[14] Following the December 3, 2024 case conference, counsel for Ms. Bursey (a different lawyer at the same firm) advised the other parties that she intended to oppose the motion for summary judgment and provide affidavit evidence in support of her position that there is a genuine issue requiring a trial. Counsel for Ms. Bursey filed an affidavit in accordance with the timetable set at the December 3, 2024 case conference, and wanted to participate in the cross-examination of the Hegenauer Defendants.

[15] Counsel for the Hegenauer Defendants took the position that Ms. Bursey could not alter her position from that taken at the December 3, 2024 case conference.

[16] Accordingly, another case conference was held on May 15, 2025 to address this issue.

[17] At that case conference I concluded that the Bursey Defendant was permitted to change her position on the summary judgment motion provided that her position was consistent with the position taken in her Statement of Defence. There was no dispute that the position she wanted to take on the motion for summary judgment - that the relative liability of the Defendants is in dispute and requires a trial - was consistent with the position taken in her Statement of Defence, and she was permitted to participate in the motion for summary judgment provided she complied with the timetable agreed to at the December 3, 2024 case conference.

[18] The only changes to the December 3, 2024 timetable were that the dates for cross-examination were extended to May 27, 2025 and the moving party (Hegenauer) was permitted to serve a reply factum by August 29, 2025.

[19] On May 26, 2025 counsel for the Hegenauer Defendants wrote to the Court to advise that cross-examinations would not be proceeding on May 27, 2025 and she requested an amendment to the timetable to permit the Hegenauer Defendants to file an expert affidavit to respond to one of the Plaintiff's expert reports. This request was opposed by the responding parties. After receiving written submissions from the parties, I issued the following direction to the parties on June 2, 2025:

Given that this is Ms. Hajderi's motion, there is no prejudice to the responding parties to permit the moving party to file a reply affidavit within 30 days. The parties are directed to agree to a revised timetable for cross-examinations that accommodates the reply affidavit contemplated by

Ms. Hajderi but still permits the Triage Court hearing date of August 19, 2025 to proceed. If the parties are not able to agree on a revised timetable, they may request an additional case conference and a revised timetable will be imposed by the Court.

- [20] The Hegenauer Defendants served the reply affidavit in accordance with that direction.
- [21] The parties were not able to agree on a revised timetable, and the fifth telephone case conference was held on October 29, 2025.
- [22] At that case conference, I was advised that the Bursey Defendant served another expert affidavit on October 1, 2025. Counsel for the Hegenauer Defendants objected to this further affidavit because it was not contemplated by the timetable ordered by the Court, and she was concerned that it would further delay the hearing of the summary judgment motion.
- [23] I agreed with counsel for the Hegenauer Defendants that this further expert affidavit was served outside of the Court's timetable, which counsel for the Bursey Defendant had agreed to follow. Notwithstanding that agreement, I permitted the Bursey Defendant to file the late affidavit, stating, at para. 6 of my Endorsement:

That said, I want to ensure that each party has an opportunity to put "their best foot forward" on this motion, and there is still time before the motion is heard to permit the moving party to serve a reply affidavit to this late filed responding affidavit. As the moving party, Ms. Hajdëri's client should get the final reply.

- [24] The timetable was amended to accommodate this late affidavit as follows:
- a. Moving party's reply affidavit to be served by January 15, 2026
  - b. No further affidavits may be served without leave of the Court.
  - c. Cross-examinations to be completed by February 27, 2026
  - d. Moving party's factum to be served by March 20, 2026
  - e. Responding factums to be served by April 17, 2026
  - f. Reply factum to be served by April 30, 2026

- [25] The parties had a Triage Court date scheduled for February 10, 2026. I indicated that the appointment should be kept, and the Triage Court could schedule this summary judgment motion on a date after April 30, 2026.

### **Further Request From Responding Parties**

[26] On January 21, 2026, counsel for the Plaintiff wrote to the Court on behalf of himself and counsel for the Defendant Bursey to request leave to file a sur-reply to the report served by the Hegenauer Defendants pursuant to my June 2, 2025 Endorsement. He also asked that the timetable be amended to permit this sur-reply report to be filed by March 1, 2026 and that the cross-examinations, currently scheduled for February 11 and 12, be adjourned to March 31, 2026. The moving party would be given no right to reply to the Plaintiff's further affidavit. The February 10, 2026 Triage Court date would also have to be adjourned.

[27] This request was opposed by counsel for the Hegenauer Defendants.

[28] Written submissions were exchanged, and the sixth telephone case conference was held on February 4, 2026.

[29] At that case conference, counsel for the Plaintiff and counsel for the Bursey Defendant advised that they each intended to file an additional affidavit to reply to the Hegenauer Reply affidavit.

[30] On February 5, 2026 I advised the parties as follows:

Further to our telephone case conference on February 4, 2026, the Responding parties' request to file additional affidavit evidence in support of their position in the Moving Party's summary judgment motion is denied. Written reasons for this decision will be provided in the next couple of weeks, but will not be available prior to the February 10, 2026 Triage Court date. I wanted the parties to know the bottom-line result so that they may proceed with the Triage Court date as scheduled and proceed with the cross-examinations scheduled for February 11 and 12, 2026.

[31] These are the reasons.

[32] On a motion for summary judgment, the moving party bears the evidentiary burden of demonstrating that there is no genuine issue requiring a trial. Only after the moving party has discharged its evidentiary burden of proving that there is no genuine issue requiring a trial for its resolution does the burden shift to the responding party to prove that its claim has a real chance of success: *Sanzone v. Schechter*, 2016 ONCA 566, at para. 30.

[33] Once a Mr. Hegenauer has proven that a rear-end collision occurred, the evidentiary burden shifts from him to the Ms. Bursey, who must then show that she was not negligent. This analysis applies even where an emergency situation is alleged: *Iannarella v. Corbett*, 2015 ONCA 110, 124 O.R. (3d) 523, at para. 19; *Chernet v. RBC General Insurance Company*, 2017 ONCA 337, at para. 10.

[34] As Ryan Bell J. explained in *Ozimkowski v. Raymond*, 2018 ONSC 5779, at para. 29:

The driver of the rear vehicle is required to anticipate that, for whatever reason, the vehicle ahead may stop:

Canadian jurisprudence recognizes a standard of care imposed upon a driver of the vehicle which follows another vehicle. The driver of that vehicle must keep a reasonable distance behind the vehicle ahead, must keep his or her vehicle under control at all times; must keep an alert and proper outlook; and must proceed at a speed which is reasonable relative to the speed of the vehicle in front. The following vehicle must anticipate that, for whatever reason, the vehicle ahead may stop. The reason need not be anticipated. The vehicle following must proceed with that care which will enable the vehicle to avoid colliding with the vehicle in front: *Kosinski v. Snaith*, 1983 CanLII 2130 (SK CA), [1983] S.J. 663 (Sask. C.A.) (*Nadeau et al. v. Peters et al.*, 2015 ONSC 4419, at para. 39).

- [35] See also: *Rahimi et al. v. Hatami et al.*, 2015 ONSC 4266, at para. 9:

The law of negligence relating to rear-end collisions has been settled in Ontario for the better part of a century. In *Beaumont v. Ruddy*, 1932 CanLII 147 (ON CA), [1932] O.R. 441 (C.A.) Masten J.A. wrote:

Generally speaking, when one car runs into another from behind, the fault is in the driving of the rear car, and the driver of the rear car must satisfy the Court that the collision did not occur as a result of his negligence.

- [36] Thus, while the initial onus is on the Defendant Hegenauer to show no genuine issue requiring a trial, that onus is easily satisfied by the driver of the car in front in a rear end collision case. The burden then shifts to the responding parties to show that there was some negligence on the part of Mr. Hegenauer. As Myers J. stated in *Rahimi*, at para. 14:

Finally, a mere suggestion of liability of the [driver in front] is not enough to overcome the burden on the [driver of the rear car] on a motion for summary judgment. There must be evidence that gives at least an air of reality to a claim for negligence by the [driver in front] before the court even embarks upon the *Hryniak* fact-finding roadmap.

- [37] In the present case, the Defendant Bursey admits that she was travelling closely behind the Defendant Hegenauer. The front of Bursey's car collided with the rear of Hegenauer's pick-up truck, and Bursey's car then struck the Plaintiff pedestrian on the road's shoulder.

- [38] Counsel for the responding parties have each filed an engineering report stating that the property damage to Ms. Bursey's car required the Hegenauer pick-up truck to have applied its brakes.

- [39] Based on this evidence, Bursey alleges that Hegenauer intentionally performed a "brake-check" due to Bursey's proximity. Counsel for the Plaintiff described this as Hegenauer braking "capriciously". Hegenauer denies having ever applied his brakes.

- [40] The responding parties will argue that if Mr. Hegenauer applied his brakes “capriciously”, there is contributory negligence on his part.
- [41] The Hegenauer Defendants have now filed reply affidavits, responding to each of these reports.
- [42] The process for the exchange of affidavit evidence on a motion was described by Perell J. in *Johnson v. North American Palladium Ltd.*, 2018 ONSC 4496, at paras. 11-15. His discussion is helpful context to this issue in this case:

Although there is no specific rule of civil procedure that orders or organizes the presentation of the evidence for a motion or application, typically on a motion or application, the moving party or the applicant delivers his or her notice of motion or notice of application along with supporting affidavit material, and then the responding party or the respondent delivers his or her responding affidavit to oppose the motion or application. Sometimes, there is reply evidence from the moving party or applicant. When the exchange of affidavits is completed, then the motion or application may proceed to cross-examinations. The modern practice is for the court to set a timetable or schedule or the parties to agree to a timetable for the motion or application covering the exchange of affidavits, the cross-examinations, and the exchange of factums.

...

The standard for permissible reply evidence, however, is less strict for motion and application procedure than the standard applied at trial. When the reply evidence for a motion or application is introduced before the cross-examination and the hearing on the merits, a less rigorous standard applies. Once cross-examinations begin, the admission of reply evidence is governed by rule 39.02 (2) of the Rules of Civil Procedure, discussed below, and the standard for admitting reply evidence is higher, but still not as strict as the standard at trial.

On motions and applications, in appropriate circumstances, the court has a discretion to admit the improper reply evidence and to allow the opponent to respond with a sur-reply affidavit. Ultimately, it is a balancing exercise, with the goal of ensuring that each party has a fair opportunity to present its case and to respond to the case put forward by the other party.

- [43] In the present case, the timetable has been amended several times, sometimes at the request of the responding parties, and sometimes at the request of the moving party. At this stage, the moving party has served its motion record, the responding parties have each served their responding material, and the moving party has served its reply affidavit. The cross-examinations on the affidavits are the next and last stage of the evidentiary portion of the motion.

[44] This action relates to a motor vehicle accident that occurred almost 7 years ago. The Hegenauer Defendants brought their motion for summary judgment nearly two years ago. It is now time for that motion for summary judgment to proceed. All parties have had a fair opportunity to present their case and to respond to the case put forward by the other party. As Justice Nordheimer stated in *Goberdhan v. Knights of Columbus*, 2023 ONCA 269, at para. 8: “At some point the back and forth must end”.

[45] As I understand this case, there will be two main issues on the summary judgment motion:

- i. Even assuming the facts as put forward by the responding parties, does the responding parties’ defence have a real chance of success? The responding parties’ defence is based on the Bursey Defendant’s admission that she was following too closely and did not have time to safely stop before rear-ending Mr. Hegenauer’s truck when he unexpectedly applied his brakes. Whether this presents a valid defence will be a question for the judge who hears the summary judgment motion.
- ii. If this is a potentially valid defence, the next question will be whether the judge hearing the summary judgment motion can resolve the factual dispute between the competing experts using the enhanced forensic tools set out in Rule 20.04(2.1) of the *Rules of Civil Procedure*:

In determining under clause (2)(a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:

1. Weighing the evidence.
2. Evaluating the credibility of a deponent.
3. Drawing any reasonable inference from the evidence.

[46] In *Hryniak v. Mauldin*, 2014 SCC 7, the Supreme Court held at para. 49, that there will be no genuine issue for trial when the summary judgment process “(1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.” That too will be a question for the judge who hears the summary judgment motion.

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CHARNEY J.