

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

Brett Robert Perry and Andrea Diane Perry

Plaintiffs

- and -

Black Fox Construction Inc., Marke Elke,
Glenda Scurfield and William Scurfield

Defendants

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) *J. Routliff*, for the Plaintiffs
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) *L. Gergely*, for the Defendants
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) **HEARD:** November 13, 2025
) at Kenora, Ontario

Mr. Justice J.S. Fregeau

REASONS ON MOTION

THE NATURE OF THE MOTION

[1] The plaintiffs bring this motion pursuant to r. 39.02(2) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, seeking leave to deliver the Supplemental Affidavit of Tom Pepper, sworn September 2, 2025, and the Supplemental Expert Report of 30 Forensic Engineering dated August

27, 2025 (collectively the “Supplemental Expert Report”), after the completion of cross-examinations on affidavits, for use at the hearing of the defendants’ summary judgment motion.

[2] The plaintiffs also seek an order striking the statement of George Laco (the “Laco Statement”), dated September 2, 2025, from the record and refusing the defendants leave to deliver the Laco Statement, pursuant to r. 39.02(2).

BACKGROUND

[3] In the underlying action, the plaintiffs allege, among other things, fraudulent misrepresentation and negligent construction by the defendants in relation to property owned by the plaintiffs, municipally addressed as 18 Green Ridge Road, Kenora, Ontario (the “property”). The property is a residential home purchased and renovated by the defendant Black Fox Construction Inc. (“Black Fox”), and sold to the plaintiffs.

[4] The defendants have brought a motion for summary judgment, seeking a dismissal of the plaintiffs’ claim. On March 31, 2025, Lepere J. endorsed a timetable for the summary judgment motion, which included the following:

- The Responding Motion Record to be delivered on or before May 16, 2025;
- Any reply evidence to be delivered on or before May 30, 2025; and
- Cross-examinations to be completed on or before June 27, 2025.

[5] The hearing of the defendants’ summary judgment motion has not been scheduled.

[6] The plaintiffs’ Responding Motion Record, delivered May 15, 2025, included affidavit evidence from the plaintiff Brett Robert Perry, and an affidavit supporting an expert report from 30 Forensic Engineering.

[7] On May 19 and 20, 2025, after the delivery of their Responding Motion Record, the plaintiffs, when upgrading the insulation in the sunroom of the property, a new addition which had been constructed by Black Fox, discovered what they allege are significant structural deficiencies in the construction of the sunroom.

[8] On May 20 and 21, 2025, plaintiffs' counsel wrote to defendants' counsel and advised that the plaintiffs had discovered the alleged deficiencies in the sunroom and that the plaintiffs would be serving supplemental affidavit evidence in support of their position on the defendants' summary judgment motion. Plaintiffs' counsel further advised that the plaintiffs reserved their right to produce supplemental expert evidence in relation to the newly discovered alleged deficiencies in the sunroom.

[9] On May 29, 2025, prior to cross-examinations, the Supplementary Affidavit of the Plaintiff Brett Robert Perry was served on counsel for the defendants. In this affidavit, Mr. Perry provided details of the discovery of the further alleged deficiencies in the construction of the sunroom.

[10] Cross-examinations on the affidavits filed for the summary judgment motion were completed on June 24 and 25, 2025.

[11] The plaintiffs' expert conducted an inspection of the sunroom addition on August 18, 2025, by video and apparently at the first available opportunity. On August 22, 2025, the initial copy of the Supplemental Expert Report of 30 Forensic Engineering was served on counsel for the defendants. On September 3, 2025, the Supplemental Affidavit of Tom Pepper (a representative of the expert, 30 Forensic Engineering), together with the final version of the Supplemental Expert

Report of 30 Forensic Engineering, dated August 27, 2025 (the subject of this motion), was served on counsel for the defendants.

[12] On September 13, 2025, the defendants' expert inspected the sunroom of the property. As of the hearing of this motion, the defendants have not delivered a responding expert report.

[13] The defendants delivered their answers to undertakings on September 19, 2025. The defendants' answers included a statement from George Laco, a former owner of the property and from whom the defendants purchased the property, dated September 2, 2025, which the plaintiffs submit was improperly produced in response to an undertaking that requested "pre-existing" documentation.

THE POSITION OF THE MOVING PARTY

[14] The plaintiffs submit that the defendants were provided notice of the alleged deficiencies in the construction of the sunroom on May 21, 2025, the day after the deficiencies were discovered.

The plaintiffs contend that this notice consisted of four things:

1. That structural defects had been discovered in the sunroom addition and that the sunroom addition was not in compliance with the Ontario Building Code (the "OBC");
2. That the roof structure of the sunroom had to be inspected by an expert and that the plaintiffs were arranging to have this done;
3. That the plaintiffs intended to rely on this expert evidence at the summary judgment motion; and
4. A point form list of the anticipated evidence in the supplemental expert report.

[15] The plaintiffs submit that they gave clear and explicit notice to the defendants, as soon as possible following the discovery of the alleged defects in the sunroom construction, of what they

anticipated the supplemental expert evidence was going to be and their intention to rely on it at the summary judgment motion.

[16] The plaintiffs further submit that the Supplemental Affidavit of the plaintiff Brett Robert Perry, affirmed May 28, 2025, outlined the newly discovered alleged defects from a layperson's perspective and how and when they were discovered, effectively putting the evidence and their position in relation to the evidence on the record for the summary judgment motion, approximately one month prior to cross-examinations.

[17] The plaintiffs acknowledge that the Supplemental Expert Report was not delivered until September 3, 2025. The plaintiffs submit that this delay was due to several factors, including the summer holiday season, the need to engage a second expert to address the recently discovered alleged defects, and the fact that the second expert was unable to inspect the sunroom addition until August 13, 2025, and then only by video to expedite matters. The plaintiffs note, however, that the unsigned, draft supplemental expert report was delivered to defendants' counsel on August 22, 2025, and a signed version delivered August 25, 2025.

[18] The plaintiffs submit that the defendants' expert inspected the sunroom addition on October 13, 2025, and that the hearing of the defendants' summary judgment motion has not yet been scheduled.

[19] In addressing the criteria to be applied in determining whether leave should be granted to deliver further affidavit evidence following cross-examinations, all to be weighed and no one of which is in itself determinative, the plaintiffs submit the following:

- The Supplemental Expert Report is relevant to and probative of the plaintiffs' allegations of negligence and fraudulent and/or negligent misrepresentation by the defendants, as it

establishes defects that ought to have been disclosed and identifies breaches of the OBC, arguably supportive of the allegation of negligence;

- The Supplemental Expert Report is responsive to a matter raised on cross-examination as it directly contradicts the sworn testimony of the defendant Marke Elke, who deposed that the sunroom was constructed in a good and workmanlike manner and in compliance with the OBC;
- Granting leave to file the Supplemental Expert Report would not result in non-compensable prejudice as the report addresses a narrow and discrete issue which would not result in the back-and-forth exchange of further affidavits. Further, the defendants had their own expert inspect the alleged defects in the sunroom addition on September 13, 2025, the plaintiffs are not opposed to the defendants filing further responding evidence nor are they opposed to the defendants conducting further, limited cross-examinations. Finally, the hearing of the summary judgment motion has not yet been scheduled; and
- The plaintiffs have provided a reasonable and/or adequate explanation for why the evidence was not provided prior to cross-examinations. The issues addressed in the Supplemental Expert Report were first discovered on or about May 20, 2025, the earliest date on which the expert was able to conduct an inspection was August 13, 2025, and the draft expert's report was delivered on September 2, 2025.

[20] The plaintiffs submit that r. 1.04 requires the rules to be construed liberally to secure the just determination of this case. The plaintiffs further submit that the need for a full and complete evidentiary record weighs in favour of granting the leave sought on this motion.

[21] The plaintiffs submit that the Laco Statement, which they refer to as an “Improper Affidavit”, and which is a response to an undertaking given during cross-examinations, is a “tactical use of undertakings” and is not properly before the court. The plaintiffs submit that the defendants should not be granted leave, pursuant to r. 39.02(2), to deliver the Laco Statement.

THE POSITION OF THE RESPONDING PARTY

[22] The defendants submit that the plaintiffs bear the onus of establishing, on a balance of probabilities, that they should be granted leave pursuant to r. 39.02 to file the Supplemental Expert Report. The plaintiffs further submit that the jurisprudence in relation to r. 30.02 establishes that

the moving party has a very high threshold to meet, and that leave should be granted sparingly and only in exceptional cases.

[23] The defendants submit that the plaintiffs' counsel's May 20 and 21, 2025 letters to defendants' counsel, in which the plaintiffs "reserved their right" to file supplemental expert evidence on the summary judgment motion does not relieve them of their obligations under the *Rules* or serve to extend procedural deadlines imposed by the *Rules*. Notice of intent to serve an expert's report is not, simply put, the equivalent of serving the expert's report within the time prescribed by the *Rules*, according to the defendants.

[24] The defendants contend that the plaintiffs had knowledge of the alleged deficiencies in the sunroom addition more than one month prior to cross-examinations and that they therefore reasonably expected that if a supplemental expert report was going to be filed for use at the hearing of the summary judgment motion, it would be delivered prior to cross-examinations, as the *Rules* require. The defendants submit that if the plaintiffs knew that they were unable to provide the supplemental expert report prior to cross-examinations, they reasonably should have sought an adjournment of the cross-examinations, which they did not do.

[25] The defendants submit that the plaintiffs have failed to establish the four criteria for the granting of leave to file the Supplemental Expert Report after cross-examinations. The defendants submit that:

- The evidence is neither material or relevant in that it alleges only possible OBC non-compliance, but no safety or structural issues and no actionable latent defects;
- The Supplemental Expert Report does not respond to a matter raised on cross-examination, nor is it new or fresh evidence that came to the plaintiffs' attention following cross-examinations. The alleged deficiencies addressed in the Supplemental Expert Report were known to the plaintiffs more than one month prior to cross-examinations;

- Granting leave to file the Supplemental Expert Report would result in non-compensable prejudice to the defendants as the defendants assumed the record was complete prior to cross-examination. Granting leave to file the Supplemental Expert Report would in all likelihood precipitate the defendants filing responding expert evidence and necessitate further cross-examinations of both experts. Further, the plaintiffs withheld expert evidence until after they had tested the defendants' witnesses on cross-examination. Granting leave would amount to the court condoning intentional case splitting; and
- The plaintiffs have not provided a satisfactory explanation for the delay. The plaintiffs discovered the alleged deficiencies in the sunroom addition on May 19 and 20, 2025, and delivered the supplementary affidavit of the plaintiff Brett Robert Perry on May 29, 2025, yet failed to deliver the Supplemental Expert Report until September 3, 2025, more than two months after cross-examinations had been completed. The submission that "everyone was too busy" is not a satisfactory explanation for the delay.

[26] The defendants submit that after balancing all factors, the plaintiffs have not established that this is an exceptional case where leave should be granted pursuant to r. 39.02.

[27] The defendants submit that the Laco Statement was provided to the plaintiffs as a response to an undertaking of the plaintiffs provided during cross-examinations. The defendants submit that the Laco Statement is not an affidavit, and that r. 39.02 has no application to it.

DISCUSSION

[28] *Rule 39.02(2)* provides:

A party who has cross-examined on an affidavit delivered by an adverse party shall not subsequently deliver an affidavit for use at the hearing...without leave or consent, and the court shall grant leave, on such terms as are just, where it is satisfied that the party ought to be permitted to respond to any matter raised on the cross-examination...

[29] *Rule 1.04(1)* provides:

These *Rules* shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

[30] The criteria that a court shall consider in determining whether to grant leave under r. 39.02 are well-established in the jurisprudence: see *First Capital Realty Inc. v. Centrecorp Management Services Ltd.*, [2009] O.J. No. 4492 (Div. Ct.), at para. 13:

1. Is the evidence relevant?
2. Does the evidence respond to a matter raised on the cross-examination, not necessarily raised for the first time?
3. Would granting leave to file the evidence result in non-compensable prejudice that could not be addressed by imposing costs, terms, or an adjournment?
4. Did the moving party provide a reasonable or adequate explanation for why the evidence was not included at the outset?

[31] I note that the defendants, at para. 12 of their factum, have framed the fourth criteria as follows:

Has a satisfactory explanation been provided for the delay.

[32] In my view, the wording employed by the defendants in addressing the fourth criteria is different in substance from that found in the case law and is incorrect. The question to be addressed by the fourth factor is whether the moving party has provided a reasonable or adequate explanation for why the evidence was not delivered prior to cross-examination, not whether the moving party has provided a satisfactory explanation for the delay in actually providing the evidence.

[33] In *First Capital*, at para. 14, the Divisional Court observed that:

A flexible, contextual approach is to be taken in assessing the criteria relevant to rule 39.02(2), having regard to the overriding principle outlined in *Rule 1.04* of the *Rules of Civil Procedure* that the rules are to be interpreted liberally to ensure a just, timely resolution of the dispute. An overly rigid interpretation can lead to unfairness by punishing a litigant for an oversight of counsel. [citations omitted].

[34] In *Shah v. LG Chem, Ltd.*, 2015 ONSC 776, at para. 23, Perell J. succinctly summarized the jurisprudence on motions under r. 39.02(2) as follows [all citations omitted]:

The jurisprudence about rule 39.02(2) indicates that (1) leave should be “granted sparingly”; (2) the moving party has a “very high threshold to meet; (3) the rule about the delivery of subsequent affidavits should not be used as “a mechanism for correcting deficiencies in the motion materials”; and (4) the rule is designed to fairly regulate and provide closure to the evidence gathering process for motions and applications.

[35] In *Brock Home Improvement Products Inc. v. Corcoran* (2002), 58 O.R. (3d) 722, at para. 8, Stinson J. stated:

Rule 39.02(1) and (2) are an important and integral part of the procedural code governing the conduct of motions and applications. These rules are designed to place finite limits on the evidentiary element of those proceedings, an element that is all too frequently time-consuming, expensive and drawn-out. These rules oblige the parties to consider the issues and to put all relevant evidence forward before embarking upon cross-examination of the opposite party’s witnesses. This is the approach mandated by the rules to achieve the “just, most expeditious and least expensive determination” of motions and applications. Consistent with that approach, it is only in exceptional cases that resort should be had to rule 39.02(2).

[36] As this motion for leave has been brought by the defendants, they bear the onus of establishing, on a balance of probabilities, that they ought to be permitted to file the Supplemental Expert Report.

Is the Supplemental Expert Report relevant?

[37] I accept the submissions of the plaintiffs that the Supplemental Expert Report is relevant.

[38] An item of evidence is relevant where it is probative of, or renders probable, the fact a party seeks to establish by its introduction. The Supplemental Expert Report identifies alleged breaches of the OBC and is therefore relevant to the plaintiffs’ allegations of negligence.

Does the Supplemental Expert Report respond to a matter raised on cross-examination?

[39] On cross-examination, the defendant Mark Elke, deposed that the sunroom addition was attached to the existing home on the property “as per the Ontario Building Code”. He further deposed that he was personally responsible for ensuring that the construction was “code compliant”.

[40] The Supplemental Expert Report addresses alleged deficiencies in the construction of the sunroom addition and alleged non-compliance with the OBC. It is therefore responsive to a matter raised on cross-examination.

Would granting leave to file the Supplemental Expert Report result in non-compensable prejudice that could not be addressed by imposing costs, terms or an adjournment?

[41] A date has not been scheduled for the hearing of the defendants’ summary judgment motion. The defendants’ expert inspected the sunroom addition on September 13, 2025. The plaintiffs are not opposed to cross-examination of the plaintiffs’ expert on the Supplemental Expert Report and the plaintiffs’ consent to the submission of a responding expert report by the defendants in response to the Supplementary Report.

[42] I reject the defendants’ submission that the plaintiffs’ counsel withheld expert opinion evidence until after testing the defendants’ witnesses on cross-examination and thereby intentionally “split” their case.

[43] Given the foregoing, I find that granting leave to file the Supplemental Expert Report would not result in non-compensable prejudice to the defendants.

Did the moving party provide a reasonable or adequate explanation for why the evidence was not included at the outset?

[44] I find that the plaintiffs have provided an adequate, if not entirely reasonable, explanation for why the Supplemental Expert Report was not provided in advance of the cross-examinations.

[45] The issues with the sunroom addition were discovered on May 19 and 20, 2025. The plaintiffs were unable to retain a qualified expert to conduct an inspection of the sunroom addition until August 18, 2025. It was simply not possible to conduct an inspection and have an expert's report prepared in advance of the cross-examinations scheduled for June 24 and 25, 2025.

[46] In hindsight, it obviously would have been preferable for plaintiffs' counsel to have sought an adjournment of the cross-examinations until a date after the delivery of the Supplemental Expert Report. Regrettably, this was not done. However, as observed by Braid J. in *Dente et al v. Delta Plus Group et al*, 2023 ONSC 3376, at para. 16, "the court should avoid an overly rigid interpretation of Rule 39.02, which can lead to unfairness by punishing a litigant for an oversight of counsel. The flexible, contextual approach is to be preferred".

[47] Considering and weighing all four criteria, I am persuaded that the plaintiffs should be permitted to deliver the Supplemental Expert Report for use at the hearing of the summary judgment motion. I further grant the defendants leave to deliver a responding expert report in response to the Supplementary Expert Report of the plaintiffs.

[48] The Laco Statement was produced by the defendants to the plaintiffs as an answer in response to an undertaking given during cross-examinations. An undertaking is a promise to provide further information or documentation. The Laco Statement is not an affidavit nor is it sworn evidence. Rule 39.02 has no application to the Laco Statement.

[49] The plaintiffs' request for an order striking the statement of George Laco dated Sept 2, 2025 from the record is dismissed.

COSTS

[50] Success on this motion has been divided. I strongly urge the parties to resolve the issue of costs, given the nature of the motion and the divided success. If the parties are unable to resolve the issue of costs, they shall file written Costs Submissions, not to exceed 5 pages exclusive of their respective Bills of Costs. The plaintiffs' Costs Submissions shall be filed within 14 days of the release of this decision; the defendants' within 7 days thereafter. If Costs Submissions are not filed within this timeframe, the issue of costs shall be deemed to have been resolved.

“Original signed by”

The Hon. Mr. Justice J.S. Fregeau

Released: January 12, 2026

Perry et al v. Black Fox Construction Inc. et al, 2026 ONSC 225
COURT FILE NO.: CV-24-0036-00
DATE: 2026-01-12

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

Brett Robert Perry and Andrea Diane Perry

Plaintiffs

- and -

Black Fox Construction Inc., Marke Elke,
Glenda Scurfield and William Scurfield

Defendants

REASONS ON MOTION

Fregeau J.

Released: January 12, 2026