

CANADA / JUDGMENT

Gutcher v. Welland Retirement Suites Limited

2026 ONCA 273

COURT

Court of Appeal for Ontario

DECIDED

16 April 2026

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Gutcher v. Welland Retirement Suites Limited Collection Decisions of the Court of Appeal Date 2026-04-16 Neutral citation 2026 ONCA 273 Docket numbers COA-25-CV-1187 Judges Huscroft, Grant; George, Jonathon C.; Wilson, Darla A. Subject Civil Decision Content COURT OF APPEAL FOR ONTARIO CITATION: Gutcher v. Welland Retirement Suites Limited, 2026 ONCA 273 DATE: 20260416 DOCKET: COA-25-CV-1187 Huscroft, George and Wilson JJ.A. BETWEEN Shawna Gutcher, Glen Gutcher, Mya Gutcher by her Litigation Guardian Shawna Gutcher, Roger Gutcher by his Litigation Guardian Shawna Gutcher, William Gutcher by his Litigation Guardian Shawn a Gutcher and Shyan Gutcher by her Litigation Guardian Shawna Gutcher Plaintiffs (Appellants) and Welland Retirement Suites Limited, Mike Hasani, Elizabeth Dumoulin, Jennifer Fabbro, and Constable Tim Ciaramitaro Defendants (Respondents) C. Michael J. Kealy and Rebecca Rabinovitch, for the appellants David S. Young and Naren G. Somayaji, for the respondents Welland Retirement Suites Limited, Mike Hasani, Elizabeth Dumoulin and Jennifer Fabbro Scott A. Crocco, for the respondent Constable Tim Ciaramitaro Heard: April 10, 2026 On appeal from the order of Justice James A. Ramsay of the Superior Court of Justice, dated August 21, 2025. REASONS FOR DECISION

- [1] The appellants commenced an action in 2017 alleging negligent investigation and malicious prosecution arising from a criminal charge that was laid against the appellant Shawna Gutcher in 2013 and later withdrawn. On August 21, 2025, the motion judge dismissed the action for delay. The appellants appeal from that order. For the reasons that follow, the appeal is dismissed. Background Facts
- [2] The appellants were represented by counsel throughout. Examinations for discovery, with the exception of the examination of Constable Ciaramitaro, were completed by 2019. In 2021, the appellants certified to the court that the case was ready to proceed to trial and the action was, accordingly, set down for trial.
- [3] A judicial pre-trial conference was held on July 13, 2022. The appellants had not complied with their obligations under the Rules of Civil Procedure, 1990, Reg. 194 to serve their expert reports before the pre-trial. The appellants had also not answered their undertakings from

the discovery held several years earlier. The pre-trial judge ordered a timetable (the “Timetable Order”) that required the appellants to fulfill their undertakings by August 31, 2022 and to deliver all expert reports by November 30, 2022, following which a further judicial pre-trial would be arranged.

- [4] On several occasions between November 2022 and September 2023, the respondents wrote to the appellants requesting that they comply with the Timetable Order. The appellants did not do so. Only some of the undertakings were fulfilled, and the appellants failed to deliver any expert report. The action was struck from the trial list on October 30, 2023.
- [5] Nearly two years passed. The appellants took no action to move the matter forward until the respondents brought the motion to dismiss the action for delay in July 2025. In response, the appellants brought their own motion seeking to restore the action to the trial list and for leave to examine Constable Ciaramitaro and to serve an expert report.
- [6] The motions were heard by the same judge who presided over the judicial pre-trial and made the Timetable Order. He rejected the explanations for the delay proffered by counsel for the appellants. He found the delay to be lengthy, unexplained, inexcusable and deliberate, and dismissed the action.

Analysis

- [7] The appellants allege that the motion judge erred by:
 - (1) finding that the delay was intentional in the absence of evidence; and
 - (2) failing to address and determine whether there was any prejudice caused by the delay.
- [8] We do not accept these submissions.
- [9] First, the motion judge’s finding that the delay was intentional was not a finding for which there was no evidence. There was a period of two years between discoveries and when the appellants filed the trial record. After the action was set down for trial in 2021, it sat dormant for another year. Then, after the court attempted to get the proceeding back on track through the Timetable Order, the appellants breached that order and made no meaningful efforts to ensure the action was ready for trial for nearly three more years, despite the respondents’ repeated requests of the appellants that they do so.
- [10] At the hearing of the motion, counsel for the appellants[1] offered explanations for the delay, including her workload, the turnover in staff at her office, the pandemic, and her own personal circumstances. The motion judge rejected all of these explanations, concluding that they did not account for large periods of the delay. Left with no reasonable explanation for the delay, the trial judge was entitled to conclude that the appellants’ inaction had been intentional. His finding in this regard is entitled to deference on appeal.

- [11] The appellants argue that the motion judge erroneously inferred intention from the breach of a single court order. We do not agree. The motion judge appropriately considered the entire context of the proceeding, including the delay both before and after the breach of the Timetable Order. There is no formula for the assessment of delay. The analysis cannot be reduced to the number of orders breached or the number of years that passed. Rather, the court must determine whether, in the context of the history of a particular action, the delay justifies dismissal.
- [12] Second, in this case, the motion judge was not required to specifically find prejudice. The motion judge correctly noted that the passage of time can, on its own, constitute prejudice: *Barbiero v. Pollack*, 2024 ONCA 904, 504 D.L.R. (4th) 652, at para. 15. The appellants assert that inordinate delay only gives rise to a presumption of prejudice and that the delay in this case was not so inordinate as to support this presumption. They argue that, in the circumstances, the respondents were required to prove that they were prejudiced by the delay. We do not accept these submissions.
- [13] Inordinate delay does not merely give rise to a presumption of prejudice. Rather, such delay can itself be prejudicial: *Barbiero*, at para. 15. The appellants' reliance on *Langenecker v. Sauvé*, 2011 ONCA 803, 286 O.A.C. 268 for this argument is misplaced. Moreover, the evidentiary burden is always on the party who initiates a claim to prove that inordinate delay in proceeding with the matter has not caused prejudice: *Ticchiarelli v. Ticchiarelli*, 2017 ONCA 1, at para. 29. The respondents were not required to lead any evidence of prejudice.
- [14] In this case, the motion judge made a finding that the delay was inordinate. The appellants have not pointed to any error which would justify interfering with this finding. Further, the appellants led no evidence below to disprove prejudice. In this context, a finding of inordinate delay was determinative of the issue of prejudice.
- [15] The appellants argue that the delay did not prejudice the respondents because the appellants had the burden of proof at trial. Any lost evidence, reduction in the quality of evidence, or failure to call expert evidence resulting from the delay would inure to the benefit of the respondents. We do not accept this submission. There is no basis to conclude that the delay would not have prejudiced the respondents' ability to defend against the appellants' claim. Lost evidence or the inability to call the best evidence does not only or primarily impact the party initiating the claim. Moreover, the onus was on the appellants to move the matter forward in an expeditious fashion. The respondents are entitled to know, at an early date, the case they have to meet. In this case, nothing was done between the examinations for discovery in 2019 and the motions in 2025 to articulate the case against the respondents. That is unfair to the respondents.
- [16] As noted in *Barbiero*, at para. 15, a "tolerant attitude toward delay is out of step with a key element of the general principle for civil litigation set out in r. 1.04(1) of the Rules of Civil Procedure, namely to secure 'the most expeditious...determination of every civil proceeding

on its merits’.” Allowing a case to languish for years without taking any steps to move it forward evinces an attitude of complacency that is at odds with the goals of providing efficient, cost-effective access to justice for all users of the justice system. The court has inherent jurisdiction to control its own process to ensure fairness to all parties. We see no error in the manner in which the motion judge exercised his jurisdiction in this case.

Disposition

[17] The appeal is dismissed. Costs are payable by the appellants to the respondents in the agreed upon all-inclusive sum of \$12,000. “Grant Huscroft J.A.” “J. George J.A.” “D.A. Wilson J.A.”

[1] Not counsel on appeal.

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Prepared on 27 October 2026 · Esheria