

CANADA / JUDGMENT

Zimmerman v. McNaull

2026 ONCA 307

COURT

Court of Appeal for Ontario

DECIDED

1 May 2026

Source: norma.lexum.com · Research copy typeset by Esheria. Not court-issued or certified.

Zimmerman v. McNaull Collection Decisions of the Court of Appeal Date 2026-05-01 Neutral citation 2026 ONCA 307 Docket numbers COA-25-CV-1101, M56424 Judges Roberts, Lois B.; Favreau, Lise G.; Rahman, Moiz Subject Civil Decision Content COURT OF APPEAL FOR ONTARIO CITATION: Zimmerman v. McNaull, 2026 ONCA 307 DATE: 20260501 DOCKET: M56424 (COA-25-CV-1101) Roberts, Favreau and Rahman JJ.A. BETWEEN Dana Zimmerman and Mark Zimmerman Plaintiffs (Respondents/Moving Parties) and Dr. Benjamin McNaull, Dr. Lea Babcock, Dr. William Tillmann, Dr. Mark Swanson, Dr. Julie Gallagher, Dr. Michael Odlozinski, Dr. Wendy McComb, and Orillia Soldiers' Memorial Hospital Defendants Tanya A. Pagliaroli and Chloe Carr, for the moving parties Matthew P. Sammon and Derek Knoke, for the responding parties, Dr. Alastair Legge and Dr. D'Arcy Little Heard: December 19, 2025 By the Court:

- [1] The moving parties challenge this court's jurisdiction over the responding parties' appeal.
- [2] The moving parties commenced an action for medical malpractice against the defendants for their alleged negligent care of Dana Zimmerman during the period July 25 to August 3, 2013. They obtained an order dated August 6, 2025, adding the responding parties as defendants, based on their involvement with Ms. Zimmerman's care in December 2009 and March 2010. In making this order, the motion judge accepted the moving parties' position that the claim was only discovered on June 20, 2018, and that it could not have been discovered earlier. The responding parties argued that the claim was discoverable against them in April 2018. The responding parties have appealed the August 6, 2025 order to this court.
- [3] The moving parties seek to quash the responding parties' appeal, arguing that the order appealed from is interlocutory and that the appeal therefore lies to the Divisional Court, with leave, pursuant to s. 19(1)(b) of the Courts of Justice Act, R.S.O. 1990, c. C.43. The responding parties maintain that the order is final because the motion judge finally determined and thus precluded their substantive limitation period defence, on which they say they can no longer rely.
- [4] We start our analysis with some general principles.

- [5] It is common ground that an order adding parties is an interlocutory order and that an order finally determining a limitation period defence is a final order because it deprives the defendant of a substantive defence: *Prescott & Russell (United Counties) v. David S. Laflamme Construction Inc.*, 2018 ONCA 495, 142 O.R. (3d) 317, at paras. 4-7, 10-12; *Lawrence v. International Brotherhood of Electrical Workers (IBEW) Local 773*, 2017 ONCA 321, 138 O.R. (3d) 129, at para. 13, *aff'd* 2018 SCC 11, [2018] 1 SCR 267; and *Drywall Acoustic Lathing Insulation Local 675 Pension Fund v. SNC-Lavalin Group Inc.*, 2020 ONCA 375, at paras. 16-17.
- [6] Section 21(1) of the Limitations Act, 2002, S.O. 2002, c. 24, Sched. B, provides that: “If a limitation period in respect of a claim against a person has expired, the claim shall not be pursued by adding the person as a party to any existing proceeding.”
- [7] Accordingly, on a motion to add parties, the motion judge must make, at least on a preliminary basis, findings of fact as to when the plaintiffs knew of the matters listed in s. 5(1)(a) of the Limitations Act, 2002, in relation to their claims against the proposed defendants and, under s. 5(1)(b), as to when they ought reasonably to have known of such matters: *Morrison v. Barzo*, 2018 ONCA 979, 144 O.R. (3d) 600, at para. 3.
- [8] These factual findings are not necessarily final and for all purposes. Rather, the motion judge must only determine whether the evidentiary threshold is met for the requested amendments: *Morrison*, at para. 3; *Mancinelli v. Royal Bank of Canada*, 2018 ONCA 544, at paras. 23-25; and *Prescott*, at paras. 10, 12. As this court observed in *Prescott*, at para. 10: “Motions to add parties that are successful, however, do not as a rule generate findings that are binding in the rest of the litigation.”
- [9] As a result, for the limited purpose of determining an amendment motion, a motion judge may make a provisional, non-binding determination that a limitation period has not expired without finally disposing of it, or any limitation period defence. In such a case, the limitation period defence is left for final determination on a motion for summary judgment, if appropriate, or at trial: see e.g., *Morrison*, at paras. 6, 66; *Mancinelli*, at para. 34; and *Di Filippo v. Bank of Nova Scotia*, 2024 ONCA 33, at para. 72, leave to appeal refused, [2024] S.C.C.A. No. 88.
- [10] On the other hand, if the record permits, it is open to a motion judge on an amendment motion to make a final determination that a limitation period has expired and deny the amendment motion: *Morrison*, at para. 27. As this court explained in *Arcari v. Dawson*, 2016 ONCA 715, 134 O.R. (3d) 36, at para. 10, leave to appeal refused, [2016] S.C.C.A. No. 522: When a plaintiff's motion to add a defendant is opposed on the basis that her claim is statute-barred, the motion judge is entitled to assess the record to determine whether, as a question of fact, there is a reasonable explanation on proper evidence as to why she could not have discovered the claim through the exercise of reasonable diligence. If the plaintiff does not raise any credibility issue or issue of fact that would merit consideration on a summary judgment motion or at trial and there is no reasonable explanation on the evidence as to

why the plaintiff could not have discovered the claim through the exercise of reasonable diligence, the motion judge may deny the plaintiff's motion. [Citation omitted.] See also *C & C Nestco Corporation v. Starr*, 2025 ONCA 792, at paras. 2-3, leave to appeal to S.C.C. requested, 42184.

- [11] The question here, then, is to determine whether the motion judge finally determined the limitation period issue and precluded the defence. As we shall explain, we conclude that he did not.
- [12] Confusion about the effect of the order under appeal has arisen in this case because 1) in their factum on the motion to amend their pleadings, the moving parties sought an order allowing the amendments without leave to the responding parties to plead a limitations defence; and 2) the definitive language that the motion judge used in his reasons to determine the amendment motion suggests a final determination of the limitation period issue. For example, he concluded in para. 2 of his reasons: “For the reasons set out, I find that the claim is not statute-barred, that it was discovered in June 2018, within the two-year period and that it could not have been discovered earlier with the exercise of reasonable diligence. The motion to file the amended statement of claim is allowed.”
- [13] However, when the motion judge's reasons are read as a whole – and especially alongside the issued and entered order – it becomes clear that his factual findings were preliminary and only for the purpose of determining the amendment motion.
- [14] In his reasons, the motion judge followed the analytical framework in *Morrison* and found that the moving parties had met the requisite evidentiary threshold to demonstrate that the limitation period had not expired for the purpose of adding the responding parties as defendants to their action. Importantly, he did not accede to the moving parties' request that the responding parties be precluded from relying on a limitation period defence. Indeed, as this court observed in *Prescott*, at para. 9, “[t]he motion judge's reasons contain no language suggesting that any finding made in respect of the application of the Limitations Act had application beyond the motion itself.” Further, the issued and entered order confirms that there was no final determination of the limitation period issue nor that the responding parties' limitation period defence was precluded: *Prescott*, at para. 8. It is well established that an appeal lies from the order and not the reasons and that in most cases, it is the content of the formal order that is integral in determining what has been decided and is binding against a party: *Fram Elgin Mills 90 Inc. v. Romandale Farms Limited*, 2016 ONCA 404, 131 O.R. (3d) 455, at para. 33. That is the case here.
- [15] With respect to the amendment, the order succinctly reads: “The Plaintiffs are granted leave to amend their Statement of Claim in accordance with the proposed Amended Statement of Claim attached to this Order”. The only other provision is that costs of the motion are payable to the moving parties. There is no reference to a limitation period defence: the order does not state that the limitation period defence is precluded. Accordingly, the responding parties are at liberty to plead and rely upon a limitation period defence in the

action.

- [16] It would have been clearer had the motion judge explicitly signaled that he was determining the limitation period issue for the purposes of only the amendment motion and that the moving parties' request to finally determine the limitations period was denied. However, the fact that the order does not explicitly state that the responding parties are precluded from raising a limitation defence, in the face of such a request from the moving parties on the motion, signals that no such relief was granted.
- [17] Moreover, to avoid any ambiguity, it would have been better had the order included an explicit term that the responding parties were not precluded from relying on the limitation period defence. Such as, for example, the terms included in the dispositions in Morrison, at para. 66: "the respondents are at liberty to plead the expiry of the limitation period as a defence"; and in Di Filippo, at para. 72: "the respondents ... are not precluded from pleading a limitations defence ... with the issue to be determined at trial or on summary judgment". Such provisions avoid the uncertainty and additional costs exemplified by this case. However, as explained above, we are nevertheless satisfied that the responding parties are not precluded from raising a limitation period defence.
- [18] For these reasons, we conclude that the order under appeal is interlocutory, and the appeal lies to the Divisional Court with leave.

Disposition:

- [19] The order under appeal is interlocutory and the appeal lies to the Divisional Court with leave. The appeal is therefore quashed.
- [20] The proceeding is transferred to the Divisional Court for the purpose of permitting the responding parties to bring a motion for leave to appeal.
- [21] As agreed, the moving parties, as the successful parties on this motion, are entitled to their costs from the responding parties in the all-inclusive amount of \$7,500. Released: May 1, 2026 "L.B.R." "L.B. Roberts J.A." "L. Favreau J.A." "M. Rahman J.A."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://norma.lexum.com/coa/coa/en/item/24136/index.do>

CASE PAGE <https://chat.esheria.ai/case-law/canada/zimmerman-v-mcnaull-2026>

Prepared on 29 October 2026 · Esheria