

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Aloysius MacNeil and Susan MacNeil, Plaintiffs

AND:

Metro Ontario Inc., Defendant

BEFORE: Associate Justice B. McAfee

COUNSEL: P. Cozzi, Counsel, for the Moving Parties, the Plaintiffs

J. Varcoe, Counsel, and J. Okezie, Articling Student, for the Responding Party,
the Defendant

HEARD: April 21, 2026

ENDORSEMENT

- [1] This is a motion brought by the plaintiffs for leave to examine for discovery a second representative of the corporate defendant. The parties confirm that no alternative relief is specifically sought or to be considered on this motion. The defendant opposes the motion.
- [2] This action arises as a result of an accident that occurred on August 2, 2019. As set out in the amended statement of claim dated May 26, 2021, the plaintiffs allege that the plaintiff Aloysius MacNeil (Mr. MacNeil) was shopping at the defendant grocery store when he attempted to reach an item located on a top shelf, lost his balance and fell sustaining injuries. The plaintiffs allege, in part, that the defendant created a dangerous condition by stocking beverages for sale beyond the reasonable reach of its customers. The plaintiffs claim damages in the amount of \$200,000.00. The action is a simplified procedure action.
- [3] In their statement of defence dated August 17, 2021, the defendant denies the allegations against it, in part, on the basis that Mr. MacNeil caused his own injuries by dangerously reaching for a product that was not within his reach and/or climbing shelving that was not meant to be climbed.
- [4] On December 2, 2022, the plaintiffs examined for discovery Ted Kucera (Mr. Kucera) as the representative of the defendant. Mr. Kucera is the store manager and he personally assisted Mr. MacNeil after the accident.
- [5] The plaintiffs seek to examine a second defendant representative, Michael Chiacchia (Mr. Chiacchia), on the issue of planograms.

- [6] On Mr. Kucera's examination for discovery, he gave evidence that a planogram is a map for the stocking of products in a section of the store and that goods are shelved based on planograms. Mr. Kucera gave an undertaking to make best efforts to inquire and provide any policy documents that explain the rationale behind a planogram (Question 65 – Undertaking No. 7). Mr. Kucera also gave an undertaking to make best efforts to provide the planogram that was being adhered to on the date of the accident (Question 65 - Undertaking No. 8).
- [7] On August 14, 2023, plaintiffs' counsel requested the defendant's planogram guidelines from the last planogram guideline before the date of the accident to date and followed up on September 18, 2023.
- [8] On September 19, 2023, defendant's counsel responded advising that the defendant does not have any planograms from 2019 or earlier because they are held for one year before they are deleted from the drives pursuant to the defendant's data retention policy.
- [9] On October 4, 2023, plaintiffs' counsel requested the current planogram, the name of the company who prepares them and their contact information for a Rule 30.10 motion.
- [10] On October 23, 2023, defendant's counsel provided the current planogram and confirmed that the defendant prepares the planograms in-house.
- [11] On April 10, 2024, plaintiffs' counsel requested all planograms in the defendant's possession.
- [12] On April 15, 2024, defendant's counsel provided a link to available planograms.
- [13] On May 17, 2024, plaintiffs' counsel requested that the defendant deliver an updated affidavit of documents with the planograms.
- [14] On May 30, 2024, defendant's counsel advised that the planograms were not relevant and that there is no dispute that the item Mr. MacNeil was reaching for was on the top shelf. There was no undertaking for current planograms and they were produced as a courtesy.
- [15] On July 12, 2024, the defendant delivered an updated unsworn affidavit of documents as requested by plaintiffs' counsel, while maintaining their position that the listed planograms are not relevant.
- [16] On July 24, 2024, plaintiffs' counsel advised that he wishes to examine Mr. Chiacchia on the basis that he prepares the planograms for the defendant.
- [17] On July 31, 2024, defendant's counsel confirmed her instructions not to produce a second witness for discovery.
- [18] On August 15, 2025, after the within motion was served, defendant's counsel advised that the defendant was agreeable to the plaintiffs re-examining Mr. Kucera with respect to the planograms. The plaintiffs were not agreeable to re-examining Mr. Kucera.

[19] It is the plaintiffs' position that Mr. Chiacchia, the employee who creates the planograms, has knowledge and information concerning the defendant's planograms.

[20] It is the defendant's position that the plaintiffs have not satisfied the applicable test for leave to examine a second representative of the defendant.

[21] Rule 31.03(1), (2) and (4) of the *Rules of Civil Procedure* provides:

31.03(1) A party to an action may examine for discovery any other party adverse in interest, once, and may examine that party more than once only with leave of the court, but a party may examine more than one person as permitted by subrules (2) to (8).

(2) Where a corporation may be examined for discovery,

(a) the examining party may examine any officer, director or employee on behalf of the corporation, but the court on motion of the corporation before the examination may order the examining party to examine another officer, director or employee; and

(b) the examining party may examine more than one officer, director or employee only with the consent of the parties or the leave of the court.

...

(4) Before making an order under clause (2)(b) or (3)(b), the court shall satisfy itself that,

(a) satisfactory answers respecting all of the issues raised cannot be obtained from only one person without undue expense and inconvenience; and

(b) examination of more than one person would likely expedite the conduct of the action.

[22] The applicable test is stated by Justice E.A. Quinlan in *Little v. Ellerbrock*, 2014 ONSC 5945 (Ont. S.C.J.) at para. 21, with citations from footnotes added:

[21] A review of the case law establishes the following principles to be applied on motions for leave to examine a second representative of a party:

(a) "It is not enough that the evidence is important to the moving parties, who must demonstrate that to refuse the second examination is to deprive them of a meaningful discovery." *Scintilore v. Larche*, 1995 CarswellOnt 2380 at para. 51 (Ont. Ct. Gen. Div.)

(b) "The fact that the person whom the moving party seeks to examine may be an important witness at trial, is not sufficient grounds for ordering an

additional examination. It is only where the representative can not or will not satisfactorily inform himself that an additional representative will be ordered to be produced. *Baylis Estate v. Canada (Att. Gen.)* (2000), 49 C.P.C. (4th) 179 (Ont. S.C.J.), at para. 9, Leave to appeal dismissed at [2000] O.J. No. 4931 (Div. Ct.)

(c) “Such orders are rarely granted. Special circumstances are required and the test is a very strict one.” *Infinium Capital Corporation v. AB 2000 Software Corporation*, 2010 ONSC 812, at para. 8

(d) “To show that an examination for discovery has been unsatisfactory so as to entitle a party to a further examination, it is necessary to demonstrate that questions asked have not been answered, or that answers given are incomplete, unresponsive, or ambiguous, or the follow-up questions have similarly not been answered in a clear, complete and responsive way.” *Fortini v. Simcoe (County)*, 2012 ONSC 1034, at para. 10

(e) “The test for whether an examination for discovery has been satisfactory is not a subjective test depending on the view of the examiner. The question is whether there has been a full inquiry into all matters which may be relevant to the issues raised on the pleadings.” *Fortini v. Simcoe (County)*, *supra*, at para. 10

(f) “It remains important to assess the willingness and ability of the deponent to provide the information sought, and to ensure that an evaluation of the quality of the evidence provided is measured by an objective standard, as opposed to the examiner simply being dissatisfied with the answers provided.” *Fortini v. Simcoe (County)*, *supra*, at para. 15

- [23] At no time prior to or during Mr. Kucera’s examination for discovery did the plaintiffs raise any concerns that Mr. Kucera was not an informed and appropriate person to give evidence on behalf of the defendant.
- [24] Notwithstanding that the defendant takes the position that the current planograms are not relevant, they have now been produced. Planograms for the date of the accident are no longer available.
- [25] There is no evidence that Mr. Kucera was unwilling or unable to satisfactorily inform himself. I was not referred to any refused questions on the issue of planograms.
- [26] The plaintiffs argue that if Mr. Kucera re-attends on examinations for discovery he will have to undertake to ask Mr. Chiacchia for answers to questions which would allow for intervention of the defendant’s lawyer crafting a biased response. While Mr. Kucera may have needed to give undertakings, which is not unusual on an examination for discovery, there is no basis for this submission with respect to crafting a biased response.

- [27] This is not one of the rare cases where an examination for discovery of a second representative ought to be ordered. Even if Mr. Chiacchia may have more knowledge of the preparation of planograms than Mr. Kucera, that is not the test.
- [28] The evidence before me does not satisfy me that the issues raised could not have been obtained from Mr. Kucera without undue expense and inconvenience or that an examination of Mr. Chiacchia will likely expedite the conduct of the action.
- [29] The motion is dismissed.
- [30] If the motion was granted, the plaintiffs sought costs in the amount of \$5,139.60. If the motion was not granted, the defendant sought costs in the amount of \$5,000.00. The motion was not granted. The defendant is entitled to costs of the motion in the all-inclusive amount of \$5,000.00, a fair and reasonable amount that the plaintiffs could expect to pay for costs, payable to the defendant within 30 days.
- [31] Order to go as follows:
1. The motion is dismissed.
 2. Costs of the motion are fixed in the all-inclusive amount of \$5,000.00 payable by the plaintiffs to the defendant within 30 days.

Associate Justice B. McAfee

Date: August 17, 2026