

[Chernet v. Galaites, \[2016\] O.J. No. 3480](#)

Ontario Judgments

Ontario Superior Court of Justice

T.R. Lederer J.

Heard: May 24, 2016.

Judgment: June 22, 2016.

Court File No.: CV-12-448942

[2016] O.J. No. 3480 | 2016 ONSC 4023

Between John Chernet, Plaintiff, and Gregorio V. Galaites and Galaites Gounell Zamora, RBC General Insurance Company and State Farm Mutual Automobile Insurance Company, Defendants

(39 paras.)

Case Summary

Tort law — Negligence — Motor vehicles — Rules of the road — Motion by the defendant for summary judgment dismissing the action allowed — Plaintiff read-ended defendant's vehicle — He alleged defendant suddenly swerved into his path — Defendant claimed she was stopped at a red light — Taking into account the responsibility placed on a driver who hit another from behind, considering that the contact between the cars was directly to the rear of the defendant's motor vehicle, and there was no physical evidence that the motor vehicle of the defendants had changed lanes just prior to the accident, plaintiff was liable for the accident.

Motion by the defendant for summary judgment dismissing the action. The plaintiff struck the defendant's motor vehicle from behind. The defendant alleged she was waiting at a red light. The plaintiff alleged that the defendant's vehicle just stopped without any reason such that the plaintiff could not stop in time. At the examination-for-discovery, he claimed saw nothing. In his affidavit, he claimed the motor vehicle of the defendants moved in front of him such that the accident was unavoidable.

HELD: Motion allowed.

Taking into account the responsibility placed on a driver who hit another from behind, considering that the contact between the cars was directly to the rear of the defendant's motor vehicle, there was no physical evidence that the motor vehicle of the defendants had changed lanes just prior to the accident, the court had no trouble in concluding that the fault for this accident lay with the plaintiff. This was a straight-forward rear-end collision.

Counsel

Martin Zatovkanuk, for the Plaintiff.

Andrew Grayson, for the Defendants, Gregory V. Galaites and Gaynell Zamora Galaites.

Luke Field, for the Defendant, RBC General Insurance Company.

T.R. LEDERER J.

1 This is a motion for summary judgment.

2 It arises from a car accident which occurred on March 31, 2010. It took place on the "ramp" exiting from the eastbound lanes of Highway 401, onto the southbound lanes of Avenue Road, in the City of Toronto.

3 A car being driven by the plaintiff, John Chernet, struck the automobile being operated by the defendant, Galites Gounell Zamora, and owned by her husband, the defendant, Gregorio V. Galaites. Her husband was, at the time of the accident, a passenger in the car. The car of John Chernet struck the car of Galites Gounell Zamora from behind. It was a straight-on rear-end collision. Any damage to the vehicle being driven by Galites Gounell Zamora was to the centre of the rear or back of the car.

4 Typically, when one car hits another from behind, it is the operator of that car that bears the liability. The reason for this is obvious. It is the driver in the back that can see what is happening and who has the obligation to keep a sufficient distance between the two vehicles such that he or she can stop quickly upon being confronted with an unexpected situation or emergency. Nonetheless, in this case, it is the operator of the car in the back who sues and is the plaintiff.

5 It is the personal defendants and the insurer of the plaintiff that seek summary judgment. The plaintiff's insurer, RBC General Insurance Company, is involved as a result of the "uninsured/underinsured provisions" of its policy. As it was explained to the court, that policy had or has \$2,000,000 in available limits, whereas the third party liability limits of the policy held by the defendants are only \$1,000,000. The Statement of Claim seeks damages that total \$1,500,000 (general damages of \$500,000 and special damages of \$1,000,000). On the one hand, this seems high for an accident such as this. On the other hand, the plaintiff has been found by an arbitrator to have suffered "catastrophic" injuries.¹ It is apparent that should the personal defendants (the owner and operator of motor vehicle) succeed in their motion for summary judgment, the insurer will have no liability and there will be no purpose in considering any independent concern it may have. In the event that the personal defendants fail in their motion, the insurer says that the case should still be dismissed as against it. In the view of its counsel, there is no issue requiring a trial that would suggest any damage to the plaintiff that could possibly exceed the \$1,000,000 of coverage held by the personal defendants and, thus, no reason that any call on the additional coverage the plaintiff holds could succeed. As it turns out, the action against the personal defendants is to be dismissed. There is no basis to examine any liability on the part of the insurer of the plaintiff.

6 As is well-known by now, our approach to summary judgment has, over the last few years, undergone a significant change. The case which defined the change is *Hryniak v. Mauldin*², where the following is said:

On a motion for summary judgment under Rule 20.04, the judge should first determine if there is a genuine issue requiring trial based only on the evidence before her, *without* using the new fact-finding powers. There will be no genuine issue requiring a trial if the summary judgment process provides her with the evidence required to fairly and justly adjudicate the dispute and is a timely, affordable and proportionate procedure, under Rule 20.04(2)(a). If there appears to be a genuine issue requiring a trial, she should then determine if the need for a trial can be avoided by using the new powers under Rules 20.04(2.1) and (2.2). She may, at her discretion, use those powers, provided that their use is not against the interest of justice.

Their use will not be against the interest of justice if they will lead to a fair and just result and will serve the goals of timeliness, affordability and proportionality in light of the litigation as a whole.³

7 The physical evidence available leads unequivocally to the proposition that this was a straight-forward rear-end collision. The damage was to the centre of the back of the defendant's car. There were no tire marks indicating a sharp stop. There was no physical evidence that the automobile being driven by the defendant, Galites Gounell Zamora, swerved or turned suddenly into the path of the plaintiff's car requiring him to stop so quickly that a collision could not reasonably be avoided. Geometry alone makes this plain. For the damage to occur, as it did, it would be necessary for the defendants' vehicle to have swerved cleanly into the path of the car being driven by the plaintiff in time for it to straighten out the path it was travelling such that it was in place to be struck cleanly in the rear without any skid-marks or other sign of this kind of precipitous manoeuvre.

8 The evidence of the defendants was consistent. The driver, Galites Gounell Zamora, testified that there were three lanes of traffic coming off the highway. She was in the extreme right-hand lane. It and the middle lane are directed to having traffic turn south onto Avenue Road. The third lane, the one to the left as cars come off the highway, is intended for cars turning north. She did not change lanes. As the car approached, the traffic light at the intersection was red. There were two or three vehicles ahead. They had stopped. She came to a gradual stop, leaving approximately one car-length between the car she was driving and the one ahead. She deposed:

I was stopped for what seemed like a minute when the traffic light turned green. I remained stopped while I waited for the vehicles in front of me to move. Suddenly, my vehicle was struck in the rear by the vehicle being operated by the plaintiff...⁴

9 Her husband said much the same thing. They entered the ramp and were travelling in the right-hand lane. As they approached the intersection, the traffic lights were red. There were two or three cars in front of them. He noted:

We were at a full stop when suddenly, the vehicle being operated by the plaintiff struck us in the rear.⁵

10 There was no suggestion that the evidence of either of these parties changed in any substantive way from the date of the accident up to the hearing of this motion.

11 This should be set against the evidence of the plaintiff. On the day of the accident, the plaintiff was interviewed by a police officer. The officer's notes are hearsay as to what took place, but they report what John Chernet said. The car being driven by Galites Gounell Zamora:

...just stopped with no reason.

12 The officer asked whether "they stopped abruptly?" The plaintiff responded:

Yes, that's when I hit them⁶

13 There is nothing in this to suggest that the car that was hit was anywhere other than directly in front. There was no suggestion that it changed lanes immediately before the impact or at any other time. The cause of the accident was stated to be that the motor vehicle in front stopped for no reason and abruptly such that the driver in the rear did not or could not stop in time.

14 John Chernet was examined for discovery. His evidence was different. As he approached the traffic lights at the intersection, there was no car in front of him:

There is no[t] any car in front of me.⁷

15 When pressed by counsel as to whether there was a motor vehicle there, he said:

None at all.⁸

16 According to the evidence at the discovery, John Chernet went on to say:

I did not see any other vehicle.⁹

17 The reason he hit the vehicle in front "so hard" is because he did not see it. In answer to the question: "How did you know you were in an accident?" He said:

I thought it was [an] explosion...¹⁰

and then:

I never thought it was an accident.¹¹

18 The plaintiff, John Chernet, swore an affidavit in support of his position at his motion. In it, he says:

I have consistently stated that Ms. Zamora Galites abruptly stopped in front of me without warning.¹²

19 This is not so. At the examination-for-discovery, he said nothing about a car stopping abruptly. To the contrary, he did not see a car at all. There is no reference to a car swerving into his path. What this suggests is John Chernet was not looking. Taken together with what he told the police officer, it suggests an inconsistent recollection of what took place. In his affidavit, John Chernet deposed:

I have further maintained that there were no cars in front of me between the scene of the accident and the stoplights, which were 150 metres ahead, until the Zamora vehicle suddenly appeared in front of me and came to an abrupt stop.

I was unable to react to the sudden appearance of the Zamora vehicle and the Zamora vehicle's abrupt stop in front of me, and collided with the rear of the vehicle...

There were no skid marks at the scene of the accident, as I did not have an opportunity to start breaking when Ms. Zamora-Galaites came in front of my vehicle and stopped.¹³

20 There is a significant difference between this and what was said at the examination-for-discovery. There, he saw nothing. In the affidavit, he explains everything.

21 As with the husband of the defendant, Galites Gounell Zamora, the plaintiff, John Chernet, submitted that there is evidence which corroborates his version of events. This refers to Assouyouti Moustapha, who was a passenger in the car John Chernet was driving. In his affidavit, John Chernet deposed:

My account of the accident is supported by Mr. Moustapha, who holds an adverse interest to my own in these proceedings...¹⁴

22 I presume that the adverse interest mentioned refers to the fact that Assouyouti Moustapha has commenced an action of his own.¹⁵ While I do not believe it is referred to in the Record before the court on this motion, I expect that John Chernet is among the defendants named in that action. No affidavit of Assouyouti Moustapha was provided. However, his examination-for-discovery in his own action was referenced. At that time, on being asked about the accident, his evidence was:

In fact, I was not driving, and I wasn't paying attention. Then, all of a sudden I heard the accident happened [*sic*] and I heard screaming.¹⁶

23 Assouyouti Moustapha said he did not see any cars in front of the car he was riding in. When asked if he was looking ahead, he repeated:

Because I wasn't the one who drives, then I wasn't really
looking or paying attention to that.¹⁷

24 The question of whether there were any cars ahead in the lane in which they were driving was pursued. In response, Assouyouti Moustapha testified:

To tell you the truth, one more time, what happened is that we were getting off, and then all of a sudden the impact happened. From where the other came, I have no clue.¹⁸

25 This does not serve to confirm any particular view as to what happened. Rather, it demonstrates that Assouyouti Moustapha was not paying attention because he was not driving and, on that account, did not see what happened.

26 What is it that is said on behalf of John Chernet that is demonstrative of an issue requiring a trial?¹⁹

27 Counsel for the John Chernet pointed to the evidence of the defendant, Galites Gounell Zamora. She said she did not drive very often. Counsel pointed to where she said:

My husband always do [sic] the driving but that time I hopped into the driver's side.²⁰

and where she was asked and said:

Q. When you go out with your husband to places, does he usually drive?

A. Yes.²¹

28 Counsel went on to refer to the evidence of Galites Gounell Zamora where she said:

I missed my exit going to Keele to collectors.²²

29 She had been unable to move from the express lanes to the collectors to leave the highway at Keele St. as she had intended.²³ She indicated that she first noticed that she would be unable to exit at Keele Street when she saw the appropriate sign in the collector lanes. In his factum, counsel for the plaintiff refers to Galites Gounell Zamora also saying that it was her daughter who noticed that the exit had been missed. The factum gives no reference point in the examination at which this statement is made. I note that the following appears in quotation marks, but without any attribution:

Oh mommy you just missed your exit.²⁴

30 Galites Gounell Zamora was asked and indicated that, as she approached the ramp, she was travelling in the extreme right-hand lane. She stayed there and did not change lanes.²⁵ Counsel also observed that in order to return, a choice available to Galites Gounell Zamora was to turn left and go north on Avenue Road, re-enter Highway 401, going west and go back to Keele Street. At the examination-for-discovery, Galites Gounell Zamora testified that this is what her husband was suggesting, but she "didn't listen". She went "...to the far right to be safe."²⁶

31 Finally, counsel noted that Galites Gounell Zamora testified that, at the time of the accident, she had a two-month-old baby. Although she said she slept "more than ten hours" daily, she acknowledged that this sleep was broken up each time the baby went to feed.²⁷

32 To counsel for the plaintiff, taken as a whole, these observations translate into an issue requiring a trial. In his factum, he summarized his conclusion:

The evidence demonstrates that Ms. Zamora-Galaites was a sleep-deprived mother, who rarely drove, missed her off-ramp and panicked when her husband repeatedly kept telling her to turn left at the upcoming intersection while she wanted to turn right...²⁸

33 I have reviewed:

- * the uncontested evidence. The motor vehicle of the defendants was struck in the rear, not to the side, without skid marks or any other physical demonstration that the car of the defendants swerved or suddenly changed lanes just prior to the accident.
- * the evidence of Galites Gounell Zamora which was consistent with and corroborated by evidence of her husband, Gregorio V. Galaites. They were in the right-hand lane; they did not change lanes. They stopped, as a result of a red light, as they proceeded on the ramp. After the car stopped, they were struck from behind.
- * the evidence of John Chernet which changed. At first, in a statement to the police officer, there was a car in front which stopped suddenly. At the examination-for-discovery, he saw nothing; indication of the accident was an explosion. In his affidavit, the motor vehicle of the defendants moved in front of him such that the accident was unavoidable.
- * The evidence of Galites Gounell Zamora relied on by John Chernet as demonstrating that there was an issue requiring a trial.

34 How should all of this be applied to the test or standard set in *Hryniak v. Mauldin*?

35 Taking into account the responsibility placed on a driver who hits another from behind, remembering that the contact between the cars was directly to the rear of the defendant's motor vehicle, recalling that there was no physical evidence that the motor vehicle of the defendants had changed lanes just prior to the accident (This includes the fact that the plaintiff did not say, in any of the three descriptions of the accident he provided, that he saw the car change lanes.), I have no trouble in concluding, without resort to the authority provided by r. 20.04 (2.1), that the fault for this accident lies with the plaintiff and to order that the action be dismissed.

36 If I am wrong in this, it does not matter. To me, it is clear. The evidence of Galites Gounell Zamora is consistent throughout. It is corroborated by the evidence of the passenger, her husband, Gregorio V. Galaites. This is to be contrasted with the evidence of the plaintiff, John Chernet, which, to my mind, went through an unhappy evolution. Each time, it was different. Applying the authority provided by the rule, if I needed to, which I do not, I would accept the evidence of Galites Gounell Zamora, reject that of John Chernet to the extent that it was inconsistent with that of the defendants and, on that basis, dismiss the claim.

37 This is confirmed by what, to me, is the misplaced effort of counsel to find an issue requiring a trial. It is not sufficient to extract a series of observations and speculate how they might come together to create another version of what took place and then submit there is an issue requiring a trial. Such an approach denies the impact of the rule and the guidance provided by *Hryniak v. Mauldin*. It would mean that any different view offered by the party opposing summary judgment, even one based on speculation without substantive demonstration in the evidence, would be enough to establish an issue requiring a trial. Such an approach would ignore the authority provided by rule 20.04 (2.4) to examine the evidence, weight it, evaluate credibility and draw reasonable inferences.

38 The action is dismissed as against the defendants, Galites Gounell Zamora and Gregorio V. Galaites. This being so, there is no need for me to consider any independent concerns of the other moving party, RBC General Insurance Company. The action is dismissed as against that defendant as well.

39 No submissions were made as to costs. If the parties are unable to agree, I will consider written submissions on the following basis:

1. On behalf of the moving parties, Galites Gounell Zamora and Gregorio V. Galaites, within 15 days of the release of these reasons. Such submissions are to be no longer than 3 pages, double-spaced, not including any Bill of Costs, Costs Outline or case law that may be relied on.
2. On behalf of the moving party, RBC General Insurance Company, within 15 days of the release of these reasons. Such submissions are to be no longer than 2 pages, double-spaced, not including any Bill of Costs, Costs Outline or case law that may be relied on.
3. On behalf of the responding party, John Chernet, within 10 days thereafter. Such submissions are to be no longer than 4 pages, double-spaced, not including any Bill of Costs, Cost Outline or case law that may be relied on.
4. On behalf of the moving parties, Galites Gounell Zamora and Gregorio V. Galaites, and the moving party, RBC General Insurance Company, within 5 days thereafter, in reply, if necessary. Each of the two submissions are to be no longer than 1 page, double-spaced.

T.R. LEDERER J.

- 1** *John Chernet v. RBC General Insurance Compan*, FSCO A13-000932 Reasons for Decision, October 1, 2015. The accompanying Arbitration Order states, at para. 1: "Mr. Chernet sustained a catastrophic impairment as a result of the accident..."
- 2** [2014 SCC 7, \[2014\] 1 S.C.R. 87.](#)
- 3** *Ibid*, at para. 66.
- 4** *Affidavit of Gaynell Zamora-Galites*, sworn March 3, 2016, at paras. 10-14. The quotation is from paragraph 13. I note, as well, that the title of the *Affidavit* and the style of cause identify the defendant operator of the motor vehicle with similar but different names. I do not recall this being raised in court and I cannot explain it. I note only that no objection was taken.
- 5** *Affidavit of Gregorio v. Galaites*, sworn March 3, 2016, at paras. 3 and 4. The quotation is from paragraph 4.
- 6** *Affidavit of John Chernet*, sworn March 23, 2016 at Exhibit D,
- 7** *Examinatio-for-Discovery of John Chernet* at Q. 166.
- 8** *Ibid*, at Q. 167.
- 9** *Ibid*, at Q. 169.
- 10** *Ibid*, at Q. 170.
- 11** *Ibid*, at Q. 171.
- 12** *Affidavit of John Chernet*, sworn March 23, 2016, at para. 11.
- 13** *Ibid*, at paras. 12, 13 and 14.
- 14** *Ibid*, at para. 34.
- 15** This would be a matter of public record. It is referred to in the *Factum of the Moving Parties Gregorio V. Galaites and Gaynell Zamora Galaites*. I note that the title to this *Factum* and the style of cause have different, albeit similar, names for the defendant operator of the motor vehicle. As referred to in fn. 4 above, this was not raised in court.

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- 16 *Examination-for-Discovery of Assouyouiti Moustapha* at Q. 156.
- 17 *Ibid*, at Q. 159
- 18 *Ibid*, at Q. 162.
- 19 *Rules of Civil Procedure, R.R.O. 1990, Reg. 194*, at rule 20.04(2)(a).
- 20 *Examination-for-Discovery of Gaynell Zamora-Galaites* at Q. 56.
- 21 *Ibid*, at Q. 58.
- 22 *Ibid*, at Q. 54.
- 23 *Ibid*, at Q. 55.
- 24 *Ibid*, at Q. 65.
- 25 *Ibid*, at Q. 80 and Q. 81.
- 26 *Ibid*, at Q. 177.
- 27 *Ibid*, at Q. 287.
- 28 *Factum of the Plaintiff*, at para. 36.

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