Positive Proof Not Necessary For Summary Judgment

September 23, 2016

The Court granted summary judgment for the defendant in Choma v City of Toronto, 2016 ONSC 5510.

On September 1, 2016, the Court granted summary judgment for the defendant in *Choma v City of Toronto*, 2016 ONSC 5510.

This case arose from a trip-and-fall incident that occurred on the evening of March 12, 2010, on a grass island adjacent to a parking lot. The parking lot had been constructed in 2004 by a contractor hired by the defendant, the City of Toronto (the "City"), and was leased to a private entity by the City pursuant to a "carefree net lease" since December 2004.

It was alleged that the plaintiff was crossing the grass island when she tripped over a bolt protruding from the ground. The bolt was one of four embedded in the base of a light standard. The light standard itself was gone, but its base had been left in place. The City moved for summary judgment on the basis that it did not create the alleged hazard.

The City bore the burden of showing the Court that a trial was not necessary to prove, on a balance of probabilities, that it did not create the hazard. This was especially difficult because the City had no positive evidence to indicate which party had created the hazard and was essentially tasked with proving a negative. Based on the evidence, the Court made the following findings:

- If the City had removed or approved the removal of the light standard, it would have generated a record of that removal;
- The City conducted a diligent search of every department that might reasonably have records of the light standard's removal, and found none; and
- The evidentiary record would not improve with a trial.

Ultimately, the Court found that a trial was not required to find that the City had not removed or approved the removal of the light standard.

This decision suggests that, given a proper evidentiary record, a Court may draw reasonable inferences and grant summary judgment in favour of a defendant who is seeking only to prove a negative, so long as the defendant can show that it exercised due diligence in searching its records and that a trial would not change anything in that regard.

By

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