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Personal Injury

Ruling shows unpredictability of court system: Paciocco

By Tony Poland, AdvocateDaily.com Associate Editor



It is important to “be prepared for any outcome” when you are dealing with the judicial system, says Windsor personal injury lawyer [Gino Paciocco](#).

Paciocco, a founding partner with [Paciocco & Mellow](#), referenced an Ontario Court of Appeal judgment arising out of a \$1-million claim for injuries suffered in a Toronto mall as proof that a case can suddenly turn in an unwanted direction.

In the [case](#), court heard a man was injured after tripping over a skateboard and filed a lawsuit against the property owner.

Following the examination for discovery, the mall owner moved for summary judgment dismissing the action, in part on the ground that “there is no genuine issue for trial with respect to the liability” of the company, court heard.

The man did not bring a cross-motion for judgment, but in what is referred to as a boomerang summary judgment, the judge rejected the mall owner’s motion and granted judgment to the plaintiff, directing a trial on the assessment of damages.

“As a plaintiff, you can go into a summary judgment motion just looking to keep your case alive, but the unexpected can happen, and you can come out with a judgment in your favour,” Paciocco tells [AdvocateDaily.com](#). “Keep in mind, when it seems too good to be true, that’s probably the case. An unexpected result in a motion can easily be appealed, and anything can happen on appeal.”

He says, while requesting a summary judgment to dismiss the action initially worked against the mall owner, it was a good move.

“A summary judgment motion can help save time and money in litigation if there are no facts in dispute and no genuine issue for trial,” says Paciocco, who was not involved with the case and comments generally. “These types of motions also help build the body of case law and help future cases assess liability without having to go to trial themselves.”

However, in this instance, there were facts in dispute, “such as what the defendant and their employee knew about the skateboard and when they knew it, and what they could have done to address the issue,” he says.

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“Hearing testimony on this issue is something that should have been addressed at a trial,” Paciocco says. “In this case, the facts might have been novel — the specific way in which the skateboard caused the accident — and the only way to determine if the defendant could be held liable was through a trial.”

During discovery, the man had introduced hearsay evidence from mall cleaning staff to support his claim, evidence that the Court of Appeal ruled “constitutes an additional reason to set aside the Judgment.”

“I think the judgment was correct in reversing the lower court’s decision,” says Paciocco. “The motion judge accepted hearsay evidence without any justification and did not create a fair process for the defendants.”

He says if the mall workers’ “evidence had been presented as first-hand accounts rather than hearsay, within hearsay, the case might have been decided differently.”

“The accounts of the cleaning staff showed that the mall, through its employees, had knowledge of the unsafe condition and failed to adequately address the issue,” Paciocco says. “This foreknowledge could be grounds for finding the defendants liable.”

He says the overall process of boomerang motions is unfair, but “the actual outcome for the mall owner was not.”

“Up until this appeal court decision, boomerang motions were an acceptable judicial tool,” Paciocco says. “The motion judge relying on hearsay evidence, viewing it as more reliable than non-hearsay evidence, influenced the judge’s ruling. The trial outcome was unfair for the defendant based on the inclusion of the hearsay evidence.

“The courts have awarded this type of boomerang motion in the past, and so while defendants know it is a possibility, it was one so remote that no defendant could have reasonably expected it to occur. I think this decision is an important reversal of a fundamentally unfair process.”

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