

Case Name:
Gohm v. York

**RE: Shannon Gohm, Plaintiff, and
Larry York, Corey MacDougall and Lisa Frew, Defendants**

[2013] O.J. No. 5238

2013 ONSC 7118

Court File No. CV-09-0000051-00

Ontario Superior Court of Justice

D.S. Gunsolus J.

Heard: November 14, 2013.
Judgment: November 19, 2013.

(64 paras.)

Civil litigation -- Civil procedure -- Judgments and orders -- Summary judgments -- Evidence -- No triable issue -- To dismiss action -- Motion by the defendant York for summary judgment for dismissal of the action allowed -- The plaintiff and co-defendant MacDougall were on York's property when the plaintiff was injured by a fence -- York was not present but acknowledged being an occupier under the Occupier's Liability Act -- However, no evidence to indicate the fence did not meet an occupier's reasonable standard or was improperly installed -- The plaintiff could not meet onus on her to identify any action York did or did not take that caused or contributed to her injury -- There was no genuine issue for trial -- Negligence Act -- Occupier's Liability Act, s. 3 -- Rules of Civil Procedure, Rules 20, 20.4(2.1), 20.04(2.2).

Tort law -- Occupiers' liability -- Dangerous premises -- Motion by the defendant York for summary judgment for dismissal of the action allowed -- The plaintiff and co-defendant MacDougall were on York's property when the plaintiff was injured by a fence -- York was not present but acknowledged being an occupier under the Occupier's Liability Act -- However, no evidence to indicate the fence did not meet an occupier's reasonable standard or was improperly installed -- The plaintiff could not meet onus on her to identify any action York did or did not take that caused or contributed to her injury -- There was no genuine issue for trial -- Negligence Act -- Occupier's Liability Act, s. 3 -- Rules of Civil Procedure, Rules 20, 20.4(2.1), 20.04(2.2).

Motion by the defendant York for summary judgment for dismissal of the action. The plaintiff and the co-defendant MacDougall were enjoying a day together working with horses on York's hobby farm. York was not present. The plaintiff alleged that some action by MacDougall while leading a horse out of a paddock resulted in the plaintiff being injured by the recoil of a bungee-cord fence. York's evidence was that he never had an issue with the fence or gate in question. It was acknowledged that this type of gate and fencing were routinely used on horse farms in Ontario. There was no evidence it was unsafe or the installation was negligent. In earlier oral reasons, the court had declined to accept an expert report for lack of qualifications, but also found that if the expert were qualified, the opinion was that the negligence involved in the incident was a result of the possible misuse of the fence or gate by MacDougall or the plaintiff. The plaintiff's claim against York was based on the Occupier's Liability Act and the Negligence Act. The first issue was whether summary judgment should be granted on the basis that York could not be said, as an occupier of the property, to have breached any duty of care owed to the plaintiff. The second issue was whether, based upon the pleadings and transcripts of examinations the court was able to attain a full appreciation of the evidence and issues or did the interests of justice require a trial.

HELD: Motion allowed. The action was dismissed as against the defendant York. York acknowledged he owed a statutory duty to the plaintiff as an occupier in the meaning of the statute. If a person was injured on the premises, the plaintiff had the burden on the balance of probabilities to pinpoint some act or failure to act on the part of the occupier, which caused the injury complained of, before liability could be established. The plaintiff must prove that the occupier breached their statutory duty of care by failing to take reasonable care to see that persons entering their premises were reasonably safe on the premises. The defendant seeking summary dismissal had the evidentiary burden of showing that there was indeed no genuine issue of material fact requiring trial. A review of the pleadings and examinations and cross-examinations revealed no evidence to indicate that York's paddocks, fences or gates were not maintained consistent with standard practice or to indicate the basis for the alleged negligence against York. The paddock, gate and fence were in working order and MacDougall had care of the premises. But for the actions of the plaintiff and/or MacDougall, the incident would not have occurred. York and MacDougall were in a common-law relationship, and there was no basis for vicarious liability. It was not reasonable to expect the fence to be foolproof. There was no evidence to indicate the fence and/or gate did not meet an occupier's reasonable standard or were improperly installed. The plaintiff could not pinpoint what York did or did not do that caused or in the very least, contributed to the incident that occurred. Without that evidence, there was no genuine issue requiring a trial. There was no evidence York created an objectively reasonable risk of harm. The plaintiff could point to no breach of custom, industry practice, statutory or regulatory standards, by-laws or manufacturer's recommendations which York breached. The plaintiff appeared to want to shift the onus of disproving negligence onto York. The plaintiff, MacDougall, and York all had experience handling horses. The plaintiff's belief that in some way York failed to properly instruct MacDougall in relation to using the fence was speculative and did not place a higher onus on him as an occupier of the land. The plaintiff herself admitted that she perceived the York property, including its paddocks and gates to be safe and in good working order, as otherwise she would not have temporarily located her own horse on the premises as she did.

Statutes, Regulations and Rules Cited:

Negligence Act, R.S.O. 1990, c. N.1,

Occupier's Liability Act, R.S.O. 1990, c. O.2, s. 3

Rules of Civil Procedure, Rule 20, Rule 20.4(2.1), Rule 20.04(2.2)

Counsel:

Monique Meloche, counsel for the plaintiff.

Linda Matthews and Dustin Milligan, counsel for the defendant, Larry York.

No one appearing for the defendants MacDougall and Frew.

ENDORSEMENT

D.S. GUNSOLUS J.:--

Nature of the Motion

- 1** The defendant, Larry York, ("York") brings this motion for summary judgment for dismissal of the action brought against him by the plaintiff Shannon Gohm ("Gohm").
- 2** The plaintiff commenced this action as the result of an incident she alleges occurred on or about May 4th, 2007 while she was visiting with her friend, the co-defendant, Corey MacDougall ("MacDougall") on the property owned by Mr. York.
- 3** The property in question was a hobby farm on which Mr. York had approximately seven of his own horses.
- 4** The co-defendant MacDougall was residing with Mr. York and was on the property at the time of the alleged incident. Mr. York was not present as he was in Fort McMurray, Alberta, working.
- 5** The plaintiff and defendants York and MacDougall all had varying levels of experience in dealing with horses most of their lives. While Mr. York was in Fort MacMurray, MacDougall cared for Mr. York's property, including his horses and the related stables and paddocks. It is acknowledged that she had experience in caring for horses.
- 6** At the time of the incident, the plaintiff had been friends with MacDougall for approximately 9 months. In April of 2007, the plaintiff had asked Ms. MacDougall if she could temporarily locate a horse that she had purchased on Mr. York's property until such time as her husband built a paddock on their own property.
- 7** Apparently Mr. York agreed to this arrangement upon being asked by MacDougall, provided that the plaintiff paid \$100 (or perhaps \$150) per month and took care of her own horse. It is acknowledged that the monthly amount was never paid. It is further acknowledged that the York farm was not a commercial enterprise, but simply his own residence and hobby farm (which he shared with MacDougall).
- 8** There is a dispute as to exactly what happened that caused the plaintiff's injuries. The plaintiff claims that while MacDougall was leading one of Mr. York's horses from a paddock, she and Ms. MacDougall stepped down on each side of a bungee-cord fence to make it flat on the ground, so the horse could be led across it. When MacDougall stepped off the fence it caused it to recoil and Gohm

either fell, tripped or was bounced up in the air and fell face-forward. She alleges that she suffered a serious knee injury in the result.

9 The plaintiff has surmised that perhaps the horse was improperly led by MacDougall across the fence in question and that perhaps the horse's feet got caught in the fence. MacDougall alleges that when one lets go of the type of fence in question, it simply retracts to the post and does not agree with Gohm's allegations.

10 In any event, it is clear that Gohm and MacDougall were friends enjoying a day together, working with horses, on Mr. York's hobby farm.

11 A review of the plaintiff's Statement of Claim discloses that the allegations of negligence centre mainly on MacDougall, claiming "Ms. MacDougall caused the horse's hoof to get caught in the fence. The horse then bolted with a portion of the fence dragging behind, causing Shannon to become tripped up and thrown to the ground."

12 Mr. York's evidence has been that the paddock in question was enclosed by a bungee cord gate and an electric fence. He himself never had an issue with the gate or fence and it is acknowledged that this type of gate and fencing are routinely used on horse farms throughout Ontario. There was no evidence presented that it is unsafe or that the installation by Mr. York was in any way negligent.

13 The defendant York takes the position that the plaintiff has failed to establish his premises were in anyway unsafe, inclusive of the fencing and gating.

14 Earlier in this motion I, for oral reasons, determined that a report submitted by the plaintiff was not an expert report as, for various reasons, the author of the report could not be qualified as an expert in relation to the fence and gate in question. I further found that even if I were wrong in that regard, as a result of cross-examination, the author of that report resiled from it and confirmed that Mr. York was not negligent with respect to the use or installation of the fence and gate at issue. Rather, she was of the opinion that the negligence involved in the incident related to the possible misuse of the fence or gate by the defendant MacDougall and by the plaintiff Gohm.

15 The issues to be determined on this motion are as follows:

- (1) Should summary judgment be granted on the basis that Mr. York cannot be said, as an occupier of the property, to have breached any duty of care owed to the plaintiff?
- (2) Based upon the pleadings and examinations, including transcripts of examinations and cross-examinations, is the court able to attain a full appreciation of the evidence and issues or do the interests of justice require a trial?

Should summary judgment be granted on the basis that Mr. York cannot be said, as an occupier of the property, to have breached any duty of care owed to the plaintiff? Is the court able to attain a full appreciation of the evidence or is a trial required in the interests of justice?

16 The plaintiff's claim against York is based upon the *Occupier's Liability Act*, R.S.O. 1990, c. O-2 and the *Negligence Act*, R.S.O. 1990, c. N.1.

17 Mr. York has acknowledged that he owed a statutory duty to the plaintiff pursuant to the *Occupier's Liability Act* in that he concedes that he was an occupier within the meaning of the statute.

18 Mr. York, however, takes the position that his premises were safe and that the activities carried out thereon were not dangerous and in particular, his fencing and gating did not create any dangers or pose any danger to the plaintiff.

The Law

19 Section 3 of the *Occupier's Liability Act* defines the duty of care owed by an occupier to those who enter upon it as follows:

An occupier of premises owes a duty to take such care as in all the circumstances of the case is reasonable to see that persons entering on the premises, and the property brought on the premises by those persons are reasonably safe while on the premises.

20 It has been held in a number of cases that the Act establishes a duty of care only and not a presumption of negligence.

21 If a person is injured on a premises, a plaintiff must still be able to pinpoint some act or failure to act on the part of the occupier, which caused the injury complained of, before liability can be established.¹

22 A reasonable standard is not one of perfection, rather it is a reasonable standard.²

23 The leading decision interpreting these provisions is a decision of Justice Campbell of this court. Justice Campbell confirmed that the *Act* imposes an affirmative duty on occupiers to make the premises reasonably safe for persons entering them, by taking reasonable care to protect them from foreseeable harm. He found however:

This duty is not absolute. Occupiers are not insurers liable for any damages that may be suffered by persons entering their premises. This standard of reasonableness requires neither perfection nor unrealistic or impractical precautions against known risks.

...

In each case, the trier of fact must determine what standard of care is reasonable and whether that standard of care has been met.³

24 As in other types of negligence cases, actions involving allegations of occupier's liability, require the plaintiff to establish the negligence of the occupier on the balance of probabilities. The plaintiff must prove that the occupier breached their statutory duty of care by failing to take reasonable care to see that persons entering their premises were reasonably safe on the premises.⁴

25 While the summary judgment rule serves an important purpose in that it prevents claims or defences that have no chance of success from proceeding to trial, it is equally true that it is essential to justice that claims disclosing real issues that may be successful, be allowed to proceed to trial.

26 The defendant who seeks summary dismissal bears the evidentiary burden of showing that there is indeed "no genuine issue of material fact requiring trial". In these motions of course, each party must put their best foot forward.

27 A motion for summary judgment is to be granted where the court is satisfied that there is no genuine issue for trial with respect to a claim or defence. The essential purpose of summary judgment is to isolate, and then terminate, claims and defences that are factually unsupported.⁵

28 Rule 20 however is not intended to deny parties access to the justice system. Rather, its purpose is to weed out cases at the pre-trial stage where it can be demonstrated clearly that a trial is not necessary.⁶

29 The court is required to take a hard look at the evidence in a summary judgment motion. The court is to consider what evidence the parties might have to put before a trial judge or jury if a trial is ultimately held. The motion's judge is entitled to assume that the record contains all the evidence which the parties will present if there is a trial and that neither party would have additional evidence available for trial purposes.⁷ Clearly, the moving party possesses the legal burden on a summary judgment motion, however, rule 20 also imposes an evidentiary burden on the responding party. Evidence must be led by the party setting out specific facts showing that there is a genuine issue for trial. The responding party may not rest on mere allegations or denials contained in the pleadings, but must put its best foot forward or risk losing⁸.

30 In addition to the foregoing, the court must ask if a full appreciation of the evidence and issues required to make dispositive findings can be achieved by way of summary judgment or only by way of trial. In cases that call for multiple findings of fact on the basis of conflicting evidence from a number of witnesses located in a voluminous record, a summary judgment motion generally should not be used as an adequate substitute for the trial process. On the other hand, in document-driven cases with limited testimonial evidence or cases with limited contentious factual issues, a motion judge would be able to achieve the full appreciation of the evidence in issues that is required to make dispositive findings.⁹

31 Subsection 2.1 of rule 20.04 requires that:

In determining under clause (2) (a) where there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise the following powers, including:

- (1) Weighing the evidence;
- (2) Evaluating the credibility of a deponent;
- (3) Drawing any reasonable inference from the evidence

...

Unless it is in the interest of justice for such powers to be exercised only at a trial.

32 In *Combined Air*¹⁰, the Ontario Court of Appeal held that there are three types of cases where summary judgment may be granted were described. The first is where the parties agree to submit their dispute to resolution by way of summary judgment.

33 The second class of cases is where the claim or defence has no chance of success. A judge may use the powers provided by rule 20.04(2.1) and (2.2) to be satisfied that a claim or defence has

no chance of success. The availability of these enhanced powers to determine whether the claim or defence has no success will allow the court to weed out more actions through the mechanism of summary judgment. However, before the motions judge decides to weigh evidence, evaluate credibility or draw reasonable inferences from the evidence, the motions judge must apply the full appreciation test.

34 There is now a third type of case that can be considered under these provisions, and that is where the motions judge is satisfied that the issues can be fairly and justly resolved by exercising the powers under rule 20.04(2.1). In such circumstances the court is required to assess whether or not a full appreciation of the evidence and issues that is required to make dispositive findings on the basis of the motion record can be achieved, or if the attributes and advantages of a full trial process require that these powers only be exercised at a trial.

35 The important element of the analysis under rule 20 is that, before using the powers in rule 20.04(2.1), to weigh evidence, evaluate credibility and draw reasonable inferences; the motions judge must apply the full appreciation test in order to be satisfied that the interest of justice does not require that these powers be exercised only at trial.

Discussion

36 Mr. York asked the court to determine that the plaintiff has failed to pinpoint any act or failure to act that would indicate a presumption of negligence on his part. He points to the allegations set out in the statement of claim, directed at the defendant MacDougall and alleging negligence on her part: "*While in full care and control of the horse, the defendant Corey MacDougall caused the horse's hoof to get caught in the fence.*"

37 He further takes the position that insofar as he was absent when this incident allegedly occurred, the allegations of negligence in the Statement of Claim that might apply to him relate only as to whether or not he left his premises in a safe condition for guests, during his absence, in accordance with the *Occupier's Liability Act*.

38 He further argues that the plaintiff was a mature horsewoman (as was the defendant MacDougall), and that she willingly placed herself in a position knowing that some degree of harm might result, and thus is not able to bring a claim against Mr. York in tort due to the doctrine of *volenti non fit injuria*. In other words, she voluntarily assumed such risk.¹¹

39 Mr. York further takes the position that there is no evidence put before the court to suggest that the premises were not reasonably safe at the time of this alleged incident. The premises were in the care of his then-girlfriend, the defendant MacDougall, who was an experienced horsewoman, and thus he cannot be found liable for the injuries, if sustained at all, as at best, the plaintiff's action might succeed as against the defendant MacDougall.

40 It is Mr. York's position that the plaintiff has put forward no evidence that his property was in an unsafe state in accordance with a reasonable standard.

41 He argues that as in the *Miltenberg v. Metro Inc.*¹² case, his property was in a state consistent with industry standard and either the plaintiff's own actions or those of the co-defendant MacDougall were the cause of the plaintiff's injuries. He points out that in that case, the court was satisfied that there was no genuine issue for trial and summary judgment was granted.

42 A review of the pleadings and examinations and cross-examinations indeed reveals that no evidence has been put forth to indicate that Mr. York's paddocks, fences or gates were not main-

tained consistent with standard practice or to indicate the basis for the alleged negligence against Mr. York. The paddock, gate and fence were in working order and the defendant MacDougall had care of the premises. As in *Miltenberg*¹³, but for the actions of the plaintiff and/or the co-defendant MacDougall, the incident would not have occurred.

43 The plaintiff takes the position that the defendant York should have installed gates and fencing that were "foolproof", which could not be misused such as alleged by the plaintiff in relation to the defendant MacDougall. (And indeed in relation to herself.)

44 Further, the plaintiff takes the position that York knew that MacDougall had in the past misused the fencing in question and that therefore, he left the premises in the hands of someone who may have again taken such steps, causing the injuries to the plaintiff. She takes the position that:

He knew or ought to have known that an accident might occur with respect to Corey's (MacDougall's) shortcut of operating the fence as a gate.

45 York was not MacDougall's employer. They were living in a common law relationship. Vicarious liability, counsel agreed, does not apply to these circumstances.

46 The position taken by the plaintiff would impose a standard of reasonableness which would require "*either perfection or unrealistic or impractical precautions against known risks*"¹⁴. This would be a standard of care beyond what is reasonable in the circumstances.

47 No matter which explanation one considers that the plaintiff has put forth in relation to the cause of the accident, no evidence was put before the court to suggest that any of these scenarios was the result of the defendant York not meeting his obligations under the *Occupier's Liability Act* or the *Negligence Act*. Whether or not the accident was caused by the misuse by the plaintiff and the defendant MacDougall of a recoiling gate or rope-type fence (which the plaintiff argues should have been "traditional" fencing and/or gating), no evidence exists to indicate that the fence and/or gate did not meet an occupier's reasonable standard. The misuse of these apparatus by the plaintiff and defendant MacDougall may have caused or contributed to the accident, but no evidence exists to suggest that the gating and fencing were not appropriately installed and acceptable installations on a farm of this nature.

48 Again, the plaintiff and the defendant MacDougall, both experienced horsewomen were enjoying time together with horses, as friends, and an accident occurred. The plaintiff could not pinpoint what the defendant York did or did not do that caused or in the very least, contributed to the incident that occurred. Without that evidence, there is no genuine issue requiring a trial.

49 The basic issue in this case is whether the defendant York was negligent in the manner in which he built fencing and/or gates on his property in such a way that he should have foreseen could reasonably cause injury to visitors to his property.

50 His conduct would be deemed negligent if it created an objectively reasonable risk of harm Under the provisions of the *Occupier's Liability Act*, in order to avoid liability, a person must exercise a standard of care that would be expected of an ordinary, reasonable and prudent person in the same circumstances. The measure of what is reasonable depends on the facts of each case including foreseeability, the gravity of possible harm and the burden of cost which would be incurred to prevent the injury. In addition, indicators of reasonable conduct, such as custom, industry practice and statutory or regulatory standards can be considered. In the case before me, as I have already said,

the plaintiff has not pointed to the act or failure to act on the part of York which caused her injury. She could point to no breach of custom, industry practice, statutory or regulatory standards, by-laws or manufacturer's recommendations which York breached.

51 As stated by Goodman, J. in *Miltenberg v. Metro Inc.*, to quote:

There is some inherent risk involved in everyday interactions between individuals in society. An occupier is not required to sanitize their environment to such a degree to negate all inherent risk. What is required is balancing what may be a reasonable course of conduct against the potential for harm. The standard of care for occupiers is one of reasonableness. It requires neither perfection nor unrealistic or impractical precautions against known risks.¹⁵

52 The evidence as presented by the plaintiff in this case suggests that the defendant MacDougall may have improperly led a horse on the York property across a fence and/or gate, causing the animal to bolt. She further argues that as a result she was either knocked over or dragged by a fence in which the animal's hoof may have caught.

53 The plaintiff has not presented any evidence as to how the defendant York could possibly be found liable as occupier for the accident which occurred.

54 As in the *Miltenberg*¹⁶ case, it would appear that the plaintiff has failed to consider that the onus is on her to prove her case. She rather appears to want to shift the onus of disproving negligence onto the shoulders of Mr. York.

55 There is no evidence that the gates and fencing located on the York property were improperly installed. Rather, the plaintiff argues that the use of same by the defendant MacDougall may have caused her injuries.

56 The plaintiff and the defendant MacDougall and the defendant York are all persons with experience handling horses. The plaintiff's belief that in some way the defendant York failed to properly instruct the defendant MacDougall in relation to the use and/or misuse of the gate and fencing is speculative and does not place a higher onus upon him as occupier of the land than the provisions of the *Occupier's Liability Act* imposes upon him.

57 In short, there is no merit to the claim that Mr. York breached his duty of care toward the plaintiff. His premises were in a reasonably safe condition on the date of the incident. Events which did occur may well be as a result of the actions of the defendant MacDougall and the plaintiff Gohm herself, however, there is no merit for the plaintiff's claim against him. She is required to put her best foot forward and she has failed to plead facts that demonstrate a genuine issue requiring a trial as against Mr. York.

58 As the plaintiff herself admitted, she perceived the York property, including its paddocks and gates to be safe and in good working order, as otherwise she would not have temporarily located her own horse on the premises as she did.

59 She presented no evidence that the fencing and gating were not safe and of a type commonly used on hobby farms such as Mr. York's. She has failed to "pinpoint some act or failure to act on the part of Mr. York" which caused the injury which she complains of, and therefore, liability cannot be established.

60 In summary, the plaintiff has not put before the court some act or failure to act on the part of the occupier York, which she alleged caused the injury she complains of. To that end, liability cannot be established as against York.

61 The plaintiff has failed to prove that the defendant York was negligent, let alone that anything he did or did not do caused her injury. The plaintiff has not established that the accident which led to her injury was caused by any breach of his statutory duty under the *Occupier's Liability Act*. It is impossible to conclude that but for the defendant's breach of his statutory duty to keep the premises reasonably safe, the plaintiff would not have been injured. She puts forth no act or failure to act attributable to York.

62 In my view, the moving party has demonstrated that the evidence before this court supports their position that there is no genuine issue requiring a trial. In other words, the plaintiff has failed to demonstrate that there is a genuine issue requiring a trial in relation to Mr. York. The interests of justice do not require a trial.

Order

63 Mr. York's motion for summary judgment is granted and an order shall issue dismissing this action as against him.

Costs

64 Should it be necessary, the parties may arrange an appointment before me to argue the issue of costs by contacting the Trial Coordinator.

D.S. GUNSOLUS J.

1 *St. Louis-Lalonde v. Carleton Condominium Corporation No. 12*, [2005] O.J. No. 2721 (SCJ), at para. 27.

2 *Whitlow v. 572008 Ontario Limited (c.o.b. Cross-Eyed Bear Tavern)*, [1995] O.J. No. 77 (Ont. Gen. Div.), at paras. 32-34.

3 *Waldick v. Malcolm*, (1989), 70 O.R. (2d) 717 (Ont. C.A.).

4 *F.H. v. McDougall*, [2008] 3 S.C.R. 41 at paras. 40-49; *Mustapha v. Culligan of Canada Ltd.*, [2008] 2 S.C.R. 114 at para. 3.

5 *Dawson v. Rexcraft Storage and Warehouse Inc.* (1998), 26 C.P.C. (4th) 1 (Ont. C.A.).

6 See: *Dawson v. Rexcraft*, *supra*.

7 See: *Dawson v. Rexcraft*, *supra*, at page 267.

8 *1061590 Ontario Ltd. v. Ontario Jockey Club* (1995), 21 O.R. (3d) 547 (ONCA) at page 557.

9 *Combined Air Mechanical Services Inc. v. Flesch* (2011), 108 O.R. (3d) 1 (ONCA).

10 See: *Combined Air Mechanical Services Inc. v. Flesch, supra.*

11 *Laws v. Wright*, [2000] A.J. No. 127, at para. 90.

12 *Miltenberg v. Metro Inc.*, [2012] O.J. No. 662 (S.C.J.O.).

13 See: *Miltenberg v. Metro Inc., supra.*

14 See: *Waldick v. Malcolm, supra.*

15 See: *Miltenberg v. Metro Inc., supra*, at paragraphs 32-33.

16 See: *Miltenberg v. Metro Inc., supra*

