Date:19980213 Docket: C.A. 141688

NOVA SCOTIA COURT OF APPEAL

Cite as: MacNeil v. Black, 1998 NSCA 48

Freeman, Jones, Bateman, JJ.A.

BETWEEN:

BRENDA MACNEIL	)	Hugh McLeod
	)	for the Appellant
Appellant	)	
	)	
- and -	)	
	)	Guy LaFosse, Q.C.
	)	for the Respondent
	)	
CHARLES PETER BLACK	)	
	)	
Respondent	)	Appeal Heard:
	)	February 13, 1998
	)	
	)	
	)	Judgment Delivered:
	)	February 13, 1998
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	)	
	)	

THE COURT: Appeal allowed with costs fixed at $1,000 plus disbursements on the application and $1,000 plus disbursements on the appeal payable forthwith per oral reasons for judgment of Freeman, J.A., Jones and Bateman, JJ.A., concurring.

FREEMAN, J.A.

Applications for summary judgment and interim payment in a claim arising from a motor vehicle collision were dismissed by Justice Edwards of the Supreme Court of Nova Scotia, who also dismissed an application in the alternative for an order under **Civil Procedure Rules** 28.03 and 28.04 to sever the issues of liability and damages.

The plaintiff appeals, alleging the respondent defendant has shown no defence to her claim that he negligently struck her motor vehicle with his from behind while she was stopped in traffic in Sydney, N.S. on June 9, 1994. She claims she suffered personal injuries which have had an on going effect on her life.

The respondent's defence alleges that the plaintiff failed to operate her vehicle in a careful or prudent manner and that she stopped her vehicle "abruptly without reason or cause in a negligent manner."

Justice Edwards considered that it was only necessary for him to determine whether there was an arguable issue, and "references must be made to the pleadings only." With respect, this was in error. A court is not restricted to considering pleadings only in an application for summary judgment pursuant to **Civil**

Procedure Rule 13.01. **Rule** 13.02 provides:

> 13.02 On the hearing of an application under rule 13.01, the court may on such terms as it thinks just,
>
> (a) give such directions as may be required for the examination of any party or witness, or for the production of any books or document or copy thereof, or for the making of further inquiries.

That provides a statutory basis for the receipt of affidavit or other evidence which is routinely considered in cases dealing with summary judgments. O Hearn, C.C.J, in **Master Charge v. Price** (1977), 42 N.S.R. (2d) 244 considered an affidavit by the defendant to be a requirement when the plaintiff's case was similarly verified. The case law was reviewed by Tidman J. in **MacDonnell et al. v. Freeman** (1992), 105 N.S.R. (2d) 268. In particular, he cited the judgment of Macdonald J. of this court in **Bank of Nova Scotia v. Dumbrowski** (1977), 23 N.S.R. (2d) 532 at p. 537, which was referred to by Justice Edwards. Justice Macdonald said that Rule 13, like its antecedent, O. 14 of the English Supreme Court Rules, was to:

> enable a plaintiff to obtain summary judgment without trial if he can prove his claim clearly, and if the defendant is unable to set up a *bona fide* defence, or raise an issue against the claim which ought to be tried. . . . The defendant is bound to show that he has some reasonable ground of defence to the action.

Tidman J. also cited the decision by Robertson, C.J.O. in **Featherstonhaugh v. Featherstonhaugh** (1939), 2 D.L.R. 262 at p. 268:

> The defendant is to show the nature of his defence, and to disclose such facts as may be deemed sufficient to entitle him to defend, and it is upon his success or failure in doing so that the fate of the motion

> must turn. In a sense the usual rule is reversed for this special purpose, and the burden of proof, such as it is, lies upon the defendant and not upon the plaintiff.

See also **Burchell v. Vincent** (1993), 121 N.S.R. (2d) 37 and **Royal Bank of Canada v. Riggers** (1993), 122 N.S.R. (2d) 435; **Podkriznik v. Schwede**, [1990] W.W.R. 220 (Man.C.A.); **Crown Cork v. Cobi Foods** (1995), 38 C.P.C. (3d) 31 (NSCA); and Dr. Livingstone, I Presume **(Canada) Ltd. v. Jesso** (1995), 43 C.P.C. (3d) 97 (Nfld. S.C.T.D.)

A further burden of proof, and a considerably heavier one, falls on the defendant in rear-end collision cases. The driver of the rear car must rebut a presumption that the collision occurred as a result of his negligence. See the judgment of Roscoe J. in **Wilson v. McInnis**, (1992), 111 N.S.R. (2d) 78.

In addition to the pleadings in the present case are the defendant's answers to interrogatories in which he admits being involved in an accident in which

the front of his vehicle struck the rear of the plaintiff's vehicle which was "stopped at the time of impact." There is also an affidavit by the plaintiff in which she says she was stopped for 45 seconds before being hit.

The threshold for showing the existence of a defence worthy of trial is not a high one, but the defendant has not met it. The standard pleading that the plaintiff stopped abruptly, without more by way of supporting facts, lacks an air of reality. It does not meet, nor suggest how the defendant hoped to meet, the plaintiff's assertion that she had been stopped for 45 seconds. It was necessary for the defendant in his pleadings or by way of affidavit or other evidence to assert facts capable, if proven at trial, of rebutting the presumption that the collision resulted from his negligence. The bald statement in the pleadings does not disclose the existence of an actual or probable defence and cannot fend off an application for summary judgment.

The appeal is allowed and judgment is entered against the respondent defendant as to liability with damages to be assessed. The entry of summary judgment fulfils a condition precedent for the application for interim payment under **Rule** 33.01(A)(1). Interim payment of $20,000 is ordered, payable forthwith, without prejudice to the plaintiff's right to reapply. The matter is returned to the trial judge for assessment of damages. This makes moot the ground of appeal related to the

severance of the issues. Costs are fixed at $1,000 plus disbursements on the application and $1,000 plus disbursements on the appeal payable forthwith.

Freeman, J.A.

Concurred in:

Jones, J.A.

Bateman, J.A.

C.A. No. 141688

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

BRENDA MACNEIL

Appellant

- and -

CHARLES PETER BLACK

Respondent

REASONS FOR JUDGMENT BY:

FREEMAN, J.A.
(ORALLY)