

CASE NO.**VOLUME****PAGE**

Cite as: MacNeil v. Black, 1998 NSCA 48

BRENDA MACNEIL

CHARLES PETER BLACK

- and -

(Appellant)

(Respondent)

C.A. No. 141688

Halifax, N.S.

FREEMAN, J.A.
(orally)**APPEAL HEARD:**

February 13, 1998

JUDGMENT DELIVERED:

February 13, 1998

WRITTEN RELEASE OF ORAL:

March 6, 1998

SUBJECT:**Subject: Civil procedure; summary judgment, Civil Procedure Rule 13.01; interim payment, Rule 33.01(A)(1).****SUMMARY:**

While the appellant's motor vehicle was stopped in traffic in Sydney, N.S. it was struck from behind by the respondent defendant's, causing her personal injuries. Alleging the respondent had no defence, the plaintiff applied for summary judgment and interim payment. The applications were dismissed. The pleadings alleged the plaintiff had stopped her vehicle abruptly although her affidavit evidence established she had been stopped for 45 seconds. The Chambers judge found "references could be made to the pleadings only" and dismissed the applications.

ISSUE:

Was there evidence in support of the motion for summary judgment?

RESULT:

The appeal was allowed. It was an error in law to consider only the pleadings, and not affidavit or other evidence, in applications under **Rule 13.01**. The defendant was bound to demonstrate an issue against the claim which ought to be tried. Summary judgment was a condition precedent to interim payment under **Rule 33.01(A)(1)** which was ordered at \$20,000 without prejudice to the plaintiff's right to reapply. Costs were fixed at \$1,000 on the application and \$1,000 on the appeal, plus disbursements, payable forthwith.

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