Date: 2001/12/05
Docket: S. P. No. 06050

IN THE SUPREME COURT OF NOVA SCOTIA
Cite as Berthier v Horton, [2001] NSSC 166

BETWEEN:

DONALDA ANN BERTHIER

PLAINTIFF

- and -

WELDON ESLING HORTON

DEFENDANT

D E C I S I O N

HEARD BEFORE:	The Honourable Associate Chief Justice Michael MacDonald, Supreme Court of Nova Scotia, at Pictou, Nova Scotia, on June 15th, 2001.
ORAL DECISION:	June 15th, 2001
WRITTEN RELEASE:	December 5, 2001
COUNSEL:	Mr. Jamie MacGillivray, for the Plaintiff Mr. Peter Rogers, for the Defendant

MacDonald, A.C.J.:

[1] In August of last year the plaintiff was injured in a motor vehicle accident that occurred on Main Street, in Antigonish. She claims to have been rear-ended by the defendant as she was stopped waiting for a red traffic light. She seeks summary judgment accordingly.

[2] The defendant denies any negligence on his part and states that it was the plaintiff who was negligent by stopping suddenly. Alternatively he states that his foot slipped off the brake peddle. He accordingly pleads pure and simple accident. I refer to the relevant excerpts in the defendant's pleading.

> 2. The Defendant denies that he was negligent in the operation of his motor vehicle or otherwise. The Defendant says that he was proceeding behind the Defendant's (sic) vehicle at a safe distance and at a speed of less than fifteen kilometres per hour. The Plaintiff stopped suddenly and the Defendant was required to quickly apply his brakes, which he did. Unfortunately the Defendant's foot slipped off the brake pedal and his vehicle collided with the Plaintiff's vehicle.
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> 3. The Defendant says he kept a proper lookout, operated his motor vehicle in a careful and prudent manner and, in all respects, discharged his duty to exercise reasonable care.
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> 4. The Defendant says that the collision referred to in the Statement of Claim occurred without negligence. He pleads simple or inevitable accident.
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> 5. In the alternative, the Defendant says that the Plaintiff was negligent in stopping her vehicle on a public highway suddenly, and without warning.

[3] Let me begin with the premise that the defendant faces a low bar to defeat a summary judgment application. While earlier cases refer to the defendant's onus of raising a fairly arguable issue once the plaintiff has established a *prima facie* case, at least one recent Nova Scotia Court of Appeal decision refers to this onus as simply raising an arguable issue. I refer to the decision of the Late Pugsley, J. A., in *Oceanus Marine Inc. v. Saunders* (1996), 153 N.S.R. (2d) 267 where he stated at 269:

> [15] The principles that govern Oceanus' application for summary judgment were stated by Macdonald, J.A., in **Bank of Nova Scotia and Simpson (Robert) Eastern Ltd. v. Dombrowski** (1978), 23 N.S.R. (2d) 532; 32 A.P.R. 532, at p. 537 (C.A.):

> Rule 13 has its antecedents in Order 14 of the English **Supreme Court Rules**. As stated in the **Supreme Court Practice** (1976), Vol. 1, p. 136, the purpose of O. 14 is to enable the 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 . . .
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> [16] All that was required of the Saunders to defeat the application was to raise an arguable issue to be tried. The burden is not a heavy one, **Lienaux et al v. Toronto-Dominion Bank** (1995), 140 N.S.R. (2d) 156; 399 A.P.R. 156, at p. 158 (C.A.).

[4] This low threshold was acknowledged in a recent Nova Scotia Court of Appeal decision with facts very similar to the case at bar. I refer to the decision of Freeman, J. A., in *MacNeil v. Black* (1998), 166 N.S.R. (2d) 127. In that case which also involved a rear-end collision, Freeman, J. A., noted at paragraphs 10 and 11:

> [10] 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.
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> [11] 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.

[5] With this background, let me consider whether the defendant has raised an arguable issue that would rebut the presumption of liability against him. I begin by stating that the defendant would have a very difficult time in meeting this burden and counsel has acknowledged this. His twin defences

of an abrupt stop and pure and simple accident would prove to be challenging before a trial judge. In fact, this court would have hoped to see the defendant file an affidavit under oath setting out his position in this matter, if he were adamant in meeting this heavy onus. At the same time, I must add that it is clear from the above passages of Freeman, J.A., that the filing of affidavit evidence or other documentary evidence is not a prerequisite in defending a summary judgment application. Assertions contained in the actual pleadings will suffice provided they are not the standard wording pleadings of the plaintiff stopping abruptly and provided the pleadings raise an arguable issue. I must therefore carefully examine this defence, especially clause 2.

[6] In so doing, I find that the defendant does more than make a bald assertion using standard wording. In paragraph 2 he confirmed his speed as being only fifteen kilometres per hour and confirmed that he was travelling a safe distance behind the plaintiff. These assertions are in addition to his general statement that the plaintiff stopped suddenly. At paragraph 3 the defendant also confirmed that he maintained a proper lookout and was operating his vehicle in a careful and prudent manner exercising at all times reasonable care.

[7] While I am not specifically ruling out a plea of pure and simple accident, for the purposes of this application I am not swayed by the assertion that a motorist can allow his foot to slip off the break peddle without negligence.

[8] At the same time, the defendant has in his pleadings raised an arguable issue going to liability. The issue is the assertion that the plaintiff stopped abruptly while the defendant was travelling very slowly at a safe distance and in a careful manner. On this basis, I am persuaded to deny the application.

[9] I must say, however, that I am denying this application with significant reluctance. Plaintiffs should not be delayed and/or denied their right to seek interim damages simply by having a defendant make assertions that may not be borne out when the facts are further explored.

[10] At the same time it would be equally wrong to deny a defendant his or her day in court in the face of an arguable issue to be tried. The factor that tipped the scale in this case involved the fact that the statement of claim is not clear as to the time the plaintiff alleges she was stopped and her supporting affidavit does not provide much more detail. She states at paragraph 4:

I was stopped several moments before impact.

[11] This somewhat vague assertion opens the door to an arguable issue being raised in the face of the defendant's assertions to the contrary. It is relatively early in the process and this issue may become clearer when discoveries are completed. Nothing in my judgment today prevents the plaintiff from reapplying for summary judgment at that time. Furthermore, if through the discovery process, the defendant's liability becomes clear, I would expect him to admit the same so as to avoid the risk of an increased order for costs. See *Skiffington v. McDonough*, [1992] N.S.J. No. 237.

[12] The Application is dismissed with costs in the cause.

Michael MacDonald
Associate Chief Justice