Civil Resolution Tribunal

Date Issued: December 5, 2018

File: SC-2018-004927

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Reid v. Nelson*, 2018 BCCRT 798

B E T W E E N :

Erin Reid

APPLICANT

A N D :

Ekaterina Nelson

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Sarah Orr

INTRODUCTION

1. This is a dispute about a damaged car. The respondent was driving the applicant's car when it hit a wall, causing extensive damage to the car. The applicant says the respondent is at fault for the collision and that the respondent should pay her the $4,000 resale value of the car before it was damaged. The applicant also wants the respondent to reimburse her tribunal fees.

2. The respondent says the collision was not her fault and that the car had mechanical problems which caused the collision.

3. Both parties are self-represented.

JURISDICTION AND PROCEDURE

4. These are the formal written reasons of the Civil Resolution Tribunal (tribunal). The tribunal has jurisdiction over small claims brought under section 3.1 of the *Civil Resolution Tribunal Act* (Act). The tribunal's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the tribunal must apply principles of law and fairness, and recognize any relationships between parties to a dispute that will likely continue after the dispute resolution process has ended.

5. The tribunal has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. The tribunal has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. Some of the evidence in this dispute amounts to a "he said, she said" scenario. Credibility of interested witnesses, particularly where there is conflict, cannot be determined solely by the test of whose personal demeanor in a courtroom or tribunal proceeding appears to be the most truthful. The assessment of what is the most likely account depends on its harmony with the rest of the evidence. In the circumstances here, I find that I am properly able to assess and weigh the documentary evidence and submissions

before me. Bearing in mind the tribunal's mandate that includes proportionality and a speedy resolution of disputes, I find that an oral hearing is not necessary. I also note the recent decision *Yas v. Pope*, 2018 BCSC 282 at paragraphs 32 to 38, in which the court recognized the tribunal's process and that oral hearings are not necessarily required where credibility is in issue.

6. The tribunal may accept as evidence information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in a court of law. The tribunal may also ask questions of the parties and witnesses and inform itself in any other way it considers appropriate.

7. Under tribunal rule 126, in resolving this dispute the tribunal may order a party to do or stop doing something, order a party to pay money, or order any other terms or conditions the tribunal considers appropriate.

ISSUES

8. Is the respondent responsible for the damage to the applicant's car, and if so, what is the applicant's remedy?

EVIDENCE AND ANALYSIS

9. I have only addressed the parties' evidence and submissions to the extent necessary to explain and give context to my decision. For the reasons that follow, I find the respondent is responsible for damaging the applicant's car.

10. It is undisputed that on June 8, 2018 the applicant drove her car, a 2003 Honda Accord LX, to work. She parked the car in the staff parking area, which is a loading bay. The respondent later asked the applicant to move her car to make space for the respondent's car in the loading bay. The applicant was unavailable at the time, so she lent her car to the respondent to move it forward into the loading bay. While the respondent was driving the applicant's car, the car collided head-first with the wall at the back of the loading bay.

11. The collision caused the car's airbags to deploy, caused damage to the car's front bumper and windshield, and caused injuries to the respondent. The respondent emailed photographs of the damaged car and its serial number to a representative at a vehicle collision centre who estimated the damage at $8,100, and said the car was a "total loss."

12. When the applicant lent her car to the respondent this created a legal relationship of bailment. A bailment is the temporary transfer of property from the "bailor" (in this case, the applicant), to the "bailee" (in this case, the respondent). As a bailee, the respondent was obligated to take reasonable care of the applicant's car. Normally in a civil claim like this one the applicant is responsible for proving the respondent was negligent in damaging the car. However, in bailment cases like this one there is a presumption that the respondent was negligent in damaging the applicant's car. This is because only the respondent can actually know what happened, which puts the applicant at a disadvantage. In order to avoid liability, the respondent must rebut the presumption of negligence. See *Cahoon v. Isfeld Ford*, 2009 BCPC 334.

13. The respondent says that according to *Fontaine v. British Columbia (Official Administrator)*, 1998 CanLII 814 (SCC), the applicant has the burden of proving the respondent was negligent. However, that case does not involve a bailment relationship.

14. In this case the respondent is a "gratuitous bailee" because she did not receive any benefit from the bailment relationship. Gratuitous bailees are held to a lower standard of care than bailees who receive a reward for the bailment. Gratuitous bailees have traditionally only been liable for "gross negligence," however the courts are moving away from a strict classification between bailments for reward and gratuitous bailments, and instead there is a preference to determine liability based on whether or not the bailee has exercised reasonable care in all of the circumstances. See *Harris v. Maltman and KBM Autoworks*, 2017 BCPC 273. This means that in order to determine whether the respondent is responsible for the damage to the applicant's car, I must determine whether she has rebutted the

presumption that she failed to exercise the care she would have exercised over her own property in similar circumstances.

15. In order for the respondent to rebut the presumption of negligence, she does not need to fully explain what happened, rather she needs to show that the system in place for the care and safekeeping of the applicant's car was up to the standard required by bailment law. See *Rowsell v. Fountain Tire (Fort St. John) Ltd.*, 2005 BCPC 42 (CanLII).

16. The respondent says the collision was caused not by her negligence, but by the car's mechanical failures. Specifically, she says the car accelerated unexpectedly without touching the gas pedal and that the brakes simultaneously failed.

17. There were no witnesses to the collision. On June 8, 2018 shortly after the collision the respondent wrote a statement describing what happened. She said she put the car in drive and took the brakes off, she "slightly moved the foot off the car…then went to stop the car and it wouldn't stop." She said she tried to brake "very hard," and that she never put her foot on the gas pedal. The statement shows a drawing of two squares with an arrow pointing to the square on the left, and the word "step" below it. The respondent says she drew this to show that she is certain she pressed the brake, not the gas pedal, before the collision.

18. The respondent wrote another statement on June 11, 2018 describing the collision. This statement is similar to the one on June 8, 2018, but it contains some additional information. She said when she put the car into drive her foot was still hovering over the brake pedal when she heard the car rev, and the car "suddenly accelerated forward unexpectedly." The statement says that after the collision she was in shock, and that it was not until a few days later that she realized the car "unintentionally accelerated" before the brakes failed.

19. The applicant says the discrepancies in the two statements show the respondent is fabricating her story of how the collision happened. I disagree. There is evidence the respondent suffered whiplash and a concussion from the collision, and in these

circumstances, I find it reasonable that the respondent would not immediately recall all of the details of the collision. I place little weight on the fact that her statement on June 11, 2018 contains additional information and details that are missing from her June 8, 2018 statement.

20. What I do find problematic is the lack of evidence of the car's alleged mechanical failures. Evidently no one with mechanical expertise inspected the car after the collision, and there is no evidence indicating the respondent made any effort to obtain such an inspection. I do note that the applicant sold the car on June 24, 2018, before she filed this dispute with the tribunal, which prevented the respondent from obtaining an inspection after that date. However the applicant says she was not aware of the respondent's claims about the car's mechanical failures until she received the Dispute Response in July 2018, despite the fact that she had been in close communication with the respondent after the collision. In all of these circumstances I do not find the fact that the applicant sold her car before starting the dispute to be detrimental to her claim.

21. None of the respondent's evidence pertains specifically to the mechanical condition of the applicant's car. The respondent provided internet research about general problems with 2003 Honda Accords, however none of this evidence is helpful in determining whether the applicant's car experienced mechanical failures before the collision.

22. The respondent provided evidence that 2003 Honda Accords were recalled in 2004 for known transmission failures, however the applicant provided more detailed information about this particular recall which describes that if such a failure occurred it would bring the car to a "sudden halt." This is the opposite of what the respondent says occurred before the collision.

23. The respondent provided measurements showing the applicant's car was parked approximately 12 meters away from the back wall of the loading bay prior to the collision. The respondent says she intended to park the car approximately 5 meters ahead of where it was initially parked, meaning she overshot her intended parking

spot by almost 7 meters. The respondent says if the car did not have mechanical issues, she would have had plenty of space to stop the car before hitting the wall.

24. The applicant denies that her car experienced mechanical problems either before or after the collision. She says the respondent must have accidentally hit the gas pedal instead of the brake, which caused the collision. She says the respondent's unfamiliarity with the car and the extent of the car's damage and the respondent's injuries support this conclusion.

25. The applicant says she drove to work on June 8, 2018 with no issues. The respondent says the car was not maintained well before the collision and that the sporadic maintenance may have led to the alleged mechanical failures. However the applicant provided maintenance records from 2017 which indicate that all known mechanical or other issues were addressed and repaired. None of the repairs related to sudden acceleration or brake failure. The respondent says the applicant's maintenance records show the car was only driven 74 kilometers between May and December 2017, and that if the vehicle was not operated over a length of time it may have become more prone to mechanical failure. However the respondent provided no evidence to support this claim.

26. The applicant also says her car had no obvious mechanical issues after the collision. She provided two videos of the car being driven forward very slowly in the loading bay and coming to a controlled stop before the back wall. Neither of the videos are dated or time-stamped, but the deployed airbags are visible in both videos. I am satisfied that the videos were taken after the collision and that they are in fact videos of the applicant's car. This evidence supports the applicant's position that there were no obvious problems with her car unexpectedly accelerating or with the brakes failing after the collision.

27. The applicant provided a witness statement from S.C. who said he saw the car after the collision. He said he lifted the hood and did not see any major leaks, nor did he see any fluid leaks under the vehicle. He said he sat in the driver's seat, pumped the brake pedal, and it immediately filled with hydraulic brake fluid. There is

certainly no indication that this witness has any mechanical expertise, however his description of the brake pedal is consistent with the applicant's videos and statements indicating the car had no obvious mechanical issues after the collision.

28. The respondent says it was the applicants' responsibility to maintain collision insurance and that it was the applicant's duty to inform the respondent that she did not have collision insurance before lending the respondent her car. I note that collision insurance is not mandatory in British Columbia, and I know of no legal authority requiring the applicant to inform the respondent that she did not have optional collision insurance before lending her the car.

29. Aside from the respondent's recollection of the collision, there is no evidence to support her claim that sudden acceleration and a simultaneous brake failure caused the collision. The applicant's evidence indicates there were no mechanical problems with the car before or after the collision. On balance I find the respondent's unsupported allegations of the car's mechanical failures are insufficient to rebut the presumption that she was negligent in the circumstances.

30. In the absence of mechanical failures, I am not satisfied the respondent has shown she exercised the care required of a gratuitous bailee in the circumstances. Her own evidence is that she was planning to move the car forward 5 meters, meaning there were 7 meters between the car and the wall at her intended stopping point. Even if she had accidentally pressed the gas pedal at the 5-meter mark, 7 meters should have been enough space to stop the car before hitting the wall if she had been exercising reasonable care. In all the circumstances, and despite the lower standard of care for gratuitous bailees, I find the respondent has failed to rebut the presumption that she failed to exercise reasonable care when driving the applicant's car. I find the respondent is responsible for the damage to the applicant's car, and the respondent must pay the applicant the replacement value of the car prior to the collision.

31. The car is a 2003 Honda Accord LX. One of the applicant's videos shows the car had 249,783 kilometers on the odometer immediately after the collision. The

respondent provided a “carproof” report showing the car was involved in three previous collisions for a total of $3,234.98 in damage repairs.

32. Both parties provided numerous online advertisements selling 2003 Honda Accords. Many of these are for cars with different trim, different engines, or far lower or higher mileage. Others do not have enough information about the car for sale to determine its similarity to the applicant’s car. The advertisements with the most comparable cars range between $1,300 and $1,688. The applicant provided a “carproof” valuation based on her car’s serial number between $3,190 and $5,038. The applicant also provided a “Kelley Blue Book” valuation of $2,416 to $3,959 USD, which on June 8, 2018 would have been between approximately $3,125 and $5,121. Weighing the car’s collision history against the fact that it had no known or proven problems prior to the collision, and recognizing the variations in values online, I find the car was valued at $3,000 prior to the collision.

33. The respondent estimated that the car could have been salvaged for between $750 and $1,000 after the collision, since many of its parts were still intact. She provided no evidence to support this claim, however the applicant sold the car prior to filing this dispute which prevented the respondent from obtaining such evidence. The applicant said that after calling several scrapyards without success she sold the car to a mechanic for $200 to $300. She provided no evidence of this transaction, and she should have known it was her responsibility to do so as the respondent raised this issue in her submissions. In these circumstances I make an adverse inference against the applicant for failing to provide available and relevant evidence, and I accept the respondent’s position on this point. I find the salvage value of the car was $750, and I find the respondent must pay the applicant $2,250 as replacement value for the car.

34. Under section 49 of the Act, and the tribunal’s rules, the tribunal will generally order an unsuccessful party to reimburse a successful party for tribunal fees and reasonable dispute-related expenses. I see no reason in this case not to follow that

general rule. I find the applicant is entitled to reimbursement of $175 in tribunal fees. The applicant has not claimed any dispute-related expenses.

ORDERS

35. Within 30 days of the date of this order, I order the respondent to pay the applicant a total of $2,440.82, broken down as follows:

    a. $2,250 as replacement value of the car before the collision;

    b. $15.82 in pre-judgment interest under the *Court Order Interest Act*, and

    c. $175 in tribunal fees.

36. The applicant is entitled to post-judgment interest, as applicable.

37. Under section 48 of the Act, the tribunal will not provide the parties with the Order giving final effect to this decision until the time for making a notice of objection under section 56.1(2) has expired and no notice of objection has been made. The time for filing a notice of objection is 28 days after the party receives notice of the tribunal's final decision.

38. Under section 58.1 of the Act, a validated copy of the tribunal's order can be enforced through the Provincial Court of British Columbia. A tribunal order can only be enforced if it is an approved consent resolution order, or, if no objection has been made and the time for filing a notice of objection has passed. Once filed, a tribunal order has the same force and effect as an order of the Provincial Court of British Columbia.

Sarah Orr, Tribunal Member