Civil Resolution Tribunal

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Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Baekhave v. Beach Grove Golf Club (1960) Ltd.*, 2019 BCCRT 1293

B E T W E E N :

MARY ANN BAEKHAVE

APPLICANT

A N D :

BEACH GROVE GOLF CLUB (1960) LTD.

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Sarah Orr

INTRODUCTION

1. This is a dispute about a damaged truck. The applicant, Mary Ann Baekhave, says that on October 28, 2018, a golf ball originating from a golf course owned by the respondent, Beach Grove Golf Club (1960) Ltd., hit her truck causing damage. She wants the respondent to pay her $982 for the cost of repairing the truck and $225

for the cost of renting a car for 3 days while her truck is repaired, for a total of $1,207.

2. The respondent says the applicant has not proven that a golf ball from its golf course damaged her truck. It also says the applicant accepted $500 to resolve the dispute.

3. The applicant is self-represented and the respondent is represented by an employee or principal.

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 118 of the *Civil Resolution Tribunal Act* (CRTA). 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. Some of the evidence in this dispute amounts to a "she said, they 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 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 9.3 (2), in resolving this dispute the tribunal may make one or more of the following orders, where permitted under section 118 of the CRTA:

    a. order a party to do or stop doing something:

    b. order a party to pay money:

    c. order any other terms or conditions the tribunal considers appropriate.

ISSUE

8. The issue in this dispute is whether the respondent is required to reimburse the applicant $1,207 for the cost of repairing her truck and renting a car while her truck is repaired.

EVIDENCE AND ANALYSIS

9. In a civil claim like this one, the applicant must prove her claim on a balance of probabilities. This means I must find it is more likely than not that the applicant's position is correct.

10. I have only addressed the parties' evidence and submissions to the extent necessary to explain and give context to my decision. For the following reasons, I dismiss the applicant's claims.

11. The applicant says that on October 28, 2018 at approximately 4:20 p.m. she was driving eastbound on 12th Avenue in Tsawwassen. As she was passing the respondent's golf course located on the north side of the road, she says a golf ball coming from the respondent's golf course hit her truck causing a dent. She submitted dashcam video footage taken from her truck at the time of the incident in

which there is a noise sounding like something struck the truck. She says the video shows there were no pedestrians on the north sidewalk at the time of impact. She also says the video shows the fence along the golf course is approximately 8 feet tall, which she says is not tall enough to reasonably prevent golf balls from flying over it onto the road.

12. The applicant submitted what she says are photos of the golf ball just before and after impact. The date stamps on the photos say October 28, 2018, however, I am unable to spot the golf ball in either of the photos.

13. The applicant also submitted dashcam footage taken from her son's truck approximately one week after the incident. The video shows what appears to be a golf ball bouncing onto the road and narrowly missing her son's vehicle.

14. The applicant also submitted photos of the damage to her truck which show a golf ball-sized dent in the front left fender.

15. The applicant says when she reported the incident to the respondent, a staff member at the golf club told her "this happens all the time." However, she provided no statement or other evidence to support this allegation.

16. The respondent says the sound of something hitting the applicant's truck does not prove that a golf ball from the respondent's golf course damaged her truck. It says its General Manager created a file on the date of the incident, and that he saw a dent on the applicant's truck where she said the golf ball struck it. The respondent did not submit its file into evidence.

17. On a balance of probabilities, I find it is more likely than not that a golf ball from the respondent's golf course damaged the applicant's truck. I say this because there is no other obvious cause of the damage, the dent in the truck is the size of a golf ball, and the video footage from the applicant's son shows it is possible for a golf ball to reach the road from the golf course. However, this does not automatically mean the respondent is responsible for the damage to the applicant's car. I find that in order to be entitled to damages, the applicant must establish that the errant golf ball

constituted a nuisance, or that the respondent was negligent by allowing one of its patrons to hit a golf ball onto the road.

18. A nuisance is a substantial interference with the use or enjoyment of land that is unreasonable in all of the surrounding circumstances. Mere annoyance is insufficient to establish a nuisance, rather the interference must be intolerable to an ordinary person. Factors to consider when determining whether an interference constitutes a nuisance include the nature, severity and duration of the interference, and the character of the neighborhood (see *St. Lawrence Cement Inc. v. Barrette*, 2008 SCC 64 at paragraph 77). In *Lakeview Gardens Ltd. v. Regina (City),* 2004 SKCA 110 (CanLII), the Saskatchewan Court of Appeal said that in cases where errant golf balls cause damage or injury outside of the property from which they originated, the distinction between a private and public nuisance is irrelevant. While *Lakeview* is not binding on me, I find its reasoning helpful in the context of this dispute.

19. To establish that the respondent was negligent, the applicant must show that the respondent owed her a duty of care, breached the standard of care, and the respondent's breach caused the damage to her truck. The damage must have been reasonably foreseeable.

20. While there are many cases of errant golf balls damaging property, most of those cases involve damage on private land. The following cases involved damage or injury caused on public land, and although none of these cases are binding on me, given their similar factual context, I find their reasoning helpful.

21. In *Lakeview* the Court cited the House of Lords' decision in *Bolton v. Stone*, [1951] A.C. 850. In that case the plaintiff was standing on a highway next to a cricket ground when she was struck and injured by a cricket ball hit over the fence. She sued the cricket club in both nuisance and negligence. The evidence showed that cricket balls had rarely been hit over the fence in the previous 30 years, and no one had ever been injured from such an event. The House of Lords upheld the Court of Appeal's finding that since cricket balls had only occasionally been hit over the

cricket club's fence, it did not create a sufficient interference with the public's use or enjoyment of the highway to constitute a public nuisance. The House of Lords also found that the cricket club was not negligent, because although the plaintiff's injury was foreseeable, it found the risk of injury to a person on the highway from a cricket ball hit over the fence was small and could not be anticipated by a reasonable person.

22. In *Castle v. St. Augustine's Links Limited* [1922] 38 T.L.R. 615, cited in *Transcona Country Club v. Transcona Golf Club*, 2000 MBQB 22 (CanLII), a golf ball hit from the defendant's golf course hit the windshield of a taxi driving on the road parallel to the golf course, injuring the driver. The court found that based on how the tee and hole were situated with respect to the road and the frequency with which balls were hit onto the road, the tee and hole constituted a public nuisance entitling the injured plaintiff to damages.

23. In *Hann v. Blomidon Golf Club* [1994] N.J. No. 230, the plaintiff parked her car in a parking lot across the street from the defendant golf club approximately 75 feet from the 8th tee. When she returned to her car the windshield was smashed and there was a golf ball nearby. Over the previous 2 years the plaintiff had seen 2 golf balls hit over the golf club's 6-foot fence. A witness who regularly walked by the golf club testified that she regularly found between 20 and 35 golf balls in the parking lot where the plaintiff parked, and on the road and nearby ditch. She had also witnessed 2 golfers hit their golf balls over the fence and into the parking lot. The defendant golf club's witness admitted that over the previous 18 years the golf club had had ongoing concerns with errant golf balls hit over the fence from the 8th tee posing a danger to users of the road, and that it was in discussions with the municipality to address to danger. The Newfoundland Provincial Court applied the principal of *res ipsa loquitur*, which is a legal doctrine inferring negligence where there is only circumstantial evidence available, and it found the respondent was negligent.

24. On the evidence before me and based on the reasoning in the decisions cited above, I find there is insufficient evidence in this case to establish a nuisance. The analyses in both *Bolton* and *Castle* focus on the frequency with which errant golf balls caused an interference. While the applicant says a representative of the respondent told her that golf balls fly onto the road from the golf course "all the time," there is no supporting evidence for this statement, and I place little weight on it. Aside from the applicant's 2 videos, there is no other evidence to suggest the frequency with which golf balls from the respondent's golf course reach the road, or the seriousness of such prior interferences. There is also no evidence about the design of the course or any specific hole or tee in relation to the road. I find the applicant has not established that the errant golf ball that hit her car created a sufficient interference with the public's use and enjoyment of the road to constitute a nuisance.

25. I also find there is insufficient evidence in this case to establish that the respondent was negligent. While I find the respondent owes a duty of care to the members of the public using the road next to the golf course, I find there is insufficient evidence to establish the respondent's standard of care or whether the respondent breached that standard. Unlike in *Hann* and *Castle*, there is no evidence before me about the design of the golf course, the placement of golf holes or tees in relation to the road, or the size or industry standards for fences on golf courses. While the applicant says the fence appears to be 8 feet tall, she did not provide evidence of the actual height of the fence. Unlike in *Hann* where there was strong evidence the defendant knew that golf balls were frequently hit over its fence posing a danger to the public, there is no such evidence in this case aside from the applicant's assertion about the respondent's staff member's statement. As described above, I place little weight on that statement. I also note that the Court in *Hann* based its finding of negligence on the legal doctrine *res ipsa loquitur*, but the Supreme Court of Canada has since said that doctrine is expired and no longer a separate component of negligence actions (see *Fontaine v. British Columbia (Official Administrator)*, [1998] 1 SCR 424, 1998 CanLII 814 (SCC)). For all of these reasons, I find the applicant has failed to establish that the respondent was negligent.

26. Having found the applicant has failed to establish negligence or nuisance, I find there is no legal basis requiring the respondent to compensate the applicant, and I dismiss her claims.

27. Having dismissed the applicant's claims, I find it is unnecessary to address the respondent's position that it already settled this dispute for $500. However, I note the respondent relies on a vaguely worded email from the applicant's son as proof of a settlement agreement, and there is no evidence her son had permission to act as her agent. I also note that even if the applicant was able to prove that the respondent was liable in nuisance or negligence and that she did not have a valid settlement agreement with the respondent, her damages would have been significantly reduced from the total amount of her claim. There is uncontested evidence that she has already received $500 from the respondent, and she provided no evidence to support her $225 claim for a hotel stay.

28. Under section 49 of the CRTA and tribunal 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. Since the applicant was unsuccessful, I find she is not entitled to reimbursement of her tribunal fees. She did not claim any dispute-related expenses.

ORDER

29. I dismiss the applicant's claims and this dispute.

Sarah Orr, Tribunal Member