Civil Resolution Tribunal

Date Issued: May 19, 2020

File: SC-2019-010962

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Kubbernus v. McBride*, 2020 BCCRT 546

B E T W E E N :

RYAN KUBBERNUS

APPLICANT

A N D :

BRIAN MCBRIDE

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Kristin Gardner

INTRODUCTION

1. This small claims dispute is about a December 28, 2017 motor vehicle accident (accident). The applicant, Ryan Kubbernus, and the respondent, Brian McBride, were driving northbound on Highway 5, about 20 kilometres south of Merritt, British Columbia, when their two vehicles collided.

2. The parties are both insured by the Insurance Corporation of British Columbia (ICBC), which internally concluded that the applicant and respondent were each 50% responsible for the accident. ICBC is not a party to this dispute.

3. The applicant says that the respondent is 100% responsible for the accident and seeks $6,424.15 for vehicle repairs and to pay out ICBC for the accident so it does not impact his insurance rates.

4. The applicant is self-represented. The respondent is represented by an ICBC employee.

JURISDICTION AND PROCEDURE

5. 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.

6. The tribunal has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. Most of the argument in this dispute amounts to a "he said, he said" scenario. In this dispute, I find I am properly able to assess and weigh the documentary evidence and submissions before me without an oral hearing. In *Yas v. Pope*, 2018 BCSC 282, the court recognized that oral hearings are not always necessary when credibility is in issue. Further, bearing in mind the tribunal's mandate of proportional and speedy dispute resolution, I find that an oral hearing is not necessary, and I can fairly hear this dispute through written submissions.

7. 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.

8. I note that the respondent requested the facilitation discussions be allowed as part of the evidence in this dispute. Normally, facilitation discussions are not included in evidence as they are confidential under the CRTA. The applicant was given a deadline to reply to the request, which was extended by 5 days when he did not respond. While the applicant did respond 2 days after the extended deadline, the time to object had expired and the facilitation discussions were allowed into evidence. However, the facilitation discussions were of no assistance in determining the issues in this dispute and I have placed no weight on them.

9. Where permitted by section 118 of the CRTA, in resolving this dispute the tribunal may order a party to do or stop doing something, pay money or make an order that includes any terms or conditions the tribunal considers appropriate.

10. The tribunal's monetary limit in small claims disputes is currently $5,000. This means that if I were to find the applicant 0% responsible, the applicant's proven damages must total $5,000 or less. By proceeding with this tribunal dispute, I find the applicant has abandoned his claim in excess of $5,000.

ISSUES

11. The issues in this dispute are:

    a. Who is liable for the accident?

    b. If the applicant is not liable, what is the appropriate remedy?

EVIDENCE AND ANALYSIS

12. In a civil claim such as this, the applicant bears the burden of proof on a balance of probabilities. While I have read all of the parties' evidence and submissions, I have

only addressed the evidence and arguments to the extent necessary to explain my decision.

Liability

13. The accident occurred on Highway 5, also known as the Coquihalla Highway, during a winter storm event. The applicant says he was driving in the left lane at about 70 kilometres per hour. As he came around a corner, he realized traffic ahead was stopped and because of the icy road conditions, he would be unable to stop in time. He says there were vehicles to both the left and right of him and he made the decision to into the ditch on his left. The applicant says that he did not make contact with any other vehicles before coming to rest in the ditch but, within 5 seconds, the respondent's vehicle drove into the ditch beside the applicant and collided with the right side of the applicant's vehicle.

14. It is undisputed that the ditch the parties came to rest in was the median between northbound and southbound traffic on Highway 5. While the parties agree that both vehicles came to rest beside each other in the ditch, they disagree about which of them hit the other.

15. The respondent says that he was also driving in the left lane but was ahead of the applicant. He saw brake lights for the traffic ahead and was slowing to stop. In his initial report to ICBC the day after the accident, the respondent said he had pulled onto the left shoulder to avoid the icy road and was "pretty much stopped" when the applicant's vehicle hit a snow bank and bounced onto the respondent's vehicle, pushing both vehicles into the ditch. Several weeks after the accident, the respondent told ICBC that he was slowing in the left lane when the applicant attempted to pass him on the left shoulder and contacted his vehicle. As a result of the contact, both vehicles went into the ditch.

16. After investigating the accident, ICBC determined that because each party had a very different version of the accident and there was no objective evidence supporting either version, they were each 50% liable. The applicant applied for an

internal claims assessment review (CAR), and the arbiter upheld the original decision, finding 50/50 was a fair assessment of liability given the information on file. The arbiter's decision noted the police report coded both drivers as being inattentive and driving too fast for the road conditions under section 144 of the *Motor Vehicle Act*, but that no principal offender was identified.

17. I am not bound by either ICBC's internal liability assessment or the CAR decision.

18. The applicant says that the respondent's version is inconsistent with the road conditions, photographs of the vehicles' resting place, and damage sustained to each vehicle. I infer from the remedies sought that the applicant's position is the respondent was 100% liable for the accident.

19. In support of his position, the applicant obtained an expert report from Mr. Lee Hamilton, a forensic accident reconstructionist. Mr. Hamilton is a retired member of the Royal Canadian Mounted Police, having worked in the "E" Division Traffic Analyst Program for 10 years and was Supervisor in Traffic Services at the time of his retirement. He has been the President and CEO of Crashtec Canada Accident Investigation Inc. since 2012 and has been qualified as an expert in accident investigation, reconstruction and technical vehicle examination in the Provincial Court of British Columbia. I find that Mr. Hamilton has the required training and experience to give an opinion about how the accident happened and I accept his opinion as expert evidence under the tribunal's rules.

20. I note that tribunal rule 8.3 says a party that provides written expert opinion evidence must provide to each party a copy of any correspondence with that expert about the requested opinion, unless the tribunal directs otherwise. While I do not have any correspondence between the applicant and Mr. Hamilton in evidence, I note that the respondent has not made any submissions about Mr. Hamilton's report and has not challenged its admissibility. Further, I find that the report of Mr. Hamilton sufficiently describes the questions sought to be addressed in the report and the documents provided by the applicant on which Mr. Hamilton based his

opinion. Therefore, I find that the report is admissible, even though the letter requesting the opinion was not submitted in evidence.

21. Mr. Hamilton relied on three photographs taken at the scene of the accident, showing where the vehicles came to rest in the ditch and the road conditions. Mr. Hamilton concluded that the respondent's version of how the accident happened is improbable because it is unlikely the applicant could have passed the respondent on the left. He relies on the photographs showing a buildup of snow on the left shoulder of the highway, making it impassable. Mr. Hamilton also concluded that for both vehicles to enter the ditch, both would have had to be travelling at a high rate of speed to get over the snow buildup on the shoulder. This is inconsistent with the respondent being at a near stop.

22. Mr. Hamilton also examined photographs of the damage to the parties' vehicles and noted the damage is consistent with contact between the vehicles as described by the applicant. Specifically, he says the damage to the applicant's vehicle could only have occurred with force coming from the rear of the vehicle traveling in a forward motion, as the damage becomes deeper as it moves towards the front of the applicant's vehicle. Similarly, he says the damage to the respondent's vehicle is consistent with contact being made from front to back which only would have occurred if the applicant's vehicle was stopped and the respondent's vehicle collided with it in the ditch.

23. I find Mr. Hamilton's opinion persuasive. I accept his description of the mechanics of the vehicle damage and that it is consistent with the applicant's version. Further, I agree that it is implausible that the applicant's vehicle made contact with the respondent's vehicle as the respondent described, and that such contact could have resulted in the applicant's vehicle pulling the respondent's vehicle to the left, over a buildup of snow, and into the ditch.

24. While it is clear the applicant was driving too fast for road conditions and caused his own vehicle to go into the ditch, I find that he did not collide with any other vehicles before coming to a stop in the ditch.

25. On balance, given the facts and my findings above, I find that the respondent collided with the applicant after the applicant had already come to a stop in the ditch. Therefore, I find that the respondent is 100% liable for the accident between the parties.

Remedy

26. When the applicant submitted his application for dispute resolution, he claimed $1,820 for increased insurance costs, $1,342 for vehicle damage including repair of a windshield crack that was not fixed, $650 for a tow bill, and a $500 deductible, for a total of $4,312.

27. In his submissions, the applicant advised that recent changes to the way ICBC calculates insurance rates will cost him more over time with this accident on his record. He changed his requested remedies, claiming $3,912.04 for the amount ICBC told him would "buy out" the accident from his record, $2,204.11 for his cost to repair his vehicle, and $308 for a windshield replacement he says was required because of the accident. These amounts total $6,424.15, over the tribunal's $5,000 small claims limit. However, while I found above the applicant abandoned his claims over $5,000, nothing turns on it given my conclusions below.

28. Although an amended Dispute Notice was not filed, I find that the respondent had sufficient opportunity to respond to the applicant's amended remedies requested. Those responses are discussed below. I note that it is undisputed that the applicant's vehicle damage was caused by the accident and not from him entering the ditch prior to the collision.

29. I turn now to each of the requested remedies.

Payment to remove accident from applicant's record

30. The applicant claims $3,912.04 as the cost for him to "buy out" the accident, which is the applicant's portion of the amount ICBC paid out for the accident. I infer the applicant has been advised that if he pays this amount to ICBC, the accident will no

longer affect his insurance rates. The applicant's evidence included an ICBC vehicle claims history report for his vehicle, confirming that $3,912.04 was paid out in repairs for this accident.

31. Neither party submitted evidence confirming that if the applicant pays this amount to ICBC, the accident will no longer affect his insurance rates. Further, there was no evidence showing that paying this amount would be more advantageous to the applicant than paying increased insurance premiums with this accident on his record.

32. In any event, given my finding on liability in the applicant's favour, this accident should no longer impact the applicant's future insurance rates and buying it out from ICBC is unnecessary. An order for the respondent to pay this amount to the applicant would then result in a windfall to the applicant. Therefore, I dismiss this claim.

Repair costs

33. The applicant claims $2,204.11 for reimbursement of the amount he had to pay to have his vehicle repaired. The evidence shows that the applicant's vehicle did not have collision coverage insurance when the accident happened. Because ICBC found him 50% liable for the accident, only half the cost of his vehicle repairs was covered and the applicant had to pay out of pocket for the other half.

34. Given that I have found the respondent is 100% liable, I find that the applicant should be reimbursed for his vehicle repair costs. The applicant submitted an invoice for repairs showing the total cost of repairs was $4,192.07 (first invoice), the insured's portion being $2,058.50 and the balance of the bill noted as $2,135.57 (net repairs).

35. I infer that the applicant's claim of $2,204.11 is made up of the net repairs amount of $2,135.57 and a second invoice submitted in evidence from the repair shop for $68.54 (second invoice). It appears the applicant may have misinterpreted which amount he paid on the first invoice. It shows that the net repairs were billed to ICBC

and I find that the insured's portion of $2,058.50 is the amount the applicant paid. There is no evidence about what the second invoice was for or how it is related to this dispute.

36. The respondent submits that the total cost of repairs to the applicant's vehicle was $2,048.83 and that he was reimbursed for 50% of that amount. However, the respondent submitted no evidence in support of this position.

37. Therefore, I find that the applicant must be reimbursed $2,058.50 for the cost I find he paid out for his vehicle repairs.

Windshield

38. The applicant claims $308 for replacement of the windshield on his vehicle. He says the accident significantly contributed to his windshield being cracked. The applicant's evidence included a photograph of his vehicle outside the repair shop demonstrating that the windshield was cracked after the accident. However, there is no evidence about when the crack occurred. The expert did not address the cracked windshield in his report, and I find the applicant has not proved it is more likely than not that the windshield was cracked as a result of the accident. I dismiss this claim.

Conclusion

39. The *Court Order Interest Act* applies to the tribunal. The applicant is entitled to pre-judgement interest on the $2,058.50, from March 2, 2018, the date of the first invoice, to the date of this decision. This equals $78.77.

40. 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 find that the applicant was substantially successful and order reimbursement of $175 in tribunal fees.

41. The applicant claims $1,259.10 for dispute-related expenses, including the expert report and the cost to obtain the ICBC claims history report. It appears from the

invoices in evidence that the applicant failed to account for the taxes paid on the cost of the expert report and I find that was likely due to the confusing layout of Mr. Hamilton's invoices. The invoices for Mr. Hamilton's initial consult and preparation of his report total $1,300.01, inclusive of tax. The ICBC claims history report was $21.00. Therefore, I order reimbursement of the applicant's dispute-related expenses in the amount of $1,321.01.

ORDERS

42. Within 30 days of the date of this order, I order the respondent to pay the applicant a total of $3,633.28, broken down as follows:

    a. $2,058.50 as reimbursement for vehicle repairs;

    b. $78.77 in pre-judgment interest under the *Court Order Interest Act*, and

    c. $1,496.01, for $175 in tribunal fees and $1,321.01 for dispute-related expenses.

43. The applicant's remaining claims are dismissed.

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

45. Under section 48 of the CRTA, 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. The Minister of Public Safety and Solicitor General has issued a Ministerial Order under the *Emergency Program Act*, which says that tribunals may waive, extend or suspend a mandatory time period. The tribunal can only waive, suspend or extend mandatory time periods during the declaration of a state of emergency. After the state of emergency ends, the tribunal will not have this ability. A party should contact the tribunal as soon as possible if

they want to ask the tribunal to consider waiving, suspending or extending the mandatory time to file a Notice of Objection to a small claims dispute.

46. Under section 58.1 of the CRTA, 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.

Kristin Gardner, Tribunal Member