



Civil Resolution Tribunal

Date Issued: September 1, 2020

File: SC-2020-002622

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Wilkie v. Avitan*, 2020 BCCRT 966

BETWEEN:

VIRGINIA-ANN WILKIE

APPLICANT

AND:

ADAM AVITAN, ADAM AVITAN HOLDING CORPORATION,
and GORE MUTUAL INSURANCE COMPANY

RESPONDENTS

REASONS FOR DECISION

Tribunal Member:

Kristin Gardner

INTRODUCTION

1. The applicant Virginia-Ann Wilkie says her dog, a 4-year-old Havanese named Molly, suffered a cruciate ligament rupture injury when the respondent veterinarian, Adam Avitan, improperly restrained Molly during a nail trimming procedure at Little Paws Veterinary Clinic (clinic) on December 21, 2019.

2. Ms. Wilkie says that Molly needed surgery as a result of her injury. She claims \$5,000 for Molly's medical expenses, decreased pet insurance coverage, Molly's future medical costs, and emotional distress.
3. I infer that Adam Avitan Holding Corporation (AAHC) owns the clinic. Two staff members at the clinic assisted Dr. Avitan with restraining Molly and trimming her nails.
4. The respondent insurer, Gore Mutual Insurance Company (Gore Mutual), requested to be added as a respondent to this dispute. Gore Mutual insurers both Dr. Avitan and AAHC and it filed Dispute Responses on their behalf. Both Dr. Avitan and AAHC rely on Gore Mutual's submissions in this dispute.
5. The respondents say that while Molly had to be restrained during the nail trimming procedure, they deny that Dr. Avitan or the clinic staff caused any injury. The respondents say that Molly had a previous similar injury to her right leg and her left leg injury was likely due to a degenerative disease. They say there is insufficient proof that Dr. Avitan was negligent and request that the dispute be dismissed.
6. Ms. Wilkie is self-represented. The 3 respondents are all represented by a Gore Mutual adjustor.

JURISDICTION AND PROCEDURE

7. These are the formal written reasons of the Civil Resolution Tribunal (CRT). The CRT has jurisdiction over small claims brought under section 118 of the *Civil Resolution Tribunal Act* (CRTA). The CRT's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the CRT 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.
8. The CRT has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. In some respects,

both parties to this dispute call into question the credibility, or truthfulness, of the other. In the circumstances of this dispute, I find that I am properly able to assess and weigh the evidence and submissions before me. I note the decision in *Yas v. Pope*, 2018 BCSC 282, in which the court recognized that oral hearings are not necessarily required where credibility is in issue. Bearing in mind the CRT's mandate that includes proportionality and a speedy resolution of disputes, I decided to hear this dispute through written submissions.

9. The CRT 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 CRT may also ask questions of the parties and witnesses and inform itself in any other way it considers appropriate.
10. Where permitted by section 118 of the CRTA, in resolving this dispute the CRT may order a party to do or stop doing something, pay money or make an order that includes any terms or conditions the CRT considers appropriate.
11. As a preliminary matter, I will address Gore Mutual's status as a respondent to this dispute. As noted, Gore Mutual requested to be added as a respondent and an Amended Dispute Notice was filed to reflect its addition. However, the Amended Dispute Notice discloses no claim against Gore Mutual. I find that Gore Mutual has no involvement in the circumstances underlying this dispute, other than as the other respondents' insurer and representative.
12. CRT rule 1.13 says an insurer may represent their insured for a CRT dispute if they may be required to provide coverage to pay damages in a dispute. I infer that is the situation here. However, I find it was unnecessary to add Gore Mutual as a respondent and I dismiss Ms. Wilkie's claims against Gore Mutual.
13. I provide my reasons below regarding Ms. Wilkie's claims against Dr. Avitan and AAHC.

ISSUE

14. The issue in this dispute is whether Dr. Avitan or AAHC were negligent during Molly's nail trim procedure, and if so, to what extent if any must they pay Ms. Wilkie the claimed \$5,000.

EVIDENCE AND ANALYSIS

15. In a civil claim such as this, the applicant Ms. Wilkie 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.
16. The following facts are undisputed:
 - a. Molly had attended the clinic for veterinary services and procedures such as nail trimming since she was a puppy. The clinic initially had a different owner and veterinarian. Dr. Avitan became the owner of the clinic sometime in 2019.
 - b. In September 2018, Molly started limping after getting out of the car one day and underwent patellar luxation surgery to her right hind leg on September 24, 2018.
 - c. In May 2019, Molly showed difficulty going up stairs and on May 14, 2019, underwent surgical repair for a torn right rear cranial cruciate ligament (CCL) and injury to her medial meniscus.
 - d. Molly's doctors advised Ms. Wilkie that there was up to a 50% chance that because Molly's right CCL ruptured, her left CCL would also rupture within 2.5 years.
 - e. On December 21, 2019, Ms. Wilkie brought Molly and her other dog, Cricket, to the clinic to have their nails trimmed.

- f. Molly's nails were trimmed first. Molly was brought into the treatment area with 2 veterinary assistants, one of whom was KT. During the procedure, Dr. Avitan was also brought in to assist with trimming Molly's nails.
 - g. After Molly was brought out of the treatment area, Cricket was taken in while Ms. Wilkie took Molly out to the car. Cricket's nail trim procedure was uneventful.
 - h. After the nail trimming, Ms. Wilkie noticed Molly was favouring her left rear leg.
 - i. On December 23, 2019, Ms. Wilkie brought Molly to an animal hospital for assessment of her left leg symptoms.
 - j. On January 3, 2020, Molly underwent surgical repair of her left CCL.
17. I find the evidence shows and it is undisputed that Molly was not displaying any signs of injury or discomfort in her left hind leg when she arrived at the clinic for her nail trim on December 21, 2019.
18. Ms. Wilkie says she was surprised when the veterinary assistants took Molly into a room alone for the nail trimming. She says that the previous veterinarian had always allowed her to be present. However, there is no evidence that Ms. Wilkie objected at the time to remaining in the waiting area. Ms. Wilkie says that she heard Molly crying and yelping loudly and that she saw Dr. Avitan go in to assist part-way through the procedure.
19. Dr. Avitan says that Molly required "additional restraint" during her nail trim procedure. The most detailed evidence about what transpired during Molly's procedure was a letter Dr. Avitan sent to Ms. Wilkie dated January 15, 2020, in response to her initial complaint to the clinic. In his letter, Dr. Wilkie says the following:

...This is the part that we call "additional restraint." This term means that Molly required 3 people, instead of 2, to complete her nail trim. This is

reserved for dogs who take extra time, resources, and staff members due to their disposition. As a result, I had my two staff members SAFELY secure Molly, one at the front end securing the neck and supporting the chest, and one at the back end supporting the abdomen and holding (“restraining”) the caudal abdomen (back end of the abdomen). This allows Molly to feel secure, prevent injury and allows the third handler to focus solely on supporting the paw and trimming the nails.

20. The respondents also filed an unsigned statement dated May 28, 2020 from KT that said she recalled that Molly would not stay still long enough to trim the nails well, so she ended up holding Molly in her arms while her coworker trimmed the nails. However, Molly was still squirming too much, so KT said Dr. Avitan “came to help”.
21. When the other assistant brought Molly out to Ms. Wilkie after the procedure, Ms. Wilkie says Molly’s harness was twisted around her body to the point that Ms. Wilkie had to completely remove it and put it back on properly. Ms. Wilkie says that the assistant apologized to Ms. Wilkie for the state of Molly’s harness and advised Ms. Wilkie that the struggle had been very intense. The respondents did not file a statement from this assistant as evidence in this dispute.
22. The clinic record from Molly’s visit that day shows that Dr. Avitan tried to charge Ms. Wilkie an extra fee for having to restrain Molly during the procedure, which Ms. Wilkie refused to pay. The note states that Ms. Wilkie did not think the extra fee was fair, and she told the staff member she thought, overall, the clinic fees were too high. There is no mention in the record that Ms. Wilkie reported any potential injury to Molly.
23. I find that the evidence is not clear about when Ms. Wilkie first noticed that Molly was favouring her left hind leg. While Ms. Wilkie says that she noticed Molly was limping as soon as she took her out to the car, I find she likely would have reported an observed limp to the clinic at the time, and there is no evidence before me that she did so. However, I find Ms. Wilkie did notice that Molly was favouring her left hind leg, at the latest, when she returned home from the clinic and saw that Molly

could not go up or down stairs and had difficulty walking. I also find that Ms. Wilkie was consistent in her reports that she observed Molly panting heavily immediately after the nail trimming procedure and accept that evidence.

24. It is undisputed that the clinic closed for the holidays shortly after Ms. Wilkie left that afternoon. Ms. Wilkie says Molly's symptoms persisted over the weekend, but she had to wait until Monday, December 23, 2019 to take Molly to an animal hospital where Molly's hind legs were x-rayed.
25. Ms. Wilkie says that the radiograph revealed that Molly's left hind CCL was ruptured. However, I find that the radiograph report in evidence stated the results showed a "very mild left stifle joint effusion and/or synovial proliferation", which may be secondary to CCL injury, concussive injury to the joint, or meniscal trauma. The report states the recommendations were for conservative management including exercise restriction and pain control, but that after discussion with Ms. Wilkie about Molly's previous right CCL surgery, Ms. Wilkie opted for surgical stabilization of the left CCL right away. It was during surgery that the surgeon found a partial tear in the left CCL.
26. I turn now to the question of whether Dr. Avitan or AAHC are responsible, at law, for Molly's injury.

Negligence

27. The general elements of a negligence claim are: the respondent owes the applicant a duty of care, the respondent failed to meet a reasonable standard of care, it was reasonably foreseeable that the respondent's failure to meet that standard could cause the applicant's damages, and the failure caused the claimed damages.
28. Dr. Avitan and AAHC, as owner of the clinic, owed Ms. Wilkie a duty of care regarding Molly. The issues here are whether they breached the standard of care of a reasonable veterinarian or clinic staff member in the circumstances, and whether Ms. Wilkie has proven any such breach caused her claimed damages.

29. Generally, in claims of professional negligence, an applicant must prove a breach of the standard of care through expert opinion evidence. I find that Molly's nail trimming procedure falls under the umbrella of a professional treatment. While I recognize there is not an absolute rule, I find expert opinion evidence is necessary here because the subject matter is technical and outside the knowledge and experience of the ordinary person: *Bergen v. Guliker*, 2015 BCCA 283.
30. Neither party filed any expert evidence about the proper standard for a veterinarian or assistant in situations involving an uncooperative or nervous dog during a nail trimming procedure, or that Dr. Avitan or his staff breached the relevant standard of care under the circumstances.
31. Both parties argued about whether Dr. Avitan and his staff had used a "fear free approach" during Molly's nail trim procedure. However, neither party explained what the fear free approach is and there was no evidence filed about the fear free approach or whether failure to use that approach would be a breach of the standard of care.
32. While Ms. Wilkie says that Dr. Avitan and the clinic staff should have come out to discuss Molly's resistance with her, I have no evidence that the failure to do so was unusual or breached the standard of care. Ms. Wilkie also says that Dr. Avitan and his staff failed to review Molly's file before the nail trimming and, if they had, they would have been aware of her previous surgery 7 months earlier and may have been more careful with her. However, again, I have no expert evidence that the standard of care required Dr. Avitan or the clinic staff to review Molly's medical file before a nail trimming procedure.
33. I note that both parties filed statements from other veterinarians, which I infer were intended to be filed as expert opinion evidence. However, I find that each of the statements commented only on the cause of Molly's injury, that is, whether it was likely to have been caused by a degenerative disease or an acute trauma from being improperly restrained, and none of them addressed the required standard of care.

34. In the absence of necessary expert evidence, I find that Ms. Wilkie has not proven what the applicable standard of care was, nor that Dr. Avitan or his staff breached the relevant standard.
35. Given my conclusion about the standard of care, it is not necessary for me to determine causation or damages in any detail. However, I note that it is undisputed that Molly had a known 50% chance of suffering a ruptured left CCL and there is no evidence that Molly's previous right CCL rupture occurred as the result of any trauma. Given this, and the lack of evidence that Dr. Avitan or his staff improperly restrained Molly during the nail trim, I would have found that Ms. Wilkie failed to prove that Dr. Avitan or AAHC caused Molly's injury. Therefore, I dismiss Ms. Wilkie's claims.
36. Under section 49 of the CRTA and CRT rules, the CRT will generally order an unsuccessful party to reimburse a successful party for CRT fees and reasonable dispute-related expenses. I see no reason in this case not to follow that general rule. Because the respondents were successful but paid no tribunal fees and claimed no dispute-related expenses, I make no order.

ORDER

37. I dismiss Ms. Wilkie's claims and this dispute.

Kristin Gardner, Tribunal Member