



# Civil Resolution Tribunal

Date Issued: January 27, 2022

File: SC-2021-005418

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Thoss v. Johnson*, 2022 BCCRT 104

**B E T W E E N :**

VIVIANE THOSS aka VIV THOSS

**APPLICANT**

**A N D :**

BRENT MICHAEL JOHNSON aka BRENT JOHNSON

**RESPONDENT**

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## **REASONS FOR DECISION**

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Tribunal Member:

Trisha Apland

## **INTRODUCTION**

1. This dispute is about a damaged window.
2. The applicant, Viviane Thoss aka Viv Thoss, and the respondent, Brent Michael Johnson aka Brent Johnson, lived together in a romantic relationship for 6 months. Ms. Thoss says during that time Mr. Johnson moved her barbeque adjacent to the

kitchen window. She alleges that Mr. Johnson damaged the window “sash” by barbequing too close to the window. Ms. Thoss seeks \$5,000 in damages for the window repair.

3. Mr. Johnson denies the claim. He says the barbeque was 4 to 5 feet away from the window and they used it several times in that location without a problem. He also says the barbeque did not transfer heat to damage the window and he saw no window damage while he lived with Ms. Thoss.
4. The parties are each self-represented.

## **JURISDICTION AND PROCEDURE**

5. 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). Section 2 of the CRTA states that 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 the dispute’s parties that will likely continue after the CRT process has ended.
6. Section 39 of the CRTA says the CRT 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. The credibility of interested witnesses, particularly where there is conflict, cannot be determined solely by the test of whose personal demeanour 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. Here, I find that I am properly able to assess and weigh the documentary evidence and submissions before me. Further, bearing in mind the CRT’s mandate that includes proportionality and a speedy resolution of disputes, I find that an oral hearing is not necessary. I also note that in *Yas v. Pope*, 2018 BCSC 282, at paragraphs 32 to 38,

the British Columbia Supreme Court recognized the CRT's process and found that oral hearings are not necessarily required where credibility is an issue.

7. Section 42 of the CRTA says 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.
8. 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.

## **ISSUE**

9. The issue in this dispute is whether Mr. Johnson must pay Ms. Thoss the claimed \$5,000 for the window repair.

## **EVIDENCE AND ANALYSIS**

10. In a civil proceeding like this one, as the applicant Ms. Thoss must prove her claims on a balance of probabilities (which means "more likely than not"). I have read all the parties' submissions but refer only to the evidence and argument that I find relevant to provide context for my decision.
11. Ms. Thoss says she purchased a Broil King barbeque in April 2020 and Mr. Johnson helped her assemble it and place it on "an appropriate spot on my deck away from the house and window and against the deck's metal railings". Ms. Thoss says a prominent community resident had burned their family home down by barbequing too close to their home. So, she says she expressed to Mr. Johnson that she wanted the barbeque as far away as possible from the house and vinyl window. However, she says Mr. Johnson disapproved of its spot by the railing and kept moving the barbeque closer to the house. She says she kept moving it back out to the railing.

12. Ms. Thoss says that on May 13, 2020, Mr. Johnson moved the barbeque “closer to the house” where she allegedly had told him not to place it and used it in that location. She says Mr. Johnson told her he had checked the barbeque and found no heat transfer to the building. Ms. Thoss does not say whether she double checked for any heat transfer herself. However, she says she told Mr. Johnson that he would have to pay to repair the window if it got damaged and he allegedly said “yes, yes” and assured her everything was fine.
13. Ms. Thoss says after she moved the barbeque back out on May 14, 2020, she noticed damage to the vinyl window’s sash. She says Mr. Johnson refused to take any responsibility for the damage. As noted, she claims \$5,000 for the window repair.
14. Mr. Johnson says Ms. Thoss’s “accusations” are false. He says the barbeque’s original position was not by the metal railing and Ms. Thoss never stated that she wanted the barbeque there. As mentioned, Mr. Johnson says he made sure the barbeque’s placement would not transfer heat to the window. Specifically, Mr. Johnson says he used the barbeque by the window but it was 4-5 feet away from it and he checked for heat transfer and found there was none. He says they used the barbeque multiple times in that position with no problem and says he never damaged the window.
15. Ms. Thoss submitted 2 opinion letters that the window damage was caused by using a barbeque up against the wall so that its heat melted the vinyl sash. The first is a July 23, 2020 letter from Roye Lovegren, principal, RGL Building Inspector Services and the second is an August 8, 2020 letter from Robert Perry, Fire Prevention Officer with Golden Fire Rescue. As Mr. Johnson does not dispute either witnesses’ expertise, I accept they have the required expertise to provide an opinion about the window damage. Based on the opinions, I find heat from the barbeque likely melted the bottom of the vinyl window.
16. I turn to the applicable law. To prove liability in negligence, Ms. Thoss must show that Mr. Johnson owed her a duty of care, that he breached the standard of care and that

his breach caused the window damage: *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, at par 33.

17. There is no dispute that Mr. Johnson owed Ms. Thoss a duty of care not to damage her home when operating the barbeque. However, I find Ms. Thoss has not proven that Mr. Johnson's barbeque use fell below a reasonable standard or caused the window damage. My reasons follow.
18. First, the only evidence showing the window sash damage is a photograph dated July 22, 2020. This is months after Mr. Johnson's May 13, 2020 use and a few weeks after he moved out on June 26, 2020. Without contemporaneous evidence, I find the window damage could have happened by someone else using the barbeque up against the window after Mr. Johnson moved out.
19. Second, there is no independent evidence that the barbeque was against the window when Mr. Johnson used it. I note Ms. Thoss says Mr. Johnson asserted that the barbeque was "beside the window". However, Mr. Johnson did not say the barbeque was right beside or against the window. Again, he said it was "by" the window but 4-5 feet away. Also, Ms. Thoss only said the barbeque was "close to" the window and she did not give its distance. The submitted photographs of Ms. Thoss's deck show it is fairly large and I find there was enough space for Mr. Johnson to use the barbeque 4-5 feet away from the window. On balance, I accept Mr. Johnson's assertion that he used the barbeque 4-5 feet away from the window.
20. The owner's manual says the barbeque must be positioned 2.5 feet away from a combustible surface. I find this means that if the barbeque was working properly, it was not supposed to radiate heat further than about 2.5 feet away. This supports Mr. Johnson's assertion that he felt no heat transfer to the window from its position 4-5 feet away.
21. As mentioned, there is no contemporaneous evidence of window damage when Mr. Johnson used the barbeque. Given this, and the lack of evidence of heat transfer when Mr. Johnson used the barbeque, I find Ms. Thoss has not proven that Mr.

Johnson caused the window damage. So, I find Mr. Johnson is not responsible for the repairs and I dismiss Ms. Thoss's claim.

22. 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. As Ms. Thoss was unsuccessful in this dispute, I find she is not entitled to any reimbursement. Mr. Johnson did not pay any CRT fees nor claim any dispute-related expenses.

## **ORDER**

23. I dismiss Ms. Thoss's claims and this dispute.

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Trisha Apland, Tribunal Member