



Civil Resolution Tribunal

Date Issued: January 4, 2024

Files: SC-2023-001069 and
SC-CC-2023-002786

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Okanagan Equine Veterinary Services Ltd. v. Pihl*, 2024 BCCRT 10

B E T W E E N :

OKANAGAN EQUINE VETERINARY SERVICES LTD.

APPLICANT

A N D :

DAVID PIHL

RESPONDENT

A N D :

OKANAGAN EQUINE VETERINARY SERVICES LTD.

RESPONDENT BY COUNTERCLAIM

REASONS FOR DECISION

Tribunal Member:

Kristin Gardner

INTRODUCTION

1. This decision relates to 2 linked disputes with the same parties that I find collectively consist of a claim and a counterclaim. So, I have issued a single decision for both disputes.
2. David Pihl owed a pregnant horse named Sugar Cat, who suffered a laceration to her hind leg. Mr. Pihl hired Okanagan Equine Veterinary Services Inc. (OEVS) to treat Sugar Cat's wound. Unfortunately, Sugar Cat and her unborn foal died 10 days later. OEVS says that Mr. Pihl failed to pay for its services in treating Sugar Cat's wound, and it claims \$3,795.64.
3. Mr. Pihl says that OEVS's services were negligent and caused Sugar Cat's death. He says that OEVS is not entitled to payment for its services because they were of no value.
4. Mr. Pihl counterclaims \$5,000 for Sugar Cat's value and that of her foal. While Mr. Pihl says the horses' value exceeds that amount, he limits his counterclaim to \$5,000, which is the small claims monetary limit at the Civil Resolution Tribunal (CRT).
5. OEVS is represented by an employee. Mr. Pihl, who is a lawyer, represents himself.

JURISDICTION AND PROCEDURE

6. These are the CRT's formal written reasons. 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.
7. 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. 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 in the interests of justice.

8. 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.
9. Between the \$3,795.64 withheld payment for OEVS's services and the \$5,000 damages claim, I find Mr. Pihl is effectively claiming \$8,795.64 for OEVS's alleged negligence. This exceeds the CRT's \$5,000 small claims monetary limit. I find that by pursuing his counterclaim, Mr. Pihl has abandoned his claim to any amount over \$5,000. Given my conclusion below, nothing turns on this.

ISSUES

10. The issues in this dispute are:
 - a. Was OEVS negligent in treating Sugar Cat's injury?
 - b. Is OEVS entitled to \$3,795.64 for its services?
 - c. Is Mr. Pihl entitled to \$5,000 in damages for the loss of his horses?

EVIDENCE AND ANALYSIS

11. In a civil proceeding like this one, OEVS must prove its claims on a balance of probabilities (meaning "more likely than not"). Mr. Pihl must prove his counterclaims to the same standard.
12. I have read all the parties' submissions and evidence but refer only to what I find necessary to provide context for my decision. I note that OEVS did not provide any final reply submissions for its claim, nor any evidence for Mr. Pihl's counterclaim. That said, in coming to my decision, I have considered the submissions and evidence submitted by the parties collectively in both disputes.

Background

13. On April 23, 2021, Sugar Cat impaled her left hind hip area on a fence post while attempting to run through a gate at the same time as 2 or 3 other horses. As noted, Sugar Cat was pregnant at the time, due to give birth within a few weeks.
14. Mr. Pihl called OEVS to examine and treat Sugar Cat's injury. His long-time veterinarian was Dr. Sheila McDonald. Dr. McDonald had recently sold OEVS to Dr. Janice Posnikoff, but Dr. McDonald remained as OEVS's employee at the time. Both Dr. McDonald and Dr. Posnikoff responded to Mr. Pihl's call, but Dr. Posnikoff arrived first and ultimately handled all of Sugar Cat's wound treatment.
15. OEVS's clinical records show that Dr. Posnikoff initially noted severe muscle trauma, swelling, bleeding, and pain. The records describe the wound as a 15 cm x 15 cm lateral V-shaped flap laceration, with a 10 cm wide x 20 cm deep penetrating muscle laceration. Dr. Posnikoff sutured the wound and put in a drain. Dr. Posnikoff returned daily to examine Sugar Cat. The clinical records noted only slight improvement in Sugar Cat's condition over the first several days, with ongoing severe pain, discharge, and bleeding. On April 27, 2021, Dr. Posnikoff removed the sutures and drain to facilitate the wound's cleaning and drainage.
16. On April 28, 2021, 5 days after the initial injury, Dr. Posnikoff palpated around the wound area and found a hard mass. Further examination revealed several pieces of fragmented wood and a 4-inch nail embedded in the superficial muscles, close to the surface. The records state that Dr. Posnikoff further explored the laceration by digital palpation, but there is no indication she found any other foreign objects.
17. Sugar Cat's condition appeared to improve between April 28 and May 2, 2021. Dr. Posnikoff continued to examine her daily. The clinical records state the horse was more alert, eating and drinking well, and that the swelling had decreased. However, the wound was still painful and draining fluid and purulent discharge.
18. Dr. Posnikoff's last exam was on May 2, 2021. The records state Sugar Cat was capable of full weight bearing on her left hind leg and was beginning to walk away

from the exam. While Mr. Pihl says that Dr. Posnikoff declared that her services were no longer required, the clinical records state that the plan was to hand off care to the on-site caretaker, BS, and to re-check in 3 days. So, I find it likely that Dr. Posnikoff intended to continue monitoring the wound, just not daily.

19. In any event, in the early morning hours on May 3, 2021, BS found Sugar Cat bleeding profusely from the wound and in significant distress. While Dr. McDonald attended immediately, Sugar Cat died before she arrived. Dr. McDonald attempted an emergency cesarian section, but Sugar Cat's foal also died. From the statements of BS, Mr. Pihl, and Dr. McDonald, I acknowledge that the circumstances of Sugar Cat's death were undoubtedly extremely shocking and distressing to those involved.

Was OEVS negligent in treating Sugar Cat's injury?

20. As noted, Mr. Pihl has not paid OEVS for its services because he says that OEVS, through the conduct of Dr. Posnikoff, was negligent in treating Sugar Cat. He also claims damages for the loss of his horses from the alleged negligence.
21. In order to establish a claim for negligence, Mr. Pihl must prove that OEVS owed him a duty of care, its conduct did not meet the expected standard of care, its conduct caused the claimed damages, and the damages were reasonably foreseeable: see *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27.
22. I find OEVS clearly owed Mr. Pihl a duty of care in providing veterinary services to his horse. The issue here is whether OEVS breached the applicable standard of care and whether Mr. Pihl has proven any such breach caused his claimed damages.
23. Mr. Pihl's main argument is that Dr. Posnikoff failed to properly investigate whether there were nails or other fence debris embedded in Sugar Cat's wound. He says that his employee immediately reported 2 missing nails from the fence post where Sugar Cat was injured, which is confirmed by OEVS's clinical entry on April 23, 2021. Mr. Pihl says he requested that Dr. Posnikoff do an ultrasound or x-ray to confirm whether the nails were in the wound, but Dr. Posnikoff refused, even after she found one of the nails 5 days later. Mr. Pihl says that the wound was obviously infected and not

properly healing, and so Dr. Posnikoff should have done an ultrasound or x-ray to determine the infection's source.

24. In claims of professional negligence, including allegedly negligent veterinary services, expert evidence is generally required to prove the applicable standard of care and how the professional's conduct fell below that standard. This is because the standards of a particular profession are often outside an ordinary person's knowledge and experience: see *Bergen v. Guliker*, 2015 BCCA 283. I find that expert evidence is required here because how to competently treat a serious gash wound on a pregnant horse is a matter outside the knowledge of an ordinary person.
25. Mr. Pihl relies on 2 statements from Dr. McDonald. The first is a June 27, 2023 statement setting out a general chronology of events, including her account of Sugar Cat's death. The second is a September 25, 2023 statement responding to OEVS's claim and submissions in this dispute. I find that Dr. McDonald has the requisite training and experience to provide expert opinion evidence in this dispute.
26. OEVS objects to Dr. McDonald's evidence on the basis that she is related to Mr. Pihl by marriage and is a "disgruntled" ex-employee of OEVS. I agree that these are factors that could impact Dr. McDonald's objectivity, and so I have considered Dr. McDonald's evidence with some caution. However, I have accepted Dr. McDonald's observations and opinions to the extent set out below.
27. First, I note that I have placed no weight on Dr. McDonald's statements relating to specific comments Dr. Posnikoff made and Sugar Cat's condition between April 24 and May 2, 2021, as Dr. McDonald was undisputedly not present and did not personally observe those events. It also appears that Dr. McDonald did not review OEVS's clinical records documenting Dr. Posnikoff's treatment efforts, and that her comments are almost entirely based on what Mr. Pihl and BS relayed to her.
28. That said, I accept Dr. McDonald's account of the events on May 3, 2021, for which she was present. Dr. McDonald confirmed that Sugar Cat was already deceased when she arrived, and the foal had also died. Dr. McDonald stated she explored

Sugar Cat's gash wound and found a 6-inch section of exposed femur, with a large pocket on the medial side of the thigh. She also stated that Sugar Cat's cause of death was a burst femoral artery. Dr. McDonald stated that the pocket (an absence of tissue or flesh) and exposed bone indicated that the wound was not healing, which she said led to the eventual erosion and rupture of the femoral artery. She said that the presence of a foreign body in the wound would explain its failure to heal. However, nobody thought to search for any such foreign bodies at the time of Sugar Cat's death.

29. OEVS disputes that Sugar Cat died from a burst femoral artery. It says Sugar Cat's initial injury from the fence post likely ripped her muscles, which OEVS says is supported by the severity of bleeding at the time of injury, severe swelling and lameness, and elevated muscle enzymes on blood analysis. OEVS says that Sugar Cat did not lay down after the injury, which it says is a common response to such trauma. However, during late pregnancy, a hormone that causes muscle relaxation increases. OEVS says that Sugar Cat likely attempted to lay down due to the hormone, re-injuring the wound and causing severe hemorrhaging from torn muscles.
30. I generally prefer Dr. McDonald's opinion that Sugar Cat's cause of death was a burst femoral artery, largely because there is no indication that Dr. Posnikoff examined Sugar Cat after her death. I also rely on the photographic evidence showing the volume of blood loss and BS's statement about how quickly Sugar Cat succumbed. Overall, I find OEVS's submission that Sugar Cat likely died from torn muscles hemorrhaging is somewhat speculative.
31. In any event, the question is whether Mr. Pihl has proven that OEVS, through Dr. Posnikoff, reasonably should have done anything differently in its treatment of Sugar Cat to prevent her death. For the following reasons, I find he has not done so.
32. As noted, Dr. McDonald stated that the gash wound was not healing, which caused the large pocket around the femur. She explained in her September 25, 2023 statement that a non-healing wound will fail to fill in cavities and cover bone with granulation tissue. She stated that Dr. Posnikoff should have recognized this condition through examining the wound.

33. However, OEVS's clinical records show that Dr. Posnikoff recorded the presence of a large pocket around the femur starting on April 28, 2021. She cleaned, aspirated, flushed, and dressed the pocket area with unpasteurized honey on a daily basis. By May 1, 2021, Dr. Posnikoff recorded that the dead space area was decreasing, which she also noted the following day. So, I find that Dr. Posnikoff was aware of the pocket and was treating it.
34. I note that Dr. McDonald did not explain in her statements how the non-healing wound and development of the pocket would cause erosion of the femoral artery. Notably, Dr. McDonald did not state that what Dr. Posnikoff did was inappropriate in the circumstances, particularly given that Dr. Posnikoff observed the pocket appeared to be improving.
35. Further, while Dr. McDonald stated that an ultrasound of the wound area would have revealed the large pocket and "perhaps" any foreign objects, she did not say that a reasonably competent veterinarian should have performed an ultrasound in the circumstances. She also did not say that a foreign object was the only possible reason the wound was not healing. As noted, Dr. McDonald did not locate a foreign object in the wound, and she did not say a foreign object was directly responsible for the femoral artery rupture. So, I find Mr. Pihl's submission that the second missing nail was likely embedded somewhere in the wound and responsible for the burst artery is unproven.
36. Finally, it appears that Mr. Pihl takes the position Dr. Posnikoff was negligent for failing to perform an ultrasound or x-ray when he requested one. However, I find that a veterinarian is not obligated to perform every investigation that a client requests. There is no evidence about the logistics or expense involved in performing an ultrasound or x-ray on a late-pregnant horse. Further, OEVS submits that foreign objects likely would not have been seen on a radiograph due to the inflammation and hemorrhage present, and that an ultrasound does not have the capacity to image far enough inside the wound to be helpful. OEVS says that Dr. Posnikoff reasonably explored the wound with her hands through deep physical palpation inside the wound.

Again, Dr. McDonald stated only that the imaging Mr. Pihl requested “may have provided more information”, but she did not say it was required to meet the standard of care. I find Mr. Pihl has not established that OEVS’s failure to perform the requested imaging fell below the standard of a reasonably competent veterinarian.

37. I also note that in a January 10, 2023 email to Dr. Posnikoff, Mr. Pihl stated that during her May 2, 2021 examination, Dr. Posnikoff had said Sugar Cat “turned the corner” but that if the small sign of ongoing infection did not improve, she would perform an ultrasound. So, contrary to Mr. Pihl’s submission, I find Dr. Posnikoff was not ignoring his concerns about the possibility of additional foreign objects in the wound causing infection. Rather, I find that Dr. Posnikoff likely made a judgment call to hold off on imaging, given the observed improvements in Sugar Cat’s condition. I find there is insufficient evidence before me that her decision was unreasonable.
38. Overall, while the outcome was most unfortunate, I find that Mr. Pihl has not proven that OEVS’s services failed to meet the applicable standard of care. So, I find OEVS was not negligent. It follows that Mr. Pihl is not entitled to damages for Sugar Cat’s or her foal’s value. I dismiss Mr. Pihl’s counterclaim.

Is OEVS entitled to payment for its services?

39. OEVS claims \$3,795.64 for its veterinary services. It did not provide a copy of its invoice in evidence. However, as noted, its clinical records show Dr. Posnikoff attended Mr. Pihl’s stable daily for 10 days to treat Sugar Cat, documented the injury with photographs and videos, administered medications, and performed several blood work analyses. There is no dispute that OEVS provided the recorded services and medications. Mr. Pihl also did not argue that OEVS overcharged for its services.
40. On balance, I find \$3,795.64 is a reasonable amount for the services OEVS provided. So, as I have found above that Mr. Pihl failed to prove OEVS was negligent, I find he must pay OEVS the claimed \$3,795.64 for its services.
41. The *Court Order Interest Act* applies to the CRT. I accept OEVS’s evidence that Mr. Pihl advised it on May 4, 2021, that he would not pay for its services. So, I find OEVS

is entitled to pre-judgment interest on the \$3,795.64 from June 4, 2021, a date I find reasonable in the circumstances, to the date of this decision. This equals \$231.51.

42. 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. OEVS was successful in its claim, and so I find it is entitled to reimbursement of \$175 in CRT fees. I dismiss Mr. Pihl's claim for reimbursement of his counterclaim fees. Neither party claimed dispute-related expenses.

ORDERS

43. Within 21 days of the date of this decision, I order Mr. Pihl to pay OEVS a total of \$4,202.15, broken down as follows:
- a. \$3,795.64 in debt,
 - b. \$231.51 in pre-judgment interest under the *Court Order Interest Act*, and
 - c. \$175 in CRT fees.
44. OEVS is also entitled to post-judgment interest, as applicable.
45. I dismiss Mr. Pihl's counterclaims.
46. Under section 58.1 of the CRTA, a validated copy of the CRT's order can be enforced through the Provincial Court of British Columbia. Once filed, a CRT order has the same force and effect as an order of the Provincial Court of British Columbia.

Kristin Gardner, Tribunal Member