Civil Resolution Tribunal

Date Issued: January 31, 2023

File: SC-2022-002295

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Rink v. ICBC*, 2023 BCCRT 88

B E T W E E N :

ANDRE RINK

APPLICANT

A N D :

THE INSURANCE CORPORATION OF BRITISH COLUMBIA

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Eric Regehr

INTRODUCTION

1. Andre Rink owns a Tesla vehicle. He claims that on November 14, 2021, an unknown driver damaged his Tesla while it was parked in a parkade. He made a claim for the repairs to his insurer, the Insurance Corporation of British Columbia (ICBC). ICBC denied coverage because it said that the damage was not consistent

with vehicle-to-vehicle impact, and so Mr. Rink made a wilfully false statement. Mr. Rink initially claimed $2,628.54, which was the estimated cost of repair at the time he filed the Dispute Notice. As discussed below, he made a slightly higher claim in submissions. He is self-represented.

2. ICBC says that Mr. Rink damaged the Tesla in a single vehicle accident, likely in a collision with a stationary object. So, ICBC maintains that Mr. Rink made a wilfully false statement that disentitles him to coverage. ICBC asks me to dismiss Mr. Rink's claim. ICBC is represented by an employee.

JURISDICTION AND PROCEDURE

3. 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.

4. 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. In some respects, both parties of 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 *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.

5. 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.

6. Where permitted by section 118 of the CRTA, in resolving this dispute the CRT may order a party to pay money or to do or stop doing something. The CRT's order may include any terms or conditions the CRT considers appropriate.

7. I note that in ICBC's correspondence with Mr. Rink and its initial submissions in this dispute, it relied on section 24 of the *Insurance (Vehicle) Act* (IVA), which governs hit and run accidents. However, for accidents since May 1, 2021, section 24 of the IVA only applies to non-vehicle damage and this dispute is about vehicle damage. The IVA no longer provides automatic coverage for vehicle damage from a hit and run. Rather, insureds must purchase it as optional coverage.

8. I raised this issue with the parties. In response, ICBC agreed that section 24 of the IVA does not apply to this dispute. ICBC admitted that Mr. Rink purchased collision coverage that included coverage for hit and run damage, but said that he still made a wilfully false statement when he made his claim. Under section 75 of the IVA, an insured is not entitled to coverage if they make a wilfully false statement. As discussed below, Mr. Rink made submissions about whether he made a wilfully false statement.

ISSUE

9. The issue in this dispute is whether Mr. Rink made a wilfully false statement by reporting the damage as a hit and run.

EVIDENCE AND ANALYSIS

10. In a civil claim such as this, the applicant (here, Mr. Rink) must generally prove their claims on a balance of probabilities, which means "more likely than not". However, when ICBC alleges a wilfully false statement, it must prove it on a balance of

probabilities. See *Boyle v. Insurance Corporation of British Columbia*, 2017 BCSC 1762, at paragraph 54.

11. According to the policy documents, Mr. Rink's collision policy covered damage from a hit and run (which is what Mr. Rink says happened) and from colliding with stationary objects (which is what ICBC says happened). In other words, Mr. Rink had coverage for the damage regardless of who is correct about what happened. This means that ICBC's only basis for denying coverage is its allegation that Mr. Rink made a wilfully false statement. I therefore find that ICBC bears the burden of proving that the damage was not from a hit and run.

12. While I have read all the parties' evidence and submissions, I only refer to what is necessary to explain my decision.

13. Mr. Rink says that he went to the gym in the afternoon of November 14, 2021. He says that he did not notice any damage when he got to the gym or when he left. He says that he first noticed damage to the Tesla's rear left quarter panel, just above the wheel, when he got home. He made an ICBC claim the same day, claiming that another vehicle must have caused the damage while he was parked at the gym. He denies causing the damage himself.

14. According to a December 21, 2021 file note, an ICBC estimator determined that the damage was not consistent with vehicle to vehicle contact. The estimate said that the damage was "abrasive" with "coarse markings", which was more consistent with contact with concrete or wood. According to ICBC's file materials, several managers agreed with this initial assessment. However, ICBC does not rely on these notes as expert evidence. I agree with ICBC's position on this point. In *Ip v. ICBC*, 2021 BCCRT 1175, a CRT vice chair declined to accept an ICBC employee's opinion about alleged hit and run damage because ICBC had a direct interest in the outcome, and so was not sufficiently neutral. I agree with this decision. I therefore do not admit these notes as expert evidence.

15. On January 21, 2022, Mr. Rink signed a proof of loss that said, among other things, that the damage was caused by a hit and run. In a March 31, 2022 letter, ICBC informed Mr. Rink that it did not believe the vehicle damage was caused by a hit and run. ICBC said that Mr. Rink had forfeited coverage for the accident because he made a wilfully false statement.

16. ICBC makes 2 arguments about why I should conclude that the damage was not from a hit and run. First, ICBC argues that I should draw an adverse inference against Mr. Rink for having the car repaired during the CRT's process, which it says deprived it of the opportunity to get an expert report. The CRT may draw an adverse inference against a party for intentionally destroying relevant evidence. This legal doctrine is called "spoliation". See *GEA Refrigeration Canada Inc. v. Chang*, 2020 BCCA 361, at paragraph 91.

17. The CRT issued the Dispute Notice on April 22, 2022. It is undisputed that on May 5, 2022, an ICBC adjuster told Mr. Rink that ICBC wanted to have an expert look at the Tesla for an expert report for the CRT dispute.

18. According to a May 11, 2022 ICBC file note, Mr. Rink told the adjuster over the phone that he wanted to get the Tesla repaired. The adjuster told Mr. Rink that ICBC wanted to wait until the CRT's facilitation process to have an expert look at the Tesla. The adjuster also told Mr. Rink that it would argue that Mr. Rink had prevented it from obtaining an expert report if he had it repaired first. Mr. Rink declined to wait, and had his vehicle repaired on May 30, 2022.

19. Mr. Rink says that he gave ICBC plenty of time to have an expert look at the Tesla before he got it repaired. He says that he wanted the car looking pristine for his child's graduation ceremony, and so he did not want to delay repairs.

20. I acknowledge that Mr. Rink decided to repair the Tesla after ICBC asked him not to. I also acknowledge that his decision was based solely on aesthetics. However, the law places a high burden on parties who want an adverse inference based on spoliation. There must be evidence that there was "an element of fraud or an

attempt to suppress the truth" when the party decided to destroy evidence. See *Owners, Strata Plan K855 v. Big White Mountain Mart Ltd.*, 2016 BCSC 862, at paragraph 132.

21. I find that the evidence here does not show that Mr. Rink repaired the Tesla to deceive the CRT or ICBC. I rely primarily on the fact that Mr. Rink did not deny ICBC access to the Tesla before it was repaired. Rather, he declined to postpone previously scheduled repairs. ICBC did not explain why it wanted to wait until the CRT's facilitation process before hiring an expert to look at the Tesla, even after it knew Mr. Rink's intentions. ICBC does not argue that 25 days was an unreasonably short time to try to arrange for an expert. I find that if Mr. Rink wanted to frustrate ICBC's attempts at obtaining expert evidence, he easily could have had the Tesla repaired without telling ICBC first. For these reasons, I decline to draw an adverse inference against Mr. Rink for repairing the Tesla during the CRT's process.

22. ICBC's second argument is that I should draw an adverse inference because Mr. Rink did not take the Tesla to a service center to obtain collision data. The CRT may draw an adverse inference when a party fails to provide relevant evidence without a good explanation. Mr. Rink undisputedly downloaded the vehicle data that was available online and gave it to ICBC, but there was nothing about collisions in that data. ICBC argues that Mr. Rink failed to take "all available steps" to obtain "possible relevant evidence". ICBC relies on *Budhwani v. ICBC*, 2021 BCCRT 1190. In that dispute, another CRT member drew an adverse inference against the owner of a Tesla for failing to make an appointment at a service center to access the car's data. ICBC argues that the same reasoning applies here.

23. Other CRT decisions are not binding on me. To the extent that ICBC argues that all Tesla owners must attend service centers to check for collision data, I disagree. I find that there must be evidence that doing so would likely provide relevant evidence. Here, ICBC's arguments about what may have been available are speculative. There is no evidence about what Tesla's sensors detect and record. In other words, there is no evidence that a relatively minor scrape would result in

retrievable collision data. There is also no evidence that Mr. Rink would have had access to different data in person than online, other than ICBC's assertions. I find that ICBC has not proven that Mr. Rink's likely would have uncovered relevant evidence if he had attended a service center.

24. ICBC provided no admissible evidence to prove that the vehicle damage was not caused by a hit and run. It relied solely on its arguments about adverse inferences. So, I find that ICBC has not proven that Mr. Rink made a wilfully false statement. I therefore find it unnecessary to address the parties' arguments about the evidence Mr. Rink provided as expert evidence, which I have not relied on. I find that ICBC has not met its burden of proving that it was entitled to deny coverage under section 75 of the IVA. I turn to Mr. Rink's damages.

25. As mentioned above, Mr. Rink's initial claim was for $2,628.54. In submissions, Mr. Rink claimed a total of $2,740.13, broken down as $2,561.07 in repair costs, $144.06 for a replacement rental car, and $35 for a notary to witness the proof of loss. Mr. Rink provided invoices for each claimed amount. Given my conclusions below, nothing turns on this small increase in the claimed amount.

26. ICBC did not make any submissions about Mr. Rink's claimed damages, other than to point out that Mr. Rink's collision coverage has a $300 deductible. Having reviewed the policy, I agree with ICBC. I also find that Mr. Rink's policy covers the cost of a replacement rental car while the Tesla was in the shop.

27. As for the $35 notary cost, Mr. Rink's policy requires him to provide a statutory declaration at ICBC's request. There is nothing in the policy that makes ICBC responsible for the cost. I dismiss this aspect of Mr. Rink's claim.

28. I therefore find that Mr. Rink is entitled to $2,584.19, which is the repair cost and rental car cost less the $300 deductible.

29. The *Court Order Interest Act* (COIA) applies to the CRT. Mr. Rink is entitled to pre-judgment interest on the damages award from June 2, 2022, when the Tesla's repairs were complete, to the date of this decision. This equals $32.84.

30. 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 find that Mr. Rink was largely successful, so he is entitled to reimbursement of $125 in CRT fees. He did not claim any dispute-related expenses.

ORDERS

31. Within 30 days of the date of this order, I order ICBC to pay Mr. Rink a total of $2,742.03, broken down as follows:

    a. $2,584.19 in damages,

    b. $32.84 in pre-judgment interest under the COIA, and

    c. $125 in CRT fees.

32. Mr. Rink is entitled to post-judgment interest, as applicable.

33. I dismiss Mr. Rink's remaining claims.

34. 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.

Eric Regehr, Tribunal Member