
CANADA / JUDGMENT

Booth v. I.C.B.C.

2009 BCSC 1346

COURT

Supreme Court of British Columbia

DECIDED

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2009 BCSC 1346 Booth v. I.C.B.C.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Booth v. I.C.B.C.,

2009 BCSC 1346

Date: 20091001

Docket: 30690

Registry: Penticton

Between:

Debra Booth

Plaintiff

And

Insurance Corporation of British Columbia

Defendant

Before: The Honourable Mr. Justice Barrow

Reasons for Judgment

Counsel for the Plaintiff:

J. Poon

Counsel for the Defendant:

S. Moring

Place and Date of Trial/Hearing:

Kelowna, B.C.

June 17 & 18, 2009

Place and Date of Judgment:

Penticton, B.C.

October 1, 2009

Introduction

- [1] On September 16, 2004, Brian Booth was involved in a motor vehicle accident near Vancouver. He was driving a 1996 Chevrolet Camaro registered in his mother's name, the plaintiff Debra Booth. Mr. Booth collided with another vehicle and a passenger in that vehicle, Ms. Mastrodonato, claimed to have been injured as a result. She sued both Mr. Booth, in his capacity as driver of the vehicle, and the plaintiff as owner of the vehicle. Mrs. Booth had insured the vehicle through the Insurance Corporation of British Columbia ("insurance corporation"). The insurance corporation defended the action and sometime in 2007 settled the claim, paying Ms. Mastrodonato \$37,660.
- [2] At some point, the insurance corporation concluded that Mrs. Booth was in breach of her insurance policy. She had declared herself the principal operator of the Camaro. The insurance corporation concluded that Mr. Booth was, in fact, the principal operator, and as a result, they demanded repayment of the \$37,660 it had paid on her behalf.
- [3] Faced with this demand, Mrs. Booth consulted a lawyer and launched this action. By it, she seeks two declarations. As set out in her statement of claim, they are:
- (a) a declaration that, at the time of the accident, the insurance policy was valid and subsisting;
 - (b) a declaration that the plaintiff is entitled to indemnification by ICBC pursuant to the terms of the insurance policy, respecting all claims arising from the accident...
- [4] Entitlement to both forms of declaratory relief turns on whether Mrs. Booth was in breach of her insurance policy. That issue falls to be resolved largely on the basis of an assessment of the credibility of the various witnesses who testified about the use of the Camaro. Before turning to that evidence, the legal framework that governs this proceeding can usefully and briefly be set out.

The Law

- [5] The phrase "principal operator" is defined in s. 1 of the Insurance (Motor Vehicle) Regulation, B.C. Reg. 447/83, as follows:

"principal operator" means the person who will operate the vehicle described in an application for a certificate for the majority of the time the vehicle is operated during the term of the certificate;

[6] Section 19 of the Insurance (Motor Vehicle) Act, R.S.B.C. 1996, c. 231, deals with forfeiture of claims. It provides, in part, as follows:

19(1) If

...

(b) an applicant for an owner's certificate or driver's certificate knowingly misrepresents or fails to disclose in the application a fact required to be stated in it...

all claims by or in respect of the applicant or the insured are rendered invalid...

[7] It is common ground that an applicant for an owner's certificate by which insurance is acquired under the Act is required to identify the principal operator of the insured vehicle. It is also common ground that the defendant bears the burden of proving, on a balance of probabilities, that the insured knowingly misrepresented a fact contemplated by s. 19(1)(b). (See generally *Gill v. Insurance Corp. of British Columbia*, 2006 BCSC 1397 at para. 20, and *Rai v. ICBC*, 2005 BCSC 92 at para. 3.)

[8] Because an assertion that an insured knowingly misrepresented a material fact is tantamount to a claim of fraud, until the Supreme Court of Canada's decision in *F.H. v. McDougall*, 2008 SCC 53, it was thought that in order to establish such a claim, it was necessary that it be proven on something more than a mere balance of probabilities and/or that the evidence said to support it be subjected to a heightened scrutiny (see *Bevacqua v. I.C.B.C.*, 1999 BCCA 553 at para. 44). In *F.H.*, the court concluded at para. 40 that:

it is time to say, once and for all in Canada, that there is only one civil standard of proof at common law and that is proof on a balance of probabilities. Of course, context is all important and a judge should not be unmindful, where appropriate, of inherent probabilities or improbabilities or the seriousness of the allegations or consequences.

[9] Finally, whether an insured has knowingly misrepresented a material fact is to be determined on the basis of the circumstances at the time the policy of insurance was issued (see s. 19(1)(b) and *Rai* at para. 14).

Position of the Parties

[10] The defendant called several witnesses who testified as to their observations of the use that was made of the Camaro over the summer of 2004 and 2003. Broadly stated, their evidence, if believed, tends to support the proposition that Mr. Booth and not his mother was the principal operator of the vehicle. The defendant argues that the evidence of these witnesses is credible and should be accepted. In addition, the defendant argues that the evidence of Mrs. Booth and Brian Booth is, for a host of reasons, simply incredible and should not be

given any weight. In the result, the defendant argues that they have proven a breach of the policy, and the plaintiff is not entitled to the declarations she seeks.

- [11] The plaintiff argues that based both her own evidence and that of her son the court should conclude that the defendant has not proven a breach of the policy. In addition to the simple persuasive force of that evidence, the plaintiff argues that this case lacks the hallmarks of many cases of this kind. In particular, she points to the fact that there is a legitimate explanation for why the vehicle, which had originally been owned by her son, was later transferred into her name. Second, she points to the fact that, unlike many cases, she or her son only stood to gain a very modest financial benefit by naming her as the principal operator. Finally, the plaintiff in effect argues that even if the court were to accept the evidence of the defendant's witnesses, it does not follow that Mr. Booth was the principal operator of the vehicle. For all of these reasons, the plaintiff argues that she is entitled to the declarations sought.

Analysis

- [12] As noted, both Mr. Booth and Mrs. Booth testified at trial. Broadly stated, their evidence was that although Mr. Booth drove the Camaro from time to time, he did so infrequently and then only locally and for short periods of time. Mrs. Booth, on the other hand, drove the car locally but more frequently than her son, and in addition, she took the car on lengthy trips on most if not all weekends over the summer of 2004. If their evidence is accepted, then no breach of the policy of the insurance has been proven.
- [13] Three people gave evidence for the defendant at trial relating to the usage of the motor vehicle. I will deal only with two of them: Ms. Mendonca and Mr. Barnhard. Broadly speaking, they testified that they saw the Camaro regularly over the summer of 2004. They never saw Mrs. Booth driving it; rather, every time they saw it, Mr. Booth was driving. If their evidence is accepted and the evidence of Mr. Booth and Mrs. Booth rejected, then the evidence would establish on a balance of probabilities that the plaintiff was in breach of her insurance policy, and she would not be entitled to the declaratory relief she seeks.
- [14] Before turning to the resolution of this issue, some further and generally undisputed background is in order. The motor vehicle in question is a 1996 Chevrolet Camaro. It is equipped a large and distinctive spoiler mounted on the trunk. It has a powerful stereo, the components of which consume most of the backseat of the vehicle.
- [15] In 2000 or perhaps a year earlier, Mr. Booth wanted to acquire the vehicle. For reasons not disclosed in the evidence, in order to do that he, his father and his mother jointly entered into a lease. The vehicle was insured and Mr. Booth was named the principal operator. He drove the vehicle virtually exclusively until May 2003. In early 2003, Mr. Booth was experiencing financial difficulties and was unable to make the monthly lease payments. Initially, Mrs. Booth lent him money to make the payments. By May 2003, Mr. Booth's financial problems had reached the point where it appeared that he would be unable to pay

the lease for the foreseeable future. Mrs. Booth agreed to pay out the lease (then outstanding in the sum of approximately \$2,800). She agreed to do this, in part, to preserve her own credit rating. In exchange, Mr. Booth agreed to transfer ownership of the car to her, and on May 5, 2003, Mrs. Booth became the registered owner of the vehicle and insured it. In doing so, she named herself as the principal operator. She renewed the insurance on May 5, 2004, and again declared that she would be the principal operator.

[16] It is admitted that the annual insurance premium payable on the vehicle would be \$295 more if Mr. Booth had been declared the principal operator instead of his mother.

[17] Some years before acquiring the Camaro, Mr. Booth worked briefly at Bob Brown's, a Chevrolet dealer in Penticton. In part, because of his association with that enterprise, he routinely took the Camaro there for maintenance and repairs. Between May 2003 and September 2004, the Camaro was in the shop 10 times. Each time it was taken there by Mr. Booth and each time it was Mr. Booth, as opposed to Mrs. Booth, who dealt with the employees of the shop. Some of the repairs disclosed in the invoices were substantial. Those invoices also set out the odometer reading on the Camaro at the time it was brought to the shop. The dates, odometer readings and cost of repairs are as follows:

Date

Odometer Reading

Approximate Cost of Repairs

September 3, 2003

136,487

\$ 1,200

September 25, 2003

137,166

3,000

November 25, 2003

139,311

0

January 27, 2004

141,122

155

February 5, 2004

141,140

166

April 28, 2004

145,946

318

July 21, 2004

149,719

263

August 31, 2004

152,907

1,846

September 14, 2004

154,000

56

November 22, 2004

154,001

370

These repairs were paid for by Mr. Booth.

[18] Finally, by way of undisputed background, from at least May 2003 until early 2004, Mr. Booth lived on Roy Avenue, the same street as his parents. His house was three doors away and across the road. He could not see his mother's house from his house, but generally knew when the Camaro was in the driveway and when it was not. In or about May 2004, Mr. Booth moved from Roy Avenue to Maple Street. Mr. Booth owns a Canadian 2-for-1 Pizza restaurant. The restaurant is located in the north end of Penticton about two blocks from Mr. Booth's Maple Street address. Royal Avenue is located in the south end of Penticton about a 10-minute drive from the pizza restaurant and Maple Street.

[19] I accept the foregoing as proven and turn now to the primary issue.

[20] Brian Booth gave a statement to an ICBC adjustor on September 21, 2004. This statement was typed and he reviewed it prior to signing it. In it he first described the circumstances of the motor vehicle accident. As to the use of the Camaro, he said:

I used to own this car about a few years ago. I could not afford the buyout so my mom took the car over and I am slowly paying her back. Until it is paid for, I don't get to use it that often. I use it at most three times a month.

That is usually to go to the video store to rent her a movie. This trip [that is, the trip to Vancouver] was the farthest she has ever let me take it. To get to work, she drives me to work or I ride my bike. I have a street bike so that is what I drive...My mom owns a Sunfire also. She mostly drives the Sunfire because she knows I will be buying the car eventually so she lets it sit. I only owe about \$2000. She only drove it on really sunny days like down to the beach or something. I don't think I've seen her ever take this car out of town. She probably only drives it about 6X/month. Otherwise it is parked in an open garage...

[21] Mrs. Booth gave a statement to the adjustor the next day. Like her son's statement, her statement was typed out by the adjustor, then read by her and corrected as necessary. In it, she said this about the use of the car:

I acquire[d] this vehicle because it was a lease vehicle and the lease was in Gordon's [her husband's] name, my name and Brian's name. We lent Brian \$2000 to pay off [the] lease. When he paid us back, he got the car. Theoretically it is still his baby, his car, but I had to do something as parent. It was always intended for his use after it was paid for by him.

We first got it in either may or April of 1999. The lease was up May 2003. I paid out the lease and Brian was going to pay me back...It went into my name when he was having trouble making his lease payments which I think was 2003 or 2002...The car has been used for pleasure and its (sic) been parked. We take it out on long trips. I do not use it for work becuase (sic) I have my own vehicle for work. My husband and I will take it to the Caribou, Alberta, Vancouver, Nelson, weekend getaways, holidays. Brian will use it for driving around town. He winds it out maybe 0-4 times a week. He actually has not used it much lately because he has used his bike all summer. The car has been in Bob Browns the majority of the time getting work done. Gordon does not have a vehicle insured. I would say I use the vehicle maybe mileage wise 990 km in 2.5 days and that was travel [to] the Caribou because we used to live up there. Since Feb. we have taken it to Vancouver twice, Kelowna about 25 times, Nelson, Sicamous and we just like to get away. Brian uses it maybe sometimes up to 4X/week and puts on maybe 10 km on it. He likes to show off the car and cruise around in it...

[22] I am unable to accept the evidence of Mrs. Booth and her son. I am driven to this conclusion, in part, because of differences between the statements they gave to the defendant's adjustor and their evidence at trial; in part, because of differences between Mrs. Booth's evidence at trial and her evidence on discovery; and, in part, because of the inherent improbability of the matters to which they testified.

[23] I will deal first with the evidence of Mrs. Booth. In her statement, she said that she and her husband used the Camaro for long trips. She said that she did not use the Camaro to drive to work because she used her Sunfire for that purpose. She said that her son used the Camaro perhaps as often as four times per week, which might involve driving only 10 kilometres. She

said that her son liked to show the car off and "cruise around in it". In her evidence given at trial, Mrs. Booth testified that in addition to the long trips she and her husband took on the weekends, she drove the Camaro to the beach in Penticton and to "cruise around" between five and seven times per week. She said that was her practice while she owned the vehicle, namely, from May 2003 until the vehicle was transferred into her son's name shortly after the accident. She was asked why she did not mention this usage when she gave her statement to the adjustor. She explained that she was nervous. She admitted, however, that she knew prior to giving her statement that usage of the Camaro was an issue as far as the insurance corporation was concerned. She explained that she thought it was determined on the basis of who had possession of the vehicle and who drove it most of the time. That explanation, however, simply does not account for why she would not mention the almost daily local use she made of the Camaro.

- [24] At trial, Mrs. Booth was asked about her son's use of the vehicle to "cruise" in the Penticton area. She said that he did that only "very occasionally" in both 2003 and 2004. She volunteered that when he used the vehicle to cruise, he had it for "five or ten minutes tops". On examination for discovery, she said that she allowed her son to go out cruising "once in awhile with his girlfriend". She said that when he did that, he drove "up and down Lakeshore with his stereo blasting". She said that on these occasions, he would be gone for "...maybe an hour. Maybe two hours." She had no explanation this frank conflict in her evidence.
- [25] At trial, Mrs. Booth testified that she had the only set of keys to the Camaro after it was put in her name and that no one used it without her permission. Initially, she made no reference to her husband having a role in the issue. On examination for discovery, she said this:

Q Okay. And he really had to ask you -

A He had to ask his father for permission to use that vehicle.

Q Okay. So if [his father] didn't give permission?

A He did not use that vehicle.

She explained this conflict in various ways. First, she said that what she meant was that her son had to ask her, and if she said no, then he had to ask his father. Then she said that when she made reference to her husband, she in fact meant both her and her husband. I do not find either of these explanations convincing. I find such a stark conflict on a matter so basic troubling.

- [26] Mrs. Booth testified about what she calls "circle trips". These trips involve driving significant distances simply for the sake of driving. In her statement to the adjustor, she said that she and her husband had taken trips to the Cariboo, Alberta, Vancouver and Nelson. In fact, between February and September 2004, she said that she and her husband had driven twice to Vancouver, once to Nelson, once to Sicamous, and perhaps 25 times to Kelowna. On cross-examination, she testified that she and her husband were in the habit of paying cash for "pretty much everything" on such trips. She said that typically, she would go to the bank and withdraw \$600 or \$700 and use that money for expenses while on these trips. No

documentary evidence was produced to support her evidence regarding these trips. Her husband did not testify. In any event, Mrs. Booth testified that, from time to time, they would drive so far that they would be unable to return to Penticton in a single day. When that happened, they often would simply pull over to the side of the road at rest stops and sleep in the car. She acknowledged that because the backseat was full of stereo equipment, the only place she and her husband could sleep was in the front bucket seats. I find all of this evidence improbable. Moreover, it stands in contrast to her son's account of the usage of the Camaro as given to the adjustor. He told the adjustor that, as far as he knew, his mother only drove the car on sunny days, "like down to the beach or something". He told the adjustor, "I don't think I've seen her ever take this car out of town."

- [27] I turn now to the evidence of Mr. Booth. As just noted, he initially told the adjustor that he thought his mother had never taken the Camaro out of Penticton. At trial, he testified that after giving his statement to the adjustor, he spoke with his mother and discovered that his mother and father had been taking the vehicle out of Penticton regularly on long trips. Both Mr. Booth and his mother testified that although the Camaro had been put into Mrs. Booth's name, the plan was that it would be put back into Mr. Booth's name once he had demonstrated some financial responsibility. It was primarily because of this expectation that Mr. Booth paid for the repairs and maintenance on the vehicle. Mr. Booth testified that when his mother insured the vehicle in May 2003, he was upset because he was expecting to get it back eventually, and he did not want his parents putting kilometres on it. When Mrs. Booth was asked why they did not simply sell the car when her son was unable to make the payments, she explained that he had a significant investment in it, which would be lost if they sold it. From all of the foregoing, I take it that the car was important to Mr. Booth. From May 2003 until September 2004, according to Mr. Booth, he drove the vehicle at least monthly. In addition, he drove it to the shop whenever it had to go in for repairs. Those repairs were reasonably frequent and, in some cases, quite substantial. The odometer readings on the vehicle show that over the 12 months from September 2003, almost 18,000 kilometres were put on it. If, as Mr. Booth and the plaintiff suggest, Mrs. Booth put the vast majority of those kilometres on the car, I simply cannot accept that Mr. Booth would be oblivious to that fact. I am satisfied that the reason he told the adjustor that his mother was not taking the car out of Penticton was because she rarely if ever did that.
- [28] The circumstances regarding the repairs to the vehicle are improbable in another respect. If the reason the vehicle was registered in Mrs. Booth's name is that her son was unable to make the lease payments, and if it was Mrs. Booth that was putting on the vast majority of the kilometres, it is improbable that her son would pay the maintenance costs for her use. On the other hand, it makes sense for Mr. Booth to pay for those repairs if he was the person primarily driving the car.
- [29] Another aspect of Mr. Booth's evidence that is difficult to understand relates to his claim that he would use the car to rent videos for his mother. He told the adjustor that when he used the vehicle, which was at most three times per month, he did so "usually to go to the video

store" to rent a movie for his mother. Both Mrs. Booth and her son testified, at least initially, that during the policy period, that is, from May 2004 until following the accident, the Camaro never stayed at Mr. Booth's house overnight. The video store to which Mr. Booth was referring is located near his pizza restaurant. Over the summer of 2004, given that Mr. Booth was living at the north end of Penticton and near his restaurant, in order to use the Camaro (if it was being kept at his mother's house) to rent a video for her, he would have to arrange for a drive for the five or 10 minute trip from his house to his mother's house, pick up the Camaro, drive back (virtually back to where he started from), rent a movie, and return to his mother's house. He would then have to drive back to his house. All of this simply makes no sense.

- [30] Finally, Mr. Booth testified that he put "spinners" on the Camaro in September 2004. He testified that he received those spinners as a birthday gift and his birthday is in September. Spinners are an accessory mounted on the wheels of a vehicle. They have the outer appearance of a hub cap. They are mounted, however, on the vehicle's axle. The discs are on bearings such that they can rotate independently of the wheel rotating. The purpose of this is to give the effect that the wheels are rotating when the car is stationary. All of the witnesses who testified about the spinners on Mr. Booth's car were of the view that his car was the first vehicle in Penticton to have this accessory. For reasons I will address in a moment, I do not accept that Mr. Booth only put the spinners on his car in September 2004. I am satisfied that he had that equipment on the vehicle long before that.
- [31] The evidence of Mrs. Booth and her son as to why the Camaro was transferred back into her son's name shortly after the accident is also improbable. Mrs. Booth took title to the car because her son could not pay the lease payments. She testified that she wanted her son to demonstrate some responsibility before she returned ownership of the car to him. Shortly after the accident (in fact, later the same month), Mrs. Booth transferred the car to her son. She did that even though he had not repaid her any of the money she had expended to buy out the lease. She explained that the vehicle was transferred back into his name because it was his birthday not because he had shown any financial responsibility. Further, if the original plan was for Mr. Booth to repay his mother, it is odd that he has still not done so in spite of the fact that he has long since sold the vehicle. On the other hand, it would make sense if Mr. Booth was in an accident while driving a vehicle registered in his mother's name for his mother to transfer the vehicle to him. That, however, was not the explanation given.
- [32] For all of these reasons, I am unable to accept the evidence of Mrs. Booth and her son regarding usage of the vehicle. It remains to be determined whether on the remaining evidence the defendant has established, on a balance of probabilities, that Mrs. Booth was in breach of her policy of insurance.
- [33] As earlier noted, Ms. Mendonca and Mr. Barnhard gave evidence on behalf of the defendant. Both are employees of the defendant. I recognize that because of this, there is a risk that they may consciously or unconsciously favour the defendant.

- [34] Ms. Mendonca is a 21-year employee of the defendant. She testified that she met Brian Booth in 2001 when he made a claim relating to the Camaro. As a result, she was familiar with him and the car. She testified that she has long been in the habit of walking along Lakeshore Drive in the spring, summer and fall. In the summer, she does the walk twice per week; in the spring and fall, she walks about once a week. She testified that in the summer of 2003 and 2004, she saw Mr. Booth driving the Camaro along Lakeshore Drive on average once a week. In the spring and fall, she saw him roughly once every second week. She recognized the vehicle both because of her earlier involvement with it, and because of its large spoiler and distinctive wheels. Because of all of these things, she said that she could not be mistaken about the car. She said that each time she saw it, she recognized Mr. Booth as the driver. She also said that she never saw anyone else driving the vehicle.
- [35] Mr. Barnhard is a damage estimator employed by the defendant. Before joining the insurance corporation, he worked for 18 years as an auto body repair person. He likes cars and pays attention to them. He did the estimate of the damage done to the Camaro in September 2004. He did not know Mr. Booth prior to that; however, he knew the car. Like Ms. Mendonca, Mr. Barnhard was in the habit of walking along Lakeshore Drive on summer evenings. He lives at one end of Lakeshore Drive and walks the distance of the lakeshore and back every night of the week. He testified that, in the summer especially, it is common for young people to drive their cars up and down Lakeshore Drive. On the majority of his walks, Mr. Barnhard saw the white Camaro. He testified that he usually heard it coming before he saw it because of its large stereo. He said that on average he saw the vehicle three or four times a week in June and July 2004. He said that usage was typical. Although he did not know Mr. Booth, he did look at the driver, and when he met Mr. Booth, he realized the person he had seen driving the vehicle was Mr. Booth. He testified that he never saw anyone else driving the vehicle, although from time to time he saw a male passenger in it. Finally, he testified that he did not see the vehicle after he had performed an estimate on it in September 2004.
- [36] Both Ms. Mendonca and Mr. Barnhard testified that the pattern of use of the vehicle, at least to the extent it was apparent to them, was constant throughout the period they were aware of it, that is to say, over the course of at least 2003 and 2004. I accept their evidence without reservation. They both testified in a balanced and careful manner. There were reasons for them to pay attention to the vehicle. Indeed, the vehicle was equipped in a manner intended to draw attention to it. I recognize that their evidence is not necessarily inconsistent with that of Mrs. Booth. It does, however, seem unlikely that if, as Mrs. Booth testified, she drove the vehicle along Lakeshore Drive regularly, sometimes seven nights per week, and that her son rarely did, that these witnesses never saw her driving the vehicle and only saw her son driving it.

Conclusion

[37] In the result, I am satisfied on the balance of probabilities that Mr. Booth was the principal operator of the vehicle at the time Mrs. Booth declared to the defendant otherwise. It follows that the plaintiff's action is dismissed. Unless there are matters touching on the question of costs about which I am unaware, the defendant is entitled to its costs at Scale B.

"G.M. Barrow, J."

The Honourable Mr. Justice Barrow

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