

IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *Amos v. Yukon Tire Centre Ltd.*,
2005 YKSC 41

Date: 20050705
Docket: S.C. No.: 03-AP006
Registry: Whitehorse

BETWEEN:

ALAN AMOS

Appellant

AND:

YUKON TIRE CENTRE LTD.

Respondent

Before: Mr. Justice R.S.K. Wong

Appearances:
Alan Amos
Calvin Murdoch

On his Own Behalf
For the Respondent

**MEMORANDUM OF JUDGMENT
DELIVERED FROM THE BENCH**

[1] WONG J. (Oral): As in the trial below, the plaintiff, Mr. Amos, to be successful in his claim, must establish the following:

1. That damage occurred to his vehicle.
2. That the damage occurred, more likely than not, from contaminated diesel fuel supplied by the defendant, Yukon Tire Centre Ltd.

[2] The law is that the onus and degree of proof is on the plaintiff to establish fault on a balance of probabilities; in other words, at least 51 percent. If the balance of probabilities is equivocal or even, in other words, in a circumstantial evidence case, as this is, if the inference of non-fault is as consistent with fault, the plaintiff at law has not met the onus and cannot succeed.

[3] Although at the trial below, Mr. Douglas Watts, the Ford dealership diesel mechanic, testified, as he did here, that there were no visible indications of damage to Mr. Amos' fuel injectors and fuel pump, Mr. Werner Arnold, another diesel expert, who later examined the internal parts of the pump under laboratory conditions, testified that there was water and dirt damage to the pump. Accordingly, I must conclude that damage at least to Mr. Amos' fuel pump occurred as a result of water in his diesel tank.

[4] Mr. Watts, however, opined that there was no permanent damage to the injection and pump system beyond usability, and his road test prior to the replacement of the injector system and pump system, as requested by Mr. Amos, was normal except that the water fuel warning light was not properly attached to the sensors to give a true reading. Extraction of one litre of water from Mr. Amos' vehicle injection and pump system together with 140 litres of water from the bottom of the defendant's fuel tank is capable of an inference that Mr. Amos' problem of water in his fuel injection system came from the fuel holding tank of Yukon Tire Centre Ltd. However, there is also the evidence of five other persons who also bought diesel fuel from Yukon Tire Centre that day who did not experience the problem complained of by Mr. Amos.

[5] Mr. Patrick O'Hagan, the service mechanic of North 60, the supplier of the fuel, went out to service that tank to determine if there was anything amiss. He found water in the tank, which initially would cause one to believe there was a problem in the tank that was transferred to Mr. Amos. Upon that tank being serviced before more fuel was put in the tank, it was determined by Mr. O'Hagan that there was 140 litres of contaminated fuel. However, he testified that with that quantity it would not likely have found its way into the pumping system that pumped the diesel into cars or trucks.

[6] Mr. O'Hagan, who has considerable years of servicing in the petroleum industry and a mechanic for 30 years, testified that one would need 2900 litres of water in the tank in order to reach the suction pipe which drains the diesel up into the pumps that takes it into the vehicles. Accordingly, the 140 litres of contaminated fuel that was found would not likely then have found its way up into the pump on his evidence. That being the case, it seems unlikely that contaminated fuel in Mr. Amos' tank came from the tanks of Yukon Tire Centre Ltd. It seems more likely the water came from elsewhere.

[7] During cross-examination of Mr. Watts at this hearing, an hypothesis was suggested that it was conceivable that prior to attending at Yukon Tire, Mr. Amos received contaminated fuel, but Mr. Amos' fuel filter and water separator system was adequate to contend initially with the problem. Additional fuel by Yukon Tire may have jostled up the previously settled contaminated mixture and made this problem evident when the mixture went through the pump and injector system.

[8] Yukon Tire mechanics drained and cleaned out Mr. Amos' injector system, but Mr. Amos, out of an abundance of caution, decided to replace the whole system. If that was

not necessary for usability, then even if Yukon Tire Centre Ltd. was responsible, that extra cost cannot be saddled on the defendant. In any event, like the Small Claims trial judge below, I also find that the case against Yukon Tire Centre Ltd. has not been proven and, accordingly, this appeal must be dismissed.

[9] I will hear from you, Mr. Murdoch, if there has been any cost incurred on this appeal.

[10] MR. MURDOCH: Your Honour, I have here a list of all the costs associated with this trial except for, of course, my time spent on it. It has the filing charges, the mailing costs, the lawyers for the appeal on the -- well, lawyers costs for the appeal, that's what's correct. And also, what else?

[11] THE COURT: I think -- was that the issue on whether or not the court had jurisdiction to extend time?

[12] MR. MURDOCH: That's correct, Your Honour.

[13] THE COURT: And I do not think you were successful on that, were you?

[14] MR. MURDOCH: That's correct, Your Honour.

[15] THE COURT: All right. I do not think I can award you for that.

[16] MR. MURDOCH: Fair enough. But here are all the documents, if you would like to have them. I have other copies. And then you can --

[17] THE COURT: Have you shown that to Mr. Amos?

[18] MR. MURDOCH: Not lately.

[19] THE COURT: What is the total amount?

[20] MR. MURDOCH: The total amount -- you're going to have to subtract some things here, 1793.22.

[21] THE COURT: 1793 --

[22] MR. MURDOCH: -- 22.

[23] THE COURT: And how much was the lawyer's fee?

[24] MR. MURDOCH: 1533.62.

[25] THE COURT: 1500 --

[26] MR. MURDOCH: -- 33.62.

[27] THE COURT: Do you have any comments on the costs? As I have indicated, Mr. Amos, that lawyer's fee was for the question on a limited matter of extension of time of which Mr. Murdoch was not successful in that.

[28] MR. AMOS: No. Charge her up.

[29] THE COURT: Accordingly, the balance is \$259.60 of which it will be awarded to the defendant.

[30] MR. MURDOCH: Thank you, Your Honour.

[31] THE COURT: Court stands adjourned then.

WONG J.