

[4] Patrick admits that he rented Kris's high performance car to drive it to his sister's wedding for \$1,000. He agrees that an express term of such agreement between the parties is that he would drive within all legal limits and to use the utmost care in the operation of the car and that he had to return the car to the Plaintiff in substantially the same condition that it was provided to him.

[5] The parties agree on many facts and although their "expert" opinions with respect to the cause of damage to the Plaintiff's car differ and conflict in some areas, they have some common ground, which is of assistance to this Court. Although there are issues with respect to the evidence of these experts, for reasons explained below, it is not necessary for this Court to make rulings on these issues. The facts which are agreed and the uncontradicted evidence as well as the areas of agreement by the "experts" are of assistance to the Court in determining whether the Defendant is liable for the damage to the Plaintiff's car.

[6] A summary of the helpful facts which are agreed to, and the uncontradicted evidence, is as follows:

- Patrick agreed to return the car to Kris in substantially the same condition that it was provided to him.
- Patrick agreed he would drive within all legal limits and use utmost care in the operation of the car.
- Kris rented his car to Patrick for the weekend of May 9-May 10, 2014.
- Kris kept Patrick's car as collateral.
- Patrick paid Kris \$1000.00 for the use of his car.
- On May 9, 2014, Patrick drove the car from Kris's place in Oshawa to a restaurant in Mississauga more than 80 km away and then to Milton without any difficulty.
- Patrick admits that the car broke down around Mississauga Road and Steeles in Mississauga on May 10, 2014 and that he called a tow truck to have the car towed from there to his parents' house. He testified that a low oil pressure light came on and that he was able to restart the car by pressing the start button between 10 to 100 times and doing nothing else. The car was not towed because he was able to start the car. He testified he was at the location where he broke down for anywhere between 10 minutes to 3 1/2 hours. He testified that after he started the car, he drove it 8 to 10 km to his parents' house and had no issues.
- Kris testified that Patrick called him on the morning of May 10, 2014, when Kris was at a gun show, and told him that the car had not started at all in the morning; it was at his parents' house, and that the car had a small oil leak.

- The Defendant's expert testified that it was not possible to start a car by pushing the stop start button if it had a hole in the engine that looked like the hole in a photograph provided. The expert further testified that it was not possible to drive a car with that kind of damage for 8 to 10 km, because the car cannot be driven at all with that kind of damage.
- Patrick admitted on cross-examination that he did not tell anyone during the litigation before the start of the trial that he called for a tow truck when he was in the area of Mississauga Road and Steeles and that he had driven to that area where the car had broken down.
- Tom testified that on May 12, 2014, he went to Patrick's parents' house to pick up the car on a trailer. Patrick's father and uncle were there. Tom inspected the driveway as well as the road in front of Patrick's parent's house, where Patrick told him during a phone call that the car was parked overnight, and did not see any signs of oil that may have leaked from the car
- Tom also testified that Kris had filled up a methanol tank in the trunk of the car immediately before he gave the car to Patrick on the morning of May 12, 2014. He saw that same tank half empty in the trunk of the car that was in the garage. Tom said that Kris had filled up the tank so that he could have proof if Patrick did not drive the car as he had promised – the absence of the methanol would show that Patrick had abused the car.
- The Defendant's expert was asked what was the purpose of putting methanol in the tank of a car and he confirmed Tom's evidence that the methanol level in the tank would decrease if the car was driven hard or beyond its limits.
- Tom took the car directly to Can Saf Auto on a trailer where Kris, Tom and Ivan Langeveldt saw holes in the engine block. These holes are duplicated in pictures taken by Tom.
- Kris testified that while at Can Saf Auto he tried to start the car and for a split second the car's navigation screen flickered on showing the car located at Mississauga Road and Steeles (the location where the car broke down). Kris and Tom testified that that is how they were able to track down the company that Patrick called to arrange for a tow.
- Tom drove the car on his trailer to Endras BMW. Brett Nolan testified that at Endras, he saw a hole in the engine the size of a hockey puck. Mark Hudson testified that he also saw the hole in the engine.
- Kris and Tom testified that before May 9, 2014, no warning lights had come on in the car and it was driven normally. There have been no issues with the car.
- Tom took pictures of the car when it was up on the hoist being examined.

[7] A summary of the disputed evidence is:

- Ivan Langeveldt at Can Saf Auto testified that the only way to blow up the engine that way was if the car was over-revved. The admissibility of this evidence is disputed, as Mr. Langeveldt was not qualified as an expert.
- Mark Hudson of Endras ran a scan and sent the data to BMW Canada. The results of the scan and Mr. Hudson's evidence regarding the cause of damages is disputed and objected to.
- The Defendant's expert, Payman Nasrollahi, testified that the Plaintiff's expert could not accurately diagnose the damage to the car by looking at pictures without examining the engine. Mr. Nasrollahi testified, however, that the picture he was shown in Exhibit A20 was of a "con-rod letting go" and stated that such an engine would have to be replaced. He referred to it as a "catastrophic engine failure".
- Mr. Nasrollahi was asked on cross-examination what would be observed on the car if such a failure happened while the car was moving. He testified that there would be oil everywhere - all over the underside of the car; on suspension components; on the doors and rocker panels and the tires. The Plaintiff submits that Tom testified that he saw such oil splatters at Patrick's parents' garage and that they were shown in pictures taken by Tom at Can-Saf Auto immediately after leaving Patrick's parents place.

[8] The theory of the Plaintiff's case is that Patrick breached his agreement with Kris by over-revving the car, failing to drive with the utmost care, trying to cover up the damage he caused, lying to Kris and Tom about what happened, and by tricking Tom into giving back Patrick's car while it was being held as collateral for any damage to the car. It is submitted that but for those breaches Kris would not have suffered the damage of having to replace the engine and having the performance modifications reinstalled, both done at Ginsano.

[9] It is submitted that Patrick has acted in bad faith throughout by trying to cover up what he did to Kris' car and that such is an independent actionable wrong that the court should "find offensive to its sense of decency". It is submitted that as a result, Patrick should be liable for Punitive Damages in the amount of \$25,000.00.

[10] The theory of Patrick's defence is that Kris has not proven that the engine of the car has sustained any damage because he has not preserved the engine of the car. It is submitted that because Kris has pleaded that the car was over-revved, his action must fail because he has failed to prove that allegation.

[11] Patrick relies on the case *Doust v. Schatz*, 2002 SKCA 129, 227 Sask.R. 1, wherein the court stated, at para. 27:

"A party is under a duty to preserve what he knows, or reasonably should know, is relevant in an action. The process of discovery of documents in a civil action is

central to the conduct of a fair trial and the destruction of relevant documents undermines the prospect of a fair trial.”

[12] Patrick relies on the evidence of his expert, Mr. Payman Nasrallohi, (qualified for expertise in servicing, diagnosing and repairing BMW engines) who testified that he needed to examine the engine of the BMW M3 to determine if in fact the engine was damaged. He also testified that he needed to examine the engine to identify the root cause of engine failure. He testified that it would not be possible to diagnose the cause of engine failure by looking at pictures. Specifically, he testified that a full tear down of the engine was needed to determine if in fact the engine was damaged and what the root cause of the engine failure was.

[13] Mr. Nasrallohi also testified that if the car was not maintained properly and the car was low on oil, depending on certain factors, the engine could go into catastrophic failure as a result of oil starvation. He testified that oil sludge could build up, and that buildup can prevent sufficient oil from lubricating the internal parts of the engine that require oil lubrication. This sludge would create a block or partial block of the passages of the engine oil galleries, which would slow down or stop oil travelling to the areas that lubrication is required. Lack of lubrication would cause overheating in those components of the engine. He was shown a video that Tom had recorded (Countdown to Launch) and testified that any drifting maneuver, such as Tom performed in the vehicle, places stress on the car and engine, and the other components of the car, including the tires, the suspension, driveline, transmission, differential, and other mechanical components of the car.

[14] Patrick submits that invoices show that the last time the car was taken for any oil maintenance prior to Patrick taking possession of the car was on December 17, 2012, at Endras BMW. There were no other invoices from Endras BMW between December 17, 2012 and May 27, 2014, to show that the car had proper oil maintenance. He submits that this shows the car was not maintained for oil service for approximately 1.5 years before he took possession of it.

[15] Patrick argues that he did not breach the contract, as he returned the car to Kris in “substantially the same condition that he received it”. Patrick argues that Tom’s “drifting of the car” in the video “Countdown to Launch” could stress out moving parts of the engine, which would make those components prone to future catastrophic failure in the engine.

[16] As I have noted above, there is a dispute between the parties with respect to the admissibility, reliability and validity of some of the expert evidence. However there is agreement between the parties on several critical facts. Tom’s uncontradicted evidence is that when he inspected the car at Patrick’s parents’ house, the methanol tank was half empty. He also testified that the tank was full immediately before Kris gave the car to Patrick. Both Kris and Tom testified that they ensured that the tank was full, because if the methanol level went down in the tank, that would give them proof that Patrick had not driven the car in the manner that he had promised to drive it in accordance with the agreement of the parties that I have referred to above.

[17] Patrick’s expert confirmed that the use of methanol in the tank would confirm that the car had been driven “hard or beyond its limits”.

[18] Notwithstanding all of the disagreements between the parties with respect to the exact cause of the damage to the car, this Court can find, on the basis of the agreed to facts or uncontradicted evidence as follows:

- There were no problems with the car before Patrick took it. He drove it a significant distance without any problem. The experts agree that the car could not be driven with a hole in the engine as depicted in photographs. One must conclude that the car's engine did not have a hole in it when Patrick took it.
- The methanol tank was full when Patrick took the car and only half-full immediately after Patrick used the car. The fact that the methanol tank was half empty after Patrick's use of the car indicates that Patrick had driven the car "hard or beyond its limits". This is clearly in breach of Patrick's promise to drive within all legal limits and to use the utmost care in the operation of the car and his obligation to return the car to Kris in substantially the same condition that it was provided to him. After Patrick returned the car it could not be driven. When he took the car it was driven with no problems.

[19] The Defendant's submission that the damage to the car was caused by lack of maintenance by the Plaintiff has not been proven through the evidence. Rather, the evidence establishes that the car was in good working order before it was given to Patrick and was not driveable when Patrick returned it.

[20] I find that, on the basis of the above noted evidence, on a balance of probabilities, Patrick breached his promise to drive within all legal limits and to use the utmost care in the operation of the car and to return the car in substantially the same condition that it was provided to him. On the balance of probabilities, I find that Kris has proven that the damage was caused while the car was in Patrick's care and that he is therefore liable for the damage. There is no persuasive evidence before this court with respect to any other cause for the damage.

[21] Kris provided two invoices as proof that the engine of the BMW M3 sustained damage. An invoice from Can-Saf is dated May 26, 2014. The invoice is for a 2012 BMW MS, (not the car that was rented to Patrick) and does not have any VIN Number or mileage information and it reveals that there is a hole in the oil pan. The owner of Can-Saf testified that he did not recall when or what day in May 2014 the BMW M3 was brought to Can Saf, and testified that the invoice did in fact indicate hole in the oil pan. The owner of Can-Saf further testified that he was paid for the invoice 1 year later. He testified that the cost of a new oil pan was approximately \$3,000.00 and the cost of engine approximately \$40,000.00.

[22] Kris testified that he spent \$53,535.30 to have his car restored to the condition it was in when he gave it to Patrick. Kris claims this amount of damages. Although Patrick attempted to challenge Kris' evidence on this point, I had no reason to disbelieve his evidence. I accept Kris's evidence with respect to the costs he has incurred to repair the damage caused by Patrick.

[23] As I have found that Patrick breached his agreement, I find that Patrick is liable to pay Kris for that amount in damages.

[24] Kris also claims exemplary and punitive damages for Patrick's bad faith conduct in trying to hide the damage that he caused to the car.

[25] Our courts have awarded such damages where a Defendant has acted in bad faith and in a high handed manner to the extent that his actions are an independent actionable wrong that the court finds offensive to its sense of decency.

[26] Although the court does not condone or approve of some of Patrick's actions and conduct in this case, I do not find that Patrick's actions or conduct meet this test the courts have applied to grant such damages. I do not find that his actions meet the requirements of the test I have referred to above.

[27] Patrick has a counterclaim against Kris for \$1,000 he paid to Kris for the use of his car. He claims that he is entitled to the return of his money as he was not able to use the car for the intended purpose of going to his sister's wedding. He argues that there is no evidence before the court that the car was taken for oil maintenance between December 17, 2012 and May 9, 2014 when he took the car from Kris. On the basis of the evidence that I have referred to above with respect to what happened to the car while it was in Patrick's possession, I find that Patrick has not established entitlement to his counterclaim and therefore dismiss it.

[28] As well, Patrick has also made a third party claim against Tom for judgments in the amount of any damages that are awarded against himself in this action.

[29] In order to support this third party claim, he repeats and adopts the allegations in the statement of defence and counterclaim. He alleges that Kris and Tom used the car recklessly and negligently for the purposes of Tom's business Gameover Inc. He relies on the evidence I have referred to above with respect to the potential consequences of failure to maintain the oil levels properly in the car.

[30] For the reasons I have given above, I also dismiss this third party claim as I find that Patrick has not established that he is entitled to any contribution or indemnity for the amount that he has been found liable to pay Kris in this action.

[31] I therefore deny the Defendant's counterclaim for such damages.

Costs

[32] Subject to any agreement between the parties, brief written submissions on costs are to be made as follows:

The Plaintiff must deliver his costs submissions by 12:00 p.m. on May 31, 2018; with the Defendant's to be delivered by 12:00 p.m. on June 7, 2018 and any reply submissions to be delivered by 12:00 p.m. on June 14, 2018.

In accordance with what the Rules provide, the submissions should not exceed three pages in length and they should include a bill of costs, together with information on each lawyer's year of

CITATION: [REDACTED] v. Bechara, 2018 ONSC 96
COURT FILE NO.: CV-14-507723
DATE: 20180522

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

[REDACTED]

Plaintiff

- and -

Patrick H. Bechara

Defendant

- and -

[REDACTED]

Third Party

REASONS FOR JUDGMENT

Pollak J.

Released: May 22, 2018