

*Case Name:*  
**Fournier v. Cartier**

**Between**  
**Kenneth D. Fournier, Plaintiff, Defendant in Defendant's**  
**Claim, and**  
**Jeremy Cartier, Defendant, Plaintiff in Defendant's Claim**

[2013] O.J. No. 3473

Nos. SC-12-43257 and SC-12-43257-01

Ontario Superior Court of Justice  
Small Claims Court - Windsor, Ontario

**J. Branoff Deputy J.**

Heard: November 29, 2012; April 8 and 9, 2013.  
Judgment: May 15, 2013.

(72 paras.)

**Counsel:**

Richard Lammers for Plaintiff/Defendant in Defendant's Claim.

Marc Levy for Defendant/Plaintiff in Defendant's Claim.

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**REASONS FOR JUDGMENT**

J. BRANOFF DEPUTY J.:--

**THE PLAINTIFF'S CLAIM**

**1** The Plaintiff is a licenced mechanic who owns and operates an auto repair shop. The Plaintiff was the owner of a 1987 Ford Mustang which he used as a street legal drag race car, but after it was involved in a race related accident, he took steps to acquire and rebuild a replacement. The Plaintiff's Claim relates to a dispute with the Defendant regarding the nature and quality of the body and paint work by the Defendant on a 1986 Ford Mustang shell intended to be the replacement.

**2** The Plaintiff's Claim is summarized at paragraph 37 of the Plaintiff's Claim as:

*	Body side moldings	\$	840.00	
*	Labour to strip paint	\$	3,420.00 )	
*	Paint strip material	\$	557.20	) \$3,977.20
*	Repair estimate	\$	14,437.56	

**TOTAL** **\$19,254.76**

### **THE DEFENDANT'S CLAIM**

**3** The Defendant is licenced in auto body and collision damage repair. The Defendant owns and operates his own business, known as, but apparently not registered, Drag U Down.

**4** The Defendant's Claim is for the balance owing on a repair and paint contract with the Plaintiff on the 1986 Ford Mustang shell in the sum of \$7,500.00 plus H.S.T. of \$975.00 for a total of \$8,475.00 less \$6,500.00 which has been paid for a balance claimed to be owing of \$1,975.00.

### **SUMMARY OF THE MATTERS**

**5** The subject matter of these claims is the bare shell of a 1986 Ford Mustang. The Plaintiff had damaged his 1987 Ford Mustang and wanted to build another one. He found and bought a 1986 Ford Mustang for approximately \$1,500 and proceeded to remove ALL of the parts on the shell and have it stripped to bare metal. The car was black, blue and red. The Plaintiff contracted with the Defendant to take the shell, which had been stripped to bare metal, and to apply epoxy, primer and paint to provide the Plaintiff with a shell that the parts, from the 1986 Mustang, the 1987 Mustang and presumably other parts could be installed to create a street legal drag race car.

**6** The problem arises with the terms of this contract. The monetary aspects are not in issue. The agreement was for payment of \$7,500 plus H.S.T. of \$975.00 for a total of \$8,475.00. The parties have vastly divergent understandings of what was to be done and the quality of the same. The Plaintiff maintains that the quality of the job was to be of "show car finish" throughout. The Defendant maintains that the shell was to have a nice finish, which he claims turned out to have an exterior show car gloss or finish.

**7** The Plaintiff claims that the finish was to be a perfect, pristine, flawless show car, fitting for high end auto shows with both the visible and not so visible areas being bright, shiny, new and uniform in appearance.

**8** The Defendant disputes this and claims that the finish was to be of nice looking quality with less emphasis on the areas that would not be visible such as the under carriage or the floor which was to be covered by carpet.

**9** The Plaintiffs vision for the shell does not match the Defendant's vision. That is the crux of this matter which the Court is being called upon to resolve.

## **MOTOR VEHICLE REPAIR ACT**

**10** As part of the submissions for the Plaintiff, it was maintained that the operation and application of the *Motor Vehicle Repair Act, R.S.O. 1990, c. M.43* results in the Defendant being not only unable to collect the balance that might otherwise be payable, but to also obligated to return the monies received. The Plaintiff relied on the provisions of sections 8 and 11. To support the inability to collect the balance, the decision in *Trudeau Motors Ltd. v. Elliott (1990), 70 O.R. (2d) 762 (Dist. Ct.)* was relied on. To support the obligation to have the Defendant return the monies paid, the decision in *Green v. Swartz, [1997] O.J. No. 5267 (Div. Ct.)* was relied on.

**11** This application of the said Act and authorities would have a significant impact on the results in this matter, not necessarily as a result of what took place and what a just result would be, but due to what could be considered a technicality in the law. Both cases made reference to the Act being draconian in nature. This Court finds that the Act cannot have any application to the subject matter of this action for the following reasons:

- a) The statute being relied upon was repealed on July 30, 2005;
- b) Many of its provisions were brought into Part VI of the *Consumer Protection Act, 2002, S.O. 2002, c.30, Sched. A, sections 55 to 65*, but the previous section 11 was not re-enacted or brought forward into the *Consumer Protection Act, 2002*;
- c) Regardless, both Acts (former and current) apply to a "vehicle" which is defined therein as, "a motor vehicle as defined in the *Highway Traffic Act* The *Highway Traffic Act* defines a *motor vehicle* as,

"motor vehicle" includes an automobile, a motorcycle, a motor-assisted bicycle unless otherwise indicated in this Act, and any other vehicle propelled or driven otherwise than by muscular power, but does not include a street car or other motor vehicle running only upon rails, a power-assisted bicycle, a motorized snow vehicle, a traction engine, a farm tractor, a self-propelled implement of husbandry or a road-building machine;

The subject matter of this action is the bare shell of a 1986 Ford Mustang. The acquired 1986 Ford Mustang had been completely stripped of all of its parts, mechanical, electrical or otherwise. There was no engine, transmission, axles, or wheels. The steel frame had no parts. It was nothing more than a steel frame or shell. While it was intended that it would become part of a motor vehicle, it was a long way from being able to be considered a vehicle.

Accordingly, the punitive provisions of the relied upon Act, even if still in force, would not apply. This matter is therefore not influenced or affected by any such statutory provisions, but depends entirely on the law of contract and the application of the same to the facts herein.

## **ISSUE AND CONSIDERATIONS**

**12** The primary issue herein arises from the fact that there was no written agreement to specify what

was to be done and to what level or quality it was to be done for the agreed upon \$7,500 plus HST.

**13** The Plaintiff maintains that he contracted for a "show car" which suggests a pristine, perfect appearance throughout with no signs of spots, shadows, shading, ripples, seams etc. The Plaintiff may have expected a level of perfection that may or may not have been attainable, but what was included in the agreed upon price of \$7,500 plus H.S.T.?

**14** The Defendant maintains that he was to clean and paint the car with the parts that are visible to be clean and shiny, and the parts that are not visible did not needed to rise to such standard.

**15** Both parties are at fault for not reducing their agreement and understandings into writing. I would have thought that the Plaintiff, being so particular with such high standards and expectations, would have called upon the Defendant to reduce what was to be done for \$8,475 into a written contract. Such a document would help significantly in establishing the existence of an agreement and what the terms and expectations of that agreement were.

**16** The Plaintiff owned and operated an auto repair shop. The Defendant owned and operated an auto body shop. Yet there was no written contract to document the deal and prevent disputes. As a result, both parties will be somewhat disappointed when their version of the contract is not strictly enforced.

**17** This Court is being called upon to determine if there was a contract and if so, what the terms were. It may very well be that if the Plaintiff expected a certain standard and quality for the agreed upon price and the Defendant expected to provide a different standard and quality, there was no ad idem or meeting of the minds and in turn no agreement in law.

**18** The consequences of this are significant and could lead to 1 of 3 different results:

- a) If there was no agreement, subject to an unjust enrichment or quantum meruit analysis, the Plaintiff would be entitled to be put back into the position that he was in before the relationship began. This involves returning the \$6,500 and the cost to return it to its original condition, claimed to be \$3,977.20. The Defendant would thereby be paying the price of having done work for nothing and paying to reverse the work that he did. That would represent a loss to him. The Plaintiff would thereby be paying the price of having to pay someone else more money, claimed to be \$14,437.56, to get the job that he expected to have done for \$8,475. They both pay a price as a result of failing to clearly document their apparent agreement;
- b) If there was an agreement with the terms as the Plaintiff maintains, then the Plaintiff would be entitled to be placed in the position that he would have been in had the agreement not been breached. This involves allowing the Defendant to be paid and retain the contract amount of \$8,475, but require him to pay for reversing his work, claimed at \$3,977.20, and then having the work completed as it should have been done in the first place, claimed at \$14,437.56 plus new moldings claimed at \$840; or
- c) If there was an agreement with the terms as the Defendant maintains, and it is found that he fulfilled that agreement, then the Plaintiff would have received what he bargained for and would not be entitled to any damages, but would be required to pay the balance of the contract price of \$1,975.



the finish was to be "show quality" with all to look the same and match throughout with no blemishes, flaws or imperfections. The Defendant was expected to apply black epoxy, white primer and green paint throughout

**21** Photograph #34 of Exhibit #1 shows the shell in the Plaintiff's driveway on June 23, 2011. There were no defects showing. It had just been painted and polished. When the Plaintiff got the shell back the second time on June 23, 2011, he claims that he was too busy to inspect it and begin work on it. He put it into his garage where he stored it for months until September or October of 2011.

**22** Throughout the Plaintiff's evidence, there were numerous descriptions of the deficiencies being complained of which included the following:

- \* bubbles in the paint
- \* imperfections showing on the surface in certain light reflections
- \* solvent pops
- \* scratches both on and under the paint
- \* blemishes
- \* rough texture
- \* orange peel finish
- \* tiger striping
- \* dents or warping
- \* dirt under the paint
- \* pitting coming through the paint
- \* blistering
- \* air pockets
- \* speckles of black
- \* area with missed spots of either epoxy, primer or paint
- \* rust or corrosion
- \* more than minimal body filler
- \* gaps in the alignment of parts

**23** By e-mail on November 14, 2011, the Plaintiff requested a refund of the \$6,500, indicated that the shell was not going back to the Defendant for more work, but that there was a need to start over. (Exhibit #2)

**24** By letter on November 26, 2011, the Plaintiff again requested a refund of the \$6,500 plus \$3,500 for the cost of having stripped the car to bare metal again. Damages were listed and Court action was threatened. (Exhibit #3)

**25** The \$3,500 cost to strip was based on a Time Sheet summary listing 228 hours written by the Plaintiff in March or April of 2012, but none of the supporting documents were introduced. (Exhibit #4)

**26** Photograph #153 of Exhibit #1 shows that after the shell was returned the first time, but before it was returned for the second time, there was a need to trim the body in order to obtain more clearance for the tires.

**27** The most substantial part of the claim is the April 10, 2012 estimate for \$14,437.56 which includes time and expense for corrections, body work and repainting. There is 20 hours allowed for "colour sand and buff vehicle complete". (Exhibit #6)

**28** On cross-examination, the Plaintiff denied that there was any discussion with the Defendant about

the risk of corrosion and there was no rust that could be seen. He does acknowledge that there was no warranty given in writing by the Defendant.

**29** The Plaintiff maintained that the Defendant was hired to produce a show car. The Defendant was to provide epoxy, prime and paint throughout including the engine bay, roll cage and underbody. He used the word show quality, but admits that the deal was only verbal.

**30** When the Plaintiff got the shell back in February of 2011 he was able to show the Defendant the defects. The Defendant came to the Plaintiff's shop to see the defects and according to the Plaintiff, did correct some, but not all of the alleged defects.

**31** The Plaintiff objected to the dirt in the paint in the floor. While it had not been specified that there would or would not be new carpet installed on the floor boards, the Plaintiff did say that the floor did not have to be show quality.

**32** The Plaintiff claims to have had 3 different body shops look at the Defendant's work, but only produced 1 written estimate.

**33** The old quarter panel had too much rust and needed to be replaced. The part was to be recycled and reused from the 1987 damaged Mustang. Doing so was part of the Defendant's work. Despite the need to do such work, the Plaintiff claims that he expected the Plaintiff to achieve show quality for the estimated and agreed upon cost.

**34** When asked about not having proceeded with the project and completing the vehicle, the Plaintiff indicates that he seeks the money from the Defendant first before investing any more money into the shell which continues to be stored in his garage having been stripped to bare metal once again. The Plaintiff also indicated that he had a budget of \$30,000 to invest into this shell and project in order to create a final product that he estimated would have a value as high as \$70,000. He further indicated that while it had never been appraised, the 1987 Mustang was worth \$55,000. It was insured at the time of the accident, but no insurance particulars were asked for or provided.

**35** Ryan Johnson, a 30 year old, General Manager of Chatham Kent Collision Centre admitted that he was not a body man, not a painter, but that he used the computer program and consulted with technicians to assist in composing an estimate. He indicated that the Plaintiff was not happy with many things and pointed out numerous issues. His estimate included work to strip the shell which signified that the shell had not yet been stripped as the Plaintiff indicated was done in November of 2011. His estimate included a 15 hours to install the quarter panel. It also included 80 hours to align and fix all panels. It became apparent and was admitted that Mr. Johnson's estimate was not a great estimate for creating a "show car"

**36** Ryan Johnson's evidence was given in an honest and straightforward fashion. He was not qualified as an expert witness and therefore was not able to give opinion evidence. He used a computer program and consulted with technicians to come up with the estimate. The bulk of his work and experience was with insured accident repair work. He readily admitted that he did not advise the Plaintiff what to fix and that he did not go out of the way to search for defects. He was not looking for issues, but he was defining the scope of work and its cost based on the Plaintiff's instructions and directions as the Plaintiff wanted the car done a certain way.

**37** Sylvestre John Franklin, who worked for the Plaintiff, did not provide much useful or necessary evidence. He participated in the initial stripping, but he stopped working for the Plaintiff in early 2012 and did not see the shell when it was first painted by the Defendant.

**38** Jeff Lacombe, who also worked for the Plaintiff, confirmed that there was stuff missed and dirt in

the paint when it first came back from the Defendant's shop. He looked at the car and saw many flaws, but once it went back to the Defendant's shop, he did not see it again as he left the Plaintiff's employ to pursue a different career.

**39** Dante Antonel was a friend of the Plaintiff who assisted in the stripping of the car by hand. He was not involved in the discussions between the parties when the agreement was being discussed or formed. He confirmed that the Plaintiff wanted it better and that he wanted it all done his way. He admitted that he was not aware of the contract terms between the Plaintiff and Defendant.

**40** Jeff Gailbraith was also a friend of the Plaintiff who happened to be present when the parties were discussing what was to be done to the vehicle. The Plaintiff wanted pricing for the prep and finish of the shell that he wanted to build for racing. The Plaintiff wanted to have a "nice looking car". The finish was to be primed and painted, "done up to the nines". It was indicated that the Plaintiff wanted a perfect car with no body filler and that to his knowledge, money was not an issue. He did not indicate until cross examination that the Plaintiff wanted a "show car finish", but he admits that he doesn't know what that means. He assumes that perfection means without flaws or blemishes.

## **DEFENDANT'S EVIDENCE AND POSITION**

**41** The Defendant's business has been creating custom cars, race cars, show cars and restorations since 2006. Awards have been won and the ability to create a show car was not beyond his ability. When he first saw the shell it had been sand blasted about 1 month earlier and had a roll cage installed. With his quote of \$7,500 there was an additional quote of \$1,000 to soda blast the shell with baking soda. Sand blasting was indicated to cause too much heat and warping. The need for soda blasting was to re-clean the shell and bring it to bare metal by removing the elements and moisture gathered while sitting. The Defendant maintained that the Plaintiff did not want to spend the extra \$1000 as it was going to be a race car. As a result without soda blasting the Defendant stated that there would be no rust or corrosion related warranty.

**42** The Defendant stated that the project involved much more work than expected and that he corrected what he thought were deficiencies. He acknowledged that there was still some work to be done, but that he was never given the opportunity. When complaints of corrosion bubbles were made, he had to remind the Plaintiff of the lack of soda blasting and therefore the lack of a warranty in that regard.

**43** The Defendant explained why the replacement quarter panel was joined to the car where it was, not at the factory seam, but in the middle of the "c" pillar, in order to maintain the strength and integrity of the factory seam. The Plaintiff supplied after market rocker panels and a lower section of the driver's door. These were not original equipment from the manufacturer and therefore do not always fit the best and had to be adapted and required the use of body filler to do so. Furthermore, the quarter panel that was cut off the 1987 Mustang had a crease in it, so that even after the crease was bumped out, the part could not be restored or stretched to its original size so as to fit as intended or expected. It did not fit right and the Defendant did not seek another quarter panel.

**44** The Defendant steadfastly denied that the Plaintiff used the term "show car" when describing what he wanted. The Plaintiff was in the shop about 6 or 7 times and saw the car throughout the process. The Plaintiff was also sent pictures and therefore was aware of the use of body filler.

**45** After making further repairs and painting the car a second time, the Defendant contended that the exterior looked like show finish, but claimed that there are different degrees of show car finishes. There was so much work to be done to and on the shell in order to make it into a race car, that dents and scratches may occur in the future, thereby taking away from what the Plaintiff sought to be a show car.



The Defendant claims that what was expected was a nice finish and that when the shell was cleaned, it did have a show car gloss. According to the Defendant, the show car finish that the Plaintiff seeks could not be provided because the shell had been sand blasted which generated heat and caused warping, but it did end up with a show car shine.

**46** Joe Cudney, an employee of the Defendant, was involved in the work done on the shell. He indicated that the Plaintiff was concerned that there would be no bare metal and with the replacement of the quarter panel and rocker panels. As for the finish, Mr. Cudney was there to hear what the Plaintiff was looking for and described it as he wanted it to look good, paint everywhere, including the underbody. There was to be carpet on the inside and as a result he was not too concerned about the inside finish, but wanted the outside to look good. He too agreed that the quarter panel was best spliced *into* the "c" pillar in order not to weld too close to the roof which could also distort other parts. He also confirmed that sand blasting caused heat and warping. Finally when the delivery took place on June 23, 2011, Mr. Cudney states that the shell looked good, that it was pulled out and the Plaintiff looked it over and was more than satisfied with it.

### **FACEBOOK COMMUNICATIONS (EXHIBIT #8)**

**47** The Plaintiff submitted 10 photographs of Facebook screens showing communications between the parties. These can be found at Exhibit #1, photos 135 to 144. These photos do not represent all of the communications, but selected communications provided by the Plaintiff to support his cause and position.

**48** The Defendant on the other hand introduced Exhibit #8 consisting of 28 pages with 104 messages commencing December 22, 2010 to October 25, 2011. Naturally, the contents of Exhibit #8 are much more comprehensive and complete than those selected by the Plaintiff and contained in Exhibit #1.

**49** The content of some of the messages is important and useful in the analysis of whose version of the agreement is more probable. Those are hereby reproduced, as typed, in chronological order:

DATE (2011)	SENDER	CONTENT
January 31	Defendant	Putting some finishing touches on the bodywork, have one rocker to do still. Im putting new hinge pins and bushings in the doors, getting em all aligned up and hope to start getting colour on it by the weekend!!
January 31	Plaintiff	Cool. Might stop our to see you and give you more money ... Then the guys can scoop the car up for me if I'm tied up.
January 31	Plaintiff	Like I said before money is never an issue with me
February 13	Plaintiff	No problem, just checking. Remember perfection. Lots of people will be seeing it in

Canada and US and hoping to get a magazine as for this one. Make it a show piece so its worth the wait.

March 5	Defendant	I sanded down the entire underside and engine bay, grinded out some of the weld spatter, reprimed all the problem areas. Just finished spreaying the underside, engine bay and wheel wells. Tomorrow, I will wetsand and reclear the engine bay and respray the trunk. Monday, I plan to touch up the roll cage, Tuesday I will do the interior doors.
March 14	Defendant	You ll be glad to know the car is ready.. I would prefer that you see it here. Its on the hoist and lights shining on it. We ll go over it with a fine tooth comb, I'm confident you will be satisfied. Let me know what u think
March 28	Plaintiff	Hey jeremy. If ur still in the shop I will stop by right now with moldings and to test that tire. Will only take a min. Also wondering if u got the trunk lid primed yet so I cvsn put it on spare car
March 29	Defendant	I will prime the decklid tomorrow for u. you can also take the other door to gut it for me
March 29	Plaintiff	Ya I stopped out and Joe was there so I grabbed the door and left the new moldings on the car. If u can prime the decklid that would be great. I will stop back out with some notice so that we can test fit the tire
May 14	Defendant	Well the drivers door and fender are also primed and painted on the inside and hung on the car. Just been waiting on that other door so we can continue.
June 19	Defendant	We sprayed er, wetsanded, 2 more coats of clear to get that deep show car finish, Just finishing the wet sand and polish in the next cuppl days. She looks pretty awesome in the sun!
June 23	Defendant	Im squirting that fender again, it looks funny in the light too. Ill have all the final polishing done today and the rear inner fenders touched up. Since were bringing the parts out next

week, The shell can get picked up today.

July 20	Defendant	I know youre busy, Just wondering how youre making out with finding a bumper cover.. Also, did you want the whole balance on a bill to youre shop, or personal. Let me know, thanks
July 21	Plaintiff	Wasn't looking for bumper to be honest. You asked bout green one that's wrecked to much and mentioned you were starting to strip the one you had. I know you said it was rough. I just didn't realize it was that rough. I will get one to you as soon as I can. Also what is the balance of the bill?
July 21	Defendant	I can fix this one, but its been painted and material cracked so many times, that I don't think the final product would be perfect.. I have a total at \$7500 plus tax bringing the total to \$8475
July 21	Plaintiff	I will get another bumper for you.
August 10	Defendant	Hey Ken, getting any time to get your car together? Hows the front bumper search coming? Should we price one out from Cross Canada?
August 11	Plaintiff	No time for car lately, only one doing the wrenching on the floor now. I have a firt bumper and fender extension. Gonna get a better fender extension tomorrow as this a some gouges. Did you get the a steel trunk lid painted yet? Also so you have the mirrors and my upper window net bar. I can not find them, one other thing is the passenger door (was the red one) has a good size blemish that has come through now that we washed it and had sometime to let it cure. For the bill I will see you when I get there, I am hoping Saturday depending on fleet vehicles coming in.

August 11	Defendant	will check if the mirrors are here. I have the window net bar. Im going to try to have youre rear bumper and some other small parts painted for Saturday, so you can take them if you make it out. As for the bottom of the door, it can be repaired at any time, probably easier once the car is back on its wheels.
September 19	Defendant	Hey Ken, the rest of the parts are all painted up ... will you have anytime to swing out in the near future?
September 23	Plaintiff	I think I was perfectly clear from the start about quality, price and deadline and about fucking me over. ... You screwed me with the first job you sent back here and you screwed me royally with the deadline. The car isn't complete but you want me to pay in full before you finish? Is this correct?
September 23	Defendant	Ken, im just asking.. No need to get upset. I've now done my part, and took care of everything youve asked. Theres a remaining 2% of panel alignment I agreed to do (once the car was running and back together) which I fully intend to do. I agree the deadline was surpassed, however, Once you were satisfied with the paint on the inside, jams, and engine bay, the plan was to take the car and put it together Noone can help the circumstances that you and your family unfortunately had to go through. I wasnt prepared for you leaving the car with me at that point, and when I needed parts or anything from you, It certainly wasnt an immediate response. You told me to take our time, and just make sure the car looked great, which i think we can agree that it does. I've run the bill through, and have already paid the taxes on it. Do you its fair to me that I have to until you put the car together to get paid? If thats the case We will come out and line up the fenders and hood. The original quote (is an estimate) and did change slightly due to the nature of the job. Additionally, the car was primed and underbody painted when you came to check

your tire clearance, which led to more body modifications and touch ups underneath.

October 17	Defendant	We delivered you the car on June 23rd, its now the middle of October ...
October 17	Plaintiff	Car is basically still the way you delivered it on June 23. Hence why I had a deadline - all summer is swamped with customer cars. What else do you need to fit everything and line up the moldings? Better if you just go ahead and fit it to get this shit taken care of - tired of holding onto you money
October 17	Defendant	I will just need the hardware. I can likely get our your way Friday afternoon and spend a couple hours with it, and get it all wrapped up
October 17	Plaintiff	Sounds good, I will try to gather up all the hardware and stuff

**50** The overall tone and content of the above exchange of messages is more consistent with the Defendant's version of what the nature and quality of the work was supposed to be and less consistent with the Plaintiffs contention that it was supposed to be a perfect, flawless, high end car show quality. It is also evident that there is unfinished work for the Defendant to so, as well as some touch up and repairs to attend to at a later date.

**51** The Defendant did what he had agreed to do, but it was not without defects that required further attention and the Defendant's work was not yet complete.

## ANALYSIS

**52** The positions of the parties are extremely divergent from the other. I have grave concerns and difficulties with the Plaintiff's version or understanding of the events. They include:

- a) It is difficult to reconcile that the Plaintiff would rebuild a car that he indicates will have an estimated value of \$60,000 to \$70,000 and refer to it as a "show car" yet he intends to race it, which is how the previous car was damaged, giving rise to the need to replace it with the current vehicle. A car for show and a car for racing are 2 distinct products;
- b) It is difficult to understand why the Plaintiff would get the car back the first time, return it for further corrective work to be done, get the car back a second time and not immediately and thoroughly inspect it. Instead, he got it back in June 2011 and put it in a garage and did not inspect it until October of 2011. I would have thought, given the prior issue and his expectation of having a pristine vehicle, that his inspection would have been immediate;
- c) I would have thought that in order to get what he said he expected, to show the Court that the standard and quality was attainable and to establish the quantum of the damages, that the Plaintiff would have had

the work completed by now and simply be seeking to recover what it cost him over and above the contract amount. The concern is that if the Plaintiff recovers what he seeks, being the \$3,977.20 to strip the vehicle to bare metal, \$840 for new molding and \$14,437.56 to finish it the way he wanted, he may never do so and thereby the Judgment would be a win fall at the expense of the Defendant. There may have been a duty that was breached, but there would be no damages.

**53** The credibility, and accordingly, the acceptance of the Plaintiff's evidence and version of events is extremely difficult. There were a number of inconsistencies which lead to the rejection of the Plaintiff's version of events and his alleged terms of the agreement with the Defendant. These include:

- a) initially stripping the shell to bare metal and then not having it immediately sealed and painted so as to prevent any risk of rust;
- b) not agreeing to the extra cost of \$1,000 to have the Defendant soda blast the shell in order to remove any microscopic moisture spots on the bare metal which could result in rust and corrosion for which the Defendant claims would accordingly not be warrantied;
- c) failing to reduce such a significant project into a clear and comprehensive written agreement which would have been reasonable if the standard and quality was to be of the caliber claimed and the end value was to be so substantial;
- d) claiming labour for stripping the vehicle at the rate of \$15 per hour of work, but then Dante Antonel testified that he was paid the rate of \$10 per hour;
- e) stating in a letter to the Defendant dated November 26, 2011 (Exhibit #3) that, "The car has now been stripped to bare metal again ... ", and seeking "additional damages of \$3500 that it will cost me to return the shell to the condition it was given to you back in November 2010.", but submitting evidence in the form of a Time Sheet summary (Exhibit #4) which shows time for work being done on November 26 (16 hours between 2 individuals), November 27 (3 hours for 1 individual), November 29 (17 hours between 3 individuals) and February 7, 9, 11, 18, 19 (60 hours between 3 individuals). If the car had been stripped by November 26, 2011 and the Plaintiff was able to specify the cost of doing so, what is the reason for the almost 100 hours spent and claimed thereafter;
- f) while the Plaintiff introduced a Time Sheet summary totaling 228 hours, he did not produce the source documents which would have enabled a verification of the summary;
- g) when the Plaintiff knew that he would be re-stripping the shell and pursuing the Defendant to recover the cost of the same, he did not separately acquire, record and produce the material costs. Instead he used material that he already had, located the prior bills for the same and tried to allocate the same when he acknowledged that he did not use the entire gallon(s) of thinner or chemical stripper;
- h) most significant is the divergent evidence between the Plaintiff and his own witness, Ryan Johnson. The Plaintiff maintains that the car was stripped by November 26, 2011 if we look at Exhibit #3 or by February 19, 2012 if we look at Exhibit #4, but Ryan Johnson, the author of Exhibit #6, being the estimate dated April 10, 2012, clearly testified that he saw

the shell twice and was told by the Plaintiff that the Plaintiff was unhappy with it, there were numerous issues and flaws such as thin paint and being able to see through the finish. Mr. Johnston clearly indicated that when he saw the car, it was in a condition similar to what is depicted in Exhibit #1, photograph #34. It was apparent from his evidence, that when he saw it and formulated his estimate, the shell had not yet been stripped to bare metal, it still had paint on it, and as a result, the estimate included time, materials and cost associated with having to spend 1 or 2 days to strip the outside of the shell.

**54** The Defendant on the other hand gave his evidence in a very forthright and believable manner. This Court was impressed with the manner in which he presented himself. There were at least 6 particular aspects that lead to this conclusion:

- a) his explanation for his advice that the shell be soda blasted to eliminate microscopic moisture as a result of the car sitting after being previously sand blasted which could result in further rust and corrosion had a significant ring of truth and common sense to it;
- b) his explanation for cutting and joining the quarter panel at the middle of the "c" pillar instead of cutting and joining at the factory seam in order to maintain the integrity and strength of the factory seam also had a logical and common sense ring to it;
- c) his explanation for the gap between the newly installed rear driver's side quarter panel and door as being attributable to the crease or dent in the quarter panel that was removed from the damaged 1987 Ford Mustang having to be bumped out and not able to be stretched to its original size was logical and also made sense;
- d) his explanation for more bondo or body filler than the Plaintiff wanted being necessary as the previous sand blasting to strip the shell to bare metal caused heat which lead to the warping of the metal, particularly in the roof also had a significant ring of truth and logic;
- e) his indication that it did not make sense that the shell was to have a show car finish because in the process of re-building it and putting on all of the parts in order to create the desired car, it will likely get bumped or scratched.
6. his indication that it did not make sense that a car with the finish that the Plaintiff claims to expect would then be used as a race car which might easily be damaged, not just from the risks associated with racing, but also from stones and other debris usually found on a race track.

**55** The inconsistent actions of the Plaintiff lead me to the conclusion that he did not want or expect to have a pristine or perfect show car, but that he wanted a race car that looked good as well. The expectations and standards were either unattainable on a vehicle that is 15 years old or it was not reasonable for those standards to be met at the price of \$8,475. Attaining that level of quality would come at a much higher cost, perhaps closer, if not greater than the \$14,437.56 estimate that he has since obtained.

**56** On the other hand, it is possible that the Defendant may have simply made a bad bargain and quoted \$7,500 for a job, that if done right, would have cost much more. If this is so, the law provides no relief to him as a deal is a deal and he is thereby obligated to provide the Plaintiff with what he agreed to provide at the cost that he agreed to charge. This would entitle him to be paid in full, but then pay to have

the car stripped to bare metal and redone the way it ought to have been done in the first place. [\$19,254.76 - (\$8,475 - \$6,500) = \$17,279.76] if the Plaintiff's figures were accurate and accepted.

**57** I find that on a balance of probabilities, that the applicable result is best summarized in paragraph 18(c) above, namely:

*If there was an agreement with the terms as the Defendant maintains, and it is found that he fulfilled that agreement, then the Plaintiff would have received what he bargained for and would not be entitled to any damages, but would be required to pay the balance of the contract price of \$1,975.*

**58** Although I have found that the Defendant's version of the agreement was more probable and therefore the one to be enforced, I also find that the Defendant did not fulfil all the terms of that agreement. While his work was substantially complete, there were defects, flaws and shortcomings that required rectification. Also, it was acknowledged by the Defendant, particularly in the Facebook communications that there was still more work to be done, including the front bumper, rear bumper, fender extension and other small parts.

## MITIGATION

**59** The law imposes a positive duty on a party suffering a loss to take steps to minimize, reduce and/or eliminate the loss. This is known as mitigation and the failure to mitigate will result in a corresponding reduction or elimination of the damages and recovery.

**60** It is somewhat bizarre that the Plaintiff chose to re-strip the shell to bare metal, but then he did not proceed with the next step or stage in the restoration project, but rather choose to store the shell in his shop where it was exposed to the elements. One would have thought that if he was not ready to proceed, it would have been better to keep the shell in the condition it was in when he got it back from the Defendant for the second time on June 23, 2011. This would have allowed the Defendant's work to be further viewed and inspected for evidentiary purposes, while at the same time better preserving the condition of the shell until the project could proceed.

**61** The Plaintiff attempts to justify the act of stripping the shell when he did and doing so manually on the need to do the work to investigate, determine and then show the faults with the Defendant's work. The concern with this is that the initial 1986 Ford Mustang was purchased for \$1,500 and after removing all of the parts in order to leave only the metal shell, it was sand blasted to bare metal at a cost of \$1,200. Furthermore, the Defendant had quoted a cost of \$1,000 to soda blast the shell before painting. These amounts make it difficult to justify spending what is claimed to be 228 man hours of labour plus material and advancing a claim almost \$4,000 being \$3,420 for labour and \$557.20 for material. There was no evidence that the Defendant's alleged shortcomings could not have been identified or demonstrated in other ways without having to embark upon the re-stripping by hand. If the evidence of the Defendant is accepted, the re-stripping could have been completed by soda blasting at a cost of \$1,000 which is not significantly different than the initial \$1,200 for the less preferable sand blasting.

## DAMAGES

**62** The damages being sought by the Plaintiff contain 4 aspects:

- (a) Body side mouldings (\$840.00) - the Plaintiff claims that, *"The brand new moldings may be scrap as they were not cleaned thoroughly before painting. The marks on them is residue from the protective tape that*



*comes on them from the factor,' nothing to do with flaws in the molding."* (Exhibit #2) The claimed cost is either \$540 (after market) or \$840 (original equipment manufacturer). The need to replace and the cost of the same was not clearly established. I find that Exhibit #7 was insufficient in this regard.

- (b) **Labour to strip paint (\$3,420.00)** - this has been previously addressed. It represents a claim for 228 hours at \$15 per hour, but the Time Sheet summary at Exhibit #4 is not reliable. The supporting documents were not introduced. The rate actually paid to Dante Antonel was \$10 per hour. Mr. Antonel claimed that he worked on the shell when Romeo did not. It was said that Romeo worked during the day and Dante worked with the Plaintiff at night, yet the Time Sheet summary shows that the dates and times for Romeo and Dante often overlapped significantly.
- (c) **Paint strip material (\$557.20)** - there can be no doubt that materials and chemicals were needed to manually strip the car back to bare metal, but as previously indicated,

*when the Plaintiff knew that he would be re-stripping the shell and pursuing the Defendant to recover the cost of the same, he did not separately acquire, record and produce the material costs. Instead he used material that he already had, located the prior bills for the same and tried to allocate the same when he acknowledged that he did not use the entire gallon(s) of thinner or chemical stripper;*

It would therefore be difficult to determine the actual cost of the materials and chemicals needed and used to strip the car manually. In any event, there was evidence that the Plaintiff had the initial shell stripped by sand blasting for

\$1,200 and that the Defendant was willing to soda blast it for \$1,000. If it had been established that the Plaintiff was entitled to the cost and that the shell warranted being stripped back to bare metal, I would have fixed those damages at \$1,200.

- (d) **Repair estimate (\$14,437.56)** - this is the largest component of the Plaintiffs claim. Though the evidence of its author, Ryan Johnson, it is evident that this estimate includes time, materials and expense for replacing the quarter panel, rocker panels, door shell, aligning and fixing all panels and stripping the car. It was not established that the estimate represents the actual or reasonable cost to create the show quality car that the Plaintiff claims to have wanted and expected. Mr. Johnson himself acknowledged that his estimate was not a great estimate for a show car. The estimate was proffered as evidence of the cost to achieve show car status in the event the Court has decided that the Plaintiff was entitled to recover the same from the Defendant, but for numerous reasons contained herein, it falls far short of providing the Court with an accurate or reliable cost of enabling the shell to be finished to the standard and quality that the Plaintiff maintained was included in his agreement with the Defendant.

## CONCLUSION

**63** The Plaintiff has not convinced or persuaded me that the work of the Defendant was contrary to the contract so as to justify manually stripping the car to return it to bare metal. His explanation for doing so, being the need to investigate and discover the faults with the Defendant's work is not acceptable absent independent evidence to show that the faults could not have been discovered if the much faster and cheaper method of sand or soda blasting had been used.

**64** The Plaintiff has not persuaded me that the work of the Defendant was a breach of their agreement or contrary to the terms so as to be entitled to the damages being sought. I am not satisfied with and do not accept the Plaintiffs version of the terms of the agreement so as to establish the terms of the duty on the Defendant, the existence of a breach of that duty or the extent of damages that would flow from that breach.

**65** As I have found that the Plaintiff did not bargain for a perfect show car, I cannot in good conscience or in law award the Plaintiff what he seeks which would result in a significant win fall to the Plaintiff to enable him to get more than he bargained for at the expense of the Plaintiff. Accordingly, the Plaintiff's Claim will be dismissed.

**66** As there were flaws and shortcomings with the Defendant's work, to which I find that the Plaintiff overreacted, and with the Defendant admitting that there was more work to do, I cannot justify awarding the Defendant the balance owing to him. The Defendant is entitled to retain the value of the work done which I find to be in the amount that has already been paid, which amount represents very close to three-quarters (76.7%) of the agreed upon contract price. Accordingly, the Defendant's Claim will be dismissed as well.

## **COSTS**

**67** The Defendant was successful in defending the Plaintiff's Claim for \$19,254.76, but unsuccessful in his claim for \$1,975.00.

**68** The Plaintiff was unsuccessful in his claim for \$19,254.76, but successful in defending the Defendant's Claim for \$1,975.00.

**69** It might appear that success was divided, but given the disparity of the quantum of each Claim, I am inclined to find that the Defendant's success was greater than the Plaintiff's success. Although not known, it is reasonable to conclude that had the Plaintiff not made the Claim for \$19,254.76, the Defendant might not have pursued a claim for \$1,975.00 as he knew there were some issues with his work and that his work was not yet complete.

**70** In any event, most of the Trial focused on the Plaintiff's Claim. The Defendant's Claim for the balance owing, where the amount of the agreement and amount paid were not at issue, did not involve much, if any, additional Court time.

**71** I am therefore inclined to award costs to the Defendant for this 3 day trial, but have not yet made a decision in this regard. Naturally, the Court is not aware if there were any Offers to Settle which might impact both on the entitlement and quantum of any costs.

**72** If the parties cannot agree on costs, the Defendant will have 15 days from the release of these Reasons to provide written submissions of no more than 3 pages. The Plaintiff will then have 10 days to respond in writing, also limited to 3 pages, and the Defendant will have 5 days to reply in writing, limited to 1 page.

**J. BRANOFF DEPUTY J.**

