

**IN THE SMALL CLAIMS COURT OF NOVA SCOTIA**

Cite as: Rumboldt v. Sackville Fine Cars, 2010 NSSM 62

Between:

Laurie Patricia Rumboldt and Steven Augustus Rumboldt

**CLAIMANT**

-and-

3039108 Nova Scotia Limited operating under the firm name and style of "Sackville Fine Cars" and Darren Blumenthal, Owner/Manager

**DEFENDANT**

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**DECISION AND AMENDED ORDER**

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Adjudicator: David T.R. Parker

Heard: June 1, 2010, June 10, 2010, September 21, 2010, September 29, 2010, and October 6, 2010

Decision: October 10, 2010

Amended Order: October 22, 2010

Counsel: B William Piercy QC represented the Claimant

David S Green represented the Defendant

**This Order is amended only to the extent of including Statutory allowable costs which have been provided to the Court by Claimant Counsel.**

Parker:-this is a matter that came before the Small Claims Court in Halifax, Nova Scotia and was heard over several days. On September 29, 2010 following the completion of testimony of David Benanson, both direct and cross-examination, Counsel for the defendant advised the court that he had been instructed not to participate any further in this trial except for making any final summations to the court. Upon that statement by Counsel, Mr. Piercy QC made a motion of no contest and therefore to have the claimant succeed in the claim. Counsel for the defendant argued against this motion. The court felt that as a defense has been filed and Counsel had cross examine witnesses there was sufficient information before this court to consider whether a conclusion could be reached. Further by deciding not to participate, Counsel did not admit to liability of his clients or suggest that the case was being abandoned or that no defense was raised. As result the motion was denied. Counsel for the claimant was directed by the court to consider whether or not he wishes to subpoena the defendant Blumenthal or any other witnesses that he was anticipating cross-examining which now would not take place as the defendant had determined not to participate further in the trial other than a summary of their position. After consulting with his client the claimant's Counsel agreed to drop the rescission part of their claim and would proceed with summaries of their position through closing arguments which took place on October 6, 2010.

Pleadings:

**The claim:**

The claimant stated he purchased a used 2005 Toyota Tundra automobile from the defendant and that the defendant represented the vehicle was never involved in a motor vehicle accident and certified the vehicle had a valid motor vehicle inspection. The claimant stated he was [later] advised the vehicle failed an earlier inspection due to a cracked frame and the vehicle failed to pass a wheel alignment. The claimant stated the defendant knowingly/negligently misrepresented that the vehicle had not been involved

in a car accident and that a valid motor vehicle inspection had been performed on the vehicle.

The claimant claimed they relied on the defendants misrepresentations when they purchased the truck and as a result it suffered damages rounded down to \$25,000.00 particulars of which are as follows:

Purchase price of eight 2005 Toyota tundra \$22,824.97

Wheel alignment inspection of \$68.82

Mileage hundred \$67.00

Purchase of another vehicle \$6650.00

**The defense:**

The defendant stated the claimant had a document known as "Carfax" when they purchased the vehicle. The defendant stated the claimants used the Carfax information, which was obtained from an independent source by the claimants to negotiate a lower price for the vehicle upon purchase, knowing it was in an accident.

The defendant stated that the claimant drove the vehicle and inspected the vehicle at least two or three times prior to purchasing the vehicle. That the claimant took the vehicle overnight on one occasion and had the opportunity to have examined by mechanical or automobile technician of their choice.

The defendant stated that after purchasing the vehicle the claimant decided they no longer wanted the vehicle and complained to David Bezanson, a motor vehicle inspector who investigated and reviewed the circumstances and determined that the defendant had done nothing wrong in its dealings with the claimant.

Norman McMichael:

Mr. McMichael provided testimony not as a certified mechanic rather as a person qualified as having knowledge about and able to do wheel alignments on motor vehicles.

Mr. McMichael picked up the claimant's vehicle as requested by his service manager at Dan McNeill's Shell Station. He took it for a test drive, about 1 km and found the vehicle had a little bit of a pull to one side. As a result Mr. McMichael put the claimant's vehicle on an alignment ramp. He checked out the ball joints, tie rods, and everything was tight on the front and. Mr. McMichael stated the vehicle is "hooked up" to the computer which produces the measurements you are looking for in doing wheel alignments. The computer printout showed there was a problem. Mr. McMichael could not get the camber within specifications on the right front. He said he had knowledge of the vehicle before he started the alignment and he didn't notice on inspection there was a crack in the frame. Mr. McMichael said it could be a bent frame and that would determine if "we could replace parts" of the vehicle so it had to be sent to a body shop to determine what parts had to be are placed and whether it could be fixed.

Danny Harvey:

Mr. Harvey was service advisor and Dan McNeill's Shell and he does the bookings for the vehicles brought into the station. He is not a licensed mechanic but has 22 years experience in the business of car repairs. He worked 13 years and auto salvage has built race cars and has worked under the supervision of mechanics in the shop. Mr. Harvey could not do wheel alignments but was familiar with computer printouts concerning wheel alignments. Mr. Harvey said that he and Mr. McMichael noticed a crack in the frame on the side where the vehicle could not be aligned. Mr. Harvey said the frame of the vehicle was damaged in that it was bent in a downward position and it was obvious there was a crack there as well. On cross examination he stated there was no sign of wear on the tires and there were no new tires on the vehicle.

Rodney Butt:

Mr. Butt worked for McPhee Pontiac and was an appraiser for repair work to be done on vehicles. In 2009 he became a certified mechanic. Mr. Butt was qualified as a person who could give estimated cost of bodywork. Mr. Butt gave an estimate on repairs to the frame and support lights on the fender in the amount of \$4442.46. With respect to the frame he said the right frame rail was kinked and the radiator support rail indicated repair work was done on the vehicle at some point in time. He said it was welded and covered up. He stated there should be an even flow of spot welds from the factory and they were not there. He stated the light connected to the radiator support and was repaired and there was damage to the right apron. He stated the repair work was caused by an accident and it was a "quick repair job". Mr. Butt stated if the wheel alignment could not be done there may be further hidden damage.

Bruce Grandy:

Mr. Grandy works at the auto auction and he is an arbitrator if the car dealer who purchases a vehicle at auction complains. The vehicle in question was sold to the defendant who later complained there was a small dent on the front that would cost \$1625.00 inclusive of HST to repair. Mr. Grandy agreed to the reduction. Mr. Grandy said on cross examination the tires and the vehicle showed average wear, "they were not brand-new tires. If the front end was way out [of alignment] it would not take long to show up."

David Benanson:

Mr. Benanson is a motor vehicle inspector with the province of Nova Scotia and was called in by the claimant to inspect the vehicle. He said that he did not know it was out of alignment when he inspected it but later found out that it was only out one half degree. He said it was not out a significant amount and that the technician who drove it indicated it was not pulling either way. He said he was deliberating on whether it was to be rejected at all. He said he couldn't find anything significant with it although sometime in the past and was involved in an accident. He said "I was brought in to confirm it was

unworthy to operate. I did not find it that way at all." He said the claimant "was concerned about the safety of herself and her children. I did not find it that way." He did say in his investigation he determined a person prior to the claimants purchasing the vehicle, was about to purchase the car and took it into the Toyota dealership in Truro Nova Scotia and as a result of their looking at the car and because of their advice they decided not to purchase the vehicle. His investigated showed there were repairs done with the vehicle and he confirmed the vehicle was in an accident in 2005 and again the vehicle was an accident in 2009. There was a crack in the frame that was repairable. Mr. Benanson rejected the vehicle as requiring these repairs to be done.

**Decision:**

The vehicle had been in two accidents, one that occurred in 2005 and which repairs were done to the vehicle under the amount of \$600.00. The one in February 2009 resulted in the problem with the frame and the wheel alignment. The defendant was aware of repairs required on the vehicle but only after it was purchased at the auction. As result the Defendant received a reduction in the auction price of \$1625.00. The claimant of course was unaware of this reduction. There was some question about whether the claimant purchased the car without warranty or on an "as is" basis. The claimants' counsel argued they never signed any such waiver of warranty however we will never know for certain as there was insufficient evidence to indicate whether the signature was forged or not. Whether they did or not is inconsequential as the waiver of warranty notice is unclear as to what it pertains to in any event. Further The Consumer Protection Act R.S.N.S., 1989 c. 92 as amended provide certain implied warranties and these cannot be contracted out by the seller of used vehicles. Section 26(3) (h) and (j) are applicable in this case. While the vehicle may have been safe to drive as suggested by Mr. Benanson it was rejected and therefore was not salable or of merchantable quality until those items were fixed on the vehicle. As well it could be concluded it was not durable from the beginning until those items were fixed.

The question becomes what are the items in the car to be fixed and what would the cost be for same. Kaizers Collision Center comes in with repairs at \$1596.63. The evidence of Mr. Benanson indicates that this repair shop is very reliable. McPhee Pontiac Buick GMC Limited came in with a repair cost of \$4442.46. Rodney Butt who works for McPhee's provided support testimony for the work that was to be done to rectify the problem. Counsel for the claimant argues that I should accept this amount over the Kaizer amount for the repair and at the very least the court should split the difference. It would appear there are some items on the McPhee estimate which are beyond the scope of what was required to put the vehicle back in the same position it was prior to the February 2009 accident. I refer to "evacuate and recharge the A/C, putting in coolant and front bumper assembly work." I do not know this for certain as it was never fully explained through Mr. Butt however for the most part I shall accept the McPhee estimate and reduce same slightly by 20% which will be then \$3145.10 plus HST a \$408.86 for total of \$3553.96. I shall also allow the costs of \$68.82 for Don McNeil Shell required by the claimants in determining the problem plus court costs \$179.36.

With respect to Darren Blumenthal the argument was made that an employer is vicariously responsible for the negligent acts of its employees and I do not believe that applies in this particular case as I have not decided the case in terms of negligent misrepresentation as I do not believe that has been proven. Even if it was I would see Mr. Blumenthal, based on the evidence that I have heard, is operating a business and it is the business itself that is responsible to the claimants. Therefore the action against Darren Blumenthal is dismissed.

**It Is Therefore Ordered** that the defendant 3039108 Nova Scotia Limited operating under the firm name and style of Sackville Fine Cars shall pay the claimants the following sums:

\$3553.96  
\$ 68.82 for Don McNeil  
\$ 179.36 Court costs  
\$ 25.00 Dillan Anderson witness fees  
\$ 25.00 Bruce Grady witness fees  
\$ 10.00 Rodney Butt witness fees

\$ 30.00 Danny Harvey witness fees  
\$ 30.00 Nathan McMichael witness fees  
\$ 460.00 service costs  
\$ 79.00 service costs  
\$ 11.76 Binding Expenses [out-of-pocket expenses]  
\$4,472.90 total