

December 7, 2010

Patrick Morini
16 Caxton Drive
New Castle, DE 19720
Pro-Se Plaintiff

Eric Scott Thompson, Esquire
Marshall, Dennehey, Warner,
Coleman & Goggin
1220 North Market Street, 5th Floor
P.O. Box 8888
Wilmington, DE 19899-8888
Attorney for Defendants

**Re: Patrick Morini v. Custom Cycle and Machine and Michael Norris
C.A. No. CPU4-10-000635**

Date Submitted: November 15, 2010
Date Decided: December 7, 2010

LETTER OPINION

Dear Mr. Morini and Mr. Thompson:

Trial in the above captioned matter took place on November 15, 2010 in the Court of Common Pleas, New Castle County, State of Delaware. Following the receipt of documentary evidence¹ and sworn testimony, the Court reserved decision. This is the Court's Final Decision and Order.

¹ The Court received into evidence the following items: Joint Exhibit # 1 (Safety Campaign History for Plaintiff's motorcycle, specifically for the motorcycle's transmission and battery caddy bolt); Joint Exhibit # 2 (Copy of Authorization for repairs and modifications by Custom Cycle & Machine signed by Patrick Morini – Repairs/modifications to be made are unable to be read clearly; Work Order from Michael Norris' Custom Cycle and Machine dated 6-22-07 for Patrick Morini at 16 Caxton Drive, New Castle, Delaware for a 2006 Dyna Superglide Motorcycle with Repair/Service Requested by Customer listed as "Fix Leak Primary. 112 miles to tank of gas check MAP."); Joint Exhibit # 3 (Copy of Harley-Davidson Dyna Bigshots Staggered Installation Instructions Part # 17919 for Stock Exhaust System Removal and Vance & Hines Exhaust System Installation); Joint Exhibit # 4 (Four receipts from Mike's Famous HD in New Castle, Delaware for Patrick Morini showing no charges dated 3-13-07 (R&R Front Fender detailing "FF, FXDLI, Deep Cobalt Pea"), 5-3-07 (5K Service Syn 3 detailing "O-Ring; Retaining Ring; Gasket, Clutch

I. Procedural Posture

The sole issue before the Court following trial on the merits is whether Plaintiff Patrick Morini (hereinafter “Morini” or “Plaintiff”) has proven by a preponderance of the evidence that he is entitled to three thousand, twenty-five dollars and fifty-five cents (\$3,025.55) as damages for breach of contract, breach of the implied covenant of good faith and fair dealing, unjust enrichment and breach of warranty.²

Cover; Oil Filter, Chrome Superp; Syn 3 Lubricant”), 6-19-08 (R&R Stator & Rotor detailing “O-Ring; Oil Seal Inner Primary; Gasket, Clutch Cover; Gasket, Primary Housing; Stator & Rotor Kit; Gasket, Primary Cover; Gasket, Tower; Bolt, Seal”; Description states “Engine Light Displayed & Makes Noise When You Accelerate”; Description states “Noise”; Customer States “Customer States Noise From Primary Area Especially On Acceleration Check & Advise”; Work Description states “Remove, Clean, Reinstall And Adjust Primary Chain Adjuster”; Handwritten Notation on receipt states “10,000 Mile Service.”) and 7-21-08 (Work Description states “Buff Fuel Tank Scratches Out” which is circled in ink; Description states “C/S That Primary Is Making Squeaking Noise, Especially When Downshifting Inspect And Advise” which is circled in ink with an arrow indicating such; Work Description states “Tech Inspected Primary, No Abnormal Noise Detected”; Handwritten notation on receipt states “his bill 7-21-08.”); Joint Exhibit # 5 (Seven receipts from Custom Cycle and Machine for Patrick Morini for a 2006 HD Super Glide dated 4-3-07 (Detailing “Create Custom Map for Power Commander; Install Customer Supplied Pipes; Install Air Cleaner and Power Commander and Exhaust Flaps; Big Sucker Air Cleaner; USB Power Commander; Exhaust Flaps” totaling \$1,058.70), 9-10-07 (Detailing “R&R rear wheel, remove tire from wheel on bike, remove tire from wheel brought in by customer and install on wheel to be installed back on bike” totaling \$95.00), 5-22-08 (Detailing “install rear brake pads Amsoil Service Special includes change engine oil, primary oil, and trans oil with Amsoil products. Check torque of all major fasteners, set tire pressures, lube and adjust cables as needed, adjust primary chain where needed, service air filter as needed, replace oil filter. Check steering bearing adjustment adjust and lube as needed. Lube all pivot points on motorcycle. Sbs sintered brake pad kit 00-07 harley models” totaling \$324.95), 9-3-08 (Detailing “mount and balance rear tire, mount and balance front tire, install new rear brake pads, lyndall racing brake pads fits 22-07 models except fxsts/flsts and 04-07 x1 models” totaling \$224.95), 4-22-09 (Detailing “Synthetic service special, amsoil 20/50, 75/140, hiflo filter” totaling \$285.00), 7-1-09 (Detailing “install primary bearing and race, install oil seal, install new clutch disks and steel disks, Barnett extra disc clutch kit, primary gasket, primary oil synthetic, inner primary seal, inner primary race, inner primary bearing” totaling \$616.00) and 8-3-09 (Detailing “R&R clutch spring, filter and top oil primary oil, repair scratched gas tank, adjust drive belt” totaling \$168.75; Photocopy of Merchant copy of credit card bill of sale on receipt from Custom Cycle and Machine totaling \$168.75 dated 8-4-09 signed by Patrick Morini); Joint Exhibit # 6 (Copy of Bulletin bearing the Harley Davidson symbol entitled “TT330: 2006-2007 Dyna Models Replacement Transmission Cases” dated August 10, 2007 indicating that “the transmission case for 2008 Dyna Models has changed at the exhaust mounting location and that it is now the only case available for use on all 2006-2008 Dyna Models.” The name Patrick Morini is handwritten on the top of the bulletin as well.); Joint Exhibit # 7 (Copy of Service Bulletin bearing the Harley-Davidson symbol entitled “Safety Recall 0124-2006 DYNA Transmission” dated June 30, 2006 issued to dealer networks in which “Harley-Davidson has learned that a condition affecting safety exists on 2006 Dyna models.” The Service Bulletin also provides instructions and photographs for repair under “Required Dealer Action.”; Plaintiff’s Exhibit # 1 (Bolt from Plaintiff’s Motorcycle in which the Court conducted an in-camera inspection.)

² See Counts I-IV, Complaint).

Plaintiff contends in his Complaint filed herein that he paid Defendant to perform modifications/installations on his motorcycle which were not performed in a workmanlike manner and constituted a breach of contract. Plaintiff further contends in his Complaint filed herein that Defendant's failure to perform the modifications in a workmanlike manner required him to incur additional costs to correct the work.³ Plaintiff also claims that Defendant was unjustly enriched by the receipt of payment. Plaintiff further alleges, *inter alia*, a claim of negligence against Defendant.

Defendants Michael Norris (hereinafter "Norris" or "Defendant") and Custom Cycle and Machine (hereinafter "CCM") denied all of Plaintiff's claims, alleging that the work performed on Plaintiff's motorcycle was performed in accordance with the manufacturer's instructions as well as with common industry standards. Further, Defendant alleges that Plaintiff was not dissatisfied with Defendant's level of expertise evidenced by the fact that Plaintiff continued to patronage Defendant's shop after the alleged breach occurred. With the conclusion of trial, the matter is now ripe for decision.

II. The Facts

After considering all of the evidence, the Court finds the relevant facts as follows: On April 3, 2007, Norris, the owner of CCM, installed a Vance & Hines Big Shot Exhaust System on Morini's motorcycle, a 2006 Harley Davidson Super Glide. Morini chose Defendant to perform work on his motorcycle because in his opinion, Defendant was the best in the area of motorcycle repair.

Morini purchased the exhaust system from a dealer via the internet. Morini received the exhaust system as factory sealed. Morini opened the system once he received it and checked the list to ensure all parts of the system were present.

³ See ¶ 13, Complaint.

Morini then took the system and his motorcycle to Norris's shop for installation of the system. Morini chose this exhaust system because he wanted a louder bike. Morini conceded that the exhaust system is used specifically for off-road bikes but stated that he observes bikes on the street all the time with a similar or identical exhaust system.

From the installation in 2007 until 2009, everything in Norris's opinion seemed fine. Morini continued to bring his motorcycle to Norris for service and never raised any issue regarding missing bolts on his motorcycle with Norris. Morini approached Defendant some two (2) years after the installation of the exhaust system informing him that bolts were missing from the exhaust system. Morini also informed Norris that a piece of one bolt broke off as well. At that time, Morini insisted that Norris repair the bolts free of charge to which Norris refused and thus giving rise to the instant litigation. Morini concluded that the bolt broke due to the failure of Norris to use lock tight in the installation of such part.

Plaintiff's father, Frank Morini (hereinafter "Frank") testified in Plaintiff's case-in-chief. Frank stated that he informed his son of vibrations within the motorcycle as well as an observation that something was loose and rattling. Frank advised his son that something was wrong with the motorcycle and suggested that Morini take the motorcycle to a Harley Davidson dealer. Frank testified that one (1) bolt was missing from the transmission case of Morini's motorcycle and stated that Morini took the motorcycle back to several times to Norris. Frank stated that he was present on at least two or three occasions when Morini took the motorcycle to Norris for repair.

On one occasion, Frank observed Norris with the exact bolts and watched as Norris installed them on the motorcycle. Frank asked Norris to torque the bolts on the motorcycle to which Frank stated that Norris did not use the correct sequence for the torque of the bolts. Frank conceded that this was the one time that he observed work being done on his son's motorcycle, specifically the time when the motorcycle experienced an oil leak. Frank did not remember the date of such observation. Further, Frank did not recall the year in which the repair took place because he does not keep track of time.

Frank conceded that Morini wrecked his motorcycle once but stated that it was nothing critical or heavy duty and that he has done the same thing himself. Further, Frank stated that if a motorcycle was dropped on its side that will do nothing to the integrity of the motorcycle.

Morini called Norris as a witness in his case-in-chief. Norris stated that he did increase the vibration level on Plaintiff's motorcycle to 6,250 but stated that a level of 5,700 or 5,750 is customary for Harley Davidson motorcycles. Norris stated that the level of alteration would not cause additional vibrations in the motorcycle and that the level is determined by the manufacturer. Norris testified that he was the only person who worked on Plaintiff's motorcycle in his shop.

Eric Carlson (hereinafter "Carlson") testified on behalf of Plaintiff.⁴ According to Carlson, all he has ever done is worked on motorcycles, specifically being employed in a collision repair center.

⁴ Plaintiff stated that Carlson was his expert witness. However, Plaintiff failed to qualify the witness as an expert and move for such admission, therefore the Court considers Carlson's as lay opinion testimony under *Delaware Rules of Evidence Rule 701: Lay Witness* rather than under *Delaware Rules of Evidence Rule 702: Expert Testimony*; *Delaware Rules of Evidence Rule 701* states: If the witness is not testifying

Carlson stated that he has had contact with two other persons who have experienced similar problems with the type of motorcycle that Plaintiff owned, specifically one person whose motorcycle had the transmission shaft loose due to the lack of lock tight. However, Carlson conceded that he did not know the maintenance; driving or accident history of the other motorcycles that he has encountered that had worked performed on them at Norris's shop. Carlson, on one occasion, repaired the primary gasket on Morini's motorcycle which cause the motorcycle to leak oil. On this occasion, Carlson inspected the motorcycle and discovered bolts missing and a cracked transmission system. Morini never mentioned missing bolts to Carlson during that occasion.

Carlson cleaned the oil from the transmission case using a solvent and brush but did not alter the transmission case in any way. Carlson acknowledged that Morini may have cleaned the motorcycle, including the transmission case, prior to his performance of work on the motorcycle and that Morini probably used wax to accomplish such. Carlson stated that the solvent that he used on the transmission case would clean oil, dirt and lock tight but would not cause alteration on the threads within the bolts. Carlson acknowledged that some motorcycles require less lock tight to be used than other motorcycles.

as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue and (c) not based on scientific, technical or other specialized knowledge within the scope of Rule 702; *Delaware Rules of Evidence Rule 702* states: If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Carlson replaced the transmission case on Morini's motorcycle and could not say exactly what caused the bolt to break. Carlson did indicate that one bolt differed from the other bolts.

Carlson was unaware of any information that came from Harley Davidson regarding recalls and safety notices on Harley Davidson motorcycles. Carlson stated that he has never seen any information of such kind previously as this type of information would only be released to Harley Davidson shops and would be able to be located on the internet. Carlson was unaware of the date in which he performed the work on Morini's motorcycle. Carlson did concede that he had seen a safety recall from Harley Davidson dated June 30, 2006 that applied to Morini's transmission on the motorcycle. Carlson was unaware of the date that Morini purchased the motorcycle.

Carlson stated that vibration is a trademark of Harley Davidson motorcycles. An increase in vibration could loosen parts on the motorcycle. If lock tight was not used on the bolts then the vibration could loosen such bolts. Carlson further stated that manufacturers typically recommend the use of lock tight but do not require such use.

Carlson inspected the bolts of the transmission case of Morini's motorcycle using a borescope which contains an optical eye that magnifies what is being viewed by the user.⁵ Carlson conceded that he has taken no classes regarding the use of the borescope nor does any training for instruction on its use exist to the best of his knowledge. Carlson learned how to use the boroscope by reading the instructions that came with the equipment.

⁵ The Court conducted an in-camera inspection in which Carlson using the borescope illustrated the bumps located within the thread of the bolt. According to Carlson, the in-camera inspection should have revealed residue at the bottom of the bolt as well as residue on the threads if lock tight was used. The in-camera inspection revealed approximately three bumps on the threads. Carlson was unsure what the substance of the bumps was. Carlson stated that the bumps may be dirt but he was unsure.

Carlson's inspection of the broken bolt revealed two (2) pieces of dirt or what may very well have been lock tight according to Carlson. Carlson noted that the broken bolt was very clean. Carlson stated that in deposition testimony, he testified that the substance in the broken bolt probably could have been lock tight. Carlson further stated that lock tight was not used on one of the clutch bolts and that the lack of lock tight bears no relevance or connection as to how the bike is driven. In other words, there is no relevance between how the bike is driven and a broken bolt. It is the lack of lock tight, not the manner in which the motorcycle is driven, that caused the bolt to break and/or loosen.

Carlson further testified that it was after he replaced the transmission on Morini's motorcycle that Morini had the accident with the motorcycle. Carlson denied any knowledge of an accident involving Morini's motorcycle between the time Norris worked on the motorcycle and the time in which Carlson worked on the motorcycle. Morini admitted that he did not think it was important to tell Carlson that the motorcycle had been dropped. Carlson stated if the exhaust system is hit during an accident or collision, it could cause vibrations to occur in the motorcycle. However, Carlson further stated that if the left side of a motorcycle is damaged then there is always no damage to the right side of the motorcycle.

Patrick Morini testified in his case-in-chief. Morini stated that he chose Norris to perform the work on his motorcycle. At some point, Morini experienced rattling in the motorcycle and stated that Norris did different things to his bike. Morini asked Norris if it was correct to only use one screw to install the exhaust system. At the time of the installation of the exhaust system, Morini also instructed Norris to change the brake pads on the motorcycle though they were not all the way worn down.

Morini was not concerned with the price but rather the quality of the work performed. After Norris serviced the motorcycle, Morini took the bike to Carlson because he desired that the injection be turned down. Morini stated that he did not believe that Norris was the only person to work on his motorcycle in Norris's shop.

Morini conceded that he is not an expert in the repair of motorcycles. Morini replaced the heat shield, which is the cover for the exhaust system, on his motorcycle at some point after the repair and scratched it.

Morini stated that he tried to use only one mechanic at a time for service on his motorcycle. Morini did take his motorcycle to Mike's Famous Harley Davidson though he disliked doing so due to issues with services and lines. Morini acknowledged work orders from Mike's Famous Harley Davidson – one for his father's motorcycle; one dated 5-30-07 for a 5,000 mile service; and one dated 6-19-08 for a 10,000 mile service and repairs covered by the warranty. Morini indicated that he took his motorcycle to Mike's Famous Harley Davidson in June 2008 because Norris informed him that the repair was covered under warranty and that Mike's Famous as a Harley Davidson dealership would repair the issues free of charge. Morini also acknowledged that his motorcycle was serviced on 7-21-08 by both Norris and Mike's Famous Harley Davidson for a scratched fuel tank. Morini stated that although he hated to take his motorcycle to Mike's Famous Harley Davidson, he did so because Norris said to take it there for free. Morini was not present to observe the work when the warranty service was performed on his motorcycle.

Morini was aware of two recalls of parts on his motorcycle after he purchased it, specifically around 8-10-07. Morini stated that the dealer did the recall service before he purchased the motorcycle. Morini was not certain as to the date in which he purchased the motorcycle, stating 2006 or 2007.

Michael Norris testified in his case-in-chief. Norris was the owner and operator of Custom Cycle which was an independent motorcycle repair shop specializing in Harley Davidson repair and modification. Norris testified that all he has ever done is worked on motorcycles as well as owning motorcycles. Custom Cycle is now defunct. Norris confirmed that he installed the exhaust system on Morini's motorcycle. Morini brought the exhaust system to Norris and Norris had no recollection of any parts missing.

Norris indicated that it is industry commonplace to use lock tight of various strengths or some type of thread-locking liquid on threads of the motorcycle. Norris informed that thread-locker is a microscopically thin layer of plastic which is used to secure the bolts. Norris explained that the thread-locking liquid takes up air space and should prevent the bolts from loosening. Norris stated that other causes, such as impact and/or vibration can affect the adhesion of the thread locker. In addition, if the seal of the thread locker is broken and one were to use a torque wrench on a bolt, the bolt would fall onto the ground. Movement is additionally a cause that would compromise or break the seal of the thread locker. Norris used thread-locker on Plaintiff's system, specifically a removable brand titled Blue. There was no thread locker provided by the manufacturer of the exhaust system. Norris indicated that if a motorcycle fell on its side that this could cause impact upon the engine and motor mounts. Further, Harley Davidson motorcycles vibrate a lot which is a trademark of these motorcycles.

After the installation of the exhaust system, Norris performed two other jobs on Morini's motorcycle contained with the same work order, specifically work in regard to the air cleaner and power commander.

Norris did not recall receiving complaints from Morini in regard to vibrations, a crack in the transmission case or missing bolts. At some point, Norris offered to repair these issues for Morini who wanted the work performed free of charge. Norris believed Morini's request to be unreasonable as a long period of time had elapsed since installation of the exhaust system. Norris concluded that if the bolts were to fail then it would have occurred within a shorter period of time.

Norris confirmed that he performed other additional service on Morini's motorcycle after the installation of the exhaust system, specifically six occasions in total, including an oil change, replacement of brakes and brake pads, service on the clutch and a tire. Norris stated that the lock tight may have been compromised prior to the loosening of the bolt and that he did not recall Morini mentioning the issue of rattling to him.

III. Issue Presented

The sole dispositive issue is whether the Defendants breached a warranty or breached the standard of care to perform the work in a workmanlike manner. For the reasons set forth below, the Court enters judgment in favor of the Defendants. Plaintiff's claims are therefore DENIED.

IV. The Law

The Plaintiff in a civil suit is required to prove all the elements of his or her claim by a preponderance of the evidence.⁶ “Preponderance of the evidence” is defined as “the weight of evidence under all the facts and circumstances proved before you.”⁷ Or, stated differently, “the side on which the preponderance of the evidence exists is the side on which the greater weight of the evidence is found.”⁸

Plaintiff bases his claim against Defendants on four (4) causes of action which will be addressed in turn.

In Count I of the Complaint, Plaintiff asserts a claim of breach of contract. In a civil claim for breach of contract, the burden of proof is on the Plaintiff to prove his claim by a preponderance of the evidence.⁹ The question of whether a contract has been formed essentially turns upon a determination of whether the parties intended to bind themselves contractually.¹⁰ A court determining intention does so from the overt acts and statements of the parties, not from the subjective mind of either party.¹¹ To state a claim for breach of contract, the Plaintiff must establish the following: (1) a contract existed; (2) the defendant breached the contractual obligations; and (3) the breach resulted in damages to the Plaintiff.¹²

⁶ *Neilson Business Equipment Center, Inc. v. Monteleone*, 524 A.2d 1172 (Del. Supr. 1987).

⁷ *Warwick v. Addicks*, 157 A.2d 205, 206 (Del. Super. 1931).

⁸ *Reynolds v. Reynolds*, 237 A.2d 708 (Del. Supr. 1967).

⁹ *Interim Healthcare, Inc. v. Spherion Corp.*, 844 A.2d 513, 545 (Del. Super. 2005).

¹⁰ *Leeds v. First Allied Connecticut Corp.*, 521 A.2d 1095, 1097 (Del. Ch. 1986).

¹¹ *Id.*

¹² *VLIW Technology, LLC v. Hewlett-Packard Co. STMicroelectronics, Inc.*, 840 A.2d 606, 612 (Del. 2003).

The standard for whether or not the Defendant performed their work under the contract in a good and workmanlike manner is “whether they displayed that degree of skill or knowledge normally possessed by members of their profession or trade in good standing under similar communities.”¹³ Furthermore, a “good faith attempt to perform a contract, even if the attempted performance does not precisely meet the contractual requirement is considered complete if the substantial purpose of the contract is accomplished.”¹⁴ Damages for breach of contract will be in an amount sufficient to return the party damaged to the position that the party would have been in had the breach not occurred.¹⁵ Plaintiff, however, has a responsibility of proving damages as an essential element of his claim by a preponderance of the evidence.¹⁶

In Count II of the Complaint, Plaintiff asserts a claim of breach of the implied covenant of good faith and fair dealing. “An implied covenant of good faith and fair dealing is inherent in every contract.”¹⁷ “This means each party is to act reasonably in fulfilling the intent within the agreement.”¹⁸ “Stated in its most general terms, the implied covenant requires ‘a party in a contractual relationship to refrain from arbitrary or unreasonable conduct which has the effect of preventing the other party to the contract from receiving the fruits’ of the bargain.”¹⁹

¹³ *Eastern Electric & Heating v. Pike Creek Professional Center*, 1987 WL 9610, at * 4 (Del. Super.).

¹⁴ *Nelson v. W. Hull & Family Improvements*, 2007 WL 1207173 (Del. Com. Pl.).

¹⁵ *Delaware Limousine Service, Inc. v. Royal Limousine Srv., Inc.*, 1991 WL 53449 (Del. Super. 1991).

¹⁶ *Gunzl v. Veltre*, 2008 WL 516037 at *5 (Del. Com. Pl. May 22, 2008).

¹⁷ *Standard Distributing Company v. NKS Distributors, Inc.*, (Del. Super., No. 92C-05-036, at 6 n.5, Quillen, J. January 3, 1996).

¹⁸ *Marshall v. Priceline.com Inc.*, (Del. Super., C.A. No. 05C-02-195 WCC at 5, Carpenter, J., October 31, 2006.)

¹⁹ *Dunlap v. State Farm*, 878 A.2d 434, 442 (Del. 2005) (citing *Wilgus v. Salt Pond Inv. Co.*, 498 A.2d 151, 159 (Del. Ch. 1985), *construing* RESTATEMENT § 205.

The Supreme Court of Delaware “has recognized the ‘occasional necessity’ of implying contract terms to ensure that the parties’ ‘reasonable expectations’ are fulfilled.”²⁰ “This quasi-reformation, however, ‘should be [a] rare and fact-intensive exercise, governed solely by issues of compelling fairness.’”²¹ “The covenant of good faith and fair dealing was created to ensure the spirit of an agreement is protected against ‘underhanded tactics to deny the other side the fruits of the parties’ bargain.”²² “Thus, it requires the Court to examine the express terms of the contract and infer the spirit of the agreement.”²³ “Based upon that inference, the Court then determines what the parties would have bargained for to control the dispute between them, had the dispute been foreseeable at the time the contract was created.”²⁴ “The Court then implies that covenant into the express agreement and treats the breach of the implied covenant as a breach of the contract.”²⁵ “Were it not for this covenant, parties to a contract could undermine and frustrate every legal obligation entered into.”²⁶ The requirement of good faith extends to the satisfaction of contractual conditions or contingencies and a breach of the requirement may be overt or may consist of inaction.²⁷

In Count III of the Complaint, Plaintiff asserts the doctrine of unjust enrichment as a cause of action against Defendants.

²⁰ *Dunlap*, 878 A.2d at 442 (citations omitted).

²¹ *Id.* (citations omitted).

²² *Kelly v. McKesson HBOC, Inc.*, 2002 WL 88939 (Del. Super. Ct.) citing *Chamison v. Healthtrust, Inc.*, 735 A.2d 912, 920 (Del. Ch. 1999).

²³ *Chamison v. Healthtrust, Inc.*, 735 A.2d 912 (Del. Ch. 1999), *af'd* 748 A.2d 407 (Del. 2000).

²⁴ *Id.*

²⁵ *Chamison v. Healthtrust, Inc.*, 735 A.2d 912 (Del. Ch. 1999), *af'd* 748 A.2d 407 (Del. 2000).

²⁶ *Standard Distributing Company v. NKS Distributors, Inc.*, (Del. Super., No. 92C-05-036, at 6 n.5, Quillen, J. January 3, 1996).

²⁷ *Rehoboth Resort Realty, Inc. v. Brittingham Enterprises, Inc.*, (Del. Super. C.A. No. 91C-03-035, at 2, Lee, J. July 21, 1992).

The elements that must be established for a claim of unjust enrichment are: (1) an enrichment; (2) an impoverishment; (3) a relationship between the enrichment and the impoverishment; (4) the absence of justification; and (5) the absence of a remedy provided by law.²⁸ However, since the Courts developed unjust enrichment as a theory of recovery to remedy the absence of a formal contract, the existence of an express, enforceable contract that controls the parties' relationship will defeat an unjust enrichment claim.²⁹

In Count IV of the Complaint, Plaintiff asserts a claim of breach of warranty. "A claim of failure to perform in a workmanlike manner is essentially an action for breach of an implied warranty."³⁰ "Delaware law recognizes an implied builder's warranty of good quality and workmanship."³¹ "This implied warranty arises by operation of law."³²

The law is clear that "where a person holds himself out as a competent contractor to perform labor of a certain kind, the law presumes that he possesses the requisite skill to perform such labor in a proper manner, and implies as a part of his contract that the work shall be done in a skillful and workmanlike manner."³³ The standard to be applied in determining whether the contractor's work was performed in a workmanlike manner is whether the party "displayed the degree of skill or knowledge normally possessed by members of their profession or trade in good standing in similar communities" in performing the work.³⁴

²⁸ *Total Care Physicians, P.A. v. O'Hara*, 798 A.2d 1043, 1056 (Del. Super. 2001).

²⁹ *Bakerman v. Sidney Frank Importing Co.*, 2006 WL 3927242, at * 18 (Del. Ch.).

³⁰ *Worcester County Development Co., Inc. v. Economos*, 2007 WL 2417338 at *4 (Del. Com. Pl. Aug. 15, 2007).

³¹ *Sachetta v. Bellevue Four, Inc.*, 1999 WL 463712, at *3 (Del. Super. June 9, 1999) (citing *Smith v. Berwin Builders, Inc.*, 287 A.2d 693, 695 (Del. Super. 1972)).

³² *Marcucilli v. Boardwalk Builders, Inc.*, 2002 WL 1038818, at *4 (Del. Super. May 16, 2002).

³³ *Bye v. George W. McCaulley & Son Co.*, 76 A. 621, 622 (Del. Super. 1908).

³⁴ *Shipman v. Hudson*, 1993 WL 54469, at *3 (Del. Super. Feb. 5, 1993).

Further, a “good faith attempt to perform a contract, even if the attempted performance does not precisely meet the contractual requirement is considered complete if the substantial purpose of the contract is accomplished.”³⁵

Further, the Superior Court of Delaware in *Grotto Pizza, Inc. v. Endecon*³⁶ held that the implied warranty theory does not apply to professional services and as such, a professional may not be sued under an implied warranty theory for merely providing professional services.³⁷

To prevail in a negligence action, “...a plaintiff must show, by a preponderance of the evidence, that a defendant’s negligent act or omission breached a duty of care owed to plaintiff in a way that proximately caused the plaintiff’s injury.”³⁸ Further, a finding of negligence by the defendant, standing alone, will not sustain an action for damages unless it is also shown to be the proximate cause of plaintiff’s injury.³⁹ “In Delaware, proximate cause is one which in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury and without which the result would not have occurred.”⁴⁰

³⁵ *Marcano v. Dendy*, 2007 WL 1493792 at *6 (Del. Com. Pl. May 22, 2007).

³⁶ *Grotto Pizza, Inc. v. Endecon*, 1997 WL 366904 (Del. Super. March 26, 1997).

³⁷ *Id.* At *3, *5.

³⁸ *Government Employees Insurance Company v. Antoinette*, 2009 WL 5667695 (Del. Com. Pl. Nov. 24, 2009) (citations omitted).

³⁹ *Id.*

⁴⁰ *Id.*

To recover on a claim of negligence in regards to the conduct of a professional, it is well established in Delaware law that “[a]s a general rule the standard of care applicable for a professional can only be established through expert testimony. An exception to the rule exists, however, when a professional’s mistake is so apparent that a layman, exercising his common sense is perfectly competent to determine whether there was negligence.”⁴¹

V. Discussion

The sole dispositive factual issue pending before this Court is whether Defendant used thread locker (lock tight) in the bolts during the installation of the exhaust system on Plaintiff’s motorcycle. Plaintiff conceded that the above issue is the sole fact in dispute in this case. On this issue, Plaintiff cannot prevail for a multitude of reasons. Plaintiff first discovered bolts missing from the exhaust system of the motorcycle almost two (2) years from the date of service by Defendant. Further, Plaintiff continued to patronize Defendant’s shop for service on the motorcycle numerous times after the installation of the exhaust system. During the subsequent services on Plaintiff’s motorcycle at Defendant’s shop, the testimony indicated that Plaintiff never brought the issue of missing bolts to Defendant’s attention. In addition, during the two (2) year period between service on Plaintiff’s motorcycle and the Plaintiff’s discovery of a missing bolt, Plaintiff had his motorcycle serviced at another dealership, Mike’s Famous Harley Davidson.

⁴¹ *Carey v. Guy A. DiSabatino & Associates*, 2009 WL 2778440 at *3 (Del. Com. Pl. June 5, 2009); See *Abegglan v. Berry Refrigeration, et. al.*, Del. Super., C.A. No. 03-08-061, Scott J. (Dec. 2, 2005) (Mem. Op.) (Expert testimony is necessary to establish negligence in regards to the proper procedures for repairing an ice machine).

Lastly, other causes may be to blame for missing bolts on Plaintiff's motorcycle as testimony revealed during trial, such as excessive vibration known to occur on Harley Davidson motorcycles and an accident. Plaintiff experienced an accident between the time of service at Defendant's shop and discovery of the missing bolts in which the motorcycle was dropped on its side.

In addition, Norris' testimony indicated that he in fact used lock tight in the installation of the exhaust system on Morini's motorcycle. Further, Carlson testified that there were one or two bumps on the thread of the bolt and could not definitely state that the bumps were not lock tight. Carlson stated that the bumps could be lock tight or dirt, or in his words, he was "unsure what the substance was." Plaintiff's fact witness could not conclude that lock tight was not used by the Defendant during the installation. The other three (3) bolts on Plaintiff's motorcycle were secured with lock tight. During the in-camera inspection conducted by the Court, Carlson could not conclude that lock tight was not used on the bolt, in fact Carlson could not rule out what the substance was in the threads. There is simply no argument present that but-for the Defendant's work on the motorcycle that the transmission cracked.

Plaintiff asserted four causes of action as a basis for recovery. The Court will discuss each of these claims in turn and why each claim must fail.

Count I: Breach of Contract

There is no doubt in the Court's view of the documentary and testimonial evidence presented at trial that a contract for installation of the exhaust system existed between the parties. Neither party disputes the existence of a valid contract between the parties.

Norris performed the installation in a workmanlike manner in accordance with common industry standards, specifically he used lock tight to seal the bolts. The testimony indicates that lock tight was used. Morini paid Norris for the work that he had performed. Thus, the contract was fulfilled and no breach had occurred. When Morini brought the issue to Norris's attention, Norris offered to repair what Morini believed to be wrong with the motorcycle. However, Morini insisted that Norris perform the work free of charge. Norris believed Morini's request to be unreasonable in the respect that he originally installed the exhaust system approximately two years prior. Finally, Plaintiff has failed to establish damages as a result of a breach of contract. There was no breach of contract. Plaintiff alleges that he suffered damages in that he expended payment to Carlson to correct the exhaust system. However, Carlson performed the work requested by Morini approximately two years after Norris installed the exhaust system. Other causes for what Morini believed to be attributable to Norris existed during that time period such as service on the motorcycle by another mechanic, vibrations known to be a trademark of Harley Davidson motorcycles and an accident in which the motorcycle was dropped on its side.

Count II: Breach of the Implied Covenant of Good Faith and Fair Dealing

At trial, Morini failed to present evidence that Norris's work fell below the relevant standard of performance. Norris possessed the skill and knowledge of a competent professional in his field. Norris's profession was to repair motorcycles, specifically Harley Davidson motorcycles. Norris performed the installation in a workmanlike manner in accordance with common industry standards, specifically he used lock tight to seal the bolts.

The testimony indicates that lock tight was used. Plaintiff's witness, Carlson, confirmed that lock tight was used in the other bolts. Further, Mike's Famous Harley Davidson, to which Plaintiff utilized after Norris performed the work, failed to uncover an issues related to the installation of the exhaust system. Norris acted reasonably in the installation and made a good faith effort to perform as such. Furthermore, the overall purpose of the contract was achieved: Morini had the exhaust system installed on his motorcycle in which he experienced no issues regarding such for approximately two years. Morini also failed to offer any credible evidence for the alleged breach of implied warranty, or damages related to such.

Count III: Unjust Enrichment

Plaintiff's unjust enrichment theory is an inappropriate remedy and must fail by failure to establish at trial his claim by a preponderance of the evidence. Plaintiff has suffered no impoverishment as he received what he bargained for – the installation of the exhaust system on his motorcycle to which he experienced no issues with almost two years.

Count IV: Breach of Warranty

It is clear that Defendant held itself out to possess the requisite skill to competently perform the installation of the exhaust system on the motorcycle. Thus, the Court finds that Defendant's work is covered by the implied warranty of good quality and workmanship. The remaining issue pending before this Court is whether Defendant breached the implied warranty of good quality and workmanship.

The Court concludes that Plaintiff has not proven by a preponderance of the evidence that Defendant's performance would not satisfy a reasonable person. The Court heard testimony from Norris and Morini. Norris testified that working on motorcycles is "all he has ever done" and that he performed the work on Morini's motorcycle in accordance with common industry standards. Morini testified that he considered Norris to be the "bees' knees" in the area of motorcycle service and took his motorcycle to Norris's shop because he believed Norris to be the best in the area. Further, Morini continued to be satisfied with Norris's work as he returned to Norris on several subsequent occasions for service on his motorcycle. During those occasions, Morini never lodged any complaints about missing bolts or loose bolts with Norris.

Therefore, the Court finds that there was no breach of warranty for good quality and workmanship because the Defendant installed the exhaust system in a workmanlike manner in accordance with industry standards and performed such work in a manner that would be satisfactory to a reasonable person. Morini has not presented sufficient evidence to rebut the evidence in the record of proper installation.

Negligence

Plaintiff argued that it would not take an expert or an inspection using the borescope to determine that lock tight was not used in the bolt.

The Court concludes that in the present case, a layman is not equipped with the expertise to determine if lock tight was used on the threads of the motorcycle. Without an expert to testify as to the direct cause that a bolt failed on the motorcycle the Court is left to speculate in determining whether Norris exercised the proper standard of care in the installation of the exhaust system or whether Norris acted in a negligent manner.

Thus, as the alleged mistake made by Norris is not a mistake so apparent that a layman exercising his common sense would be able to determine if the defendant was negligent, in the absence of expert testimony as well as no causal connection can be established between the damage to Morini's motorcycle and the conduct of Norris, a finding of negligence by this Court would be mere speculation. As Morini has failed to produce an expert to offer such expertise, he has failed to establish a *prima facie* case of negligence. Even if this Court were to conclude that such expert testimony is not required in the instant record, or was not necessary and lay witness testimony was competent, this Court concludes that Plaintiff has failed to prove by a preponderance of the evidence both causation and damages. If the expert testimony is required, which the Court so finds, the Court also finds that the trial testimony did not consist of a *diminimus quantum* of evidence on the issue of damages or causation.

Plaintiff cited his witness, Carlson, as an expert in motorcycle repair; however, this Court considers Carlson's testimony under *Delaware Rules of Evidence Rule 701: Lay Witness* due to the fact that Plaintiff never moved to qualify Carlson as an expert witness. Carlson, whose testimony was considered by this Court under *Delaware Rules of Evidence Rule 701: Lay Witness* and who was termed as "an expert" by the Plaintiff, could not conclusively state that lock tight was not used in the bolt. Even if Morini had produced an expert witness, this Court would conclude that Norris did not commit a breach of the standard of care as Norris completed the work on the motorcycle in a workmanlike manner in accordance with industry standards.

VI. Opinion and Order

Based on the foregoing facts and analysis discussed *supra*, the Court finds that Plaintiff has not proven that it is more likely than not that Defendants breached any warranty nor breached the standard of care to perform work in a workmanlike manner and has failed to meet its burden of proving all elements of its claims by a preponderance of the evidence.

Defendants' Motion for Summary Judgment is now moot. The Plaintiff has failed to establish liability on the part of the Defendants by a preponderance of the evidence. Therefore, no judgment is entered against any entities and the Court enters judgment in favor of the Defendants. Each party shall bear their own costs.

IT IS SO ORDERED THIS 7th DAY OF DECEMBER, 2010.

John K. Welch
Judge