SUPREME COURT OF FLORIDA

CAROLE M. SIEGLE,

Plaintiff/Petitioner **CASE NO.: SC01-1219**

v.

Lower Tribunal No.: 4D00-1503

PROGRESSIVE CONSUMERS INSURANCE COMPANY,

Defendant/Respondent.
_____/

PETITIONER'S INITIAL BRIEF ON THE MERITS

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STATEMENT OF THE CASE

Petitioner filed her Second Amended Complaint on February 21, 2000. Alleging that Respondent failed to repair Petitioner's vehicle to like kind and quality as required by Respondent's insurance policy contract. (Record on Appeal, hereinafter "Record" p. 142 ¶ 13) Petitioner further alleged that when Progressive returned her vehicle after electing to repair it, her vehicle had diminished in value $2677.19 because of the accident and repairs. (Record p. 142 ¶13) Respondent filed a Motion to Dismiss Petitioner's Complaint which was heard by the trial court on March 8, 2000. The court announced its intention to Dismiss the cause[1] and on March 29, 2000 signed an Order Granting Respondent's Motion to Dismiss Petitioner's Second Amended Class Action Complaint and Final Order of Dismissal with Prejudice. (Record p. 610-611)

Petitioner appealed the trial court's decision to the Fourth District Court of Appeal. The Fourth District Court heard oral argument and entered its original order on May 2, 2001 ruling against Petitioner. Petitioner promptly filed a Notice to Invoke Discretionary Jurisdiction. The Fourth District Court *sua sponte* replaced its order dated May 2, 2001 with an order dated June 12, 2001. The only substantive changes

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1. See the transcript of the March 8, 2000 hearing in Volume 3 of the Record at p. 13:1-5 and 14-21 of the transcript.

were the removal of the statement "that there is no Florida case squarely on point" and the addition of the citation to Rezevskis v. Aries Ins. Co., 26 Fla. L. Weekly D725 (Fla. 3d DCA March 14, 2001). The June 12, 2001 order prompted Petitioner's filing an Amended Notice to Invoke Discretionary Jurisdiction.

SUMMARY OF ARGUMENT

Petitioner maintains that Florida law recognizes an insured's right and an insurer's liability to reimburse its policyholder for the loss in value experienced when an insured automobile is damaged, repaired and returned, and has a value less than the pre-accident value. As Petitioner alleged in her Second Amended Complaint, "[a]fter the vehicle was repaired to the best of human ability, SIEGLE discovered that it had not been repaired to 'like kind and quality' as provided for in the contract." (Record p. 142 ¶ 13). Respondent had the opportunity through their contract of adhesion to exclude recovery of diminution in value, but chose not to do so. Diminished value is the loss in value suffered by a vehicle, which is attributable to the fact that certain types of car damage, even when the repair is correctly performed, will leave remaining physical damage and evidence of an accident having occurred and a repair having been made.

Respondent elected to pay to repair the vehicle to "like kind and quality" even though it knew that Petitioner's vehicle had sustained frame damage that could not be

fully repaired. Petitioner contends that by electing this option, Respondent became obligated to repair her vehicle and compensate her for any remaining irreparable damage.

By granting Respondent's Motion to Dismiss, the trial court necessarily found that Respondent's policy *expressly and unambiguously* relieved it of any obligation to pay Petitioner for the entire loss to her vehicle, including the substantial loss resulting from damages *incapable* of repair.

Respondent's insurance policy contract does not specifically address the issue of diminution in value. Additionally, Respondent does not define key words in its policy contract such as "repair," "replace" or "like kind and quality." This failure creates an ambiguous insurance policy contract requiring the court to interpret the contract and give it meaning. Under Florida law, ambiguities in an insurance policy contract are resolved in favor of the broadest coverage. Therefore, the Petitioner and all others similarly situated are entitled to reimbursement for the difference between the value of their vehicles immediately prior to a covered accident and the value of their vehicles after the vehicle is repaired and returned.

JURISDICTION AND STANDARD OF REVIEW

The Fourth District Court of Appeal's final opinion affirmed the trial court's order granting Respondent's Motion to Dismiss in LT Case No. CACE 99-5529-21,

and certified the following question to the Florida Supreme Court as one of great public importance:

> "Does an automobile collision policy which provides that the insurer must repair or replace the damaged vehicle 'with other of like kind and quality' obligate the insurer to compensate the insured in money for any diminution in market value after the insurer completes a first-rate repair which returns the vehicle to its pre-accident level of performance, appearance and function?"

The jurisdiction of the Florida Supreme Court is invoked pursuant to Fla. R. App. P. 9.030(a)(2)(A)(v) which permits a party to seek review of a district court of appeal's decision that "pass[es] upon a question certified to be of great public importance."

Appellate review of an order dismissing a complaint is limited to whether the complaint states a cause of action and is therefore a question of law. W.R. Townsend Contracting, Inc. v. Jensen Civil Const., Inc., 728 So. 2d 297, 300 (Fla. 1st DCA 1999). The lower court's rulings on matters of law are subject to *de novo* review on appeal. Id. at 300, citing Sarkis v. Pafford Oil Co., Inc., 697 So. 2d 524, 526 (Fla. 1st DCA 1997)

ARGUMENT

I. THE CONCEPT OF DIMINISHED VALUE IS NEITHER UNIQUE NOR FOREIGN TO AMERICAN JURISPRUDENCE OR FLORIDA JURISPRUDENCE.

A. Florida law recognizes that when an insurer elects to repair or replace to like kind and quality, the vehicle must be restored to its pre-loss appearance, function and value.

Florida law has specifically addressed the issue of diminished value. Under the heading "Election by Insurer to Repair, Rebuild, or Replace Insured Property," Florida Jurisprudence reads in pertinent part:

> If there has been a timely and unequivocal exercise by the insurer of its option to repair, **the insurer becomes obligated to so restore the damaged property that when it is returned to the insured, the function, appearance, and value are substantially the same as they were immediately prior to the loss.** Thus, where proposed repairs would not restore a vehicle to substantially the value and condition existing prior to accident, and the insurer seeks a release of liability for any diminution in the value of the vehicle, the insured may justifiably refuse the proposed repairs and release and is entitled to damages for the loss of the vehicle.

31A Fla.Jur.2d Insurance § 3389 (1996) (citations omitted) (emphasis added).

Florida courts have acknowledged that actual damages may exist where an insurer offers to repair the insured's covered vehicle, but the repairs cannot restore the vehicle to its pre-loss value. See Auto-Owners Ins. Co. v. Green, 220 So. 2d 29 (Fla. 1st DCA 1969) and Arch Roberts & Co. v. Auto-Owners Ins. Co., 305 So. 2d 882

(Fla.1st DCA 1974). Furthermore, the Fourth District recognized that there may be a reduction in the market value of an automobile simply because it had been in a collision, and specifically referred to this reduction as "diminished value." Fort Lauderdale Lincoln Mercury, Inc. v. Corgnati, 715 So. 2d 311, 314 (Fla. 4th DCA 1998).

The insured's vehicle in Auto-Owners Ins. Co. v. Green, was driven into a telephone pole which broke and fell across the top of the insured's new Lincoln Continental. Green, 220 So. 2d at 29. The insurance company elected to repair the vehicle rather than replace it. The applicable insurance contract provided that:

> The Company shall not be liable beyond the actual cash value of the property insured at the time any loss or damage occurs, and such loss or damage shall be ascertained accordingly with proper deduction or depreciation however caused . . . and shall in no event exceed what it would then cost to repair or replace the property, or such parts thereof as may be damaged with other of the like kind and quality. . . . .
>
> The Company may at its option, either repair or replace any part or all of the property upon which loss is claimed or pay to the assured in money the full amount of such loss as determined in accordance with the provisions of this policy, subject however, to such deduction, if any, as may be applicable thereto.

Pursuant to the above cited policy, the insurer chose to repair the vehicle and sought to exact a release from the insured. The insurance company's position was that

"upon electing to repair, its obligation was satisfied by having the car repaired." Id. at 32. However, the Green Court ruled in favor of the insured finding that:

> The evidence here was that this almost new car had sustained a major accident and that Green (the insured) was justified in refusing to authorize the insurance company to have North Florida Motors repair same because North Florida admitted that its proposed repairs would not restore the car to substantially the value and condition existing prior to the accident. Id.

The trial court had heard testimony from automobile repairmen that the vehicle "could be rebuilt or repaired but it would never be the same car as before the accident." Id. at 31.

In Arch Roberts and Co. v. Auto-Owners Ins. Co., supra, the court applied the same law but reached a different result based on the actions of the insurance company. The insurance company in Arch offered to repair the damaged vehicle pursuant to the same policy option cited in Green. However, in Arch, the company offered to repair the vehicle and offered to pay "any overlooked or unforeseen damages." Id. at 883. The insured refused to allow the insurance company to repair the vehicle as in Green. The Arch Court ruled in favor of the insurance company finding that:

> Under the policy, Respondent (Auto-Owners) had the option to repair the automobile which it elected to do. Upon making that election it was then obligated to restore it to substantilly [sic] the same condition as to function, appearance and value as existed before the accident.

> **Should it fail to do so, it would then be liable to the owner for its value immediately prior to the accident.**

Id. at 884 (emphasis added).

In 1998, the Fourth District specifically addressed the issue of a vehicle's "diminished value" resulting from its involvement in an accident and the consequential damages arising therefrom. Fort Lauderdale Lincoln Mercury, Inc. v. Corgnati, supra. Corgnati purchased a used automobile from Lauderdale Lincoln Mercury with the assurance that the automobile had not been in an accident. After Corgnati purchased the automobile, he learned that the automobile had been in an accident and had consequently been repainted. Corgnati sued Lauderdale Lincoln Mercury under Florida's Deceptive and Unfair Trade Practices Act for damages. Corgnati provided testimony regarding the market value of the vehicle assuming it had not been involved in an accident, but failed to provide testimony regarding the value of the vehicle he actually received. The Corgnati court found that Corgnati "failed to sustain his burden of demonstrating the market value of the car, a limited production vehicle, in its **diminished value**, assuming an accident, in order for the trial court to ascertain his actual damages." Corgnati, supra at 314 (emphasis added). While the court returned the case to the trial court for a determination of damages, it upheld the trial court's finding that Lauderdale Lincoln Mercury was liable to Corgnati for the

difference in market value of an automobile not involved in an accident as compared to the automobile Corgnati received, which was involved in an accident.

Petitioner maintains that Florida law requires an automobile insurance company to restore the insured vehicle to its appearance, function and value that it had immediately prior to a covered accident. This value, as demonstrated by the aforementioned case law, includes any value by which the vehicle is diminished after having been involved in an accident; repaired with other of like kind and quality; and returned to the insured.

B. The Florida Department of Insurance recognizes the insurer's duty to compensate its insureds for loss in value.

The Florida Department of Insurance has specifically addressed the issue of an insurance company's liability for payment of diminished value in Informational Bulletin 84-270 issued on December 31, 1984. (Record p. 498) Then Insurance Commissioner Bill Gunter issued the Bulletin to "All Companies Authorized to Write Motor Vehicle (Automobile) Insurance in Florida." The Bulletin reads in pertinent part:

> The responsibility of the insurance company for automobile accident damages is the substantial restoration of the automobile as to function, appearance, and value. **The owner has not been properly indemnified unless there is no diminution in value of the automobile as it was before the damage and as it is after repairs.** (Emphasis added.)

Upon reading Bulletin 84-270, one cannot dispute Florida's policy regarding an insurance company's liability for payment of diminished value. As previously discussed, Respondent uses its model policy in each state but makes state specific changes based on specific laws and regulations in effect in the particular state. While the model policy contract includes a specific exclusion for diminished value liability, Respondent removed the limit of liability for diminished value in its Florida policy contract. It is this contract that is at issue in the cause before this Court. The logical inference drawn from Respondent's removal of the specific exclusion of diminished value liability is that Florida requires, and therefore Respondent provides, diminished value recovery to its Florida policyholders.

C. The majority of jurisdictions in the United States recognize the insurer's duty to compensate the insured for diminution in value experienced after the vehicle is repaired and returned.

Many jurisdictions nationwide have addressed the issue of whether an insurer is responsible to the insured for loss of value in the vehicle when the insurer elects to repair the vehicle with other of like kind and quality. The majority of the jurisdictions have held that the insurer ***is*** required to restore the insured's vehicle to its pre-loss value when the insurer elects to repair the vehicle with other of like kind and quality.[2]

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2 See *Delledone v. State Farm Mutual Automobile Ins. Co.*, 621 A. 2d 350, 353 (Del. 1992); *MFA Ins. Co. v. Citizens Nat'l Bank of Hope*, 545 S.W.2d 70, 71-72 (Ark. 1977); *U.S. Surgical Corp. v. U.S. Fire Ins. Co.*, 1990 WL 277471 (Conn. Super. 1990); *Hartford Fire Ins. Co. v. Rowland*, 351 S.E.2d 650, 652 (Ga. Ct. App. 1986); *Dodson Aviation, Inc. v. Rollins, Burdick,*

The Superior Court of Delaware interpreted the same policy language at issue in the case before this Court regarding the election to repair with other of like kind and quality in Delledone v. State Farm Mut. Auto. Ins. Co., 621 A.2d 350, 353 (Del. 1992) and reasoned as follows:

> It is the view of this Court that the susceptibility of the policy language in dispute in the instant case to two or more reasonable interpretations is evidenced by the development of two distinct lines of authority in the interpretation of similar policy language. In one camp of construction, the courts have held that policy language requiring the insurer to "repair or replace" the property "with like kind and quality" limits the insurer's duty to repair the vehicle to substantially the same physical/operating condition as before the damage. (Citations omitted) This Court finds the better view to be that of the majority of jurisdictions, however, which hold that an insurer's provision to "repair or replace" a vehicle or its parts with "like kind and quality," requires that the insurer pay for diminution in value. (Citations omitted) The underlying rationale for these decisions is essentially that in the context of an insurance contract, the words "repair or replace" with "like kind and quality" mean the restoration of the vehicle to substantially the same condition as prior to the damage; and restoration to such condition can not be said to have been effected if the repairs fail to render the vehicle as valuable as before.

Hunter of Kansas, Inc., 807 P.2d 1319, 1320 (Kan. Ct. App. 1991); *Romco, Inc. v. Broussard*, 528 So. 2d 231, 234 (La. App. 3d Cir. 1988); *Potomac Ins. Co. v. Wilkinson*, 57 So. 2d 158, 160 (Miss. 1952); *Williams v. Farm Bureau Mut. Ins. Co. Of Missouri*, 299 S.W.2d 587, 589 (Mo. Ct. App. 1957); *Edwards v. Maryland Motorcar Ins. Co.*, 197 N.Y.S. 460, 461 (NY S. Ct., App. Div. 1922); *Dunmire Motor Co. v. Oregon Mut. Fire Ins. Co.*, 114 P.2d 1005, 1009 (Ore. 1941); *Campbell v. Calvert Fire Ins. Co.*, 109 S.E.2d 572, 576-577(S.C. 1959); *Grubbs v. Foremost Ins. Co.*, 141 N.W.2d 777, 779 (S.D. 1966); and *Senter v. Tennessee Farmers Mut. Ins. Co.*, 702 S.W.2d 175, 178 (Tenn. Ct. App. 1985).

The Supreme Court in South Carolina addressed the same issues currently before this Court and held that:

> [W]here there is a partial loss and the automobile can be repaired and restored to its former condition and value, the cost of repairs is the measure of liability, less any deductible sum specified in the policy. But if, despite such repairs, there yet remains a loss in actual value, estimated at the collision date, the insured is entitled to compensation for such deficiency.

Campbell v. Calvert Fire Ins. Co., 109 S.E.2d 572, 576-577 (S.C. 1959).

D. The Third and Fourth District Courts of Appeal decisions on this issue are not as well-reasoned as the majority position.

The Third District Court of Appeal addressed the issue of "diminished value" in Rezevskis v. Aries Ins. Co., 26 Fla. L. Weekly D275, (Fla. 3rd DCA March 14, 2001). The Rezevskis court did not provide an analysis of the requirement to "repair or replace with like kind and quality." Neither did the court address the notion that Florida law requires the insured to restore a vehicle to substantially the same appearance, condition and value when the insured elects to repair the vehicle. Thus the Rezevskis case provides little guidance.

The Fourth District Court of Appeal in its opinion in the case before this Court acknowledged that the resolution of the meaning of "repair or replace with like kind and quality" is a matter of great public importance as it effects nearly every citizen in the state of Florida carrying property insurance coverage. However, Petitioner

submits that the position taken by a majority of other jurisdictions is the better reasoned result.

In the Fourth District Court's analysis of the Arch Roberts and Green cases discussed above, the court focused upon the fact that these cases "did not require the panel to decide whether the insurer must repair and compensate for any inherent diminished value." (Order p. 3) However, the significance of Arch Roberts and Green is the courts (and in Arch Roberts the parties') recognition that the contractual language allowing the company to elect to repair the vehicle with that of like kind and quality requires the restoration of the vehicle as to appearance, condition and **value**.

The Fourth District Court then analyzed the meaning of the words repair, kind, quality and accident, but never addresses the term "like" nor the Respondent's agreement to "pay for the loss to your insured vehicle." (Record p. 162) The phraseology being interpreted in the insurance policy contract is "like kind and quality." The term "like" qualifies the phrase "kind and quality." Websters New American Dictionary, 1995, defines the term "like" as "similar, alike, analogous, comparable, parallel, uniform." If the value of the repaired vehicle is diminished from its pre-loss value, then the repair did not make the vehicle analogous, alike or parallel to the vehicle prior to the accident. Therefore, the insurer has not repaired the vehicle to like kind and quality or returned the vehicle to its pre-loss condition.

Finally, the Fourth District Court acknowledges that the Respondent's insurance policy allows the company to either (1) pay the actual cash value of the damaged property, (2) replace the property with other of like kind and quality, or (3) repair the property with other of like kind and quality. However, to adopt the Fourth District Court's reasoning, only two of the three options would fully restore the insured to his pre-loss condition. The only option above that would not fully restore the insured to his or her pre-loss condition, under the Fourth District Court's theory, is the option to repair the vehicle to like kind and quality. The better reasoned approach and interpretation is that the insured must be restored to his or her pre-loss condition under any of the insurer's options.

II. PROGRESSIVE'S POSITION ON DIMINISHED VALUE

Respondent has acknowledged the existence of the diminished value theory of damages internally as well as publically. Respondent's designated representative specifically identified the concept of "diminished value" in a recent proceeding. When asked to define diminished value under oath and at deposition, Jeffrey Nash, Respondent's in-house counsel, testified as follows:

> In the context of first party claim [it] would be the difference in the fair market value of a vehicle when comparing its value before the - - before loss and its value after there has been a proper workman like repair.

(Record p. 210 Lines 12-16).[3]

Brian Brylinski, Respondent's designated representative for a discovery deposition in the Delaware case referenced above testified that he works in "corporate claims." (Record p. 305 line 19). When asked to define diminished value, Mr. Brylinski responded as follows:

> Diminished value is a theory that inherently when a vehicle is damaged, no matter how well it is repaired, that the market value of the property after the loss is less than the market value of the property before the loss.

(Record p.332 lines 9-13).

Furthermore, while Respondent argues that Petitioner has created the term "diminished value," Respondent uses the term in its model policy. Respondent creates a model auto insurance policy and uses the model in all subsidiaries in each state with only state specific changes based upon the laws and regulations governing automobile insurance in each state. (Record pp. 207-208) The model policy states, "coverage under this part. . . does not apply for loss 'to a covered vehicle, non-owned

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3. Jeffrey Nash, Policy Compliance Attorney for Progressive Casualty Insurance Company, was offered by the company and was deposed during the discovery process pursuant to a Federal Rule of Civil Procedure 30(b)(6) as "The person with the most knowledge regarding the policy language of the contracts in the various states . . ." on January 19, 2000. The deposition took place in O'Brien, et al. v. Progressive North Insurance Company, C.A. No. 99C-05-33 (VAB), which is pending in the Superior Court in New Castle County, Delaware. (Record pp. 201-297)

vehicle, or trailer, for **diminution in value**." (Record p. 228 lines 3-6) (Emphasis added.) This language has remained the same throughout the changes made to the model policy over the years. (Record p. 229 lines 1-3) Furthermore, Mr. Nash described the reason for adding this specific exclusion for diminished value to the model policy as follows:

> The [original] contract did not cover diminution of value, and I had recalled from the time period when I had handled claims having had occasion to look at some cases and in those couple of cases the courts discussed whether or not diminution of value was covered in those states and left me with the belief that if these claims were made it would be easier to resolve those claims if there was an exclusion that said this.

(Record p.228 lines 11-19)

Respondent's Counsel, responsible for supervising the attorneys who draft Respondent's model policy contract language, has testified under oath that Respondent knew that the claim for damages for diminished value exists and drafted model language to specifically exclude diminished value as described above. This is of particular importance as the policy contract that Petitioner and Respondent agree is at issue in the cause before this Court does not contain the specific exclusion for coverage of "diminution of value." Respondent knows that Florida requires payment of diminution in value as evidenced by the following exchange regarding discussions about diminished value with insurance regulators:

Q. Had you excluded it (diminished value liability) at the time you had the discussion with him?

A. It was in a proposed but not yet approved or adopted form.

Q. Any other parts to that discussion other than did you exclude it? Is that all he asked you?

A. That's all he asked me.

Q. Is that all you discussed with him?

A. No.

Q. What else did you discuss (sic) him?

A. **He asked me to take it out**.

Q. Did you?

A. **After doing the research in that state, yes.**

Q. What state was that?

A. **That was Florida.**

(Record p.64 lines 4-18). (Emphasis added.)

Finally, Respondent has admitted that it pays first party diminution in value claims in Florida. (Record pp. 274-275).

III. RESPONDENT'S INSURANCE POLICY CONTRACT DOES NOT EXCLUDE RECOVERY FOR DIMINISHED VALUE.

Respondent's insurance policy provides that "[I]f you pay a premium for collision coverage, we will pay for loss to a covered vehicle . . . ." (Record p. 162) Respondent defined the term loss as follows, "'**Loss**' means direct and accidental loss of or damage to your insured auto, including its equipment." (Record p. 162) Loss in value is a loss covered under the policy contract. Respondent did not exclude recovery for loss in value from the definition of "loss" and Respondent's duty to reimburse its insureds for the loss in value pursuant to a covered accident or incident is apparent from a review of its contract language.

As set forth above, Respondent's policy provides that "if you pay a specific premium for Auto Damage Coverage, we will pay for the loss to your insured auto. . ." (Record p. 162) The company further explains how it will pay the insured for the loss as follows: "We may pay the loss in money or repair or replace damaged or stolen property with other of like kind and quality." (Record p. 162) Finally, Respondent's policy provides:

> Our limit of liability for loss shall not exceed the lesser of:
>
> 1. The actual cash value of the stolen or damaged property less the applicable deductible shown in the Declarations;
>
> 2. The amount necessary to repair or replace the property with other of like kind and quality less the applicable deductible shown in the Declarations; or
>
> 3. The amount stated in the Declarations page of this policy.

(Record pp. 164-165) The third paragraph above refers to a contractual cap on the amount of damages the insured will pay and the insurer agrees to accept. Neither Petitioner nor Respondent have argued that this option applies to this case. Therefore, Respondent has three options on how to reimburse the insured for an experienced loss. Paragraph one provides payment of the actual cash value of the damaged or stolen property, thereby making the insured whole by reimbursing the insured for the full extent of the loss experienced. Paragraph two provides two additional options from which the Respondent may choose. Respondent can replace the damaged or stolen property with other of like kind and quality, thus restoring the insured to his or her position immediately before the loss. Finally, Respondent can choose to repair the damaged or stolen property with other of like kind and quality. Without limiting this option further, repairing with other of like kind and quality necessarily contemplates returning the insured to his or her position immediately prior to the accident. The only caveat Respondent placed upon its responsibility under any option is that the amount is "less the applicable deductible." Had Respondent intended to excluded payment of the difference between the value of the vehicle immediately prior to the accident and the value of the vehicle after it was repaired, Respondent could have specifically excluded liability for that difference, as other insurance companies have done. Respondent's option to pay the insured the actual cash value of the vehicle or to

replace the vehicle with other of like kind and quality necessarily contemplate the value of the vehicle immediately prior to the accident. There is no logical reason to presume that Respondent's third option of repairing the property with other of like kind and quality ignores the value of the damaged vehicle immediately prior to the loss. Additionally, the Limits of Liability expressly require the company "to repair or replace the property with other of like kind and quality." Petitioner specifically alleged in her Second Amended Complaint that Respondent failed to repair or replace her property with other of like kind and quality. (Record p. 142 ¶ 13).

IV. FLORIDA LAW AND CONTRACT INTERPRETATION

A. Ambiguities in an insurance contract are liberally construed in favor of the insured.

Respondent's insurance policy contract language is ambiguous. Respondent alone drafted its insurance policy contract language and yet chose not to define any of the relevant terms in its Limits of Liability. For example, as cited above, Respondent allows itself the option of repairing or replacing the damaged property with other property of like kind and quality. (Record p. 165) Nowhere in Respondent's thirty (30) page contract does the Respondent define the terms "repair," "replace" or "like kind and quality." By choosing not to define these terms in its

contract, Respondent has created ambiguities leaving interpretation of Respondent's contract language to the courts.

Florida law is well settled regarding ambiguities in insurance policy contracts. "Ambiguities are interpreted liberally in favor of the insured and strictly against the insurer who prepared the policy." Prudential Property and Cas. Ins. Co. v. Swindal, 622 So. 2d 467, 470 (Fla. 1993), citing Gulf Life Ins. Co. v. Nash, 97 So. 2d 4 (Fla. 1957); Stuyvesant Ins. Co. v. Butler, 314 So. 2d 567 (Fla. 1975) and Poole v. Travelers Ins. Co., 130 Fla. 806, 179 So. 138 (1937). Therefore, "[i]f the insurer fails in the duty of clarity by drafting an exclusion that is capable of being fairly and reasonably read both for and against coverage, the exclusionary clause will be construed in favor of coverage." Westmoreland v. Lumbermens Mut. Cas. Co., 704 So. 2d 176, 179 (Fla. 4th DCA 1997).

B. Specific and clear insurance contract language is strictly construed against the insurer.

Respondent cites case law in its Motion to Dismiss for the proposition that "where an insurance contract contains a clearly stated exclusionary provision, such a provision will be interpreted in accordance with its plain meaning and will be upheld." Liberty Mut. Ins. Co. v. Capeletti Bros., Inc., 699 So. 2d 736, 738 (Fla. 3d DCA 1997), citing Hawk Termite & Pest Control, Inc. v. Old Republic Ins. Co., 596 So. 2d 96 (Fla. 3d DCA 1992). Petitioner agrees that this is an accurate statement of the law

under the circumstances set forth in these cases. However, in both Hawk and Liberty Mut., the insurance companies had clearly defined exclusions applicable to the cases before the courts. In Hawk, a homeowner sued Hawk Pest Control for negligence in their failure to properly exterminate resulting in damages to the home. Hawk Pest Control brought an action seeking declaratory relief establishing Hawk's rights under its insurance contract. The court in Hawk cited the following

insurance policy language:

> [L]ack of performance by or on behalf of the named insured of any contract or agreement, or the failure of the name [sic] insured's products or work performed to meet the level of performance, quality, fitness or durability warranted or represented by the named insured.

The Hawk court found that the insurance company was not liable because this language *specifically excluded* coverage for the insured's negligence where the negligence was based on poor workmanship. Id. at 97.

Similarly in Liberty Mut., supra, the court relied upon very specific language in defining the insurance company's limited liability. Liberty Mutual Insurance Company issued a commercial liability insurance policy to subcontractor Community Asphalt Company. Respondent, Capeletti, a general contractor, hired Community Asphalt to provide services on a project. Capeletti was ultimately sued for negligence arising from injury to the passenger in a vehicle involved in an accident in the

construction area where Capeletti was working. The court found that the insurance company was not liable because the following language specifically excluded this type of coverage for Capeletti:

> Additional Exclusions. This insurance does not apply to:
>
> (3) "Bodily injury" or "property damage" arising out of any act or omission of the additional insured(s) or any of their employees, other than the general supervision of work performed for the additional insured(s) by you.[4] Id. at 737.

Hawk and Liberty Mut. are distinguishable from the cause before this Court. The insurance companies in these two cases included very explicit exclusionary language protecting themselves from specific liability. Respondents in the case at bar could have included language specifically excluding its liability for the loss in value of the damaged vehicle. Respondent exercises complete and sole control over the language in its insurance policy contracts. These contracts of adhesion provide the insured no opportunity to negotiate the terms of the contract other than the amount of premiums to be paid. Respondents could have specifically excluded coverage for loss in value in its Limits of Liability section of the Policy contract, but did not. It is well settled in Florida law that coverage clauses in insurance policy contracts are "construed in the broadest possible manner to effect the greatest extent of coverage"

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4. Community Asphalt's insurance policy contract defined Capeletti as an "additional" insured.

while exclusionary clauses are strictly construed. Westmoreland, supra at 179. The Fourth District expounded upon this rule as follows:

> Thus, the current Florida rule is that strict construction is required of exclusionary clauses in insurance contracts only in the sense that the insurer is required to make clear *precisely* what is excluded from coverage.

Id. at 179, quoting State Farm Fire & Cas. Ins. Co. v. Deni Assoc. of Florida, Inc., 678 So. 2d 397, 401 (Fla. 4th DCA 1996), rev. granted, 695 So. 2d 699 (Fla. 1997).

V. THE DIFFERENCE BETWEEN THE VALUE OF THE INSURED'S VEHICLE IMMEDIATELY PRIOR TO A COVERED ACCIDENT AND THE VALUE OF THE VEHICLE AFTER IT IS REPAIRED AND RETURNED IS AN ACTUAL LOSS.

As set forth above, Respondent defines the term "loss" in its insurance policy contract as "direct and accidental loss of or damage to your insured auto, including its equipment." (Record p. 162) The use of the term loss to define the term loss is not clearly defined. Therefore, the common usage determines the meaning. Nateman v. Hartford Cas. Ins. Co., 544 So.2d 1026, 1028 (Fla. 3d DCA 1989), *rev denied*, 553 So.2d 1166 (Fla. 1989). **New Webster's Dictionary**, 1993, defines "loss" in pertinent part as follows, "the financial detriment suffered by an insured person as a result of damage to property, theft, etc." The definition of the term "loss" therefore contemplates the loss in value as damage that the insured suffered. The loss, the instant after the accident and repair includes the loss in value, i.e. the difference

between the pre-accident and post accident value of the car. The remainder of such loss after repairs remains compensable pursuant to the subject contract. Since the policy herein does not specifically exclude loss in value, it requires Respondent to compensate Petitioner, and all others similarly situated for the entire loss.

Loss in value is part of the entire loss. The loss in value occurs when the vehicle is damaged and cannot be repaired in a manner that restores the value of the vehicle to its pre-loss value. Although repairs may reduce loss, they may not eliminate it. Not every type of damage will necessarily result in a difference between the value of the vehicle immediately prior to the accident and that after repairs are completed. Petitioner specifically included only damage not completely repairable in her definition of the proposed class in this case.

> All residents of the State of Florida who were insured pursuant to a casualty automobile insurance policy issued by PROGRESSIVE, who submitted a claim for damage to an insured automobile for fire, theft, flood, vandalism, collision or loss arising out of any comprehensive, collision, or uninsured/undersinsured claim for the five (5) years next preceding the filing of this action, and who did not receive payment for the inherent diminished value as defined herein. Except as follows:
>
> a. Excluded from the Class are any vehicle damage claims wherein the vehicle has not had any of the following:
> Structural damage;
> Paint work;
> Deformed sheet metal;
> Body repair;
> Suspension repair or replacement;

Windshield replacement; or
Electrical work.

b. Excluded from the Class are policyholders whose policy insures a leased vehicle.

(Record p. 145, ¶ 25) However, damage such as structural damage and suspension damage is not damage that can be fully repaired. Thus the value of the vehicle is diminished or lessened after repairs are completed. Unless Respondent compensates Petitioner for this deficiency, it has not fulfilled its obligation to indemnify its insured for the loss and to restore him to his pre-loss condition.

Finally, Respondent has acknowledged that a loss in value is a compensable loss under its insurance policy contract. Under oath, a Progressive representative acknowledged that diminished value is a loss where loss is defined as "any damage to the quality, quantity, or value of property." (Record p. 343, lines 5-15)

CONCLUSION

Petitioner submits that if Respondent intended to specifically exclude coverage for the loss in value of the vehicle once repaired, Respondent could have easily drafted language explicitly excluding this loss from coverage as it did in other states. Additionally, the consequence of finding that Respondent is not liable to its policyholders for the loss of diminution in value after a vehicle is repaired and

returned leaves Florida policyholders without the property coverage afforded the policyholders living in the majority of the jurisdictions in the United States.

WHEREFORE, Petitioner respectfully requests this Honorable Court accept jurisdiction in this cause and find that an automobile collision policy which provides that the insurer must repair or replace the damaged vehicle 'with other of like kind and quality' obligates the insurer to return the vehicle to the insurer in the same condition, appearance and value as existed immediately prior to the loss. If the vehicle cannot be repaired to the same condition, appearance and value, the insurer is obligated to compensate the insured for the difference in the value of the repaired vehicle and its value immediately prior to the loss.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by fax and Federal Express Delivery, to the Attorneys for Respondent on this ____day of July, 2001.

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CERTIFICATE OF COMPLIANCE

I hereby certify that Petitioner's Initial Brief On The Merits complies with the applicable Florida Rules of Appellate Procedure.

_____

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