IN THE SUPREME COURT OF FLORIDA

CAROLE M. SIEGLE,

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

Lower Tribunal No.: 4D00-1503

v.

PROGRESSIVE CONSUMERS INSURANCE COMPANY,

Defendant/Respondent.
_____/

PETITIONER'S AMENDED REPLY BRIEF

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I. Introduction

Petitioner asks this Court to determine the Petitioner's and purported Class Member's rights and Respondent's obligations under Respondent's insurance policy, which indemnifies its insureds for property loss. Petitioner's loss in value is a tangible, identifiable and quantifiable loss, not merely a stigma or psychological perception. Respondent's portrayal of "diminished value" as an attempt to create nonexistent coverage is misleading and inaccurate.

In its insurance policy Respondent agreed to "pay for loss to a covered vehicle," and defined the term "loss" as "direct and accidental loss or damage to your insured auto, including its equipment." (Record p. 162). As Petitioner alleged in her Second Amended Complaint, Respondent elected to repair her vehicle but did not return it to her repaired to "like kind and quality" as required by the insurance policy because her vehicle after repaired and returned had diminished in value by $2,677.19. (Record p. 142) The substantial loss in value Petitioner suffered is clearly and undeniably a loss as defined by Respondent's insurance policy. Although Respondent seems to claim that no loss in value exists, this position flies in the face of reason and jurisprudence.

The question is whether under the existing contract of insurance the Respondent has limited its liability sufficiently to protect itself from having to pay Petitioner and purported Class Members for this quantifiable financial loss. Respondent does not explicitly exclude indemnification for the loss in value described as diminished value. It does limit its liability in another respect, when it elects to repair a vehicle to "the amount necessary to repair or replace the property with other of like kind and quality less the applicable deductible shown on the Declarations page." (Record pp. 164-165) If a repaired and returned vehicle is worth substantially less than it was worth before the accident, has the vehicle been repaired or replaced with other of like kind and quality?

Petitioner pled in her Complaint and has maintained throughout that her vehicle was repaired and returned to her with significantly less value than before the accident. (Record p. 142) Additionally, Petitioner alleged that her claim does not arise from faulty repairs and that not every vehicle that is repaired and returned will suffer a quantifiable loss in value. (Record pp. 141, 142) Petitioner carefully identified a class of policyholders that has experienced the same loss. Only those policyholders whose vehicles were damaged in the following ways are included in the class: "structural damage, paint work, deformed sheet metal, body repair, suspension repair or replacement, windshield replacement or electrical work." (Record p. 145) This

carefully identified class presents a cognizable claim that such damage carries a financial loss falling within Respondent's obligation to remedy.

II. Split of Authority Nationwide

Many state courts in this country have addressed the issue of whether an insurance company must reimburse the insured for the difference in the value of the insured's vehicle once the company elected to repair the vehicle pursuant to a "like kind and quality" repair option. The state courts have split in their decisions. The majority of state courts have held that an insurer must restore the vehicle to substantially the same appearance, function and value as before the accident to comply with the company's contractual obligations.[1] Some courts have disagreed, finding that

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[1] *MFA Ins. Co. v. Citizens National Bank of Hope,* 545 S.W.2d 70, 72 Ark. 1977) (whether the repairs with parts of like kind and quality could restore the vehicle's pre-accident value was a question of fact and affirmed the lower court's award of diminished value damages to the insured); *Delledone v. State Farm Mutual Automobile Ins. Co.*, 621 A.2d 350, 353 (Del. Super. Ct. 1992)(restoration to pre-accident condition can not be said to have been effected if the repairs fail to render the vehicle as valuable as before); *Hartford Fire Ins. Co. v. Rowland*, 351 S.E.2d 650, 652 (Ct. App. Ga. 1986) (the market value of the property plus (deductible) after payment must equal the market value before the loss); *Dodson Aviation, Inc. v. Rollins, Burdick, Hunter of Kansas, Inc.*, 807 P.2d 1319, 1321 (Ct. App. Kan. 1991) (measure of damages include the loss of value even though the property was repaired by the insured); *Romco, Inc. v. Broussard*, 528 So.2d 231, 233 (Ct. App. La. 1988) (where the measure of damages is the cost of repairs, damages for depreciation are also recoverable); *Potomac Ins. Co. v. Wilkinson*, 57 So.2d 158, 160 (Miss. 1952) (If, despite repairs, there remains a loss in actual market value such deficiency is to be added to the cost of repairs); *Williams v. Farm Bureau Mut. Ins. Co. Of Missouri*, 299 S.W.2d 587, 589 (Ct. App. Missouri 1957) (insurer obligated to restore vehicle to its

once the vehicle is properly repaired and returned the company has met its contractual obligations under contract language similar to the language at issue in this cause. However, most adverse rulings are based upon the market psychology of a "wrecked vehicle," rather than an actual, identifiable and quantifiable loss in value. Respondent alleges in its Response that the cases Petitioner cited supporting the recovery of diminished value are factually dispositive or apply tort law. Without summarizing each of the eleven cases individually, each case involved an insured suing its insurer for damages tantamount to what Petitioner terms diminished value; that is the difference in the value of the vehicle immediately prior to the accident and its value once repaired and returned. In each case the courts considered contract language substantially similar to the language at issue in the cause before this Court; i.e. an insurer's obligations and the insured's rights when an insurer elects to repair or replace damaged property. In most instances the contract language in the cases also

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function, appearance and value immediately prior to the accident); *Edwards v. Maryland Motorcar Ins. Co.*, 197 N.Y.S. 460, 461 (1922) (diminution in value is a loss not limited by insurer's election to repair the vehicle); *Campell v. Calvert Fire Ins. Co.*, 109 S.E.2d 572 (S.C. 1959) (if, despite repairs, a loss in actual value remains, the insured is entitled to compensation for the deficiency); *Grubbs v. Foremost Ins. Co.*, 141 N.W.2d 777 (S.D. 1966) (recovery is limited to the cost of repair or replacement only if that restored the property to substantially its prior condition); *Senter v. Tennessee Farmers Mut. Ins. Co.*, 702 S.W.2d 175, 178 (Ct. App. Tenn. 1985); cert. denied, Dec. 30, 1985 (If the repairs restore function and appearance but not market value, then the insured is entitled to recovery).

included the "like kind and quality" limitation as well. In each of the cited cases, the court interpreted this contract language to require the insurer to restore the pre-accident value to the damaged property.

Petitioner maintains that this reading is the better reasoned approach under Florida law, as Florida jurisprudence has established that "upon [the insurer] making the election [to repair the damaged vehicle] it was then obligated to restore it to substantilly [sic] the same condition as to function, appearance and value as existed before the accident." *Arch Roberts and Co. v. Auto-Owners Ins. Co.*, 305 So.2d 882, 884 (Fla. 1st DCA 1975). Respondent's attempts to distinguish the decisions from other jurisdictions based upon the specific facts of the cases are misplaced. The cause before this Court, as it was before the cited courts, is a breach of contract claim requiring only that this Court review the contract language in the insurance policy and construe that language in accordance with Florida law. Requiring Respondent to pay the costs of repairs, and the difference in the vehicle's value prior to the accident and after it is repaired and returned fulfills the insurer's obligation to repair with "other of like kind and quality" as required by the insurer's own policy contract language.

III. Florida courts have held insurers liable to their insureds for the diminished value.

Trial courts in Florida have addressed the same issue before this Court and have held that when an insurer elects to repair an insured's vehicle, the vehicle must be restored to substantially the same appearance, function and value as existed immediately before the accident. In *Torpy v. State Farm Mut. Auto. Ins. Co.*, Case No. 96-17624-CC (January 15, 1999), the trial court in Brevard County thoroughly discussed the recovery of diminished value based upon a breach of contract where the insurance policy contained a "repair or replace with like kind and quality" clause limiting the insurer's liability in the event of a loss. First, the court surveyed disparate opinions from other jurisdictions, citing several cases allowing recovery for diminished value and cases for the denial of recovery of diminished value. The court then turned to a complete analysis of Florida law on the issue of diminished value, thoroughly discussing *Auto-Owners Insurance Co. v. Green*, 220 So.2d 29 (Fla. 1st DCA 1969) and *Arch Roberts and Co. v. Auto-Owners Ins. Co.*, 305 So.2d 882 (Fla. 1st DCA 1974). The county court held that when State Farm elected to repair the vehicle it agreed to return the vehicle to its pre-loss condition. "Applying *Arch Roberts*, 'pre-loss condition' would mean restoring the vehicle to the same condition as to function, appearance, and value as existed immediately before the accident." *Torpy* p.8. The county court recognized that in interpreting the insurance policy

language the relevant issue is whether the company must restore the vehicle to its pre-accident value as well as appearance and function and found that the insurer must do exactly that.

A trial court in Hillsborough County, Florida addressed the same issue in *Salomone v. State Farm Mut. Auto. Ins. Co.*, Case No. 95-9117 CC (March 25, 1997). As in *Torpy*, the insured brought an action against the insurer to recover the difference in the value of the vehicle immediately prior to the accident and the value of the vehicle once repaired and returned. In this case the court noted that the evidence at trial established that value was the only issue, since the vehicle was returned to substantially the same condition as to appearance and function. Citing *Arch Roberts*, supra. and *Auto-Owners*, supra, the court held that "once the Defendant opts to repair the vehicle, the law implies a duty to substantially return the vehicle to its pre-accident value." *Salomone* p. 2. In this case, the court found after a non-jury trial, that based upon the specific facts presented to the Court that the vehicle was returned to substantially the same value and therefore ruled in favor of the insurer. Although the court found for the insured, the court required, based on Florida jurisprudence, that once the insured ted to repair the vehicle, it must return the vehicle to substantially the same value as existed immediately prior to the accident.

As the aforementioned Florida trial court decisions illustrate, although neither *Arch Roberts* nor *Auto-Owners* address the issue of "diminished value," both appellate cases shed light on the meaning of the contract language found in the cause before this Court. The facts in *Arch Roberts* involve an insurer's option to repair or replace with like kind and quality. The appellate court followed the decision in *Auto-Owners* holding that "the contractual undertaking of the insurer for damages due to collision is substantial restoration as to function, appearance and value." *Arch Roberts* at 883.

Recently in *Rezevskis v. Aries Ins. Co.*, 784 So.2d 472 (Fla. 3rd DCA 2001), the Third District Court of Appeals misconstrued the case law, finding that neither *Arch Roberts* nor *Auto-Owners* specifically addressed the issue of diminished value. Rather than applying *Arch Roberts* or *Auto-Owners* as the trial courts did in *Torpy* and *Salomone*, the Third District Court of Appeals relied upon a recent Texas case, *Carlton v. Trinity Universal Ins. Co.*, 32 S.W.3d 454, 464 (Ct. App. Tex. 2000). Citing *Carlton*, the *Rezevskis* court stated that: "Nowhere does that obligation include liability for loss due to 'a stigma on resale resulting from 'market psychology' that a vehicle that has been damaged and repaired is worth less than a similar one that has never been damaged.'" *Rezevskis* at 474. Petitioner does not allege that the diminished value of Petitioner's vehicle is based upon stigma or market psychology but rather is based upon a tangible, identifiable and quantifiable loss. Petitioner's and

purported Class Member's vehicles have substantially diminished in value after being repaired and returned because it is not possible for a body shop to repair certain damage, as limited in the Complaint. Petitioner does not argue that all vehicles involved in an accident suffer a diminution in value once repaired and returned.

Respondent relies heavily upon *Morrison v. Allstate Indem. Co.*, 1999 WL 817660 (M.D. Fla. 1999), however, this case was reversed at 228 F.3d 1255 (11th Cir 2000). Moreover, the Middle District of Florida effectively declined to address the issue of an insurer's obligations under an insurance policy allowing the election to repair stating that "This is not within the province of this Court." Additionally, Respondent's reliance on *Traveler's Indemnity Co. v. Parkman*, 300 So.2d 284 (Fla. 4th DCA 1974) is also misplaced. The *Travelers* court addressed the issue of derivative damages for plaintiff's loss of the use of his vehicle. The court found that loss of use is not a direct loss but is a consequential damage and is therefore not recoverable under a breach of contract theory. The cause before this Court concerns a loss that is the direct result of the covered automobile accident, not a derivative or consequential damage; therefore, *Travelers* is inapplicable.

IV. Option of Respondent to Limit Liability

Petitioner acknowledges Respondent's right under the insurance policy to choose to repair the vehicle rather than replace it. However, Florida law requires that once an insurer elects to repair a vehicle it must be restored to substantially the same appearance, function and value. Contracts implicitly incorporate the law of the land unless expressly stated otherwise. *Gordon v. State*, 608 So. 2d 800, 802 (Fla. 1992) and *Northbrook Prop. & Cas. Ins. Co. v. R & J Crane Service, Inc.*, 765 So.2d 836, 839 (Fla. 4th DCA 2000).

As Respondent did not limit its liability for the difference between the vehicle's pre-accident value and the value of the vehicle once repaired and returned, Respondent is liable to Petitioner and the purported Class Members for those losses. Respondent was required to draft its insurance policy to specifically exclude the obligation to restore the vehicle to substantially the same appearance, function and value as existed immediately prior to the accident; had Respondent intended its obligation under the insurance policy to be something other than the obligations required by Florida law. *Westmoreland v. Lumbermans Mut. Cas. Co.,* 704 So.2d 176, 179 (Fla. 4th DCA 1997).

V. The Department of Insurance's position as set forth in *Informational Bulletin 84-270* is entitled to great weight.

Contrary to Respondent's arguments in footnote 4 of its Answer Brief, the Commissioner of the Florida Department of Insurance, knowing full well the difference between first party and third party claims, **published** *Informational Bulletin 84-270* clarifying Florida law on the issue of diminished value, and requiring insurers to restore insureds' vehicles to substantially the same function, appearance and value. The suggestion that this published *Bulletin* relates to third party claims rather than first party claims is misplaced. The Insurance Commissioner could have limited his statement to third party claims, but did not. Additionally, the language the Commissioner chose tracks the language in *Arch Roberts*, supra and *Auto-Owners*, supra. Finally, the interpretation or construction of a law "by the agency or body charged with its administration is entitled to great weight and will not be overturned unless clearly erroneous." *Consumer Credit Counseling Serv. of the Fla. Gulf Coast, Inc. v. Dept. Of Revenue*, 742 So.2d 259,260 (Fla. 2nd DCA 1997), citing *Fort Pierce Util. Auth. v. Fla. Public Serv. Comm'n,* 388 So.2d 1031, 1035 (Fla. 1980).[2]

IV. Conclusion

[2] Respondent's reliance on a legal memorandum drafted by an employee of the Florida Department of Insurance in lieu of *Information Bulletin 84-270*, a published position from the Insurance Commissioner is misplaced and unreasonable. An internal legal memorandum cannot be said to carry the same weight as a published opinion by the Florida Insurance Commissioner.

Respondent does not ask this Court to impose obligations upon Respondent arising from "stigma" or "market psychology." Petitioner asks this Court to require Respondent to comply with its obligations as set forth in the plain language of the insurance policy Respondent drafted. Respondent agreed to indemnify Petitioner for a tangible, identifiable, and quantifiable covered loss. Because Respondent chose not to explicitly limit its obligation to restore insureds' vehicles to substantially the same appearance, function and value that existed immediately prior to the accident, Respondent must do no less. To rule otherwise allows Respondent to ignore Florida law, rewrite its contract to Petitioner's and purported Class Members' detriment, and create a windfall for itself.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Petitioner's Reply Brief and Appendix to Petitioner's Reply Brief was furnished by Federal Express Delivery, to the Attorneys for Respondent on this ____day of September, 2001.

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CERTIFICATE OF COMPLIANCE

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

_____
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