Box 2

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
AT INDEPENDENCE

DONALD ARMON, SR.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 1016-CV38265
	)	
UNITED FINANCIAL CASUALTY COMPANY d/b/a PROGRESSIVE INSURANCE COMPANY,	)	Division No. 17
	)	
Defendant.	)	

REPLY SUGGESTIONS IN SUPPORT OF DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT

Defendant United Financial Casualty Company d/b/a Progressive Insurance Company ("Progressive") seeks summary judgment to enforce the unambiguous language of the Commercial Auto Policy issued to Plaintiff Donald Armon, Sr. The Policy plainly states that the "most" Progressive will pay for loss to the insured auto is the "least" of four amounts listed in the Policy: "actual cash value," "amount necessary to replace," "amount necessary to repair," or "Stated Amount." Progressive Ex. A-3 at 16. After Plaintiff sustained a total loss to his vehicle in a collision, Progressive determined that the least of those four amounts was the vehicle's actual cash value, which it paid minus Plaintiff's chosen deductible. Progressive thereby fulfilled its contractual obligations under the Policy, so summary judgment should be entered against Plaintiff. [1]

[1] Both of the cross-motions for summary judgment were filed before the Court dismissed Dennis Lagares as a named plaintiff and granted Plaintiff leave to file a third amended petition. *See* Orders dated March 6 and 11, 2013. Therefore, Progressive will generally refer to a singular Plaintiff, and in the interests of avoiding delay and repetitious rebriefing, Progressive requests that the Court treat Progressive's motion for summary judgment as if made based on the third amended petition.

In an effort to avoid summary judgment, Plaintiff offers an assortment of unfounded, and even contradictory, arguments. Plaintiff's Suggestions in Opposition to Defendant's Motion for Summary Judgment (filed Feb. 19, 2013) ("Plaintiff's Opp."). Plaintiff first tries to invoke a Missouri "valued policy" statute that Missouri courts have consistently construed as applicable only to fire loss cases and have never applied to any other type of loss. Plaintiff next argues that the Policy contains an unambiguous agreement that the "Stated Amount" must be paid in the event of a total loss – a new theory that contradicts the Policy and improperly relies on extrinsic and mischaracterized evidence rather than the actual words of the Policy. Plaintiff then reverses field and argues the Policy is ambiguous, but again he erroneously relies on extrinsic and mischaracterized evidence, as well as a grossly distorted reading of the Policy, to manufacture ambiguity that does not exist. Finally, Plaintiff argues this Court should rewrite the unambiguous Policy language based on the doctrine of reasonable expectations, but Missouri courts have repeatedly held that the doctrine cannot trump unambiguous policy language.

FACTUAL RECORD

A. Progressive's Admitted Facts

Plaintiff's response confirms that there is no genuine dispute about the facts supporting Progressive's motion for summary judgment, which are largely based on Policy provisions and Plaintiff's pleading. Except for two paragraphs, Plaintiff has admitted all of Progressive's facts outright or with clarification. Plaintiff's Responses to Defendant's Statement of Uncontroverted Facts ¶¶ 1-24 (filed Feb. 19, 2013).

As for Plaintiff's attempted denial of paragraphs 11 and 12, the purported dispute is neither genuine nor material. Both paragraphs accurately summarize Plaintiff Armon's deposition testimony about reading his Policy and understanding what it meant. Despite his attempted quibble, Plaintiff repeatedly testified that he read his Policy; he also understood the

limit of liability regarding the most Progressive would pay for a collision loss under the Policy. Progressive Ex. C at 146-48.[2] In any event, the Policy language speaks for itself, and Plaintiff will not be heard to claim that he did not read or was ignorant of the contract terms. Suggestions in Support of Defendant's Motion for Summary Judgment at 4 (filed Dec. 17, 2012) ("Progressive's Sugg.") (collecting cases).

B. Plaintiff's Immaterial and Unsupported Additional Facts

As part of his response to Progressive's facts, Plaintiff has filed a statement of additional material facts, many of which are argumentative mischaracterizations of the record and immaterial as a matter of law. Thus, Plaintiff's alleged facts create no genuine issue of material fact and present no impediment to the entry of summary judgment for Progressive. Defendant's Response to Plaintiff's Statement of Additional Material Facts (filed herewith) contains Progressive's separate response to each paragraph of Plaintiff's facts, supported by additional exhibits. The legal reasons Plaintiff's facts are immaterial can be summarized as follows.

First, Plaintiff's efforts to go outside the four corners of the Policy must be rejected. "Extrinsic evidence may not be introduced to vary or contradict the terms of an unambiguous agreement or to create an ambiguity." *Dunn Industrial Group, Inc. v. City of Sugar Creek*, 112 S.W.3d 421, 429 (Mo. banc 2003). In addition, Plaintiff has admitted that the Policy contains an integration clause. Progressive Fact No. 19 (admitted by Plaintiff). "If the parties have integrated their agreement into a single written memorial, all prior negotiations and agreements in regard to the same subject matter are excluded from consideration, whether they were oral or

[2] In his attempt to dispute his own testimony Plaintiff submits only pages 134 and 135 of his deposition (Plaintiff's Ex. 1), even though it ends with the following question and answer carried over to the top of page 136: "Q: Have you now gone back and read the policy? A: Yes, I have." Progressive Ex. F at 136 (attached to Defendant's Response to Plaintiff's Statement of Additional Material Facts (filed herewith)).

written." *Sedalia Mercantile Bank & Trust Co. v. Loges Farms, Inc.*, 740 S.W.2d 188, 193 (Mo. App. W.D. 1987).

Second, it is immaterial whether the Progressive Policy may be regarded as an adhesion contract, because the Missouri Supreme Court has recognized that "[a]bsent ambiguity, an insurance policy must be enforced according to its terms." *Seeck v. Geico General Ins. Co.*, 212 S.W.3d 129, 132 (Mo. banc 2007). "The key is whether the contract language is ambiguous or unambiguous." *Todd v. Missouri United School Ins. Council*, 223 S.W.3d 156, 160 (Mo. banc 2007) (internal quotations omitted). Therefore, Plaintiff's characterization of the Policy as an "adhesion contract" entitles him to no relief under the reasonable expectations doctrine, which only applies in case of ambiguity. Progressive's Sugg. at 7 (collecting cases); *see also* Section IV, *infra*.

Finally, the legal issues presented here must be decided based on a reading of the *entire* Policy without surmise or speculation about what a policyholder *might* have thought based on an isolated word or phrase or some preconceived assumption. *Kastendieck v. Millers Mutual Ins. Co.*, 946 S.W.2d 35, 39-40 (Mo. App. W.D. 1997); *Todd*, 223 S.W.3d at 163 ("[i]nsurance policies are read as a whole"). If the terms of a policy "are clear and unambiguous within the context of the policy as a whole, they are enforceable." *Id.* And it stands admitted that the cover page of Plaintiff's Policy contains the following notice:

> PLEASE READ YOUR POLICY AGREEMENT CAREFULLY.
>
> Provisions of this Agreement and its endorsements restrict coverage. Be certain you understand all of the coverage terms, the exclusions and your rights and duties.

Progressive Fact No. 10 (admitted by Plaintiff). Plaintiff's additional facts are immaterial because Plaintiff has ignored settled Missouri law that a policyholder has a duty to examine the

policy, is charged with knowledge of its contents, and cannot be heard to claim ignorance of its terms. Progressive's Sugg. at 4 (collecting cases).

REPLY ARGUMENT

I. Valued Policy Statute Does Not Apply

For his first argument against summary judgment, Plaintiff asserts that RSMo § 379.160, one of Missouri's "valued policy" statutes,[3] applies to collision loss under an auto policy. But this argument fails for three reasons: it has never been accepted by any court and is contrary to well-settled authority; it misconstrues the statute; and it improperly asks this Court to make public-policy decisions reserved to the legislature.

First, Plaintiff contends "this court is bound by" Missouri appellate decisions (Plaintiff's Opp. at 8), but he cites no decision by any court, Missouri or elsewhere, holding that any Missouri valued policy statute applies to a suit where there was no fire loss. As detailed in Progressive's opening suggestions, Missouri courts for more than a century have construed the valued policy statutes of Missouri as applying only to fire losses and have rejected efforts to extend them to other types of insured losses. Progressive's Sugg. at 9-11. Decades ago, one Eastern District decision speculated whether section 379.160 might be construed to apply to "a policy providing fire coverage where the loss is other than by fire," but no court has ever done so in the decades since then. *Huth v. General Accident & Life Assurance Corp.*, 536 S.W.2d 177, 180 (Mo. App. E.D. 1976). As even Plaintiff must concede, the *Huth* discussion is dicta. Plaintiff's Opp. at 9; *Huth,* 536 S.W.2d at 180 ("we need not resolve this question of statutory interpretation"). The *Huth* dicta disregards the Missouri Supreme Court's long-standing admonition that an insurance statute covering one category of insurance risk will not be applied

[3] In an effort to advance his argument by mislabeling, Plaintiff incorrectly refers to section 379.160 as "Missouri's Stated Value Statute." Plaintiff's Opp. at 3.

to other types of risk absent explicit legislative intent to do so. *Nalley v. Home Ins. Co.*, 157 S.W. 769, 774-75 (Mo. 1913) (review of statute makes it "evident that the Legislature only had in mind fire insurance"). And the *Huth* court's criticism of a "certain logical inconsistency" (536 S.W.2d at 180) in restricting the statute to fire loss also contradicts the Missouri Supreme Court's recent pronouncement that "[i]t is not up to this Court to determine which legislative scheme . . . is most logical." *City of Wellston v. SBC Communications*, 203 S.W.3d 189, 192 (Mo. banc 2006).

Given the passage of a century during which the legislature never expanded any valued policy statute beyond loss by fire and during which section 379.160 has been repeatedly re-enacted in successive revisions of the Missouri statutes, this Court should conclude that the legislature knew of and adopted the many court decisions construing the law as limited to fire losses. *Duckworth v. United States Fidelity & Guaranty Co.*, 452 S.W.2d 280, 286 (Mo. App. 1970) (discussing legislative history and re-enactment of section 379.160). Further confirming this result is another case involving no loss by fire, wherein Judge Wimes recently rejected the plaintiff's attempt to invoke a Missouri valued policy statute containing language identical to section 379.160.3. *Garvin v. Acuity*, 2012 WL 5197223 at *4-*5 (W.D. Mo. Oct. 19, 2012) (construing RSMo § 379.140 regarding real estate, which applies in "all suits brought upon policies of insurance against loss or damage by fire") (attached).[4]

Second, Plaintiff's argument fundamentally misconstrues section 379.160.3. By its terms, the scope of the statute is defined not in terms of "policies" but in terms of "suits" – it applies in "*suits* brought *upon* policies of insurance against loss or damage by fire." RSMo § 379.160.3 (emphasis added). Plaintiff argues that the statute should be applied as if it included

[4] A copy of the *Garvin* decision was inadvertently omitted from Progressive's opening suggestions.

additional words: "suits brought upon *the class of* policies *that insure* against loss or damage by fire." Plaintiff's Opp. at 6 (emphasis added to Plaintiff's words that do not appear in the statute). But as the Missouri Supreme Court has repeatedly stated: "Courts cannot add words to a statute under the auspice of statutory construction." *State v. Vaughn,* 366 S.W.3d 513, 518 (Mo. banc 2012) (internal quotation and citation omitted). And as the Western District Court of Appeals has recognized, a suit to recover under a policy of insurance against loss by fire requires proof of loss or damage by fire. *Gorman v. Farm Bureau Town & Country Ins. Co.*, 977 S.W.2d 519, 522 (Mo. App. W.D. 1998). In his effort to distinguish *Gorman*, Plaintiff simply confirms he has not alleged and cannot prove a loss by fire, but would have to submit this case on an instruction involving loss by collision. Plaintiff's Opp. at 7.

Third, Plaintiff is asking this Court to legislate based on Plaintiff's notions of desirable public policy. Unable to demonstrate that section 379.160 applies in this suit involving a collision loss, Plaintiff merely quotes cases generally describing the legislative purpose underlying the Missouri valued policy statutes. *See* Plaintiffs' Opp. at 4-9. But in all instances, these statements of public policy were made in the context of *fire loss*. *Id.*[5] And the recited public policy was established by the legislature, so as recognized by one of Plaintiff's own cases, "its change was for the legislative not judicial authority." *Gamel v. Continental Ins. Co.*, 463 S.W.2d 590, 593 (Mo. App. 1971). Thus, Plaintiff's argument is misdirected because Missouri courts "must enforce statutes as written, not as they might have been written." *City of Wellston*, 203 S.W.3d at 192. "There is no room for construction even when a court may prefer a policy

[5] All of these cases were insurance suits to recover for fire loss except for *Runny Meade Estates, Inc. v. Datapage Technologies Int'l, Inc.*, 926 S.W.2d 167, 170 (Mo. App. E.D. 1996), a lease dispute wherein the court cites a fire-loss case for the proposition quoted by Plaintiff. And several of Plaintiff's cases consider whether the plaintiff had an insurable interest, which is not an issue in this case.

different from that enunciated by the legislature." *Kearney Special Road District v. County of Clay*, 863 S.W.2d 841, 842 (Mo. banc 1993). If Plaintiff believes Missouri needs a valued policy statute covering collision losses, Plaintiff should ask the legislature in Jefferson City, rather than a circuit court in Jackson County, to enact such a law.[6]

II. No Valued Policy By Contract

For his second argument against summary judgment, Plaintiff offers a new theory, namely that "[t]he Progressive policy at issue in this case is unambiguously a 'valued policy' contract." Plaintiff's Opp. at 10. Plaintiff's other theories all allege ambiguity or ask this Court to rewrite the contract in accordance with an implied covenant of good faith and fair dealing or the doctrine of reasonable expectations.[7] Progressive Exs. B and E (Second and Third Amended Petitions). Plaintiff also relies on extrinsic and mischaracterized evidence of an alleged agreement and premium-calculation method to vary or contradict Policy language, but this approach is contrary to Missouri law as well as the Policy's integration clause. *Dunn Industrial Group*, 112 S.W.3d at 429 (extrinsic evidence cannot be used to vary or contradict terms of unambiguous contract); *Sedalia Mercantile*, 740 S.W.2d at 193 (integrated agreement is a complete statement of the parties' bargain and precludes consideration of prior negotiations and agreements).

Plaintiff also relies on two cases involving insurance policies that contain language substantially different than what appears in the Progressive Policy. *Huth,* 536 S.W.2d at 178

---

[6] It is also worth noting that Plaintiff's pleas to change legislative policy rest on extrinsic and/or mischaracterized evidence of an alleged agreement, alleged premium calculation and the like. *See, e.g.*, Progressive's Response to Plaintiff's Statement of Additional Material Facts ¶¶ 3-7, 10-11 (filed herewith).

[7] Plaintiff has apparently abandoned a separate claim for breach of implied covenant of good faith and fair dealing, which is now mentioned only in passing as part of Plaintiff's attempt to invoke the doctrine of reasonable expectations. Plaintiff's Opp. at 17.

(inland floater policy on gun collection); *Grantham v. Shelter Mutual Ins. Co.*, 721 S.W.2d 242, 243 (Mo. App. W.D. 1986) (inland marine policy on silver and jewelry). The policies in both cases are readily distinguishable from this commercial auto policy, and these fundamental differences establish why the Progressive Policy is not a valued policy.

First, in both *Huth* and *Grantham,* the policy set forth an exact number described as the "amount of insurance." *Huth,* 536 S.W.2d at 179, 181 (policy used the phrase "amount of insurance" next to specified sums ($15,232.82 and $4,808.00)); *Grantham,* 721 S.W.2d at 243 ("the figure $11,714.00 was listed as the 'Amount of Insurance'"). Rather than showing an "amount of insurance," the Progressive Policy establishes the "Limit of liability" – the "most" Progressive will pay − as the "least" of four possible amounts. Progressive Ex. A-1 at 1; Progressive Ex. A-3 at 16. And the reference to a dollar figure as the "amount of insurance" in *Huth* and *Grantham* cannot be equated with the words "Stated Amount," which appear in the Policy's Declarations Page as one of several terms used to identify the vehicle, including its VIN, Garaging Zip Code and Radius. Progressive Ex. A-1 at 2.

Second, the policies contained attachments that superseded basic policy language. *Huth*, 536 S.W.2d at 181 (attachment *deleted* "any reference to actual cash value" and a provision that the property was insured "to an amount not exceeding the amount(s) specified"); *Grantham*, 721 S.W.2d at 244 (attached to the basic policy was a sheet detailing "special conditions" which stated that "the amount set opposite the respective articles covered hereunder [is] agreed to be the value of said articles for the purpose of this insurance"). The Progressive Policy contains no endorsement or rider altering or superseding any matter at issue in this case.

Finally, both policies showed on their face that premium was a percentage of the insured amount. *Huth,* 536 S.W.2d at 179; *Grantham*, 721 S.W.2d at 244-45. But the Progressive

Policy recites no formula for premium calculation, and Plaintiff's extrinsic evidence regarding premium is legally immaterial and merely describes Stated Amount as *one factor* considered in establishing the amount of premium. Progressive's Response to Plaintiff's Statement of Additional Material Facts ¶ 10 (filed herewith).

By these various terms that are absent in the Progressive Policy, the *Huth* and *Grantham* policies demonstrated a contractual intent that "a valuation was fixed in advance by way of liquidated damages *to avoid making a valuation after the loss had occurred*." *Daggs v. Orient Ins. Co.*, 38 S.W. 85, 87 (Mo. banc 1896) (emphasis added). By contrast, the Progressive Policy plainly establishes that there *must be* a valuation made after a loss occurs, including references to actual cash value "at the time of loss," the amount necessary to replace "damaged property," and the amount necessary to repair "damaged property." Progressive Ex. A-3 at 16. Only after these amounts are established is it possible to compare them to the Stated Amount to determine "the least of" them and the amount payable on the claim. *Id.*

In sum, Plaintiff cannot equate the term "Stated Amount" with the *Huth* or *Grantham* policy phrases "amount of insurance" or "agreed to be the value." Instead, the Progressive Policy language states that the "*most* we will pay for loss to your insured auto is the *least* of" four different amounts. Progressive Ex. A-3 at 16 (emphasis added). This Policy term precludes any interpretation that Progressive agreed in advance to pay a loss based on only one of the four listed amounts without regard to the other three. Nor can Plaintiff's argument that "Progressive must pay to Plaintiff the full Stated Amount" (Plaintiff's Opp. at 17) be reconciled with the existence of a "Collision Deductible" and the "Limit of liability less deductible," both as shown on the Declarations Page. Progressive Ex. A-1 at 1, 2. Even aside from the Policy language foreclosing Plaintiff's untenable contract interpretation arguments, Plaintiff's selection of a

deductible amount negates any reasonable expectation that the Stated Amount somehow equals the amount to be paid for a loss.

III. No Policy Ambiguity

Plaintiff's assertion of ambiguity has always been a contention in search of a legal and factual basis, and his response continues that futile search without success.

Plaintiff's petition asserts that the Policy incorporates "vague and ambiguous terminology, to-wit: 'actual value.'" Progressive Ex. B, Second Amended Petition ¶ 37; Progressive Ex. E, Third Amended Petition ¶ 36. But this contention has always rested on a fiction because the Policy does not use the term "actual value." Progressive's Sugg. at 5. Plaintiff never acknowledges this error and does not oppose summary judgment based on this assertion of ambiguity.

But Plaintiff persists in the contention that "actual cash value" is somehow ambiguous, or at least not defined, even though Plaintiff ignores two arguments that foreclose his contention. Plaintiff's Opp. at 15. First, the term "actual cash value" is not ambiguous as a matter of law. Progressive's Sugg. at 5-6 (citing cases). Second, the Policy expressly states that "the actual cash value is determined by the market value, age and condition of the auto at the time the loss occurs." Progressive Ex. A-3 at 16. Plaintiff never acknowledges this Policy language nor offers any explanation of how it is ambiguous. And the absence of a separate definition for "actual cash value" simply means the term "is interpreted in its ordinary sense." *Todd*, 223 S.W.3d at 162 n.3.

Plaintiff apparently has a new theory of ambiguity that slices and dices Policy language into an unrecognizable hash. Plaintiff now asserts that "'value of the insured auto,' 'Limit of Liability' and 'Stated Amount,' each refers to the same value – the stated amount listed opposite each insured auto in the auto coverage schedule." Plaintiff's Opp. at 15. To demonstrate why

Plaintiff's new recipe for ambiguity is a failure, the first step is to return to the Policy language itself.

As Plaintiff concedes, "the Declarations Page describes the limit of liability in the event of a collision as the 'Limit of Liability less deductible'. . . ." Plaintiff's Opp. at 15. The Policy part entitled **"DAMAGE TO YOUR AUTO"** (Progressive Ex. A-3 at 13) then contains the following under the heading **"LIMIT OF LIABILITY"**:

> 1. The most we will pay for loss to your insured auto is the least of:
>
> a. the actual cash value of the stolen or damaged property at the time of loss;
>
> b. the amount necessary to replace the stolen or damaged property with other of like kind and quality;
>
> c. the amount necessary to repair the damaged property to its pre-loss physical condition, however if we determine that the insured auto is a total loss, we may, at our option, pay the lesser of the actual cash value, Stated Amount, or the cost to replace, rather than repair the insured auto; or
>
> d. the applicable Limit of Liability or Stated Amount of the property as shown on the Declarations Page.
>
> Permanently attached equipment is included in the *value of the insured auto*, but only to the extent the value of the equipment has been included in the *Limit of Liability or Stated Amount shown on the Declarations Page.*

Progressive Ex. A-3 at 16 (italics added).[8]

On its face, the final sentence quoted above merely addresses permanently attached equipment. But in an effort to distort Policy language beyond all recognition, Plaintiff has taken out of context the two passages italicized above and then reassembled them to make the fabricated assertion that the "policy refers to the 'value of the insured auto' as the 'Limit of Liability or Stated Amount shown on the Declarations Page'. . . ." Plaintiff's Opp. at 15. One

[8] As with Progressive's Suggestions, quotations to Policy provisions appear here without defined terms in bold; provisions with the bolding shown are available in Progressive's Statement of Facts and Progressive Ex. A-3.

need only read the sentence quoted verbatim above on "Permanently attached equipment" to see that the Policy says no such thing. "Courts may not unreasonably distort the language of a policy or exercise inventive powers for the purpose of creating ambiguity when none exists." *Todd*, 223 S.W.3d at 163. "The terms of a contract are *read as a whole* to determine the intention of the parties and are given their plain, ordinary, and usual meaning." *Dunn Industrial Group*, 112 S.W.3d at 428 (emphasis added). So neither Plaintiff nor this Court is permitted to dismember or disregard unambiguous policy language "to enforce a particular construction that it feels is more appropriate." *Harris v. Shelter Mutual Ins. Co.*, 141 S.W.3d 56, 60 (Mo. App. W.D. 2004).

In short, Plaintiff's newest theory of ambiguity is yet another fabrication that flies in the face of the Policy language and settled principles of contract interpretation. Progressive is entitled to summary judgment enforcing the unambiguous Policy.

IV. No Reasonable Expectations Doctrine

For the final argument in opposition to summary judgment, Plaintiff invokes the reasonable expectations doctrine, citing only one case decided more than thirty years ago: *Estrin Construction Co. v. Aetna Casualty & Surety Co.*, 612 S.W.2d 413 (Mo. App. W.D. 1981). *Estrin* purports to apply the doctrine of reasonable expectations without regard to whether an insurance policy is ambiguous, but *Estrin* does not represent the law of Missouri. In its opening suggestions, Progressive marshaled ample authority from the Missouri Supreme Court and court of appeals demonstrating that, under current Missouri law, the doctrine of reasonable expectations does not apply unless contract ambiguity is first established. Progressive's Sugg. at 7-8; *accord Kastendieck*, 946 S.W.2d at 39. Plaintiff ignores all of these cases from the past two decades and never explains how *Estrin* can be regarded as stating the current law of Missouri. Indeed, courts from other jurisdictions have examined Missouri law and concluded "[i]t is thus clear that Missouri has implicitly if not explicitly rejected *Estrin*." *Independent Petrochemical*

Corp. v. Aetna Casualty & Surety Co., 842 F. Supp. 575, 582 (D.D.C. 1994); *Smith v. Northwestern Mutual Life Ins. Co.*, 2011 WL 4336750 at *4 (E.D. Wis. 2011).

Reduced to its essence, Plaintiff's entire argument in this case is that an insured should be allowed to fixate on whatever amount the insured declares to be the "Stated Amount" regardless of what the Policy says. Sixteen years after *Estrin*, the Western District repudiated a similar argument in *Kastendieck*, 946 S.W.2d 35, a case where a claim for the total loss of a house and its contents had been paid with no increase under replacement-cost endorsements. Arguing the policy was an adhesion contract and invoking the doctrine of reasonable expectations, the policyholder argued he was entitled to receive the higher replacement cost of such property without actually replacing it. But the policy stated the insurer "will pay no more than the actual cash value for the loss or damage until the actual repair or replacement is complete." *Id.* at 39. In a unanimous decision written by Judge Ellis, for a panel that included Judges Stith and Hanna, the court rejected the policyholder's argument:

> This provision is clear and unambiguous and must be enforced as written. . . . While we may feel another construction would more accurately reflect what most consumers reasonably anticipate they will receive when purchasing an option identified as "replacement cost," such *assumption cannot create an ambiguity* where none exists in the language of the policy.

Id. at 40 (emphasis added; citation omitted).

This Court must reject Plaintiff's argument for the same reasons. A policyholder's assumption cannot trump unambiguous policy language, nor is there anything for a jury to decide because contract interpretation is a question of law for the Court. The Progressive Policy language is not reasonably open to different constructions and is therefore not ambiguous. *Gulf Ins. Co. v. Noble Broadcast*, 936 S.W.2d 810, 814 (Mo. banc 1997). The doctrine of reasonable expectations has no place in this case, and summary judgment should be entered against Plaintiff.

V. Conclusion

Accordingly, defendant United Financial Casualty Company d/b/a Progressive Insurance Company requests that its motion for summary judgment be granted.

Respectfully submitted,

LATHROP & GAGE LLP

By: /s/ *Brian C. Fries*

Brian C. Fries (40830)
bfries@lathropgage.com
James Moloney (56267)
jmoloney@lathropgage.com
Rachel E. Stephens (59419)
rstephens@lathropgage.com
2345 Grand Boulevard, Suite 2200
Kansas City, Missouri 64108-2618
Telephone: (816) 292-2000
Telecopier: (816) 292-2001

ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

This is to certify that, on this 15th day of March, 2013, Defendant's Reply Suggestions in Support of Defendant's Motion for Summary Judgment was electronically filed and served by the ECF Court filing system on the below named counsel:

Martin M. Meyers
mmeyers@meyerslaw.com
The Meyers Law Firm, LC
503 One Main Plaza
4435 Main Street
Kansas City, MO 64111

And was served by electronic mail and U.S. First-Class Mail, postage prepaid, on the following:

John M. Klamann
jklamann@klamannlaw.com
The Klamann Law Firm, PA
929 Walnut Street, Suite 800
Kansas City, MO 64106

/s/ *Brian C. Fries*
An Attorney for Defendant