IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
AT INDEPENDENCE

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

SUGGESTIONS IN SUPPORT OF DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT

In their second amended petition against defendant United Financial Casualty Company d/b/a Progressive Insurance Company ("Progressive"), Plaintiffs Donald Armon, Sr. and Dennis Lagares assert five counts – all sounding in contract. Generally stated, Plaintiffs allege they received an insufficient claim payment under their respective Progressive commercial auto insurance policies after each of their insured trucks suffered a total loss in two different collisions. Each Plaintiff received a claim payment based on the actual cash value of the vehicle at the time of the collision but alleges he should have received the "Stated Amount" specified for such vehicle under his policy.

Plaintiffs' various contract theories can be summarized as follows: Plaintiff Armon in Count I and Plaintiff Lagares in Count II assert claims for breach of contract. In Count III, they allege breach of covenant of good faith and fair dealing. In Count IV they allege breach of contract based on an assertion that a Missouri "valued policy statute" (RSMo § 379.160) governs their contracts. Finally, Count V alleges breach of contract based on the assumption that

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Plaintiffs should be allowed to invoke the doctrine of reasonable expectations to require payment of the Stated Amount.

Summary judgment should be entered against Plaintiffs because all of their claims fail as a matter of law. Counts I, II, III and V must fail because the Progressive Commercial Auto Policy ("Policy") is unambiguous as a matter of law. Under the express terms of the Policy, at the time of a total loss Progressive has no duty to pay, and Plaintiffs have no right to receive, claim payments based on Stated Amounts that were higher than the actual cash values of their vehicles. Missouri law commands that this unambiguous Policy be enforced according to its terms. And Count IV fails because section 379.160 does not apply to a collision loss under an automobile policy but is instead limited to a loss by fire under a fire insurance policy.

I. Summary of Facts

Pursuant to Rule 74.04(c), Progressive has filed herewith its Statement of Uncontroverted Material Facts ("Facts") setting out pertinent Policy provisions and supported by pleadings and evidence. [1] The key facts can be briefly summarized as follows:

The Declarations Page for each Plaintiff's Policy defines the limit of collision coverage as "Limit of liability less deductible," and the insuring agreement for collision coverage is expressly made "[s]ubject to the Limits of Liability." Facts ¶¶ 1-15. The Limit of Liability is stated in pertinent part as follows:

> 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; . . . or
>
> d. the applicable Limit of Liability or Stated Amount of the property as shown on the Declarations Page.

[1] Terms defined in the Policy appear in bold font, as shown in those portions of the Policy quoted in the Statement of Uncontroverted Material Facts. In these suggestions, quotations to Policy provisions appear without defined terms in bold.

Facts ¶ 16. The Policy further provides that "the actual cash value is determined by the market value, age and condition of the auto at the time the loss occurs." Facts ¶ 17.

After the loss, the actual cash value of Plaintiff Armon's vehicle was determined to be $12,035, which was less than the $28,000 Stated Amount for the vehicle, so he received a claim payment based on actual cash value. Facts ¶¶ 4, 21-22. Similarly, for Plaintiff Lagares, the actual cash value of his vehicle was determined to be $4,111, which was less than the Stated Amount of $8,000 for the vehicle, so he also received a claim payment based on actual cash value. Facts ¶¶ 8, 23-24.

II. Breach of Contract Claims: Counts I and II

A. Legal Standards

A "court interprets insurance contracts by applying general rules of contract interpretation." *Jensen v. Allstate Ins. Co.*, 349 S.W.3d 369, 374 (Mo. App. W.D. 2011). The interpretation of an insurance policy, and the determination of whether it is ambiguous, present questions of law for determination by the court. *Burns v. Smith*, 303 S.W.3d 505, 509 (Mo. banc 2010); *Gulf Ins. Co. v. Noble Broadcast*, 936 S.W.2d 810, 813 (Mo. banc 1997). "An ambiguity exists when there is duplicity, indistinctness, or uncertainty in the meaning of the language in the policy. Language is ambiguous if it is reasonably open to different constructions." *Id.* at 814; *Seeck v. Geico General Ins. Co.*, 212 S.W.3d 129, 132 (Mo. banc 2007); *accord Rodriguez v. General Accident Ins. Co.*, 808 S.W.2d 379, 382 (Mo. banc 1991). "A court is not permitted to create an ambiguity in order to distort the language of an unambiguous policy, or, in order to enforce a particular construction which it might feel is more appropriate." *Id.* And a contract is not rendered ambiguous merely because the parties disagree about its meaning. *J.E. Hathman, Inc. v. Sigma Alpha Epsilon Club*, 491 S.W.2d 261, 264 (Mo. banc 1973); *Lupo v. Shelter Mutual Ins. Co.*, 70 S.W.3d 16, 19 (Mo. App. E.D. 2002). "Summary judgment is particularly

appropriate when construction of a contract is at issue and the contract is unambiguous on its face." *Id.* at 18.

"It has been the law in Missouri for over a century that an insured has a duty to promptly examine its policy to ensure it contains the terms of coverage desired or agreed upon, and if the policy does not, to reject it by promptly notifying the insurer of its dissatisfaction therewith." *Jenkad Enterprises, Inc. v. Transportation Ins. Co.*, 18 S.W.3d 34, 38 (Mo. App. E.D. 2000). "[A]n insured is chargeable with knowledge of the contents and legal effect of his policy, and plaintiff will not be heard to say in this court that it was ignorant of the conditions and limitations of the . . . policy." *First National Bank v. Farmers New World Life Ins. Co.*, 455 S.W.2d 517, 526 (Mo. App. 1970). *See also Kastendieck v. Millers Mutual Ins. Co.*, 946 S.W.2d 35, 39 (Mo. App. W.D. 1997) (stating general rule that "a person is bound by the terms of the contract signed").

B. No Breach and No Ambiguity

Each Plaintiff's Declarations Page establishes the amount of collision coverage as the "Limit of liability less deductible." The Policy then explains the "Limit of Liability" in the clearest possible terms: "The *most* we will pay for loss to your insured auto is the *least*" of four specified amounts described in subparagraphs a through d. Ex. A-3 at 16 (emphasis added). In summary, those four possible amounts are (a) "the *actual cash value* of the . . . damaged property at the time of loss", (b) "the amount necessary to *replace* the . . . damaged property", (c) "the amount necessary to *repair* the damaged property" or (d) "the applicable Limit of Liability or *Stated Amount* of the property as shown on the Declarations Page." Ex. A-3 at 16 (emphasis added). The Policy further states that "the actual cash value is determined by the market value, age and condition of the auto at the time the loss occurs." Ex. A-3 at 16. This language defining the limits of Progressive's contractual liability is crystal clear and enforceable by summary

judgment.[2] *Lupo*, 70 S.W.3d at 19-20 (affirming summary judgment against policyholder seeking to recover for collision damage an amount greater than the Limits of Liability specified in the policy).

There is no dispute that the actual cash value of the damaged vehicles was the least of these four amounts, so under the unambiguous policy language, the claim payments made on the basis of actual cash value complied with the contract. Summary judgment against a policyholder is appropriate where a commercial auto policy provides that the "most" that the insurer will pay for a loss is the "least" of actual cash value, the cost of repair or replacement, or the amount shown in the policy schedule, and the insurer pays the least of those amounts. *Seckinger-Lee Co. v. Allstate Ins. Co.*, 32 F. Supp. 2d 1348, 1351-52, 1357-58 (N.D. Ga. 1998) (entering summary judgment against plaintiff seeking loss payment on the basis of "stated amount" under commercial auto policy).

Despite the clear Policy language, Plaintiffs assert in Counts I and II that their policies incorporate "vague and ambiguous terminology, to wit: 'actual value'". Petition ¶¶ 37, 49. But Plaintiffs can make this claim of ambiguity only by misquoting the Policy, which uses the term "actual cash value" and rather than "actual value." Ex. A-3 at 16. And Plaintiffs ignore the Policy language stating that "the actual cash value is determined by the market value, age and condition of the auto at the time the loss occurs." Ex. A-3 at 16.

Plaintiffs' fictitious claim of ambiguity must be rejected because the term "actual cash value" is not ambiguous under Missouri law. *See, e.g., Porter v. Shelter Mutual Ins. Co.*, 242 S.W.3d 385, 390 (Mo. App. W.D. 2007) ("Actual cash value means a depreciated sum, i.e., the

[2] Indeed, after recently reading the Policy for the first time, Plaintiff Armon understands that the payment for a total loss would be the lesser of the Stated Amount or actual cash value. Facts ¶¶ 11-12. Plaintiff Lagares has repeatedly failed to appear for his deposition. *See* Facts ¶ 13.

difference between the reasonable value of the property immediately before and after the loss."); *see also Myers v. American Indemnity Co.*, 457 S.W.2d 468, 471 (Mo. App. 1970) ("actual cash value means the sum of money the insured goods would have brought for cash, at the market price, at the time when, and place where, they were destroyed") (internal quotation marks and citation omitted).

"[T]he function of this court is to interpret and enforce an insurance policy as written; not to rewrite the contract." *Lupo*, 70 S.W.3d at 21. Summary judgment on Counts I and II is appropriate because the explicit and unambiguous language of the Policy forecloses Plaintiffs' claims for breach of express contract.

III. Other Contract Claims: Counts III and V

In an effort to circumvent the Policy language, Plaintiffs ask this Court to remake their contract with new terms under the guise of the implied covenant of good faith and fair dealing or the doctrine of reasonable expectations. But as explained below, this Court has no power to rewrite the unambiguous language of the Policy.

A. Implied Covenant of Good Faith and Fair Dealing

Count III alleges that Progressive breached an implied covenant of good faith and fair dealing "[b]y applying a methodology for determining actual cash value that is unrelated to and fails to take into account the Stated Amount for which a vehicle is insured." Petition ¶ 57. The limitation of liability provision in the Policy, however, is unambiguous: in the event of a total loss, Progressive is to pay the *least* of four different amounts, two of which are the actual cash value of the vehicle or the Stated Amount. The Policy does not require Progressive to take into account the "Stated Amount" in determining the "actual cash value" of a vehicle. Instead, the Policy states that "actual cash value is determined by the market value, age and condition of the

auto at the time the loss occurs." Ex. A-3 at 16. This express Policy language precludes Plaintiffs' effort to inject Stated Amount into the determination of actual cash value.

"Missouri law implies a covenant of good faith and fair dealing in every contract." *Farmers Electric Coop., Inc. v. Missouri Department of Corrections*, 977 S.W.2d 266, 271 (Mo. banc 1998). An implied covenant will not, however, be imposed where the parties expressly address the matter at issue in their contract. *Crestwood Plaza, Inc. v. Kroger Co.*, 520 S.W.2d 93, 98 (Mo. App. 1974); *see also Acetylene Gas Co. v. Oliver*, 939 S.W.2d 404, 409 (Mo. App. E.D. 1996) ("covenants will not be implied in a contract for any matter that is specifically covered by the written terms of the contract itself"); *Morrow v. Hallmark Cards, Inc.*, 273 S.W.3d 15, 31 n.1 (Mo. App. W.D. 2008) (Ahuja, J., concurring) (implied covenant of good faith and fair dealing "'cannot block [the] use of terms that actually appear in the contract'") (internal quotation marks and citation omitted).

The unambiguous express terms in the Policy negate Plaintiffs' claim that Progressive has breached an implied covenant of good faith and fair dealing. When a party's "argument is inconsistent with the very language" of an insurance policy, "[i]t is well-settled that this Court will not add language to a policy." *Burns v. Smith*, 303 S.W.3d 505, 511 (Mo. banc 2010). Count III of the Petition therefore fails as a matter of law, and summary judgment should be entered against Plaintiffs.

B. Reasonable Expectations Doctrine

In Count V, Plaintiffs again ask the Court to disregard the contract language and rewrite it to award them the Stated Amount for a total loss to their vehicles, this time arguing that result is compelled by the doctrine of reasonable expectations. Plaintiffs assert that this doctrine empowers a Missouri court to rewrite an insurance policy or any other contract if it can be regarded as a "contract of adhesion." Plaintiffs are incorrect.

As the Missouri Supreme Court has stated, "'the application of the reasonable expectations doctrine depends on the presence of an ambiguity in the policy language.'" *Kellar v. American Family Mutual Ins. Co.*, 987 S.W.2d 452, 455 (Mo. App. W.D. 1999) (per Stith, J.) (quoting *Rodriguez v. General Accident Ins. Co.*, 808 S.W.2d 379, 382 (Mo. banc 1991)). So even assuming the Policy could be regarded as an adhesion contract, that would not be sufficient to invoke the doctrine of reasonable expectations. *Id.*; *Harris v. Shelter Mutual Ins. Co.*, 141 S.W.3d 56, 60-61 (Mo. App. W.D. 2004) (where a "policy is unambiguous, no basis exists for application of the objective reasonable expectation doctrine to the policy"); *see also Kertz v. State Farm Mutual Automobile Ins. Co.*, 236 S.W.3d 39, 43 (Mo. App. E.D. 2007) (same).

Only *after* policy language is found to contain some ambiguity will a court "construe the contract according to the 'reasonable expectations' of the party, provided the party's expectations are objectively reasonable and that of the average person." *Kastendieck v. Millers Mutual Ins. Co.*, 946 S.W.2d 35, 39 (Mo. App. W.D. 1997) (regardless of what most consumers might anticipate when purchasing "replacement cost" coverage, court would enforce unambiguous policy provision requiring actual repair or replacement of damaged property before claim would be paid at a level greater than actual cash value). *Accord Burns v. Smith*, 303 S.W.3d 505, 512 (Mo. banc 2010) (when there is an ambiguity, it will be resolved consistent with reasonable expectations). Thus, judgment must be rendered against an insured attempting to invoke the doctrine of reasonable expectations when the insured fails to plead or prove any ambiguities in the policy language. *Kastendieck*, 946 S.W.2d at 39-40. In short, unambiguous policy language must prevail: "Absent 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).

Therefore, summary judgment should be entered against Plaintiffs on Count V.

IV. Valued Policy Claim: Count IV

In Count IV, Plaintiffs invoke RSMo § 379.160, one of three Missouri provisions regarding fire insurance known as a valued policy statute. Count IV fails as a matter of law because section 379.160 does not apply to Plaintiffs' collision losses under an auto insurance policy.

The valued policy statutes of Missouri can be traced back to the late nineteenth century, and Missouri courts have long recognized that they are limited to loss by fire under a fire insurance policy. *See, e.g., Cox v. Home Ins. Co.*, 19 S.W.2d 297, 298 (Mo. App. 1929) (valued policy "statute is limited to fire insurance policies"), *ruling approved and adopted, Cox v. Home Ins. Co.*, 52 S.W.2d 872, 872 (Mo. 1932); *see generally Duckworth v. United States Fidelity & Guaranty Co.*, 452 S.W.2d 280 (Mo. App. 1970) (reviewing statutory history and collecting cases). "The Missouri Valued Policy statutes have been interpreted as meaning exactly what they say (that is, the insurer may not deny the insured value at the time the policy was issued was the amount of the policy, and the measure of damages *in a case of a complete loss by fire* is the amount for which the property was insured less whatever depreciation in value may have occurred between the time the policy was issued and the time *of the fire*." *Riccardi v. United States Fidelity & Guaranty Co.*, 434 S.W.2d 737, 740 (Mo. App. 1968) (emphasis added).

For example, nearly a century ago the Missouri Supreme Court refused to apply a valued policy statute to a policy insuring against the risk of tornado. *Nalley v. Home Ins. Co.*, 157 S.W. 769, 774-75 (Mo. 1913). The court recognized that statutes regulating policies of insurance for one risk do not automatically apply to other types of insurance:

> It is true that as a general classification of insurance our laws speak of "life insurance" and "insurance other than life," but it does not follow from this that all statutes on insurance other than life apply to each of the many kinds of insurance risks. The peculiarities of the many different kinds of risks make them classes unto themselves, although they may fall within the very general class of

> "insurance other than life." Statutes which could be made applicable to one of sundry classes could not be made applicable to each and all of them. *In such case the law, if intended to cover all, must state so explicitly, or by an inference so strong as to leave no doubt of the legislative intent.*

Id. (emphasis added). In the decades that followed, the Missouri legislature passed statutes governing auto insurance, but without expanding the scope of the valued policy statutes to encompass auto insurance. *See, e.g.,* RSMo §§ 379.201-204; *see also* 20 CSR 500-2.100 (insurance regulations establishing minimum standards for auto policies issued without reference to or reliance on RSMo § 379.160).

This long-held view by the Missouri courts follows from both the text and context of section 379.160, as well as the other two valued policy statutes, all of which refer exclusively to fire insurance.[3] For example, section 379.160.1 first states certain requirements applicable to "[e]ach fire insurance company doing business in the state of Missouri" in regard to "the standard fire insurance policy." Subsection 3 defines the significance of "[t]he appearance of an adjuster of any company *at the place of fire and loss*." RSMo § 379.160.3 (emphasis added). Subsection 3 then further provides "that in all suits brought upon policies of insurance against loss or damage by fire hereafter issued or renewed, the defendant shall not be permitted to deny that the property insured thereby was worth at the time of issuing the policy the full amount insured therein." This language is necessarily limited to a fire-loss claim because one of the essential elements that must be proven in a suit brought upon a policy of insurance against loss or damage by fire is that the covered property *was damaged by fire. See, e.g., Gorman v. Farm Bureau Town & Country Ins. Co.*, 977 S.W.2d 519, 522 (Mo. App. W.D. 1998) (citing MAI 31.09). Moreover, in one of his early decisions from the federal district bench, Judge Brian

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[3] The other two provisions (RSMo §§ 379.140 and 379.145) by their terms apply only to fire insurance policies covering *real property*. RSMo § 379.145.2.

Wimes also recognized this requirement by rejecting an argument to apply another valued policy statute (RSMo § 379.140) to a case involving no loss by fire. *Garvin v. Acuity*, 2012 WL 5197223 at *4-*5 (W.D. Mo. Oct. 19, 2012) (attached).

Neither Plaintiff sustained a loss by fire, so they have no rights under section 379.160 and it does not displace the terms of their commercial auto policies. Summary judgment should be entered against Plaintiffs on Count IV.

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,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing document was served by Electronic Mail and Hand Delivery, this 17th day of December, 2012, on the following counsel:

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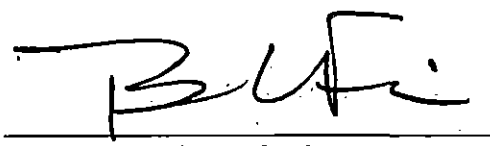

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