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No. 69554-1-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

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STATE OF WASHINGTON
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FIROZ IBRAHIM

Appellant,

v.

AIU INSURANCE COMPANY, A FOREIGN INSURER,

Respondent.

RESPONDENT'S ANSWERING BRIEF

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I. INTRODUCTION

Plaintiff Firoz Ibrahim (“Plaintiff”) filed this civil action against Defendant AIU Insurance Company (“AIU”), alleging that AIU breached the contract and acted in bad faith by failing to pay for damages to his vehicle that he argues are recoverable under his insurance policy with AIU. The trial court dismissed all of Plaintiff’s claims on summary judgment, ruling that AIU fully compensated Plaintiff under the insurance policy for damages sustained to his vehicle as a result of an accident.

The trial court did not err by ruling in favor of AIU on summary judgment. AIU fully compensated Plaintiff by indemnifying him in the amount required to repair the vehicle to its pre-loss condition, as required under the terms of the policy. Further, even if Plaintiff could have recovered additional damages under this policy—for alleged “diminished value”—he failed to produce any evidence of such. In fact, Plaintiff’s own expert report and Plaintiff’s responses to AIU’s request for admissions establish that his vehicle had been

returned to its pre-loss condition and that there was no remaining physical damage. AIU was entitled to judgment as a matter of law on all of Plaintiff's claims, and this Court should affirm the trial court.

II. STATEMENT OF CASE

1. BACKGROUND FACTS

AIU and Plaintiff entered into a contract of automobile insurance, Policy No. 703 69 39 ("the policy"), effective from February 1, 2007, to August 1, 2007. CP 17. The policy provides coverage for the compensation of property damage caused by a collision, which an insured is legally entitled to recover from the owner of an underinsured vehicle, subject and pursuant to all of the terms, conditions, limitations and exclusions stated in the policy. CP 17. The policy defines "property damage" as "physical injury to, destruction of or loss of use of tangible property." *Id.* The policy further provides, in relevant part, as follows:

"UNDERINSURED MOTORISTS COVERAGE – LIMIT(S) OF LIABILITY

C. Property Damage Limit of Liability
– Our Limit of Liability under this **Part C**
for Property Damage to a covered auto from
any one *accident* is the lowest of:

3. The amount needed to restore the covered *auto* to its pre-loss condition, reduced by the applicable deductible;”

Id.

Plaintiff’s 2007 Lexus ES 350 (“the vehicle”) was listed as a covered vehicle on the policy, and was damaged in a collision that occurred on or about April 25, 2007. CP 1. The vehicle was subsequently repaired and fully restored to the same condition it was in immediately prior to the collision (“pre-loss condition”). CP 13, Exs. 2 and 3. The total cost of repairing the vehicle to its pre-loss condition was \$18,908.62, and the net cost of repairs after the application of the policy deductible was \$18,408.62. CP 13, Ex. 4. The vehicle was fully restored to its pre-loss condition as of July 2, 2007, and AIU paid the full cost of repairs no later than August 13, 2007. CP 13, Ex. 5.

In February 2008, Plaintiff presented a claim to AIU for alleged diminished value of the vehicle pursuant to the above-cited Underinsured Motorist Coverage

provisions. CP 1. In response, AIU acknowledged to Plaintiff that diminished value would be covered under the policy, but only to the extent that it can be proven. CP 30. Plaintiff failed to submit any proof of diminished value to AIU. To the contrary, both Plaintiff and Plaintiff's expert, John R. Walker Sr., of Frontier Adjusters, admitted that the vehicle had been "fully repaired back to its pre-loss condition and there is no remaining physical damage after these repairs." CP 13, Ex. 3.

2. PROCEDURAL HISTORY

AIU moved for summary judgment on all of Plaintiff's claims. Oral argument was held on September 21, 2012. The trial court rejected Plaintiff's argument that he was entitled to "diminished value," reasoning that the insurance policy at issue required payment by AIU of the amount needed to restore the vehicle to pre-loss condition, which AIU had done:

"THE COURT: I want you to look at the particular language of the contract in this case, which says that, "The" – "the insured is entitled to property" – "property damage in amount needed to restore the automobile to its preloss condition." It

doesn't say 'preloss value'; it says "preloss condition."

And reading your responses to – or your – your client acknowledged that the vehicle had been restored to its preloss condition. *** I'm looking right at this contract and seeing that it limits the – the – it defines property damaged covered as an amount needed to restore the automobile to its preloss condition.

I am granting summary judgment because the way that I read this policy limits the insured's responsibility for property damage to that which restores the covered auto to its preloss condition. And because the – there are no disputed facts as to the vehicle having been restored to its preloss condition, as to – as opposed to its preloss value, the insurer has met the requirements of the policy. So the insurer is entitled to judgment as a matter of law." RP 11-12; 27-28.

III. ARGUMENT

Plaintiff agrees that AIU fully indemnified him for repair costs that were incurred to restore his vehicle to its pre-loss condition.

However, Plaintiff argues that he is entitled to be compensated for alleged "diminished value" of the vehicle in addition to the amount it cost to repair the vehicle to its pre-loss condition. Plaintiff's argument

fails for two reasons: (1) the policy language he relies on does not support his position; and (2) even if the policy permitted recovery for “diminished value,” Plaintiff has no evidence of it. Plaintiff’s Consumer Protection Act and bad faith claims were also properly dismissed by the trial court, because AIU performed its obligations under the contract, and any alleged misstatements of facts or policy provisions did not cause Plaintiff any injury.

1. AIU fully compensated Plaintiff for the amounts owing under the policy.

A. The policy provisions relied on by Plaintiff do not support his theory that he is entitled to damages due to diminished value.

The applicable AIU insurance policy contains the following relevant provisions:

**PART C – UNDERINSURED MOTORISTS
COVERAGE**

**“UNDERINSURED MOTORISTS
PROPERTY DAMAGE COVERAGE
INSURING AGREEMENT**

Subject to the Underinsured Motorists Property Damage limit of liability stated on *your Declarations Page*, if you pay the premium for Underinsured Motorists Property Damage Coverage, *we* will pay for *property damage* caused by an *auto accident* which an insured is legally entitled to recover from the **owner** or operator of an *underinsured motor vehicle.*”

**UNDERINSURED MOTORIST
COVERAGE - LIMIT(S) OF LIABILITY**

C. Property Damage Limit of Liability –
Our Limit of Liability under this **Part C**
for Property Damage to a covered auto
from any one *accident* is the lowest of:

3. The amount needed to restore the covered *auto* to its pre-loss condition, reduced by the applicable deductible[.]”

CP 13, Ex. 1.

The interpretation of language in an insurance policy is a matter of law. *Allstate Ins. Co. v. Peasley*, 131 Wash.2d 420, 423–24, 932 P.2d 1244 (1997). This Court gives effect to the insurance contract as a whole, and does not simply view insurance policy terms in isolation. *Id.* at 424.

This case presents a straightforward application of clear policy provisions. The “Limit(s) of Liability” section of the policy specifically provides that it applies to Underinsured Motorist Property Coverage. AIU’s limit of liability under the property damage portion of the policy is the amount needed to “restore the covered

auto to its pre-loss condition, reduced by the applicable deductible.” That amount was determined, is undisputed, and was paid by AIU.

Plaintiff, however, argues that other language in the policy allows him to recover an additional amount for “diminished value.” Plaintiff focuses on the following policy language: AIU “will pay for property damage caused by an auto accident which an insured is *legally entitled* to recover from the owner or operator of an underinsured motor vehicle.” (Emphasis added) Plaintiff reasons that under Washington law a person is legally entitled to recover loss of value to one’s property, and therefore, the inclusion of “legally entitled” in the policy requires indemnification for the cost of repairs and loss of value. Plaintiff’s argument fails, because as the trial court ruled, common-law tort concepts, case law and statutory references have no bearing on the interpretation of the contractual language at issue here.

Plaintiff’s reliance on the policy’s use of the term “legally entitled” to support his argument is misplaced.

The fact that the policy permits the insured to recover for property damage that he is “legally entitled” to recover from an uninsured motorist must be read with the other provisions of the policy. The policy clearly states that AIU will pay for “property damage,” and limits that liability to the amount needed to restore the vehicle to its pre-loss condition.

As the trial court stated, the only sensible reading of the language “legally entitled” is to read it as limiting the type of damage recoverable to that which was caused by the accident. In other words, if there was pre-existing damage to the vehicle, an insured would not be able to recover for that damage because he would not be legally entitled to do so. To read the policy the way Plaintiff urges would gut the limit of liability provisions of the policy and interfere with the parties’ ability to contract.

AIU fully performed under the contract, and Plaintiff is not entitled to anything further.

B. Plaintiff did not produce any evidence of diminished value.

Even if the policy allows for recovery of diminished value damages, there is no evidence that the

vehicle at issue suffered diminished value. The only “damage” Plaintiff claims is unrecoverable “stigma” damage.

The Washington Supreme Court has drawn a clear distinction between claims for “diminished value” damage and “stigma” damage:

A vehicle suffers ‘diminished value’ when it sustains physical damage in an accident, but due to the nature of the damage, it cannot be fully restored to its pre-loss condition. Weakened metal that cannot be repaired is one such example. **In contrast, ‘stigma damages’ occur when the vehicle has been fully restored to its pre-loss condition, but it carries an intangible taint due to its having been in an accident.** *Moeller v. Farmers Ins. Co. of Wash.*, 173 Wn.2d 264, 271, 267 P.3d 998 (2011) (internal citations omitted) (emphasis added).

As stated in *Moeller*, and subject to the particular terms of the policy at issue, the diminished value caused by property damage to a vehicle may be covered under an insurance policy. Stigma damages, on the other hand, are not. *Id.* The damages requested by Plaintiff in this matter are properly classified as unrecoverable stigma damages.

There is no evidence that Plaintiff claims any physical damage to his vehicle, such as weakened metal.

Plaintiff's expert report expressly states that, "after my personal inspection I concluded this vehicle was fully repaired back to its pre-loss condition and there is no remaining physical damage after these repairs." CP 13, Ex. 3. Thus, Plaintiff's expert's appraisal of damage addresses unrecoverable stigma damages because it addresses the "intangible taint due to [the vehicle's] having been in an accident." *Moeller, supra*.

Further, Plaintiff's Responses to AIU's Requests for Admission confirm that there is no unrepaired physical damage. In those Responses, Plaintiff admitted the following:

REQUEST NO. 1: According to the plaintiff's expert, John Walker, Sr. the car has been returned to pre-loss condition to the extent possible with current technology and therefore admits that it has been returned to its pre-loss condition.

REQUEST NO. 2: Plaintiff is unaware of any remaining physical damage to the vehicle in question and therefore admits the same.

REQUEST NO. 3: Plaintiff admits that one component of diminished value in this matter is the perception that the repaired parts may be weaker or less-structurally sound and that this perception would occur in the mind of any potential buyer in accordance with his duty to report the same. Therefore, plaintiff admits

that perception is one of a number of issues bearing on diminished value. CP 13, Ex. 2.

Under the distinction set forth in *Moeller*, any damages Plaintiff claims to his vehicle by definition are “stigma” rather than “diminished value” damages. Plaintiff concedes that the vehicle has no remaining physical damage after it was repaired. Because Plaintiff failed to produce any evidence of diminished value to the vehicle, the trial court properly granted summary judgment to AIU.

2. Plaintiff’s Bad Faith and Consumer Protection Act Claim was Properly Dismissed.

The trial court correctly granted summary judgment in favor of AIU on Plaintiff’s Washington Consumer Protection Act (“CPA”) and tortious bad faith claims. As discussed above, it is undisputed that AIU indemnified Plaintiff for repair costs that were incurred to restore his vehicle to its pre-loss condition. That was all that was owed under the terms of the policy. Further, even if a “diminished value” claim were recoverable under the policy, Plaintiff offered no evidence of the vehicle’s “diminished value.”

On appeal, Plaintiff argues that AIU's conduct in this claim was a *per se* violation of WAC 284-30-330.¹ Plaintiff states that AIU "argued that the limits of liability clause in the policy excluded a claim for diminished value when it had already conceded in a letter that by its own interpretation of its policy includes such a claim, upon proof." According to Plaintiff, the foregoing conduct violated the CPA because AIU misstated pertinent facts or insurance policy provisions.

To establish a *per se* violation of the CPA, Plaintiff must show that AIU acted without reasonable

¹ Plaintiff alleges a violation of the following sections of WAC 284-30-330 provides as follows:

Specific unfair claims settlement practices defined.

The following are hereby defined as unfair methods of competition and unfair or deceptive acts or practices of the insurer in the business of insurance, specifically applicable to the settlement of claims:

(1) Misrepresenting pertinent facts or insurance policy provisions.

(7) Compelling a first party claimant to initiate or submit to litigation, arbitration, or appraisal to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in such actions or proceedings."

justification. *Starzewski v. Unigard Ins. Co.*, 61 Wn. App. 267, 273, 810 P.2d 58 (1991).

As the trial court ruled, AIU properly denied Plaintiff's claim for diminished value, as discussed in section 1A. above. AIU's denial was reasonable as a matter of law.

Furthermore, while a misstatement of coverage may be a violation of WAC 284-30-330, there must also be an injury to support a claim for damages. *See Sheldon v. American States Preferred Ins. Co.*, 123 Wn. App. 12, 17-18, 95 P.3d 391 (2004). Plaintiff did not establish an injury sufficient to support a claim for damages because Plaintiff failed to produce any evidence of diminished value damages to his vehicle. All the evidence before the trial court on that issue—Plaintiff's expert report and his admissions in AIU's requests for admissions—established that there was no evidence of diminished value. Plaintiff's claim that the value of his vehicle was

based on a perceived “intangible taint” that was due to the vehicle having been involved in an accident. Those types of stigma damages are not recoverable.

Consequently, the trial court’s ruling for AIU on Plaintiff’s CPA claim was not in error.

The trial court also correctly dismissed Plaintiff’s bad faith claim. The sole basis for Plaintiff’s bad faith claim was that AIU did not tender diminished value damages as part of Plaintiff’s UIM property damage claim. As detailed above, Plaintiff is not entitled to these damages under the applicable policy. AIU’s proper denial of these benefits was not “unreasonable, frivolous or unfounded.” *St. Paul Fire and Marine Ins. Co. v. Onivia, Inc.*, 165 Wn.2d 122, 130, 196 P.2d 664 (2008).

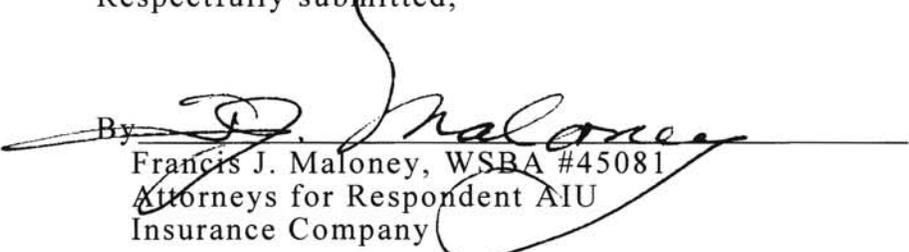
Therefore, the trial court correctly dismissed Plaintiff’s claim for bad faith.

IV. CONCLUSION

For the foregoing reasons, AIU asks this Court to affirm the trial court's ruling in its favor.

Dated: May 10, 2013.

Respectfully submitted,

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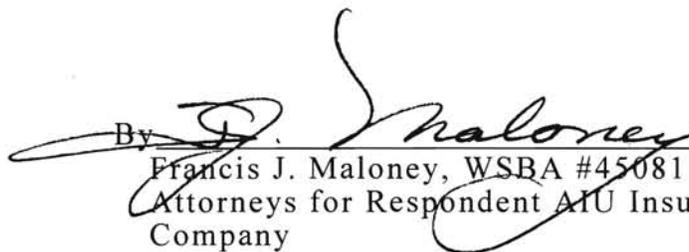
CERTIFICATE OF SERVICE

I certify that on May 10, 2013, I caused a true and correct copy of this RESPONDENT'S ANSWERING BRIEF was served on the following by U.S. First Class Mail, postage pre-paid.

I declare under the penalty of perjury under the laws of the State of Oregon that the foregoing is true and correct.

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