Carole M. Siegle v. Progressive Consumers Insurance Co.

THE NEXT CASE ON THE COURT'S ORAL ARGUMENT CALENDAR IS SIEGLE VERSUS PROGRESSIVE. MR. PEACOCK.

GOOD MORNING. MAY IT PLEASE THE COURT. I AM MIKE PEACOCK, ALONG WITH KATHLEEN FORD, THE LAW FIRM OF JAMES, HOYER, NEW KORAN SMILJANICH IN THIS CASE. THE COURT OF APPEALS AFFIRMED A DECISION GRANT AGO MOTION TO DISMISS AT THE TRIAL COURT LEVEL, IN A CASE WHERE, AS A RESULT OF AN ACCIDENT, MS. SIEGLE HAD BEEN INVOLVED IN, SHE RELIED UPON HER PROGRESSIVE INSURANCE POLICY FOR THE REPAIR OF HER VEHICLE, AND ALTHOUGH THE VEHICLE WAS REPAIRED, THE VEHICLE, AFTER THE TIME THAT THE REPAIR HAD OCCURRED, HAD A DIMINISHED VALUE IN THE AMOUNT OF $2600 AND SOME ADDITIONAL CHANGE. WE ARE NOT HERE IN THIS CASE, TODAY, BASED UPON SOME CONCEPT OF STIGMA OR, AS THE FOURTH DCA REFERRED TO IT, PSYCH HOLING IN THE MARKET -- PSYCHOLOGY IN THE MARKETPLCE OR MARKETPLACE PSYCHOLOGY OF SOME SORT. WE ARE HERE SUGGESTING THAT THE RIGHT OF MS. SEEING TOLL RECEIVE THE DIMINISHED VALUE OF HER VEHICLE IS A RIGHT THAT SHE IS ENTITLED TO, BASED UPON THE SPECIFIC CONTRACT IN THIS CASE. AS IT APPLIED, ISSUED BY THE DEFENDANT IN THIS CASE, AND THAT IT IS SOMETHING THAT IS OCCUPY ARE THED BY -- THAT IS SUPPORTED BY ACTUALLY, TANGIBLE, QUANTITY FINAL EVIDENCE, THAT WILL SHOW THE DIFFERENCE IN THE VALUE OF HER VEHICLE PRIOR TO THE TIME OF ACCIDENT AND THE VALUE OF HER VEHICLE AFTER THE TIME THAT IT HAD BEEN REPAIRED, PURSUANT TO THE INSURANCE POLICY.

YOU SAID, WE ARE NOT HERE ON A TORT LAW CONCEPT, THAT IS, THAT IF SHE WAS SUING FOR PROPERTY DAMAGE, THERE IS A CONCEPT OF DIMINISHEDxD MARKET VALUE AND THAT IS ONE ELEMENT OF DAMAGE. YOU HAVE GOT TO GET TO WHERE YOU WANT TO GET, BASED ON THE ACTUAL LANGUAGE OF THE POLICY, AND MY GREATEST CONCERN THERE, IS THAT THE OPTION THAT THE INSUROR HAS TO REPAIR, AT THEIR ELECTION, WOULD BE, REALLY, RENDERED MEANINGLESS, IF THIS, IF THE ARGUMENT YOU ARE ADVANCING WAS, IF WE WERE TO ACCEPT THAT ARGUMENT. COULD YOU HELP ME OUT WITH HOW THIS CONCEPT CAN OPERATE WITH THE LANGUAGE OF SAYING THEY HAVE THE OPTION TO REPAIR, VERSUS GIVE THEM A MONETARY AMOUNT?

I DON'T BELIEVE IT IS RENDERED MEANINGLESS, AND ACTUALLY THERE IS THE THREE OPTIONS THAT EXIST UNDER THE CONTRACT, IS EITHER TO PAY THE TOTAL CASH VALUE, THE EQUIVALENT OF WHAT WE WOULD REFER TO AS TOTAL IT, OR REPAIR OR REPLACE THE VEHICLE WITH LIKE KIND AND QUALITY. AND IT IS, REALLY, THE INTERPRETATION OF THE MEANING OF THE WORDS "REPAIR OR REPLACE" AND AS IT IS MODIFIED BY "LIKE KIND AND QUALITY", AND WHAT IS MEANT BY HAD, IN FACT, LIKE KIND AND QUALITY. I WOULD SUBMIT THAT, WITHIN THE TERM LIKE KIND AND QUALITY IS TO RETURN THE VEHICLE TO VALUE, THAT VALUE, IN ITSELF, IS LIKE KIND AND QUALITY. IT IS NOT JUST HOW DID THE VEHICLE LOOK WHEN THE REPAIR IS DONE AND HOW DID THE VEHICLE FUNCTION WHEN THE REPAIR IS DONE BUT THAT WHEN PEOPLE CONTRACT FOR INSURANCE, WHAT THEY ARE EXPECTING IS TO PROTECT THE VALUE THAT THEY HAVE IN THE VEHICLE, THE INVESTMENT VALUE OF THE VEHICLE OR ANY OTHER PROPERTY, FOR THAT MATTER. IN THIS PARTICULAR INSTANCE IT HAPPENS TO BE --

BUT DON'T YOU HAVE TO STRAIN THE -- I AM HAVING A HARD TIME SEEING THE AMBIGUITY IN SAYING THAT WE WILL REPLACE THE PARTS WITH LIKE KIND, WITH LIKE KIND PARTS. AND THAT SEEMS TO BE PRETTY UNAMBIGUOUS LANGUAGE. IT DOESN'T SAY WE ARE GOING TO RETURN

YOUR AR TO ITS PREACCIDENT VALUE. A POLICY COULD SAY THAT, I GUESS GUESS.

IT COULD SAY THAT.

IT DOES NOT SAYTHAT, DOES IT?

NO. IN ADDITION, NEITHER DOES IT SAY THAT WE ARE NOT GOING TO PAY FOR YOU THE DIMINISHED VALUE OF YOUR VEHICLE AFTER THE TIME WE HAVE REPAIED OR REPLACED IT.

WHY DOES IT HAVE TO SAY THAT, TO REACH THAT RESULT? THAT IS WHAT I AM HAVING DIFFICULTY UNDERSTANDING. CERTAINLY WE ARE TALKING ABOUT, HERE, A CERTAIN STANCE WHERE IT IS A NONREPAIRABLE ITEM, I WOULD ASSUME, IS THAT YOU HAVE GOT A VEHICLE THAT IS DAMAGED. A FRAME IS BENT OR SOMETHING. THEY STRAIGHTEN THE FRAME, BUT BY VIRTUE OF IT HAS BEEN IN AN ACCIDENT, THERE IS AN INTANGIBLE LOSS OF VALUE THAT YOU CAN'T REPAIR WITH PAINT AND METAL AND GLASS AND WHAT HAVE YOU. WHAT IS THE SOURCE OF THE OBLIGATION BEYOND WHAT IS IN THE POLICY?

THE SOURCE OF THE OBLIGATION IS, LIES IN THE TERMS OF REPAIR AND REPLACE WITH LIKE KIND AND QUALITY. THERE IS NUMEROUS CASES THAT HAVE EXISTED AROUND THE COUNTRY, WHERE THE FOCUS HAS BEEN ON THE MEANING OF THOSE WORDS. WHAT IS MEANT BY THE EQUIVALENT OF REPAIR AND WHAT IS MEANT BY THE TERMS "LIKE KIND AND QUALITY", AND CERTAINLY IT WOULD NOT BE PRESUMED THAT, UNDER THE INSURANCE CONTRACT, MERELY PAINTING THE VEHICLE TO MAKE IT LOOK RIGHT, DURING THE COURSE OF A REPAIR, WHEN, IN FACT, THE VEHICLE HAD NOT BEEN REPAIRED TO THE STATUS THAT IT WAS PRIOR TO THE TIME OF THE ACCIDENT, WOULD BE CONTEMPLATED BY THE LANGUAGE OF THE CONTRACT.

I THOUGHT IT WAS STIPULATED THAT THE REPAIRS WERE PROPERLY PERFORMED. THERE IS NOT AN ISSUE ABOUT ANY KIND OF SLAPPING ON PAINT, BUT REPAIRS WERE DONE.

THAT'S CORRECT.

WE ARE TALKING ABOUT A TOTALLY SEPARATE ITEM OR ELEMENT OF HE POLICY.

ABSOLUTELY. ABSOLUTELY. WE ARE TALKING ABOUT THE FAT OF THE VALUE AFTER THE TIME THAT THE VEHICLE HAD BEEN REPAIRED IS WORTH LESS THAN IT WAS IN THE MARKETPLACE PRIOR TO THE TIME OF THE ACCIDENT.

BUT HAVEN'T YOU DEMONSTRATED, BY YOUR VERY USE OF LANGUAGE YOURSELF, HERE, YOU HAVE REPEATEDLY USED THE PHRASE DIMINISHED VALUE, AND THEN YOU HAVE USED THE WORDS OF THE ACTUAL POLICY THAT ARE INVOLVED HERE, OF LIKE KIND AND VALUE, AND IF WE GIVE THOSE WORDS THEIR PLAIN MEANING, THEY WOULD NOT INCLUDE DIMINISHED VALUE, WHICH IS A PHRASE THAT YOU HAVE USED, AND OBVIOUSLY IT IS CAPABLE OF BEING USED BY INSURANCE COMPANIES OR OTHER PEOPLE HERE, HOW DO YOU GET DIMINISHED VALUE, WHICH OU HAVE USED REPEATEDLY, AND SO WE KNOW WHAT WE MEAN, WHEN WE KNOWHOW TO SAY THAT, IF WE MEAN DIMINISHED VALUE. WE SAY DIMINISHED VALUE. HOW DO YOU GET THAT, THOUGH, OUT OF LIKE KIND AND QUALITY?

IT DOESN'T REALLY MATTER WHAT IT IS CALLED, OBVIOUSLY.

I KNOW. BUT I AM HAVING DIFFICULTY. YOU HAVE BEEN USINGTHE PHRASE, AND THAT IS A GREAT PHRASE, AND I THINK I KNOW WHAT YOU MEAN WHEN YOU SAY THAT. IT SEEMS TO ME A VERY ACCEPTABLE WAY OF COMMUNICATING. BUT LIKE KIND AND QUALITY AS THE OTHER QUESTIONS HAVE INDICATED HERE, IAM HAVING A LOT OF DIFFICULTY GETTING DIMINISHED VALUE OUT OF LIKE KIND ND QUALITY. THAT IS THAT I WOULD ASSUME PEOPLE ORDINARILY MEAN "LIKE KIND", IF IT WAS A METAL FENDER THAT WAS DAMAGED AND METAL QUALITY IS

DIFFERENT THAN FIBERGLASS OR SOMETHING, YOU WOULD ASSUME THEY WOULD PUT THE, WOULDN'T BE ABLE TO GET AWAY WITH A FIBERGLASS FENDER, IF THE METAL WAS BETTER. THAT WOULD BE LIKE KIND. IF SOMEBODY SAID THESE ARE CHEAP FENDERS, AND THEY WILL ALL RUST OUT IN SIX MONTHS, AND YOU HAD A JAGUAR WITH A HEAVY METAL FENDER THAT WOULD LAST FOR YEARS, YOU KNOW, THOSE ARE COMMONLY UNDERSTOOD WITH THAT, BUT HOW DO YOU GET DIMINISHED VALUE OUT OF "LIKE KIND AND QUALITY"?

I DON'T THINK I CAN ANSWER THE QUESTION BY ANSWERING DIRECTLY HOW YOU GET DIMINISHED VALUE OUT OF LIKE KIND AND QUALITY. I THINK THE ANSWER LIES IN THE DEFINITIONS AS THEY EXIST WITHIN THE CONTRACT, ITSELF, INTERPRETED BY FLORIDA LAW THAT EXISTED AT THE TIME THAT THE CONTRACT WAS CREATED, AND THAT WOULD INCLUDE THE LANGUAGE THAT EXISTED IN THE ARCH, ROBERTS AND GREEN CASES, AS EARLY AS 1969 IN THIS CASE, ESSENTIALLY REFERRED TO IN HE GUIDELINS SET FORTH BY THE DEPARTMENT OF INSURANCE IN 1984, AND I THINK IT IS READING THE LANGUAGE WITHIN THE CONTRACT, ITSELF, ATTEMPTING TO INTERPRET WHAT THE MEANING OF THAT LANGUAGE IS, APPLYING THE FLORIDA LAW AS IT EXISTED AT THE TIME THAT THE CONTRACT WAS ENTERED INTO, WHICH PROVIDES THE ELEMENT OF UNDERSTANDING THAT, WHEN DEFINING REPAIR OR REPLACE WITH LIKE KIND OR QUALITY, THAT INHERENT WITHIN THAT, IS A CONCEPT OF VALUE. THAT, WHEN A VEHICLE IS DESCRIBED, YOU KNOW, THE, SOMETHING HAS BEEN INVOLVED IN AN ACCIDENT AND HAS NOT BEEN INVOLVED IN AN ACCIDENT, TWO VEHICLES, IT IS IMPOSSIBLE TO RESTORE THE VEHICLE TO THE SAME VALUE THAT IT HAD BEFORE THE ACCIDENT. WE ARE NOT SUGGESTING IT IS A CONCEPT THAT WOULD APPLY --

YOU ARE SUGGESTING MORE THAN YOU CONTRACTED FOR SEEMINGLY. IF, IN YOUR SITUATION, A VEHICLE JUST DOOR, WAS THE ONLY THING THAT WAS DAMAGED, AND THE INSURANCE COMPANY PLACED IT WITH A BRAND NEW -- THE INSURANCE COMPANY REPLACED IT WITH A BRAND NEW DOOR, THE BEST THAT IS MADE IN THE WORLD, YOU WOULD STILL SAY THAT HAS NOT COMPENSATED YOU.

NO, NOT NECESSARILY. I AM CERTAINLY NOT SUGGESTING THAT DIMINISHED VALUE APPLIES TO EVERY CLAIM THAT EXISTS. I AM CERTAINLY NOT SUGGESTING TO THIS COURT THAT, EVERY TIME AN AUTOMOBILE IS INVOLVED IN AN ACCIDENT AND THAT IT HAS BEEN REPAIRED TO THE BEST OF ABILITY, IN TERMS OF REPAIRING IT, THAT THERE WOULD ADDITIONALLY BE AN OBLIGATION OF THE INSURANCE COMPANY TO PAY SOME AMOUNT OF DIMINISHED VALUE. THE REALITY IS THAT, IN SOME CIRCUMSTANCES, RECOGNIZED BY THE SHRAYER COURT IN A TEXAS DECISION AT THE END OF LAST YEAR IT WOULD ACTUALLY BE POSSIBLE THAT THE VALUE OF THE VEHICLE, AFTER THE TIME OF THE REPAIR, MAY BE GREATER THAN IT WAS PRIOR TO THE TIME OF THE ACCIDENT. SO THAT WOULD MEAN --

THAT WOULD BE AN UNUSUAL SITUATION. WHAT DID YOU ALLEGE IN YOUR COMPLAINT THAT WAS DIMINISHED, OTHER THAN THE PHYSICAL DAMAGE TO THE VEHICLE? YOU ARE SAYING THERE WAS AN ACCIDENT AND SUCH-AND-SUCH AND SUCH HAPPENED, AND SUCH-AND-SUCH OF DAMAGE OCCURRED AS A RESULT OF IT.

RIGHT.

WHAT DID YOU SAY OCCURRED, OVER AND ABOVE THAT PHYSICAL DAMAGE?

IT IS NOT SPECIFICALLY ALLEGED IN THE COMPLAINT, AND IN TERMS OF THE FACTS THAT EXIST IN THE RECORD AT THIS POINT, THEY DON'T EXIST, BECAUSE WE HAVEN'T REACHED THAT LEVEL IN THE COURSE OF EVENTS. I CAN ANSWER THE QUESTION FOR THE COURT BY SAYING THAT THE ELEMENTS THAT WOULD HAVE BEEN DIFFERENT, AFTER THE TIME OF THE ACCIDENT THAT RESULTS IN SUPPORT OF THE CLAIM FOR DIMINISHED VALUE WITHDREW, WOULD BE STRUCTURAL, FRAME DAMAGE, PAINT DAMAGE, SHEET METAL DAMAGE, THAT COULDN'T BE,

THAT, AS A RESULT OF THE REPAIRS, STILL HAD A REMAINING DIMINISHED VALUE TO THE VEHICLE, AFTER THE TIME THAT THE REPAIRS WERE MADE, TO THE BEST OF THE ABILITY.

IS THIS SOME FORM OF THIS CAR SHOULD HAVE BEEN TOTALED AND PASS TH CASH VALUE AND NOT REPAIRED? SEE, WE DON'T PERCEIVE IT AS THAT KIND OF CASE.

THE INSURANCE COMPANY CERTAINLY HAS THREE OPTIONS, AND I CERTAINLY AM NOT STANDING HERE SUGGESTING THAT PROGRESSIVE ONLY HAS A SINGLE OR LIMITED OPTION UNDER THEIR CONTRACT. THEY HAVE THREE OPTIONS. OBVIOUSLY THEY GET TO CHOOSE, UNDER THE TERMS OF THE CONTRACT, WHICH OF THOSE THREE OPTIONS THEY WISH TO EXERCISE. PAYING THE TOTAL CASH VALUE, REPAIRING LIKE KIND AND QUALITY OR REPLACING WITH LIKE KIND AND QUALITY, AND CERTAINLY THEY ARE GOING TO MAKE THAT DETERMINATION AS A BUSINESS, TO EXERCISE THEIR OPTIONS IN A WAY THAT IS BEST, IN THEIR BEST FINANCIAL INTEREST AND I HAVE NO ARGUMENT ABOUT THAT. I AM NOT SUGGESTING THAT IT IS ANY DIFFERENT THAN WHAT HAS BEEN CONTRACTED FOR OR WHAT HAS BEEN PROVIDED FOR. ALL I AM SUBMITING TO THE COURT IS THAT, BASED UPON FLORIDA LAW THAT EXISTED AT THE TIME OF THE CONTRACT BEING ENTERED INTO, THAT ELEMENT OF DIMINISHED VALUE THAT, DIFFERENCE BETWEEN PREACCIDENT AND POST ACCIDENT REPAIR, IS AN AMOUNT THAT IS CONTEMPLATED, SHOULD BE CONTEMPLATED, BASED UPON FLORIDA LAW, WITHIN THE DEFINITION OF REPAIRING WITH LIKE KIND AND QUALITY.

HELP ME UNDERSTAND HOW YOU SEE THOSE CASES TO APLY. AS I READ GREEN, THAT IS ONE THAT, AS I READ IT, WAS A CASE THAT, REALLY, WAS ADDRESSING WHETHER AN INSURANCE COMPANY COULD FORCE AN INSURED TO ACCEPT SOME UNCERTAIN REPAIRS AND ISSUE A RELEASE AND THEN ARCH ROBERTS WAS WHERE A QUESTION OF WHETHER AN INSURANCE COMPANY HAD BEEN PREVENTED FROM DOING REPAIRS, AND I AM REALLY STRUGGLING WITH TRYING TO UNDERSTAND HOW THOSE APPLY HERE, UNLESS THERE IS SOME THEORY OF THE INSURANCE COMPANY FORCING YOU TO GIVE UP, THROUGH SUBJUGATION, SOME ADDITIONAL CLAIM THAT YOU WOULD HAVE HAD AGAINST A TORTFEASOR. BUT I DON'T READ THAT ELEMENT INTO YOUR CASE, EITHER.

I DON'T READ EITHER THE ARCH ROBERTS CASE OR THE GREEN CASE TO SAY THAT THIS IS THE CASE WHERE DIMINISHED VALUE WAS ESTABLISHED. I DON'T SUGGEST TO THE COURT THAT THAT IS WHAT EITHER OF THESE CASES DO. I SUBMIT TO THE COURT THAT WHAT EACH OF THE CASES DOES IS PROVIDE THE FRAMEWORK, THE STATUS OF THE LAW IN FLORIDA, BY WHICH TO INTERPRET THE LANGUAGE WITHIN THE SPECIFIC CONTRACT THAT WE ARE LOOKING AT IN THIS INSTANCE. IN AN INTERPRETATION OF VERY SIMILAR CONTRACT LANGUAGE, IN EACH OF THOSE CASES, THE DETERMINATION WAS ULTIMATELY MADE THAT THE, INTERPRETING THE LANGUAGE OF THE CONTRACT, THAT THE OBLIGATION OF THE INSUROR WAS ESSENTIALLY TO RESTORE THE VEHICLE TO THE SAME FUNCTION, APPEARANCE AND VALUE, AND THOSE THREE TERMS, FUNCTION, APPEARANCE AND VALUE, ARE THE TERMS THAT ARE USED IN BOTH THE ARCH ROBERTS AND THE GREEN CASE, AND IT IS THAT CONCEPT OF VALUE RECOGNIZED IN THOSE CASES THAT I WOULD SUBMIT TO THE COURT IS WHAT NEEDS TO BE FACTORED INTO THE INTERPRETATION OF THE CONTRACT LANGUAGE IN THIS INSTANCE. IT SEEMS TO BE SIGNIFICANT AND, ONCE AGAIN, I AM BEFORE THE COURT HAVING FOUND MYSELF HERE ON A RULING ON A MOTION TO DISMISS, PRIOR TO THE TIME THAT FACTS WERE ESTABLISHED IN THE RECORD, PRIOR TO THE TIME THERE HAD BEEN A HEARING, PRIOR TO THE TIME WHEN WE WOULD BE REVIEWING EVIDENCE IN A CIRCUMSTANCE WHERE FOR INSTANCE, IF I WAS STANDING HERE AS A RESULT OF A MOTION FOR SUMMARY JUDGMENT, BUT FACTUALLY, AS IT EXISTS IN THIS CASE, THE SIGNIFICANT ELEMENT IS THAT THE COMPANY HERE COULD HAVE CHOSEN TO EXCLUDE DIMINISHED VALUE FROM THEIR CONTRACTOR COULD HAVE CHOSEN TO INCLUDE IT OR COULD HAVE CHOSEN TO REMAIN SILENT, WHICH IS WHAT THEY DID UNDER THE CIRCUMSTANCE.

WHAT YOU ARE SAYING IS THAT THE COMPANY WOULD HAVE HAD TO HAVE PUT EXPRESS

LANGUAGE IN SAYING THAT THIS DOES NOT INCLUDE A DIMINISHED VALUE. IS THAT THE ESSENCE OF IT?:zjDTQ) rJN AM SAYING IF THAT FACT HAD OCCURRED, OBVIOUSLY WE WOULDN'T BE STANDING HERE TODAY, AND THERE WAS ACTUALLY A TOTAL OF 21 I BELIEVE, EXCLUSIONS THAT WERE ACTUALLY INCLUDED IN THIS PARTICULAR CONTRACT, ITSELF, IN STANDARD CONTRACTS THAT EXIST FROM THIS COMPANY AND OTHERS, THERE IS OFTEN A STANDARD DIMINISHED VALUE EX-LUTION -- EXCLUSION THAT IS INCLUDED AMONGST EXCLUSIONS. FACTUALLY, IT WOULD BE ESTABLISHED IN THE COURSE OF PROCEEDINGS IN THIS CASE, THAT THE STANDARD CONTRACT ISSUED BY THE HAD 4 BY THIS COMPANY HAD A DIMINISHED VALUE AND AN AFFIRMATIVE DECISION WAS MADE TO NOT INCLUDE IT IN THE FLORIDA POLICY, AND I BELIEVE THAT IS AS A RESULT OF THE DEPARTMENT OF INSURANCE OPINION FROM 1984. MR. CHIEF JUSTICE

YOU ARE IN YOUR REBUTTAL TIME. THANK YOU. MR. RICHARDS.

MAY IT PLEASE THE COURT. I AM BARRY RICHARD, AND I AM COUNSEL FOR PROGRESSIVE INSURANCE COMPANY. I HAVE WITH ME AT COUNSEL TABLE MR. JOHN FITZ, WHO IS DEPUTY GENERAL COUNSEL FOR PROGRESSIVE. I BELIEVE, YOUR HONOR, THAT THERE IS SOME CONFUSION IN THIS CASE AS TO WHAT THE RELIEF IS THAT THE PLAINTIFFS ARE ACTUALLY SEEKING. WHEN ONE READS THE BRIEFS THAT WERE FILED BEFORE THE DISTRICT COURT OF APPEAL, THEY CLEARLY APPEAR TO BE SEEKING PRECISELY WHAT THEY ARE NOW SUGGESTING THEY ARE NOT SEEKING, AND THAT IS THE SO-CALLED STIGMA DAMAGES FROM THE FACT THAT THE PUBLIC MAY PERCEIVE THE VALUE OF AN AUTOMOBILE, REGARDLESS OF HOW PERFECTLY IT IS REPAIRED, TO BE LESS VALUE THAN IT WAS BEFORE. AS A MATTER OF FACT, IF YOU READ THEIR BRIEF, THEY MADE THE STATEMENT IN IT, IN THE DCA, THAT AN AUTOMOBILE LOSES VALUE THE MOMENT IT IN AN ACCIDENT, EVEN BEFORE IT IS REPAIRED. TODAY THEY APPEAR TO BE BACKING SOMEWHAT OFF OF THAT. COUNSEL SPECIFICALLY TOLD YOU, AT THE BEGINNING OF HIS REMARKS, THAT THEY ARE NOT SEEKING THE SO-CALLED STIGMA DAMAGES THAT WERE REJECTED BY THE THIRD DISTRICT COURT OF APPEAL. I WOULD SUGGEST TO THE COURT, MATTER OF FACT I WOULD AFFIRMATIVELY SUBMIT TO THE COURT, THAT IF ALL THEY ARE SEEKING IN THIS CASE, WHICH APPEARS TO BE WHAT THEY ARE SAYING TODAY, IS DAMAGES WHEN IT IS NOT POSSIBLE TO REPAIR A CAR TO ITS ORIGINAL FUNCTIONALITY AND APPEARANCE, BECAUSE THE NATURE OF THE DAMAGES ARE SO SUBSTANTIAL THAT THAT CANNOT BE DONE, THAT IN THAT CASE THEY ARE ENTITLED TO REDUCE VALUE, THEN THERE IS NO DISPUTE HERE, AND WE NEED NOT BE ARGUING BEFORE THIS COURT, BECAUSE MY CLIENT CONCEDES THAT. CLEARLY THE OPTION TO REPAIR HAS IMPLICIT WITHIN IT, THE POSSIBILITY OF REPAIRING TO ORIGINAL FUNCTIONALITY AND APPEARANCE.

BUT I GUESS GOING BACK TO THE REAL-LIFE WORLD, IF A VEHICLE IS IN AN ACCIDENT, AND EVEN AFTER IT IS REPAIRED, I THINK IT IS COMMON KNOWLEDGE THAT, IF YOU THEN WENT TO SELL THAT VEHICLE AS REPAIRED, YOU ARE NOT GOING TO GET THE SAME AMOUNT, I MEAN, IF YOU ARE WILLING, IF YOU TRUTHFULLY DISCLOSE THAT IT HAS BEEN IN AN ACCIDENT AND HAD $4,000 WORTH OF REPAIRS OR $10,000 WORTH OF REPAIRS, YOU ARE GOING TO GET LESS FOR THAT VEHICLE, CORRECT?

ABSOLUTELY. ABSOLUTELY.

AGAIN, IF THIS WAS A TORT CASE, THERE IS NO QUESTION THAT WOULD BE ONE OF THE ELEMENTS OF DAMAGES THAT THE PLAINTIFF COULD RECOVER. SO WE ARE BACK HERE AS TO WHETHER THE CONTRACT THAT PROGRESSIVE ISSUED CONTEMPLATED, AMONGST PROPERTY DAMAGE THAT YOU COULD GET HATEVER, I GUESS WE ARE HERE ON THE PLEADINGS, THIS IS STILL PLEADINGS, WHETHER YOU CAN GET DIMINISHED VALUE OR THEY SHOULD BE ABLE TO CLAIM THAT, AND SO IS THERE AN AMBIGUITY, WHAT IS YOUR POSITION AS TO WHETHER THERE IS AN AMBIGUITY IN THIS POLICY, OR IF IT IS CLEAR THAT LIKE KIND AND QUALITY JUST COULD NEVER INCLUDE DIMINISHED VALUE?

JUSTICE PARIENTE, OUR POSITION IS THAT THERE IS CLEARLY NO AMBIGUITY, BUT I THOUGHT IT WAS IMPORTANT FOR US TO BEGIN BY UNDERSTANDING WHERE THE DISPUTE IS. THE ONLY DISPUTE IN THIS CASE IS OVER THE QUESTION OF WHETHER OR NOT ASSUMING THAT A CAR IS REPAIRED TO ITS ORIGINAL FUNCTIONALITY AND APPEARANCE IN ALL RESPECTS, THERE IS STILL A RIGHT, UNDER THIS POLICY, FOR THE CAR OWNER TO RECEIVE THE DIMINISHED MARET VALUE OF THE CAR, BECAUSE EXACTLY WHAT YOUR HONOR IS ADDRESSING.

YOU WERE MAKING IT SOUND AS IF IT IS NOT A REAL LOSS.

IT IS CLEARLY. THE POINT IS THIS. IT IS NOT A SIMM ANTIC NUANCE. WE ARE TALKING ABOUT FUNDAMENTALLY DIFFERENT COVERAGE FUNDAMENTALLY DIFFERENT COVERAGE. THE AS ULTION OF THE -- THE ASSUMPTION OF AN OBLIGATION TO REPAIR A DAMAGED VEHICLE WITH PARTS OF LIKE KIND AND QUALITY IS ONE THING, AND THE DETERMINATION OF WHETHER OR NOT IT HAS BEEN DONE IS INTRINSIC TO THE REPAIR ITSELF. YOU DON'T HAVE TO LOOK AT ANYTHING ELSE. IT IS ENTIRELY DIFFERENT THAN ASSUMING THE GUARANTEE OF THE MARKET VALUE OF A VEHICLE. WHICH HAS NOTHING TO DO WITH THE REPAIR. I MEAN, IT MAY HAVE SOMETHING TO DO WITH THE REPAIR, BUT WHAT WE ARE REALLY TALKING ABOUT IS THE PUBLIC'S PERCEPTION OF THE VALUE OF THE VEHICLE, SO THAT EVEN IF IT IS REPAIRED TO BETTER FUNCTIONALITY, IT IS STILL LOSS OF VALUE.

CAN I GET THAT TYPE OF POLICY FROM PROGRESSIVE, IF I SAID, LISTEN, CHANCES ARE MY VEHICLE IS GOING TO BE IN AN ACCIDENT. I KNOW THAT I HAVE GOT AN EXPENSIVE VEHICLE. I HAVE GOT A ROLLS-ROYCE AND I DON'T WANT TO CHANCE THE IDEA THAT, IF IT IS IN AN ACCIDENT, THE OPTION TO REPAIR JUST WON'T PUT ME WHERE I WANT TO BE. IS THAT AVAILABLE? WHAT ARE WE DEALING WITH, AS FAR AS STANDARD POLICIES IN THE INDUSTRY?

YOUR HONOR, I DON'T KNOW WHETHER IT IS AVAILABLE. I DON'T BELIEVE THAT THE RECORD REFLECTS THAT. BUT THE FACT IS THAT THE QUESTION IS TRULY POINTED IN THIS CASE, BECAUSE THAT IS THE ISSUE. IF THE POLICYHOLDER DESIRES TO HAVE THAT COVERAGE, AND THE INSURANCE COMPANY AGREES TO PROVIDE IT, THE INSURANCE COMPANY WILL DETERMINE, BASED UPON ITS RATE-MAKING PROCEDURES, WHETHER OR NOT WHAT THE PREMIUM SHOULD BE.

HOW WOULD THAT BE WRITTEN THEN? IN OTHER WORDS A STATEMENT AT THE END OF THE ARGUMENT THAT PROGRESSIVE ACTUALLY HAS POLICIES THAT HAVE STANDARD DIMINISHED VALUE EXCLUSIONS, WHICH WOULD IMPLY THAT, THE EXCLUSION, THAT IT IS OTHERWISE INCLUDED. WHAT WOULD HAVE TO BE WRITTEN INTO THE POLICY, TO MAKE IT CLEAR THAT IT WAS A, THAT YOU COULD GET MARKET, DIMINISHED MARKET VALUE?

THERE IS NO POLICY AVAILABLE IN THE STATE OF FLORIDA WITH THAT EXCLUSION IN IT. AND BEFORE YOU GET TO THE QUESTION OF WHETHER OR NOT YOU NEED TO EXCLUDE, YOU HAVE TO BEGIN WITH WHETHER OR NOT YOU HAVE AGREED TO COVER SOMETHING IN THE FIRST PLACE. WE ARE DEALING, HERE, WITH A DIFFERENT UNDERWRITING CRITERIA, DIFFERENT RATE-MAKING CRITERIA, DIFFERENT PREMIUM CONSIDERATIONS. THEY ARE ENTIRELY DIFFERENT TYPES OF COVERAGE. WHAT COUNSEL IS RELYING UPON HERE, WHEN WE TALK ABOUT AMBIGUITY, THERE IS NO PLACE IN THIS ENTIRE CONTRACT THAT USES THE TERM "MARKET VALUE", AND THERE IS NO PLACE, THERE ARE NO WORDS THAT COUNSEL CAN POINT TO IN THIS CONTRACT, FROM WHICH ONE CAN REASONABLY CONCLUDE THAT THE COMPANY HAS AGREED TO GUARANTEE THE VALUE YOUTHFUL THE CAR. NO PLACE IN THIS CONTRACT. WHAT THEY ARE RELYING UPON IS THE GENERAL STATEMENT THAT PRECEDES THIS LIMITATION THAT SAYS THAT WE WILL PAY FOR LOSS TO YOUR VEHICLE. THAT IGNORES TWO FUNDAMENTAL RULES OF CONSTRUCTION. ONE IS THAT YOU HAVE TO READ THE CONTRACT IN PARAMAKE TEAR YEAH. YOU DN'T JUST -- IN PARAMATERIA. YOU DON'T JUST READ THE ONE PHRASE ITSELF, AND TWO, WHEN YOU HAVE A GENERAL PROVISION, THE SPECIFIC -- AND, TWO, WHEN YOU HAVE A SPECIFIC PROVISION, THE SPECIFIC PROVISION PREVAILS.

IS THAT WHAT THEY RELIED ON IN THAT STATEMENT?

THEY HAVE A STATEMENT THAT SAYS WE ME REPLACE OR REPAIR AND THEN WITH LIKE KIND AND QUALITY AND THEY WISH TO IGNORE LIMITS OF LIABILITY, IN WHICH THE COURT SAYS THIS IS THE LIMIT OF OUR LIABILITY. WE MUST PAY THE LESSER OF THESE OPTIONS. ONE OF WHICH IS THE OPTION TO REPAIR WITH PARTS OF LIKE KIND AND QUALITY. YOUR HONOR MADE A STATEMENT THAT WAS REFLECTED IN A DECISION BY THE CALIFORNIA COURT, AND IT IS NOT MY PURPOSE HERE, TO COUNT DECISIONS OUT OF THE STATE OF FLORIDA, BECAUSE I DON'T THINK THAT IS PRODUCTIVE, BUT I THINK THE DECISION WAS IMPORTANT ONE, BECAUSE IT REFLECTED EXACTLY WHAT YOU SAID. IT WAS THE RAY VERSUS FARMER INSURANCE COMPANY, WHICH WE CITED IN OUR BRIEF, IN WHICH THE COURT SAID EXACTLY WHAT YOUR HONOR SAID, WHICH IS THAT, IF THIS OBLIGATION WERE INTERPRETED AS THE PLAINTIFFS ARE SEEKING HERE, AND THEY WERE DEALING WITH THE SAME ESSENTIAL LANGUAGE, IT WOULD RENDER, ESSENTIALLY MEANINGLESS, AS YOUR HONOR SAID, ITS RIGHT TO SELECT REPAIR WITH PARTS OF LIKE KIND AND QUALITY, IF THAT WERE THE LESSER COST. IT WOULD BE MEANINGLESS. THE COURT WENT ON TO SAY THAT IT WAS NOT GOING TO RENDER A DECISION THAT WOULD PROVIDE THE POLICYHOLDER WITH A RISK OR IMPOSE UPON ACCOMPANY A RISK IT DIDN'T CONTEMPLATE AND PROVIDE THE POLICYHOLDER WITH COVERAGE THAT IT DID NOT PAY FOR. NOW, THAT IS PARTICULARLY CRITICAL IN THE AREA OF INSURANCE, WHICH BASICALLY IS IN THE BUSINESS OF SPREADING RISK. EVERYBODY PAYS FOR IT SOONER OR LATER, AND THE QUESTION IS WHETHER EVERYBODY AGREED TO PAY FOR IT WHEN THY INED THE CONTRACT, BECAUSE THAT IS WHAT THE PREMIUMS WERE BASED UPON.

WOULD YOU COME BACK AND ADDRESS YOUR OPPONENT'S ARGUMENT THAT THERE ARE POLICIES THAT HAD EXCLUSIONS FOR DIMINISHED VALUE? THAT IS EXPLICITLY SAY THIS DOES NOT COVER THE DIMINISHED VALUE OF THE VEHICLE. I AM NOT SURE WHAT -- BUT, AND THE INFERENCE A RISING FROM THAT BEING -- ARISING FROM THAT BEING, WELL, YOU WOULDN'T HAVE THE EXCLUSION FOR DIMINISHED VALUE, UNLESS YOU HAD ORIGINALLY INTENDED, IN THE BROADER LANGUAGE OF THE POLICY, TO INCLUDE DIMINISHED VALUE. SO IS HE CORRECT ABOUT THAT?

I WON'T SURPRISE TO YOU SUGGEST THAT I BELIEVE HE IS INCORRECT ABOUT. THAT I SUGGEST THAT, IF THESE PARTIES HAD NEGOTIATED A CONTRACT BETWEEN THEM AND AT SOME STAGE THEY HAD HAD THAT EXCLUSIONARY LANGUAGE IN ONE OF THEIR DRAFTS AND THEY EVENTUALLY DELETED IT, THEN, OF COURSE, ON BASIC RULES OF CONSTITUTION, ONE CAN SAY THAT IT WAS THEIR INTENTION NOT TO COVER IT. WE ARE NOT DEALING WITH THAT HERE. THE ONLY POLICY THAT EXIST IN THIS STATE, THE ONLY POLICY THAT WAS EVER OFFERED, DID NOT INCLUDE ANY LANGUAGE EVER WITH THAT EXCLUSION. NOW, IS IT SIGNIFICANT THAT THERE ARE SOME POLICIES ELSEWHERE THAT DO IT? I THINK NOT. THERE ARE VARIOUS REASONS WHY IT APPEARS IN SOME STATES AND NOT OTHERS. AND A PART OF IT IS WHAT WE, IN THIS PROFESSION, ARE ALL FAMILIAR WITH, WHICH IS THAT LAWYERS LOP ON ADDITIONAL LANGUAGE ANY TIME THEY THINK IT MIGHT HELP IN COURT LATER. THAT IS WHY WE HAVE EXTRAORDINARILY LENGTHY DOCUMENTS, BECAUSE YOU RECEIVE ONE FROM SOMEBODY ELSE AND YOU SAY THAT IS A GOOD IDEA. I WILL STICK IT ON TO THE END OF THIS. BUT THAT DOESN'T MEAN THAT EVERY DOCUMENT THAT WAS WRITTEN BEFORE THAT DOESN'T INCLUDE THE NEW PHRASE. WE BEGIN WITH THE PREMISE THAT EITHER THEY HAVE AGREED TO IT, THE COVERAGE, OR NOT, AND WE HAVE, BY THE WAY, COUNSEL IN THEIR BRIEF, SAY THAT THE MAJORITY OF JURISDICTIONS HAVE RULED IN THEIR FOR, AS MY CLIENT POINTED OUT IN OUR ANSWER BRIEF. THAT IS NOT REALLY CORRECT. THE WEIGHT OF AUTHORITY, WE BELIEVE, IS IN FAVOR OF PROGRESSIVE'S POSITION HERE.

BUT, AGAIN, WE ARE DEALING WITH A STANDARD POLICY, AND THERE ARE JURISDICTIONS AROUND THE COUNTRY THAT HAVE TAKEN THE SAME LANGUAGE AND HAVE EITHER READ IN, DEPENDING ON HOW YOU LOOK AT IT, HAVE INTERPRETED THE POLICY TO INCLUDE AN ELEMENT

FOR DIMINISHED VALUE.

CLEARLY, YOUR HONOR, THERE IS AUTHORITY. WE BELIEVE THAT THOSE COURTS THAT HAVE DONE THAT, THAT THAT IS NOT THE BEST STATEMENT OF LAW.

BUT YOU WOULD, IF YOU ARE NOW ADVISING PROGRESSIVE FOR THE FUTURE, YOU WOULD SAY, ASSUMING IT CAN PASS THE DEPARTMENT OF INSURANCE, STATE OF FLORIDA, THAT, MAKE THAT EXPLICIT. SAY YOU ARE NOT COVERING IT, SO WE DON'T HAVE THIS IN THE FUTURE.

I MIGHT TELL THEM THAT, YOUR HONOR. BUT I THINK THEY HAD THE RIGHT TO RELY UPON THOSE CASES THAT INTERPRETED MORE PROPERLY, THIS FLAIS AS NOT REQUIRING IT IN THE -- THIS PHRASE AS NOT REQUIRING IT IN THE FIRST PLACE. I CAN'T TELL YOU OR KNOW WHAT THE REASONS ARE WHY IN SOME STATES IT IS OR IT ISN'T. IT MAY BE BECAUSE OF REGULATORY AUTHORITIES. IF THE STATE OF FLORIDA PROHIBITED THEM FROM INCLUDING THAT PHRASE, TO BE HONEST WITH YOU I THINK THE DEPARTMENT WAS BEYOND ITS AUTHORITY IN DOING SO BUT THAT IS DISCUSSION FOR ANOTHER DAY. THE POINT IS THAT THEY CLEARLY DID NOT ASSUME IT HERE. I MIGHT POINT OUT, IF I MAY, THAT, IF WE GO BACK TO THE INITIAL PREMISE, WHICH IS DID THEY ASSUME IT, BECAUSE, AGAIN, I BELIEVE THIS IS UNAMBIGUOUS, IF YOU ACCEPT THE ARGUMENT THAT COUNSEL IS MAKING, WHICH IS THAT GENERAL INITIAL STATEMENT THAT WE WILL COVER YOU FOR LOSS, COVERS EVERYTHING THAT IS NOT EXCLUDEED. WE MUST EXPRESSLY EXCLUDE IT. THEN YOU HAVE WHAT RESULTS IS UNREASONABLEnr CONSEQUENCES. WHAT YOU ARE THEN SAYING IS THE PERSON HAS AN ACCIDENT, AND BECAUSE OF NOT HAVING USE OF THE CAR, LOSES HIS OR HER JOB, AND BECAUSE OF LOSING THE JOB, CAN'T MAKE THE MORTGAGE PAYMENT AND LOSES THE HOUSE THAT, THE INSURANCE COMPANY IS THEN RESPONSIBLE FOR PAYING FOR THE LOSS OF THE HOUSE. COUNSEL MIGHT ARGUE, OH, YES, BUT IT DEFINES LOSS AS BEING DIRECT CONSEQUENCES. WELL, IF YOU USE TORT LAW THEORY WHICH THE PLAINTIFF ESSENTIALLY IS TRYING TO CONVINCE THIS COURT TO USE, IT WAS A DIRECT CONSEQUENCE. THE LOSS OF THE HOUSE WAS A DIRECT LINE OF CONSEQUENCES FROM THE DAMAGE TO THE CAR. THE POINT HERE IS YOU CANNOT READ THE WORD "LOSS", WITHOUT READING THE REST OF THE CONTRACT INPARIMATERIA.

YOUR COMMENT AS THE ARGUMENT BEING FOR ANOTHER DAY, AND CONCLUDING REMARKS OF THE BULLETIN, WE ARE AWARE OF THE BULLETIN, IS THERE ANYTHING IN THE PLEADINGS OF THIS CASE AS IMPLICATED OR THAT IMPLICATE THAT THIS POLICY WENT THROUGH SOME TYPE OF REGULATORY PROCESS? WE ALL KNOW THAT PROPERLY CYST HAVE TO BE APPROVED BY -- THAT POLICIES HAVE TO BE APPROVED BY THE STATE OF FLORIDA BEFORE THEY ARE SOLD. IS THERE ANYTHING HERE THAT THIS POLICY THAT IS ALLEGED, THAT IT WENT THROUGH THAT PROCESS AND THAT THERE WAS THAT DISCUSSION OR REQUIREMENT THAT SOMETHING BE REMOVED FROM THE POLICY THAT SUPPORTS THIS KIND OF ARGUMENT?

YES, YOUR HONOR. THERE WAS A COMMENT BY AN OFFICER OF THE COMPANY, IN A DEPOSITION TAKEN IN ANOTHER CASE IN ANOTHER STATE, IN WHICH HE SAID THAT IT WAS HIS UNDERSTANDING THAT HE WAS BEING ASKED WHETHER THIS PHRASE EXISTED IN ALL OF THE STATE'S CONTRACTS, AND HE SAID I BELIEVE IT DOES NOT EXIST IN FLORIDA, BECAUSE THE DEPARTMENT OF INSURANCE REQUIRED THAT IT BE REMOVED, OR WORDS TO THAT EFFECT. I WOULD SUGGEST, YOUR HONOR, THAT IF THAT IS TRUE, AND THERE WAS NOBODY TALKING TO THE DEPARTMENT HERE, BY THE WAY, AS WE POINTED OUT IN OUR BRIEF AND AS IS IN THE RECORD, THAT BULLETIN THAT IS BEING DISCUSSED WAS ISSUED IN THE '80s. THERE IS A MUCH MORE RECENT STATEMENT BY THE DEPARTMENT, WHICH WAS QUITE THE OPPOSITE, IN WHICH THEY CLEARLY SAID THAT, IN A FIRST PARTY CASE, SUCH AS THIS THAT DIMINISHED DAMAGES IS NOT COVERED. IT MAY WELL BE IN A THIRD PARTY CASE, WHICH MAY BE WHAT THE BULLETIN IN THE '80s WAS REFERRING TO.

WE DON'T GET, I GUESS THE QUESTION IS, IF WE DON'T FIND AN AMBIGUITY, AND THIS QUESTION

OF WHAT ELSE EXISTS OUT THERE, IS JUST, IS INTERESTING, AND BUT WE DON'T GET TO THERE, WOULD BE YOUR ARGUMENT.

EXACTLY, YOUR HONOR, THAT IS WHAT I WAS ABOUT TO GET TO. WE NEVER HAVE TO REACH THAT ISSUE. I THINK IT IS AN INTERESTING QUESTION. I THINK, BY THE WAY, THAT THIS WHOLE DISCUSSION OF BULLETINS OR MEMOS FROM THE DEPARTMENT WOULD BE IRRELEVANT IN ANY CASE, BECAUSE WE ARE NOT DEALING, HERE WITH AN ISSUE OF DEFERENCE, AS WE ALL KNOW, THAT THE AGENCY HAS ISSUED AN OPINION INTERPRETING A STATUTE IN AN AREA IN WHICH THEY ARE CHARGED WITH THE ADMINISTRATION OF THE LAW, IT IS ENTITLED TO SOME DEGREE OF DEFERENCE. THESE BULLETINS HAVE NOTHING TO DO WITH THAT. THE LAW SAYS NOTHING ABOUT THIS ISSUE. THAT IS WHY I SUGGESTED THAT I THINK IF, INDEED, THE DEPARTMENT OF INSURANCE IS DICTATING WHAT SHOULD GO IN THESE CONTRACTS, I THINK THEY ARE BEYOND THEIR AUTHORITY, BUT IT CERTAINLY IS NOT ENTITLED TO ANY DEFERENCE, BECAUSE THE OTHER ISSUE --

IS THERE ANY OTHER CASES THAT DEAL WITH THAT EXACT POLICY AS INCLUDED THE DIMINISHED VALUE ASPECT, REFER TO THIS OTHER STANDARD EXCLUSION, THAT IS CONTAINED INSERT POLICIES THAT IS DIMINISHED VALUE EXCLUSION?

NONE IN FLORIDA, AND I DO NOT RECALL ANY DISCUSSION OF THAT IN OTHER CASES. AGAIN, I THINK THAT WE ARE DEALING WITH A TRULY ELEMENTARY ISSUE OF CONTRACT LAW HERE.

I GUESS USUALLY IN THE INSURANCE INDUSTRY, WHEN THERE IS ONE PHRASE THAT USUALLY DOES GET USED ACROSS THE STATE, AND MANY TIMES ACROSS THE COUNTRY, UNLESS THERE IS VARIATIONS IN THE LAW, SO IT IS KIND OF DISCONCERTING TO ME, TO THINK THAT THE EXACT SAME PROVISION HAS BEEN INCLUDED FOR A CONSUMER IN SOME STATES TO SAY, YES, YOU ARE GOING TO GET DIMINISHED VALUE, AND THE EXACT SAME PHRASE IS BEING INTERPRETED OTHERWISE.

I BELIEVE THERE IS NOTHING IN THE RECORD OR IN THE CASE LAW, TO INDICATE THAT THIS EXCLUSIONARY LANGUAGE IS STANDARD IN THE INDUSTRY, AND THE PROBLEM, OF COURSE, WITH INSURANCE CONTRACTS, IS THAT WHILE THERE ARE PHRASES THAT BECOME STANDARD IN THE INDUSTRY, CONTRACTS DIFFER MARKEDLY, FROM ONE REGION OF THE COUNTRY TO ANOTHER, LARGELY BECAUSE OF THE MYRIAD OF REGULATORY AUTHORITIES THAT INVADE THE AREA OF CONTRACT LANGUAGE AND, BUT, THE BOTTOM LINE IS THAT WHATEVER JUDGMENTS MAY HAVE BEEN MADE BY ACCOMPANY IN ONE STATE OR ANOTHER, THEY WERE ENTITLED TO RELY UPON THAT VERY STRONG BODY OF CASE LAW THAT SAYS THERE IS NO AMBIGUITY HERE. THERE HAS BEEN NO ASSUMPTION OF COVERAGE, AND THAT IS THE END OF THE LINE AND WE DON'T HAVE TO LOOK AT ANYTHING ELSE. WE DON'T HAVE TO LOOK ATTENTION CONCLUSION AREA LANGUAGE, IF YOU HAVEN'T ASSUMED COVERAGE TO BEGIN WITH, AND I BELIEVE THAT IS THE BEGINNING AND THE ENDING OF ALL THAT REALLY MATTERS IN THIS CASE, IS IT IS NOT AMBIGUOUS, AND THERE HAS NEVER BEEN AN ASSUMPTION OF LIABILITY FOR THIS COVERAGE. THANK YOU. MR. CHIEF JUSTICE

THANK YOU. MR. RICHARDS. REBUTTAL. ISN'T THAT LAST PROPOSITION CORRECT, THAT THE FIRST DETERMINATION HAS TO BE WHETHER THERE IS AN AMBIGUITY IN THIS POLICY?

YES, YOUR HONOR.

AND IT HAS TO BE CONSTRUED TO BE AMBIGUOUS.

I BELIEVE IT IS A FIRST STEP THAT HAS TO OCCUR BY THE COURT IN EVALUATING THIS POLICY. I WOULD SUBMIT TO THE COURT THAT WHETHER THE COURT FINDS THE LANGUAGE TO BE AMBIGUOUS OR UNAMBIGUOUS, THAT IT CAN SUPPORT THE ARGUMENT THAT I HAVE BEEN PRESENTING HERE TODAY AND PRESENTED IN OUR BRIEFS IN SUPPORT OF A CLAIM FOR

DIMINISHED VALUE. I THINK CLEARLY IT IS EASIER TO GET THERE, OBVIOUSLY, IF AN AMBIGUITY IS FOUND TO EXIST IN THE LANGUAGE.

AND THE AMBIGUITY THAT YOU ARE REFERRING TO IS BY THE FACT THAT THEY HAVE THE WORD "QUALITY "QUALITY? IS THAT -- IS THAT THE BOTTOM LINE OF YOUR --.

I THINK THE AMBIGUITY IS CREATED BY THE LACK OF DEFINITIONS, THE LANGUAGE THAT IS CHOSEN, IN TERMS OF ESTABLISHING THE LIABILITY OF THE COMPANY, THE FACT THAT EXCLUSIONARY LANGUAGE EXISTS WITHIN THE CONTRACT THAT HAS TO BE RECOGNIZED IN TERMS OF HOW THE CONTRACT WAS CREATED. I BELIEVE ALL OF THOSE FACTORS HAVE TO BE CONSIDERED TOGETHER.

HOW DO YOU GET AROUND THE LANGUAGE ABOUT THE LIMITS OF LIABILITY? HOW COULD, IT SEEMS TO ME THAT IS SORT OF PRETTY CLEAR THAT THEY ARE EXPRESSLY SAYING WE ARE GOING TO EITHER PAY THE LESSER OF THIS OR THE COSTS OF REPAIR. ISN'T THAT --

I DON'T ARGUE WITH THE FACT THAT CLEARLY THE INTENT OF THE INSURANCE COMPANY IS TO PAY THE LEAST AMOUNT THEY CAN PAY ON EACH CLAIM. THAT IS CLEARLY WHAT THE INTENT OF THE LANGUAGE IS AND CLEARLY WHAT I BELIEVE THEY ARE ENTITLED TO DO. THE QUESTION BECOMES, UNDER EACH OF THE THREE OPTIONS THAT THE COMPANY HAS, AND AS THEY EXERCISE THEM, WHAT THEIR OBLIGATION IS UNDER EACH OF THOSE THREE OPTIONS. IT WOULD BE OUR POSITION THAT, WITH REGARD TO THE OPTION OF TO REPAIR WITH LIKE KIND OR CAUGHT ARE -- OR QUALITY, THAT, INHERENT WITHIN THAT IS NOT JUST RETURNING THE VEHICLE TO THE SAME FUNCTION AND APPEARANCE, BUT IT WOULD MEAN THE SAME FUNCTION, APPEARANCE AND VALUE.

THAT IS THE FIRST QUESTION I ASKED. IT SEEMS TO ME THAT WOULD RENTER THAT OPTION MEANINGLESS, BECAUSE AS A MATTER OF COMMON KNOWLEDGE, ANY REPAIR THAT IS GOING TO OCCUR IS GOING TO HAVE TO CARRY WITH IT, SOME INHERENT DIMINUTION IN THE VALUE OF THAT VEHICLE, THAT A VEHICLE REPAIRED IS NOT WORTH THE SAME AS A VEHICLE THAT WAS NOT IN AN ACCIDENT, SO IT IS JUST, IT, THAT WOULD BE A PART AND PARCEL OF EVERY REPAIR ASPECT, AND THAT --

WITHOUT MEANING TO REPEAT THE ANSWER THAT I GAVE PREVIOUSLY, WHILE I UNDERSTAND WHAT THE COURT IS RECOGNIZING AS THE COMMON SENSE OR PRACTICAL UNDERSTANDING OF SOMEBODY COMPARING TWO EQUAL VEHICLES, ONE OF WHICH HAS BEEN IN AN ACCIDENT REPAIRED AND ONE OF WHICH HAS NOT, AND THAT THE GENERAL UNDERSTANDING OR THE COMMON SENSE UNDERSTANDING WOULD BE THAT THE VEHICLE INVOLVED IN THE ACCIDENT WOULD BE WORTHLESS. I DON'T STAND HERE TODAY, SUGGESTING THAT, UNDER THIS INSURANCE POLICY, THAT EVERY VEHICLE THAT HAS BEEN INVOLVED IN AN ACCIDENT, RESULTS IN A VALID CLAIM FOR DIMINISHED, A VALID DIMINISHED VALUE CLAIM. I AM SUBMITTING THAT THERE WOULD BE THOSE CIRCUMSTANCES WHERE IT DID APPLY AND THOSE CIRCUMSTANCES WHERE IT DOESN'T APPLY.

HOW WOULD THAT BE DETERMINED? AN EXPERT WITNESS TO SAY?

YES.

AND THAT IS, TO SAY WHAT? THAT THE MARKET VALUE HAS BEEN DIMINISHED BECAUSE OF THE COST OF --

IT IS NOT IN THE RECORD THAT EXISTS AT THIS POINT, BUT IN BRIEF ANSWER TO YOUR QUESTION, THE REALITY IS THAT THERE IS ESSENTIALLY A MATRIX OR A CHART. IF YOU ARE WORKING AT THE AUTO AUCTION SELL AGO CAR ON THE WHOLESALE MARKET, DETERMINATIONS OF WHETHER IT HAS BEEN INVOLVED IN AN ACCIDENT AND THE REMAINING DAMAGE TO THAT VEHICLE, THE

INHERENT DIMINISHED VALUE THAT IS FOUND, WHICH IS TANGIBLE, IDENTIFIABLE, QUANTITY FINAL, IS -- QUANTIFIABLE, IS THE STIGMA INVOLVED HERE TODAY, NOT THE REALITY OF THE VEHICLE THAT HAS BEEN INVOLVED IN THE ACCIDENT.

UNDER THIS WHAT I PERCEIVE TO BE A LATENT AMBIGUITY ARGUMENT, THAT IS NOT HAVING THE EXCLUSION YOU HAVEN'T PLACED IN THIS RECORD, ANY UNDERWRITER'S REPORT OR AFFIDAVIT OR ANYTHING LIKE THAT, WHICH STATES, IN DECIDING WHAT THE INSURANCE RATES OR PREMIUMS ARE GOING TO BE HERE, I HAVE CONSIDERED THE FOLLOWING FACTORS, AND ONE IS IF EXPOSED TO THIS DIMINISHED VALUE ELEMENT OF DAMAGE UNDER CLAIMS WHERE WE REPAIR THE VEHICLE OR SOMETHING, YOU HAVEN'T -- YOU DON'T HAVE AN UNDERWRITER'S REPORT THAT SAYS THAT IS PART OF THE RISK THAT THE INSURANCE COMPANY IS UNDERTAKING, DO YOU?

AN ACCURATE STATEMENT OF THAT IS NOT INCLUDED IN HAD -- IS NOT INCLUDED IN THE RECORD. THAT'S CORRECT. MR. CHIEF JUSTICE

THANK YOU, COUNSEL. THANK YOU, COUNSEL, FOR YOUR ASSISTANCE IN THIS CASE. THE COURT WILL BE IN RECESS FOR 15 MINUTES.