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.	)	

DEFENDANT'S SUGGESTIONS IN OPPOSITION
TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

In this action against defendant United Financial Casualty Company d/b/a Progressive Insurance Company ("Progressive"), Plaintiff Donald Armon, Sr. alleges he received an insufficient claim payment for a collision loss under his Progressive Commercial Auto Insurance Policy ("Policy").[1] 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 insured truck 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 Progressive has moved for summary judgment against Plaintiff;

[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 makes this response on the assumption that the Court will treat Plaintiff's motion for summary judgment as if made based on the third amended petition.

Progressive's motion is now fully briefed and should be granted. *See* Defendant's Motion for Summary Judgment, Suggestions in Support and Statement of Facts (filed Dec. 17, 2012); Defendant's Reply Suggestions in Support of Motion for Summary Judgment (filed herewith).

Although never contemplated by the Second Amended Scheduling Order entered on January 22, 2013, Plaintiff has now cross-moved for summary judgment for payment of the "Stated Amount" he specified for his vehicle. Plaintiff offers an assortment of unfounded, and even contradictory, arguments. Suggestions in Support of Plaintiff's Motion for Summary Judgment (filed Feb. 13, 2013) ("Plaintiff's Sugg."). 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 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 and would not give Plaintiff a right to judgment in his favor. Finally, Plaintiff argues this Court should rewrite the unambiguous Policy language based on the doctrine of reasonable expectations, but Missouri courts have repeatedly held the doctrine cannot trump unambiguous policy language.

FACTUAL RECORD

The facts in support of Progressive's motion for summary judgment, based primarily on Plaintiff's pleading and the Policy itself, stand virtually undisputed. *See* Plaintiff's Responses to Defendant's Statement of Uncontroverted Facts (filed Feb. 19, 2013). But Plaintiff's cross-motion depends on extrinsic evidence and mischaracterizations disputed by Progressive, thereby

precluding summary judgment for Plaintiff. *See* Defendant's Responses to Plaintiff's Statement of Uncontroverted Facts and Defendant's Additional Facts ("Progressive's Fact Responses") (filed herewith). In any event, Plaintiff's alleged facts provide no basis for summary judgment because they are legally immaterial for several reasons.

First, "[t]he general rules for interpretation of other contracts apply to insurance contracts as well." *Todd v. Missouri United School Ins. Council,* 223 S.W.3d 156, 160 (Mo. banc 2007) (internal quotations omitted). 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); *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.*; *Jensen v. Allstate Ins. Co.*, 349 S.W.3d 369 (Mo. App. W.D. 2011) (reversing trial court finding of policy ambiguity). 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.

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

Third, 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*, 212 S.W.3d at 132. "The key is whether the contract language is ambiguous or unambiguous." *Todd*, 223 S.W.3d at 160 (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. *See* 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

[2] "Progressive Fact No. ___" refers to the facts as originally set forth in support of Progressive's motion for summary judgment filed December 17, 2012, to which Plaintiff responded on February 19, 2013. Those same facts bearing the same paragraph numbering, together with Plaintiff's responses, are restated as Progressive's Statement of Additional Facts in opposition to Plaintiff's motion for summary judgment. Progressive's Fact Responses at 10-16 (filed herewith).

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). "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*, 946 S.W.2d at 39 (stating general rule that "a person is bound by the terms of the contract signed").

ARGUMENT

I. Valued Policy Statute Inapplicable

For his primary argument in support of summary judgment, Plaintiff invokes RSMo § 379.160, one of three Missouri provisions regarding fire insurance known as a valued policy statute, but section 379.160 does not apply to Plaintiff's collision loss 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, 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 Wimes also recognized this requirement by rejecting an argument to apply another valued policy statute to a case involving no loss by fire. *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).

Despite the overwhelming authority arrayed against him, Plaintiff asserts that section § 379.160 applies to collision loss under an auto policy.[4] But this argument fails for three reasons: it misconstrues the statute; it has never been accepted by any court and is contrary to well-settled authority; and it improperly asks this Court to make public-policy decisions reserved to the legislature.

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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.

[4] In an effort to advance his argument by mislabeling, Plaintiff incorrectly refers to section 379.160 as "Missouri's Stated Value Statute." Plaintiff's Sugg. at 5.

First, 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). Rather than focusing on the nature of the suit as required by the statute, Plaintiff attempts to rewrite the law to focus on the scope of risks insured against without regard to the actual nature of the suit or recovery sought. Plaintiff argues that the statute should be applied as if it included different words and applied to any suit brought "upon a policy *that insured* against loss or damage by fire." Plaintiff's Sugg. at 7 (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).

Second, Plaintiff 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 discussed above, Missouri law is contrary to Plaintiff's attempt to invoke a valued policy statute in a suit where there was no loss by fire. 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*, 452 S.W.2d at 286 (discussing legislative history and re-enactment of section 379.160).[5]

[5] In opposition to Progressive's motion for summary judgment, Plaintiff pointed to dicta in one Eastern District opinion that decades ago 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). The *Huth* dicta disregards the Missouri

Third, by attempting to invoke section 379.160, Plaintiff is essentially asking this Court to legislate based on Plaintiff's notions of desirable public policy.[6] 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' Sugg. at 5-7. But in all instances, these statements of public policy were made in the context of *fire loss*. *Id.*[7] 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 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.

Supreme Court's long-standing admonition that a statute covering one category of insurance risk will not be applied to other types of risk absent explicit legislative intent to do so. *Nalley*, 157 S.W. at 775 (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).

[6] 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 Fact Responses ¶¶ 4-7, 18 (filed herewith).

[7] 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 policyholder had an insurable interest, which is not an issue in this case.

Finally, even if section 379.160 could somehow apply where there is no fire loss, Plaintiff has no right to summary judgment because he has failed to carry the insured's burden under the statute to prove lack of depreciation from the date of the policy. *West v. Shelter Mutual Ins. Co.*, 864 S.W.2d 458, 461 (Mo. App. S.D. 1993). And a jury is "not required to believe the [plaintiff's] evidence of value of the personal property, as of the time of the loss." *Id*.

II. No Valued Policy By Contract

As his second argument for summary judgment, Plaintiff offers the new theory that the Policy by its own terms is a valued policy. Plaintiff's Sugg. at 7-12. 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.[8] 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, but such allegations cannot be the basis for summary judgment because Progressive has controverted them. Progressive's Fact Responses ¶¶ 4-7, 18 (filed herewith); *ITT Commercial Fin. Corp. v. Mid-America Marine Supply Corp*., 854 S.W.2d 371, 382 (Mo. banc 1993) (to successfully oppose summary judgment "non-movant need only show that there is a genuine dispute as to the facts underlying the movant's right to judgment") (emphasis deleted). And such allegations are immaterial because they attempt to vary or contradict Policy language 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

[8] 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 Sugg. at 14.

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 (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, by its terms, 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 Fact Responses ¶ 7.

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 Sugg. at 15) 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 Ambiguity and No Breach of Contract

For his third argument in support of summary judgment, Plaintiff seeks the same result based on the opposite argument. No longer contending the Policy is *un*ambiguously a valued policy, Plaintiff instead argues it is a valued policy because it *is* ambiguous. In support of this contorted argument, Plaintiff offers a tortured interpretation of the Policy. In order to dispel the confusion created by Plaintiff's third argument, the Court should begin by returning to the Policy itself.

Plaintiff's Declarations Page establishes the amount of collision coverage as the "Limit of liability less deductible." Progressive Ex. A-1 at 1. 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. Progressive 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." Progressive 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." Progressive Ex. A-3 at 16.

This language defining the limits of Progressive's contractual liability is crystal clear. There is no dispute that the actual cash value of Plaintiff's damaged vehicle was the least of these four amounts, so the unambiguous policy language precludes summary judgment for Plaintiff.[9] *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). A policyholder cannot prevail 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).

Plaintiff's assertion of ambiguity has always been a contention in search of a legal and factual basis, and his cross-motion 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 Plaintiff created by misquoting the Policy, which refers to "actual cash value" and does not use the term "actual value." Progressive Ex. A-3 at 16. Plaintiff never acknowledges this error and does not seek summary judgment based on this assertion of ambiguity.

But Plaintiff apparently contends that "actual cash value" is somehow ambiguous, or at least not defined, even though Plaintiff ignores two arguments that foreclose his contention.

[9] 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. Progressive's Statement of Additional Facts ¶¶ 11-12 (filed herewith as part of Progressive's Fact Responses).

Plaintiff's Sugg. at 12-13. First, Plaintiff's 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 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).

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 Sugg. at 13. To demonstrate why Plaintiff's new recipe for ambiguity is a failure, it is again necessary 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 Sugg. at 13. 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).[10]

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 Sugg. at 13. One 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

[10] As with Progressive's other summary judgment 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, Progressive's Statement of Additional Facts, and Progressive Ex. A-3.

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. Plaintiff has no right to summary judgment because there is no ambiguity; instead, the explicit and unambiguous language of the Policy forecloses his claims for breach of contract.[11]

IV. No Reasonable Expectations Doctrine

In his final argument for summary judgment, Plaintiff asks the Court to disregard the contract language and rewrite it to award him the Stated Amount for a total loss to his vehicle, this time arguing that result is compelled by the doctrine of reasonable expectations based on a 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). Plaintiff asserts this doctrine empowers a Missouri court to rewrite an insurance policy if it can be regarded as a "contract of adhesion." Plaintiff is incorrect because *Estrin* does not represent the law of Missouri.[12]

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*, 808 S.W.2d at 382). "Absent ambiguity, an insurance policy must be

[11] Moreover, the alleged existence of contract ambiguity would preclude summary judgment for Plaintiff and require a trial for resolution of fact issues involving extrinsic evidence. *See* Progressive's Suggestions in Opposition to Plaintiffs' Motion for Class Certification at 8-17 (filed Dec. 17, 2012).

[12] Plaintiff also recites a sentence from *Niswonger v. Farm Bureau Town & Country Ins. Co.*, 992 S.W.2d 308, 316-17 (Mo. App. E.D. 1999), but fails to disclose that the quoted proposition is supported only by citation to a Wisconsin case.

enforced according to its terms." *Seeck*, 212 S.W.3d at 132. So even assuming the Policy could be regarded as an adhesion contract, that would not be sufficient to invoke the doctrine of reasonable expectations. *Harris*, 141 S.W.3d at 60-61 (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 Auto. 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*, 946 S.W.2d at 39. *Accord Burns*, 303 S.W.3d at 512 (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.

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).

Nor can the implied covenant of good faith and fair dealing be used to rewrite the Policy under the guise of "reasonable expectations." "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 Limit of Liability provision in the Policy 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 any effort to inject Stated Amount into the determination of actual cash value. 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,* 303 S.W.3d at 511.

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. The Progressive Policy language is not reasonably open to different constructions and is therefore not ambiguous. *Gulf Ins. Co.*, 936 S.W.2d at 814. The doctrine of reasonable expectations has no place in this case and provides no basis for granting summary judgment to Plaintiff.

V. Conclusion

Accordingly, Defendant United Financial Casualty Company d/b/a Progressive Insurance Company requests that Plaintiff's motion for summary judgment be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

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