IN THE SUPREME COURT OF FLORIDA

Case No. SC01-1219

CAROLE M. SIEGLE,

Petitioner,

v.

PROGRESSIVE CONSUMERS INSURANCE COMPANY,

Respondent.

On Review of a Question Certified by the District Court of Appeal,
Fourth District of Florida to be of Great Public Importance

ANSWER BRIEF OF RESPONDENT PROGRESSIVE CONSUMERS INSURANCE COMPANY

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TABLE OF CONTENTS

PAGE

Table of Authorities iii

Introduction 1

Statement of the Case and Facts 1

Summary of the Argument 3

Standard of Review 4

Argument 5

I. THE CERTIFIED QUESTION SHOULD BE ANSWERED IN THE NEGATIVE BECAUSE THE PLAIN AND UNAMBIGUOUS LANGUAGE OF THE POLICY EXPRESSLY NEGATES SIEGLE'S CONTENTION THAT PROGRESSIVE HAS AN OBLIGATION TO REIMBURSE HER FOR THE SO-CALLED "INHERENT DIMINISHED VALUE" OF HER PROPERLY REPAIRED VEHICLE 5

II. THIS COURT SHOULD REJECT SIEGLE'S INVITATION TO LOOK BEYOND THE PLAIN AND UNAMBIGUOUS LANGUAGE OF THE POLICY IN ORDER TO CREATE COVERAGE WHERE NONE EXISTS, BECAUSE IT CANNOT DO SO WITHOUT VIOLATING SEVERAL WELL-SETTLED PRINCIPLES OF INSURANCE LAW 16

A. This Court Is Not At Liberty To Create Coverage Under A Policy Of Insurance That Is Unambiguous 17

B. The Absence Of A Specific Exclusion Does Not Create Coverage For A Claim Which Plainly Falls Outside The Insuring Provisions Of The Policy 20

C. The Adoption of Siegle's Contention Would Improperly Negate Certain Policy Provisions 20

III. **THE TRIAL COURT PROPERLY REFUSED TO CONSIDER EVIDENCE OUTSIDE THE FOUR CORNERS OF THE SECOND AMENDED COMPLAINT IN ENTERING ITS ORDER OF DISMISSAL AND THIS COURT MAY NOT CONSIDER SUCH EVIDENCE IN REVIEWING THAT ORDER** 21

Conclusion 22

Certificate of Service 23

Certificate of Type Size 23

TABLE OF AUTHORITIES

CASES **PAGE**

Arch Roberts & Co. v. Auto-Owners Insurance Co.,
305 So. 2d 882 (Fla. 1st DCA 1974) 12, 14

Auto-Owners Insurance Co. v. Green,
220 So. 2d 29 (Fla. 1st DCA 1969) 12, 13

Bickel v. Nationwide Mutual Insurance Co.,
143 S.E.2d 903 (Va. 1965) 10, 12

Campbell v. Calvert Fire Insurance Co.,
109 S.E. 2d 572 (S.C. 1959) 15

Delledone v. State Farm Mutual Automobile Insurance Co.,
621 A.2d 350 (Del. Super. Ct. 1992) 14, 15

Deni Associates of Florida, Inc. v. State Farm Fire & Casualty Insurance Co.,
711 So. 2d 1135 (Fla. 1998) 5, 15

Dodson Aviation, Inc. v. Rollins, Burdick, Hunter of Kansas, Inc.,
807 P.2d 1319 (Kan. Ct. App. 1991) 15

Duncan Auto Realty, Ltd. v. Allstate Insurance Co.,
754 So. 2d 863 (Fla. 3d DCA 2000). 17

Dunmire Motor Co. v. Oregon Mutual Fire Insurance Co.,
114 P. 2d 1005 (Or. 1941) 15

Edwards v. Maryland Motorcar Insurance Co.,
204 A.D. 174, 197 N.Y.S. 460 (N.Y. App. Div. 1922) 15

Fort Lauderdale Lincoln Mercury, Inc. v. Corgnati,
715 So. 2d 311 (Fla. 4th DCA 1998) 12, 13

General Accident Fire & Life Assurance Corp. v. Judd,
400 S.W.2d 685 (Ky. App. Ct.1966) 10

General Accident Fire & Life Assurance Corp. v. Liberty Mutual Insurance Co., 260 So. 2d 249 (Fla. 4th DCA 1972) 17

Grubbs v. Foremost Insurance Co., 141 N.W. 2d 777 (S.D. 1966) 15

Hancock v. Brumer, Cohen, Logan, Kandell & Kaufman, 580 So. 2d 782 (Fla. 3d DCA), *rev. denied*, 591 So. 2d 180 (Fla. 1991) 17

Hartford Fire Insurance Co. v. Rowland, 351 S.E. 2d 650 (Ga. Ct. App. 1986) 15

Hollywood Lakes Section Civic Association, Inc. v. City of Hollywood, 676 So. 2d 500 (Fla. 4th DCA 1996) 1

Inter-Active Services, Inc. v. Heathrow Master Association, Inc., 721 So. 2d 433 (Fla. 5th DCA 1998) 20

Johnson v. State Farm Mutual Automobile Insurance Co., 754 P.2d 330 (Ariz. App. Ct. 1988) 10, 12

Liberty Mutual Insurance Co. v. Capeletti Bros., Inc., 699 So. 2d 736 (Fla. 3d DCA 1997) 17

McHale v. Farm Bureau Mutual Insurance Co., 409 So. 2d 238 (Fla. 3d DCA 1982) 6

McWhirter, Reeves, McGothlin, Davidson, Rief & Bakas, P.A. v. Weiss, 704 So. 2d 214 (Fla. 2d DCA 1998) 21

MFA Insurance Co. v. Citizens National Bank of Hope, 545 S.W. 2d 70 (Ark. 1977) 16

Morrison v. Allstate Indemnity Co., 1999 WL 817660 (M.D. Fla. 1999), *rev'd on other grounds*, 228 F.3d 1255 (11th Cir. 2000) 7, 8, 12

Munoz v. Allstate Insurance Co.,
Case No. 9906-2855 (Pa. 1st Jud. Dist. Ct. Nov. 15, 1999),
aff'd, Case No. 3475 EDA 1999 (Pa. Super. Ct. July 3, 2000) 11, 12

O'Brien v. Progressive Northern Insurance Co.,
2000 WL 33113833 (Del. Super. Ct. 2000) 15

Pastori v. Commercial Union Insurance Co.,
473 So. 2d 40 (Fla. 3d DCA 1985) 17

Potomac Insurance Co. v. Wilkinson,
57 So. 2d 158 (Miss. 1952) 15

*Prudential Property & Casualty Insurance
Co. v. Swindal*,
622 So. 2d 467 (Fla. 1993) 17

Ray v. Farmers Insurance Exchange,
200 Cal. App. 3d 1411, 246 Cal. Rptr. 593 (1988) 9, 10, 12

Rezevskis v. Aries Insurance Co.,
784 So. 2d 472 (Fla. 3d DCA 2001) 7

Romco, Inc. v. Broussard,
528 So.2d 231 (La. Ct. App.),
writ denied, 533 So. 2d 356 (La. 1988) 15

Roth v. Amica Mutual Insurance Co.,
Case No. 98-3551 (Mass. Sup. Ct. Comm., Sept. 3, 1999) 11, 12

Senter v. Tennessee Farmers Mutual Insurance Co.,
702 S.W.2d 175 (Tenn. Ct. App. 1985) 15

Siegle v. Progressive Consumers Insurance Co.,
26 Fla. L. Week. D1506 (Fla. 4th DCA June 13, 2001) 2, 3, 4, 19

State Farm Fire & Casualty Co. v. Oliveras,
441 So. 2d 175 (Fla. 4th DCA 1983) 17

Travelers Indemnity Co. v. Skyway Marine, Inc.,
251 So. 2d 327 (Fla. 3d DCA 1971) 6

Travelers Indemnity Co. v. Parkman,

300 So. 2d 284 (Fla. 4th DCA 1974) 8, 9, 12

United States Fire Insurance Co. v. Meridian of Palm Beach Condominium Association, Inc., 700 So. 2d 161(Fla. 4th DCA 1997), *rev. denied*, 717 So. 2d 535 (Fla. 1998) 20

United States Surgical Corp. v. United States Fire Insurance Co., 1990 WL 277471 (Conn. Super. Ct. 1990) 15

Universal Underwriters Insurance Co. v. Fallaro, 597 So. 2d 818 (Fla. 3d DCA 1992) 8

Westmoreland v. Lumbermens Mutual Casualty Co., 704 So. 2d 176 (Fla. 4th DCA 1997), *rev. dismissed*, 717 So. 2d 534 (Fla. 1998) 17

Williams v. Farm Bureau Mutual Insurance Company of Missouri, 299 S.W. 2d 587 (Mo. Ct. App. 1957) 15

STATUTES & RULES

1997 Florida Department of Insurance Memorandum 6

1984 Florida Department of Insurance Bulletin 6

INTRODUCTION

The Respondent, Progressive Consumers Insurance Company ("Progressive"), defendant/appellee below, hereby files its Answer Brief in response to the Initial Brief ("I.B.") filed herein by the Petitioner, Carole M. Siegle ("Siegle"), plaintiff/appellant below. As Progressive will demonstrate, the insurance policy Progressive issued to Siegle does not obligate it to reimburse Siegle for the so-called "inherent diminished value" of her properly repaired vehicle. Accordingly, this Court should answer the certified question in the negative, and affirm both the Order dismissing Siegle's Second Amended Complaint and the decision of the District Court of Appeal, Fourth District of Florida.

STATEMENT OF THE CASE AND FACTS[1]

Progressive submits the following Statement of the Case and Facts to highlight those aspects of Siegle's statement with which Progressive disagrees and supply the Court with important information Siegle omitted from her Statement. Because this appeal calls for the review of an Order dismissing a complaint for failure to state a cause of action, Progressive will presume that the allegations of Siegle's Second

[1]Throughout this Answer Brief, the symbol "R." refers to the Record on Appeal. Relevant portions of the Record on Appeal are included in the Appendix filed by Siegle. Progressive has filed an Appendix to this Answer Brief which contains a copy of each authority cited in this Answer Brief. All emphasis in this Answer Brief is added unless otherwise indicated.

Amended Complaint are true, as this Court must for purposes of answering the certified question. *See, e.g., Hollywood Lakes Section Civic Ass'n, Inc. v. City of Hollywood*, 676 So. 2d 500, 501 (Fla. 4th DCA 1996).

Siegle initially filed suit against Progressive on behalf of herself and all persons similarly situated. (R.1-55). After two (2) amendments, Siegle filed a Second Amended Complaint in which she alleges that her 1994 Acura automobile was covered by the Auto Damage provisions of a Progressive insurance policy, which Siegle attached as an exhibit to her Complaint. (R. 140-68). Siegle further alleges that, on July 7, 1997, her automobile sustained property damage. (R. 142). Siegle, in turn, submitted a claim to Progressive and, at Progressive's expense, the property damage to Siegle's vehicle was "repaired to the best of human ability." *Id.*

However, after the repairs were completed, Siegle "discovered" that her automobile had sustained what she characterizes as "inherent diminished value," in the amount of $2,677.19. (R. 142).[2] Siegle submitted this additional claim to Progressive,

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[2]In her Second Amended Complaint, Siegle affirmatively pled that Progressive had "repaired [her vehicle] to the best of human ability" (R. 142), and sought damages only for the "inherent diminished value" of her vehicle, which she defined as "not includ[ing] the loss which may have resulted from improper and/or incomplete repairs." *Id*. In her Summary of Argument, Siegle makes the curious statement that Progressive "knew that [her] vehicle had sustained frame damage that could not be fully repaired." (I.B. 2-3). This Court should disregard Siegle's statement because it is made without a record reference, and was not raised in any proceeding below. Moreover, the question the Fourth District certified to this Court assumes that Progressive "complete[d] a first-rate repair which return[ed] the vehicle to its pre-accident level of performance, appearance and function." *Siegle v. Progressive Consumers Ins. Co.*, 26 Fla. L. Week. D1506, D1508 (Fla. 4th DCA June 13, 2001). Thus, to the extent that Siegle seeks to assert that her vehicle was not so repaired, this Court should decline to accept jurisdiction over this case because the certified question will have become moot.

but Progressive declined to pay it. (R. 142). Siegle later filed this action against Progressive. In her Second Amended Complaint, Siegle asserted claims for breach of contract and unjust enrichment. (R. 147-49). Progressive responded by filing a Motion to Dismiss and a supporting memoranda of law. (R. 131-36, 499-502, 510-609). After hearing argument, the trial court dismissed Siegle's Second Amended Complaint with prejudice. (R. 610-11). Siegle appealed that dismissal to the Fourth District.

On June 13, 2001, the Fourth District affirmed the dismissal and certified to this Court the following question as one of great public importance:

> Does an automobile collision policy which provides that the insurer must repair or replace the damaged vehicle "with other of like kind and quality" obligate the insurer to compensate the insured in money for any diminution in market value after the insurer completes a first-rate repair which returns the vehicle to its pre-accident level of performance, appearance and function?

Siegle v. Progressive Consumers Ins. Co., 26 Fla. L. Week. D1506, D1508 (Fla. 4th DCA June 13, 2001).

SUMMARY OF THE ARGUMENT

The certified question should be answered in the negative because: (1) Progressive's insurance policy does not contain any provision which affords Siegle coverage for the "inherent diminished value" of her properly repaired vehicle; (2) the plain and unambiguous language of the policy provides that, when a covered vehicle has been damaged in an accident, Progressive is permitted to pay to repair the property damage; (3) courts must construe insurance contracts in accordance with

their plain language; (4) courts cannot create insurance coverage where, as here, the plain language of the policy does not provide coverage; (5) Florida courts consistently have rejected insureds' claims for "inherent diminished value;" (6) contrary to Siegle's contention, the absence of a specific exclusion for the "inherent diminished value" of a vehicle does not create coverage, particularly where, as in this case, such a claim plainly falls outside the scope of the insuring provisions of the policy; and (7) the Progressive policy is not ambiguous and does not provide for the payment of all actual losses to a vehicle. Indeed, this Court cannot adopt Siegle's contention (*i.e.*, that Progressive has an obligation to pay for "inherent diminished value" of a properly repaired vehicle) without substantially rewriting the policy. Accordingly, the certified question should be answered in the negative.

STANDARD OF REVIEW

"Construction of the insurance contract and the determination of whether Florida law requires the insurer to provide coverage for diminished value are questions of law subject to de novo review on appeal." *Siegle v. Progressive Consumers Ins. Co.*, 26 Fla. L. Week. D1506, 1506 (Fla. 4th DCA June 13, 2001).

ARGUMENT

I. THE CERTIFIED QUESTION SHOULD BE ANSWERED IN THE NEGATIVE BECAUSE THE PLAIN AND UNAMBIGUOUS LANGUAGE OF THE POLICY EXPRESSLY NEGATES SIEGLE'S CONTENTION THAT PROGRESSIVE HAS AN OBLIGATION TO REIMBURSE HER FOR THE SO-CALLED "INHERENT DIMINISHED VALUE" OF HER PROPERLY REPAIRED VEHICLE.

The certified question should be answered in the negative because the plain and unambiguous language of the Progressive policy makes it clear that the policy does not provide coverage for the so-called "inherent diminished value" of a properly repaired vehicle.[3] Instead, the policy expressly provides that, when a covered vehicle has been damaged in an accident, Progressive is permitted to pay Siegle either: (1) the amount necessary to repair the damaged property with parts of "like kind and quality

[3]It is well-settled that the unambiguous terms of an insurance contract and not the "reasonable expectations" of the insured govern the scope of coverage under the contract. *See, e.g., Deni Assocs. of Fla., Inc. v. State Farm Fire & Cas. Ins. Co.*, 711 So. 2d 1135, 1140 (Fla. 1998)(wherein the Supreme Court of Florida rejected the doctrine of using an insured's "reasonable expectations" to dictate the scope of coverage, noting that application of that doctrine to an unambiguous provision [in an insurance contract] would be to rewrite the contract and the basis upon which the premiums were charged" and would lead to uncertainty and unnecessary litigation").

less the applicable deductible;" **or** (2) the "actual cash value ["ACV"] of the stolen or damaged [vehicle] less the applicable deductible." (R. 162). Progressive indisputably paid the amount necessary to properly repair the property damage to Siegle's vehicle and, in doing so, fully discharged its contractual and indemnity obligations to Siegle. *Id.* (wherein Siegle acknowledges that she is not challenging the adequacy of the repairs and that her claim for inherent diminished value "does not include [any] loss which may have resulted from improper and/or incomplete repairs").

Indeed, Florida courts and regulators have made it clear that where, as here, an automobile insurer pays to repair a vehicle, **diminished value is not a consideration**. In a November 4, 1997 Legal Memorandum on the issue of "Diminution of Value," for example, John R. Dunphy of the Florida Department of Insurance and Treasurer addressed the issue raised by Siegle and concluded as follows:

> First party claims are subject to contract law rather than tort law. As such, whether diminished value is covered on first party claims is a function of the policy language. Most physical damage policies provide for the insurer to be able to satisfy a claim through repair, replacement, or payment of the actual cash value of the insured property before the accident. **If the repair option is elected, the policy ordinarily limits the insurer's liability to the cost of repair. In this circumstance, the issue becomes the adequacy of the repair and diminished value is not a consideration.**

(R. 573).[4] The courts of Florida consistently have maintained this position.

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[4]Although an insurer is not obligated to pay for the "diminished value" of a properly repaired vehicle in response to a **first party claim**, the owner of a vehicle may seek damages in tort for lost value from a tortfeasor who has caused damage to the vehicle. *See McHale v. Farm Bureau Mut. Ins. Co.*, 409 So. 2d 238, 239 (Fla. 3d DCA 1982)("In such cases, the cost of the repairs made plus the diminution in value will

In *Rezevskis v. Aries Insurance Co.*, 784 So. 2d 472 (Fla. 3d DCA 2001), the plaintiff sued his insurer for "the diminished value of his car" which had been damaged in a hurricane. The insurance policy provisions at issue were virtually identical to those in the Progressive policy. The trial court dismissed the complaint with prejudice, and the plaintiff appealed. Upon affirming the dismissal, the Third District held:

> Pursuant to the "repair or replace" limitation of liability in the Aries policy, the insurer's responsibility is limited to the amount necessary to return the car to substantially the same condition as before the loss. **Nowhere does that obligation include liability for loss due to "a stigma on resale resulting from 'market psychology' that a vehicle that has been damaged and repaired is worth less than a similar one that has never been damaged."** The Aries policy's express provision that the insurer's responsibility is limited to the amount necessary to "repair or replace" permits no other reasonable interpretation. **Thus, the diminished value resulting from damage not susceptible to repair or replacement does not fall within the insurer's obligations under the policy.**

Id. at 474 (citation omitted).

Similarly, in *Morrison v. Allstate Indemnity Co.*, 1999 WL 817660 (M.D. Fla. 1999), *rev'd on other grounds*, 228 F.3d 1255 (11th Cir. 2000), the plaintiffs sued several automobile insurers, claiming that the physical damage portions of their policies included the diminished value of their vehicles subsequent to repair. In support of their contention, the plaintiffs cited to policy language which obligated the insurers to

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ordinarily be the proper measure of damages..."). In all likelihood, the latter concept forms the basis for the **1984 Insurance Bulletin upon which Siegle relies** (I.B. 9-10), given that the author of the Bulletin uses the term "damages," rather than "loss," in referring to an insurer's indemnity obligation. To the extent that **the 1984 Bulletin** refers to **third party claims**, it accurately reflects the well-settled **tort-based** rule that "the cost of repairs plus the diminution in value will ordinarily be the proper measure of damages." *Id.* at 439; *Travelers Indem. Co. v. Skyway Marine, Inc.*, 251 So. 2d 327 (Fla. 3d DCA 1971).

"fully compensate the insured for all loss to a covered vehicle, subject only to any specified limitations of liability." *Id.* at *2. The plaintiffs reasoned that, since there was no provision in the policies which expressly excluded or limited that indemnity obligation, as it relates to "diminished value," such losses are compensable. *Id.* The insurers moved to dismiss on the ground that the plain language of their policies expressly permitted them to pay the insureds "the lesser of the actual cash value of the vehicle at the time of the loss or [the cost of] repairing the vehicle or any of its parts [with parts] of like kind and quality." *Id.* The insurers further argued that, absent express policy language to the contrary, they did not have an additional and independent obligation to pay the plaintiffs for any diminution in value that may have resulted from the proper performance of those repairs. The federal district court agreed and granted the insurers' motions to dismiss. The court emphasized that, without a clear dictate from a Florida court to the contrary, it was unwilling to conclude that "Florida law automatically imposes [diminished value] coverage on insurance policies in the absence of a specific agreement [giving rise to such coverage]." *Id.* The court noted that to hold otherwise would violate the well-established principle that "[i]t is not within the purview of the courts to create insurance coverage where none exists on the face of the insurance contract." *Id.* (citing *Universal Underwriters Ins. Co. v. Fallaro*, 597 So. 2d 818 (Fla. 3d DCA 1992)).

In *Travelers Indemnity Co. v. Parkman*, 300 So. 2d 284 (Fla. 4th DCA 1974), the court reached a similar result. In that case, an insured sued his insurer for

damages resulting from the loss of use of his vehicle during the time the vehicle underwent repairs following a collision. As in this case, the insured did not question the adequacy of the repair. Instead, the only issue was the plaintiff's purported entitlement to derivative damages. The *Parkman* court held that, under an insurance policy which provides the insurer with an option to repair, "the insured is not entitled to recover for the loss of use of the vehicle if the insurer pays in money or repairs the damage within a reasonable time." *Id.* at 285. In reaching its decision, the court specifically held that, when an insurer opts to repair a damaged vehicle, it satisfies its obligation when it pays for the cost of repair:

> The obligation to repair is not fulfilled until the insurer has paid the cost of repair, less any deduction provided in the policy, or has placed the insured in possession of the repaired vehicle.

Id. at 285. Stated otherwise, the court held that an insurer which properly repairs an insured's vehicle fully discharges its contractual obligation under the insurance policy, and is not liable for additional derivative monetary losses resulting from the damage.[5]

Numerous courts in other jurisdictions have reached the same result in analogous factual contexts. In *Ray v. Farmers Insurance Exchange*, 200 Cal. App. 3d 1411, 246 Cal. Rptr. 593 (1988), for example, an insured sued his automobile insurer to recover the alleged diminution in market value that his vehicle suffered by virtue of the fact that it had been in an accident and was a "repaired, wrecked car."

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[5]The *Parkman* court did hold that if the insurer does not repair the vehicle within a reasonable time, the insured may have a cause of action sounding in tort, not contract. *Id.* at 285.

The applicable policy obligated the insurer to pay either the actual cash value of the vehicle or the amount necessary to repair the damage to the vehicle. The trial court entered a judgment based upon a jury verdict in favor of the insurer and the appellate court affirmed. The court reasoned as follows:

> To hold Farmers [*i.e.*, the insurer] liable for the automobile's diminution in value would make Farmers an insurer of the automobile's cash value in virtually all cases and would render essentially meaningless [Farmers'] clear right to elect to repair rather than pay the actual cash value at the time of the loss. . . The policy language unambiguously reserves to Farmers the right to elect the most economical method of paying claims. [The insured's] strained interpretation would gut that right and hold Farmers to a risk it did not contemplate, [and] one for which [the insured] [did not pay]. . . [W]e will not rewrite an otherwise unambiguous limitation of collision coverage to provide for a risk not bargained for.

Id. at 596. *See also General Accident Fire & Life Assur. Corp. v. Judd*, 400 S.W.2d 685, 687 (Ky. App. Ct. 1966) (wherein the court held that "the option to repair [a] vehicle with parts of like kind and quality does not require a restoration of **value** [such that a diminution in value relating to the repair also would be compensable]; it requires only a restoration of **physical condition**").

Similarly, in *Bickel v. Nationwide Mutual Insurance Co.*, 143 S.E.2d 903 (Va. 1965), the Supreme Court of Virginia rejected an insured's attempt to obtain diminished value damages over and above the cost of repair. In support of its conclusion, the court emphasized that "[t]he contract of insurance does not so provide [*i.e.*, for diminished value]. [Thus,] **to apply such a measure of damages would be arbitrarily reading out of the policy the right of the [insurer] to make repairs**

or replace the damaged part with materials of like kind and quality." *Id.* at 906. *See also Johnson v. State Farm Mut. Auto. Ins. Co.*, 754 P.2d 330, 331 (Ariz. App. Ct. 1988) (wherein the court also rejected an insured's attempt to recover diminished value damages over and above the cost of repairs, noting that "[n]owhere in the policy does there appear any language which requires [the insurer] either to restore the vehicle to its pre-accident condition or to pay the insured the difference in value after the accident as opposed to before").

In *Munoz v. Allstate Insurance Co.*, Case No. 9906-2855 (Pa. 1st Jud. Dist. Ct. Nov. 15, 1999), *aff'd*, Case No. 3475 EDA 1999 (Pa. Super. Ct. July 3, 2000), the court rejected a claim for diminution in value damages and dismissed a class action complaint similar to Siegle's complaint, notwithstanding the fact that Pennsylvania, unlike Florida, has adopted the "reasonable expectations doctrine." The *Munoz* court held that:

> [Plaintiff's] expectations are not reasonable . . . [P]ayment [for diminished value] would not be the norm and cannot be the basis for a *reasonable* expectation among the public. [Plaintiff] does not have the right to expect that she [will] receive something of comparable value in return for her premium payment . . . This she received when her car was repaired following her accident.

Id. at 4. The court based its decision to reject the plaintiff's "diminished value" claim and its conclusion that "the [insurer] did not breach [its] contractual duty," in part, on the "reasonings" of the Virginia Supreme Court in *Bickel*. *See also Roth v. Amica Mut. Ins. Co.*, Case No. 98-3551 (Mass. Sup. Ct. Comm., Sept. 3, 1999)(wherein the court held that an insurer's right to pay the cost to repair a damaged vehicle does not

include an obligation to reimburse the insured for "diminution in market value due to the alleged stigma of [having been in an] accident").

Like the insurers in *Morrison*, *Parkman*, *Bickel*, *Munoz*, *Roth*, *Ray*, and *Johnson*, Progressive indisputably had an obligation, under the plain language of its policy, to pay the amount necessary to repair the property damage to Siegle's vehicle. Progressive discharged that obligation and the repairs were fully and properly performed. Nonetheless, like the insureds in the foregoing cases, Siegle argues that Progressive had an obligation to go beyond payment for those repairs and compensate her for the purported "diminution in value" attributable to those repairs. However, Siegle cannot point to any specific language in the policy that provides for such coverage. Instead, she seeks to infer that indemnity obligation from general policy language to the effect that Progressive "will pay for loss to a covered vehicle" and the *absence* of any language expressly limiting or excluding coverage for diminished value. As the courts in *Morrison*, *Parkman*, *Bickel*, *Munoz*, *Roth*, *Johnson*, and *Ray* properly recognized, however, such an argument cannot give rise to coverage, as a matter of law, without imposing on Progressive a risk that it did not agree to accept and conferring a benefit on Siegle for which she did not pay a premium.

Siegle's reliance on *Fort Lauderdale Lincoln Mercury, Inc. v. Corgnati*, 715 So. 2d 311 (Fla. 4th DCA 1998), *Auto-Owners Insurance Co. v. Green*, 220 So. 2d 29 (Fla. 1st DCA 1969), and *Arch Roberts & Co. v. Auto-Owners Insurance Co.*, 305 So. 2d 882 (Fla. 1st DCA 1974), as a support for a contrary result, is badly misplaced, because those cases are legally and factually inapposite. In *Fort Lauderdale Lincoln*

Mercury, for example, the purchaser of an automobile obtained a judgment against the defendant dealer for fraud and violations of Florida's Deceptive and Unfair Trade Practices Act ("Act"). The appellate court reversed the judgment and held that the Act entitles a consumer to recover from a seller damages attributable to the diminished value of the goods received. Significantly, however, the court did not even consider, let alone decide, the question at issue in this case, *to wit*: whether an insurer is obligated to pay for the diminished value of a properly repaired vehicle under an insurance policy, whose unambiguous terms do not require such payment. Thus, *Ft. Lauderdale Lincoln Mercury* offers no support for Siegle's position.

Green is similarly distinguishable. In that case, the plaintiff made a claim with his insurer after his automobile was damaged. The insurer determined that certain damage could be repaired for $2,353.11, but that it could not determine the full extent of the damage to other items, such as the transmission, until the automobile was put in driving condition. Even though the repair estimate did not address all of the damage to the vehicle, the insurer offered to pay the amount of the incomplete appraisal, and demanded that the insured release it from responsibility to pay for further damage which later might be found. The plaintiff refused to provide the release, sued the insurer, and obtained a judgment. The First District affirmed and held that, under the conditions that the insurer imposed, the plaintiff was not obligated to accept the partial repair job. Like *Ft. Lauderdale Lincoln Mercury*, *Green* does not apply here, because the court did not address, let alone resolve, an auto insurer's obligation to reimburse an insured for the "inherent diminished value" of a properly repaired vehicle. Instead,

the insurer in *Green* only offered its insured an incomplete repair job, which would not substantially restore the vehicle to its pre-accident condition. In contrast, Siegle acknowledges that Progressive paid for the complete repair and that a complete repair was effected to "the best of human ability." (R. 142).

The final Florida case upon which Siegle relies (*i.e.*, *Arch Roberts*) actually belies her contention. In *Arch Roberts*, the plaintiff submitted a claim to its insurer for damage to its automobile. The insurer appraised the damage, opted to have it repaired, and obtained an estimate. The plaintiff claimed that the automobile could not be satisfactorily repaired. Accordingly, he did not allow the insurer to repair it and, instead, sold the vehicle. The trial court entered summary judgment for the insurer, specifically finding that the insurer's "liability herein is limited to ... the amount of the appraisal for repair." *Id.* at 883. The plaintiff appealed and the First District held that "[t]he trial judge was correct." *Id.* at 883. The court first noted that the insurance policy afforded the insurer the option to repair the automobile. The court then held that the insurer had satisfied its obligation to substantially restore the automobile to its pre-accident condition by obtaining the appraisal for repair and offering to have the automobile fully repaired. **The court did not impose a further obligation on the insurer to compensate the plaintiff for any diminished value of the automobile.**

Siegle also relies on *Delledone v. State Farm Mutual Automobile Insurance Co.*, 621 A.2d 350 (Del. Super. Ct. 1992). In *Delledone*, mis-cited by Siegle as a Delaware Supreme Court case, the Superior Court of Delaware based its ruling on the "reasonable expectations" of the insured. *Id.* at 354. In Florida, the unambiguous

terms of an insurance contract, **and not the "reasonable expectations" of the insured**, govern the scope of coverage under the contract, *Deni Assocs. of Fla., Inc. v. State Farm Fire & Cas. Ins. Co.*, 711 So. 2d 1135, 1140 (Fla. 1998). Moreover, in the subsequent case of *O'Brien v. Progressive Northern Insurance Co.*, 2000 WL 33113833 (Del. Super. Ct. 2000), the Superior Court of Delaware distinguished *Delledone* and squarely held that an insurer's "obligation to repair a damaged vehicle does not include paying the repaired vehicle's diminished value." *Id.* at *7.

Finally, Siegle string cites to several cases from other states, without so much as an explanatory parenthetical, and proclaims that a "majority of jurisdictions" have adopted the view she expresses in her brief. (I.B. 11). Significantly, most of the cases Siegle string cites do not address the issue at bar.[6]

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[6] *Dodson Aviation, Inc. v. Rollins, Burdick, Hunter of Kansas, Inc.*, 807 P.2d 1319 (Kan. Ct. App. 1991)(policy language distinguishable); *United States Surgical Corp. v. United States Fire Ins. Co.*, 1990 WL 277471 (Conn. Super. Ct. 1990)(policy language distinguishable); *Senter v. Tennessee Farmers Mut. Ins. Co.*, 702 S.W.2d 175 (Tenn. Ct. App. 1985)(policy language not provided in decision); *Potomac Ins. Co. v. Wilkinson*, 57 So. 2d 158 (Miss. 1952)(policy language not provided in decision); *Romco, Inc. v. Broussard*, 528 So.2d 231 (La. Ct. App.), *writ denied*, 533 So. 2d 356 (La. 1988)(court addressed a third party claim made under a liability insurance policy); *Edwards v. Maryland Motorcar Ins. Co.*, 204 A.D. 174, 197 N.Y.S. 460 (N.Y. App. Div. 1922)(theft provisions of automobile policy entitled insured to the reduced value of the vehicle resulting from the 1500 miles the thief presumably placed on the vehicle); *Williams v. Farm Bureau Mut. Ins. Co. of Mo.*, 299 S.W. 2d 587 (Mo. Ct. App. 1957)(if vehicle could not be satisfactorily repaired thereby restoring the function of the vehicle, diminished value may be recovered); *Hartford Fire Ins. Co. v. Rowland*, 351 S.E. 2d 650 (Ga. Ct. App. 1986)(opinion does not disclose whether vehicle could be satisfactorily repaired thereby restoring the function of the vehicle); *Dunmire Motor Co. v. Oregon Mut. Fire Ins. Co.*, 114 P. 2d 1005 (Or. 1941)(opinion does not disclose whether vehicle could be satisfactorily repaired thereby restoring the function of the vehicle); *Campbell v. Calvert Fire Ins. Co.*, 109 S.E. 2d 572 (S.C. 1959)(plaintiff testified that vehicle was not satisfactorily repaired); *Grubbs v. Foremost Ins. Co.*, 141 N.W. 2d 777 (S.D.

In sum, Siegle has not cited any appellate authority from Florida, and only modest authority from other jurisdictions to support her alleged entitlement to reimbursement for the so-called "inherent diminished value" of her properly repaired vehicle. Contrary to Siegle's contention, the overwhelming weight of authority has rejected the notion that she is entitled to recover for "inherent diminished value." Accordingly, the certified question should be answered in the negative.

II. THIS COURT SHOULD REJECT SIEGLE'S INVITATION TO LOOK BEYOND THE PLAIN AND UNAMBIGUOUS LANGUAGE OF THE POLICY IN ORDER TO CREATE COVERAGE WHERE NONE EXISTS, BECAUSE IT CANNOT DO SO WITHOUT VIOLATING SEVERAL WELL-SETTLED PRINCIPLES OF INSURANCE LAW.

Notwithstanding the plain and unambiguous language in the Progressive policy and the overwhelming weight of authority in Florida and elsewhere, which has refused to recognize an insured's right to recover for the so-called "inherent diminished value" of a properly repaired vehicle, Siegle maintains that this Court should reach a contrary result, because: (1) the policy allegedly is ambiguous and should be construed against the drafter; (2) at best, the policy language is capable of being fairly and reasonably read for and against coverage and, therefore, should be construed in favor of coverage; (3) "loss in value is a loss" and Progressive agreed to pay for "loss to a covered vehicle;" and (4) Progressive "could have included language specifically

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1966)(witnesses testified that vehicle not properly restored because of unavailability of certain metal); *MFA Ins. Co. v. Citizens Nat'l Bank of Hope*, 545 S.W. 2d 70 (Ark. 1977)(bank, as third party loss payee, sought recovery for vehicle "almost totally destroyed by fire.").

excluding its liability for the loss in value of the damaged vehicle," but failed to do so. However, a review of the policy and the applicable authorities conclusively establishes that there is no merit to any of Siegle's arguments. Accordingly, this Court must reject those arguments.

A. This Court Is Not At Liberty To Create Coverage Under A Policy Of Insurance That Is Unambiguous

It is axiomatic that a court must construe contracts of insurance "in accordance with the plain language bargained for by the parties." *Prudential Prop. & Cas. Ins. Co. v. Swindal*, 622 So. 2d 467, 470 (Fla. 1993). *See also Westmoreland v. Lumbermens Mut. Cas. Co.*, 704 So. 2d 176, 179 (Fla. 4th DCA 1997), *rev. dismissed*, 717 So. 2d 534 (Fla. 1998). Moreover, it is equally well-established that, where policy language is clear and unambiguous, a court must give effect to the policy as written and it may not rewrite the policy to create coverage where none plainly exists. *See, e.g., Duncan Auto Realty, Ltd. v. Allstate Ins. Co.*, 754 So. 2d 863, 864 (Fla. 3d DCA 2000); *State Farm Fire & Cas. Co. v. Oliveras*, 441 So. 2d 175 (Fla. 4th DCA 1983); *Liberty Mut. Ins. Co. v. Capeletti Bros., Inc.*, 699 So. 2d 736 (Fla. 3d DCA 1997). *See also Pastori v. Commercial Union Ins. Co.*, 473 So. 2d 40, 41 (Fla. 3d DCA 1985)("courts have no power simply to create coverage out of the whole cloth when none exists on the face of the insurance contract ..."); *General Accident Fire & Life Assur. Corp. v. Liberty Mut. Ins. Co.*, 260 So. 2d 249 (Fla. 4th DCA 1972). As a general rule, the question of whether a contract provision is ambiguous is an issue of law for the trial court and the court's determination arrives

at the appellate court with a presumption of correctness. *Hancock v. Brumer, Cohen, Logan, Kandell & Kaufman,* 580 So. 2d 782, 784 (Fla. 3d DCA), *rev. denied,* 591 So. 2d 180 (Fla. 1991).

The plain language of the Progressive policy at issue provides, in pertinent part, that, in exchange for Siegle's premium payment, Progressive will pay for collision or comprehensive damage to the subject vehicle, less any applicable deductible. (R. 162). The Progressive policy then goes on to define a covered "loss" to include "**direct and accidental loss of or damage to [Siegle's] insured auto**." *Id*. Finally, the policy plainly defines Progressive's obligations in the event of a covered "loss" as follows:

> **Our** limit of liability for **loss** shall not exceed the lesser of:
>
> A. the actual cash value of the stolen or damaged property less the applicable deductible shown in the Declarations;
>
> B. the amount necessary to repair or replace the property with other of the like kind and quality less the applicable deductible shown in the Declarations; or
>
> C. the amount stated in the Declarations page of this policy.

(R. 164-65)(emphasis in original).

Siegle attempts to create an "ambiguity" where none exists. Siegle contends that when Progressive opts to "repair ... the property with other of like kind and quality," it is obligated to "make the vehicle analogous, alike or parallel to the vehicle prior to the accident." (I.B. 14). Siegle's contention not only is illogical, but it distorts the

plain language of the Progressive policy. As the policy language provides, and the Fourth District found:

> A repair with like kind and quality would thus require the property to be restored to good condition with parts, equipment and workmanship of the same essential character, nature and degree of excellence which existed on the vehicle prior to the accident. The damaged vehicle may or may not be returned to its pre-accident market value, but a return to market value is not what the words "repair" with "like kind and quality" commonly connote...

Siegle v. Progressive Consumers Ins. Co., 26 Fla. L. Week. D1506, D1507 (Fla. 4th DCA June 13, 2001).

The trial court and the Fourth District necessarily and properly concluded that the policy language is unambiguous and that it does not require Progressive to pay any additional element of loss, including reimbursement for the so-called "inherent diminished value" of a properly repaired vehicle.

Siegle also contends that the policy is inherently ambiguous, because the term "loss" is included within the definition of "loss," *i.e.* "direct and accidental loss of or damage to your insured auto, including its equipment." (I.B. 25). That argument ignores the issue presented. There is no dispute that a covered "loss" has occurred, no matter how that term is defined. Rather, the question presented is the extent of Progressive's liability for that loss. The provisions of the policy entitled "LIMITS OF LIABILITY" answer that question and identify the three (3) options available to Progressive, as discussed above.

Contrary to Siegle's contention, Progressive's policy does not provide for payment of what she terms "the entire loss." The extent of Progressive's liability for

any loss is clearly stated in the policy. That liability does not include reimbursement for the so-called "inherent diminished value" of a properly repaired vehicle.

B. The Absence Of A Specific Exclusion Does Not Create Coverage For A Claim Which Plainly Falls Outside The Insuring Provisions Of The Policy

Siegle argues that this Court should construe the policy against Progressive because Progressive "could have specifically excluded liability for" the inherent diminished value of the vehicle. (I.B. 20). However, it is the **insuring** provisions of a policy which determine what the policy covers and only claims falling within the insuring provisions are covered. Thus, while an insurer may use a specific exclusion to excise from coverage particular claims which otherwise would be covered by the insuring provisions, a specific exclusion is not required if the claim falls outside the insuring provisions. *United States Fire Ins. Co. v. Meridian of Palm Beach Condominium Ass'n, Inc.*, 700 So. 2d 161, 162 (Fla. 4th DCA 1997), *rev. denied*, 717 So. 2d 535 (Fla. 1998)("[p]olicy exclusions cannot create coverage where there is no coverage in the first place"). Here, the insuring provisions of the policy plainly do not include a claim for the "inherent diminished value" of Siegle's vehicle. Accordingly, the absence of a specific exclusion does not and cannot create that coverage.

C. The Adoption Of Siegle's Contention Would Improperly Negate Certain Policy Provisions

Florida courts have long recognized that, when a contract is susceptible to an interpretation that gives effect to all of its provisions, the "court should select that interpretation over an alternative interpretation that relies on negation of some of the

contractual provisions." *Inter-Active Servs., Inc. v. Heathrow Master Ass'n, Inc.*, 721 So. 2d 433, 435 (Fla. 5th DCA 1998). Here, Progressive's policy plainly and unambiguously provides that Progressive may (1) pay the ACV of a damaged vehicle **or** (2) pay to repair the property damage to the vehicle. Under Siegle's proffered construction, however, Progressive would be obligated to pay for the repair **and** pay an amount equal to the alleged difference between the pre-accident and post-accident ACV of the vehicle. Such a construction would, in effect, eliminate the difference between the options of paying the ACV of the vehicle or paying to repair the property damage to the vehicle. Thus, this Court must reject Siegle's contention because it impermissibly reads Progressive's right to chose the option of paying to repair the property damage to her vehicle entirely out of the policy.

III. THE TRIAL COURT PROPERLY REFUSED TO CONSIDER EVIDENCE OUTSIDE THE FOUR CORNERS OF THE SECOND AMENDED COMPLAINT IN ENTERING ITS ORDER OF DISMISSAL AND THIS COURT MAY NOT CONSIDER SUCH EVIDENCE IN REVIEWING THAT ORDER.

At the hearing on Progressive's Motion to Dismiss, on appeal to the Fourth District, and again in her Initial Brief to this Court, Siegle relied on matters outside the four corners of her Second Amended Complaint. Specifically, Siegle refers to selected excerpts from depositions of Progressive representatives taken in a Delaware action

and a purported "model auto insurance policy." (I.B. 14-18). Siegle's reliance on such "evidence" is improper, as a matter of law, *see, e.g.*, *McWhirter, Reeves, McGothlin, Davidson, Rief & Bakas, P.A. v. Weiss*, 704 So. 2d 214, 215 (Fla. 2d DCA 1998)(when ruling on a motion to dismiss, a court must confine itself strictly to the allegations within the four corners of the complaint and any accompanying exhibits, and may not consider evidence in the case). Therefore, this Court should ignore those items in considering the certified question.

CONCLUSION

Based on the foregoing arguments and authorities, the Appellee, Progressive Consumers Insurance Company, respectfully requests that this Court answer the certified question in the negative.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was forwarded via U.S. Mail this ____ day of August, 2001 to Mike Peacock, Esq., James, Hoyer, Newcomer & Smiljanich, P.A., One Urban Centre, Suite 147, 4830 West Kennedy Blvd., Tampa, Florida 33609-2522; Debra Brewer Hayes, Esq., Reich & Binstock, 4265 San Felipe, Suite 1000, Houston, Texas 77027; and Michael L.

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CERTIFICATE OF TYPE SIZE

In accordance with Florida Rule of Appellate Procedure 9.210(a)(2), this Answer Brief of Respondent Progressive has been prepared using Times New Roman 14 point font.

By:_____
Francis A. Anania, Esq.