CAUSE NO. 09-0367-CC4

MARY DOE,	§	**IN THE COUNTY COURT**
	§	
Plaintiff,	§	
	§	
V.	§	
	§	**AT LAW NUMBER FOUR**
RAUNEL ARROYO AVILA and CHRISTIANSON AIR CONDITIONING & PLUMBING, L.L.C. d/b/a CHRISTIANSON AIR CONDITIONING,	§	
	§	
Defendants.	§	**WILLIAMSON COUNTY, TEXAS**

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, MARY DOE, Plaintiff in the above-styled cause, and hereby files her Response to Defendants' Motion for Partial Summary Judgment, and in opposition thereto, would respectfully show the Court as follows:

I. FACTUAL BACKGROUND

Plaintiff brought this cause of action for property damage and personal injuries arising out of a motor vehicle collision caused by Defendants' negligence on November 8, 2007.

Defendants have failed and refused, and continue to fail and refuse, to compensate Plaintiff for the total loss of her vehicle (a time period that now spans more than two-and-a-half years). Accordingly, as to the property damage portion of her claims, Plaintiff seeks damages beyond simply the market value of the vehicle, and can show judicial authority for doing so.

Defendants claim there is no judicial authority whatsoever for doing so (contrary to appellate opinion in Texas), and on May 27, 2010, filed their Motion for Partial Summary

Judgment as to any loss of use or consequential damages beyond the market value of Plaintiff's totaled vehicle.

II.
ARGUMENT & AUTHORITIES

A. Standard of Review

The standard for appellate review of a summary judgment is that the Court must find that there is no genuine issue of fact and that the movant (i.e., Defendants) is entitled to judgment as a matter of law. *See Cate v. Dover Corp.*, 790 S.W.2d 559, 562 (Tex. 1990). All doubts as to the existence of a genuine issue must be resolved against the movant (Defendants). *See Acker v. Texas Water Comm'n*, 790 S.W.2d 299, 301 (Tex. 1990). All evidence and reasonable inferences are to be viewed in the light most favorable to the non-movant (i.e., Plaintiff), and all doubts are to be resolved in her favor. *See Harwell v. State Farm Mut. Auto. Ins. Co.*, 896 S.W.2d 170, 173 (Tex. 1995). As the following analysis will show, Defendants cannot possibly meet this high standard.

Defendants claim summarily and impressively in their Motion, Section III, Subsection C (on page 4), that: "Texas law clearly holds that loss of use damages and/or any other damages related to the unavailability of a vehicle are *never* available in cases where a plaintiff's vehicle has been totally destroyed." However, the law in Texas is not nearly so "clear" as Defendants would have this Court believe. Defendants have relied on a number of outdated and, in some instances, inapplicable case citations to obfuscate this issue.

B. There is Texas judicial opinion in support of Plaintiff's damages claim

Plaintiffs would draw the Court's attention to the more recent case of *Mondragon v. Austin*, 954 S.W.2d 191 (Tex. App.—Austin 1997, writ denied), which is curiously absent from Defendants' list of authorities on this issue. In this, case the Third Court of Appeals held that

loss of use damages of the type sought by Plaintiff in this case could be awarded even when such damages went far and beyond above the actual market value of a claimant's vehicle, particularly when the additional damages were a result of a defendant's protracted failure and refusal to pay a meritorious damage claim. In fact, as the Court will see, the facts of the present case are even far more egregious than the facts presented to the *Mondragon* court.

In *Mondragon*, just as in the present case before this Court, the issue was a property damage dispute where the defense insurance carrier denied payment to the injured claimant. 954 S.W.2d at 192. Also, Plaintiff in this case is in the identical situation as the claimant in *Mondragon*, in that she has no collision coverage to take care of the loss herself. *Id.* Furthermore, Plaintiff is in the identical situation as the claimant in *Mondragon*, in that she has had to continue making monthly payments on her vehicle, which has been sitting unusable and undrivable since November of 2007. *Id.* ("As a consequence of Mondragon's choices, Austin had to continue making the payments on the car, send additional money to his daughter for transportation at college, and travel six-hundred miles each way to transport her back and forth on holidays."). Additionally, in both cases, the insurance carrier representing the defendant had more than reasonable basis to believe that its driver was at fault. *Id.* at 195 ("Austin lost the use of his car because Mondragon, while intoxicated, negligently drove backwards down a street and collided with the car. The loss continued for more than a year because Mondragon and his insurance company chose to deny the claim."). In the present case, from the beginning, Defendants have been aware of the existence of, and voluntary written statement of, an eyewitness who happens to be the only eyewitness with the admitted capability to view both Plaintiff's and Defendants' traffic lights at the time of the November 8, 2007 collision, and who has stated unequivocally, under video deposition by both parties' counsel, that she saw Plaintiff's

light to be green and Defendants' light to be red. Defendants continue to deny the claim based upon their reliance on another witness, who was self-admittedly not in a position where it would even be physically possible to see Plaintiff's traffic light, and whose testimony indicates that he was distracted by a telephone call and not even watching this event from start to finish. He has also testified that it appeared to him Defendants' truck was speeding (consistent with Plaintiff's account, and the first eyewitness's account, that Defendants' truck barreled through the intersection in a failed attempt to beat the red light). Yet, in *Mondragon*, just as in this case, the defense insurance carrier gambled by refusing to pay the property damage. *Id.*

In *Mondragon*, the plaintiff was without a car for over 12 months. *Id.* In the present case, as a result of Defendants' unwillingness to satisfy the property damage claim, Plaintiff has been without her car (and still continues to be) for over two-and-a-half years. Furthermore, in both cases, the plaintiff was unable to mitigate the damages suffered as a result of the defendants' negligence. In *Mondragon*, the plaintiff was without collision coverage and had to continue to make monthly loan payments on the car, and therefore had no surplus income that could be used to offset or take care of the damages himself. *Id.* at 192, 195. In the present case, Plaintiff has no collision coverage and has had to continue to make very high monthly payments of over $668.00 on the vehicle that was totaled in this collision, and has had to continue to do so since November of 2007 (Plaintiff provided documentation of these continued payments in her First Supplemental Responses to Defendants' Request for Production, served on February 26, 2010). Accordingly, Plaintiff has no surplus income or funds with which to take on another car loan. The court in *Mondragon* was entirely unsympathetic with the defendant's argument that those consequential damages were not due to his own negligence, but rather due to plaintiff's own financial situation:

> Mondragon argues the reason Austin was deprived of the car for such an extended period of time was Austin's lack of financial resources, not Mondragon's negligence. That Mondragon happened to collide with a car whose owner did not have surplus disposable income does not absolve him of responsibility for the consequences of his negligent act. The court properly considered the particular facts surrounding the incident, including Austin's financial condition, in determining the compensable time period.

Id. at 195.

Ultimately, the court in *Mondragon* held that there was no reason not to award loss of use damages that went far and beyond the actual market value of the car itself, especially in the face of such egregious behavior on the part of the defense: "We note at least two other Texas courts have affirmed awards derived from these rules even when the result was to award loss of use damages that exceeded the total value of chattel that had been only partially damaged." *Id.* at 196 (citing the appellate decisions in *Metro Ford Truck Sales, Inc. v. Davis,* 709 S.W.2d 785, 790 (Tex. App.—Fort Worth), *affirmed on rehearing,* 711 S.W.2d 145 (Tex. App.—Fort Worth 1986, writ ref'd n.r.e.), which awarded $74,016 for loss of use of a truck valued at $48,500), and *McCullough-Baroid Petroleum Svc. v. Sexton,* 618 S.W.2d 119, 120 (Tex. Civ. App.—Corpus Christi 1981, writ ref'd n.r.e.), which awarded $30,880 for loss of use of equipment valued at $30,000). In further support of its holding, the court reasoned that if it were to limit loss of use damages to the plaintiff in such a case:

> [W]e would be penalizing him for his lack of financial resources, denying him recovery of the damages he suffered because of Mondragon's negligent act, and allowing the insurance company to reap the benefit of its refusal to pay the meritorious claim. The law does not permit or require such a result.

Id. at 194.

Undoubtedly, Defendants' first counter-argument against the above analysis would be that *Mondragon* was deciding a case wherein it was generally agreed that the plaintiff's car was not totally destroyed but was potentially repairable. However, Plaintiff believes that the

Mondragon court effectively preempted such a counter-argument and reasoned that its holding would extend to a total loss case, if such facts had presented themselves to the court:

> The difference in the rules exists, however, because courts **assume** that a person does not suffer loss of use damages when a car is a total loss. Courts **assume** that the car can be replaced immediately. In contrast, we assume a partially damaged car, while repairable, cannot be repaired immediately. Consequently, a person whose car is only partially damaged suffers damage in addition to loss in value of the car. The person also suffers loss of *use* of the car, a value not necessarily correlative to the value of the *car*. We believe the assumption made in partial damage cases is more realistic than that made in total destruction cases. In other words, **even a person whose car is totally destroyed might suffer loss of use damages, because it may be difficult or impossible to replace the car immediately**. For that reason, we decline to accept Mondragon's suggestion that we must equalize the two situations by limiting loss of use damages in partial destruction cases. **We believe the better policy might be to reconsider permitting loss of use damages in total destruction cases. As discussed above, this case does not present those facts**.

Id. at 195-96 (emphasis added).

The key word in the *Mondragon* court's analysis is "assume." In standard cases, it is assumed that loss of use damages are already built into the fair market value of a totaled vehicle. *See, e.g., American Jet, Inc. v. Leyendecker*, 683 S.W.2d 121, 128 (Tex. App.—San Antonio 1984, no writ). However, just as in the *Mondragon* case, Plaintiff's case does not fit into the traditional mold. Plaintiff has been without her car for over two-and-a-half years, due to Defendants' negligence and their unreasonable delay and refusal to pay for it. *Mondragon* makes clear that, in such egregious cases and compelling circumstances, loss of use damages should be available to a plaintiff, notwithstanding that the vehicle is a total loss. 954. S.W.2d at 196. In other words, a fair market could never "assume" or contemplate that the offer to pay market value comes almost three years after the loss – if it even comes at all. Defendants' position – understandably, from a defense perspective – is that there should be no other recourse or additional damages for a plaintiff in a case so appalling as this.

C. Texas courts have given guidance on how to calculate loss of use damages

As to the issue of what the appropriate measure for loss of use damages should be, *Mondragon* and other cases provide the guidance for this Court. One way a plaintiff may prove up loss of use damages is to establish the reasonable rental value of a substitute car. *See, e.g., Luna v. North Star Dodge Sales, Inc.*, 667 S.W.2d 115, 118 (Tex. 1984). Using this analysis, the *Mondragon* court noted that the parties stipulated the reasonable rental value of a car to be $20.00 per day, the only dispute being over what length of time that should be computed. *Mondragon*, 954 S.W.2d at 193. The court quoted the *Luna* decision, stating that the "period of compensatory loss of use will be the amount of time the plaintiff was deprived of the loss of use of the automobile." *Id.* at 194 (adding that, "the thing to be kept in view is that the party shall be compensated for the injury done"). In fact, the *Luna* court had even held that a plaintiff may recover loss of use damages even though he or she had not actually expended money renting another car. 667 S.W.2d at 118-19 (reasoning that to condition compensation on financial ability to rent a substitute car would deny a plaintiff compensation for the damages resulting from the defendant's wrongful act). Accordingly, one valid measure of Plaintiff's loss of use damages in this case, according to both the Texas Supreme Court in *Luna* and the Third Court of Appeals in *Mondragon*, would be the reasonable rental value (e.g., $20.00 per day) of a substitute car, over the two-and-a-half year period (almost three years by the time of trial of this cause) that Plaintiff has been without it, due to Defendants' negligence and appalling refusal to pay for it.

Another reasonable measure of damages, in the alternative, would be the continued monthly loan payments Plaintiff has had to make on the totaled vehicle, beyond the date that her car loan would have been paid off if Defendants had reasonably and promptly compensated her for the fair market value of her vehicle subsequent to this collision. In this regard, counsel for

Plaintiff sent a rigorous amortization calculation to counsel for Defendants, via electronic mail, on February 19, 2010. Rather than reproduce in its entirety the amortization calculations and figures in this response motion, Plaintiff will instead attach that electronic mail as "Exhibit A" to this response motion. As the Court will see, Plaintiff is being entirely reasonable by taking into account the fact that even if Defendants had promptly paid the fair market value for the total loss, after the November 8, 2007 collision, Plaintiff would have continued to make monthly payments until September 2008, the final month upon which the entire principal and interest of the car loan would have been paid off. Accordingly, Plaintiff asserts that a reasonable basis for "loss of use" damages could also be the continued monthly loan payments she has had to make from October 2008 onward until date of payment by Defendants (e.g., payment of judgment, whenever that may be). Plaintiff can accept either of the above two measures of loss of use damages (i.e., reasonable rental value, or continued monthly loan payments) in the alternative. Plaintiff would note that Defendants are trying to paint a picture of Plaintiff throwing "the kitchen sink" at Defendants and seeking both categories of damages mentioned above. However, Plaintiff has proffered the electronic mail as an alternative measure of "loss of use" damages (since it also fairly measures the loss of use Plaintiff has been suffering, is suffering, and will continue to suffer for the foreseeable future, insofar as she has no use of the vehicle for which she is paying). However, the standard loss of use damages as calculated by the case law mentioned above (i.e., reasonable rental value) would be equally fair and appropriate.

D. Defendants have overreached in claiming entitlement to summary judgment

In summary, there exists more than reasonable basis for Plaintiff's claim of loss of use damages resulting from Defendants' unreasonable failure and refusal to compensate her property damage total loss for over two-and-a-half years, under the above-cited Texas case law.

Accordingly, Plaintiff's pleadings do set forth a cognizable claim under Texas judicial opinion. It is therefore flagrantly overreaching for Defendants to file a Motion for Partial Summary Judgment on this issue, arguing that there is no genuine issue whatsoever, and that they are entitled to judgment as a matter of law, even going so far as to say the damages sought by Plaintiff "are *never* available" in a total loss case, in direct contravention of the *Mondragon* case.

E. Defendants' other case citations are inapplicable and obfuscate the issue

Furthermore, Defendants have cited a string of outdated cases with little to no analysis or application to the case at hand. Specifically, they have cited these three cases for the proposition that no loss of use damages can be awarded in a case where a car is a total loss: (1) *Hartley v. Schwab*, 564 S.W.2d 829 (Tex. Civ. App.—Amarillo 1978, writ ref'd n.r.e.); (2) *Carson v. Bryan*, 532 S.W.2d 711 (Tex. Civ. App.—Amarillo 1976, no writ); and, (3) *Hanna v. Lott*, 888 S.W.2d 132 (Tex. App.—Tyler, no writ).

The *Hartley* case (1978) was decided two (2) full decades before the *Mondragon* decision (1997), and there is no evidence at all in the *Hartley* fact record to show that the circumstances were anything remotely close to the situation presented in *Mondragon* (and presented even more glaringly in the case before this Court). There was no discussion at all in *Hartley* about a protracted length of time during which the claimant was without use of a car, nor the defendant's unreasonable failure and refusal to compensate the value during that time. *Hartley*, 564 S.W.2d at 830. Naturally, therefore, the court in that case relied upon the earlier judicial precedents about actual cash value being the only proper measure of damages in a total loss case. *Id.* at 831. However, the *Mondragon* court directly and explicitly challenged and questioned this judicial precedent in a case where a claimant, through no fault of his or her own, is left without use of a car for an unreasonably protracted length of time, due to unreasonable failure and refusal of a

defendant to pay the value. 954 S.W.2d at 196 ("[C]ourts assume that a person does not suffer loss of use damages when a car is a total loss. Courts assume that the car can be replaced immediately. … [E]ven a person whose car is totally destroyed might suffer loss of use damages, because it may be difficult or impossible to replace the car immediately. … We believe the better policy might be to reconsider permitting loss of use damages in total destruction cases.").

In the *Carson* case, the primary issue appears to be whether the trial court properly entered judgment on the plaintiff's property damage claim for $4,500.00 (which was the difference in market value of his vehicle from before and after the collision with the defendant), along with "loss of business" damages. *Carson*, 532 S.W.2d at 714. Because there was no cognizable theory for "loss of business" damages on top of the difference in market value, the appeals court modified the judgment. *Id.* ("The judgment of the trial court is reformed by deleting recovery for loss of business and awarding plaintiff recovery for $4,500 vehicle damage. The judgment as modified is affirmed."). Plaintiff in this case is making no such claim of "loss of business." Defendants' citation of this case in this context is wholly misplaced.

Similarly, the *Hanna* decision was related to whether a claimant could recover "loss of earning capacity" damages, not loss of use damages. *Hanna*, 888 S.W.2d at 139 (holding, ultimately, "It was error to charge the jury to award damages for Andrew's 'loss of earning capacity' resulting from the unavailability of his wrecked vehicle."). Plaintiff in the present case is making no such claim of loss of earning capacity, so Defendants' use of the *Hanna* case in this context is again misplaced. As to the general or underlying precedent that no other measure of damages of any kind may be had in a total loss case other than the market value of the vehicle, Plaintiff would again refer the Court to *Mondragon*, wherein the appeals court directly challenged that view and suggested this should no longer be the case, particularly upon facts as

egregious as those involved in the present case. 954 S.W.2d at 196.

Because *Mondragon* sets forth a proper basis for Plaintiff's claim for property damage to include loss of use, and because Defendants can do no better than rely upon decades-old earlier holdings, or else cases which are entirely inapplicable to the scenario presented by this case, Defendants' special exception should therefore be denied and overruled.

E. Public policy strongly militates against Defendants' position

As a final matter, Plaintiff would argue that on public policy grounds, the Court should deny Defendants' motion. Taken to its logical conclusion, Defendants' argument is that neither this Court, nor any court in Texas, can ever or should ever allow for the fashioning of new law (or more appropriately, in this case, the reasonable and logical extension of application of existing law). An appellate court that sits directly above this Court has stated in clear terms that:

> The difference in the rules exists, however, because courts assume that a person does not suffer loss of use damages when a car is a total loss. Courts assume that the car can be replaced immediately. … We believe the assumption made in partial damage cases is more realistic than that made in total destruction cases. In other words, even a person whose car is totally destroyed might suffer loss of use damages, because it may be difficult or impossible to replace the car immediately. … We believe the better policy might be to reconsider permitting loss of use damages in total destruction cases. As discussed above, this case does not present those facts.

Mondragon, 954 S.W.2d at 195-96.

Thus, the appellate court in this case indicates that it is only because total loss facts were not presented before the court that it could not rule on this matter. Such facts do present themselves now, to this Court, at this time and place. If this Court grants summary judgment to Defendants, it will be rewarding an argument by Defendants that is as perverse as it is circular, i.e.: (a) until an appellate court makes a formal holding that loss of use damages can be awarded in a total vehicle destruction case, such damages are not available (despite the appellate court saying the

time has come to consider awarding them); (b) such an appellate holding can never be made, because all trial courts must dispose of such a claim on summary judgment, for the very reason that no appellate holding exists; and, (c) ergo, loss of use damages can never and should never be allowed in a total vehicle destruction case!

On grounds of public and judicial policy, Plaintiff would point out that this argument seeks a result that is perverse, oppressive, and unjust. If appellate opinion opens the door to the very damages that Plaintiff is seeking, the decision to shut that door should be made by the same appellate court, should Defendants choose to appeal. Plaintiff prays that this Court will see that policy favors allowing these damage claims to go forward, as a reasonable and logical application of the extension of existing law, discussed in *Mondragon*.

III.
PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Plaintiff requests that Defendants' Motion for Partial Summary Judgment be denied, that trial of this cause proceed forward with Plaintiff's claims as pled in her Fourth Amended Petition, and that the Court grant such other and further relief to which it finds Plaintiff justly entitled.

Respectfully submitted,

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Ali A. Akhtar
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ATTORNEY FOR PLAINTIFF

VERIFICATION

BEFORE ME, THE UNDERSIGNED AUTHORITY, on this day personally appeared Ali A. Akhtar, known to me to be the attorney whose name is subscribed above to the foregoing *Plaintiff's Response to Defendants' Motion for Partial Summary Judgment*, and being by me duly sworn, affirmed under oath that all statements of fact contained therein are true and correct to the best of his knowledge and belief.

SUBSCRIBED AND SWORN BEFORE ME on this 8th day of June, 2010.

_____ _____

Notary Seal Notary Public – State of Texas

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of this instrument has been served upon the following counsel of record, via facsimile, on this 9th day of June, 2010, pursuant to the Texas Rules of Civil Procedure:

Via Facsimile: (512) 708-8777

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