

IN THE CIRCUIT COURT OF THE 16TH
JUDICIAL CIRCUIT OF THE STATE OF
FLORIDA IN AND FOR MONROE COUNTY

CASE NO: 2007-CA-1269-K

MURRAY MARINE SALES AND
SERVICE, INC., and MURRAY
MARINE, INC.,

Plaintiffs

Vs.

GREAT AMERICAN INSURANCE
COMPANY,

Defendant

**ORDER GRANTING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY
JUDGMENT AND DENYING DEFENDANT'S CROSS-MOTION FOR
PARTIAL SUMMARY JUDGMENT**

THIS MATTER came on to be heard upon the Plaintiffs' Motion for Partial Summary Judgment and Defendant's Cross-Motion for Partial Summary Judgment. The Court, having considered the Cross-Motions, all supporting documentation, the argument of counsel, and all of the facts and circumstances herein, hereby finds and Orders as follows:

1. This action arises from damage to Plaintiffs' property caused by Hurricane Wilma on October 24, 2005, and a claim for insurance proceeds against the Defendant made by the Plaintiffs.

2. The Court finds that the undisputed facts show that the damage to boat motors/engines were damaged as a result of a covered loss, and that the engines were new.
3. The parties disagree on an issue of law, which is the interpretation of the contract between these parties regarding how the value of the property is to be determined, and any contractual limits on that determination.
4. Plaintiffs claim that the valuation of new engines is controlled by paragraph 8(a) of the contract which states that the valuation shall be:

“as to new property the cost price to the insured plus freight charges and assembly costs actually incurred.”
5. Defendant, however, asserts that portions of paragraph 8(b) and paragraph 10(a) of the contract would limit or reduce the amount for which they may be liable to Plaintiffs. Paragraph 8(b) provides:

“as to used property, the actual cost to the insured either through outright purchase or as an allowance in trade-in plus the costs of repairs actually made; but this Company’s liability shall be limited to the cost and expense of repairing or replacing any damaged part or parts, including forwarding charges, labor and installation charges necessary to repair or restore the damaged property to its original condition, but not in excess of the above valuation nor in excess of the cost to replace the property, whichever is the lesser.”

The Defendant suggests that the limitation on liability set forth in the second clause of sub-paragraph (b) limits the Defendant’s liability to the cost and expense of repair or replacement of damaged parts, even with respect to “new property.” Defendant further asserts that paragraph 10(a), which provides:

“no recovery for the constructive total loss of any property insured hereunder shall be had unless the expense of recovering and repairing the property shall exceed the valuation as stated in this section”

also limits the recovery of the Plaintiffs to the lesser of either the

“recovery and repair” of the property or the valuation formula set forth in paragraph 8.

- 5. The Court, having carefully considered this issue, and having considered the contract, rejects Defendant’s attempt to limit its responsibility to the cost of repairs or replacement of damaged parts with regard to “new property.” The structure of the contract itself provides the answer to this question. Paragraph 8(a) is, by its terms, limited in application to “new property” and the application of paragraph 8(b) is limited to “used property”, as is obvious from review of the contract. Accordingly, words of limitation set forth in paragraph 8(b) only apply to used property, and cannot reasonably be said to limit the Defendant’s liability with regard to “new property” which is controlled by paragraph 8(a). In order to achieve the result sought by Defendant, the contract would have been written quite differently, and would have used the words of limitation not simply with regard to sub-paragraph b, but would have been structured so as to apply to the entirety of paragraph 8, including both new and used property. It is apparent to the Court that the Plaintiff, in entering into this contract, did not agree to the words of limitation set forth in paragraph 8(b) with regard to claims regarding**

“new property” and the contract cannot be reasonably interpreted to allow such a limitation.

- 6. The “special conditions” set forth in paragraph 10 similarly do not relieve the Defendant of its responsibility under this contract to value new property as set forth in paragraph 8(a). The contract itself does not define the phrase “constructive total loss”, but the clause clearly bars recovery for any such “constructive total loss” unless the expense of recovery and repair of the property exceeds the valuation “as stated in this section.” The plain meaning of this clause does not extend to the valuation of “new property”. This language, as used in the Special Conditions clause, by its nature indicates an exclusion of its application to valuation of “new property” because of the use of the phrase “recovering and repairing the property” as part of the formula for determining whether the special condition shall apply. The phrase “recovering and repairing the property” is functionally equivalent to the phrase “repairing or replacing any damage part or parts” (paragraph 8(b)) which only applies to the valuation of used property. The Court finds that the Special Conditions set forth in paragraph 10(a) only apply to the valuation of used property, by reason of the virtual identity between the phrases used in these parts of the contract, and the obvious structural distinction between the valuation of new property and used property set forth in paragraph 8.**

7. Accordingly, for the reasons set forth above, partial summary judgment is **GRANTED** to the Plaintiffs, and partial summary judgment is **DENIED** to the Defendant, and as stated, the Court finds that the words of limitation set forth in paragraphs 8(b) and 10(a) shall not, and do not, apply to the Plaintiffs' claim for loss to "new property" which is at issue herein.

DONE and ORDERED at Key West, Monroe County, Florida, this 6th day of January, 2009.

David J. Audlin, Jr.

DAVID J. AUDLIN, JR.
CIRCUIT JUDGE

cc: Kelly L. Kubiak, Esq.
John D. Kallen, Esq.