[Cite as *Braum v. Kinderdine,* 2015-Ohio-696.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

LISA BRAUM, et al.	:	
	:	
Plaintiffs-Appellee/Appellant	:	Appellate Case No. 26298
	:	
v.	:	Trial Court Case No. 2013-CVE-953
	:	
JACK KINDERDINE	:	(Civil Appeal from Municipal Court)
	:	
Defendant-Appellee	:	
	:	

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O P I N I O N

Rendered on the 27th day of February, 2015.

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LISA BRAUM, 6513 Imperial Woods Road, Dayton, Ohio 45459
Plaintiff-Appellee-Pro Se

JOHN P. CARLSON, Atty. Reg. No. 0076002, 9277 Centre Point Drive, Suite 370, West Chester, Ohio 45069
Attorney for Defendant-Appellee

TIMOTHY R. RUDD, Atty. Reg. No. 0075490, 812 East Franklin Street, Suite C, Dayton, Ohio 45459
Attorney for Plaintiff-Appellant-Scott Braum

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WELBAUM, J.

{¶ 1} In this case, Plaintiff-Appellant, Scott Braum, appeals from a trial court judgment in favor of Defendant-Appellee, Jack Kinderdine. In support of his appeal, Braum contends that the trial court erred as a matter of law when it ruled that residual diminution of the value of damaged property is not a proper measure of damages. Braum further contends that the trial court erred when it ruled in Kinderdine's favor on the issue of damages.

{¶ 2} We conclude that the trial court erred in refusing to consider evidence about the residual diminution in value of Braum's automobile, which was repaired after a collision. Where a plaintiff can prove that the value of a damaged vehicle after repair is less than the vehicle's worth before the injury, the plaintiff may recover both the reasonable cost of repair and the residual diminution in value after repair, provided that the award does not exceed the gross diminution in value. Accordingly, the judgment of the trial court will be reversed, and this cause will be remanded for further hearing.

I. Facts and Course of Proceedings

{¶ 3} On January 5, 2012, Jack Kinderdine rear-ended Scott Braum's vehicle, a 2009 GMC Acadia, which was being driven by Scott's wife, Lisa. Scott Braum had purchased the vehicle in April 2009 from Bob Ross Buick-GMC ("Bob Ross"), and had paid off the loan on the vehicle about three months before the accident. Braum typically purchased a decent vehicle, took care of it, and drove it as long as he could before purchasing another. At the time of the accident, the Acadia had been driven only about

22,000 miles, and had undergone all standard maintenance, which was performed by Bob Ross. In Braum's opinion, the condition of the vehicle was outstanding. Braum testified that, in his opinion, the fair market value of the Acadia was about $31,000 before the accident.

{¶ 4} After the accident, the damage to the Acadia was repaired at a cost in excess of $14,000. The repairs were paid for by Kinderdine's insurer, and Braum did not have to pay any money for the repairs, which were done by Bob Ross. After the initial repairs were completed, Braum noticed that the rear tail gate was not working properly. He also noticed some "weird" electrical things and some "weird" noises. Braum returned the vehicle to Bob Ross on two occasions thereafter. The invoices from Bob Ross indicate that the airbag light was on and that Braum was getting a "service airbag" message. The invoice further indicates that Bob Ross repositioned the harness and reseated the connector.

{¶ 5} An additional invoice dated the same day, February 23, 2012, indicated that Braum wanted the four-wheel alignment checked. An alignment was then performed. Neither invoice indicated that the vehicle was running "funny" or was making noise.

{¶ 6} Braum was not comfortable having his family drive the car around and decided to trade in the 2009 Acadia for a new car. Braum bought a new version of the same car, a 2012 Acadia, from Bob Ross. He did not offer the 2009 Acadia for personal sale to a private party, nor did he consult other dealerships about a trade-in. The purchase price of the new car was approximately $50,000, and Bob Ross credited Braum with $19,000 for the trade-in. Bob Ross subsequently sold the vehicle wholesale for $20,000.

{¶ 7} Believing that he should be entitled to recover for the residual diminution in value of the vehicle, Braum filed suit in Montgomery County Common Pleas Court against Kinderdine. Braum dismissed that action without prejudice in July 2013, and refiled in Kettering Municipal Court in December 2013. Kinderdine then filed a motion to dismiss or for summary judgment regarding the residual diminution in value claim. In June 2014, the trial court filed a decision and entry limiting Braum's evidence about damage to evidence conforming to the holding in *Falter v. Toledo*, 169 Ohio St. 238, 158 N.E.2d 893 (1959).

{¶ 8} Shortly thereafter, the parties waived a jury trial, and a visiting judge held a hearing, during which Braum was permitted to testify and to proffer evidence about his vehicle's residual diminution in value. Consistent with the trial court's prior ruling, the visiting judge ruled that diminution of residual value was not an appropriate measure of damages. Since Braum had already received the full cost of the needed repairs, the court entered judgment in favor of Kinderdine. Braum appeals from the judgment of the trial court.

II. Residual Diminution in Value

{¶ 9} Braum's First Assignment of Error is that:

> The Trial Court Erred as a Matter of Law When it Ruled that Residual Diminution of the Value of Damaged Personal Property Was Not a Proper Measure of Damages Arising out of Defendant-Appellee's Tort.

{¶ 10} Under this assignment of error, Braum contends that the trial court erred in concluding that he could not recover for residual diminution of value under *Falter*, 169

Ohio St. 238, 158 N.E.2d 893. Braum argues that we should follow two decisions of the Tenth District Court of Appeals, which have allowed such a recovery. In contrast, Kinderdine argues that under *Falter*, Ohio law provides two "exclusive and alternative methods" of calculating damages: diminution of value and cost of repairs.

{¶ 11} In *Falter,* the Supreme Court of Ohio considered whether the trial court had erred in overruling the defendants' motion to strike language from the plaintiffs' pleading. *Id.* at 239. The language in question was the "allegation that 'the reasonable cost of the labor and material necessary to repair said automobile was the sum of one hundred seventy[-]eight and 74/100 dollars ($178.74) which amount also represents the depreciation in the reasonable value of said automobile as a result of said collision.' " *Id.*

{¶ 12} The defendants' argument in favor of striking the language was that "the plaintiffs should not have pleaded the cost of repairs but should have alleged 'the difference in the reasonable market value of the motor vehicle immediately before the actionable collision and the reasonable market value of said motor vehicle immediately after said collision.' " *Id.*

{¶ 13} The Supreme Court of Ohio concluded that the plaintiffs did not erroneously plead the cost of repair. *Id.* at 240. In this regard, the court observed that:

> Of course it was not necessary to * * * [plead the cost of repair] since it would have been sufficient for the plaintiffs to allege the difference in the market value before and after the collision. But it clearly was proper for the plaintiffs to allege, prove and recover the reasonable cost of repairs, provided that such cost did not exceed the difference in market value before and after the collision.

Falter, 169 Ohio St. at 240, 158 N.E.2d 893. Thus, in its syllabus, the Supreme Court of Ohio held that:

> 1. Under the general rule the owner of a damaged motor vehicle may recover the difference between its market value immediately before and immediately after the collision.
>
> 2. It is not prejudicial error for the owner of such a vehicle to allege, prove and recover the reasonable cost of repairs provided that such recovery may not exceed the difference between the market value of the vehicle immediately before and immediately after the collision.

Id. at 238, paragraphs one and two of the syllabus.

{¶ 14} Subsequently, in *Allstate Ins. Co. v. Reep*, 7 Ohio App.3d 90, 454 N.E.2d 580 (10th Dist.1982), the Tenth District Court of Appeals described the cost of repair as an "alternative method" and "acceptable measure of damages if the cost of repair does not exceed the amount of damages that would be arrived at using the primary measure of damages." *Id.* at 91.

{¶ 15} However, the issue in the case before us is not whether the cost of repair is an alternative method; it is whether a plaintiff is precluded from offering evidence about residual diminution of value where he or she has previously chosen to repair the vehicle.

{¶ 16} Our own district has not previously analyzed *Falter* in the current context, i.e., where the owner of an automobile claims that, despite repair, the value of his or her vehicle is less than it was before an accident. *Marino v. Ekey*, 2d Dist. Montgomery No. 4911, 1975 WL 181781 (Dec. 3, 1975) is one of the few cases in which we have cited *Falter,* and in that case, we cited *Falter* merely for the proposition that "the true test for

damage to a motor vehicle is the difference between its market value immediately before and immediately after the collision. Evidence of the reasonable cost of repair is admissible; *however, the recovery may not exceed the difference between the market value of the vehicle immediately before and immediately after the collision.* (Emphasis sic.) *Id.* at *1.

{¶ 17} As Braum notes, the Tenth District Court of Appeals has addressed this particular issue. In *Rakich v. Anthem Blue Cross & Blue Shield*, 172 Ohio App.3d 523, 2007-Ohio-3739, 875 N.E.2d 993 (10th Dist.), the plaintiffs attempted to assert a claim for the diminished value of their automobile after it had been repaired following a collision. *Id.* at ¶ 4. However, the trial court concluded that plaintiffs could not present evidence about the lesser future resale value of their vehicle, because "Ohio law provides two exclusive and alternative methods to calculate property damages: diminution of value and cost of repairs." *Id*. at ¶ 5. The Tenth District Court of Appeals disagreed, and reversed the trial court.

{¶ 18} Initially, the Tenth District Court of Appeals noted that "rules controlling recovery of compensatory damages to personal property generally apply to damage to vehicles," and that "in a tort action, the measure of damages is that which will make the injured party whole." (Citations omitted.) *Id.* at ¶ 8. The court of appeals then observed that *Falter* had set forth the general rule for calculating damages to vehicles. *Id.* at ¶ 9. In this regard, the court of appeals noted that *Falter* concluded that it was not erroneous to plead the cost of repairs, and that it was proper to prove and recover this cost, " 'provided such cost did not exceed the difference in market value before and after the collision.' " *Id.* at ¶ 10, quoting *Falter*, 169 Ohio St. at 240, 158 N.E.2d 893. The

Tenth District Court of Appeals observed that "[t]hus, while approving the pleading of the cost of repairs as a means of establishing damage to an automobile, the Supreme Court limited recovery based on the cost of repairs to the difference in market value before and after the collision to prevent the plaintiffs from benefiting from their loss." *Id.* at ¶ 10.

{¶ 19} The Tenth District Court of Appeals then discussed its prior decision in *Allstate,* 7 Ohio App.3d 90, 454 N.E.2d 580, and other prior case law, and agreed with the plaintiffs that parties are not permitted to recover both the cost of repairs and the difference in market value right before and after an accident. Concerning this point, the court of appeals commented that:

> A damage award comprising both the difference in a vehicle's market value immediately before and after the accident and the reasonable cost of repairs presents a classic example of double recovery because those measures of damages overlap. *See Am. Serv. Ctr. Assoc. v. Helton* (D.C.App.2005), 867 A.2d 235, 242. Diminution in market value subsumes the cost of repair. To permit recovery of both measures of damages would overcompensate the plaintiff for his or her loss. The Ohio Supreme Court was careful to preclude that result in *Falter* by limiting the recoverable cost of repairs to the difference in market value of the vehicle immediately before and immediately after the accident. In *Allstate*, [7 Ohio App.3d 90, 454 N.E.2d 580,] this court also limited the recoverable cost of repairs to the market value of the vehicle before the accident to prevent plaintiffs from benefiting from the loss.

Rakich, 172 Ohio App.3d 523, 2007-Ohio-3739, 875 N.E.2d 993, at ¶ 13.

{¶ 20} However, the court of appeals further stressed that this agreement did not resolve the issue of whether the plaintiffs could recover for the diminution in value of their vehicle, even though they had recouped the cost of repairs. *Id.* at ¶ 14. In this regard, the court emphasized that:

> Appellant does not seek an additional award of the difference between the market value of her vehicle immediately before and after the accident but, rather, contends that the cost of repairs did not fully compensate her for the loss caused by appellees' negligence. Specifically, appellant contends that her vehicle, as repaired, has a value less than its preaccident market value. Thus, appellant asserts that she is entitled to recover the difference between the market value of her automobile immediately before the accident and the market value of her vehicle immediately after its repair. We refer to such damages as "residual diminution in value." Unlike the gross diminution in value that Ohio courts have recognized as the preferred method of calculating damages to a motor vehicle, the residual diminution in value, realized because of a vehicle's involvement in a collision, does not overlap the cost of repairs, "because it is calculated based on a comparison of the value of the property before the injury and after repairs are made, i.e., excluding injury compensated by damages for the cost of repair." (Emphasis sic.) *Helton*, 867 A.2d at 242. Neither the parties' briefs nor our research reveals any Ohio case that has addressed whether a plaintiff who, in a case like this, recovers the cost of repairs is limited to those costs to the exclusion of a claim for residual diminution in value when it can be shown

> that the repairs were insufficient to restore the vehicle to its precollision value.

Rakich at ¶ 14.

{¶ 21} The court of appeals then went on to discuss various authorities and cases which had allowed recovery in such situations. *Id.* at ¶ 15-18, considering, among other things: Restatement of the Law 2d, Torts, Section 928 at 543 (1979); *Helton*, 867 A.2d 235; and cases from other jurisdictions, which had "overwhelmingly permitted recovery of such damages." *Id.* at ¶ 18.

{¶ 22} In discussing *Helton*, which involved facts similar to the case at hand (and to the case before us at well), the court of appeals made the following observations:

> Noting that the purpose of a damage award is to make the injured party whole again, the court [in *Helton*] stated that for certain property, repair will achieve this goal, and recovery of the cost of repairs will suffice. However, the court went on to acknowledge that "for some property, the additional recovery for residual diminution in worth is necessary to make the injured party whole." *Id.*, 867 A.2d at 242–243. The court explained:
>
> > "If the [chattel] is completely destroyed, the plaintiff receives the market value. To be consistent, the plaintiff should be put in the same position when his injured vehicle is repairable; he should have a vehicle of the same market value. If the repaired vehicle does not have the same market value, the plaintiff should receive additional damages. To do otherwise would put the plaintiff in a different position depending on whether the vehicle was partially or completely destroyed."

> [*Helton*] at 243, citing *Fred Frederick Motors, Inc. v. Krause* (1971), 12 Md.App. 62, 277 A.2d 464, 466. Accordingly, the court [in *Helton*] held that "when a plaintiff can prove that the value of an injured chattel after repair is less than the chattel's worth before the injury, recovery may be had for both the reasonable cost of repair and the residual diminution in value after repair, provided that the award does not exceed the gross diminution in value." *Helton*, 867 A.2d at 243.

Rakich, 172 Ohio App.3d 523, 2007-Ohio-3739, 875 N.E.2d 993, at ¶ 17.

{¶ 23} The Tenth District Court of Appeals then followed the decision in *Helton*, finding it persuasive, and also finding nothing in either *Falter* or other Ohio precedent to preclude recovery for residual diminution in value. *Id*. at ¶ 19. The court of appeals also rejected the defendants' argument that the damages were too speculative, stating that "[t]he market value of appellant's vehicle immediately following its repair is no more speculative than the market value of the vehicle immediately before or immediately after the collision, and courts routinely require evidence of those values." *Id.* at ¶ 20.

{¶ 24} After Rakich was decided, the Tenth District Court of Appeals has continued to adhere to the theory of residual diminution of value. *See Safe Auto Ins. Co. v. Hasford*, 10th Dist. Franklin No. 08AP-249, 2008-Ohio-4897, ¶ 28-29, citing *Rakich* at ¶9 and 14.

{¶ 25} Kinderdine urges us to continue to follow *Falter*, and to reject the theory in *Rakich*, which, according to Kinderdine, has not been recognized by any other appellate districts in Ohio. We have reviewed *Helton*, as well as the other cases cited in *Rakich,* and conclude that the discussion in these cases is well-reasoned. A litigant should be

entitled to full compensation for loss of property if he or she can convince a fact-finder that the vehicle, though repaired, has suffered a loss in fair market value.

{¶ 26} Furthermore, the fact that other Ohio appellate districts have not yet recognized the theory may simply be based on the fact that the theory has not been presented. In this regard, we note that Kinderdine has not provided us with authority from Ohio rejecting the theory, or rejecting *Rakich.* Our own research has also not disclosed any such authority. And, as we noted, we have not previously considered this issue.

{¶ 27} More importantly, *Rakich* does not either contradict or fail to follow *Falter*. The issue of residual diminution of value was not presented in *Falter,* and we can see nothing in *Falter* that prevents adoption of such a theory. *Falter* concluded only that the reasonable cost of repairs can be an appropriate means of establishing damages, even though the general rule for establishing damages is the difference between a vehicle's fair market value immediately before and immediately after a collision; recovery of the cost of repairs is, however, subject to the limitation that it cannot exceed the difference between the value of the property before and after the accident. *Falter*, 169 Ohio St. at 240, 158 N.E.2d 893, at paragraphs one and two of the syllabus. There is nothing in this holding that precludes recovery of residual diminution in value.

{¶ 28} The rule in *Falter* makes sense, because it prevents parties from making a double recovery, or recovering more than the fair market value of the automobile before the accident. However, that is not the result that would occur in situations involving diminished value. The amount of the recovery, including the cost of repair and residual diminution in value cannot exceed the gross diminution in value. *Rakich,* 172 Ohio

App.3d 523, 2007-Ohio-3739, 875 N.E.2d 993, at ¶ 17.

{¶ 29} In the case before us, Braum, as the owner, testified about the vehicle's fair market value before the collision, about the cost of repairs, and about the car's value after the repairs were made. In addition, Braum proffered evidence pertaining to the alleged depreciation of the vehicle after the repairs. Although we express no opinion on what the ultimate result of a fact-finder should be, we conclude that Braum was entitled to pursue his claim that the value of his automobile was diminished, even conceding the fact that the damage from the collision had been repaired.

{¶ 30} In this context, Kinderdine also argues that Braum should be precluded from recovery because he traded in his vehicle and breached his obligation to secure as much return for his vehicle as it was worth. In essence, Kinderdine is arguing that Braum failed to mitigate his damages.

{¶ 31} "It is a fundamental principle of the law of damages that one who is injured in his or her person or property by a wrongful act or omission, whether as a tort or a breach of contract, must use reasonable care to avoid loss and minimize the damages resulting." *Kanistros v. Holeman*, 2d Dist. Montgomery No. 20528, 2005-Ohio-660, ¶ 35, citing *Maloney v. General Tire Sales, Inc*., 34 Ohio App.2d 177, 296 N.E.2d 831 (10th Dist.1973). "A plaintiff is not permitted to remain idle and thus enhance its damages; however, failure to mitigate does not necessarily result in non-recovery." *Id.*, citing *AB & B, Inc. v. Banfi Products, Inc*., 71 Ohio App.3d 650, 594 N.E.2d 1151 (11th Dist.1991).

{¶ 32} "The burden to demonstrate a plaintiff's failure to discharge his or her duty to mitigate is on the defendant against whom the damage claim is made." *Kanistros* at ¶ 37. Since Braum has not yet had the opportunity to prove residual diminution in value,

the issue of whether Braum failed to mitigate his damages has also not yet been litigated, and ruling on this issue would be premature.

{¶ 33} As a final matter, Kinderdine cites *Freeman v. Blosser*, 3d Dist. Hancock No. 5-06-06, 2006-Ohio-5386, in the course of a discussion contending that Braum would be provided with a windfall if he is allowed to recover residual diminished value. According to Kinderdine, the court of appeals in *Freeman* affirmed the trial court's award, recognizing that the amount awarded would put the plaintiff into the same position he would have been before the collision, even though the repairs were more costly. Appellee's Brief, p. 6. The relevance of this statement in Appellee's Brief is unclear.

{¶ 34} Nonetheless, we note that in *Freeman*, the plaintiff provided two estimates of repairs: one was $1,915, and the other was $1,483. *Id.* at ¶ 4. In contrast, the defendant's insurer provided evidence that the cost of repairs was $1,609.09, that the auto was considered a total loss, and that the suggested retail market value of the auto was $1,550. The insurer had actually offered the plaintiff $1,654.63, which the plaintiff refused. *Id.* at ¶ 6. After hearing the evidence, the trial court awarded the plaintiff the fair market value, $1,550, finding that this amount was reasonable. *Id.* at ¶ 7 and 9.

{¶ 35} On appeal, the Third District Court of Appeals discussed the standard in *Falter*, and concluded that if the trial court found either of the two higher estimates credible, the court could have awarded the plaintiff the fair market value of the auto prior to the accident, i.e., $1,550. *Id.* at ¶ 16-17. This is consistent with *Falter*, which precludes recovery of the reasonable cost of repairs where they exceed "the difference between the market value of the vehicle immediately before and immediately after the collision." *Falter,* 169 Ohio St. at 238, 158 N.E.2d 893, paragraph two of the syllabus.

As such, *Freeman* offers no support for Kinderdine's contention that Braum would be unjustly enriched by allowing recovery of residual value. The situation in the case before us is unlike *Freeman*, anyway, since the cost of repairs did not even arguably exceed the value of Braum's vehicle.

{¶ 36} Accordingly, the First Assignment of Error is sustained. This matter will be remanded to the trial court for further hearing.

III. Judgment on Damages

{¶ 37} Braum's Second Assignment of Error states that:

> The Trial Court Erred as a Matter of Law When It Awarded Judgment in Favor of Defendant-Appellee on the Issue of Damages.

{¶ 38} Braum has not presented specific arguments pertaining to this assignment of error, other than his general contention that the trial court erred in refusing to allow evidence of residual diminution of value. Since the trial court did err in this regard and based its denial of recovery solely on this holding, the Second Assignment of Error is sustained.

IV. Conclusion

{¶ 39} All of Braum's assignments of error having been sustained, the judgment of the trial court is reversed, and this cause is remanded for further hearing.

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DONOVAN, J. and HALL, J., concur.

Copies mailed to:

Lisa Braum
John P. Carlson
Timothy R. Rudd
Hon. Larry W. Moore, Visiting Judge