

# Diminution in Property Value After *Rakich*

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## The Problem

You find yourself driving along in your one-year-old dream car, just washed and waxed when some knucklehead blows a stop sign and sideswipes your precious. It costs \$10,000.00 to fix your car all of which is begrudgingly paid by the insurer of the careless driver. You pry yourself from the mini subcompact rental car the insurance company provided in exchange for your repaired vehicle at the body shop. The measure of damages for the loss of use of a vehicle is the reasonable rental cost of a like kind vehicle for such reasonable period of time as is necessary to make the repairs. You know in your heart that which is substantially damaged can never be made new. Fortunately for you the law of Ohio recognizes you are entitled to be compensated for this loss.

## The Solution

In *Rakich v. Anthem Blue Cross and Blue Shield*,<sup>1</sup> the Tenth District Court of Appeals, in a well reasoned unanimous Opinion, held personal property diminution in value caused by a third party's negligence is alive and well in Ohio.

In *Rakich*, the Court focused on the difference between fair market value (FMV) of a vehicle before an automobile collision and FMV after the vehicle is repaired. In brief, fair market value is the price a willing buyer would pay to a willing seller. In reversing the trial court's decision, the court held that when the owner proves the value of his automobile after repair is less than the pre-crash value of the vehicle, the owner is entitled to recover the "residual diminution in value" of the vehicle. However, the owner may not recover damages that exceed the FMV of the car immediately before the crash notwithstanding loss of use or out of pocket expenses.<sup>2</sup>

Diminished value recognizes accelerated depreciation sustained by an automobile in contrast to its natural depreciation. Natural depreciation is uniformly applicable to all vehicles characterized by change in models or body style, age, and

normal wear and tear. Accordingly, natural depreciation applies to all vehicles subsequent to purchase. Accelerated depreciation is based upon facts or circumstances related to a particular event such as an automobile collision, theft, manufacturer recall, flood or fire damage. *Rakich* addresses accelerated depreciation of a vehicle caused by a third party.

Diminished value can also occur due to property and casualty insurance company repair standards arbitrarily applied and vary from company to company thus affecting the quality of vehicle repair. Insurance companies often instruct body shops to use after market parts, refuse to authorize certain repairs or place "caps" on materials used that negatively affects adequate repair. Therefore if a body shop follows insurance industry standards the integrity of a severely damaged vehicle after repair can not only lead to diminished value but also compromise vehicle safety.

## Procedural History and Analysis A Diminution in Value

On April 13, 2004 Plaintiff Rakich was driving her 2004 GMC Yukon when a young lady, insured by Nationwide Mutual Fire Company, failed to yield from a private drive, struck Rakich's Yukon and caused a "T-bone" collision. Rakich suffered bodily injury and incurred property damage to the vehicle. Suit was filed and upon Rakich's motion, the trial court found the young lady solely responsible for the collision.

The Rakich vehicle necessitated repairs totaling \$8,049.00. Nationwide paid for the repairs but refused to pay for diminution in value. Rakich filed suit and alleged, among other things, property damage resulting from the diminished value of her vehicle. Nationwide's in-house counsel responded and claimed diminution in value is not a legal theory of recovery recognized in Ohio.

Subsequent to briefing, the trial court ruled the plaintiff was not entitled to present evidence of diminished property value because Rakich chose to have her car fixed and the repairs were paid for by the

at fault party's insurance company. The trial court adopted a divergent damage analysis by carving out an alternative "election of remedies" option. Essentially, the trial court erred by holding that a person whose vehicle incurred damage caused by a negligent driver could either recover under a diminished value theory or a cost of repair theory, but not both. As such, the trial court ruled Rakich was prohibited from presenting evidence of diminished value to a judge or jury.

On appeal Rakich argued she was entitled to present evidence that her repaired vehicle had a lesser FMV than a substantially similar vehicle that had not been wrecked and repaired and was therefore entitled to present evidence of diminished value to the trier of fact.

The trial court misinterpreted *Hayes Freight Lines, Inc., v. Tarver*,<sup>3</sup> and *Allstate Ins. Co. v. Reep*<sup>4</sup> for the proposition diminished value of a wrecked vehicle is measured as the difference between the market value immediately before and immediately after the collision, or alternatively, measured by the cost to repair the vehicle. The Court of Appeals reversed and remanded and set sail on a thorough historical analysis of property damage recovery in Ohio.

In a tort action the measure of damages is that which will make the injured party whole, a maxim often lost for its simplicity. The Rakich court recognized diminution in value adhered to this principle in making an injured party whole citing to *Falter v. City of Toledo*, (1959) 169 Ohio St. 238, wherein the Supreme Court held, "[t]he owner of a damaged motor vehicle may recover the difference between its market value immediately before and immediately after the collision," *Rakich* at paragraph 9. Accordingly, the Court noted the FMV of a vehicle before a collision is not necessarily equal to the FMV of the same vehicle after repair.

The long established general rule for ascertaining damage to property was set forth in *Ohio Collieries Co. v. Cocke*, (1923), 107 Ohio St. 238, wherein the Ohio Supreme Court held:

If restoration can be made, the measure of damages is the reasonable cost of restoration, plus the reasonable value of the loss of the use of the property between the time of the injury and the restoration, unless such cost of restoration exceeds the difference in the market value of the property as a whole before and after the injury, in which case the difference in the market value before and after the injury becomes the measure.

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The rule was expressly adopted by the Tenth District Court of Appeals in the context of damaged motor vehicles in *Reep* at 91, wherein the Court held:

While the usual measure of damages in a case such as this would be the difference between the fair market value of the car before and after the accident, an alternative method — the cost of repair — is an 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. In other words, the cost of repair must not exceed the diminution in market value. Nor may the cost of repair exceed the fair market value of the property before the accident.

This proposition of law requires a routine mathematical application. The critical part of the analysis overlooked by the trial court was the failure to recognize the pre-crash and post-crash FMV of a vehicle after repair is usually not equal and therefore becomes a question of fact to be resolved with the at fault party's insurance company or by the trier of fact.

This article presumes the vehicle warranty, if any, was not affected by the repairs and that proper workmanship and appropriate parts were used in repairing the vehicle. See R.C. 1345.81. B. Evidentiary Considerations

In *Reep*, the cost of repair was the only evidence offered, without objection. No evidence of diminution in value was offered. As a result, the court in *Reep* accepted as evidence the cost of repair in assessing whether the damaged party was made whole.

Thus, Ohio law has always required evidence of pre and post crash value to determine diminution in value, if not waived by both parties. Only after such a factual analysis is completed and evidence offered is it possible to determine whether the cost of repair will fully restore, exceed, or be less than the pre crash FMV.

The lynchpin of the *Rakich* holding is based upon the trial court's erroneous interpretation of *Reep*. The record in *Reep* only contained evidence regarding cost of repairs introduced, without objection, to the absence of evidence of pre-crash FMV and diminution in value. Noting this distinction, the *Rakich* court cited to *Auto-Owners Ins. Co. v. Santilli*, (Jan. 23, 1966), Franklin App. No. 95APG06-771, wherein the Tenth District affirmed the trial court's finding plaintiffs presented evidence of the cost of repair to the automobile but not of the vehicle's pre-crash FMV. As a result, *Santilli* recognized diminution in value but noted the record was devoid of evidence in support thereof.

The *Rakich* court also noted no Ohio case had held a plaintiff was limited to recovering the cost of repair to the exclusion of residual diminution in value when evidence is offered the repairs are insufficient to restore the vehicle to its pre-collision FMV. Accordingly, the *Rakich* court sought guidance from the Restatement of the Law, Second Torts (1979) 542, Section 928 that reads in pertinent part:

When one is entitled to a Judgment for harm to chattels is not amounting to a total destruction in value, the damages include compensation for (a) the difference between the value of the chattel before the harm and the value after the harm or, at its election or in an appropriate case, the reasonable cost of repair or restoration, with due allowance for any difference between the original value and the value after repairs.\*\*\* [.]<sup>5</sup>

In *Rakich*, the court was careful to distinguish the plaintiff was not seeking compensation for loss of future potential resale of the vehicle. The diminution in value recovery is time specific measured

by the FMV of the vehicle immediately before and after the collision.

The court also confirmed the plaintiff would not be entitled to recover both the cost of repair plus the difference between the pre-crash and post-crash value leading to double recovery. In other words, if one elects to have a damaged car repaired, the aggrieved party may not also recover the difference between the pre and post crash FMV unless the repaired vehicle's FMV is less than the pre-crash FMV.

From an evidentiary standpoint, the *Rakich* court found the market value of a vehicle immediately following its repair was no more speculative than the market value of a vehicle immediately before or after the collision. FMV is an automobile industry threshold by which all used vehicles are valued, bought and sold every day. Authoritative sources of a vehicle's FMV includes use of the National Automobile Dealer's Associate (NADA) Official Used Car Guide or like-kind industry standard, *Henry v. Serey*, (1989) 46 Ohio App. 3d 93.

Finally, the court headed off Nationwide's argument that recognition of a claim for residual diminution in value would promote increased litigation of property damage claims. Nationwide argued that if diminution in value was a recognized loss each party would be required to hire an expert to ascertain a vehicle's value. This argument was summarily dismissed as proof of a vehicle's FMV immediately before and after a collision has always been an evidentiary prerequisite in determining value. An expert may be helpful but is not needed for this purpose.<sup>6</sup>

In sum, all is not lost when your property is damaged and repaired and you are transformed into the less than proud owner of damaged goods. You are entitled to be made whole. This has always been the law of Ohio. *Rakich* did nothing more than clarify this theory of recovery.

1. 171 Ohio App. 3d 523, 2007-Ohio-3739.
2. See *Hayes Freightlines, Inc. v. Turner* 148 O.S. 822 (1947); *Robbins* at 166-167.
3. 148 O.S. 822 (1947)
4. (1982), 7 Ohio App.3d 90
5. *Rakich* at paragraph 15 also citing to Annotation, Measure of Damages for Destruction of or Damage to Automobile Other than Commercial Vehicle (1947), 169 ALR 1100, 1112. The court acknowledged a majority of jurisdictions overwhelmingly permitted recovery of diminution in value beyond the cost of repairs
6. *Nearhouse v. Volkswagen of America, Inc.* (19887) 42 Ohio App. 3d 42; *Insley v. Mitchell* (1963) 118 Ohio App. 104; *Buck v. Auto Shop MD* 2003-Ohio-6959 citing *Starkinski v. Pace* (1987) 41 Ohio App. 3d 200, 202; *Henry v. Serey* (1989) 46 Ohio App. 3d 93 citing Evid. R. 807(17); *Hess v. Riedell-Hess* (Franklin) 2003-Ohio-3912 citing Evid. R. 901(A), (B)(1); *Combs v. Cincinnati Gas & Electric Co.* (1984) 16 Ohio App. 3d citing *Bishop v. East Ohio Gas Co.* 143 Ohio St. 541.



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