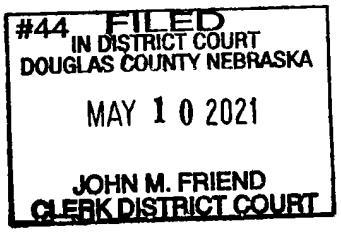
IN THE DISTRICT COURT OF DOUGLAS COUN

BRETT WAGNER, individually and on behalf of all others similarly situated, Plaintiff, vs. SAFECO INSURANCE COMPANY OF ILLINOIS, Defendant.	Case No. CI 20-10735 **ORDER ON DEFENDANT'S MOTION TO DISMISS**



This matter came before the Court for hearing on April 21, 2021, on Defendant's Motion to Dismiss. Evidence was received, and the matter submitted to the Court on arguments and briefs of the parties. Based on the foregoing, the Court finds as follows:

BACKGROUND AND PROCEDURAL HISTORY

Plaintiff Bret Wagner and former-Plaintiff Jeffrey Jenson filed their Class-Action Amended Complaint on February 24, 2021. They alleged one cause of action for breach of contract. They alleged that Defendant Safeco Insurance Company of Illinois ("Safeco") failed to pay a portion of the monies owed under the terms of their auto insurance contracts. On March 8, 2021, Jenson filed a Notice of Voluntary Dismissal and is no longer a party to this case.

Plaintiff Wagner purchased a policy of auto insurance for his vehicle from the Defendant, prior to November 6, 2018, under a policy issued by Safeco ("the Policy"). (Amended Complaint, ¶ 23). The Policy contains the following provisions regarding Safeco's duty to Wagner:

> PART D — COVERAGE FOR DAMAGE TO YOUR AUTO
> INSURING AGREEMENT
> A. We will pay for direct and accidental loss to your covered auto …
> …
> LIMIT OF LIABILITY
> A. At our option, our limit of liability for loss will be the lowest of:
> 1. **The actual cash value of the stolen or damaged property;**

2. a. The amount necessary to repair or replace the property;
b. Determination of the cost of repair or replacement will be based upon one of the following:
(1) the cost of repair or replacement agreed upon by you and us;
A competitive bid approved by us; or an estimate written based upon the prevailing competitive price. ... or
3. the limit of liability shown in the Declarations.

...

PAYMENT OF LOSS

We may pay for loss in money or repair or replace the damaged or stolen property.

...

If we pay for loss in money, our payment will include the applicable sales tax for the damaged or stolen property.

(Ex. 1, Devasher Aff., pp. 23–28) (Emphasis added). The phrase "actual cash value" is not defined in the Policy.

In his Amended Complaint, Wagner alleges that on or about November 6, 2018, the vehicle in question was damaged, after which he filed a claim for property damage with Safeco. (Amended Complaint, ¶ 24). Wagner claims that Safeco, through a third-party vendor, determined that the vehicle was a total loss with a base vehicle value of $31,569.00 and an adjusted vehicle value of $34,006.00. (Amended Complaint, ¶¶ 25–26). Wagner alleges that Safeco, through a third-party vendor, calculated that the sales tax on the adjusted vehicle value was $2,380.42. (Amended Complaint, ¶¶ 26–27). Wagner alleges that Safeco elected to pay Wagner "in money", and paid him only the adjusted vehicle value of $34,006.00, minus the deductible of $1,000.00, for a net payment of $33,006.00. (Amended Complaint, ¶ 28). Wagner argues that Safeco breached the Policy by failing to pay Wagner the sales tax in addition to the adjusted vehicle value, and Wagner seeks recovery of the sales tax from Safeco in his Amended Complaint.

Safeco filed a Motion to Dismiss, stating that under Neb. Ct. R. Pldg. § 6-1112(b)(6) Wagner's Amended Complaint failed to state a claim upon which relief may be granted.

LEGAL STANDARD

In order to survive a motion to dismiss for failure to state a claim, a plaintiff must allege sufficient facts to state a claim to relief that is plausible on its face. *See Davis v. State*, 297 Neb. 955, 902 N.W.2d 165 (2017). In order to analyze the Defendant's motion to dismiss under Rule 6-1112(b)(6), the Court must accept the allegations in the Amended Complaint as true and draw all reasonable inferences in favor of the nonmoving party Plaintiff. *See Eadie v. Leise Properties, Inc.*, 300 Neb. 141, 146, 912 N.W.2d 715, 720 (2018). However, the Court is still "free to ignore legal conclusions, unsupported conclusions, unwarranted inferences and sweeping legal conclusions case in the form of factual allegations." *Kellogg v. Nebraska Dep't of Corr. Servs.*, 269 Neb. 40, 44, 690 N.W.2d 574, 578 (2005).

Nebraska is a notice pleading jurisdiction. *See Rodriguez v. Catholic Health Initiatives*, 297 Neb. 1, 899 N.W.2d 227 (2017). Civil actions are controlled by a liberal pleading regime: a party is only required to set forth a short and plain statement of the claim, showing that the pleader is entitled to relief. *See Id.* A complaint should not be dismissed merely because it does not state with precision all elements that give rise to a legal basis for recovery. *Anderson v. Wells Fargo Fin. Acceptance Pennsylvania, Inc.*, 269 Neb. 595, 603, 694 N.W.2d 625, 632 (2005). However, a complaint must nonetheless set forth sufficient information to suggest that there is some recognized theory upon which relief can be granted. *See Id.* Dismissal under Rule 6-1112(b)(6) should be granted only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief. *See In re Interest of Noah B. et al.*, 295 Neb. 764, 891 N.W.2d 109 (2017).

ANALYSIS

The interpretation of an insurance policy is a question of law. An insurance policy is a contract. When the terms of the contract are clear, a court may not resort to rules of construction, and the terms are to be accorded their plain and ordinary meaning as the ordinary or reasonable person would understand them.

Under Nebraska law, a court interpreting a contract, such as an insurance policy, must first determine, as a matter of law, whether the contract is ambiguous. A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings. The fact that parties to a document have or suggest opposing interpretations of the document does not necessarily, or by itself, compel the conclusion that the document is ambiguous. The language of an insurance policy should be read to avoid ambiguities, if possible, and the language should not be tortured to create them. See *Molina v. Am. Alternative Ins. Corp.*, 270 Neb. 218, 222 (2005). *Pogge v. Am. Fam. Mut. Ins. Co.*, 13 Neb. App. 63, 67, 688 (2004).

The Court finds as a matter of law that the Policy is not ambiguous. Neither party argues that the Policy is ambiguous. Although the parties disagree about the meaning of the phrase "applicable sales tax," that phrase is not susceptible of two conflicting interpretations. The terms of the Policy, specifically regarding Safeco's limit of liability, are afforded their plain and ordinary meanings.

When reading the Policy as a whole so as to avoid ambiguity, there are three clauses that detail Safeco's liability when paying Wagner for his damaged vehicle:

> LIMIT OF LIABILITY
> A. At our option, our limit of liability for loss will be the lowest of:
> 1. The actual cash value of the stolen or damaged property;
> ....

PAYMENT OF LOSS
We may pay for loss in money or repair or replace the damaged or stolen property.
...
If we pay for loss in money, **our payment will include the applicable sales tax for the damaged or stolen property.**

(Ex. 1, Devasher Aff., pp. 23–28). Those three clauses, when read together, provide that Safeco's limit of liability will be the "actual cash value" of Wagner's damaged property, and that if Safeco elects to pay Wagner in money the actual cash value of his damaged property, such payment will include the applicable sales tax for his damaged property.

Defendant makes four arguments in support of its motion to dismiss. The Court addresses each argument in turn.

First, Safeco argues that the Nebraska Department of Insurance ("DOI") only requires payment of sales tax when the insured obtains a replacement vehicle. Wagner does not allege in his Amended Complaint that he did not obtain a replacement vehicle. Safeco cites to "NE Bulletin No. CB-49 (Dep't of Ins. June 8, 2006)," which states in part:

1. Special costs must be paid on loss settlements where the property is replaced. The amount reimbursable shall be based on the value of the pre-loss property, not on the value of the replacement property, unless the pre-loss property value is greater than that of the replacement, in which case, payment will be based on the value of the replacement property.
2. Special costs payment **need not** be a part of the settlement when the property is not replaced.
3. Reimbursement may be made as a supplemental payment when actual replacement occurs.
4. If the actual cash value settlement amount has met the stated value shown on the declarations page of a stated value policy, then special costs need not be paid.

(NE Bulletin No. CB-49 (Dep't of Ins. June 8, 2006)) (Emphasis added).

Safeco argues that the DOI guidance specifies that sales tax is *only* to be paid when the vehicle which is determines to be a total loss is replaced. However, Safeco's argument misinterprets the plain language of the guidance. The DOI guidance states the minimum

requirements for special costs payments, not the maximum. An insured is free to negotiate for greater coverage within a given insurance policy. See *Kracl v. Aetna Casualty and Surety Co.*, 220 Neb. 869 (1985). The parties were free to contract for payment of special costs even when the property is not replaced. Safeco's first argument is without merit.

Safeco's second argument is that the phase "applicable sales tax" in the Policy applies to any replacement property. The Policy states, "If we pay for loss in money, our payment will include **the applicable sales tax for the damaged or stolen property.**" (Ex. 1, Devasher Aff., p. 28) (Emphasis added). Replacement property and Wagner's damaged property are different things, and the Policy provides that Safeco would pay sales tax "for the damaged property," not replacement property. Safeco's argument that the phrase "applicable sales tax" applies to replacement property is without merit.

Safeco's third argument is that its liability is capped at the actual cash value of the damaged property, and such value does not include sales tax. The Policy does not define the phrase "actual cash value." Under Wagner's interpretation of the Policy, the "actual cash value" of his damaged vehicle is its adjusted value plus the sales tax. Under Safeco's interpretation of the Policy, the "actual cash value" is the damaged vehicle's adjusted value not including the sales tax.

As stated above, Safeco contracted to pay the sales tax applicable to Wagner's damaged property if Safeco chose to pay for the loss in money. The Amended Complaint states that Wagner's vehicle had an adjusted value of $34,006.00 and a sales tax value of $2,380.42. If the actual cash value of Wagner's damaged vehicle is the limit of Safeco's liability, and the phrase "actual cash value" does not include the applicable sales tax, then Safeco's promise to pay the sales tax would be a contradiction. If Safeco is correct then under one clause Safeco promised to

pay the applicable sales tax, and under another clause Safeco's liability is explicitly limited to prevent payment of the applicable sales tax.

When reading the Policy's clauses together, the Court finds that the phrase "actual cash value" refers to the adjusted value of the damaged property, and includes the applicable sales tax for the damaged property. Safeco's argument that its liability is limited to only the adjusted value of the vehicle without the applicable sales tax is without merit.

The Policy includes no language that could support a reading that requires an insured to first replace a vehicle before Safeco's duty to pay sales tax is required. The Policy specifies that a loss payment "will include" sales tax, which language is clear and unambiguous. If Safeco intended to require an insured to replace a total loss before payment of sales tax as promised in the Policy, it should have explicitly included such term in the Policy. When the provisions of the Policy are read as a whole, the Policy provides that where Safeco elects to pay for the loss in money, in lieu of paying to repair the damaged vehicle, it will include sales tax in such payment.

Lastly, Safeco argues that Wagner failed to sufficiently allege all elements of his claim for breach of contract in that Wagner failed to allege that he complied with the terms of the contract, specifically that he cooperated with Safeco after his vehicle was damaged.

A complaint should not be dismissed merely because it does not state with precision all elements that give rise to a legal basis for recovery. In cases in which a plaintiff does not or cannot allege specific facts showing a necessary element, the factual allegations, taken as true, are nonetheless plausible if they suggest the existence of the element and raise a reasonable expectation that discovery will reveal evidence of the element or claim. *Craw v. City of Lincoln*, 24 Neb. App. 788, 805, 899 N.W.2d 915, 926 (2017).

Taking Wagner's factual allegations as true, the Court finds Wagner's claim for breach of contract is plausible despite his failure to allege that he complied with the terms of the contract. Wagner's Amended Complaint suggests the existence of his compliance and raises the reasonable expectation that discovery will reveal his compliance. Therefore, Safeco's argument that Wagner failed to plead all elements is without merit.

The Court finds the Plaintiff, in his Amended Complaint, has stated a claim upon which relief might be granted, and Defendant's Motion to Dismiss must be denied.

IT IS SO ORDERED this 10 day of May, 2021.

BY THE COURT:

GREGORY M. SCHATZ
DISTRICT COURT JUDGE

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