



By order of the Court, GRANTED in part, DENIED in part. Presiding Judge Robert C. Naraja

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**IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

MARIA D. AGUON,

Plaintiff,

vs.

SANDY B. QUEMADO,

Defendant.

CIVIL ACTION NO. 09-0491

**ORDER DENYING DEFENDANT’S
MOTION TO EXCLUDE ALL
EVIDENCE OF LOSS OF USE
DAMAGES, AND GRANTING MOTION
TO LIMIT LOSS OF USE DAMAGES TO
THIRTY DAYS**

I. INTRODUCTION

THIS MATTER came before the Court on August 3, 2011 on Defendant’s Motion in Limine to Limit All Testimony and Evidence Regarding Plaintiff’s Claim for Loss of Use. Sandy B. Quemado (“Defendant” or “Quemado”) was represented by David G. Banes, Esq. Maria D. Aguon (“Plaintiff” or “Aguon”) was represented by Victorino DLG. Torres, Esq.

Based on the papers submitted and oral arguments of counsel, the Court **DENIES** in part and **GRANTS** in part Defendant’s motion.

II. BACKGROUND

This case involves an automobile accident, which allegedly resulted in the total loss of Plaintiff’s vehicle. (Def.’s Reply Mem. in Supp. of Mot. in Limine to Limit All Test. and Evidence Regarding Pl.’s Claim for Loss of Use at 1: 20-21, hereafter “Reply.”) Plaintiff seeks damages for the total value of her vehicle and for loss of use since the time of the accident to the present (over two years). (Compl. ¶ 13.)

1 Defendant contends that Plaintiff may recover damages for the total value of her
2 vehicle or loss of use of the same vehicle, but not both. (Reply at 2: 10-11.) To avoid
3 granting Plaintiff a windfall or a double recovery, according to Defendant, the Court should
4 exclude all evidence relating to loss of use damages at trial. (*Id.* at 2:6-8.) In the alternative,
5 Defendant moves the Court to limit evidence of loss of use damages to the reasonable period
6 of time (30 days) necessary for Plaintiff to have replaced her vehicle. (*Id.* at 7: 18-21.)

7 As an ancillary matter, Plaintiff contends that certain portions of Plaintiff’s
8 deposition testimony¹ should be stricken under NMI R. Evid. 408’s exclusion of statements
9 made for compromise or settlement purposes. (*Id.* at 11: 9-11.) Defendant counters that the
10 Plaintiff’s statements were given in the context of discovery rather than settlement
11 proceedings, and thus, are admissible. (*Id.* at 11: 11-14.)

12 **III. LEGAL STANDARD**

13 The CNMI has no statute or case law on point for loss of use damages. Where
14 CNMI statutes or case law has not addressed an issue of law, the Court applies “the rules of
15 common law, as expressed in the restatements of law . . . [and] as generally understood and
16 applied in the United States” 7 CMC § 3401; *Ito v. Macro Energy, Inc.*, 4 NMI 46, 55
17 (1993).

18 Restatement (Second) of Torts § 901 cmt. a (1979) states: “The law of torts attempts
19 primarily to put an injured person in a position as nearly as possible equivalent to his
20 position prior to the tort.” One who is tortiously deprived of his chattel is restored to his
21 pre-tort position by receiving “specific restoration of that which was taken from him, or by
22 giving him its value, together with, in either case, compensation for the deprivation during
23 the period of detention.” *Id.* The trial court is given a great deal of discretion to determine
24 the damages awarded for loss of use of a vehicle. *Alexander v. Qwik Change Car Center,*
25 *Inc.*, 352 So. 2d 188 (La. 1977). If the court does award such damages, they must be limited

27 ¹ Q. (by Mr. Banes) Well, let me ask you let me ask you a related question? What will it take to settle this
28 case?

A. (by Ms. Aguon) Have my car fixed. (Tr. of Dep. Of Ms. Maria D. Aguon.)

1 to a reasonable time in which the owner is able to secure a substitute vehicle based on the
2 totality of the circumstances. *Fukida v. Hon/Haw. Serv. & Repair*, 33 P.3d 204, 211 (Haw.
3 2001); *Livingston v. Knight*, 396 N.Y.S.2d 562, 563 (N.Y. Ct. Cl. 1976).

4 5 **IV. DISCUSSION**

6 Loss of use damages are intended to compensate the victim of damaged or destroyed
7 property for the deprivation of use of that property. *See* Restatement (Second) of Torts §
8 931(a) (1979) (providing compensation for the “period of detention or prevention or the
9 value of the use of the amount paid for a substitute”). With respect to vehicles that are
10 tortiously deprived from its owner, the owner is generally entitled to the rental value of a
11 similar vehicle during the period of detention. *Chlopek v. Schmall*, 396 N.W.2d 103, 110
12 (Neb. 1986).

13 Jurisdictions have historically permitted loss of use damages only for vehicles that
14 are repairable, but not for vehicles that are a total loss. *Dennis v. Ford Motor Co.*, 471 F.2d
15 733, 736 (3d Cir. 1973). The modern approach and increasing trend, however, is to erase
16 the distinction between repairable and unrepairable vehicles, and award loss of use damages
17 to the owner of a vehicle even when it is completely destroyed. *Id.* (finding support for the
18 modern approach in the Restatement); *see also* 18 A.L.R.3d 497 (1968 & Supp. 2008)
19 (citing cases).

20 **A. LOSS OF USE DAMAGES WHEN VEHICLE IS COMPLETELY DESTROYED**

21 Restatement (Second) of Torts § 927 (1979) expressly provides compensation for the
22 value of a chattel and its loss of use. “When one is entitled to judgment for . . . the
23 destruction or impairment of any legally protected interest in land or other thing, he may
24 recover . . . the value of the subject matter” and “his damages also include . . . compensation
25 for the loss of use not otherwise compensated.” *Id.*; *see Chlopek*, 396 N.W.2d at 110.

26 Defendant interprets the Restatement as precluding loss of use damages because
27 Plaintiff is “otherwise compensated” by prejudgment interest. However, the Restatement
28 explains that “loss of use” damages may consist of *either* interest or “as an alternative to

1 interest during the period of detention, the damages can properly include . . . the value of the
2 use of a substitute until a replacement of the subject matter can be made.” Restatement
3 (Second) of Torts cmt. o (1979).² Although a plaintiff may not recover *both* interest and
4 loss of use damages during the same period of time, *Alaska Constr. Equip., Inc. v. Star*
5 *Trucking, Inc.*, 128 P.3d 164, 170 (Alaska 2006), the Restatement does not preclude a
6 plaintiff from recovering the total value of a chattel and loss of use damages during a
7 reasonable time period of the owner’s deprivation of use.

8 Defendant’s heavy reliance on Comment o’s statement that begins: “Ordinarily there
9 is no recovery for loss of use of a chattel” is misplaced. During oral argument, Defendant
10 conveniently omitted the second half of this clause that excludes loss of use damages “*after*
11 the point of time at which the plaintiff has *fixed* the loss.” Restatement (Second) of Torts §
12 927 cmt. o (1979) (emphasis added). Once a plaintiff repossesses his vehicle or secures a
13 replacement vehicle, the period of detention ends, and the plaintiff can no longer claim
14 damages for loss of use.³ *Id.* After plaintiff fixes the loss, plaintiff will be compensated
15 solely with prejudgment interest and any special damages proximately resulting from the
16 loss of use. *Id.* The Restatement provides compensation for both the total value of a
17 destroyed chattel and loss of use, which is also supported by the case law.

18 Although there is a split of authority on the issue of when loss of use damages are
19 recoverable, those jurisdictions relying on the Restatement award such damages regardless
20 of whether the vehicle is repairable or at a total loss. *Dennis*, 471 F.2d at 736-37. “A
21 noticeable trend toward allowing loss of use damages in destruction cases has emerged since
22 World War II.” *Long v. McAllister*, 319 N.W.2d 256, 260-61 (Iowa 1982); *see also Knapp*

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25 ² Comment o also states that when “the plaintiff is unable to promptly find a replacement for the chattel on the
26 market and is deprived of use during the period of delay . . . [t]he loss of that use is not made good by a
subsequent purchase and it is therefore compensable.”

27 ³ In Defendant’s Reply Motion, he equates “fix[ing] the loss” with “declar[ing] that the vehicle was a total
28 loss.” This interpretation defies the plain meaning of the Restatement’s language. Fixing a loss and declaring
something as a loss are two completely different actions with completely different consequences. Fixing the
loss terminates the period of detention; whereas, declaring a loss simply acknowledges that the owner is being
deprived of her property.

1 v. *Styer*, 280 F.2d 384, 390 (8th Cir. 1960). A plaintiff suffers the “indistinguishable
2 inconvenience” of being deprived of the use of her vehicle whether she must wait for repairs
3 to be completed or must seek a replacement for her destroyed vehicle. *Fukida*, 33 P.3d at
4 211; see also *Reynolds v. Bank of America Nat’l. Trust & Sav. Assoc.*, 345 P.2d 926, 927
5 (Cal. 1959) (noting support from the Restatement and other cases that “[t]here appears to be
6 no logical or practical reason why a distinction should be drawn between cases in which the
7 property is totally destroyed and those in which it has been injured but is repairable.”).

8 Restatement (Second) of Torts (1979), and the jurisdictions relying thereon,
9 compensate plaintiffs for both the total value and loss of use even when the plaintiff’s
10 vehicle is completely destroyed. See, e.g., *New York C. R. Co. v. Churchill*, 218 N.E.2d
11 372, 376-77 (Ind. Ct. App 1966) (“The position that loss of use is a proper element of
12 damages even though the property is permanently destroyed finds support in the
13 Restatement of Torts, § 927”)⁴; *Allanson v. Cummings*, 439 N.Y.S.2d 545, 548 (N.Y. App.
14 Div. 1981) (“The Restatement of the Law of Torts suggests that there should be loss of use
15 recovery for a destroyed vehicle.”). This Court also finds that the Restatement supports
16 recovery for loss of use damages, in addition to the total value of the destroyed chattel.

17 **B. LOSS OF USE DAMAGES LIMITED TO A REASONABLE TIME**

18 Defendant argues that if Plaintiff is entitled to loss of use damages, that such
19 damages should be limited to a reasonable time, which Defendant claims is thirty days.

20 Restatement (Second) of Torts § 931 cmt. c (1979) imposes a reasonable time limit
21 for loss of use damages based on the time necessary to replace the damaged or destroyed
22 chattel. Nearly every jurisdiction measures the period of recovery for loss of use damages
23 from the date of the accident until the time the owner could reasonably replace the vehicle.
24 *Dennis*, 471 F.2d at 736; *New York Cent. R. R. Co.*, 218 N.E.2d at 377; 18 A.L.R.3d 497
25 (1968 & Supp. 2008) (citing cases).

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28 ⁴ *Churchill*, and several other cases awarding damages for loss of use to the owner of a destroyed vehicle,
relied on the first Restatement. Nevertheless, the relevant, material provisions in §927 are essentially identical
in both the first Restatement and the Restatement (Second) of Torts.

1 The reasonable amount of time to acquire a replacement is determined by “the
2 totality of the circumstances.” *Fukida*, 33 P.3d at 211. Before receiving compensation for
3 loss of use, the plaintiff must provide the court with evidence showing how much time was
4 reasonably necessary to obtain a substitute chattel based on the surrounding circumstances.⁵
5 *Allanson*, 439 N.Y.S.2d at 548 (holding that in order to recover loss of use damages for a
6 destroyed vehicle, “plaintiff must initially prove that for a stated period he was in fact
7 unable to obtain a replacement vehicle.”); *Persinger v. Lucas*, 512 N.E.2d 865, 869 (Ind. Ct.
8 App. 1987).

9 In *Persinger*, the trial court awarded plaintiff the rental value of a vehicle for 120
10 days based on the plaintiff’s evidence that he was financially unable to procure a
11 replacement any sooner. *Id.* The appellate court found the trial court’s loss of use damages
12 award to be excessive and reduced it to 30 days. *Id.* The appellate court held that “financial
13 inability” is a factor to consider in determining a reasonable time for calculating loss of use
14 damages, but is insufficient alone to establish a “reasonable time.” *Id.* The defendant
15 conceded that 30 days would have been sufficient to obtain a replacement. *Id.* The court
16 held that based on the lack of plaintiff’s evidence and the defendant’s recommendation of 30
17 days, the award should be reduced to 30 days. *Id.*

18 Here, Plaintiff similarly failed to offer sufficient evidence to show the reasonable
19 time necessary to replace her vehicle under the specific circumstances of her case. For
20 whatever personal or financial reasons, Plaintiff declined to purchase or rent a replacement
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24 ⁵ In determining how much time was reasonably necessary to replace a destroyed vehicle, the court should consider the following factors:

25 [T]he time required to determine that the property is unrepairable, the nature of the
26 property, market availability of a replacement, the time required to locate a replacement,
27 the availability and time required to obtain financing, the plaintiff’s efforts to locate and
obtain financing, the defendant’s good or bad faith efforts to settle or litigate, and the
plaintiff’s financial ability to obtain a replacement.”

28 *Persinger v. Lucas*, 512 N.E.2d 865, 869 (Ind. Ct. App. 1987).

1 vehicle.⁶ Nevertheless, Plaintiff is entitled to loss of use damages, but only for the
2 reasonable amount of time it would have taken her to replace her vehicle had she opted to do
3 so. *Fukida*, 33 P.3d at 208; *Neloms v. Empire Fire & Marine Ins. Co.*, 859 So. 2d 225, 233
4 (La. Ct. App. 2003); *Kim v. American Family Mut. Ins. Co.*, 501 N.W.2d 24 (Wis. 1993).
5 Plaintiff offered no reason why she needed over two years to replace her vehicle.⁷ The “rule
6 against avoidable consequences” prevents one from simply declining to replace a vehicle
7 and then accumulate loss of use damages for an indefinite period of time. Restatement
8 (Second) of Torts § 931 cmt. c (1979).

9 Rather than providing any specific facts or circumstances to rebut Defendant’s
10 recommendation of 30 days as a “reasonable time,” Plaintiff cites to *Straka Trucking, Inc. v.*
11 *Estate of Peterson* 989 P.2d 1181 (Wash. Ct. App. 1999). Plaintiff mistakenly asserts that
12 the appellate court granted plaintiff loss of use damages for three months. In fact, the
13 appellate court reversed summary judgment, and remanded the case to require plaintiff to
14 carry its “burden of proving the reasonableness of the period of time for which it claims loss
15 of use.” *Id.* at 1184. The court never found that three months was appropriate for awarding
16 loss of use damages, primarily because plaintiff had not met her burden in proving that three
17 months was reasonably necessary to replace her vehicle. *Id.* at 1183.

18 In the instant case, Plaintiff similarly did not meet her burden in proving that she has
19 been unable to replace her vehicle for over two years since the time of the accident.
20 Plaintiff’s vehicle was used for personal pleasure, and could have presumably been replaced
21 with relative ease and timeliness. Neither party presented any evidence, nor are there any
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23 ⁶ Plaintiff may not extend the time for calculating loss of use damages based merely on such factors as the
24 insurer’s delay to inspect the damaged vehicle or to make an acceptable settlement offer. *Cecere v. Harquail*,
25 481 N.Y.S.2d 533, 535 (N.Y. App. Div. 1984).

26 ⁷ If Plaintiff is permitted to admit evidence for loss of use damages for over two years at trial and succeeds,
27 Plaintiff will almost certainly reap damages far in excess of the actual value of her vehicle, which is
28 inappropriate. See *Fukida*, 33 P.3d at 207-08 (“In determining the value of the use [of a chattel in a replevin
action], care should be taken not to permit the fixing of an amount out of all proportion to the value of the thing
itself; otherwise, the result is not compensation for use, but punishment for a wrong, in a case were exemplary
damages, as such, would not be allowed.”) (citing 66 Am. Jur. 2d § 122, 910 (1973)).

1 unusual circumstances readily apparent, to suggest that Plaintiff would have been unable to
2 replace her vehicle within 30 days if she had put forth a reasonable effort to do so.⁸

3 The general case law supports Defendant's assertion that 30 days represents a
4 reasonable time for procuring a replacement vehicle absent any evidence to the contrary.
5 *See Romco, Inc. v. Broussard*, 528 So. 2d 231 (La. Ct. App. 1988) (reducing the trial court's
6 award for 50 days of loss of use to 30 days because the owner should have been able to
7 secure a replacement within 30 days); *Neloms*, 859 So. 2d at 233; *Pesinger*, 512 N.E.2d at
8 869 (adopting defendant's recommendation of 30 days to calculate plaintiff's loss of use
9 damages despite plaintiff's demand for 120 days). Similar to the ruling in *Persinger*, this
10 Court defers to Defendant's recommendation of 30 days as a "reasonable time" due to
11 Plaintiff's lack of evidence to the contrary.

12 **C. TESTIMONY CONCERNING SETTLEMENT NEGOTIATIONS**

13 Plaintiff contends that a specific portion of her deposition testimony, in which she
14 relates that she would want to have her car fixed to settle this case, should be stricken from
15 the record and excluded at trial. In support of Plaintiff's argument, she solely cites NMI R.
16 Evid. 408, which states:

17 Evidence of (1) furnishing or offering or promising to furnish, or (2)
18 accepting or offering or promising to accept, a valuable consideration in
19 compromising or attempting to compromise a claim which was disputed as
20 to either validity or amount, is not admissible to prove liability for or
21 invalidity of a claim or its amount. Evidence of conduct or statement
22 made in compromise negotiations is likewise not admissible.

23 It is undisputed that Plaintiff's statements were made during her deposition in the
24 course of discovery. The purpose of discovery is to gain information that is at least

25 ⁸ A plaintiff may recover loss of use damages well in excess of one month if, for instance, she proves that she
26 was unable to replace her vehicle despite a reasonable effort, *Knapp v. Styer*, 280 F.2d 384, 390 (8th Cir. 1960)
27 (finding that plaintiff contacted four or five dealers in an effort to procure a replacement and was finally
28 successful after 47 days), or certain circumstances rendered a replacement unavailable. *Guido v. Hudson
Transit Lines, Inc.*, 178 F.2d 740, 741 (3d Cir. 1950) ("[B]ecause of post-war shortages [plaintiffs] did not
succeed in buying a new truck until two years after the accident").

1 reasonably calculated to lead to the discovery of admissible evidence. The purpose is not,
2 however, to discuss settlement offers or compromise.

3 After reviewing Plaintiff's deposition transcript, the Court has determined that
4 Defense counsel in no way misled Plaintiff to believe that he was "furnishing or offering or
5 promising to furnish . . . a valuable consideration in compromising or attempting to
6 compromise a claim." *Id.* Plaintiff volunteered part of her contested testimony prior to
7 Defense counsel even mentioning any "settlement" or "compromise" terms.⁹ Only then was
8 Defense counsel prompted to clarify that Plaintiff wanted only to have her car fixed.¹⁰
9 Lastly, the mere mention of "settlement" or "compromise" terms does not automatically
10 trigger Rule 408's exclusion of evidence. *Gailey v. Allstate Ins. Co.*, 210 S.W. 3d 40, 45
11 (Ark. 2005) (citation omitted).

12 **V. CONCLUSION**

13 For the reasons set forth above, the Court hereby **DENIES** Defendant's Motion to
14 limit all evidence of loss of use damages and **GRANTS** Defendant's Motion to limit
15 evidence of loss of use damages to 30 days. Lastly, the Court hereby **DENIES** Plaintiff's
16 request to strike from evidence certain identified portions of Plaintiff's testimony pursuant
17 to NMI R. Evid. 408.

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19 **IT IS SO ORDERED** this 12th day of December, 2011.

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21
22 /s/
ROBERT C. NARAJA, Presiding Judge

23
24 ⁹ Q. (by Mr. Banes) Have you had any discussions with Mr. Que, Quemado? Since the accident or his wife?

25 A. (by Ms. Aguon) No, the only time I communicate with the guy is that when I was, I was at the insurance
26 when I saw him and . . . he wants to confess so I just pursue you know this lawsuit for me, I wasn't asking for
anything, I just want my car fixed. (Tr. of Dep. Of Ms. Maria D. Aguon.)

27 ¹⁰ Q. (by Mr. Banes) Well, let me ask you let me ask you a related question? What will it take to settle this
28 case?

A. (by Ms. Aguon) Have my car fixed. (*Id.*)