

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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DARCEE THOMPSON,

Plaintiff,

v.

OPINION AND ORDER

19-cv-150-wmc

PROGRESSIVE UNIVERSAL INSURANCE  
COMPANY,

Defendant.

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In a prior opinion and order, the court granted defendant Progressive Universal Insurance Company's motion to dismiss plaintiff's breach of contract claim, finding that market value is *not* an ambiguous term under Wisconsin law, and that term under the insurance policy at issue does not require reimbursement of sales tax, registration fees or other costs that might be incurred in actually purchasing a replacement vehicle. (11/14/19 Op. & Order (dkt. #41).) Before the court is plaintiff Darcee Thompson's motion to alter or amend the judgment under Federal Rule of Civil Procedure 59(e). (Dkt. #43.) For the reasons that follow, the court will deny that motion.

OPINION

Under Federal Rule of Civil Procedure Rule 59(e), a court has the opportunity to consider newly discovered material evidence or intervening changes in the controlling law or to correct its own manifest errors of law or fact to avoid unnecessary appellate procedures. *See Harrington v. City of Chi.*, 433 F.3d 542, 546 (7th Cir. 2006). A "manifest error" occurs when the district court commits a "wholesale disregard, misapplication, or failure to recognize controlling precedent." *Burritt v. Ditlefsen*, 807 F.3d 239, 253 (7th Cir.

2015) (internal quotations and citations omitted). Rule 59(e) “does not provide a vehicle for a party to undo its own procedural failures, and it certainly does not allow a party to introduce new evidence or advance arguments that could and should have been presented to the district court prior to the judgment.” *Moro v. Shell Oil Co.*, 91 F.3d 872, 876 (7th Cir. 1996). Rule 59(e) relief is only available if the movant clearly establishes one of the foregoing grounds for relief. *Harrington*, 433 F.3d at 546 (citing *Romo v. Gulf Stream Coach, Inc.*, 250 F.3d 1119, 1122 n.3 (7th Cir. 2001)).

Plaintiff contends that the court erred in considering information outside of the pleadings in ruling on defendant’s motion to dismiss. Specifically, plaintiff argues that the court impermissibly considered “Edmunds True Market Value (TMV) pricing system’ to show that market value does not include rebates, tax, license and registration fees, and dealer title or documentation fees.” (Pl.’s Mot. (dkt. #43) 3 (citing 11/14/19 Op. & Order (dkt. #41) 8 n.5).) Plaintiff also argues that the court should not have taken judicial notice of this public domain website under Federal Rule of Evidence 201(b), explaining that “[w]hile Edmunds is certainly a significant company in the automotive resale industry, the website does not purport to show that their system for calculation of TMV has any relationship to the proper legal standard for calculation of ‘market value.’” (*Id.* at 4.)

As defendant points out in its opposition brief, the court’s decision did not hinge on consideration of Edmunds TMV pricing system. Indeed, this citation was in a footnote of the decision. Instead, the court reviewed the language of the insurance contract, considered the cases cited by plaintiff and distinguished them, finding that they did not provide a basis to read an ambiguity into the contract language. Instead, relying on the

Western District of Texas’s decision in *Singleton v. Elephant Insurance Company*, CIVIL No. 6:19-CV-00200-ADA, slip op. at \*1-\*2 (W.D. Tex. May 10, 2019), the court concluded that the term “market value” as used in the policy was not ambiguous and did not contemplate the reimbursement of sales tax, registration fees or other costs that might be incurred in actually purchasing a replacement vehicle.<sup>1</sup>

Moreover, even if the reference to Edmunds TMV pricing system was central to the court’s decision, numerous courts, as defendant points out in its opposition, have taken judicial notice of Kelly’s Blue Book, which the court also cited in its opinion and which is comparable to Edmunds TMV pricing system. *See, e.g., 10ITT Commercial Fin. Corp. v. Unlimited Auto., Inc.*, 814 F. Supp. 664, 668 (N.D. Ill. 1992) (“This court, however, takes judicial notice that Kelley’s Blue Book is an authoritative guide to the valuation of recreational vehicles.”); *Kiddie v. Copeland*, No. 3:13-CV-03030, 2019 WL 7019220, at \*2 n.2 (W.D. Ark. Dec. 20, 2019) (“The Court takes judicial notice of the means by which Kelley Blue Book values are determined. See <https://www.kbb.com/articles/car-advice/what-are-kelley-blue-book-values/>. The Court takes further judicial notice that the Kelley Blue Book is customarily used in this geographic region to determine the value of a vehicle at time of sale.”); *Weisz v. Volkswagen Grp. of Am., Inc.*, No. 2-16-CV-05565-RGK-KS, 2016 WL 9342527, at \*1 (C.D. Cal. Nov. 30, 2016) (taking judicial notice of MSRP in Kelley

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<sup>1</sup> The court also notes that defendant has filed several other decisions by courts, including the Fifth Circuit affirming the Western District of Texas decision in *Singleton*, and more critically, a Seventh Circuit decision, rejecting on the pleadings the same breach of contract claim as that presented here. *See Singleton v. Elephant Ins. Co.*, 953 F.3d 334, 339 (5th Cir. 2020); *Sigler v. GEICO Cas. Co.*, No. 19-2272, 2020 WL 4251699 (7th Cir. July 24, 2020); *Pieczonka v. Progressive Select Ins. Co.*, No. 19-CV-2965, 2020 WL 1930134, at \*2 (N.D. Ohio Apr. 21, 2020).

Blue Book); *Ortega v. FCA US, LLC*, No. 1:18-CV-1440 AWI SAB, 2018 WL 5255239, at \*2 n.3 (E.D. Cal. Oct. 22, 2018) (“The Court finds that the Kelley Blue Book website is a source that is not subject to reasonable dispute and thus, takes judicial notice of the information regarding the 2016 Jeep Cherokee’s MSRP as reflected in that website.”).

For all the reasons set forth above, the court concludes that plaintiff has failed to identify a manifest error of law or other basis to justify reconsideration.

ORDER

IT IS ORDERED that plaintiff Darcee Thompson’s motion to alter or amend the judgment (dkt. #43) is DENIED.

Entered this 5th day of January, 2021.

BY THE COURT:

/s/

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WILLIAM M. CONLEY  
District Judge