

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS  
DEPARTMENT OF BUSINESS REGULATION  
JOHN O. PASTORE CENTER  
1511 PONTIAC AVENUE  
CRANSTON, RHODE ISLAND 02920

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ALLSTATE INSURANCE COMPANY,  
Complainant,

v.

LEONE'S ATWOOD COLLISION  
CENTER AND AUTO SALES, LLC,  
Respondent.

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DBR No.: 06-L-0183

**DECISION**

Hearing Officer: Michael P. Jolin, Esq.

Hearing Held: October 10, 2008  
February 23, 2009

Appearances:

For Complainant: Thomas A. Pursley, Esq.

For Respondent: John C. Manni, Esq.

**I. INTRODUCTION**

The above-entitled matter came before the Department of Business Regulation (“Department”) as the result of two (2) complaints filed by Allstate Insurance Company (“Complainant” or “Allstate”) against Leone’s Atwood Collision Center and Auto Sales, LLC

(“Respondent”), owned by a single member, Frank Leone (“Leone”).<sup>1</sup> Respondent is licensed as an automobile body repair shop. The complaints allege that Respondent engaged in conduct that violated R.I. Gen. Laws §§ 5-38-10(1) and (7), and Insurance Bulletin No. 2002-6.

Section 5-38-10(1) provides that the Department may suspend or revoke a license upon “proof of unfitness of the applicant to do business as an automobile body repair shop[.]” Section 5-38-10(7) provides that the Department may suspend or revoke a license “[f]or having indulged in any unconscionable practice relating to the business as an automobile body repair shop[.]” Insurance Bulletin No. 2002-6 clarifies R.I. Gen. Laws § 27-10.1-6(b) by specifying that the physical damage appraiser must leave a copy of the appraisal at the auto body shop at the time of the initial inspection of the vehicle unless the appraiser has been intimidated or threatened.

Based on the evidence presented at hearing and the applicable law, Complainant preponderated sufficient evidence to establish that Respondent’s license should be sanctioned for violating R.I. Gen. Laws § 5-38-10(7).

## **II. JURISDICTION**

The Department has jurisdiction over this matter pursuant to R.I. Gen. Laws §§ 5-38-1, *et seq.*, 42-14-1, *et seq.*, and 42-35-1, *et seq.*

## **III. ISSUES PRESENTED**

A. Whether or not Respondent engaged in conduct that demonstrates unfitness to do business as an automobile body repair shop in violation of R.I. Gen. Laws § 5-38-10(1), and if so, whether or not such violation warrants an administrative sanction against his license;

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<sup>1</sup> Given that the licensee, Leone’s Atwood Collision Center and Auto Sales, LLC, is a closely-held limited liability company, “Respondent” shall be used interchangeably with “Leone” for readability purposes.

B. Whether or not Respondent indulged in any unconscionable practice relating to the business as an automobile body repair shop in violation of R.I. Gen. Laws § 5-38-10(7), and if so, whether or not such violation warrants an administrative sanction against his license;

C. Whether or not Respondent's conduct implicated Insurance Bulletin No. 2002-6, which clarifies R.I. Gen. Laws § 27-10.1-6(b) by requiring the physical damage appraiser to prepare and leave a legible copy of the appraisal at the auto body shop at the time of the initial inspection of the damaged vehicle.

#### **IV. MATERIAL FACTS AND TESTIMONY**

This matter came on for hearing on October 10, 2008. Subsequent to that hearing date, it was discovered that the testimony of one of the witnesses was not recorded inadvertently. As a result, the witness was recalled to the stand without objection on February 23, 2009 to provide his testimony.

Complainant filed two (2) separate complaints against Respondent. The first complaint, filed on May 17, 2006, involved the repair of a vehicle owned by a third-part claimant, Walter Tutay ("Tutay"). Tutay's vehicle was damaged by an Allstate insured in an April 2005 accident. The complaint alleges that Respondent did not perform all of the repairs for which Allstate paid him. In addition, the complaint alleges that Respondent made threatening statements regarding an Allstate supervisor of appraisers, Brian Crysler ("Crysler").

In Leone's response to the first complaint, dated May 25, 2006, he states that Tutay had no complaints regarding the repair job. In addition, he alleges that Crysler arrived at his shop unannounced and without an appointment to inspect Tutay's vehicle while it was under repair. Leone states that he asked Crysler to leave but then saw Crysler entering his premises through

another entrance. At that point, according to the response, Leone then “threw him out of [his] shop.” Finally, he states that Allstate failed to pay him for all of the repairs for the Tutay vehicle.

The second complaint, also filed on May 17, 2006, concerned a lively and somewhat colorful exchange between an Allstate appraiser, James Crandall (“Crandall”), and Leone on February 15, 2006. It alleges that Leone made certain threatening and intimidating statements about Chrysler, Crandall’s supervisor, during a discussion regarding the repair of a vehicle owned by Dorothy DeAngelis (“DeAngelis”).

Leone responded to the second complaint in a letter dated May 25, 2006. He wrote that Crandall and he reviewed and inspected the damage to the DeAngelis vehicle. They verbally agreed to the required repairs. Leone avers that he did not make any threats during this conversation. He continued in his response that about two and a half hours after the inspection, he received the appraisal via facsimile that it did not correlate to the discussion that took place during the inspection. Leone stated that he was then forced to request a supplemental appraisal that resulted in extending the time it took to complete the repairs on the DeAngelis vehicle. He also states that Allstate refused to reimburse DeAngelis for an additional \$108 in rental car fees from the resulting delay.

At hearing on October 10, 2008, Crandall testified on behalf of Allstate. Due to a tape recording malfunction, a record of his testimony was not captured. By agreement of the parties and the undersigned, Crandall appeared on February 23, 2009 to provide his testimony once again. He was also subject to cross-examination by Respondent’s counsel.

Crandall testified that he is a licensed motor vehicle damage appraiser pursuant to R.I. Gen. Laws § 27-10.1-1, *et seq.*, and is employed by Allstate. Previously, he worked as an auto body repair technician for over thirteen (13) years. On April 28, 2005, Crandall said he

conducted an appraisal of Tutay's vehicle at Respondent's shop. He recalled that, during the negotiation process, Leone advocated for replacement of the reinforcement beam and the bumper energy absorber. Crandall testified that they agreed to have the reinforcement beam and the absorber replaced but to repair – not replace – the rear bumper cover.

Crandall went with Crysler, his Allstate supervisor, to Respondent's shop on May 2, 2005. Crandall said that he remembered Leone stating at some point, "He belongs in a cemetery." Crandall assumed that Leone was referring to Crysler but admitted that Leone did not mention Crysler's name. It appears from Crandall's testimony and Crysler's testimony that followed that Crysler was not present when Leone made the "cemetery" comment.

A couple of weeks later, Crysler and Crandall went to Tutay's house to inspect Leone's repair job. According to Crandall, they noted that the paint on the rear quarter panels was not blended and the pinstripes had not been replaced. In addition, the bumper cover was repaired, not replaced, and the reinforcement beam appeared to be the original beam. Similarly, the energy absorber had not been replaced and, indeed, remained broken in half.

Crandall also mentioned that he saw Tutay's vehicle for a fourth time at Exclusive Auto Body in Johnston. After Crandall and Crysler inspected the vehicle at Tutay's residence, Tutay brought to that shop to have the energy absorber and the reinforcement beam replaced.

Crandall then testified that on February 15, 2006 he inspected another vehicle at Leone's shop. A third-party claimant, Dorothy DeAngelis, owned this vehicle. The statements made during this inspection became the subject of Allstate's second complaint against Leone. Crandall had secretly recorded his conversation with Leone. Crandall stated that he taped it in order to "protect" himself and to "show anybody what I have to deal with going in there." Crandall characterized his negotiations with Leone as "difficult" and "unreasonable". Under cross-

examination, Crandall admitted that he had taped other discussions with repair shops over “a half dozen” times or so. He also admitted that he purposely brought up the “big beef” with Chrysler over Tutay’s vehicle that had occurred nine (9) months earlier.

On the tape, Crandall and Leone went over the appraisal that Crandall wrote up for the DeAngelis vehicle. In response to Crandall’s challenge of Leone’s desire for 3.5 hours to repair a bumper cover, Leone expressed unhappiness with Allstate’s rate of \$38 per hour and stated that that was why he had to “put up the hours a little bit.” Exhibit C-12, p 4. Leone then stated, “As it is I’m getting burned on the labor rate. I’m getting burned on the paint and materials. I can’t. I have to get it from somewhere.” Exhibit C-12, p 5. The discussion then turned to a dent in the quarter panel. Leone wanted 5.5 hours for the job but Crandall stated that he could only give him “3 hours tops on that quarter.” *Id.* At this point, Leone began showing signs of agitation:

Three, no, that’s not three hours. Come on. Come on. You guys don’t want to pay me. You know, you know you’re f\*\*\*\*\* me in the beginning at \$38, and then you want to f\*\*\* me on the labor time. I can’t do it for three.

*Id.* Leone continued venting his frustration as they discussed other items on Crandall’s estimate and at one point stated:

I tell you, Progressive pays better than you guys [Allstate]. That’s how bad it’s become with Allstate, Progressive pays better. At least if you showed ‘em something they pay you. I don’t have a problem with them. The come in, they want to see everything you do, but they pay me. You guys, no, “that’s included, that included.” Get the f\*\*\* out of here, “included.” In the bottom line, is that included.

Exhibit C-12, p 8.

Crandall then asked Leone if he remembered the “big beef” about the Tutay vehicle and Chrysler’s involvement with that repair job. Exhibit C-12, p 9. Crandall told Leone, “We re-inspected the car and you did like about a quarter of the work that we paid for.” *Id.* Leone responded, “What quarter? The only thing I didn’t do to that car was blend the quarters and I

didn't put an absorber in it. The absorber was already repaired from before." *Id.* Leone then admitted after being challenged by Crandall that he did not replace the reinforcement beam either, stating, "Well, I ran out of money." He then said, "And by the way I brought that customer in and I gave him a long talking about how much I got to get an hour. I can't work for those numbers." *Id.*

Leone explained that Tutay was a happy customer until Chrysler went over to Tutay's house and "put a flame under his a\*\*." Exhibit C-12, p 9. Leone believed that Chrysler went to Tutay's house because Leone would not let Chrysler into his shop to inspect Tutay's vehicle:

All that because I wouldn't let him in here. I walked in, I had had three people in here that were gonna look at a car. I don't let anybody near [inaudible]. I don't let anybody do that. What does he do? He walks out and he goes in that f\*\*\*\*\*g door. He's lucky he didn't get his f\*\*\*\*\*g legs broken in here. He walked out and tried to sneak in my other door. I was ready to call the f\*\*\*\*\*g cops on him.

*Id.*

The conversation then returned to how many hours that Crandall was willing to give Leone to repair the quarter panel on DeAngelis's car. Leone did most of the talking and continued to express his deep frustration with Allstate, stating, for example, "[N]obody wanted to pay us any more for nothing. The expenses are through the f\*\*\*\*\*g roof. They [Allstate] come in and they shove the \$38 an hour down your f\*\*\*\*\*g throat." Exhibit C-12, p 12. At one point, he told Crandall, "And I told you don't walk in my f\*\*\*\*\*g door again" or he would call the police. *Id.* The tape ends with the following exchange:

Leone: Another place would ask you for, if you went to f\*\*\*\*\*g Metro Honda they might ask you for a f\*\*\*\*\*g rear bumper cover and ask you for eight hours on the quarter and then you'll be happy giving them five and a half [hours]. Maybe I should have put an eight [hours] on the quarter. Then you'd say, "Frank, I'll give you five." I try to be reasonable; I put five and a half. You're gonna argue with me about an hour? Come on.

Crandall: Yeah.

Leone: Do what whatever you've got to do. Okay?

Crandall: Yup.

Exhibit C-12, p 13.

Brian Crysler also testified on behalf of Allstate. Crysler began by stating that he is Allstate's auto field claims manager for Rhode Island. In that role, he manages ten (10) appraisers who cover Rhode Island and certain parts of Connecticut. In 2005, he was a manager and a claims re-inspector, performing quality control reviews and examining the estimates written by his appraisers.

With respect to the Tutay vehicle, Crysler testified that he became involved with this claim during the normal course of doing his job, namely reviewing estimates and identify any "coaching opportunities" for the appraiser. The purpose of his re-inspections, he said, is to ensure that appraisers are treating the customer fairly and are writing accurate appraisals. He looks to make sure that his appraisers identify all of the damage on the vehicle and write the proper amount for each component so that it can be repaired correctly.

Crysler said he went to Leone's shop to re-inspect Tutay's car on April 29, 2005. When he arrived at the shop's main office, no one was there. He testified that he waited a few minutes and then went to a small entry door next to a bay door in the front of the shop. He said he was met there by Leone. After introducing himself to Leone, Crysler told him that he was here to inspect a vehicle that had just been appraised by one of his subordinate appraisers. At that point, Crysler recalled Leone essentially telling him to take a hike because he was not going to allow Crysler to see the car. Crysler testified that he went back to his car and left. He denied trying to sneak into the shop.



Crysler then testified that at some later date he was in the area of Tutay's home and went there to conduct a reinspection. After introducing himself to Tutay and obtaining permission to inspect the vehicle, Chrysler began his reinspection, going line by line on the estimate. After about five (5) minutes had passed, Tutay came out of his house and asked him to leave his property.

During this reinspection, Chrysler found that Leone had not replaced the pinstriping, blended the quarter panels, or replaced the bumper absorber. He stated that Allstate subsequently agreed to pay for a bumper absorber at a different repair shop.

Crysler and Crandall then stopped by Leone's premises. Chrysler explained to Leone that he re-inspected the vehicle and found that there were a number of items on the estimate that were not completed. He pointed out that Allstate had paid the claim pursuant to the estimate and requested that Leone compensate Allstate for the uncompleted work. Leone refused. Chrysler stated that that was why this hearing was taking place. He also testified that no threats were made to him at that point but was made aware that Leone had made remarks about him to Crandall.

During cross-examination, Chrysler stated that Leone never threatened him to his face. When he went to the shop on April 29 to do the re-inspection, he said that Leone did not threaten him but was short and rude to him. Chrysler also admitted that Leone also did not threaten him when Chrysler returned to the shop with Crandall to discuss the repairs that were listed in the estimate but not completed on the Tutay vehicle.

Frank Leone testified on behalf of Respondent. He is the sole member of the limited liability company, Leone's Atwood Collision Center and Auto Sales, LLC, and has owned the business for over 31 years. In that time, he stated that he has never had a customer file a complaint against him.

Leone testified that he met Crysler for the first time when he came in the shop to reinspect the Tutay vehicle. It was a couple of days after Crandall wrote the supplement appraisal for this car. Leone recalled that on the day that they came into his office there were four (4) other customers that he was helping. When Crysler told Leone that he was here to reinspect the Tutay vehicle, Leone said that he refused him permission to do so. After noticing him hanging around for another 5-10 minutes, Leone recalled seeing Crysler put some paperwork in his car and then attempt to enter his shop by the side entrance. Leone testified that he met him at the door and told him to leave his premises in no uncertain terms. Crysler then left. Leone insisted that he never threatened him.

Leone then stated that he spoke with Crysler on the phone some time after Crysler visited his shop. Crysler mentioned that he noticed the reinforcement beam and the absorber were not replaced on the Tutay vehicle. Leone admitted that he did not change those two parts. Leone testified that he repaired the car to Tutay's satisfaction and in the manner in which Tutay wanted it repaired.

Regarding the DeAngelis vehicle, Leone said that Crandall did not tell him that he was taping the conversation that took place on February 15, 2006. He stated that he and Crandall discussed whether Allstate would pay Leone three(3) hours of time to repair the left rear quarter panel or five and a half hours (5.5). Leone recalled that Crandall said Allstate refused to pay more than three (3) hours for the quarter panel repair. He expressed frustration that Allstate would not negotiate with him. Later, when a supplemental was written for the DeAngelis vehicle, Leone noted that he finally received five (5) hours for the rear quarter panel job. Leone flatly denied that he threatened either Crandall or Crysler.

On cross-examination, when asked if he told Tutay that he was not going to repair the car in conformance with Allstate's estimate, Leone stated that he "had an agreement" with Tutay. Counsel for Allstate then had Leone read a portion of the transcript of a deposition taken in preparation for this matter. In it, Leone admitted that he did not tell Tutay that he was not going to repair the vehicle in accordance with the estimate. In discussing the estimate and the negotiation for the repair of Tutay's car, Leone confirmed that he believed that the energy absorber and the reinforcement beam needed to be replaced. He then admitted that he did not replace them even though he advocated for their replacement when Crandall appraised the car. He did state, however, that he repaired the energy absorber in the same way that it had been repaired previously and that he did repair the reinforcement beam.

Allstate introduced ten (10) photographs depicting the damage to Tutay's car that were admitted into evidence. Also introduced into evidence were the tape that recorded the conversation between Crandall and Leone on February 15, 2006, a transcript of that conversation, and Crandall's repair estimate for the Tutay vehicle. Respondent entered two (2) exhibits that were admitted into evidence: a handwritten "final bill" for the Tutay vehicle and an accompanying letter, both prepared by Leone and dated May 28, 2005.

## **V. STANDARD OF REVIEW FOR AN ADMINISTRATIVE HEARING**

It is well settled that in formal or informal adjudications modeled on the federal Administrative Procedures Act, the initial burdens of production and persuasion rest with the moving party. 2 Richard J. Pierce, *Administrative Law Treatise* § 10.7 at 759 (2002). Unless otherwise specified, a preponderance of the evidence is generally required in order to prevail. *Id.* at 763-766; see also, *Lyons v. Rhode Island Pub. Employees Council 94*, 559 A.2d 130, 134 (R.I. 1989) (preponderance standard is the "normal" standard in civil cases); *Parker v. Parker*, 238

A.2d 57, 60 (R.I. 1968) (“satisfaction by a ‘preponderance of the evidence’ [is] the recognized burden [of proof] in civil actions”). This means that for each element to be proven, the factfinder must believe that the facts asserted by the proponent are more probably true than false. See *Parker*, 238 A.2d at 60. When there is no direct evidence on a particular issue, a fair preponderance of the evidence may be supported by circumstantial evidence. *Narragansett Electric Co. v. Carbone*, 898 A.2d 87, 100 (R.I. 2006).

Here, the proponent of this action is the complainant, Allstate. As such, it bears the burden for establishing why it is more likely than not that Respondent conducted himself in a manner that violated the statutes under which his auto body repair shop is licensed.

## **VI. DISCUSSION**

R.I. Gen. Laws § 5-38-10 provides that the Department, after a due and proper hearing, may suspend or revoke a license for upon proof that the holder of the license has engaged in certain conduct enumerated in the statute. In addition, R.I. Gen. Laws § 5-38-10.1 provides that, in addition to suspension or revocation of a license, the Department may levy an administrative penalty not exceeding one hundred dollars (\$100) for any violation under Title 5, Chapter 38 or the rules and regulations pertaining to auto body repair licensure.

The facts alleged in the complaints and during the hearing, if preponderated, implicate two (2) of the bases set forth in R.I. Gen. Laws § 5-38-10. Each will be addressed in turn. Complainant also averred that Respondent violated Insurance Bulletin Number 2002-6. This bulletin clarifies the timing of when an appraiser must be delivered to the auto body repair shop and provides alternatives in the case of intimidation, threats, or an auto body shop’s refusal to allow the appraiser to view the damaged vehicle. However, it does not provide a separate basis for sanctioning a licensee and therefore will not be considered in the analysis *sub judice*.

**A. R.I. Gen. Laws § 5-38-10(1) – Unfitness.**

The first provision implicated is R.I. Gen. Laws § 5-38-10(1). It authorizes the Department to suspend or revoke a license “on proof of unfitness of the applicant to do business as an automobile body repair shop[.]”<sup>2</sup> The statute does not define “unfitness.” As such, it is reasonable to assume that the legislature contemplated its plain and ordinary meaning given the unambiguous nature of this provision. See *Henderson v. Henderson*, 818 A.2d 669, 673 (R.I. 2003).

“Unfit” generally refers to being unsuitable, unqualified, or incompetent.<sup>3</sup> Here, in the auto body repair regulatory context, a finding that a licensee is unfit to do business as an automobile body repair shop means that the licensee does not meet the standard qualifications for licensure as set forth in the statutory scheme. The statute pertaining to auto body shop licensure and its regulation contain several criteria that must be met before a license will issue or be renewed. For example, an applicant or licensee must provide evidence of financial responsibility.<sup>4</sup> The applicant must also have a service repair shop and related tools and equipment having a minimum value of \$10,000 at the time of licensure or renewal.<sup>5</sup> A garage or work area enclosed within a building with sufficient space to repair motor vehicle bodies, including fenders, bumpers, chassis and similar components is also required.<sup>6</sup> Additionally, the applicant must have certain equipment such as electrical and/or hydraulic pulling equipment; a four (4) point clamping system to secure vehicles; welding equipment; equipment/gauges capable of measuring symmetrical and asymmetrical vehicles; and a paint system or access to a paint system capable of meeting the original

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<sup>2</sup> While Respondent is not an applicant, there was no dispute that this provision applies to licensees as well.

<sup>3</sup> See *Random House Unabridged Dictionary* (Random House, Inc. 2009).

<sup>4</sup> See R.I. Gen. Laws § 5-38-6.

<sup>5</sup> Section 4(B)(v) of *Commercial Licensing Regulation 4 – Motor Vehicle Body Repair*.

<sup>6</sup> See R.I. Gen. Laws § 5-38-1.

manufacturers' requirements.<sup>7</sup> In the not-so-distant future, licensees will be required to have their staff meet certain industry certifications in auto body repair as well.<sup>8</sup> Thus, given these criteria, it follows that determining whether a licensee is unfit to engage in the business of auto body repair depends on the licensee's ability, resources and wherewithal to do the actual work of auto body repair.

Complainant argues that Leone is "unfit" because of purported threats to Allstate's appraisal manager and his failure to make all of the repairs negotiated in the appraisal and supplemental appraisal for the Tutay vehicle. As discussed *infra*, such conduct may constitute "unconscionable" behavior in violation of R.I. Gen. Laws § 5-38-10(7) but it does not support a finding of Respondent's "unfitness" under the plain and ordinary meaning of the term.

The evidence adduced at hearing does not sustain a finding that Leone is unfit to engage in the repair of automobile bodies. If anything, the record shows that he possesses the requisite competencies. There was no dispute that he is knowledgeable or experienced to do auto body repair. In addition, it was clear that he possesses the physical premises and the proper tools and equipment to do the work. And, despite Leone's protestations on the surreptitious tape recording, Respondent appears to be a financially viable enterprise. As such, Complainant fails to state a basis that Leone violated R.I. Gen. § 5-38-10(1).

**B. R.I. Gen. Laws § 5-38-10(7) – Unconscionable Practice.**

The second statutory provision that may have been implicated is R.I. Gen. Laws § 5-38-10(7). This provision authorizes the Department to suspend or revoke a license where a licensee "indulged in any unconscionable practice relating to the business as an automobile body repair

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<sup>7</sup> See Section 4(B)(i) of *Commercial Licensing Regulation 4 – Motor Vehicle Body Repair*.

<sup>8</sup> See *Commercial Licensing Regulation 16 – Motor Vehicle Body Repair Technician Certification*.

shop[.]” Examples of unconscionable practices in the auto body repair context are not provided in the statute, regulations, or in the case law. Thus, once again, it is appropriate to rely on the plain and ordinary meaning of an “unconscionable practice” given the unambiguous nature of this provision. See *Henderson v. Henderson*, 818 A.2d at 673.

“Unconscionable” is an adjective that describes something as “not guided by conscience” or as being of “unscrupulous” character.<sup>9</sup> Put another way, it is something “not in accordance with what is just or reasonable.”<sup>10</sup> Here, in the context of R.I. Gen. Laws § 5-38-10(7) and the auto body repair business, it is reasonable to adopt as the definition of an “unconscionable practice” as some type of action taken by a licensee or an agent of a licensee that is unscrupulous or unjust. In other words, it is behavior that offends the conscience, or more simply put, is the wrong thing to do.

Complainant points to two (2) separate examples of where it believes that Leone indulged in unconscionable practices in the course of operating his business. First, it looks to have Leone sanctioned for alleged threats made about Chrysler. Second, it seeks to have Leone held to account for failing to repair Tutay’s vehicle in accordance with Allstate’s appraisal after Allstate made payment for those repairs. While the evidence is woefully insufficient to make a credible finding that Leone threatened Chrysler, it does support a finding that Leone engaged in unscrupulous behavior with respect to the repairs conducted on Tutay’s car.

Allstate avers that Leone’s comments about Chrysler constitute threats to him and therefore represents an unconscionable practice. Threats made to anyone have no place in any profession, especially in a business that serves the public like the auto body repair business. Certainly threatening harm to someone is unconscionable and deserves some type of sanction but in this case, the evidence does not support such a finding.

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<sup>9</sup> See *Random House Unabridged Dictionary* (Random House, Inc. 2009).

<sup>10</sup> *Id.*

Allstate attempts to suggest that Leone's comment that "he belongs in a cemetery" is a threat. While there is no dispute that Leone was referring to Crysler, Crandall's supervisor, the context in which the comment was made makes clear that it was not a threat. Leone made the remark shortly after Crysler appeared unannounced at his shop. It was during this visit that Leone believed that Crysler was trying to sneak in without permission to inspect the Tutay vehicle. Crysler denied that he was attempting to enter Leone's shop without permission. Regardless, whether or not Leone misinterpreted Crysler's actions that day is irrelevant. What is relevant is that Leone was unhappy about something Crysler did. Indeed, no one disputes that Leone ordered Crysler off his property that day.

When Leone saw Crandall, Crysler's underling, shortly after this incident, Leone vented his negative feelings that he had for Crysler. Clearly, Leone was unhappy with Crysler but to interpret "belongs in a cemetery" as a threat in this context is inappropriate. Rather, it illustrates Leone's contempt for Crysler or, at the very least, his frustration with the way Crysler conducts himself. Even so, Crysler testified that Leone never threatened him in person. Crandall also admitted that Leone never threatened him personally.

As for the other alleged threat, Allstate points to a statement Leone made to Crandall during the conversation Crandall secretly recorded on February 15, 2006 during the DeAngelis car inspection. After Crandall intentionally reminded Leone of the "big beef" about the Tutay car, Leone referenced Crysler's unannounced inspection in May 2005 and said that Crysler was "lucky he didn't get his f\*\*\*\*\*g legs broken in here." Exhibit C-12, p 9. Leone then said, "He walked out and tried to sneak in my other door. I was ready to call the f\*\*\*\*\*g cops on him." *Id.*

As with the "cemetery" comment, it would be improper to equate this statement as a threat. It occurred nine (9) months or so after the initial incident took place. Moreover, Leone only said it



after Crandall brought up in the first place, something that Crandall admitted to doing purposely. With this time lapse and Crandall's goading, characterizing this statement as a threat to do harm to Crysler is simply nonsensical.

The other basis on which Allstate asserts that Respondent engaged in unconscionable practices has slightly more merit, but not necessarily in the manner in which Allstate framed it. With respect to the Tutay vehicle, Allstate essentially argues that, because it paid Respondent for all of the repairs that Respondent and Allstate's appraiser had negotiated, Respondent had a duty to make those repairs. Failure to do so, according to Complainant, was "deception at its basic, fundamental level" and consequently constituted an "unconscionable practice relating to the business as an automobile body repair shop" in violation of R.I. Gen. Laws § 5-38-10(7).

While the record supports a finding that Respondent engaged in an unconscionable practice, it was not for any "deception" towards Allstate. Rather, the evidence preponderated at hearing shows that Respondent failed to obtain the consent of his customer, Mr. Tutay, to repair (or, more accurately, not repair) the vehicle in the manner in which he did. How Allstate wanted Respondent to repair the car is immaterial under the current regulatory paradigm. A recent Departmental decision recently discussed this paradigm and summarized it with respect to the obligations and duties of insurers and automobile body repair shops.

Under Rhode Island law, the first or third party claimant has the right to select the automobile body shop he or she wishes to have repair the vehicle. The insurer then has the option to accept an estimate from the automobile body shop or require an appraisal of the vehicle damage. If the insurer decides to have an appraisal completed, the insurer sends an appraiser licensed under R.I. Gen. Laws § 27-10.1-1, *et seq.*, to appraise the damage to the vehicle. The appraiser prepares an appraisal of the damage including the estimated cost of parts and time to repair the vehicle. The insurer then negotiates with the automobile body shop and comes to an agreed upon price for repair based upon the appraisal and the facts of the particular claim.

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The insurer's obligation is to pay the damages suffered by the insured or third party claimant as a result of contract (first party) or liability of its insured (third party)...The insured or claimant, however, is not required to have all of the work performed on his or her vehicle or to have the exact work designated in the appraisal done at all...These decisions have nothing to do with the insurer as the insurer is liable to pay for the damages suffered, not to determine how that payment will be utilized.

*Ray Stewart's, Inc. v. Allstate Insurance Company*, DBR No. 03-I-0237, p. 3-4 (July 2, 2008).

Given this regulatory framework, Allstate cannot claim that Leone engaged in an "unconscionable practice" simply because his shop did not make all of the repairs on Tutay's vehicle even though it paid the claim based on the cost of those repairs. Once it paid the claim, Allstate met its obligations under the law and had no duty to ensure that the repairs were made in accordance with the appraisal.

The fact that Allstate paid Leone directly pursuant to direction to pay does not change the analysis. The customer is free to direct payment to the repairer. A direction to pay does not create some type of privity between the repair shop and the insurer. The insurer, in this case, Allstate, need only be concerned with paying the claim for which it is liable. How the customer chooses to use the funds from the claim is not Allstate's concern.

What is relevant here is the evidence that Tutay, Leone's customer, did not authorize Leone to repair the car in the manner in which he did. Leone made a vague reference to some type of agreement between them but he lacks credibility on this point given the weight of the evidence to the contrary. First, it is undisputed that Leone did not replace the energy absorber, the bumper cover, or the reinforcement beam as called for in the appraisal. Second, while Leone made a vague reference to some sort of agreement between Tutay and him, he admitted that he never told Tutay that was not going to repair according to the appraisal. Third, there is no dispute that Tutay brought his car to a different shop to complete the repairs not made by Leone. Fourth, Leone indicated in his

conversation with Crandall on February 15, 2006 that Tutay was not a happy customer after Crysler went to Tutay's house and discovered that Leone did not make certain repairs. And finally, Leone never produced the repair certification form required by R.I. Gen. Laws § 5-38-28. This form is supposed to be executed by the automobile repairer and the customer to certify under the penalties of perjury the repairs to a particular vehicle that have actually been made. Its absence is telling.

Taken together, there is sufficient, competent evidence on the record that Respondent failed to obtain Tutay's authorization to repair the car in the manner in which he did. Such conduct constitutes "unscrupulous" behavior that is "not in accordance with what is just or reasonable." As such, it is unconscionable and worthy of sanction.

## **VII. FINDINGS OF FACT**

1. The facts contained in Sections IV and VI are incorporated herein.
2. Under the standard set forth in Section V and the statutory framework and analysis set forth in Section VI, there is sufficient evidence to establish by a preponderance that Respondent failed to obtain his customer's authorization to repair the car in a manner not in accordance with the appraisal or supplemental appraisal.

## **VIII. CONCLUSIONS OF LAW**

Based on the testimony and facts presented:

1. The Department has jurisdiction over this matter as set forth in Section II, *supra*.
2. Under the standard set forth in Section V and the statutory framework and analysis set forth in Section VI, Complainant failed to establish that Respondent was unfit to do business as an automobile body repair shop, pursuant to R.I. Gen. Laws § 5-38-10(1).
3. Under the standard set forth in Section V and the statutory framework and analysis set forth in Section VI, Complainant failed to establish by a preponderance of the

evidence that Respondent indulged in an unconscionable practice in violation of R.I. Gen. Laws § 5-38-10(7) by stating that Crysler “belongs in a cemetery” or that Crysler was “lucky he didn’t get his f\*\*\*\*\*g legs broken in here.”

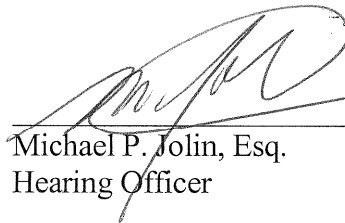
4. Under the standard set forth in Section V and the statutory framework and analysis set forth in Section VI, Complainant failed to establish by a preponderance of the evidence that Respondent indulged in an unconscionable practice in violation of R.I. Gen. Laws § 5-38-10(7) because he did not make all of the repairs that constituted the basis of the claim paid by Allstate.

5. Under the standard set forth in Section V and the statutory framework and analysis set forth in Section VI, Complainant established by a preponderance of the evidence that Respondent indulged in an unconscionable practice in violation of R.I. Gen. Laws § 5-38-10(7) because he failed to obtain his customer’s authorization to repair the car in a manner not in accordance with the appraisal or supplemental appraisal.

#### **IX. RECOMMENDATION**

Based on the above analysis, the Hearing Officer recommends that the Director of the Department find that Respondent violated R.I. Gen. Laws § 5-38-10(7). In addition, the Hearing Officer recommends that Respondent have its license suspended for seven (7) days and pay an administrative penalty in the amount of one hundred dollars (\$100) in accordance with the maximum fine allowed pursuant to R.I. Gen. Laws § 5-38-10.1, payable to the Rhode Island General Treasurer, no later than thirty (30) days from the date of this decision.

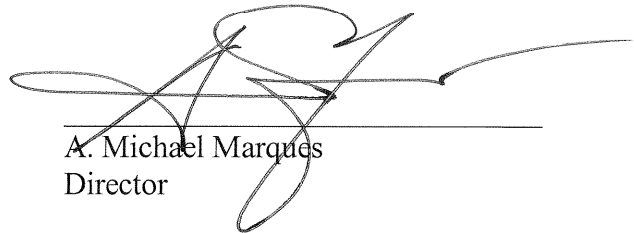
Dated: 5/17/09

  
\_\_\_\_\_  
Michael P. Jolin, Esq.  
Hearing Officer

I have read the Hearing Officer's Decision and Order in this matter, and I hereby take the following action:

ADOPT  
 REJECT  
 MODIFY

Dated: 5-19-2009

  
\_\_\_\_\_  
A. Michael Marques  
Director

**NOTICE OF APPELLATE RIGHTS**

**THIS DECISION AND DECLARATORY RULING CONSTITUTES A FINAL ORDER OF THE DEPARTMENT OF BUSINESS REGULATION PURSUANT TO R.I. GEN. LAWS § 42-35-12. PURSUANT TO R.I. GEN. LAWS § 42-35-15, THIS ORDER MAY BE APPEALED TO THE SUPERIOR COURT SITTING IN AND FOR THE COUNTY OF PROVIDENCE WITHIN THIRTY (30) DAYS OF THE MAILING DATE OF THIS DECISION. SUCH APPEAL, IF TAKEN, MUST BE COMPLETED BY FILING A PETITION FOR REVIEW IN SUPERIOR COURT. THE FILING OF THE COMPLAINT DOES NOT ITSELF STAY ENFORCEMENT OF THIS ORDER. THE AGENCY MAY GRANT, OR THE REVIEWING COURT MAY ORDER, A STAY UPON THE APPROPRIATE TERMS.**

**CERTIFICATION**

I hereby certify on this 20<sup>th</sup> day of May, 2009, that a copy of the within Decision was sent by first class mail, postage prepaid to:

Thomas A. Pursley, Esq.  
Lynch & Lynch  
45 Bristol Drive  
South Easton, Massachusetts 02375

John C. Manni, Esq.  
Attorney at Law  
1405 Plainfield Street  
Johnston, Rhode Island 02919

And by electronic mail to the following personnel of the Department of Business Regulation, 1511 Pontiac Ave, Cranston, Rhode Island 02920:

Maria D'Alessandro, Esq.  
Associate Director

Kimberly Precious  
Implementation Aide

Paula M. Pallozzi  
Chief Property & Casualty Insurance Analyst

A Brooke Ellison